THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT (sitting alone)**

BETWEEN:

Mr P Stephany

Claimant

AND

Newton Investment Management Ltd

Respondent

ON: **11, 12, 13, 16, 17 and 18 July 2018**
IN CHAMBERS: **19 and 20 July 2018**

Appearances:
For the Claimant: **Mr T Ogg, counsel**
For the Respondent: **Ms J McCafferty, counsel**

Recital: *This decision is the subject of a Rule 50 Order made on 12 July 2018 to ensure that there was no breach of any enactment. Those paragraphs which have been redacted are identified below.*

RESERVED JUDGMENT
PUBLIC VERSION

The Judgment of the Tribunal is that the claim fails and is dismissed.

REASONS

1. By a claim form presented on 27 December 2017, the claimant Mr Paul Stephany claims unfair and wrongful dismissal.

2. The claimant worked for the respondent as a fund manager from 14 November 2005 to 14 August 2017.

3. A preliminary hearing for case management took place on 13 April 2018 before Employment Judge H Clark at which standard directions made on 29 January 2018 were varied. The claimant was also given leave to amend to include a

claim for wrongful dismissal (Order paragraph 3, bundle page 52). The amendment to the claim was at page 53.02.

The issues

4. The issues were agreed between the parties and confirmed at the outset of the hearing as set out below. The remainder of day 1 was used as reading time for the tribunal. The issues were:

5. What was the reason for dismissal and was it a potentially fair reason under section 98 of the Employment Rights Act 1996 (ERA). The respondent relies on misconduct or alternatively, some other substantial reason.

6. Did the respondent (a) hold a genuine belief in the claimant's misconduct; (b) hold that belief on reasonable grounds and (c) conduct an investigation that was itself reasonable? Did the respondent follow a fair process taking into account its own written processes, the ACAS Code and the ACAS Guidance?

7. Did the respondent act reasonably i.e. within the band of reasonable responses within section 98(4) ERA in treating the reason relied upon as a sufficient reason for dismissal?

8. If the claimant was unfairly dismissed should any compensatory award being reduced in line with ***Polkey*** on the basis that the claimant would have been fairly dismissed in any event, and if so when?

9. Did to the claimant contribute to his dismissal by culpable or blameworthy conduct and if so to what extent?

10. Did the claimant commit gross misconduct such that the respondent would have been entitled to dismiss him without notice i.e. the wrongful dismissal claim.

11. What, if any, compensation should be awarded to the claimant?

12. If the claimant was unfairly dismissed is reinstatement or re-engagement appropriate in the circumstances?

13. Was there an unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures such that it is just and equitable to increase any awards to the claimant by up to 25%?

Witnesses and documents

14. The tribunal heard from the claimant.

15. For the respondent to the tribunal heard from 3 witnesses: (1) Mr James Helby, the Chief Risk Officer, (2) Mr Jeff Munroe, the dismissing officer and (3) Ms Hanneke Smits, the Chief Executive and appeal officer.

16. A set of documents ran to 5 lever arch files with two smaller supplementary

bundles plus a bundle of witness statements. There was approximately 2,500 pages of documents.

17. I had an opening note from the respondent, an agreed cast list and an agreed chronology.

18. I had detailed written submissions from both parties which are not replicated here and to which counsel spoke. These submissions were considered in full together with the authorities relied upon, whether or not expressly referred to below.

Findings of fact

19. The claimant commenced work for the respondent on 14 November 2005. The respondent is a London based global asset management subsidiary of the Bank of New York Mellon Corporation (BNYM). It provides investment products and services to investor clients.

20. The claimant started as an assistant fund manager and in 2011 was promoted to fund manager. His seniority and responsibility increased over the years and by the date of his dismissal he was responsible for four large funds. In his position as a portfolio fund manager, the claimant performed what is termed a "controlled function" known as CF30 - in relation to the way in which advisory services are provided to customers.

21. The claimant's work frequently involved dealing with sensitive and confidential market information. He was registered with the Financial Conduct Authority (FCA) and was subject to their Statement of Principles and Code of Practice for Approved Persons (APER). The claimant's role involved dealing with sensitive and confidential information concerning (amongst other things) the respondent's trades and/or intentions in respect of particular investments.

22. He was a high performer and highly regarded both within the respondent and externally. He generally did well in his appraisals, although in his 2014 appraisal his line manager had cause to note that at times he could seem to have a "*rather laissez-faire attitude toward compliance and risk matters, giving the appearance that some of the controls in place …..are a burden/distraction".* There was also a comment that on one occasion in 2014 the claimant did not approach the resolution of an error on one of his accounts in a timely and appropriate manner, in that he did not engage with the risk team as soon as the error was detected (page 126).

23. The respondent has an obligation to inform the FCA when one of its employees ceases to carry out a controlled function, including when the cessation is temporary, such as on a suspension.

24. The respondent has a whole raft of policies and procedures regarding the behaviour of their fund managers, covering matters such as handling confidential information, anti-competitive behaviour, material non-public information (known as MNPI), investor collaboration and escalating matters to compliance or managers when there are risks and concerns. This included dealing with IPO's

(Initial Public Offering) and private placements (the sale of shares by way of direct sale rather than by way of the public offering).

25. When a company's shares come to the market for the first time, such as in an IPO or private placement, the price range at which shares will be offered to the market is determined following a process known as "book building". The company or individual carrying out this process is known as the "bookrunner". The company issuing the shares appoints a sponsor responsible for advising them on market and regulatory issues. In addition a broker is appointed to help the company market the offering to suitable investors such as the respondent. Part of the broker's role is to lead the marketing process and to encourage investors to invest in that company's shares. This will involve the broker in discussing with investors (such as the respondent) the potential valuation of the shares so that the broker can gauge the market's appetite for the shares and the reaction to the valuation. At the end of that exercise the broker, the company and its existing shareholders agree a price range within which its shares will be offered to the market.

26. In his role as a fund manager, if the claimant had an interest in investing in shares coming to the market for the first time, he had to make his decision as to what those shares were worth. He would then place an order through the respondent's dealing team. It is not the fund manager's role, as a potential or actual investor, to attempt to influence the price of shares.

27. The claimant was bound to comply with the respondent's various policies and procedures put in place to ensure compliance with the respondent's regulatory, legal and contractual obligations. He was bound by the BNYM Code of Conduct, the Risk and Compliance Policies and Procedures Manual, the Investor Collaboration "What you need to know" guidance, the Investment Management Manual, the Antitrust and Anti-Tying Policy, the Compliance and Ethics Goals and the APER/CF30 Approved Person's Guide. The Code of Conduct has the strap line "*Doing what's right".*

<u>The OTB IPO</u>

28. The claimant was the lead fund manager in respect of an IPO for a company known as OTB. The book runner for this IPO was Numis Securities Ltd led by Mr Ross Mitchinson. The claimant made a decision to invest in OTB on behalf of his clients. The claimant submitted a bid on behalf of his clients for shares worth in the region of £17 million and valued the company at £270 million during the book building stage.

29. Towards the end of the week commencing 14 September 2015 the claimant called Mr Mitchinson for an update on the IPO. Due to a change in market conditions, the claimant told Mr Mitchinson that he was considering lowering his bid. The claimant felt that the value of the company should be no higher than £260 million.

30. Over the weekend of 19 and 20 September 2015 the claimant came to the view that the value of the company should be no more than £260m and he should

reduce his valuation of OTB by £10m. The claimant's evidence was that he "*did not know how exactly the idea occurred to him*", but he decided that he would communicate this view by email to fund managers at competitor firms whom he considered were likely to be interested in the IPO.

31. He considered whether this form of communication was appropriate and did some research on line. He chose not to wait until Monday morning (21 September 2015) to raise his query with compliance as to whether such a communication was appropriate and within the rules. The claimant's evidence was that he "*self-resolved*" the issue. This self-resolution was in favour of the actions he proposed to take.

32. The claimant's evidence was that it was only "concert party" regulations which he considered relevant and this only concerned shareholders illicitly combining their voting power to the detriment of others. No documentation was produced by the claimant supporting the research he said he had done. This is despite him otherwise producing an abundance of documentation within these proceedings. He made no notes on his research. He accepted in evidence that he ran a risk in carrying out his own legal and compliance research. The book was due to close on the OTB IPO at 2pm on 21 September 2015.

33. On the morning of Monday 21 September at 7:49am the claimant reduced his bid to £260m. At 08:10am he went on to send two emails bcc'd to 14 undisclosed fund managers at competitor firms, including two at Old Mutual Global Investors (OMGI). In some cases the recipients were fund managers known to the claimant, but not all. In some cases he had to figure out their email addresses by looking at the firm's website and find out the way in which they formatted their email addresses. He sent the first email from home at 08:10am before he went to work. He could not recall where he was when he sent the second email at 09:03am. The emails were at page 118 and said:

> <u>The first email sent at 08:10 – Subject line "Urgent - on the beach IPO"</u>
>
> *Sorry for the out of the blue email but I wanted to urge those considering or in for the OTB IPO to think about moving to a 260m pre money valuation limit. I have done that first thing this morning with my GBP17m order. I don't usually do last minute brinkmanship on IPOs but think there are particularly good reasons on this one given significant market uncertainty since Fed decision – huge private equity profits bagged by Inflexion given they bought it for c73m two years plus have taken mgmt fees and dividends – the c.15x PER which looks attractive is predicated on significant top and bottom line growth – this is a relatively large placing in a small cap so sensitive to future mkt weakness.*
> *I haven't received any indication that the books are well covered or even covered so suspect this one is still very much open to price movement. Please have a think and mention to any colleagues or have put orders in.*
>
> <u>The second email sent at 09:03</u>
>
> *Sorry I should have added.*
> *Books close at 2 today with first day dealing tomorrow Numis have had two orders limited at 260 of c20m each already.*

34. As can be seen from these emails, the claimant set out the fact that an order had been placed by his company and the amount of that order. The information in

the second email at 09:03 was based on information given to the claimant by Mr Mitchinson in their conversation at the end of the previous week.

35. At 1.43pm on 21 September Mr Mitchinson emailed the claimant saying "*The price may be coming towards you in OTB but still not entirely clear"* (page 774).

