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# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr D Fotheringhame**

**Respondent:** **Barclays Services Ltd**

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

**On:** **17 - 20 & 31 July 2018**

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

**Representation**

**Claimant:** **In person**

**Respondent:** **Mr P Goulding (Counsel)**

## REMEDY JUDGMENT

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

**(1) The Tribunal does not make an order for reinstatement because it is not practicable for the Respondent to comply with such an order and it would not be just to order reinstatement when the complainant caused or contributed to some extent to his dismissal.**

**(2) The Tribunal orders the Respondent to re-engage the Claimant into the role of Director Data Commercialisation because the Claimant wishes to be re-engaged by the Respondent, it is practicable for the Respondent to comply with this order for re-engagement and it is just to order his re-engagement to this role.**

**(3) The terms on which re-engagement is to take place are as follows:-**

**(i) The Respondent shall be the Claimant's employer;**

**(ii) The Claimant's job title will be Director Data Commercialisation;**

**(iii) The Claimant's total remuneration annually shall be £150,000;**

**(iv) The Respondent shall pay the Claimant in respect of any benefit which the Claimant might reasonably be expected to have had but for the dismissal from the date of his dismissal to the date of re-engagement. The Respondent shall pay the Claimant arrears of pay on the basis that his loss of earnings and benefits are calculated according to the non-discretionary compensation and benefits (including pension benefits) he would have continued to receive in his pre-dismissal role, had he not been dismissed, during that period.**

**(v) The Claimant shall be restored to the position of Director and shall have the pension rights associated with the Data Commercialisation Director post.**

**(vi) The order must be complied with 21 September [six weeks].**

## REASONS

***Preliminary***

1 This was a remedy hearing following liability judgment sent to the parties on 15 March 2018. That liability judgment determined that the Respondent had dismissed the Claimant unfairly and that, had it acted fairly, it would not have dismissed the Claimant. The Tribunal also decided that the Claimant had contributed to his dismissal in the order of 20%. The Claimant sought reinstatement or, alternatively, re-engagement as the remedy for unfair dismissal. The issues to be determined at the remedy hearing were set out by the Tribunal at a hearing on 9 May 2018. They were as follows:

**Issues**

1.1. Whether the Tribunal should make a reinstatement order in the case, in particular:

1.1.1. Whether it is practicable for the employer to comply with an order for reinstatement in the circumstances that the Respondent contends that:

1.1.2. The Claimant's role no longer exists.

1.1.3. The Respondent would not certify the Claimant as a fit and proper person.

1.1.4. Reinstatement will breach the DFS order.

1.1.5. The Respondent has lost trust and confidence in the Claimant.

1.1.6. The Claimant continues to criticise the Respondent and appears to have lost confidence in the Respondent.

1.1.7. The DFS concluded that the Claimant played a role in misconduct which led to a $150 million fine for the Respondent.

1.2. Whether it would be just to order reinstatement having regard to s*116(1)(c) ERA 1996* the Claimant's contributory fault and/or

1.3. Whether the Tribunal should exercise its discretion to order reinstatement.

1.4. Whether the Tribunal should order the Respondent to re-engage the Claimant and, in particular

1.4.1. Whether there is employment comparable to that from which the Claimant was dismissed, or other suitable employment.

1.4.2. Whether it is practicable for the employer to comply with an order for re-engagement, for the reasons set out in paragraphs 2.1.1.1 – 2.1.1.6 above.

1.4.3. Whether it would be just to order re-engagement where the Claimant contributed to his dismissal under *s116(3)(c) ERA 1996.*

1.4.4. Whether the Tribunal should exercise its discretion to order re-engagement.

1.5. If the Tribunal does order re-engagement, on what terms the Claimant should be re-engaged, as set out in *s115(2) Employment Rights Act 1996.*

2 The Respondent opposed the Tribunal making, either, or a reinstatement order, or a reengagement order. It did not oppose the Tribunal awarding the Claimant a basic award of £3,065.60 and the maximum compensatory award of £78,962, in compensation for unfair dismissal.

3 In preparation for the remedy hearing, I made orders on 9 May 2018 which I described as follows: -

3.1 The parties agreed that it would be sensible for the Claimant to answer the questions sent by the Respondent to the Claimant on 8 May 2018 at 12.24, regarding the nature of a role into which he should be re-engaged. They agreed that thereafter, the Respondent would conduct a job search and inform the Claimant of the results, so that the Claimant could identify, from the results, any roles in respect of which he says the Tribunal should order re-engagement.

3.2 The Claimant agreed that he would identify the roles into which he seeks re-engagement by 19 June 2018 that that he would also say why he

contends that the roles are comparable and suitable and why re-engagement would be practicable and just.

3.3 The parties then agreed to exchange witness statements by 3 July 2018, along with any other documents on which they rely in relation to remedy.

3.4 There was some dispute about the extent of the order I should make requiring the Respondent to provide information on the number of new MD roles taken up by external and internal hires in the last three years and the number of MD vacancies advertised in the last three years. The Claimant contended that the order should be in relation to MD roles globally. The Respondent said that it should be confined to the UK; an order in relation to global roles would be extremely onerous. I had understood that the context in which the Claimant had made his application for disclosure/information was in the context of his knowledge of appointments to MD roles and advertisements for MD roles in the UK, rather than globally. My order, therefore, was for the Respondent to provide information regarding UK roles. The Respondent said that it could provide the relevant information to the Claimant by 22 May 2018.

3.5 I also ordered the Respondent to provide vacancy adverts for the roles set out in the Claimant's application for information dated 6 May 2018. In addition, I ordered the Respondent to provide disclosure of hiring plans which contained those roles. The Claimant asked for the date of the hiring plan which first contained the relevant role. I told the Respondent that I was ordering that the first iteration of the relevant hiring plan on which the role appeared should be disclosed. If the date of that document is not apparent from the document itself, I said that I expected that, if that document was held in electronic form, it could be interrogated and the date on which the first iteration was created could be established and disclosed. I agreed with the Respondent that the wording of the relevant order should be that the Respondent conduct a reasonable search for the vacancy adverts and the first iteration of the hiring plan which mentioned the roles set out in the Claimant's application dated 6 May 2018, in so far as they exist in the UK. The Respondent agreed to do that by 12 June 2018.

3.6 The Respondent also agreed to disclose to the Claimant the three Compliance Remediation plans set out in his written application of 9 May 2018. The Respondent shall do this by 12 June 2018.

3.7 The Claimant agreed to provide disclosure of his current CV to the Respondent by 15 May 2018.

4 The parties had generally complied with those orders.

5 On 31 May 2018, the Respondent had sent the Claimant a list of 294 vacancies at Managing Director and Director grades in all the Respondent's global locations.

6 On 12 June 2018, the Claimant listed 33 roles in which he was interested, and, on 15 June 2018, the Respondent sent the Claimant available job descriptions for the roles.

7 On 19 June 2018, the Claimant identified 15 roles into which he sought to be re-engaged.

8 On 10 July 2018, the Respondent told the Claimant that 9 of those 15 roles were no longer vacant.

9 At the start of the remedy hearing, the Claimant told the Tribunal that he did not wish to cross-examine the recruiting managers for the remaining 6 vacant posts. He contended that, if the Tribunal were to make an order for re-engagement, it would not be necessary for the Employment Tribunal to specify a particular post into which the Respondent should re-engage the Claimant. The Claimant nevertheless indicated that he did not accept the evidence of those recruiting managers that, either, the Claimant did not have the skills required for the role, or could not be employed in the relevant role because of the New York DFS Consent Order, or that the Claimant was otherwise unsuitable for the relevant role. I decided that, if the Claimant wished to challenge the evidence of those recruiting managers, then they would have to be called to give evidence and the Claimant would need to cross-examine them, so that they would have an opportunity to provide an answer to his challenge.

10 The Respondent helpfully arranged for the relevant managers to attend to give evidence at short notice, whether in person, or by video link from America.

11 Also at the start of the hearing, the Respondent made an application for an order that some of the Claimant's witness statement be excluded from evidence because that evidence was not relevant, would be disproportionately time consuming and a distraction from the issues to be determined, prejudicial to some of the individuals mentioned and/or calculated to embarrass the Respondent and/or those individuals. I did make an order that some of the Claimant's evidence be excluded, giving reasons orally at the time.

12 Later during the hearing, on the Respondent's application, I made an anonymisation order in respect of two individuals on whom the Claimant relied as comparators. I gave reasons orally for making the anonymisation order.

13 I heard evidence from the Claimant, who relied on two witness statements and from Tim Cartledge, the Claimant's former manager.

14 I heard evidence from 7 witnesses for the Respondent: Michelle Kates, Global Head of Employee Compliance; James Hassett, Global Head of FX Trading and hiring manager for the role of Global Head of FX Platforms; Sameer Jain, Chief Technology Officer and hiring manager for the role of Head of Developer Experience; Laurence Braham, Co-Head of Technology Banking and hiring manager for the role of Managing Director Technology Banking; Grant Lewis, Director of Payment Processing and hiring manager for the role of Director Data Commercialisation; John Stecher, Group Head of Innovation and Chief Innovation Officer and hiring manager for the role of BI Innovation

Coverage Officer; and Eric Anderson, Pre-Trade Technology Lead and hiring manager for the role of Head of Macro Electronic Trading.

15 There was a Remedy Hearing Bundle in four volumes and a Correspondence Bundle. Page references in this judgment are to pages in the Remedy Bundle, unless otherwise stated. The parties submitted written submissions both at the beginning and the end of the remedy hearing. The parties exchanged written closing submissions and written replies to closing submissions; they also made oral closing submissions.

***Findings of Fact***

16 The Claimant is an exceptionally intelligent and well qualified individual in the field of finance and investment banking. He has a First Class degree in Natural Science from Cambridge University, a PhD in Computational Neuroscience from Oxford University, a First Class Maths Degree from the Open University and a recent Masters Degree with Distinction in Machine Learning from University College London, for which he won entry to the Dean's List, which is given to the top 5% of graduates.

17 He has 16 years' experience in finance and investment banking and many years' experience in coding and, subsequently, in managing teams developing electronic trading systems. He has skills in managing large IT projects, in electronic trading, in real-time low latency technology systems, in artificial Intelligence (AI) and Machine Learning, in Advanced Statistical Modelling and in Market Making and Market Structure.

18 At the time of his dismissal by the Respondent, the Claimant was employed as Head of Automated Flow Trading within the Respondent's Electronic Fixed Income Currencies and Commodities ("eFICC") trading business. His corporate title was Managing Director. He had been paid gross pay of over £1m in 2014.

19 The Claimant was employed in Barclays' FX business, which is part of its investment bank. It facilitates transactions on behalf of clients seeking to hedge or trade currencies.

20 The Claimant had direct supervisory responsibility over London-based traders and indirect supervisory responsibility over technology and quantitative research groups.

21 The Claimant told the Tribunal that he sought a reinstatement or re-engagement order. He said that it was his only real hope of re-entering the job market.

22 The Claimant said that he was seeking reinstatement to the role he would have been reorganised into. He said that it would be the same job with the same relationships and responsibilities that he had previously had. He said the e-FX business still existed and was, in very large part, the same as when he was dismissed.

23 The Claimant also said he could be reinstated into the role of Head of eFX Trading, which he held from 2010-2013, the duties and responsibilities of which were transferred to his Head of Automated Flow Trading eFICC role.

24 The Claimant said that, in reality, Managing Director and Director roles were not advertised in the Bank. He contended that there were far more roles available than the roles which appeared on the Respondent's vacancy list.

25 Nevertheless, pursuant to the Tribunal's Orders, the Claimant had identified the roles, from the vacant roles disclosed to him, which he said had the skills and qualifications to perform. He had explained why he considered the roles suitable, Correspondence Bundle, p99 -104.

26 The following 6 roles were the roles which were unfilled at the time of the Tribunal remedy hearing and to which the Claimant contended that he should be reengaged:

(a) Head of Developer Experience, hiring manager Mr Jain;
(b) Director Data Commercialisation, hiring manager Mr Lewis;
(c) Head of Macro Electronic Trading and Markets Analytics Technology, hiring manager Mr Anderson;
(d) Managing Director Technology Banking, hiring manager Mr Braham;
(e) BI Innovation Coverage Officer, hiring manager John Stecher;
(f) and Global Head of FX Platforms, hiring manager James Hassett.

27 Addressing his suitability for the role of Head of Developer Experience, the Claimant said he had 25 years' experience in software development, 17 of which had been in finance. He had worked in, and then led, numerous development teams; he had been a hands-on developer, cutting code for 10 years of his career in finance. The Claimant said that he understood the competing constraints operating on developers in investment banks generally and in Barclays specifically and understood the role from the perspective of being a key business user of in-house built technology, Correspondence Bundle p102.

28 With regard to the Director Data Commercialisation post, the Claimant said that that role fitted squarely within his fields of expertise: Data Analytics, IT Project Leadership and Business Focused Quantitative methods and proven commercial success, Correspondence Bundle p103.

29 Regarding the Head of Macro Electronic Trading and Markets Analytics Technology Managing Director post, the Claimant said, "This job is made for me. There are very few people in the industry who can point to the breadth and depth of experience I have in electronic trading of macro products," Correspondence Bundle p104.

30 Laurence Braham was the recruiting manager for the Managing Director Technology in Banking role. The Claimant confirmed that he no longer sought reengagement into that role following Mr Braham's evidence to the Tribunal.

31 Addressing the BI Innovation Coverage Officer Director role, the Claimant said that his detailed knowledge of global markets, as well as implementing new technology, made him ideal for the role. He said that he had extremely up-to-date training in techniques at the cutting edge of Artificial Intelligence and machine learning and this would make him a compelling candidate, Correspondence Bundle p103.

32 With regard to the Global Head of FX platforms, the Claimant said he was uniquely well qualified for the role, having worked in FX trading technology for 15 years. He said he had rare and extensive experience in the Barclays FX electronic platforms, having run and grown the main one, BARX, for five years, Correspondence Bundle p103.

**Regulatory Context**

33 The Respondent's eFICC trading business was part of its investment banking business. The investment banking business is regulated in the UK by the Prudential Regulation Authority and the Financial Conduct Authority. In the US, the Bank's significant regulators and authorities include the New York State Department of Financial Services ("the DFS"), the Commodity Futures and Trading Commission, the US Department of Justice and the Board of Governors of the Federal Reserve System.

34 On 17 November 2015, Barclays Bank entered into a Consent Order with the New York State Department for Financial Services (DFS), under which the bank agreed to pay a civil penalty of $150m (page 19 remedy hearing bundle).

35 The preamble to the agreed Order said that: "Barclays failed to properly use Last Look due to the failure of systems and controls, including management oversight.." and ".. there was a lack of transparency both internally and with customers regarding Last Look.." and ".. in certain instances, information provided to customers and/or the Barclays sales team concerning Last Look was insufficient and/or incomplete," (p.20).

36 The "Factual Background" set out in the Order stated, at paragraph 28,

> "Certain senior Barclays employees instructed traders and IT employees not to inform the Barclays Sales team about the existence of Last Look:
>
> a. On June 6, 2011, in an email discussion about Last Look, a Barclays Managing Director and Head of Automated Electronic FX Trading wrote:
>
> > "Do not involve Sales in anyway whatsoever. In fact avoid mentioning the existence of the whole BATS Last Look functionality. If you get enquiries just obfuscate and stonewall."
>
> …
>
> c. On November 7, 2011, the Barclays Managing Director and Head of Automated Electronic FX Trading wrote: "Do not discuss Last Look with Sales. If there has been a spurt [in rejected trades] just blame it on the weekend IT release and say it's being fixed" (p.27)

The order said:

> "Violations of Law and Regulations
>
> With regards to the aforementioned conduct, the Bank has conducted banking business in an unsafe and unsound manner."

37 As set out in the liability judgment, the Order required the bank to take all steps necessary to dismiss the Claimant, whom the Order described as having: "played a role in the misconduct discussed in this Consent Order" (p.27). The Order also said (para 33):

> "If a judicial or regulatory determination or order is issued finding that the termination of any of the above employees is not permissible under local law, then such employees nevertheless shall not be allowed to hold or assume any duties, responsibilities, or activities involving compliance, FX benchmarks, or any matter relating to U.S. or U.S. Dollar operations."

The "Factual Background" in the Order also stated:

> "Barclay's Use of Last Look Was Overbroad
>
> 9. Barclays did not seek to distinguish toxic order flow from instances in which prices merely happened to move in favour of the customer and against Barclays after the customer's order was entered on Barclay's systems.
>
> 10. Barclays instead applied Last Look to *all* API/FIX trades, as well as a handful of GUI customers.
>
> 11. From 2009 to 2014, a large number of the trades Barclays rejected were not truly examples of latency arbitrage or other toxic order flow.
>
> …
>
> 13. Whenever prices within this holding period moved against Barclays and in favour of the customer beyond a certain undisclosed loss threshold, Barclays treated the trade as toxic flow.
>
> 14. Barclays thereby evaluated and applied its Last Look rejection protocols almost entirely in reference to the profit or loss the trade would bring to the Bank.
>
> 15. Barclays did not perform an analysis to ensure Last Look was limiting its rejections to trades that in fact reflected "latency arbitrage" or other truly "toxic" flow.
>
> 16. Thus, instead of employing Last Look as a purely defensive measure, Barclays instead used it as a general filter to reject customer orders that Barclays predicted, based on price movements during the hold period, would be

unprofitable to the Bank" (p23).

38 The Order required the bank to work with a monitor installed by the DFS on remediation plans (p.28 paras 34-35).

39 The Order stated that, upon a finding that the bank was in breach of the Order, the DFS had all the remedies available to it under New York Banking and Financial Services Law (para. 37, p.29). Those remedies could include fines, removal of officers and removal of the bank's licence to operate in New York. At the time the Consent Order was entered into, Barclays New York branch had more than 500 employees and total assets of $36b (p.19).

40 In the UK, the Financial Conduct Authority ("the FCA") and the Prudential Regulation Authority ("the PRA") have issued regulations to institute a "Certified Persons Regime," which has applied to banks such as the Respondent since 7 March 2016.

41 In the case of the FCA, the main regulations in respect of the Certified Persons Regime are set out in the Senior Management Arrangements Systems and Controls ("SYSC") section of the FCA Handbook in subsection 5.2 (pgs.240-7 Remedy bundle).

42 Under the Certified Persons Regime, Barclays is required to certify any of its employees performing a "significant harm function" (SYSC 5.2.4). Certificates can only be issued where the Bank is satisfied that the employee is "fit and proper" to perform the function in question (SYSC 5.2.5). Under the FCA's certification regime, firms should ensure that their employees only perform an "FCA specified significant harm function" if the employee has a certificate issued by the firm to perform that function (SYSC 5.2.3, p.240). A firm may issue a certificate to a person only if the firm is satisfied that the person is a fit and proper person to perform the FCA specified significant harm function to which the certificate relates, (SYSC 5.2.6, p.240).

43 In assessing if a person is fit and proper to perform an FCA specified significant harm function, a firm must have regard, in particular, to whether that person: (1) has obtained a qualification, (2) has undergone or is undergoing training, (3) possesses a level of competence, or (4) has the personal characteristics, required by general rules made by the FCA." (p.240, SYSC 5.2.7).

44 The FCA has issued guidance about the criteria which the FCA would expect a firm to consider in assessing if a person is fit and proper to perform an FCA specified significant harm function (SYSC 5.2.8, p.241). FCA specified significant harm functions include "material risk takers," as defined in SYSC 5.2.42r, pgs.244 to 245):

> "… each function performed by a member of a firm's dual-regulated firms Remuneration Code staff (including any person who meets any of the criteria set out in articles 3 to 5 of Commission delegated regulation (EU) No 604/2014 (criteria to identify categories of staff whose professional activities have a material impact on an institution's risk profile)) is an FCA-specified significant-harm function." (p.246).

45 The relevant guidance issued by the FCA on the criteria which firms should

consider when assessing fitness and propriety is set out in section FIT1.3 of the FCA Handbook (pgs.238 to 239). This says that firms are required to assess fitness and propriety of staff having regard to substantially the same factors as outlined in FIT2:

> "In the FCA's view, the most important considerations will be the person's:
>
> (1) honesty, integrity and reputation;
> (2) competence and capability; and
> (3) financial soundness.
>
> In assessing fitness and propriety, account will also be taken of the activities of the firm for which the control function is ….. to be performed, the permission held by that firm and the markets within which it operates." (FIT 1.3, p.238).

46 FIT2 states that the relevant authorised person determining the honesty, integrity and reputation of staff being assessed under FIT should consider all relevant matters including those set out in FIT 2.1.3G which may have arisen either in the United Kingdom or elsewhere (p.239a).

47 In considering the reputation of staff being assessed, a relevant authorised person should have regard to whether that person's reputation might have an adverse impact upon the firm for which the function is to be performed and the person's responsibilities (FIT2.1.2A, p.239a). The FIT 2.1.3G matters "to which a relevant authorised person should also have regard, include, but are not limited to:

> (1) Whether the person has been convicted of any criminal offence …;
>
> (2) Whether the person has been the subject of any adverse finding or any settlement in civil proceedings, particularly in connection with investment or other financial business, misconduct, fraud or the formation or management of a body corporate;
>
> (3) Whether the person has been the subject of, or interviewed in the course of, any existing or previous investigation or disciplinary proceedings, by the appropriate regulator, by other regulatory authorities …;
>
> (4) Whether the person is or has been the subject of any proceedings of a disciplinary or criminal nature …;
>
> (5) Whether the person has contravened any of the requirements and standards of the regulatory system or the equivalent standards or requirements of other regulatory authorities …;
>
> (8) Whether, as a result of the removal of the relevant licence, registration or other authority, the person has been refused the right to carry on a trade, business or profession requiring a licence, registration or other authority;
>
> (9) …;
>
> (10) Whether the person, or any business with which the person has been

involved, has been investigated, disciplined, censured or suspended or criticised by a regulatory or professional body, a court or Tribunal, whether publicly or privately;

(11) Whether the person has been dismissed, or asked to resign and resigned, from employment …;

(13) Whether, in the past, the person has been candid and truthful in all his dealings with any regulatory body and whether the person demonstrates a readiness and willingness to comply with the requirements and standards of the regulatory system and with other legal, regulatory and professional requirements and standards." (pgs.239a to 239c).

48 The FCA guidance states that all relevant matters should be considered, including criminal convictions. With regard to the latter, "It any staff being assessed under FIT has a conviction for a criminal offence, the firm should consider the seriousness of and circumstances surrounding the offence, the explanation offered by the person, the relevance of the offence to the proposed role, the passage of time since the offence was committed and evidence of the individual's rehabilitation," FIT 2.1.1A, p239a.

49 The Certified Persons Regime replaced the previous Approved Persons Regime, under which individuals conducting certain roles within the Bank had to be approved by the FCA. Approval was given or refused depending on whether the individual was considered by the FCA to be fit and proper. The criteria which were taken into account in assessing fitness and propriety were the same as under the Certified Persons regime.

50 I accepted the Respondent's evidence, from Michelle Kates, Global Head of Employee Compliance by Barclays Services Ltd, part of the Barclays Group, that the Certification regime is of wider application than the previous Approved Persons Regime, due to the broad interpretation of a significant harm function. Barclays considers that the definition of significant harm function applies to 3,500 roles and, in particular, the majority of trading roles at the Respondent. Further, the Regime encompasses material risk takers, who are defined in accordance with EU Regulations No 604/2014 (pgs.248 to 253). The criteria to be applied are both qualitative, based on the individual's role, and quantitative, that is, based on the individual's total compensation. An individual whose total compensation is more than €500,000 per annum is presumed to be a material risk taker and subject to the Certified Persons Regime.

51 It is clear from the above that the responsibility for determining whether an individual is "fit and proper" now lies with the firm employing the relevant individual, rather than the FCA. Under the new Certification Regime, Barclays is required to conduct fitness and propriety checks for prospective Certified Persons and any offers of employment are conditional on the Bank's certification.

52 I accepted the Respondent's evidence that the decision on whether or not an individual can be certified is taken by the relevant business manager, in consultation with the Respondent's Compliance Department, which advises on regulatory

requirements, and the Respondent's Legal and Human Resources Departments, as appropriate.

53 The Claimant was registered as an Approved Person throughout his employment by the Bank until March 2016. On 7 March 2016 the Respondent certified the Claimant as a fit and proper person in relation to material risk taking (p.769). He was certified as a fit and proper person in relation to client dealing functions on 7 September 2016 (p.769).

54 Ms Kates was cross-examined about the fact that the Claimant had been certified as a fit and proper person by the Respondent in March and September 2016. She said that the Claimant had simply been "grandfathered" over from the previous regime in March and then, later, in September 2016; the regulator had not introduced client dealing as part of the certified person regime until September 2016. Ms Kates said there was no reassessment of the Claimant as a fit and proper person until March 2017, after he had been dismissed. However, Ms Kates also said that, despite the DFS Consent Order being in place, it would have been wrong for the Respondent to pre-judge the outcome of disciplinary proceedings by decertifying the Claimant. She said that, when the certification came in the Respondent had not decertified the Claimant.

55 As at 7 March 2016, the FCA Handbook, at SUP 15.3.7 stated that: "Principle 11 requires a firm to deal with its regulators in an open and cooperative way and to disclose to the FCA appropriately anything relating to the firm of which the FCA would reasonably expect notice…" (p.344). SUP 15.3.8 provided:

> "Compliance with Principle 11 includes, but is not limited to, giving the FCA notice of: …
>
> (2) any significant failure in the firm's systems or controls, including those reported to the firm by the firm's auditor …" (p.345).

56 It appears that the Respondent had some telephone discussions with the FCA, updating it on the conduct of the DFS investigation into Last Look, as well as a US Department of Justice investigation (which ultimately did not result in any regulatory enforcement action by that body). These amounted to about four or five brief telephone conversations in 2015. In the conversations the FCA was told the Claimant was being interviewed by the US Department of Justice. On 17 November 2015 the Respondent told the FCA about the DFS Order and the request for termination of UK approved individuals, including the Claimant (pgs.809 to 813).

57 The Claimant submitted a Subject Access Request to the FCA concerning himself; brief notes of these telephone calls were the only documents which the Subject Access Request returned.

58 Ms Kates was cross-examined on whether the Respondent had notified the FCA of a "material breach" in the Claimant's case. She said that the relevant conduct rule was not in force until March 2016. Ms Kates said that the Bank was not expected to notify the FCA of any breach of its Code of Conduct source book rules if that breach occurred before the application of the Code of Conduct source book to that bank

(COCON)(p.795 of the bundle). She confirmed that the Respondent had not notified the FCA of disciplinary action in relation to the Claimant concerning breach of the FCA's rules.

**The Claimant's Contractual Terms**

59 When the Claimant was first appointed by the Respondent, his statement of employment particulars simply provided the following about his job role:

> "Whilst you are employed by the Company, you are expected to devote your full business time and attention to the performance of such duties as may from time to time be assigned to you by the Company or Barclays Capital … You may be asked to perform services for one or more of the Company's Affiliates …
>
> You will initially be based at 5 North Colonnade, Canary Wharf, London, E14 4BB. In view of the nature of our business, it may become necessary to require you to work in different divisions, sections or offices of the Barclays Group or at business recovery locations." (p. 355 ).

60 That statement from the written particulars of employment, dated 11 June 2010, was not replaced when the Claimant moved from role to role within the Respondent. That iteration of the employment particulars stated that the Claimant would be appointed as a Director within Barclays Capital with a gross base salary of £85,000 per annum and an additional fixed payment of £55,000 per annum (p. 355). The statement of employment particulars allowed the Claimant to participate in a discretionary bonus scheme. It also entitled the Claimant to receive an incentive award in respect of the 2010 calendar year with a guaranteed value of £215,250 gross (p.357). The terms and conditions also provided for "long term awards" pursuant to the Barclays plc cash value plan and Barclays plc share value plan (p.358).