36. The recipients at OMGI were sufficiently concerned about these emails to forward them to their Head of Compliance, Ms Carter saying: "*Unprompted, I have also just received this email which should also be forwarded to Compliance [the second email] – precise information about the book, which appears to have come from Numis. Bizarre behaviour".*

Initial investigation

37. Ms Carter sent the claimant's emails to Mr James Helby, the respondent's Compliance Risk Officer. He received this on 23 September and was immediately concerned to read the emails and took the view that there was potential market abuse on the part of the claimant by sharing specific details of the respondent's proposed order ahead of the IPO closing at 2pm which he followed with "*precise information about the book*". Ms Carter said that she was uncomfortable about receiving the information. Mr Helby considered this a potentially serious compliance issue and he ordered an immediate initial investigation which was carried out by himself and two colleagues. The respondent also took legal advice.

38. On 29 September 2015 Mr Helby referred the matter to the respondent's then Chief Executive Ms Morrissey and to the Head of Risk Compliance in BNMY. They jointly considered whether the matter should be referred to the FCA. They agreed that the claimant should be interviewed. It was unusual for Mr Helby to escalate a compliance issue to the CEO outside the normal meeting cycle but he decided that this had the potential to put the respondent's business at risk and he considered it sufficiently serious.

39. Within the initial investigation Mr Helby and his colleagues discovered a related email from the claimant dated 22 September 2015 in which he had told colleagues that following his *"haggling"* the deal had been priced downwards (page 785). They also found an email to external portfolio managers Mr Santa Barbara, Mr Guy Fled and Mr Giles Hargreave, dated 25 September 2015 (page 799) in which he thanked them "*if you did indeed come in with a lowball bid for OTB. I think we should do more of this – not be bullied by the brokers who say 'this is coming at X price' like it or lump it*".

40. In a Bloomberg chat (an instant messaging service) on 22 September 2015 the claimant said: "*I'm in the midst of potentially getting an IPO canned single handedly"* (page 785). In his witness statement (paragraph 74) the claimant described this as him bragging about the ability to impact the IPO because he made a change to his own order. He acknowledges that the words were "*ill-chosen*" and could "*give the wrong impression that [his] intention was to hamper the IPO*."

41. On 25 September 2015 the claimant went for a drink with Mr Mitchinson from Numis. Mr Mitchinson told him that another fund management firm might make a complaint about his 21 September emails. When the claimant went back to work on Monday, 28 September 2015 he told his line manager Mr Jon Bell about the conversation with Mr Mitchinson on 25 September and asked him to inform Mr Helby in Compliance. Mr Bell did not do so and was subsequently disciplined, resulting in demotion and a final written warning for his inadequate response to the OTB emails (pages 171-172).

42. Mr Helby's initial investigation into the claimant's actions revealed an email from Ms Lucy Marmion at Blackrock who told the claimant that his 21 September communication was "*not in line with Blackrock protocols*" (page 800). She said "*The reason being it could potentially give rise to a situation where a group of shareholders were viewed to be acting in concert with all the attendant implications".* She did not wish to be canvassed in that way in the future. The claimant replied saying he was sorry if he had put her in an awkward position, he said "*However, I did consider 'concert party' rules but given none of the addressees were shareholders at the time and there was no 'market' in the shares, there can be no wrongdoing".*

43. The claimant admitted in cross-examination that he had tried to conceal the Blackrock email. He also admitted that he knowingly exposed the respondent to reputational risk by not going to compliance.

<u>The Card Factory IPO</u>

44. Mr Helby's investigation also revealed two earlier matters of concern. He discovered emails between the claimant and an external fund manager at Artemis Investment Management LLP, Mr Giles Parkinson, in relation to an IPO for a company known as Card Factory. The email correspondence was on 25 April 2014 and in the bundle at pages 809-810. The book opened for the Card Factory on 1 May 2014 and closed on 14 May 2014 (timetable page 821).

45. In the email correspondence on 25 April Mr Parkinson asked the claimant in the subject header: "*You going for Card?"* The claimant said: "*not sure about Cards ….did two pilot fishes… seeing analyst today*". Mr Parkinson said: "*I'm strongly talking the range down to £700-800m*" and the claimant said: "*good plan 13x2015 similar to where [company P] is now Fair enough*".

46. Mr Helby also saw Bloomberg chats between the claimant and Mr Parkinson on 29 April 2014 with Mr Parkinson saying "*view on Card Factory? I'm trying to talk it down to 12–14x*" and the claimant replying *"Cardies at 12×14 would be good yes*" (page 813).

47. In a Bloomberg chat on 1 May 2014 with Mr Patrick Newens a fund manager at BMO, the claimant said "*I want 700m v 760m bottom"* (page 816).

48. Further emails were found dated 1 May 2014, between the claimant and external fund managers Mr Parkinson and Mr Newens, in relation to the Card Factory IPO, (pages 819–820). The claimant said: "*I won't be participating in this range.*

£700m more realistic. Use the phrase 'we don't have to do anything'. Thoughts?". Mr Parkinson replied: "*my understanding is that it will get away at £800m. This one certainly isn't "hot". I'm taking William to see them this afternoon. Much depends on his view. If he isn't that keen I'll really try to screw the price downwards towards £650–700m. But he may be happy at £750. You could always put your order in now at £700m – that will send a v strong signal"*. The claimant had informed Mr Parkinson of his views on price and he forwarded those emails to Mr Newens at BMO.

The Market Tech private placement

49. On 9 July 2015 Market Tech Holdings Ltd announced a private placing. The books closed on the placement on the same day.

50. An investigation into telephone recordings revealed that in July 2015 the claimant had conversations with two external fund managers in respect of the Market Tech private placement. In a Bloomberg chat between the claimant and Mr Newens at BMO on 13 July 2015 the claimant said (page 804) "*I was haggling with the CEO on a price as the ABB was closing*"; "*we were a big order and played hardball*"; "*I rang giles h and rodders to get them to push the price down*"… "*they didn't help me out*". Giles H is Mr Giles Hargreave at Hargreave Hale and Rodders is Mr Phil Rodrigs a fund manager at River & Mercantile.

51. He went on to say within the same chat "*I put in a large order with a 220 limit"* (page 805) thus disclosing to the competitor fund manager the size and price of the respondent's order.

52. In response to the claimant's 21 September 2015 group email of 08:10am, the claimant received a response from Mr Newens (page 771) saying "*Good luck Wonder if rodders will listen to you this time?"* which the claimant accepted was a comment on Mr Rodrigs not helping out on the Market Tech matter. Mr Newens said (page 770): "*some collective bargaining from the buy side not a bad thing."*

53. On 8 October 2015 the claimant spoke to Mr Helby in the office to ask whether he had heard anything about the OTB IPO. During that discussion the claimant told Mr Helby that he was "*99.9% sure*" he had done nothing wrong.

The suspension

54. Following his initial investigation, Mr Helby was concerned that the claimant was potentially committing market abuse and breaching competition law and sharing confidential information with third parties in breach of his obligations to the respondent. Mr Helby decided that he wished to suspend the claimant. He wanted to meet with the claimant first. It took time to arrange a meeting because of the availability of those he wished to have present including external counsel.

55. On 7 October 2015 Mr Helby met with Mr Campbell Waterson, the Deputy Chief Investment Officer, for his view on whether the claimant's actions were normal in the market place, particularly for the small and mid-cap IPO market. He did not pass that view on to Mr Munroe the dismissing officer who did not know about it.

Mr Waterson's view was that it was not necessary to suspend the claimant, just to monitor any ongoing IPOs and to give the claimant a reduced appraisal score and a final written warning. Mr Helby said and I find that this was based on the limited information given to Mr Waterson at the time. The claimant did not know about this conversation.

56. On 13 October 2015 Mr Helby escorted the claimant to a meeting with internal and external counsel for the respondent. Mr Helby did not attend the meeting. The respondent relies on that meeting as being privileged and a result of taking this position there was no note of the meeting was disclosed within the proceedings.

57. After the meeting concluded Mr Helby had a meeting with the legal advisers and the Chief Executive Ms Helena Morrisey.

58. The Chief Executive Ms Morrisey made the decision to suspend the claimant. She did not give evidence to the tribunal. She met with the claimant at around lunch time on 14 October 2015, told him he was suspended and handed him the suspension letter (page 136 of the bundle). There was no note of that meeting. The suspension letter said in fairly standard terms that the suspension would be for as short a time as possible and not longer than four weeks, unless longer was reasonably required to complete the investigation.

59. Also on 14 October 2015 Mr Helby submitted a Form C to the FCA (page 130-134) in accordance with the respondent's regulatory obligations. He also submitted a Suspicious Transaction Reporting Form, (STRF). The claimant's IT access was suspended to ensure that he could not delete evidence or conduct business that could prejudice the respondent in the event that he was disgruntled.

60. In a document dated 22 October 2015 produced by the claimant he set out factors that he wished to be considered within the investigation. This was at page 150.2. At paragraph 1.2 he said his actions could be seen as "*just an exaggerated, if unorthodox, version of […] very normal behaviour".*

61. The claimant accepts that he did not challenge his suspension at the time. He said that this was because he believed it would be short. I find that he did not challenge the fact of his suspension because he knew it could not reasonably be challenged. The claimant was in receipt of legal advice funded by the respondent, throughout his suspension.

62. I find based on Mr Munroe's evidence as a Board member that the claimant's suspension was reviewed from time to time by the respondent in Board meetings but no documentation was produced to support this or to show exactly what was discussed.

<u>Further initial investigation</u>

63. Mr Helby decided to widen the scope of the investigation. He was concerned that the claimant did not appear to accept that his conduct was contrary to the

respondent's policies and expectations and the wider anti competition rules. Mr Helby decided to conduct a comprehensive review of the claimant's trades, emails and Bloomberg chats and recorded telephone calls. Bloomberg chats are not routinely monitored by the respondent in the same way as their phone calls are recorded.

64. The respondent self-reported to the Competition and Markets Authority (CMA) and the FCA.

65. The claimant attended three meetings with the respondent's solicitors as part of the investigation. The meetings took place on 26 November 2015, 3 December 2015 and 19 January 2016. No notes were disclosed because parties treat these meetings as privileged.