**The Claimant's Attitude; Trust and Confidence**

61 During the disciplinary proceedings against the Claimant, the Claimant made statements and allegations which were critical of the Respondent and its actions. The Respondent cross examined the Claimant in detail about these at the Remedy Hearing and set them out exhaustively in its submissions. The statements were as follows:

(1) "Further, I require your written assurance that no decision has yet been taken by the Bank in relation to the allegations against me…it seems clear to me that the outcome of this disciplinary action is a foregone conclusion and that the Bank is simply going through the motions to give the appearance of acting reasonably" (letter 2 December 2015, Claimant to Human Resources [2/63/625]).

(2) "It is quite clear that Barclays have now abandoned any pretence of conducting a fair disciplinary process. However I have no interest in continuing to allow Barclays to inflict further stress and uncertainty on me and my family. Hence I consent to attending this sham disciplinary process in order to allow us to move the process forwards" (Email of 1

March 2016, Claimant to to Human Resources) [2/64/626-7].

(3) "I will then address the DFS settlement which is a shameful tissue of deliberate misrepresentations, distortion of the truth, outright lies and abuse of power" (Claimant's submission in disciplinary proceedings, 4 April 2016) [2/65/628].

(4) "DF said that he had been subject to a malign interpretation of the wording" (Disciplinary hearing of 23 March 2016) [2/66/630].

(5) "DF read a paragraph from DFS allegations and said that this was all blatant lies" (Disciplinary hearing of 23 March 2016) [2/66/631].

(6) "The firm started harassing me over my alleged inappropriate communications in April 2015 when I was suddenly publicly attacked and humiliated by the firm's lawyer ….His behaviour was unprofessional and contrary to company policies" (Email of 22 August 2016 Claimant to Human Resources) [2/67/632].

(7) "This looks like a cynical delay deliberately to allow Barclays to achieve their goals" (Email of 22 August 2016, Claimant to Human Resources) [2/67/632].

(8) "It is quite clear that it is an informal Barclays' policy to use their employee suspension powers to pin down and oppress staff in an attempt to delay public investigation of the issues and deny employees the opportunity to seek redress in an Employment Tribunal and thus deny them their legal rights" (Email of 22 August 2016, Claimant to Human Resources) [2/67/632].

(9) "The random insertion of completely baseless accusations like this is just another example of the active fabrication Barclays are engaged in here" (C's submission in disciplinary proceedings) [2/68/634].

(10) "needs to find a reason to fire me…active fabrication" (disciplinary appeal hearing, 3 November 2016) [2/69/636].

(11) "DF stated that Barclays would have to explain the many emails he brought to their attention. DF believed there was a deliberate misrepresentation of some of the emails" (disciplinary appeal hearing, 3 November 2016) [2/70/637/#3.15].

(12) "DF thought that because of the DFS settlement, he understood that Barclays had to find retrospective reasons to fire him but felt that there had been active fabrication of allegations and the Bank would have to defend these in court" (disciplinary appeal hearing, 3 November 2016) [2/70/638/#4.35].

(13) "[DF] further explained that the firm had a gun to its head to sign the absurd settlement with a rogue regulator and therefore it was compelled to fire him. He said that Barclays then fabricated reasons to fire him. DF thought the entire thing was a fabrication, misrepresentation of the truth, lies and abuse of power" (disciplinary appeal hearing, 3 November 2016)

(14) "DF thought Barclays needed a fall guy and he was that person" (disciplinary appeal hearing, 3 November 2016) [2/70/640/#8.1].

(15) C repeated his allegations against a Barclays' in-house lawyer on 15 November 2016 [2/71/641].

62 The Respondent also cross examined the Claimant about statements he had made in his ET1:

(1) "During that meeting I was harangued very aggressively by a Barclays lawyer despite being wholly co-operative" [1/6/61/#15].

(2) "Barclays notified me that they refused to provide me with clearly all the documents I needed" [1/6/62/#21].

(3) "Barclays failed to protect my interests and rights why they entered into this legal settlement" [1/6/63/#30].

(4) "By agreeing to dismiss me before even starting their own disciplinary process they ensured that all that followed was a foregone conclusion carried out in an attempt to convey the impression of fair treatment" [1/6/63/#31].

(5) "While Barclays have employed a large number of lawyers to pore over thousands of my emails and engaged in gross cherry-picking to fabricate their case" [1/6/63/#32].

(6) "Barclays have clumsily attempted to construct a bogus and ill defined concept of fairness in relation to clients" [1/6/63/#33].

(7) "Barclays have tried to fabricate a story about the adequacy of the controls in the business I worked in" [1/6/63/#35].

(8) "I have received totally different treatment from other staff in situations where there were real failures and abuse of clients as can be easily proven by comparison with those cases" [1/6/64/#36].

(9) "Barclays have deliberately strung out my suspension period as an act of control and defensive stalling" [1/6/64/#37].

(10) "The attempt to try and use one example of my diligence and a slow IT delivery chain as evidence of a 'contempt for clients' illustrates the extreme lengths to which Barclays are prepared to go to fabricate their case" [1/6/64-5/#41].

63 The Respondent also drew the Tribunal's attention to the Claimant's liability witness statement, in which the Claimant said:

(1) "Overall I felt that Allegation Three was a blatant, selective and unrepresentative hand picking of evidence to make a contrived case against me while completely ignoring the vast majority of times when correct information was given by my team"

(2) "After receiving judgment and various communications [John Mahon] had had after the disciplinary meetings it was evidence that he had a systematic bias in misquoting and misrepresenting the statements I and others made in the disciplinary meetings"

(3) "I genuinely felt (and still feel) that Barclays needed a fall guy and I was that person"

And to his first remedy witness statement, in which the Claimant :

(1) Referred to the Respondent's "delaying tactics", obstructive behaviour", " obstruction of fair disclosure" ;

(2) Said that he had suffered enormous reputational damage as a direct and avoidable consequence of the Respondent's actions and that the Respondent's decision to publicise his alleged misconduct in the Consent Order was unfair and violated his rights under New York law;

(3) Alleged that the Respondent had violated its own policies;

(4) Said that Barclays had abused their suspension powers and his employment rights to suit their own agenda, ".. at the cost of a career I had toiled over for most of my adult life;"

(5) Spoke about ".. the firm agreeing the Consent Order and fabricating the allegations to unfairly dismiss me."

And to his second remedy witness statement , in which the Claimant said:

(1) "After further examination of the FCA Handbook I discovered that this reply by the Respondent was grossly misleading;"

(2) "This is a misleading attempt to evade the truth of the matter;"

(3) "Hence the firm was certainly required to notify the FCA. These facts prove that their claim now that they were not required to report is an outright falsehood."

64 The Claimant was cross-examined about his attitude to the DFS Order. He agreed that firms must deal with regulators in an open and cooperative way. He said that, however, if a lawful Order of a regulator was unfair, or had followed an unfair process, or violated the rights of individuals, then firms should breach or renegotiate such Orders. When pressed on this, he said that firms should renegotiate the terms of unfair Orders.

65 The Claimant agreed that individuals must be open and cooperative with regulators.

66 The Claimant agreed that aspects of the DFS Order, including criticisms of the conduct of Last Look in it, referred directly to him. The Claimant said, however, that he had never been given an opportunity, as was his right under New York law, to make representations about the Order before it was entered into. The Claimant agreed that he was highly critical of the DFS in respect of its treatment of him, as a result.

67 The Claimant agreed that breaching the DFS Order could have serious consequences for the Respondent, including removal of its banking licence in New York.

68 It was put to the Claimant that he had described the DFS as a "rogue" regulator. The Claimant agreed that he had, and explained that he had used the term "rogue" in the modern sense of "outlier". The Claimant said that DFS had adopted a malign interpretation of words that he had used in his emails. When cross-examined about an assertion that the DFS had told blatant lies, the Claimant acknowledged that he had used those words, but said that, now, with a cooler head and not under pressure, he would word his statement differently.

69 The Claimant agreed in cross examination that mutual trust and confidence was essential between employers and employees. The Claimant agreed that he had accused the Bank of engaging in a sham disciplinary process, adopting deliberate delaying tactics, engaging in obstructive behaviour in the Tribunal proceedings. He said that he was critical of the Respondent in relation to its traducing of his rights under New York law, in the circumstances that he considered that Barclays had an obligation to defend his rights. He said he had been excluded from negotiations and that there was no-one, other than the Respondent, who could have protected his rights. The Claimant said he acknowledged, however, that firms were under enormous pressures from regulators and that they were therefore highly motivated to settle proceedings against them by powerful regulators. He said that, in relation to his dismissal, he believed that the DFS Order created such a strong current that no-one in the firm was going to swim against it.

70 The Claimant was cross-examined on his use of the words to the effect that

Barclays had abandoned any attempt at a fair disciplinary process. The Claimant said that, at that point, he had been suspended for 9 months and had received allegations against him which he knew to be baseless. He was under enormous personal and mental stress and may have been using particular language in those circumstances.

71 The Claimant was cross-examined about his description of the disciplinary process as a "sham". He said that "sham" was a lawyer's words and he, himself, may have used a different word to describe it now; but that the disciplinary process, in his view, was profoundly flawed and substantively unfair.

72 The Claimant said that he believed that Mr Mahon had engaged in active fabrication and had misinterpreted the facts. He did believe that Mr Mahon had invented the notion that the Claimant had contempt for clients. He said that allegation 6 against him was at the extreme end of absurd criticism of him. The Claimant agreed that he was very critical of Mr Mahon, but said that Mr Mahon had left the business.

73 It was put to the Claimant that he was asserting that the Respondent had used him as a "fall guy." The Claimant said that he believed that the DFS had needed a fall guy - and that that was the Claimant.

74 When cross examined about whether he had trust and confidence in the Respondent, the Claimant said that he was critical of the lawyers in the case. He did not agree that the lawyers took their instructions from all the employees of the firm. He said that he did believe that the Respondent had abused its suspension powers, in that suspension was unnecessarily lengthy and he had not been given the reason for it immediately, as required in the firm's procedures. The Claimant said, however, that when he pointed out things that were wrong and unjust, he was acting in accordance with the Respondent's principles.

75 It was put to the Claimant that he had been highly critical of the Human Resources team which had run his disciplinary process and had advised Mr Mahon. The Claimant responded that be believed all the important decisions in his disciplinary process would have been made by a lawyer of some seniority. He said that the HR team would not have been making such decisions.

76 It was put to the Claimant that he would have to deal with lawyers if he was reinstated or reengaged. The Claimant agreed that this could happen in the context of internal investigations, regulatory issues in relation to certain job roles and, potentially, in relation to contractual and business matters in certain job roles. It was put to him that he would be unable to deal cooperatively with the Respondent's lawyers. The Claimant denied this. He said that he never had had the slightest problem in dealing with lawyers when he was employed by the Respondent. Indeed, he said that he had been complimented on his cooperation with lawyers in defending the DFS case against the Respondent.

77 The Claimant said that any resentment he had was towards the lawyers conducting his particular employment case, but that they were not the majority of lawyers employed by the Respondent. He agreed that he would find it difficult to deal with the individual lawyer who he felt had harassed him. However, that lawyer lived in New York and the Claimant said the chances of the Claimant coming into contact with

him again were non-existent. He denied that he had deep anger towards the Respondent's lawyers generally.

78 It was put to the Claimant that he would not be able to deal cooperatively with Compliance. The Claimant denied this; he said that he had never had a problem in dealing with Compliance and believed that Compliance did a very difficult job under competing constraints and did it very well, in general.

79 It was put to the Claimant that he would have difficulty in dealing with regulators cooperatively. The Claimant denied this and said that lots of critical statements had been made by senior Respondent personnel of regulators, but no one had declared that those people were unemployable. He said he had cooperated fully with regulators when required to do so and would do so in future, although he would be watching his own back in the future.

80 It was put to the Claimant that so numerous were the targets of his criticism and so deep-seated his resentment, that the Claimant would not be able to work cooperatively at the Respondent. The Claimant denied this. He said his criticism was tightly limited to behaviours and to people in the litigation department. He had no problems with Compliance and Human Resources. He said that he had undergone tough treatment for 3 years and anyone who tried to take on disciplinary proceedings and a Tribunal claim would endure a lot. He said that management changed every few years, in any event. He said that he had good trust in his colleagues and noted that Mr Jain and Mr Hassett were happy to see him in the Tribunal. The Claimant said that he was not angry with the firm and was not irrational.

81 The Tribunal heard evidence from Sameer Jain, Technology Officer and Managing Director for Barclays Services Corporation, part of the Barclays Group. Mr Jain told the Tribunal that, previously, he had had responsibility for technology within Barclays Investment Bank and had come into contact with the Claimant during his work there. Mr Jain did not say that he considered that trust and confidence had broken down between the Respondent and the Claimant. Mr Jain is an extremely senior employee of Barclays, being the Chief Technology Officer for a Division which employs 25,000 people. Mr Jain's evidence regarding re-engagement of the Claimant, and which roles could be suitable for the Claimant, is set out in detail below, in these Reasons.

82 Michelle Kates, Global Head of Employee Compliance by Barclays Services Ltd, part of the Barclays Group, told the Tribunal that she believed there was no evidence that the Claimant had been untruthful to regulators. She believed that the Claimant had demonstrated willingness to assist regulatory bodies.

83 Mr James Hassett, Global Head of FX Trading and a Managing Director at the Bank, said that he understood that the Claimant had made a number of serious allegations to the effect that his dismissal by Barclays was a sham in order to appease the Bank's regulators. Mr Hassett said that he did not consider that it would be appropriate for the Claimant to rejoin the business in a senior position having made these allegations. He also said that, in light of the Tribunal's findings on contribution and the DFS Consent Order, he would find it difficult to have trust and confidence in the Claimant as a supervisor of other team members within the FX business and as a

senior member of his team with a duty to effectively manage risks in the FX business. He also considered that team members reporting to the Claimant might find it difficult to have trust and confidence in him as their manager and supervisor. Mr Hassett said that it was important to bear in mind that trading was a highly regulated industry in which it was essential that there was a close relationship of trust between an employer and its employees, especially those at senior level.