Policies, procedures and contractual terms

66. Proprietary Information is defined in the respondent's Code of Conduct at pages 891-892 as follows:

> *As an employee, you may ….. possess confidential information about the …business affairs of our existing …..clients…..You should assume all such information is confidential and privileged and hold it on the strictest confidence. Confidential information includes all non-public information that may be of use to competitors, or harmful to the company or its clients, if disclosed.*
>
> *It is never appropriate to use such information for personal gain or pass it on to anyone outside the company who is not expressly authorized to receive such information.*
>
> *You should assume all information related to client trades, non-public portfolio holdings and research reports are proprietary"*

67. The definition of Proprietary Information in the Code of Conduct cross-refers to the respondent's Securities Firewalls policy. This was found in the respondent's Compliance Manual (the version for December 2014 started at page 900) and the Securities Firewalls policy was at page 1099.114. This defines Proprietary Information on page 1099.115 as follows:

> *Information that is not to be publicly disseminated i.e. information that should not exist in the public domain. This may include any analysis and plans that are created or obtained for business purposes. It may include, but is not limited to:*
>
> - *Trading positions of Newton or its clients;*
> - *Trading intentions of Newton or its clients;*
> - *Internal research material;*
> - *Pending or completed client orders; or*
> - *Confidential analysis of companies, industries or economic forecasts.*

68. Confidential Information was further defined in the claimant's contract of employment at pages 87, 88, 91 and 92:

    a. ***Clause 4.1*** *"Whilst in the service of the Company, you are bound by Procedures, Manuals or circulars concerning secrecy or confidentiality which may be issued from time to time. These include the BNY Mellon Code of Conduct…... Any breach of*

secrecy or confidentiality may lead to dismissal/termination of your contract and/or criminal proceedings"

b. ***Clause 4.2*** *"In particular, you must not disclose or use any information of a confidential nature (including, but not limited to, Confidential Information) relating to: (a) any business activity carried on by the Company or any Group Company; (b) any plans or proposals regarding any business activity to be carried on by the Company or any Group Company; (c) the finances or transactions of customers or agents of the Company or any Group Company; ……..*

c. ***Clause 11.4*** *"**Confidential information**" means any trade secrets, customer lists, trading details or other information of a confidential nature relating to the goodwill and secrets of any company in the Group (including, without limitation, details of the …….investments, prospective investments (and their terms), ……and (a) any other information specifically designated by the Company or any Group Company as confidential; and (b) any information in relation to which the Company or any Group Company owes a duty of confidentiality to any third party."*

69. Clause 5.2 of the contract of employment sets out the circumstances in which the respondent could summarily dismiss the claimant (page 88 of the bundle). This is in circumstances where the respondent reasonably believes:

(a) You have committed an act of gross misconduct;

….

(f) you fail or cease to meet the requirements of any regulatory body whose consent is required to enable you to undertake all or any of your duties under this Agreement or are guilty of a serious breach of the rules and regulations of such regulatory body or of the BNY Mellon Code of Conduct, the BNY Mellon personal Securities Trading Policy or of any applicable compliance requirements that may be published by the Company or any Group Company from time to time.

70. The claimant's line manager Mr Bell's disciplinary hearing, for failing to escalate the matters referred to him by the claimant on 28 September 2015, took place on 10 February 2016 (notes of disciplinary hearing, page 173). It was heard by the Chief Executive Ms Morrissey. Mr Bell was demoted and given a final written warning for his inadequate response to the claimant's OTB emails. The claimant's case is that his own disciplinary should have taken place at the same time as Mr Bell's and further findings on this are made below.

71. In about February 2016 the claimant's role was taken over by Mr Christopher Metcalfe and this was reported publicly in the financial media (news article on "Wealth Manager" webpage dated 26 February 2016 page 176.1). The claimant relied upon this either as evidence that his dismissal had been prejudged or that the decision to dismiss was influenced by the fact that it was commercially difficult for him to return. Findings in relation to this are made below in relation to Mr Munroe's decision to dismiss.

<u>Investigation by the FCA</u>

72. The respondent had self-reported to the FCA which inevitably led to an investigation on their part as the regulatory body and their investigations took time. Their processes had not concluded as at the date of this tribunal hearing.

<u>Training given to the claimant</u>

73. The claimant accepts that he received three training session related to his regulatory responsibilities and these were in December 2013, January 2014 and February 2015. He said that the training *"focused on egregious and dishonest examples of market abuse or very dry and/or irrelevant material*". He also accepts that he received two hours of training from an external company in 2014. He said that it only focused on "*presentational style and confidence*". The claimant's contention was that he was not given any training in relation to being aware of what fund managers should say or write to each other regarding views on the valuation of the company.

74. The claimant's contention was that there exists a climate where portfolio managers are empowered to publicise their views and do this over email, in newspaper articles or on blogs on their company websites.

75. The respondent did not agree with the claimant's position on his training. At page 74 of the bundle in a letter from the respondent's solicitors to the FCA there was an extensive list of the face-to-face and computer-based training provided to the claimant together with the written guidance and updates with which he was issued.

76. At pages 416-441 of the bundles there was a set of slides dated November/December 2013 prepared by solicitors who gave training for the respondent. The subject matter of the training was "Market Abuse" giving definitions of market abuse, misuse of information, misleading behaviour and market distortion. It set out the consequences of such behaviour which included in addition to statutory penalties, "*immediate suspension/loss of employment."* The claimant accepts and I find that he attended this training on 9 December 2013. The training included a slide on misuse of information (page 423) which was described as:

> *Behaviour (not amounting to insider dealing or improper disclosure of inside information) which is:*
>
> - *Based on information not generally available to those using the market*
> - *which is available to a regular user of the market, would be, or would be likely to be, regarded by him as relevant when deciding the terms on which transactions in qualifying investments should be affected and*
> - *is likely to be regarded as a failure on the person concerned to observe the standard of behaviour expected of a person in his position in relation to the market*

77. There was a further set of slides at pages 378-414, again provided by solicitors, dated December 2014 which included a slide (page 412) setting a scenario in which asset manager firms with holdings in a particular company get together to discuss its current performance and plans for a new CEO. Again the claimant accepted that he attended this training. The slides ask whether they could do this and what they should and should not do. Mr Helby's evidence was that the respondent had expressly asked the solicitors to include such a slide to bring about a discussion aimed at ensuring that asset managers knew that they must speak with compliance if they were uncertain. This was underlined by the following slide (413) which said: "*consult before you deal – ask compliance or*

you won't have the defence".

78. In his appeal hearing the claimant said: "*Training's not a large part of this"* (transcript, appeal hearing page 644) from which I find that in the internal disciplinary proceedings he was not relying to any large degree on lack of training. I also find that the respondent gave the claimant appropriate training on the matters in question.

The disciplinary investigation

79. The respondent's internal disciplinary investigation did not commence until 24 April 2017 and concluded on 11 May 2017. The tribunal did not hear from the HR investigating officer Ms Vani Kalai, the Global Head of HR who had been asked by the Chief Executive Ms Smits to conduct the investigation. Ms Smits took the view by April 2017 that although there were certain elements of the FCA investigation yet to be concluded, she understood that the evidence-gathering stage for both the FCA and CMA was sufficiently progressed to allow the respondent to start its internal investigation. Ms Smits' was conscious of the timing and made all decisions on the internal process with a view to the wider position of the FCA and CMA investigations.

80. The respondent's position was confirmed by Mr Helby's evidence that the disciplinary investigation into the claimant's conduct was not commenced until the FCA had substantially concluded the evidence-gathering stage of its investigation. The claimant's position was that the respondent delayed the disciplinary process in order to secure his assistance within the FCA investigation and that they unfairly prioritised their interests over his.

81. I find based on the evidence of both Mr Helby and Ms Smits that the delay in commencing the claimant's disciplinary investigation was based on the respondent's wish to secure the claimant's cooperation within the FCA competition investigation and to wait until the FCA had completed the evidence gathering stage of their investigation.

82. It was not in dispute that both parties are separately under an obligation to cooperate with the FCA. Mr Helby agreed and I find that the respondent risked substantial penalties of up to 10% of turnover where they are found to have infringed competition law. They were given a "leniency" or "immunity marker" in respect of any Competition Act offence and in doing so they admitted a cartel offence to remove the risk of a fine. The claimant also accepted that his interests were best served by assisting the respondent in maintaining an immunity marker.

83. The claimant also accepted that in February 2016 he wished the respondent to delay starting an internal investigation in the hope that the FCA would discontinue its investigation. The claimant accepted and I find that it was in both parties' interests to cooperate with the FCA and that both his and the respondent's interests were aligned in cooperating with the FCA.

84. During late 2015 the claimant questioned the state of play on his suspension. During 2016 through until about September he raised various matters with Ms

Kalai on matters such as his bonus, his personal effects and accessing the website. His evidence was that he did not ask her during 2016 about the state of play on his suspension or the internal disciplinary process because he had the impression she had no power at all and it was pointless asking her for anything other than routine matters.

85. Despite this view, in May 2017 he asked Ms Kalai for an update on the disciplinary situation. He told her (email 11 May 2017 page 200) that the most serious charge against him of market abuse had been dropped by the FCA in December 2016 and that he was still being investigated for breach of their principles of conduct. He wanted to know what plans were in place in the event that he was exonerated which is what he was hoping for. He did not urge the respondent to push on with the disciplinary process or complain about the delay.

86. I find that the claimant did not think that Ms Kalai I had "*no power at all*" and that had he wished to chase with her the progress of his disciplinary, he would have done, as he did in May 2017. I find that he was content with remaining employed by the respondent on full pay and with payment of his legal fees, in the hope that he would be exonerated by the FCA and this would in turn have the effect that he hoped for on the internal process.

87. The claimant also accepts that his solicitors and the respondent's solicitors were in regular contact throughout his suspension although I had no evidence to show that they communicated about the state of play on the disciplinary process. It is not in dispute that in May 2017 it became clear that the FCA required a further witness statement from the claimant and this extended the evidence-gathering stage of their investigation until July 2017 (email between the parties' lawyers at page 197.7).

88. Ms Kalai produced a lengthy investigation report. She had previously interviewed Mr Helby on 4 and 5 February 2016. She considered the relevant emails, the claimant's training history and materials, the contractual provisions, policies and procedures and the disciplinary procedure.

89. Ms Kalai set out the background to the claimant's employment, a summary of the FCA's investigation, the relevant contractual terms and policies and procedures, the training history and the evidence of the three allegations in question relating to the OTB IPO, the Market Tech Private placement and the Card Factory IPO.

90. She made a recommendation (page 761) to commence disciplinary proceedings against the claimant. She said: "*I therefore believe that there is sufficient evidence that [the claimant] engaged in the alleged conduct and that in doing so he committed gross misconduct in breach of his obligations owed to [the respondent] and the FCA".* The claimant takes great issue with this paragraph and relies upon it as evidence that the decision to dismiss had already been made, prior to his disciplinary hearing.

91. Ms Kalai's investigation concluded on 11 May 2017 (as seen within the report itself, bundle page 206). The investigation report was dated 6 July 2017 (page 204). There was therefore a period of almost two months between the conclusion

of the investigation and the report being sent to the claimant (covering letter 6 July 2017 page 201). I find based on the timing and on a balance of probabilities (having not heard from Ms Kalai) and on the email between the parties lawyers on 26 May 2017 (page 197.7) that the reason for this further two month delay was because the FCA required a further statement from the claimant and the respondent chose to wait until the conclusion of the FCA's evidence-gathering stage.

The lead up to the disciplinary hearing

92. The disciplinary hearing took place on 25 July 2017. It was heard by Mr Jeff Munroe, Investment Leader, Global Equities. He is on the respondent's Board of Directors. Mr Munroe has worked for the respondent for 25 years and has conducted a number of disciplinary hearings and appeals over those years. I accepted his evidence and find that the claimant's case was the most serious misconduct case he had ever heard during his service with the respondent. Mr Munroe has imposed the penalty of dismissal on one other occasion other than the claimant's dismissal and in all other cases imposed a lesser sanction than dismissal.

93. In June 2017 Mr Munroe was asked to chair the disciplinary hearing. I accepted his evidence and find that he had no detailed knowledge of the matter prior to June 2017.

94. On 6 July 2017 the Mr Munroe wrote to the claimant inviting him to the disciplinary hearing which was originally scheduled for 18 July 2017 (letter pages 201-203). The letter set out the disciplinary charges and set out the claimant's right to be accompanied.

> *I am writing to advise you that BNY Mellon has undertaken investigation into concerns relating to your conduct in relation to 2 initial public offerings (IPOs) and a private placement, namely: the On The Beach OTB IPO (the OTB IPO), the Card Factory IPO (the Card Factory IPO) and the Market Tech Holdings (Market Tech) private placement (the Market Tech private placement) (collectively the Key Corporate Events) in 2014 and 2015…*
> ***Summary of allegations***
> *……*
> *The allegations made against you are as follows:*
> *(a) in relation to the Key Corporate Events, the inappropriate disclosure of commercially sensitive and proprietary information; and*
> *(b) attempting to collude with other market participants to influence the prices at which OTB, Market Tech and Card Factory's shares were offered for sale in breach of your duties and obligations owed to Newton and the Financial Conduct Authority*

95. In preparation for the disciplinary hearing Mr Munroe reviewed Ms Kalai's Investigation Report of 6 July 2017 with the documents annexed to it. This was an extensive quantity of documents running from pages 752-1318 of the trial bundle. It included the relevant contractual documentation, policies and procedures and the respondent's Code of Conduct. It contained the respondent's Compliance Manual for December 2014 and the version for September 2015.

96. Mr Munroe was also provided with a preparation document giving him assistance

on how to structure the disciplinary hearing and setting out some of the questions he may wish to ask. Mr Munroe found this helpful and I find that this was the purpose of the document. It was not in any way to influence his decision making and I find that it does not suggest that Mr Munroe's decision was made in advance or that it was influenced by someone else. It was to give him assistance in conducting a difficult disciplinary hearing.

97. In essence Mr Munroe understood that there were three sets of communication upon which he had to make a decision. They were:

    a. The OTB communications in September 2015
    b. The Card Factory IPO communications in April/May 2014
    c. The Market Tech private placement communications in July 2015

98. The claimant asked for a postponement of the hearing. He felt he had not been given enough time to set out his position and although the FCA had dropped its market abuse investigation into him, there was an outstanding investigation into a potential breach of APER. The claimant expressly said that the respondent should await the FCA's decision on that issue before taking disciplinary action against him (email to Mr Munroe and Ms Kalai 11 July 2017 page 217). The claimant said: "*Otherwise Newton will be acting with incomplete information in the middle of a regulatory investigation and that would be entirely unfair on me".*

99. Despite saying this the claimant relied on the delay in holding his disciplinary hearing as rendering his dismissal unfair. He did not complain about the delay at the time and quite the reverse, wanted a further delay when it was scheduled to take place in July 2017. The claimant's position in mid-July 2017 was that it would be "entirely unfair" on him, to hold it without waiting for the outcome of the FCA investigations.

100. Mr Munroe was initially not inclined to agree to any delay but after considering further representations from the claimant he agreed to a short postponement until 25 July 2017.

<u>The disciplinary hearing</u>

101. The claimant chose not to be accompanied at the disciplinary hearing and understood his rights in that respect. He said he was "comforted" by the fact that there was going to be a transcript, which was in the bundle from pages 464-499. The claimant had prepared a long statement which he read out at the hearing. The claimant denied committing gross misconduct but said he deeply regretted that his actions had led to where they were (Transcript of hearing, bundle page 467) and that he would not act in the same way again if "*time were to be wound back".* Nevertheless, the claimant denied the disciplinary charges against him and said he thought they were unfounded. He had submitted a document within the process in which he described his actions as "*unorthodox*" (page 150.2).

102. In the disciplinary hearing (notes page 489) the claimant admitted that his actions were in breach of the information-sharing policy in the respondent's Code of Conduct (page 891) on Inside or Proprietary Information. He said to Mr Munroe:

"*And I've conceded I breached that policy".* He said in his witness statement (paragraph 119) that he described it as a technical breach and says that what he meant by this was that it was immaterial. In this hearing (again statement paragraph 119) he resiled from this and took the position that there was "*no breach at all*" and set out in his witness statement his reasons for this. He no longer accepted that it was proprietary information. What matters so far as the unfair dismissal claim is concerned is what was in the mind of Mr Munroe when he made the decision to dismiss and not what the claimant said about it at the date of this tribunal hearing. In the disciplinary hearing, the claimant admitted breaching the policy and Mr Munroe was entitled to take that admission into account.

103. The claimant admitted in the disciplinary hearing in relation to Allegation 2 that the claimant admitted that the views he shared on the OTB IPO were "an attempt to persuade". It was put to Mr Munroe that this was not collusion. Mr Munroe disagreed and said that in his view the claimant was the initiator and the leader and that was enough for him.

104. The claimant thought that Mr Munroe had not read all the papers at the start of the disciplinary hearing but even if he had not, I find that he had read them all by the time he made his decision.

105. Mr Munroe reviewed further guidance and documents subsequent to the hearing and considered further written representations from the claimant. I find that at his disciplinary hearing the claimant had a proper opportunity to state his case and answer the charges against him.

106. Mr Munroe also carried out some further investigation by means of what he described as "informal conversations" on the issue of accepted market practice. He spoke with Mr Iain Stewart, Lead Portfolio Manager, the respondent's longest serving and most senior investor and with other unnamed colleagues on a "no names" basis. He did not wish to disclose any confidential information regarding the claimant. The claimant was not told that Mr Munroe had canvassed these views before making his decision. Mr Munroe's evidence was that Mr Stewart's view was the same as his own in relation to how the market operated.

<u>The disciplinary outcome</u>

107. Mr Munroe's decision-making process consisted of asking himself two key questions: Firstly whether the claimant had committed misconduct in engaging in the conduct with which he was charged and secondly did this amount to gross misconduct meriting summary dismissal, taking account of the mitigation relied upon by the claimant.

108. Mr Munroe's reasoning was set out in his detailed outcome letter of 14 August 2017 (page 591-604). Mr Munroe summarised the disciplinary charges as relating to the claimant's conduct concerning to initial public offerings and private placement; namely the OTB IPO, the Card Factory IPO and the Market Tech Private Placement. The disciplinary proceedings comprised two main allegations:

- Allegation 1: in relation to the Key Corporate Events, the inappropriate disclosure of commercially sensitive and proprietary information; and
- Allegation 2: attempting to collude with other market participants to influence the prices at which OTB, Market Tech and Card Factory's shares were offered for sale.

109. This was said to be in breach of the claimant's duties and obligations owed to the respondent and the FCA. Mr Munroe decided that the claimant's actions amounted to gross misconduct meriting the summary termination of his employment, without notice. He set out his detailed reasoning.

110. For the disciplinary hearing Mr Munroe had seen the investigation report and its annexes, the claimant's written submissions, his letter of 14 July 2017 (page 222) the documents referred to in that letter and the claimant's written submissions and his letter, sent after the disciplinary hearing dated 10 August 2017 (page 587). He had considered the relevant policies and procedures and the relevant provisions of the claimant's contract of employment which was set out in an annex to the outcome letter (page 604).

Allegation 1

111. On Allegation 1, Mr Munroe found that the claimant circulated an email relating to the OTB IPO to 14 external fund managers in which he shared the details of the price and size of the order that he was placing for the OTB shares. The claimant then sent the follow-up email to include details of the orders received by the broker on the OTB IPO. He found that the claimant had forwarded to an external fund manager communication with Numis in which Numis suggested that the price might be reducing. He found that on 25 September the claimant sent a further email to 3 external fund managers thanking them if they did place a lower bid and expressing an interest to act in the same way again in the future. These factual matters on the content of the emails were not in dispute between the parties.

112. In relation to the Market Tech private placement Mr Munroe found that the claimant had a number of conversations about this on 9 July 2015 with the book runner and then spoke to contacts at other fund managers to discuss the valuation of the placing. Mr Munroe had reviewed the Bloomberg chat from 13 July 2015.

113. In relation to the Card Factory IPO Mr Munroe found that the claimant discussed the valuation of the IPO with an external fund manager at Artemis and then informed another fund manager at BMO of that discussion. On 1 May 2014 he again discussed his views on the company valuation with an external fund manager from BMO and told him that he wanted "*700m v 760m bottom*". The claimant forwarded an entire conversation with the Artemis fund manager to the BMO fund manager which included the Artemis fund manager suggesting that if the claimant were to submit an order for £700m at a particular time this would send a strong message. He found that the claimant suggested negotiation tactics to aid other fund managers in reducing the price of the IPO.

114. Mr Munroe took the view that in engaging in those communications, the claimant was inappropriately disclosing commercially sensitive and/or proprietary information in breach of his contractual duty of confidentiality as set out in his contract of employment. He also found that the claimant was in breach of a number of other company policies and procedures. The claimant did not and does not deny that he breached his contract of employment.

115. Mr Munroe did not agree with the claimant's contention that he had not disclosed commercially sensitive information. He did not accept the claimant's contention that he had not seen the guidance notes on Investor Collaboration. This was a reasonable view to take given the claimant had said in his own document dated 10 August 2017 (587) that he had received it.

116. Mr Munroe confirmed that he was not so concerned with the claimant's communication with counterparties (the broker) but was most concerned with the claimant's communication with other fund managers, who were competitors of the respondent, and what he had disclosed to them. The claimant sought to compare the disclosures he had made in his communications in the Key Corporate Events with discussions made on valuations in other IPO's. He had included in the bundle an article regarding Allianz which had published a view on valuation at £950-£1080m (page 745-746) and a TV interview he did in May 2015 commenting on marketing predictions ahead of the general election. Mr Munroe's view was that this was not the same as targeting a narrow group of investors and it was not seeking to adjust the IPO price.