84 It appeared that Mr Hassett's comments on trust and confidence specifically related to the Claimant being re-enaged in a senior role and as a supervisor of employees in the FX business.

85 Elsewhere in his evidence, Mr Hassett agreed with the Claimant that challenging the things that an employee believed to be wrong was acting in line with Barclays values; and, by contrast, not being open to challenge was inconsistent with Barclay's values.

86 John Stecher, Head of Innovation and Chief Innovation Officer Managing Director at Barclays Services Corporation in New York gave evidence to the Tribunal. Mr Stecher said that he could envisage the Claimant being hired into a role where the Claimant had a head start over other candidates in terms of skills and where the Claimant's history did not preclude him from being appointed. He said that the Claimant's history would one of the inputs into the equation. Mr Stecher said that he did not believe that the Claimant was unappointable to a role in the Bank.

**Availability of Managing Director and Director Roles at the Bank**

87 In oral evidence, Mr Jain confirmed that, when he joined Barclays from UBS, he had been approached by the previous Head of Technology for UBS, now employed by Barclays. Mr Jain said he did not apply through a job advert. He said that his subsequent roles developed in an organic manner, including his role as Head of Exotics and Co-Head of FX; he did not reply to adverts for those posts either. His subsequent role as CIO of the investment bank was not advertised and Mr Jain was simply deemed to be the most appropriate candidate to take on the role. It was his experience that people looked for opportunities. His current role was a new one and he had assumed it following discussions about the future direction of his career.

88 Also in oral evidence to the Tribunal, James Hassett, Global Head of FX Trading, confirmed that when he was first hired by the Respondent in Singapore, he was approached by a Barclay's employee about an appointment to the potential role. He had not responded to an advert. Mr Hassett moved to a similar job in Sidney after about four years, following ongoing discussions with managers. He also later moved to London in collaboration with managers and not in response to any job adverts. Mr Hassett had been employed as Head of Europe Forwards and then Global Forwards; these roles had evolved over time. Gradually thereafter, Mr Hassett had assumed greater responsibility, until he was appointed to the Head of FX Trading, which, again, was not advertised.

89 Mr Tim Cartledge gave evidence to the Tribunal. He was previously the Claimant's line manager at the Respondent and was then employed as Managing Director and Head of eFICC. Mr Cartledge said that he had been involved in many

dozens of hiring processes at Barclays Bank, at all levels up to Managing Director, for both external and internal candidates. In his experience, most senior external hirers and all senior internal hirers were made without the vacancy being advertised. He said that he was unaware of anything called a hiring plan being a critical part of the process. He said that, despite roles generally not being advertised, there were regular and extensive internal role changes within Barclays, especially at the Managing Director level, as changing business requirements demanded changing staff. He said that Barclays' businesses evolved structures frequently and rapidly, to take advantage of changing market opportunities. Business Heads would have considerable latitude to make the hires they needed and senior roles, in particular, were offered and were not generally applied for.

90 Mr Cartledge said that he had had the opportunity to assess the abilities of the Claimant at close quarters over many years, having worked with him, both at Barclays and at Dresdner Bank. Mr Cartledge told the Tribunal that the Claimant is the most academically gifted individual he has ever encountered during his time within the banking industry or in academia.

91 Mr Cartledge also said that banking is increasingly more focused on electronic and Artificial Intelligence - based solutions and that the Claimant is at the forefront of expertise in those areas. Banks are developing the use of electronic trading and artificial intelligence, not only in foreign exchange but in credit, commodities, equities and futures and in more day-to-day banking activities such as credit cards and retail and corporate banking. All banks and firms have critical shortages of employees with skills in these areas. In Mr Cartledge's view, the Claimant's skills could easily be applied productively at the Respondent.

92 The Claimant told the Tribunal that, in his experience, the normal process for hiring at Managing Director level was to adapt roles to suit senior candidates. He pointed out that, when the remedy hearing had originally been listed for May 2018, the Respondent had submitted a witness statement from a Niall Finnegan, who said that few Managing Director vacancies were available, evidenced by the fact that few were advertised. As a result, the Claimant had applied for specific disclosure in relation to advertisements for some Managing Director roles into which he knew people had been recruited. The Claimant pointed out that that the Respondent's representatives had then conceded that Managing Director vacancies were often not advertised, but had said that hiring plans for such vacancies were necessary. The Claimant obtained data on advertising of Managing Director vacancies for the past three years in Barclays. The Claimant said that the data showed that 66% of UK Managing Director vacancies were not advertised internally and 96% were not advertised externally. The Claimant pointed to a press report, Bundle pages 821 to 822, which said that in 2018, the UK Bank had added at least 9 Managing Directors to its investment banking division in Europe, Middle East and Africa and that, last year, it had recruited 40 Managing Directors and Directors across its investment bank globally.

**Reinstatement Head of Automated Flow Trading in the Bank's electronic Fixed Income, Currencies and Commodities Trading Business (eFICC) – Certification of the Claimant as a Fit and Proper Person**

93 Ms Kates told the Tribunal that, if the Claimant were to be reinstated as Head of

Automated Flow Trading in eFICC, the role would require him to be certified by the Bank as fit and proper. She said that the matters to be taken into account in making an assessment pursuant to the FCA's guidance at FIT included any adverse impact a person's reputation could have on a firm, involvement in regulatory investigations and any contravention of a requirement or standard, or being criticised by a regulatory authority, as well as the person's competence and capability in carrying out a regulated role. She also said that criticism by a Court or Tribunal and being subject to a DFS Order would be relevant factors for the firm to take into consideration when assessing honesty, integrity and reputation.

94 Ms Kates said that the compliance remediation action plan which was put into place to address issues in Last Look was a very significant body of work (pgs. 1-7 remedy bundle).

95 Her view was the Bank would not be able to certify the Claimant as fit and proper and/or registered and that, therefore, he could not return to work in any certified role at the Bank, or to any role that was subject to similar requirements imposed by a regulator in another jurisdiction. She said that this would be her view regardless of whether the Claimant had been dismissed by the Bank. If the Bank had decided not to dismiss the Claimant on 15 September 2016, the Bank would have been required to assess the Claimant's fitness and propriety in order for it to continue employing him as Head of Automated Trading. Her view was that the Bank would not have been able to certify the Claimant as such, in the light of the DFS Order and the Employment Tribunal judgment.

96 Ms Kates was asked about Mr Jain's evidence and the fact that Mr Jain had said that he would only make a judgment in relation to a particular role and that his judgment would depend on the role. She was cross-examined about her blanket assertion that the Claimant could not be certified as a fit and proper person. She said her determination was on the basis that the relevant role would be a certified role and significant harm function role; her blanket statement was made on the basis of the DFS order, the Tribunal outcome and the internal Barclays disciplinary process. All of these would be significant challenges for a supervisor when considering whether to make an assessment of fitness and propriety. Ms Kates said that it was significant that one regulator had taken regulatory action and it did not matter that others had not. She said that she believed that the DFS had standards and practices to ensure that a fair process was undertaken. She expected that the DFS had gone about their investigations and decision-making appropriately. She did not have power, herself, to look behind the DFS decision.

97 Nevertheless, Ms Kates said that she had given her opinion of fitness and propriety, but it did not mean that the Claimant could not be assessed as fit and proper. When challenged in cross examination, she also repeatedly said that the decision would be for the hiring manager.

98 In oral evidence to the Tribunal, Ms Kates said that a memorandum of education which had been given to other employees in relation to their involvement in Last Look operations was not a disciplinary sanction and would not trigger a certification review. Those employees continued to be certified as fit and proper. When cross-examined about other employees of the Bank who had been subject to regulatory sanctions, she

said that each case was determined on its own facts and that she was not aware of the individual facts of those cases.

99 James Hassett, Global Head of FX Trading, told the Tribunal that the Bank takes its regulatory obligations extremely seriously.

100 He also said that the Head of Automated Flow Trading for eFICC would be a certified role, in common with most senior trading roles at the Bank. Accordingly, the post holder would have to be certified as "fit and proper" by the Bank, in accordance with the Certified Persons regime. As Head of FX Trading, Mr Hassett is involved in decisions on whether individuals in the FX business could be certified by the Bank. He would generally seek Compliance Department guidance in relation to his decision.

101 Mr Hassett said that, in view of the DFS Order and taking into account Ms Kates' view on the impact of the Order, he did not consider that it would be appropriate to certify the Claimant as "fit and proper" for the role, if it existed.

102 Mr Hassett was cross examined about the DFS Order. Mr Hassett said that there was a serious lengthy process leading to it, when numerous documents were reviewed, and he accepted the outcome. There was no reason in his mind to think that it was incorrect. It was not his responsibility to revisit the investigation. He trusted that regulatory and compliance teams within the Bank would challenge regulators where appropriate. This was consistent with working with regulators. Once an outcome was reached, it had to be accepted and the Bank needed to move on from it.

103 He explained the Respondent's assessment that that other employees in the FX business, who had been involved with Last Look at the same time as the Claimant, remained "fit and proper" people. He referred to the DFS Consent Order, where he considered that the issues were looked at in detail and noted that the Order determined that the appropriate level where responsibility lay was at the Claimant's level.

104 Mr Hassett said that he also believed that the DFS's findings in respect of the Claimant's conduct were likely to be well known amongst clients of the FX business. In light of the Claimant's emails mentioned in the DFS Order and its public findings, he did not consider that it would be acceptable to Barclay's clients for the Claimant to rejoin the FX business.

105 Mr Hassett said that there would be risks in employing the Claimant because, if something later came to light about the Claimant, Mr Hassett would be accountable for the decision to certify the Claimant as fit and proper. He said that, if the Employment Tribunal were to order the Respondent to re-employ the Claimant, that would be some mitigation of the risk. At its core, certification was a risk-based decision. He said that all the FX roles were client dealing roles and considered that the Claimant was therefore not suitable for any roles in the FX business.

106 Mr Hassett said that he understood that the Tribunal had found that the Claimant had failed to ensure that policies on the use of Last Look were followed in his business. He said, "It is my view that in a regulated industry it is essential that managers properly supervise staff in their business and there is limited benefit in having policies in place without ensuring they are followed."

107 In his witness statement, Mr Hassett said that the Employment Tribunal's finding on contributory fault was consistent with his view that it would not be appropriate to certify the Claimant as fit and proper. In cross examination, however, he told the Tribunal that, in isolation, paragraphs 319 and 321 of the Tribunal's judgment would not be sufficient to prevent the Claimant being certified as fit and proper. Mr Hassett said that they were serious matters.

108 Mr Hassett was asked about Mr Jain's comment on there being fewer concerns if the Claimant was not employed in a framework setting role. Mr Hassett said that a role which did not involve setting a framework or providing leadership would lie somewhere between a Director and Vice President level - the role might, or might not, be a Director- level role. He said that client dealing functions would not be appropriate for the Claimant. He said that Mr Jain was very experienced, but did not operate in client dealing functions, but worked within technology.

109 The Claimant was cross examined about Mr Hassett's evidence. He said that he accepted that Mr Hassett held the view that it would not be acceptable to clients for the Claimant to be employed in the eFICC role and that Mr Hassett held that view in good faith.

**Reinstatement Head of Automated Flow Trading (eFICC) – Existence of the Role**

110 Mr Hassett told the Tribunal that the Head of Automated Flow Trading for eFICC role, which the Claimant held at the time of his dismissal, no longer exists in the Respondent's market business structure. He explained that the Claimant's trading responsibilities covered, not only FX Trading and currencies, but also some other asset classes – Fixed Income and Commodities. Mr Hassett said that the Respondent's markets business has since been reorganised, to separate quantitative analysis from trading and, within trading, to segregate FX Trading from other asset classes. As a result, the Claimant's previous responsibilities are now divided amongst a number of different roles. The FX Trading aspects of his role have been subsumed into the role of Global Head of eFX and FX Spot Trading, held by Ed Falinski, who reports to Mr Hassett.

111 Mr Hassett said that he believed that the Bank could not reinstate the Claimant as Head of Automated Flow Trading, even if the role still existed, without breaching its obligations to the DFS.

112 In oral evidence, the Claimant said he had not cross-examined Mr Hassett on the reorganisation, but that the Claimant's role would be to slot in under Mr Falinksi. He agreed that such a role had not been identified as a vacant role, but said that that was not determinative of anything, given that that was not how Managing Director roles were appointed to.

**Reengagement - Individual Roles – Global Head of FX Platforms, Hiring Manager Mr Hassett**

113 Mr Hassett is the recruiting manager for the role of Global Head of FX platforms. Mr Hassett confirmed that the role would potentially be suitable for the Claimant.

Nevertheless, the DFS Order would prevent the Claimant from holding the role because the role would have a trading mandate and it would not be possible to hold an FX Trading role at Barclays without being involved in US Dollar operations. Further, even if the trading aspect of the role could be hived off, the overall purpose of the role of Global Head of FX platforms is to develop and implement technology for FX Trading within the Bank. FX trading platforms and technology operate globally and, even without a trading mandate, the role would still involve duties, responsibilities and activities relating to $ US operations.

114 Mr Hassett said, therefore, that the Claimant was prohibited by the DFS Order from holding or assuming such a role. He said he could not envisage any senior role in the FX business that did not relate in some way to US or US Dollar operations, given that the business was conducted on a global basis and the US was such an important centre for that business.

115 The Claimant told the Tribunal that he considered himself very well suited to the role of Global Head of FX platforms, but agreed that appointing him to the role of Head of FX platforms would breach the DFS Order. He also agreed that the Global Head of FX would need to be certified as a "fit and proper" person by the Respondent.

116 The Claimant agreed that some of the factors in FIT 2, page 239a, would apply to him. For example, that he had been subject of disciplinary proceedings, subject of regulatory action and criticism in the Employment Tribunal judgment, albeit he said that that was to the limited extent of the contributory fault judgment.