117. Mr Munroe explained that there is a difference in the information that can be discussed in the early stages of an IPO compared with the later stages. Following on from that a prospectus is published which provides detail and then as it gets closer to the IPO date, (the date on which the company goes public) there a period of time when the broker begins to solicit views on valuation and on the investor appetite to establish the price range. Mr Munroe explained that this is the period when the information becomes proprietary and commercially sensitive.

118. He found it pertinent that the claimant admitted in the hearing that he was in "technical" breach of the respondent's Code of Conduct in relation to confidential information on the two IPO's. Mr Munroe saw it as more than a technical breach, in his view it was a fundamental breach. He was concerned that the claimant did not grasp the seriousness of his actions.

119. His understanding was that the claimant was sharing information and looking to influence the outcome of the IPO or placement, inviting competitors to act in a certain way. On the IPOs it was on the day of and within hours of the book closing.

120. The claimant accepted in cross-examination that his conduct was in breach of his contract of employment. Although in submissions it was said that this was not formally conceded, I find that it was conceded by the claimant himself and I find that his actions were in breach of his contract, he knew this and that is why

he made the concession.

121. Mr Munroe was a thoughtful and considered witness. I find that he properly applied his mind to the reasons for dismissal and he was not "under pressure" as the claimant submits, to dismiss the claimant because of the FCA investigation. He was not aware when he made his decision as to what parts of the FCA investigation were still ongoing and which were not. This was not a feature of his decision making. I find that his reasons were as stated in his outcome letter.

Allegation 2

122. On Allegation 2 Mr Munroe found that in the initial OTB email on 21 September 2015, sent to 14 external fund managers, the claimant urged those managers considering or in for the OTB IPO, to think about moving to a 260m pre-money valuation limit. The claimant went on to disclose details his own order, commented on the demand for shares and indicated that the IPO was open to price movement. He then sent a further email to those fund managers including details of the orders received by Numis.

123. Mr Munroe commented on the Bloomberg chat of 22 September 2015 where the claimant said he was potentially "*getting an IPO canned single-handedly*" by pushing the price down. He considered the claimant's reference to "*haggling*" the price and encouraging others to place orders not exceeding 260m to drive down price at which OTB's shares were offered for sale. He considered the fact that the claimant subsequently thanked those if they came in with a "lowball bid".

124. He considered the Bloomberg chat of 9 July 2015 in relation to Market Tech trying to persuade other fund managers to put in an order at 220p per share and in relation to the Card Factory IPO approving of the Artemis approach to strongly talk the range down to 700m–800m.

125. Mr Munroe viewed this behaviour as collusion, being an attempt to collude with other market participants to influence the price at which those shares were being offered for sale. He considered this in breach of the Code of Conduct and the Anti-trust and Anti-trying policy which refers to "*an agreement among independent competitors that establishes or stabilises prices or standardises terms*". In cross-examination Mr Munroe withdrew his reliance on his finding that the claimant had been involved in market abuse (dismissal letter point (b) page 599).

126. Mr Munroe was challenged on the meaning of collusion and whether it was the dictionary definition or a legal definition, which he had not made clear to the claimant. Mr Munroe is not a lawyer. In his view it was a matter of the claimant working together with others to affect an outcome and he did not consider there was any real surprise to the claimant in this. I agree with Mr Munroe and find that the claimant was in no doubt about the nature of the disciplinary charge that he faced or what this meant, however much he sought to weave around definitions and wording.

127. Mr Munroe considered the claimant's representation that what he had done was accepted market practice. Mr Munroe did not agree. In his experience it was not market practice for fund managers to discuss a firm's intentions regarding price or a position in relation to an IPO. Neither had he seen situations where investors attempted to join forces to influence price or valuation. The respondent's practice is and was to engage directly with the seller or the counterparty in an IPO and to reflect to them the respondent's views on price.

128. The claimant raised examples of the dismissal of other individuals in other companies. Mr Munroe took the view that each case was fact-specific. Quite properly on my finding, he did not consider the actions of other companies relevant to his decision-making in the claimant's case.

129. The claimant also raised his view that the reaction of others at the time was a relevant consideration as to why his actions should not be regarded as gross misconduct. He raised the reaction of his line manager Mr Bell. Mr Munroe rightly pointed out that Mr Bell had been disciplined for failing to escalate the matter and that he had acknowledged in the course of his disciplinary hearing that the claimant's conduct was inappropriate. The reactions of others did not in Mr Munroe's eyes, "*neutralise*" the gravity of the claimant's actions. At least one external fund manager, Blackrock, had complained about his actions.

130. Mr Munroe was satisfied that the claimant breached the policies in question. The claimant told Mr Munroe in the disciplinary hearing that he could understand why Mr Munroe thought his behaviour, in relation to the OTB IPO in particular, was unusual, that he did not know what made him do it and he deeply regretted it and would not act in the same way again. Mr Munroe could not reconcile this with a lack of understanding that it was gross misconduct. He was satisfied that it was gross misconduct and that it merited summary dismissal.

131. Mr Munroe did not go so far as to find that the claimant's actions had been deliberate, reckless, dishonest or in bad faith. He considered that the claimant's actions were serious enough and spoke loud enough for him to come to a conclusion about the claimant's behaviour, without making such findings.

<u>Mitigation</u>

132. Mr Munroe considered mitigation on both allegations. He took into account the claimant's admission on allegation one of a technical breach of the information sharing policy. The claimant said that this nevertheless fell well short of gross misconduct but Mr Munroe found it concerning that the claimant did not grasp the seriousness of his actions. In Mr Munroe's view, the claimant exposed to the respondent to the risk of regulatory sanction and potentially significant reputational issues and this was evidenced by the CMA and FCA investigations prompted by the claimant's actions. Mr Munroe considered that the inappropriate disclosure of commercially sensitive and proprietary information made this gross misconduct meriting summary dismissal.

133. It was irrelevant to Mr Munroe that this was not for personal gain, nor was it dishonest. He was unconvinced by the claimant's comparison with information

shared by respondent or other fund managers in the media as in his view there is a clear distinction between publicly available information and the respondent's confidential intentions with regard to its participation in corporate events.

134. He took the view that the claimant had not adhered to the respondent's culture of "*Doing what's right*". He took account of the claimant's past performance record and his position on certain committees but found the conduct all the more concerning in the light of this. He was also satisfied that the training the claimant had received over the years was appropriate and regular on matters such as risk and compliance, market abuse and inside information.

135. Mr Munroe had assistance in drafting the dismissal letter in bringing together his thoughts and "*making it coherent".* I find this unsurprising. It was a complex and important case and it is not at all unusual for disciplinary decision makers to receive assistance with the drafting of their outcome letters. It does not mean that the decision was not theirs and I find that this was Mr Munroe's decision.

136. I find that Mr Munroe's decision was not affected by the question of the leniency or immunity marker. When he heard the disciplinary and made his decision in July and August 2017, he was not aware of it. The claimant was aware of it during his disciplinary process. The claimant accepted that seeking the immunity marker and the admissions the respondent had to make in order to secure it, was a rational position for them to adopt. I agree and find as such.

137. It was put to Mr Munroe that the fact that the claimant had been publicly replaced by Mr Metcalfe made it commercially difficult for the claimant to return and this influenced his decision to dismiss. Mr Munroe denied this and said that for all sorts of different reasons, the respondent accommodated returns to work and that client confidence was maintained. He had no doubt that the claimant could be reintegrated back into the business. In the meantime claimant's funds and clients had to be managed. I found Mr Munroe's evidence credible and convincing on this issue and I find that his decision was not influenced by any "difficulties" that might be presented by the claimant returning to work. I also find that the decision to put Mr Metcalfe in the role was for understandable operational reasons.

<u>The appeal against dismissal</u>

138. The claimant's letter of appeal dated 13 September 2017 was at page 618-621. He had five numbered points of appeal and these were (1) unfair delay, that there was a 19 month delay before starting the investigation which he considered prejudiced the investigation and would render his dismissal unfair (2) the disciplinary procedure was insufficiently diligent and the result was a foregone conclusion (3) that his conduct was not serious enough to justify finding of gross misconduct (4) the changing nature of the allegations (5) his conduct was similar to other employees' conduct and no action was taken against them. He did not name anyone. He said he would expand on his appeal points in the hearing.

139. The claimant was invited to an appeal hearing on 18 September 2017 to be heard by Ms Hanneke Smits, the respondent's new CEO. Ms Smits had the claimant's

disciplinary outcome letter, the statement the claimant had provided to the investigating officer, his appeal letter and a further document the claimant had provided on 13 September 2017. She said that if he had further documents or information that he wished her to consider, he should forward them no later than 24 hours before the meeting. He was informed of his right to be accompanied.

140. If I am wrong on my finding that Mr Munroe had read all the disciplinary papers by the time he made the decision to dismiss the claimant, I find in any event that this was corrected on appeal by Ms Smits.

141. The appeal hearing took place over two dates, 18 September and 16 October 2017. The claimant was accompanied. Ms Smits was assisted by Ms Jenkins from HR. As with the disciplinary hearing there was a full transcript which was not challenged, save by the claimant towards the end of his cross-examination on one point referred to below.

142. Ms Smits joined the respondent as Chief Executive in August 2016 by which time the claimant had already been suspended for 10 months. It was her decision to commence the disciplinary investigation in April 2017. By the time of the appeal hearing in September 2017, the claimant had been suspended for nearly 2 years. Ms Smits accepted in evidence that on the delay point, she was effectively a judge in her own cause. I find that this relates only to the delay issue. Ms Smits was not a judge in her own cause on any other appeal point.

143. The claimant gave his view that his conduct was not serious enough to amount to gross misconduct and summary dismissal was not within the range of reasonable responses (transcript – page 636). I find that the claimant accepted before Ms Smits that he had committed misconduct but it did not amount to gross misconduct. He did not maintain a position that there was no misconduct on his part.

144. The claimant raised the inconsistency of treatment point and was asked by Ms Smits to expand on it. The claimant declined to do so and said that he had specifics but was not willing to go into it at that time. Ms Smits pressed him on it but he said he did not think it was appropriate to give the details and he understood that this made it difficult for Ms Smits to consider it as part of his appeal. As the claimant declined to give the details, I find that Ms Smits cannot be criticised for not looking further into the matter. At no time during the disciplinary process or this tribunal hearing did the claimant say that he was aware of anyone else having disclosed the size and price of one of the respondent's orders on the day that an IPO closed.

145. In the hearing Ms Smits summarised the claimant's actions through his emails as "*making an attempt to persuade other fund managers to come into an IPO at a lower price or lower valuation point*". The claimant said "*That's a fairly good summary of how I would describe it. I didn't view it at the time as an attempt to persuade. In hindsight I can see how it's viewed as that*" (transcript of appeal hearing, page 641). The claimant confirmed to Ms Smits that he had expressed regret for his actions (pages 655 and 660) and said he had not acted dishonestly.

146. Following the first day of the appeal hearing the claimant sent a letter to Ms Smits (21 September 2017 page 665) setting out caselaw references in support of his case that his actions did not amount to gross misconduct. He made further points in relation to his assertion that Mr Munroe did not read all the documentation and a further point on the collusion allegation. He attached further documentation and arguments (pages 669 – 679).

147. On 25 September 2017 Ms Smits had a conversation with Mr Munroe as part of her appeal process. Mr Munroe informed Ms Smits of his conversation with Mr Iain Stewart prior to making the decision to dismiss. There was a handwritten note of Ms Smits' conversation with Mr Munroe at page 1365 which said "*IS thought it was "murky" but should not be had"* as in the conversations between the claimant and the other fund managers should not have happened.

148. Ms Smits understanding was that Mr Stewart told Mr Munroe that the sort of discussions under consideration should not have taken place. It is accepted by the respondent that at the disciplinary stage the claimant was not aware of Mr Stewart's view or that it had been canvassed by Mr Munroe. He was aware of this by the time of his appeal hearing as he raised it with Ms Smits on day 2 of the appeal hearing (page 700).

149. On 3 October 2017 Ms Smits sent the claimant an email setting out three points that she wished to follow up with him (page 683) (i) on Mr Munroe's discussion with Mr Stewart on acceptable market practice, (ii) seeking the transcripts of his calls relating to Market Tech and (iii) his "self-reporting" on 28 September 2015.

150. What the claimant meant by self-reporting was his raising of the OTB IPO matter on that Monday 28 September 2015 with his line manager Mr Bell. There were no transcripts of the Market Tech calls on 9 July 2015 available to the respondent because the claimant had used his personal mobile rather than his work landline or work blackberry. It was one of the claimant's points of appeal that the respondent had failed to consider the transcripts of these calls (page 618) and thus was "deliberately selective" in its investigation. I find that the claimant knew that there was no transcript within the respondent's possession because he had made the calls on his personal mobile when he had two other recorded lines available to him. As Ms Smits did not have the transcripts she had to rely on the claimant's verbal account of the calls.

151. The second day of the hearing took place on 16 October 2017 after Ms Smits had reviewed the further documentation submitted by the claimant. The transcript was at pages 695-711. There was a discussion of the three points raised by Ms Smits in her 3 October email including the claimant's Market Tech calls on 9 July 2015 with Mr Santa Barbara of Hargreave Hale and Mr Rodrigs of River Mercantile in which he discussed his view on the price.

152. On 17 October 2017 the claimant submitted further documents and representations for Ms Smits to consider.

153. Ms Smits observed on the collusion issue that the claimant was sharing the respondent's confidential and proprietary information with the market, for

example in the OTB email sharing the amount of the order that he had placed – at GBP17m. In Market Tech she observed that the claimant had advised other fund managers that he had "put in a large order within a 220m limit". She observed, correctly, that this was not information in the public domain.

The appeal outcome

154. On 20 October 2017 Ms Smith sent her appeal outcome letter, page 748 – 751, giving her decision on the five points of appeal.

155. On the delay point she acknowledged that ordinarily a disciplinary process should commence as swiftly as possible but given the FCA investigation, she was satisfied that it was appropriate to delay pending that investigation and that on 21 December 2016 the FCA had given notice that they were discontinuing certain aspects of their investigation into the claimant personally.

156. Ms Smits was satisfied that the process was properly carried out and that the decision was not predetermined. She was satisfied with the finding of gross misconduct. Ms Smits agreed with Mr Munroe's finding that the claimant's breaches of contractual duties and obligations and of relevant policies and procedures meant that his conduct was fundamentally in breach. On the collusion allegation, namely the claimant's attempt to collude with others to influence the prices of the OTB, Market Tech and Card Factory shares. The Code of Conduct required the claimant not to enter into any "*formal or informal agreements, whether written or oral, with competitors regarding…..fixing prices or terms, or any information that impacts prices or terms*". Ms Smits' view was that the claimant's conduct showed that he attempted to do precisely that (page 750).

157. On the claimant's contention that he had self-reported, Ms Smits noted that this was only after the respondent had been contacted by a third party on 23 September 2015 (Ms Carter, Head of Compliance at OMGI) and the claimant mentioned it to his line manager on Monday 28 September 2015.

158. Ms Smits did not accept that the allegations had changed and she could not take the inconsistency point any further because the claimant did not provide any information. The appeal was not upheld.

FCA Statement of Objections

159. Subsequent to the disciplinary hearing and in November 2017, the FCA publicly issued a Statement of Objections to four asset management firms including the respondent – the FCA press release was page 751.1 – which stated that the FCA believed that 4 firms, including the respondent may have broken competition law in relation to two IPOs and one placing.

160. The FCA press release made clear that these were provisional findings and might not necessarily lead to an infringement decision. The statement of objections gives the firms notice that the FCA thinks that they have infringed competition law and gives them an opportunity to respond by making representations. This

was the first case brought by the FCA using its competition enforcement powers. On Mr Munroe's evidence I find it was a reference to the conduct in the Key Corporate Events.

The claimant's evidence

161. The claimant was not, on my finding, the most forthcoming or straightforward of witnesses. He often relied on less than obvious interpretations of documents or correspondence to suit his case, occasionally clarified or changed his evidence when he had given an answer the consequences of which he realised may not help him and on occasions avoided admissions unless it was unavoidable on the documents. He relied heavily on the most exact and precise meaning of words if it was to his advantage. The following are examples that led me to this finding.

    a. When asked about the phone calls he made to competitor fund managers in relation to Market Tech on 9 July 2015 and why he made them from his personal mobile rather than his work landline or work Blackberry when he was at work, he said firstly, "*I didn't say I was sitting at my desk throughout the first call, I got the phone number, but I don't know exactly where I was, it is fairly likely I went to the coffee machine or somewhere else"* and later said: "*I didn't say I walked away from my desk".* The cross examination centred around why the claimant did not make the call on a device which made a recording.
    b. He said that one of the reasons he did not use the work landline for the above calls was because the lead for his phone was "*curled up*"; not a reason he had ever mentioned previously. He accepted it had a speaker phone function, but said he "*did not wish to disturb colleagues*".
    c. Admitted that he only raised the Market Tech matter when he knew the respondent was "*crawling all over"* his emails in connection with the OTB investigation.
    d. That he did not use his work Blackberry for the calls to Mr Santa Barbara and Mr Rodrigs on 9 July 2015 because it was not working yet at around the same time he admitted to having a conversation with Mr Newens on the Blackberry and it was the number he had given to Mr Newens. The claimant then said that the Blackberry was "temperamental" and that it was difficult to type small numbers on the Blackberry.
    e. When asked about a Bloomberg chat with Mr Newens on 13 July 2015 (page 805) describing Mr Santa Barbara and Mr Rodrigs as having "*no cahones*" for not helping him out in pushing the price down, the exchange with counsel was as follows:

        Q: You say "no cahones", you say that because you know this was a risky action and they weren't brave enough, isn't that right?
        A: Yes that's right.
        Q: [counsel starts to ask next question]
        A: I'd like to clarify my last answer, I meant it was risky from their point of view ……but in reality it was not risky"

    f. When asked about a laminated document with guidance on Investor Collaboration (page 582) the claimant tried to distance himself from

knowledge of it by saying he did not think it had been distributed to him. He was taken to his own authored document five pages further on (587) where he said: "*I do recall receiving a laminate on my desk…. ….. which includes the content on Investor Collaboration"* and then reluctantly accepted that the tribunal should proceed on the basis that he had read it.

g. On the issue of collusion the claimant said that he was not asking other fund managers to agree to do the same thing, he was asking them to agree individually to do the same thing. This was the distinction that he drew in support of his case. I found it a self-serving and unconvincing distinction.
h. REDACATED PARAGRAPH

HEADING REDACTED

162. Redacted paragraph

163. Redacted paragraph

164. Redacted paragraph

165. Redacted paragraph

166. Redacted paragraph

167. Redacted paragraph

168. Redacted paragraph

The law

169. Section 98(4) of the Employment Rights Act 1996 provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and (b) shall be determined in accordance with equity and the substantial merits of the case.

170. The tests in ***British Home Stores Ltd v Burchell 1980 ICR 303*** as restated in ***Graham v Secretary of State for Work and Pensions (JobCentre Plus) 2012 IRLR 759 (CA)*** are first, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; second, did the employer believe that the employee was guilty of the misconduct complained of; and third, did the employer have reasonable grounds for that belief.

171. Those tests have been questioned in the Supreme Court decision of ***Reilly v Sandwell 2018 UKSC 16***; nevertheless, ***Burchell*** remains good law (see Lord Wilson, paragraph 22; Lady Hale, paragraph 35).

172. In ***Royal Mail Group Ltd v Jhuti 2018 IRLR 251*** the Court of Appeal (Underhill LJ) said at paragraphs 56-57:

"The two stages of the process required by section 98 are inextricably linked. The question formulated by subsection (4) is whether the employer acted reasonably in treating the reason shown by it under subsection (1) (that being the "it" referred to under (a)) as a sufficient reason for dismissing the employee. What that reason was will be established by reference to the mental processes of the particular person (or persons) responsible for the decision…

….for the purpose of determining "the reason for the dismissal" under section 98 (1) of the 1996 Act the tribunal is obliged to consider only the mental processes of the person or persons who was or were authorised to, and did, take the decision to dismiss."

173. The tribunal's role is to review the employer's decision and not substitute its decision for that of the employer, and this is so when considering the investigation process as much as the sanction applied (see per Mummery LJ in ***Sainsbury's Supermarkets Ltd v Hitt 2003 ICR 111 CA***).

174. In ***A v B 2003 IRLR 405 EAT*** (Elias J) it was held that in determining whether an employer carried out such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and their potential effect upon the employee. An investigator carrying out the inquiries should focus no less on any evidence that may exculpate or at least point towards the innocence of the employee as on the evidence directed towards proving the charges. This is particularly so where, as is frequently the situation, the employee himself is suspended and has been denied the opportunity of being able to contact potentially relevant witnesses.