117 The Claimant agreed that Mr Hassett held the view that he could not certify the Claimant as a fit and proper person in good faith. The Claimant said that he agreed that Mr Hassett did not want to take the risk of employing the Claimant in the role of FX platforms and that Mr Hassett held that view in good faith.

**Reengagement - Individual Roles - Head of Developer Experience, Hiring Manager Mr Jain**

118 Mr Jain is the hiring manager for the post of Head of Developer Experience. Mr Jain told the Tribunal that a current Managing Director, already working in the technology business area of Barclays Bank in the UK, had asked to be considered for the Head of Developer Experience role. In the week of the Remedy hearing, Mr Jain had come to London and had met with the individual. Mr Jain told the Tribunal that he intended to give that Managing Director the role and to negotiate a transition period for that individual with his current manager.

119 Mr Jain told the Tribunal that the Head of Developer Experience was a newly established senior global role within the technology business area, with the corporate grade of Managing Director. It involved managing a team of about 100 technologists and its aim was to drive efficiency and standardisation in the way that Barclay's technologists work and create software. The role would be responsible for ensuring key controls of the Software Development Life Cycle (FSDLC) and technology and cyber standards were upheld and would maintain and enhance the technology platforms used by all business at Barclays. He said that the scope of the role was such that changes to software development practices within the Bank would need to be in an

environment that was well controlled and managed to Barclay's standards.

120 Mr Jain told the Tribunal that the role of Head of Developer Experience might also be designated as a material risk taker role, which meant that the individual would have to be certified by Barclays as a fit and proper person to carry out the role. Mr Jain said that he would take guidance from the Bank's Compliance Department in making a decision on whether a candidate could be certified as fit and proper. He said that Michelle Kates' witness statement (as representative of the guidance he would receive from the Bank's Compliance team), the DFS Order and the Tribunal judgment at paragraphs 316 to 323, "would be significant factors to be taken into careful consideration" in determining whether the Claimant was fit and proper to perform the role.

121 In Mr Jain's opinion, the Head of Developer Experience role is not comparable to the Claimant's previous role, but is fundamentally different. The role in bank-wide, managing 100 direct reports and incorporating the requirements of all 25,000 technology staff.

122 Mr Jain said that he believed that the Claimant did not have the right skill set for the role and that the Claimant's practical experience in software development was too narrowly focused. The Claimant's area of specialisation had been in electronic trading platforms within the FX business. Mr Jain was looking for candidates with significant recent technical experience in developing software in a modern way and, in particular, individuals who had worked in Silicon Valley. He would not invite the Claimant for interview for the role.

123 However, Mr Jain said that, more generally, he had worked in technology and banks for his whole career and knew that there were often movements from trading and quantitative analyst roles into technology functions. Mr Jain said that he knew the Claimant and had a good understanding of his previous role and skill set and could see the Claimant doing other roles in Barclays, particularly where there was interplay between quantitative analyst technology and trading. Given the Claimant's experience and skill set, which were high, the Claimant should be able to find a role available if there were an opening.

124 Mr Jain said he had not reached a conclusion that the Claimant would not be suitable in any role at the Bank. However, Mr Jain did not have many openings. He did not have a suitable enough role for the Claimant, at present.

125 In considering whether the DFS Order, the Tribunal's judgment and findings of misconduct against the Claimant would be a bar to the Claimant assuming any role in the technology division, Mr Jain said that he would have to consider the points and dig into them. Mr Jain said that whether the Claimant would be setting key risk indicators would be important in his decision. Key risk indicators are matrices which managers look at to determine whether the right things are being done at the Bank. People who set key risk indicators have responsibility for identifying the correct risk indicators and thresholds of materiality, to determine whether functions are operating correctly. Being such a "control owner" is a very serious responsibility. Mr Jain said that, if the Claimant were to be considered for a job in the Respondent's Technology Division, the level of Mr Jain's concern would depend on the particular role for which the Claimant was

being considered. Some roles operate within a risk framework - and some set the risk framework. There would be a different conversation to be had, depending on whether the Claimant would be operating within a framework, or whether the Claimant would be setting the risk framework. He would have fewer concerns if the Claimant was simply working within a framework, rather than monitoring matrices; it would depend on the overall risk management responsibility that the role would have.

126 I concluded that Mr Jain could envisage the Claimant being employed by the Respondent in a technology role and that he believed that the Claimant's expertise and experience would be valuable to the Respondent in the right role. He did not consider the DFS Order, the Respondent's findings of misconduct, or the Employment Tribunal decision, together, were a bar on the Claimant being employed. Mr Jain would have fewer concerns if the Claimant was operating within a risk framework which had been set by others. Mr Jain did not say that he considered that trust and confidence had broken down between the Respondent and the Claimant. Mr Jain is an extremely senior employee of Barclays, being the Chief Technology Officer for a Division which employs 25,000 people.

127 The Claimant said that he did wish to be considered for the role of Developer Experience, if appointing another candidate did not render this impracticable. He accepted that Mr Jain had offered the role to another person. The Claimant said that, while Mr Jain had said he did not believe that the Claimant had the relevant skills, the Claimant thought that Mr Jain had not understood his pitch for the position, or the breadth of the Claimant's technology experience. The Claimant accepted that Mr Jain said that he would not invite the Claimant for interview in good faith, on the information that he had.

**Reengagement - Individual Roles – Data Commercialisation Manager, Hiring Manager Mr Lewis**

128 Grant Lewis is Director of Payment Processing and is the recruiting manager for a new vacant role of Date Commercialisation Director. Mr Lewis told the Tribunal that the recruitment process for the post was fairly advanced and that 3 candidates, out of an initial pool of 12, were at the final assessment stage. All 3 candidates had been seen and Mr Lewis was waiting for the last tranche of feedback. He said that, if that last tranche of feedback confirmed the proposed recommendation, then he would finalise an "HR values interview", after which a recommendation would be made; he hoped that the approval process would be completed in weeks.

129 It was clear that, as of Thursday 19 July 2018, a final recommendation had not yet been made, an HR values interview had not yet been held and the approval process would still take weeks to conclude (albeit not months).

130 Mr Lewis said that the successful candidate for the Director Data Commercialisation role would be a junior Director within the Barclaycard card and payments business area, reporting directly to him. The person hired would be responsible for recruiting one team member, who would be their sole report. The total compensation to be offered to the successful candidate would be £130,000 - £170,000. Mr Lewis said that there was clearly a significant difference between the compensation the Claimant had last received from the Bank and the compensation he would receive

for that role. Mr Lewis was concerned that the Claimant working as a junior Director would not work well in practice, as it would be a significant step down.

131 Mr Lewis said the role involved understanding and assessing the Bank's data to develop and implement strategy and create propositions to drive value from the data for the Bank's merchants and the Bank. This required significant data analytics experience with an ability to take a strategic view of payment eco systems and create new commercial propositions. Mr Lewis said that, while the Claimant might have experience in some elements of the skill set required for the role, it was unclear to him whether the role sat squarely within the Claimant's fields of expertise. He said that, for that reason, as well as concerns as to the difference between seniority and compensation of this position against his last position, Mr Lewis would not invite the Claimant to interview.

132 Mr Lewis said that, although the US elements of the role would initially be limited, his intention was to expand the scope of the role in the future to include analysis of data deriving from card transactions in the US. He said that, in his view, the role would then involve US operations. Mr Lewis also said that the data commercialisation role involved processing a significant amount of personal data, so that it was key for the person holding the role to protect the Bank against the risks under applicable data protection legislation. He said that he understood from the Tribunal's judgment that the Claimant had been found to have been to a limited extent culpable and blameworthy for failing to protect the Bank against serious risks. Mr Lewis said: "I would therefore have some concerns about Mr Fotheringhame sufficiently protecting the Bank against those risks which would be a requirement of this role."

133 In cross-examination Mr Lewis said that the Claimant's skills in relation to Artificial Intelligence and machine learning were highly relevant to the Bank's requirements and were in demand and that the Claimant could, in Mr Lewis' opinion, work in the Bank's data analytics teams and in data science roles. Mr Lewis said that the Claimant clearly had data and IT experience which would be of interest to the role, but that he was not clear whether those would translate to data commercialisation.

134 The Claimant was cross-examined about whether he still sought to be re-engaged into various roles. He said, initially, with regard to the Director of Data Commercialisation, that he was not sure. When it was put, in cross examination, that Mr Lewis had said that recruitment to the role was at an advanced stage and an offer would soon be made to another candidate, the Claimant said he did not seek to be re-engaged to the role. The Employment Judge indicated that it was not necessarily the case, under statute or case law, that selecting another candidate for a vacant role rendered it not practicable to re-engage another employee into the role. The Claimant the said that, if appointing a permanent replacement rendered it not practicable to re-engage him into the role, then he accepted he could not be reengaged into it; but, if appointing another candidate did not mean it was impracticable to reengage him into the role, then he would like to be considered for the role.

135 The Claimant said that there were some similarities and some differences between the Claimant's previous role as Head of Automated Flow Trading in eFICC and the Director Data Commercialisation role. He agreed that the corporate grade and

compensation were different, but said that there were similarities in relation to the technology and data analysis skills required. The Claimant agreed that re-engaging him to Data Commercialisation role would involve a significant step down, in terms of grade and responsibility for people.

136 The Claimant did not accept that the Data Commercialisation role would involve $ US functions and said that Mr Lewis had simply said that, at some point in the future, it could. In any event, the Claimant said that he did not accept that analysing card data related to $US operations. He said that the Respondent was trying to expand the prohibition in the DFS Order to cover all jobs in the Bank.

**Reengagement - Individual Roles – Head of Macro Electronic Trading and Markets Analytics Technology, Hiring Manager Mr Anderson**

137 Mr Eric Anderson is employed as Pre-Trade Technology Lead, with the corporate grade of Managing Director, and is the hiring manager for the post of Head of Macro Electronic Trading and Markets Analytics Technology, a senior global role within the Chief Operating Office and functions business, with the corporate grade of Managing Director. He told the Tribunal that the role involved managing a team of around 200 developers and was responsible for designing, architecting, enhancing and developing the credit FX and algorithmic trading systems in the business. He said he expected the total annual compensation for the role to be around £700,000.

138 Mr Anderson told the Tribunal that he had been recruiting to the role because the previous post holder had been absent, on long-term sick leave. However, the post-holder had recently come to the office and was going to discuss returning to the role in September 2018. A phone call in this regard with Human Resources was scheduled to take place in the week beginning 23 July 2018. Alternatively, Mr Anderson said that he had a preferred individual candidate, who had passed through the key stages of the recruitment process to date.

139 Mr Anderson gave evidence that the Head of Macro Electro Trading and Markets Analytics Technology position would be an extremely technical, technology-focused role. It was not a trading role. Mr Anderson's technology team is responsible for designing and maintaining trading systems. Mr Anderson said that, from his understanding, the Claimant had some skills which were relevant to the role, in particular the MSc he had completed in machine learning and his experience in computer programming, but that his practical experience was insufficient to make him a suitable candidate for the vacancy.

140 Mr Anderson said that the role would comprise duties, responsibilities and activities involving FX benchmarks, since it involved trading platforms. The relevant person would also have significant involvement with Barclays' US and US Dollars operations. Almost all trading platforms for which the role would be responsible would involve US Dollar trading and/or trading on the US markets. Reengaging the Claimant to that role, therefore, would be in breach of the DFS consent order.

141 The Claimant told the Tribunal that, while the Head of Macro Electronic Trading and Markets Analytics Technology role was a technology focused role, his previous role had been very technology focused. While his previous role had been

characterised as a trading role, the Claimant had never made a single trade in it.

142 The Claimant acknowledged that reengagement into the Head of Macro Electronic Trading and Markets Analytics Technology role would breach the DFS Order. He said that the DFS Order would need to be renegotiated in those circumstances.

**Reengagement - Individual Roles – BI Innovation Coverage Officer, Hiring Manager Mr Stecher**

143 John Stecher is employed by the Respondent as Group Head of Innovation and Chief Innovation Officer and is the hiring manager in relation to the BI Innovation Coverage Officer, which has a corporate grade of Director.

144 Mr Stecher told the Tribunal that another candidate has now been offered the role, has resigned from his current position in another investment bank and is due to start at Barclays on 10 September 2018. Mr Stecher said that the BI Innovation Coverage Officer role involves working with the Bank's market division and external technology providers, to explore and define the future software tools that the Bank should develop for use internally and by clients of the markets business. The holder of the position would then work with the Bank's engineering team to develop the relevant software. The person hired into the role would report to Head of Markets Innovation and would have two direct reports at Vice President Corporate grade. The role would attract annual compensation of between $500,000 and $600,000.

145 Mr Stecher said that the Claimant would be well qualified for the role, given his experience in the markets business and technology operations. On the basis of the Claimant's technical experience alone, he would invite the Claimant for interview.

146 In oral evidence, Mr Stecher said that he felt that the Claimant was a good technical fit for the role and that Mr Stecher had no issues with employees stepping down in pay, or taking a step back in their career. He said, however, that the role would involve dealing with individuals in the Bank's market business. The two main criteria he would apply in appointing to the role were, first, technical skills and, second, interpersonal trust with clients. He said that, when he considered the Claimant's history, he felt that there was a gap with regard to the second. The preferred candidate who had been offered the role had no such history and had a great relationship with clients.

147 Mr Stecher told the Tribunal that, on aspects of client trust, the Claimant would rank below other candidates. Mr Stecher said that he could envisage the Claimant being hired into a different role where the Claimant had a head start over other candidates in terms of skills and where the Claimant's history did not preclude him from being appointed. He said that the Claimant's history would one of the inputs into the equation. Mr Stecher said that he did not believe that the Claimant was unappointable to a role in the Bank. Mr Stecher had simply ranked the candidates for this particular role.

148 Mr Stecher said that, given that the DFS Order prohibited the Claimant from holding any roles involving FX benchmarks or any matter relating to US or US Dollar

operations, this would prevent the Claimant from being appointed to the post of BI Innovation Coverage Officer. That post would be based in New York and would be responsible for developing products for, and working with clients of, the global investment banking business. The holder of the role would therefore be materially involved in the Bank's US operations, given that the US was such an important centre for the Bank's investment banking business. Mr Stecher said that it would be impossible to redesign the role in such a way that it did not involve US and US Dollar operations.