175. The Court of Appeal in ***Salford Royal NHS Foundation Trust v Roldan 2010 IRLR 721*** endorsed the decision in ***A v B*** and said that it is particularly important for employers to take seriously their responsibilities to conduct a fair investigation where the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite.

176. In ***RSPCA v Cruden 1986 ICR 205*** the EAT upheld the ET's finding that a dismissal was unfair when there was a delay in instituting the disciplinary proceedings. In that case the delay was for about seven months and the reason put forward by the employer was that the employee was facing a disciplinary for another matter and they wanted to get that out of the way first. The EAT agreed that the delay in instituting the disciplinary proceedings made the dismissal unfair notwithstanding that the delay did not prejudice the claimant and the result (that he would have been dismissed) would have been the same. The EAT said that the predecessor section to section 98(4) ERA was concerned with whether the employer acted fairly and not with whether the employee suffered injustice.

177. Procedural defects in a disciplinary process can be corrected on appeal. What matters is whether the disciplinary process as a whole was fair - ***Taylor v OCS Group Ltd 2006 IRLR 613 CA***. Earlier defects in a procedure cannot be cured if the appeal manager is properly regarded as a judge acting in his or her own cause – ***Byrne v BOC Ltd 2006 IRLR 613 CA.***

<u>Polkey and contributory fault</u>

178. The relevant authorities on the approach to be taken under each reduction were recently summarised in ***Soll (Vale) v Jaggers EAT/0218/16*** by Eady J at paragraphs 30-31, as follows:

> *30 In making any Polkey reduction (relevant to the assessment to be made under section 123(1), guidance has been laid down by the EAT, Elias J (as he then was) presiding, in the case of Software 2000 Ltd v Andrews and Ors [2007] ICR 825 :*
>
> *"53. The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed. For example, there may be insufficient evidence, or it may be too unreliable, to enable a tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the tribunal to conclude that on any view there must have been some realistic chance that he would have been. Some assessment must be made of that risk when calculating the compensation even though it will be a difficult and to some extent speculative exercise.*
>
> *Summary*
>
> *54. The following principles emerge from these cases. (1) In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal. (2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future.) (3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made. (4) Whether that is the position is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence. (5) An appellate court must be wary about interfering with the tribunal's assessment that the exercise is too speculative. However, it must interfere if the tribunal has not directed itself properly and has taken too narrow a view of its role. … (7) Having considered the evidence, the tribunal may determine: (a) that if fair procedures had been complied with, the employer has satisfied it — the onus being firmly on the employer — that on the balance of probabilities the dismissal would have occurred when it did in any event: the dismissal is then fair by virtue of section 98A(2) ; (b) that there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly; (c) that employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in O'Donoghue v Redcar and Cleveland Borough Council [2001] IRLR 615 ; (d) that employment would have continued indefinitely. However, this*

last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."

31 *On the question of contributory fault, section 123(6) requires an ET to consider the conduct of the employee. The guidance offered by HHJ Peter Clark in the case of* Optikinetics Ltd v Whooley *[1999] ICR 984 EAT is helpful in this regard, specifically:*

> *"(1) Before making any finding of contribution the employee must be found guilty of culpable or blameworthy conduct. The inquiry is directed solely to his conduct and not that of the employer or others.*
> *(2) For the purposes of section 123(6) the employee's conduct must be known to the employer at the time of the dismissal … and have been a cause of the dismissal.*
> *(3) Once blameworthy conduct causing, in whole or in part, the dismissal has been found, the tribunal must reduce the compensatory award by such proportion as it considers just and equitable. …*
> *(4) A finding of contribution under section 122(2) does not require a finding that the conduct is causatively linked to the dismissal. … The wording … grants to the employment tribunal a wide discretion as to whether to make any, and if so what, reduction in the basic award on the grounds of the employer's conduct.*
> *(5) …it is now clear that different proportionate reductions are permissible in relation to the basic and compensatory awards …*
> *(6) The appellate courts will rarely interfere with the employment tribunal's assessment of the percentage reduction for contribution …" (Page 989A-E)*

32 *More generally, in* Steen v ASP Packaging Ltd *[2014] ICR 56 EAT Langstaff J provided the following guidance when applying sections 122 and 123 ERA:*

> *"11. The application of those sections to any question of compensation arising from a finding of unfair dismissal requires a tribunal to address the following: (1) it must identify the conduct which is said to give rise to possible contributory fault; (2) having identified that it must ask whether that conduct is blameworthy.*
> *12. It should be noted in answering this second question that in unfair dismissal cases the focus of a tribunal on questions of liability is on the employer's behaviour, centrally its reasons for dismissal. It does not matter if the employer dismissed an employee for something which the employee did not actually do, so long as the employer genuinely thought that he had done so. But the inquiry in respect of contributory fault is a different one. The question is not what the employer did. The focus is on what the employee did. It is not on the employer's assessment of how wrongful that act was; the answer depends on what the employee actually did or failed to do, which is a matter of fact for the employment tribunal to establish and which, once established, it is for the employment tribunal to evaluate. The tribunal is not constrained in the least when doing so by the employer's view of wrongfulness of the conduct. It is the tribunal's view alone which matters.*
> *13. (3) The tribunal must ask for the purposes of section 123(6) if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did not do so to any extent, there can be no reduction on the footing of section 123(6) , no matter how blameworthy in other respects the tribunal might think the conduct to have been. If it did cause or contribute to the dismissal to any extent, then the tribunal moves to the next question, (4).*
> *14. This, question (4), is to what extent the award should be reduced and to what extent it is just and equitable to reduce it. A separate question arises in respect of section 122 where the tribunal has to ask whether it is just and equitable to reduce the amount of the basic award to any extent. It is very likely, but not inevitable, that what a tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award, but it does not have to do so."*

Wrongful dismissal

179. In determining whether an employer was entitled to dismiss summarily for gross misconduct, the focus is on the damage to the relationship between the parties, and while dishonesty and other deliberate actions that poison the relationship would obviously fall into the gross misconduct category, so also could an act of gross negligence in an appropriate case: see ***Adesokan v Sainsbury's Supermarkets Ltd 2017 ICR 590*** per Elias LJ at paragraph 23. The question for the judge was therefore whether the negligent dereliction of duty in this case was "so grave and weighty" as to amount to a justification for summary dismissal.

180. At paragraph 29 Elias LJ said: "*It is a natural construction of that example of misconduct [a serious breach of policy or procedure] for it to include acts which undermine the operation of a policy of procedure even if they are not direct breaches of it*".

ACAS Code

181. The Tribunal must take into account the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015).

    a. Paragraph 4 bullet point 4 of the ACAS Code says: "*employers should **inform** employees of the basis of the problem and give them an opportunity to **put their case** in response before any decision is made*".
    b. Paragraph 5 of the ACAS Code provides that the investigation should be carried *'without unreasonable delay'.*
    c. Paragraph 6 of the ACAS Code provides that where practicable, different people should carry out the investigation and the disciplinary hearing.
    d. Paragraph 8 of the ACAS Code provides that the suspension period should be as brief as possible and be kept under review.
    e. Paragraph 9 of the ACAS Code provides that if there is a disciplinary case to answer, *the employee should be notified in writing and the notification should contain sufficient information about the alleged misconduct …and the consequences to enable the employee to prepare to answer the case at the disciplinary hearing*. *It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.*
    f. Paragraph 11 of the ACAS Code provides that the meeting should be held *'without unreasonable delay'.*
    g. Paragraph 12 of the ACAS Code provides that at the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should also be given an opportunity to raise any points about any information provided by witnesses.

Conclusions

Delay in the disciplinary process

182. In relation to the delay in the disciplinary process, I have found above that the reason for the respondent's delay was to await the conclusion of the evidence gathering stage of the FCA investigations. The claimant did not actively chase up the internal proceedings until May 2017, although he was not obliged to do

so. He accepts that his own and the respondent's interests were aligned in regard to the FCA investigations. As late as July 2017 he was seeking further delay in the disciplinary action to await the FCA's decision on the remaining element. His view was to hold it then would be "entirely unfair" on him. The claimant now challenges the delay within these proceedings, but that was not his position in July 2017 when he was seeking yet further delay.

183. The claimant rightly submits that the focus in relation to the delay should be on the respondent's decision because the respondent has the power to make the decisions on timing. At the same time, I find that they may properly take account of the claimant's position and interests when making those decisions. Both parties accept that it is a balancing exercise of the parties' respective interests.

184. The claimant said in submissions that it is not suggested that a delay in bringing or concluding disciplinary proceedings automatically renders a dismissal unfair. The claimant accepts that section 98(4) is fact-sensitive in every case and accepts that there is no tariff based rule where for example a six-month delay would be reasonable but a 12 month delay would not. I have to examine both the length of the delay and the reasons for that delay.

185. The respondent accepted in submissions that the length of the suspension and the delay in holding the disciplinary hearing was exceptional but submitted that these were exceptional circumstances. The claimant was suspended in total for 22 months and this is indeed exceptional.

186. I find that the respondent carried out the balancing exercise. Ms Smits and Mr Munroe took account of the fact that the interests of both parties were aligned so far as the FCA investigation was concerned and that it was sensible to await the completion of the evidence-gathering stage before pushing ahead with the disciplinary process. There had been some initial investigations carried out in late September 2015 and the claimant had produced a long document in October 2015 setting out matters which he wished to be considered within the investigation. This was prepared when his memory was fresh. The parties had the benefit of documentary evidence and telephone recordings including the Bloomberg chats and the emails upon which the disciplinary charges were based. This was not a disciplinary matter on which there were substantially disputed issues of fact.

187. I find that in circumstances where the claimant considered it entirely unfair on him to go ahead with the disciplinary hearing in July 2017 and wanted the respondent to agree to further delay to await the FCA's outcome, it is disingenuous to rely on the delay as rendering his dismissal unfair.

188. I find that this case is distinguishable from ***Cruden*** for the following reasons. In ***Cruden*** the tribunal did not accept the employer's reasons for the delay as genuine. They found the real reason for the delay was the hope that an earlier set of disciplinary proceedings would illicit some damning evidence which would itself justify dismissal. The tribunal did not accept the employers "*excuses*" for the delay; they found the delay was deplorable and their excuses for it invalid, although the employee had sustained no prejudice as a result of the delay.

189. The EAT's decision records paragraph 33 of the industrial tribunal's decision which said: "*the employer's enormous delay in taking disciplinary action in relation to the dog incidents made the dismissal unfair as being contrary to equity and the substantial merits of the case unless the employers had some good grounds for the delay.*" (see ICR report at page 217 paragraphs A and B).