149 The Claimant said that the role was well within his domain of expertise. He said that other employees, including Mr Bill White, had been responsible for lots of the Barclays business which had been criticised by regulators, and had remained in post. The Claimant was thus confident that he would be able to undertake the client liaison and ambassadorial responsibilities involved in the BI Innovation Coverage Officer role.

150 The Claimant accepted that appointment to the BI Innovation Coverage Officer role would involve a breach of the DFS Order. He said that the Order would have to be renegotiated.

***Relevant law***

***Ss 112 – 115 Employment Rights Act 1996***

121 If the complainant expresses such a wish, the Tribunal may make an order for reinstatement or re-engagement: *s112(3), 113 ERA 1996*. An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed: *s114(1), ERA 1996.* An order for re-engagement is an order, on such terms as the Tribunal may decide, that the complainant be engaged by the employer, or by a successor of the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment: *s115(1), ERA.*

122 On making an order for re-engagement, the Tribunal shall specify the terms on which re-engagement is to take place, including (a) the identity of the employer, (b) the nature of the employment, (c) the remuneration of the employment, (d) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have but for the dismissal, (e) any rights and privileges which must be restored to the employee, and (f) the date by which the order must be complied with: *s115(2), ERA*.

***s 116 Employment Rights Act 1996***

123 In exercising its discretion under *s 113 ERA 1996*, the Tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account (a) whether the complainant wishes to be reinstated, (b) whether it is practicable for the employer to comply with an order for reinstatement, and (c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement: *s116(1), ERA.*

124 If the Tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms: *s116(2)ERA*.

125 In so doing, the Tribunal shall take into account (a) any wish expressed by the complainant as to the nature of the order to be made, (b) whether it is practicable for the employer (or a successor or any associated employer) to comply with an order for re-engagement, and (c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just and equitable to order his re-engagement and (if so) on what terms:s116(3),ERA.

126 Where in any case an employer has engaged a permanent replacement for a dismissed employee, the Tribunal shall not take that fact into account in determining, for the purposes of subsection *(1)(b)* or *(3)(b),* whether it is practicable to comply with an order for reinstatement or re-engagement: *s116(5), ERA*.

**Interpretation - Caselaw**

127 The legislation is not designed to enable complainants to re-establish or vindicate their reputation or anything of that kind. It is concerned with whether they were fairly or unfairly dismissed and once a conclusion is reached that they were unfairly dismissed, the question is how reasonably and most sensibly to compensate the unfairly dismissed employee, Nothman **v London Borough of Barnet** [1980] IRLR 65 [A/4], per Ormrod LJ at [5].

128 Reinstatement requires the employer to treat the complainant in all respects as if he had not been dismissed: *s114(1)ERA*. It places the Claimant into the same job with the same contractual rights on the same terms and conditions of employment from which he was dismissed. The Tribunal has no power to order reinstatement in terms which alter the contractual terms of the Claimant's employment: **McBride v Scottish Police Authority** [2016] ICR 788, per Lord Hodge at [34]-[35].

129 An order for re-engagement, by contrast, may involve a change in the identity of the employer, the nature of the employment or the terms as to remuneration, per Simler J in **British Airways plc v Valencia** [2014] IRLR 683 at paragraphs 25 and 26.

130 An order for re-engagement can be made that the employee be reengaged by the employer into employment comparable to that from which the Claimant was dismissed or other suitable employment.

131 The definition of suitability has been considered in relation to suitable alternative employment in the context of redundancy. The question is whether the employment is suitable in relation to the Claimant, which requires asking whether it suits his skills aptitudes and experience. The whole of the job must be considered, not only the tasks to be performed, but also the terms of employment, especially wages and hours, and the responsibility and status involved: **Bird v Stoke-On-Trent Primary Care Trust**, UKEAT/0074/11, per Keith J at [18].

132 The Tribunal must identify specifically and with precision the role into which an employer is ordered to re-engage the complainant: **Lincolnshire County Council v Lupton** [2016] IRLR, per Simler J at [22].

133 The Tribunal must take account of the three factors identified in s *116(1)* and *(3),* namely the Claimant's wish, practicability and justice (where there is contributory fault).

134 The practicability of reinstatement or re-engagement is to be determined as at the date it takes effect. In practice, absent any very unusual circumstances, that will mean judging the position as at the remedy hearing date: **Rembiszewiski v Atkins Ltd** UKEAT/0402/11, per Slade J at [39].

135 Practicable in this context means more than merely possible but 'capable of being carried into effect with success'. It is the duty of the Tribunal to consider the employment realities of the situation: **Coleman v Magnet Joinery Ltd** [1975] ICR 46, per Stephenson LJ at 52B-H.

136 Re-engagement is not to be used as a means of imposing a duty to search for and find a generally suitable place within the ranks for a dismissed employee irrespective of actual vacancies: **Cold Drawn Tubers Ltd v Middleton** [1992] IRLR 160, per Tucker J at [15], [23]; **Lincolnshire CC v Lupton** [2016] IRLR 567, per Simler J at [18].

137 Re-engagement may be impracticable where the employer genuinely believes the employee was guilty of misconduct, even though a Tribunal found they did not have reasonable grounds on which to base that belief and had not carried out a reasonable investigation: **ILEA v Gravett [1988]** IRLR 497 at [21]; **Wood Group Heavy Industrial Turbines Ltd v Crossan** [1998] IRLR 680 at [10]. This is particularly the case where there are very real risks should the employee depart from the highest standards of care: **ILEA v Gravett** at [22].

138 The remedy of re-engagement has very limited scope and will only be practicable in the rarest cases where there is a breakdown in confidence as between the employer and the employee. Even if the way the matter is handled results in a finding of unfair dismissal, the remedy, in that context, invariably will be compensation: **Crossan** at [10]. In that case, Mr Crossan had been dismissed following allegations that he had used and dealt drugs at work. The Tribunal had decided that his dismissal was unfair because the employer had not carried out a sufficient investigation into the allegations against him.

139 The question is: was it practicable to order *this* employer to re-engage *this* Claimant; it is the employer's view of trust and confidence, appropriately tested by the Employment Tribunal as to whether it was genuine and founded on a rational basis, which matters, not the Tribunal's: **United Lincolnshire Hospital NHS Foundation Trust v Farren** [2017] ICR 513, per Judge Eady QC at [40], [42].

140 An employee's lack of confidence in, or distrust of, his employer can be a relevant factor when deciding whether re-engagement is practicable or whether

discretion should be exercised to make such an order: **PLA v Payne** at 570F-G; **Rembiszewski**, per Slade J at [46].

141 An employee who feels that they are the victim of a conspiracy, and particularly by their employers, is not likely to be a satisfactory employee in any circumstances if reinstated or re-engaged: **Nothman v London Borough of Barnet (No2)** [1980] IRLR 65, per Ormrod LJ at [4]-[5].

142 In **King v Royal Bank of Canada Europe Ltd** [2012] IRLR 280 EAT, the EAT (Richardson J presiding) said at paragraph 56:

"In this case it is hardly surprising that the Claimant was aggrieved about the circumstances of her dismissal, and suspicious about the motives for it; the respondent's failure to adopt any fair procedure … was liable to give rise to a sense of injustice and suspicion. It does not follow that it is not practicable to re-engage her. Nor do views expressed by an inexperienced litigant in person in the heat of litigation necessarily lead to this conclusion."

143 In **Oasis Community Learning v Wolff** UKEAT/0364/12, the Claimant had made allegations of misconduct against the Respondent as an institution and members of its human resources department. He accused a colleague of having made "fabricated" evidence which raised the possibility of "collusion" between that colleague and another potential witness. He described the chair of the Respondent's Board as: "having abrogated his responsibilities in order to allow the Respondent's HR department to suppress evidence" and alleged that the Respondent had falsified documents in his witness statement. In correspondence the Claimant had described the Respondent's conduct as constituting: "criminal contempt for justice and also the criminal offence of fraud".

144 The EAT, per Underhill J, observed at [18], [23], [36]:

".. we cannot regard the allegations .. as egregious. No doubt the Claimant used some hyperbolic language, and we are very willing to assume that his allegations of forgery and fraud are ill-founded; but they appear to be over-reactions rather than wanton inventions. Anyone with experience of employment litigation knows how difficult it can be for an unrepresented party to maintain a sense of proportion, and it is very common for genuine differences of opinion or recollection to be as dishonest or innocent errors in documents to be treated as evidence of forgery. …Of course we appreciate that the importance of the Claimant's allegations is principally because of the effect which it is said they had on the people who were subject to them..[18].."

"…. The fact that an employee has made serious allegations against colleagues or managers in one workplace will not have as much impact on the relationship which he will have with colleagues and managers at a different workplace..[23].."

"…"Mr Jeans argued that the relevant relationship was not with a particular school but with Oasis [the employer] as an institution. While we accept that the Claimant did have a relationship with Oasis, it is inherently unlikely that any difficulties outside the sphere

of those with whom he would have a regular working relationship would be such as to render his re-engagement "impracticable." [36].

**Terms of an Order of Reinstatement or Re-engagement**

145 The terms of and order for reinstatement or re-engagement require that the employee receives back pay between the date of termination and the date of reinstatement or re-engagement, *ss114(2)(a) & 115(2)(d) ERA 1996.*

146 In determining back pay a Tribunal ought not to specify a lump sum, but instead 'should specify amounts payable by reference to rates of pay or other formulae so that appropriate calculations can be made when the date of any reinstatement is known'— per Lord Donaldson MR in **O'Laoire v Jackel International Ltd** [1990] IRLR 70, [1990] ICR 197, CA.

147 A Tribunal must reduce the employer's liability by giving credit for sums received by the employee in respect of the period between the date of termination of employment and the date of reinstatement or re-engagement by way of (a) wages in lieu of notice or ex gratia payments made by the employer; (b) remuneration in respect of employment by another employer; and (c) such other benefits as the Tribunal considers appropriate.

148 In **Electronic Data Processing Ltd v Wright** [1986] IRLR 8 at 8, EAT the EAT held that , in making an order for re-engagement, the Industrial Tribunal had not erred in holding that the amount payable by the employer, in accordance *with s.69(4)(d) of the Employment Protection (Consolidation) Act*, "in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal" for the period between the date of termination of employment and the date of re-engagement meant the benefit which would have accrued to the complainant if she had not been unfairly dismissed. The Industrial Tribunal had correctly calculated the amount payable by the employer, therefore, on the basis of the employee's earnings at the date when she was dismissed, rather than on what she would have earned if she had been re-engaged as the Tribunal ordered.

***Discussion and Decision***

149 In his evidence to the Tribunal and in his submissions, the Claimant was clear that he sought, either, reinstatement, or re-engagement, as the remedy for unfair dismissal in this case. He was clear that he would accept a Managing Director or Director role. The Employment Tribunal is required to consider reinstatement first, then re-engagement and then compensation.

150 The Claimant contended that compensation in this case would be a completely inadequate remedy for unfair dismissal. His financial loss has vastly outstripped the maximum award possible in ordinary unfair dismissal cases. The Respondent does not oppose the Tribunal ordering it to pay a maximum compensatory award of £78,962. It does not oppose an order for a basic award of £3,065.60 that is £3,832 less a

20% reduction for contributory fault.

**The Nature of a Reinstatement Order**

151 The Claimant contended that he should be reinstated, either into his pre-dismissal role Head of Automated Flow Trading eFICC, or into the role into which he would have been reorganised on the reorganisation of the Respondent's FX business, or into his previous role as Head of e-FX Trading.

152 However, I was satisfied that the law requires that reinstatement must be into the same job, with the same contractual terms and conditions of employment, from which an employee was dismissed, so that the Tribunal has no power to order reinstatement on terms which alter the contractual terms of the Claimant's employment.

153 There is a difference, as described by Simler J in **British Airways plc v Valencia** [2014] IRLR 683 at paragraphs 25 and 26, between an order for reinstatement which places the complainant into the same job on the same terms, and an order for re-engagement, which may involve a change in the identity of the employer, the nature of the employment, or the terms as to remuneration.

154 A reinstatement order does not require recreation of the precise factual conditions at the point of dismissal, but nevertheless there is a basic dichotomy between an order for reinstatement and an order for re-engagement.

155 While the Claimant argued that his contractual terms were very general in their requirement for the Claimant to do work, I considered that it had become a term of the Claimant's employment that the Claimant was employed as Head of Automated Flow Trading eFICC. This was his job title at the time of his dismissal and he was required to carry out the duties and responsibilities assigned to that job role.

156 I accepted the Respondent's evidence that that role no longer exists. I accepted Mr Hassett's evidence that its responsibilities have been divided up between existing employees. The FX Trading aspects of the role have been subsumed into the role of Global Head of eFX and FX Spot Trading, held by Ed Falinski, who reports to Mr Hassett. The Claimant did not challenge Mr Hassett's evidence on this.

157 As the role does not exist, I concluded that it would not be practicable to order the Respondent to reinstate the Claimant into that role.

158 Further, I could not "reinstate" the Claimant into the role into which he would have been reorganised, as this would not constitute placing the complainant into the same job on the same terms as he was employed in at the point of dismissal.

159 While the Claimant sought reinstatement to the role of Head of e-FX Trading, a role he held in 2010 to 2013, again, such an order would not be a reinstatement order because it would place the complainant into a different job to the one in which he was employed in at the point of dismissal.

**Reinstatement and Re-engagement: Practicability**

160 When considering whether to make an order for re-engagement, the Tribunal must consider whether the complainant wishes to be re-engaged, whether it is practicable for the employer to comply with an order for re-engagement and, where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and if so, on what terms.

161 The Respondent made a number of submissions with regard to practicability. Some applied generally to the Claimant's re-engagement/reinstatement and some applied to particular roles.

162 By *s115 ERA 1996* an order for re-engagement is an order on such terms as the Tribunal may decide that the complainant be engaged by the employer in employment comparable to that from which he was dismissed or other suitable employment. The Respondent also made a number of arguments about the comparability and suitability of the 6 roles which remained vacant at the date of the Employment Tribunal hearing and which the Claimant had indicated he considered to be suitable and/or comparable employment for him.