190. Having found that there were no such grounds, the tribunal stated their conclusion that "*though the employee entirely merited dismissal it was not in accordance with equity or the substantial merits of the case to dismiss him when they did dismiss him*".

191. The distinguishing feature which I find in this claimant's case is that the respondent had good grounds for the delay. The reasons which they gave for that delay were honest and good reasons. In terms of the balancing exercise their interests were aligned with the interests of the claimant in respect of that delay. I find that it was not contrary to equity and the substantial merits of the case to delay the disciplinary hearing in the way and for the reasons which they did and as such, in these exceptional circumstances, the delay does not render the claimant's dismissal unfair.

<u>The investigating officer's recommendation</u>

192. I find that Ms Kalai was making a recommendation that the case go forward on a charge of gross misconduct because she had found sufficient evidence to that effect. An investigating officer has to reach a conclusion as to what should happen to the case once the investigation is complete and why. An investigating officer has to say whether he or she considers that there is enough evidence for the case to go forward to a disciplinary hearing and what the disciplinary charges should be.

193. The claimant is right that Ms Kalai does not work in financial services. This was why she was not the disciplinary officer and the decision maker. This decision making was sensibly placed in the hands of a person with the necessary knowledge and expertise.

194. The claimant is also right that the ACAS Guidance on Conducting Workplace Investigations (October 2015), this not being the ACAS Code, or the Guide on Discipline and Grievances at Work of March 2015, says that an investigator should not suggest a possible sanction or prejudge what the outcome to a grievance or disciplinary hearing will be. The key words are that Ms Kalai found "sufficient evidence" that the claimant engaged in the alleged conduct and in doing so committed gross misconduct. She recommended disciplinary action, she did not prejudge the outcome, she did not recommend a sanction. I find that Ms Kalai's report did not and does not suggest that Mr Munroe's decision was prejudged. That was a decision he made for himself.

<u>Reason for dismissal and reasonable belief</u>

195. The claimant accepted in submissions (paragraph 4) that the principal reason for

his dismissal was misconduct and that Mr Munroe reasonably believed that he had committed misconduct. What the claimant says is that one of the reasons for dismissal related to the FCA investigation into the respondent itself and the leniency/immunity arrangement which improperly influenced the decision.

196. My finding above is that Mr Munroe properly applied his mind to the reasons for dismissal and his reasons were those set out in his outcome letter. Mr Munroe accepted that there are differences in what can be said in the early stages of an IPO than in the later stages. On my finding there can be no reasonable doubt that the day of and within hours of the book closing, is not an early stage, it is a very late stage. I find that Mr Munroe reasonably formed the belief that the claimant disclosed confidential information to competitors within the IPO when he should not have done.

197. I find that even though the claimant was not given a precise definition of the word "collusion" he was under no misapprehension about the disciplinary charges that he faced or the case that he had to answer. The claimant was communicating with individuals at competitor organisations, encouraging them to act in a certain way with a view to influencing the price of an IPO by way of disclosing a trade detail to competitors to influence the price. That is enough on my finding for Mr Munroe to make a reasonable finding that the claimant had been colluding in a manner that was not permitted under the policies and procedures set out above.

198. The claimant had disclosed the size and price of the respondent's order; this was proprietary and confidential and commercially sensitive information. Mr Munroe formed a reasonable belief in this and had in front of him the claimant's own words in the Bloomberg chat of 22 September 2015 saying that he was in the midst of potentially single-handedly getting the IPO "*canned*" by pushing the price down and in July 2015 that he rang giles h and rodders to get them to push the price down. The claimant admits that he was bragging about this. I find that Mr Munroe reasonably took the view that the claimant had disclosed proprietary and confidential to achieve this.

199. Mr Munroe had the benefit of an admission from the claimant that this was an "*attempt to persuade*". Mr Munroe formed the view that the claimant was the initiator and leader of this attempt to persuade others to act in a certain way (to push the price down) and reasonably on my finding, this was enough for him to find against the claimant on the collusion allegation.

200. Based on the claimant's acceptance as to the training he had received I find that Mr Munroe reasonably formed the belief that the claimant had received appropriate training on a regular basis on matters such as risk and compliance, market abuse, inside information and failing to protect client money. I find that during the internal disciplinary process, lack of training was not a large part of the claimant's case (he said as much during his appeal) and that he now seeks to make more of this than was the position during his disciplinary process.

201. The claimant told Mr Munroe that he regretted his actions, he would not act in the same way again and he knew that his actions were "*unorthodox".* He admitted a "technical breach" of the information sharing policy around the

disclosure of commercially sensitive and proprietary information. The claimant accepts that Mr Munroe genuinely believed that the claimant committed misconduct. I have found that it was Mr Munroe's own decision and it was not put upon him by anyone else.

202. I find that Mr Munroe properly considered mitigating factors, as set out in his outcome letter and as I have found above and having considered this he reasonably formed the view that the claimant had committed gross misconduct.

Did dismissal fall within the band of reasonable responses

203. The claimant's misconduct had very serious consequences for both parties. The claimant knew his actions were unorthodox, he knew that it raised a regulatory question which he decided to "self resolve" despite knowing that the correct course of action was to refer it to Compliance, he failed to consult the Code of Conduct in relation to his proposed actions, and instead relied on his own internet research. He knew that he ran a regulatory risk which exposed both himself and the respondent to investigations by regulatory bodies and risks of substantial penalties. On allegation 1 he admitted a "technical" breach around the disclosure of commercially sensitive and proprietary information.

204. The reasons for dismissal fell within description of circumstances in which the respondent could summarily dismiss, set out in clause 5.2 ((a) and (f)) of the claimant's contract of employment (set out above) on both limbs.

205. I cannot substitute my view for that of the respondent. I find that the dismissal fell within the range of reasonable responses open to the respondent.

The appeal

206. As I have found above, Ms Smits was a judge in her own cause on the timing and delay issue. I find following the ***Soll (Vale)*** above, at paragraph 48, that this taints only the delay issue and no other part of Ms Smits' decision. I have made separate findings and conclusions above on the delay point. Ms Smits was not a judge in her own cause on any other aspect of the appeal.

207. Any defect that may have existed in relation to Mr Munroe not disclosing his conversation with Mr Iain Stewart as part of his further investigation was corrected on appeal as the claimant then knew about it and it was discussed in the appeal hearing (transcript page 700). In any event, any informal views from others were not material in the decisions made either by Mr Munroe or Ms Smits. They had sufficient information upon which to base their decisions without these "soundings" which I find had no material effect on the outcome.

208. For these reasons the claim for unfair dismissal fails and is dismissed.

Wrongful dismissal

209. It is for the respondent to show that the claimant, on a balance of probabilities, committed gross misconduct amounting to a repudiatory breach of his contract,

entitling them to dismiss without notice. The focus is on the damage to the relationship between the parties. Dishonesty would fall into that category, but so can a case of gross negligence. It must be "so grave and weighty" as to provide justification for summary dismissal. The respondent must show that the claimant disregarded the essential conditions of his contract of service.

210. On the OTB IPO, the claimant was aware that there was a potential regulatory issue. He had attended training less than a year earlier, which it clear that where there was uncertainty he should raise the matter with Compliance. I find that he made a deliberate decision not to raise the matter with compliance. This deprived him of any objectivity in his own decision-making. He carried out his own research on the internet but could produce no materials to show what he had found. The claimant is not slow in coming forward with documents or written submissions to support any part of his case. He did not consult the Code of Conduct or the myriad of policies and procedures that were available to guide him. He convinced himself that his actions were the right side of the line, yet he admits that he knew that his conduct was "*unorthodox*". He knew he was taking a regulatory risk and knew or ought reasonably have known that it was a risk that could have grave and serious consequences – as has transpired with the regulatory investigations.

211. The claimant admitted during his evidence that he attempted to conceal the Blackrock email. I find that he did so because he knew that his actions were serious and wrong and undermining of the policies in place to protect against it.

212. In saying to Mr Newens in a Bloomberg chat on 13 July 2015 that he "*rang giles h and rodders to get them to push the price down"* I find that the claimant was clearly attempting to persuade other participants in the market to agree to submit an order at the same price as himself a matter of hours before the book was due to close. This was clearly contrary to the respondent's Code of Conduct. The claimant was seeking agreement on actions in order to impact prices, albeit that Mr Hargreave and Mr Rodrigs did not go along with him. The claimant nevertheless attempted to persuade them to go along with him. The attempt was on my finding enough to undermine the Code of Conduct even though there was no actual breach because the competitor fund managers did not "*help him out*".

213. The claimant sought to persuade with the 21 September 2015 emails and I do not accept his distinction between asking other fund managers to agree to do the same thing and asking them to agree individually to do the same thing. It was seeking collective action as recognised by Mr Newens in his email of 21 September 2015 (page 770).

214. Whatever doubt the claimant purported to have around the cut-off point in time as to when parties were in the early or late stages of an IPO I find that there can be no reasonable doubt that on the day of and within hours of the closing of the book is a very late stage. It can in no way be construed as an early stage. The claimant disclosed his firm's order details to competitors, which was clearly in breach of the information sharing policy, with a view to pushing the price down.

215. The claimant submits that I should take account of Mr Waterson's view

expressed on 7 October 2015 in relation to the OTB emails that it was not necessary to suspend the claimant, just to monitor any ongoing IPOs and to give the claimant a reduced appraisal score and a final written warning. I am unpersuaded by this as Mr Waterson's view was expressed at a very early stage in an informal manner and he did not have before him the full picture.

216. The respondent's policies and Code of Conduct are in place to protect both the respondent and its employees from the sorts of risks and consequences that have come to pass in this case.

217. The reasons for dismissal fell within description of circumstances in which the respondent could summarily dismiss, set out in clause 5.2 ((a) and (f)) of the claimant's contract of employment (set out above) on both limbs.

218. I find that the claimant acted in a grossly negligent manner which was undermining of the operation of the respondent's policies and procedures and this was sufficiently grave and weighty to fall within the definition of gross misconduct. This entitled the respondent to find that he was in repudiatory breach of his contract and dismiss him without notice.

219. For these reasons the claim for wrongful dismissal fails and is dismissed.

220. At the end of the hearing I expressed my gratitude to both counsel and their instructing solicitors. This was a well prepared case with a high standard of advocacy and the hearing was conducted with the utmost professionalism by both parties.

_____

Employment Judge Elliott
Date: 23 July 2018

Judgment sent to the parties and entered in the Register on: : : .
_____ for the Tribunals