163 I made some general findings with regard to practicability which I have set out first. Then I dealt with each of the individual roles to which the Claimant sought to be re-engaged, applying those general findings and further specific findings in relation to those roles.

**The Nature of a Re-engagement Order**

164 The Claimant contended that the Tribunal should order that the Claimant be re-engaged on the same flexible terms on which he was originally engaged in 2010.

165 He also contended that many Managing Director level jobs do exist in Barclays, even if they are not advertised. He argued that he had numerous skills which would be invaluable to Barclays and that the Tribunal should order the Respondent to re-engage him in a Managing Director role, but that it was not necessary to specify the role with precision.

166 The Claimant relied on Mr Cartledge's evidence that the Claimant's skill set was so extraordinary that Barclays could employ the Claimant successfully in some capacity.

167 The Claimant contended that that approach was supported by the case law in **Rank Xerox (UK) Ltd v Strychzek** [1995] 568, in which the EAT said:

> "It is in general undesirable for the Tribunal to recommend re-engagement in respect of a specific job, as distinct from identifying the nature of the proposed employment," per HHJ Butter QC at [16].

168 However, in **Lincolnshire County Council v Lupton** [2016] IRLR 576, the EAT, per Mrs Justice Simler P said that, although Tribunals have a wide discretion as to the terms of an order for re-engagement, those terms must be specified with a

degree of detail and precision. To simply require that re-employment must be to a comparable role is not adequate to identify specifically and with precision into what role an employer is ordered to re-engage the employee.

169 In **Lupton** at paragraph 18, Mrs Justice Simler, also said: "An employer does not necessarily have a duty to create space for a dismissed employee to be re-engaged. The question at the end of the day is one of fact and degree by reference to what is capable of being carried into effect with success…".

170 I agreed with the Respondent's submissions that the comment on which the Claimant relied in **Strychzek** at [16] was *obiter* and expressed in general terms. Insofar as it is inconsistent with **Lupton,** the decision in **Lupton** was part of the ratio of the case. For those reasons, I would follow **Lupton** rather than **Strychzek.** Furthermore, I noted that **Lupton** is a more recent decision of the EAT.

171 I agreed with the Respondent that the effect of **Lupton** was that the Employment Tribunal could not make a generic, unspecific order, or an indicative order. I therefore considered that if, I were to make a re-engagement order, it needed to be into one of the roles which had been identified as existing in the Respondent's structure at the time of the Tribunal hearing.

172 While I accepted the Claimant's contention that most Managing Director jobs develop organically and are not advertised, I considered that I was constrained by caselaw to only order re-engagement to a specific role which had been identified with precision.

**Practicability of Reinstatement or Re-engagement – General Findings**

**Respondent's Trust and Confidence**

173 The Respondent contended that it would not be practicable for it to comply with an order for reinstatement or re-engagement because, both, the Respondent had lost trust and confidence in the Claimant, and the Claimant had lost trust and confidence in the Respondent and/or had a hostile and highly critical attitude to both the Respondent and the DFS.

174 With regard to the Respondent's trust and confidence in the Claimant, I concluded that, on the evidence before me, it was plain that at least two very high-ranking Managing Directors in the Respondent business had not lost trust and confidence in the Claimant. Both Mr Jain and Mr Stecher were clear that they considered the Claimant could potentially be employed by the Respondent in a role for which he had the requisite skills. They considered that the Claimant's past regulatory history and disciplinary history would need to be taken into account in making a final decision as to whether the Claimant was appropriate for a particular role. Certainly, neither had reached the conclusion that the Claimant's history or his attitude to the Respondent was a bar to him being employed.

175 The Respondent relied on the words of Mr Mahon and Mr Mbanefo, the disciplinary and appeal officers, in contending that the Respondent had lost trust and

confidence in the Claimant. Mr Mahon said in his dismissal letter:

> "In summary therefore your actions are extremely serious and go directly to the relationship of trust and confidence between you and Barclays."

Mr Mbanefo similarly said:
"In conclusion therefore I confirm that I agree with the disciplinary hearing manager's decision that you were guilty of serious misconduct which went directly to the heart of the relationship of trust and confidence between you and Barclays."

176 The Tribunal found that Mr Mahon and Mr Mbanefo believed that the Claimant was guilty of the misconduct described in their outcome letters. Nevertheless, the Tribunal also found that the Respondent acted unfairly in dismissing the Claimant and that, if it had acted fairly, it would not have dismissed him. While Mr Mahon and Mr Mbanefo believed what they wrote at the time, the Tribunal's findings were that Mr Mahon's and Mr Mbanefo's determinations were so unreasonable as to go beyond the conclusions of a reasonable employer. Insofar as the Respondent relied on Mbanefo and Mr Mahon's earlier findings that there had been a breakdown or trust and confidence between the Claimant and the Respondent, the findings were based on an unreasonable investigation and unreasonable evidence and I did not consider that those unreasonable beliefs made it impracticable for the Respondent to re-employ the Claimant.

177 Furthermore, both Mr Mahon and Mr Mbanefo made concessions at the Tribunal liability hearing about evidence which, if they had seen or understood it at the time, would have affected their decisions. Mr Mahon: ET Judgment paragraphs [186], [189] – [191]; Mr Mbanefo: ET Judgment paragraphs [169]; [171]; [176]. I have heard no evidence from Mr Mbanefo or Mr Mahon as to their current beliefs, following the Tribunal's liability Judgment, regarding breakdown of trust and confidence between the Respondent and the Claimant.

178 I noted the Mr Hassett's evidence about lack of trust and confidence in the Claimant appeared to be specifically directed to reinstatement or reengagement of the Claimant as a senior employee with supervisory responsibility and within the Respondent's FX business.

179 On all the evidence, I concluded that there had not been a breakdown in trust in confidence between the Respondent and the Claimant so that re-engagement was impracticable in any role. Certain, two very senior managers had not lost trust and confidence in the Claimant. Applying **Farren**, it was practicable to order *this* employer to re-engage *this* Claimant.

180 However, I considered that Mr Hassett's evidence regarding trust and confidence was relevant to whether it would be practicable for the Claimant to be reinstated, or to be re-engaged in a senior role in the FX business. Mr Hassett gave sensible, measured and relevant reasons for his lack of trust and confidence in the Claimant in carrying out such roles. I accepted his evidence and decided that Mr Hassett, Head of the FX business, would not have trust and confidence in the Claimant if he were to be reinstated or re-engaged into the FX roles which the Claimant identified.

**Claimant's Conduct and Attitude**

181 I noted the words of Ormrod LJ in **Nothman** at paragraph 4:

> "It is only right to say that anyone who believes that they are a victim of conspiracy, and particularly by their employers, is not likely to be a satisfactory employee in any circumstances if reinstated or re-engaged."

Further, I took into account the words of Wood J in **Rao v Civil Aviation Authority** cited with approval by Lord Justice Neil in **PLA v Payne** at page 570f to g:

> "factors which have influenced decisions in the past are: … the fact that the employee has displayed her distrust and lack of confidence in her employers and would not be a satisfactory employee on reinstatement".

I also noted the words of Johnson in **Crossan** at paragraph 10:

> "We consider that the remedy of re-engagement has very limited scope and will only be practical in the rarest cases where there is a breakdown in confidence as between the employer and the employee."

182 Mr Goudling QC for the Respondent conducted a skilful and thorough cross-examination of the Claimant regarding the Claimant's attitude to the Respondent, the DFS, the Respondent's Human Resources, Compliance and Legal Officers. The Claimant's evidence has been set out in this Judgment.

183 From that I evidence, I concluded that the Claimant does not believe that there is a conspiracy against him, or that the Respondent is part of one. I considered that the Claimant was rational in his explanations of the criticisms he made of the Respondent's lawyers and individual officers employed by the Respondent.

184 I accepted his evidence that he had not lost trust and confidence in the Respondent, in general, but that he was critical of individuals.

185 I noted the cases of **King v Royal Bank of Canada Europe Ltd** [2012] IRLR 280 and **Oasis Community Learning v Wolff** UKEAT/0364/12. I considered that, given the liability judgment in the present case, as in **King**, it was hardly surprising that the Claimant was aggrieved about the circumstances of his dismissal, and suspicious about the motives for it. I considered that the Claimant's criticisms of the Respondent's allegations and findings against him were, in many respects, upheld by the Employment Tribunal's judgment. Furthermore, the Claimant had succeeded in obtaining specific disclosure of documents after a contested preliminary hearing on the subject. Those documents turned out to be relevant to the Tribunal findings at the liability stage. I considered that the Respondent's failure to adopt a fair procedure and to disclose relevant documents to the Claimant was liable to give rise to a sense of injustice and suspicion. It did not follow that it was not practicable to re-engage him.

186 As in **Oasis Community Learning v Wolff** , I considered that it was appropriate to recognise that the Claimant was a litigant in person and that he had undoubtedly

undergone a great deal of stress and distress following the DFS Order and through the disciplinary proceedings, his subsequent dismissal and conduct of lengthy and closely contested Employment Tribunal proceedings. It was not surprising that he had expressed his frustration and distress regarding the things that had happened to him.

187 Nevertheless, I considered that the Claimant had presented, both at the liability and remedy hearing, as a highly rational individual. In cross examination at the remedy hearing, he made appropriate concessions and said he would reword some of his criticisms of the Respondent and the DFS; he expressed sympathy for the Respondent. I accepted his evidence that he had worked with the Respondent's Compliance and Legal Departments in the past without difficulty and would do so again. I accepted his evidence that he had criticised specific behaviours and individuals, with justification, rather than making vindictive, or vexatious assertions.

188 Further, I accepted the Claimant's evidence that the Respondent's own core values stipulate that employees are expected to challenge things they believe to be wrong and to be open to challenge from others (p.768). Mr Hassett agreed with the Claimant's assertions in this regard. That was relevant to the effect the Claimant's criticisms of the Respondent would be likely to have on the Respondent, if it was abiding by its own principles.

189 Taking into account **Oasis Community Learning v Wolff,** I accepted the Claimant's evidence that his difficulty in working with Mr Mahon in the future is not relevant to the practicability of his re-employment given that Mr Mahon is no longer in the business. I also accepted his evidence that he is unlikely to come upon the particular US lawyer who the Claimant considers harassed and humiliated him in an unprofessional manner.

190 I considered that the Claimant's beliefs are rationally and genuinely held but also that his criticisms were not directed to the Respondent as a whole, nor to any of the individual managers or senior managers by whom he would be directly employed if he were to be re-engaged.

191 As a result, in summary, neither Mr Mahon or Mr Mbanefo's views of trust and confidence in the Claimant, nor the Claimant's beliefs and attitudes towards the Respondent made it, in my view, impracticable for this Respondent to re-engage this Claimant.

192 With regard to the Claimant's criticisms of the DFS, I accepted the Claimant's evidence that other senior employees at the Bank had criticised regulators in the past but that this had not led to the Respondent losing trust and confidence in them. I accepted his evidence that he worked cooperatively with the regulators regarding Last Look. Ms Kates corroborated the Claimant's evidence in this regard. In any event, the Claimant's comments regarding the DFS would only be of real relevance to roles in which the Claimant was likely to be subject to DFS regulation. I did not consider that the Claimant's criticisms of the DFS made it impracticable for the Respondent to re-engage him.

**Effect of the DFS Order**

193 The DFS Order is plain in its terms. The Claimant accepted that the Head of Developer Experience role, the Global Head of FX platforms role, the BI Innovation Coverage Officer role and the Head of Macro Electronic Trading and Markets Analytic Technology role all involved activities which came within the prohibition in the DFS Order. He accepted that the Respondent would be in breach of the DFS Order if it re-engage the Claimant into any of those roles.

194 The Claimant contended that the DFS Order could nevertheless be renegotiated. He pointed to the evidence of Mr Mahon in another case in front of this Tribunal and this judge, **Mr C Ashton v Barclays Capital Services** case number 3202066/2015. In that case, Mr Mahon had said, in evidence, that the DFS could not compel the bank to dismiss employees, who still had the benefit of local employment law. He said that he would not have agreed to hear Mr Ashton's appeal if he knew that the bank could not change its decision. Mr Mahon said that, if the Bank reached a different decision to the relevant regulatory body and simply ignored the order of the regulatory body, then the body could withdraw the Bank's licence. However, in Mr Mahon's experience, further negotiations between the Bank and the regulators would ensue.

195 The Claimant therefore argued that, while reinstatement / re-engagement would be in breach of the DFS Order, in reality, what would then happen would be that the Bank would renegotiate the Order with the DFS.

196 It was correct that in two separate cases, **Mr C Ashton v Barclays Capital Services** and the present case, the dismissing and appeal officers – and, in particular, Mr Mahon himself, who was a witness in both cases – assured me that the fact that a Regulator required Barclays to terminate an employee's employment did not mean that dismissal was a foregone conclusion; and that the bank could nonetheless have decided not to dismiss, after a fair disciplinary procedure. I accepted that evidence in both cases. If the evidence was correct, then it must follow that the Respondent did not consider that the DFS Order barred the continued employment of the relevant individual. Renegotiation or other steps must still be open to the Bank.

197 Nevertheless, I considered that the DFS Order was, at the current time, valid, and that, pursuant to it, the Bank was prohibited from employing the Claimant in a role which assumed duties, responsibilities or activities involving compliance, FX benchmarks, or any matters relating to US or Dollar operations. Pursuant to the terms of the Order, the Bank would be exposed to further sanctions if it breached the Order, including, potentially, the revocation of its licence.

198 There was no evidence that a negotiation with the DFS would necessarily be successful, or would reach any particular conclusion. There was no evidence that the Bank had approached the DFS, or had attempted to change the Order to date.

199 I accepted Mr Hassett's evidence that the Bank takes its regulatory obligations extremely seriously and that it needs to work with its regulators.

200 I reminded myself that "practicable" in this context means more than merely possible but, 'capable of being carried into effect with success'. It is the duty of the

Tribunal to consider the employment realities of the situation: **Coleman v Magnet Joinery Ltd** [1975] ICR 46, per Stephenson LJ at 52B-H.

201 While renegotiation of the DFS Order was a possibility, it was not more than that.

202 I considered that it was not practicable for the Respondent to re-engage the Claimant into any role which would breach the DFS Order and would therefore expose the Bank to further regulatory sanctions. The gravity of the risk to which the Bank would be exposed by breaching the Order meant that I could not conclude that reinstatement or re-engagement of the Claimant into such a role was capable of being carried into effect with success.

**Justice**

203 The Respondent contended that it would not be just, in any event, to order reinstatement or re-engagement and that the Employment Tribunal should give significant weight to the fact that the Claimant had been criticised by the DFS and identified in the DFS Order, which had necessarily resulted in damage to his reputation and that of the Bank. The DFS Order is one of public record and widely reported.

204 Furthermore, the Respondent highlighted the Tribunal's liability judgment findings at, paragraphs [319] to [321], which concluded that the Claimant's contributory fault was serious, given the regulatory context, the $150m penalty imposed on the Respondent, the Claimant's seniority, his responsibility for failing to protect the Respondent from the serious risks, and that his failures were culpable and blameworthy and did contribute to the dismissal. The Respondent said that it would not be just to require the Respondent to re-employ the Claimant where he had contributed to $150m sanction against it. The Respondent said that it would inevitably damage the Respondent's business to have to re-employ the Claimant. Employment against that background would offend against common sense, would be unreasonable and unfair.

205 I decided that the liability judgment should also be considered as a whole. It was to be borne in mind that the Tribunal concluded that the Claimant contributed to his dismissal by only 20% - and that, if the Respondent had acted fairly, it would not have dismissed the Claimant. Given the finding of substantive unfairness in this case and the small degree of contribution found by the Tribunal, it was not necessarily unjust to order reinstatement or re-engagement. Indeed, the finding that, if the Respondent had acted fairly, it would never have dismissed the Claimant from employment in the first place, might suggest that reinstatement / re-engagement would be the just outcome.

206 The fact of the DFS Order and the Tribunal's findings on contributory fault were clearly relevant factors to be taken into account in exercising the Tribunals' discretion regarding reinstatement or re-engagement, but I did not consider that they meant that it was unjust to re-engage the Claimant at all.

**Certification of the Claimant as Fit and Proper**

207 It was clear from the Respondent's evidence that the decision as to whether to certify the Claimant as a fit and proper person for a particular role would be taken by the line manager who would have responsibility for recruiting into that role. The line manager would do so, taking advice from the Respondent's Compliance, Human Resources and Legal departments, as appropriate.

208 I found Michelle Kates' evidence to be rather difficult to rationalise. On the one hand, she asserted with confidence her view that the Bank would not be able to certify the Claimant as fit and proper and/or registered and that he could not return to work in any certified role at the Bank, or any role which was subject to similar requirements imposed by a regulator in another jurisdiction. This notwithstanding, in cross-examination she repeatedly retreated behind her assertion that it would ultimately be for the line manager to decide.

209 It seemed to me that the FCA Handbook guidance empathically did not say that a regulatory finding against an individual – or any other relevant matter listed in the guidance – operated as a bar to them being certified. I agreed with the Claimant that the FCA guidance makes clear that, for example in the case of a criminal conviction, the duty of the employer, as of the FCA, is to consider that conviction in its relationship to the particular job.

210 I further agreed with the Claimant that the "Factual Background" set out in the DFS Order which gave rise to the agreed statement that the Bank had conducted banking business "in an unsafe and unsound manner" appeared to be erroneous on the facts as found by the ET, or and/or appeared to be practices which are still applied in the operation of Last Look. One example is the fact that Last Look is applied to all clients. I considered that the tenor of the guidance from the FCA required the Bank to consider the Claimant's explanation for the DFS Order and relevant legitimate criticisms of it.

211 The guidance from the FCA is that relevant factors have to be considered in relation to the particular job. I did not accept Ms Kates' evidence, therefore, that the Bank could not certify the Claimant as a fit and proper person for any of the 3,500 roles which are subject to the certified person regime. I considered it very unlikely that Ms Kates was so familiar with the requirements of each role that she would be able to judge that the DFS Order, misconduct findings and the ET judgment, together, would have such a relevant and significant impact on the Claimant's ability to do the roles that he could not be certified as fit and proper for any. Ultimately, as the Respondent's witnesses said, the decision would be one for the individual hiring manager assessing the Claimant's suitability for the individual role.

**Individual roles – Application of *s116 ERA 1996***

Head of Automated Flow Trading eFICC / Head of e-FX / Role "Into Which the Claimant Would have been Reorganised"

212 The Claimant wanted to be reinstated or re-engaged into these roles. They were all either the same as, or comparable to, the job he was performing when he was dismissed.

213 However, I concluded that I could not order "reinstatement" into either the Head of e-FX or the "role into which the Claimant would have been reorganised" because this would not constitute placing the complainant into the same job on the same terms as he was employed in at the point of dismissal.

214 I also concluded that it would not be practicable to order the Respondent to reinstate the Claimant to the role of Head of Automated Flow Trading eFICC because it does not exist.

215 The Claimant accepted in evidence that, if he were reinstated or re-engaged into any of these roles, the Respondent would be in breach of the DFS Order. Given my findings that it would not be practicable for the Respondent to re-employ the Claimant into a role in breach of the DFS Order, I did not consider it would be appropriate for the Claimant to be re-employed into any of these roles, in any event.

216 Further, while I did not accept Ms Kates' blanket assertion that the Claimant could not be certified as "fit and proper" for any regulated role in the Bank, I did accept Mr Hassett's measured and thoughtful evidence that he would not certify the Claimant as "fit and proper" for these specific roles. The Claimant agreed that Mr Hassett held the view that he could not certify the Claimant as a fit and proper person in good faith.

217 In addition, I accepted Mr Hassett's evidence that he, personally, and other FX colleagues and clients, would not have trust and confidence in the Claimant carrying out a senior role in the FX business. The Claimant agreed in evidence that Mr Hassett did not want to take the risk of employing the Claimant in the role of FX Platforms and that Mr Hassett held that view in good faith.

218 For all those reasons I concluded that it would not be practicable for the Respondent to comply with an order for reinstatement or re-engagement into any of the FX roles sought by the Claimant.

219 Furthermore, given the ET's findings on contributory fault, I concluded that it would not be just to order the Respondent to reinstate or re-engage the Claimant to a role which was directly comparable to his Head of Automated Flow eFICC, with all the fixed and discretionary compensation attached to it. While the contributory fault finding of 20% was relatively limited, it was not trivial. The Claimant's previous role had elevated status within the Bank, weighty responsibilities and commensurate compensation. I considered that it would not be just to order the Bank to re-engage or reinstate into a corresponding role where the Claimant had failed to discharge his previous responsibilities in a more than minor way.

<u>Head of Developer Experience - Hiring Manager Mr Jain</u>

220 The Claimant wished to be re-engaged into the Head of Developer Experience role. He said that he was suitably qualified for it, having had 25 years' experience in software development, 17 of which had been in finance. He had worked in, and then led, numerous development teams; he had been a hands-on developer, cutting code for 10 years of his career in finance. The Claimant said that he understood the competing constraints operating on developers in investment banks generally and in

Barclays specifically and understood the role from the perspective of being a key business user of in-house built technology.

221 However, I accepted Mr Jain's evidence that the Claimant did not have the right skill set for the Head of Developer Experience role and that the Claimant's practical experience in software development was too narrowly focused. The Claimant's area of specialisation had been in electronic trading platforms within the FX business. Mr Jain was looking for candidates with significant recent technical experience in developing software in a modern way and, in particular, individuals who had worked in Silicon Valley. I accepted that Mr Jain would not invite the Claimant for interview for the role. I found that Mr Jain's opinion was an informed one, in that he had known the Claimant and his work at Barclays and had a good understanding of the Claimant's previous role. I found Mr Jain to be an honest and fair-minded witness. The Claimant accepted that Mr Jain had given his evidence in good faith.

222 I therefore concluded that it would not be practicable for the Respondent to comply with an order to re-engage the Claimant into the Head of Developer Experience role – the Claimant does not have the right skill set to do the job.

<u>BI Innovation Coverage Officer role – Mr Stecher; Head of Macro Electronic Trading and Markets Analytics Technology role – Mr Anderson</u>

223 The Claimant sought re-engagement into both these roles.

224 I accepted Mr Stecher's evidence that it would not be possible to redesign the BI Innovation Coverage Officer role in such a way that it did not involve US and US Dollar operations. Mr Stecher's evidence on this was not challenged by the Claimant in cross-examination.

225 Similarly, I accepted Mr Anderson's evidence that the Head of Macro Electronic Trading and Markets Analytics Technology role would comprise duties, responsibilities and activities involving FX benchmarks, US and US Dollar operations; Mr Anderson's witness statement at paragraph 13. The Claimant accepted this.

226 It would not be appropriate to order the Respondent to re-engage the Claimant into either of these roles because it would not be practicable for the Respondent to comply with such an order, in breach of the DFS Order. I refer to my findings in this regard, above.

<u>MD Technology Banking – Hiring Manager, Mr Braham</u>

227 The Claimant confirmed both in cross-examination and in submissions that he no longer wished to be re-engaged to this role. He did not challenge Mr Braham's evidence that the Claimant did not have the requisite experience to be successfully employed in that role.

<u>Director Data Commercialisation</u>

228 The Respondent contended that the Claimant said that he did not wish to be re-engaged into the role of Director Data Commercialisation.

229 However, the Claimant did wish to be re-engaged by the Respondent in any suitable capacity in a Director or Managing Director role.

230 Further, when the Employment Judge explained that it was not her understanding of the law that, because a vacancy was being recruited to, there was a bar on re-engagement, either under *s116(5) ERA 1996* or at common law, the Claimant said that he did wish to be re-engaged into the role. He maintained this in his submissions to the Tribunal and I concluded that he did wish to be re-engaged into the Director Data Commercialisation role. Even if he did not, because he believed another employee was being recruited to it, the Claimant's wish was simply one factor to be taken into account.

I

231 I considered, first, whether the role of Director Data Commercialisation was comparable to that from which the Claimant was dismissed. I decided that it was not. It was a junior Director role, reporting directly to Mr Lewis who holds the corporate grade of Director. The Claimant's previous corporate grade was Managing Director. Further, the Director Data Commercialisation would be responsible for recruiting one team member, who would be their sole report. The Director Data Commercialisation would be paid between £130,000 and 170,000 total compensation, which was not comparable to the compensation of the Head of Automated Trading within eFICC which attracted a total compensation in excess of £1m per year.

232 Mr Lewis said that he considered that he would not invite the Claimant for interview because of his concerns about the Claimant not being fulfilled in a junior Director role. I noted that Mr Stecher, a much more senior employee, whose views I considered to be more authoritative, said that he had no problem with people taking a step back in their career. Moreover, the Claimant is applying for a job in a competitive interview process. Re-engagement is different. I accepted the Claimant's evidence that he would be happy to work in this grade or this pay. It would be a change of direction for him. It might well be appropriate for an employee to take a pay cut when pursuing a new line of employment, to which they are not bringing recent practical experience.

233 I accepted the Claimant's evidence that he was well qualified to carry out this role. I accepted his evidence, corroborated by his curriculum vitae, that he has considerable academic and working experience of analytics and statistical analysis. I noted Mr Cartledge's evidence that, given the Claimant's skill set, Mr Cartledge was confident that the Claimant would be of value to the Bank. I noted other Respondent witness evidence that employees do move between Divisions in the Respondent on a relatively regular basis; for example, between technology and trading departments, or quantitative analysts to trading.

234 I therefore decided that, although the Director Data Commercialisation role was not comparable to the Claimant's previous role, it was suitable employment under *s115(1) ERA 1996*.

235 The Director Data Commercialisation role is currently vacant. Mr Lewis' evidence was that, on Thursday 19 July 2018, the last set of feedback from interviews had not yet been received, that there would still have to be an HR interview arranged

and that the approval process would take weeks. It was quite clear from that evidence that, at the date of the remedy hearing, the post was vacant and would not be finally recruited to for a number of weeks. The recruitment process did not prevent it being practicable for the Respondent to comply with an order for re-engagement of the Claimant into the role of Director Data Commercialisation.

236 The Tribunal process in this case involved the Respondent notifying the Claimant of vacant Managing Director/Director roles, Claimant identifying potentially suitable ones, the parties exchanging witness statements as to whether those roles would be suitable and practicable for re-engagement, and the Tribunal making a determination on the subject. The necessary passage of time involved, combined with the Respondent's decision to continue actively recruiting to those vacant roles, could well mean that all roles initially identified would be filled by the Respondent by the end of the Tribunal process. It would be a matter of concern if all possible avenues of re-engagement were said to be impracticable because a Respondent chose actively to recruit to vacant roles, and therefore to fill them, while the Tribunal remedy process was ongoing. As a result, in any event, I would not conclude that the Respondent's recruitment process for the Director Data Commercialisation role rendered it impracticable for the Respondent to comply with an order for re-engagement to the role.

237 I have found that trust and confidence has not broken down between the Respondent and the Claimant so as to render re-engagement to this role impracticable. I have also found that the Respondent's witnesses, in particular Ms Kates, accepted that the Claimant had, in fact, cooperated with regulators. Even if the Claimant has been critical of the DFS and its order, his criticisms are rational and evidenced based. Re-engagement to the Director Data Commercialisation role would not, in any event, involve any interaction between the DFS and the Claimant. There was no allegation that the Claimant had made criticisms of other regulators.

238 The role does not currently involve any $US operations. While Mr Lewis said that it could in the future, he gave no timescale. Moreover, I agreed with the Claimant that simply analysing card transactions did not come within the wording of the DFS Order. Re-engagement into this role is therefore practicable.

239 I rejected the Respondent's argument that, seeing that the role involved processing a significant amount of personal data and that the post holder was required to protect the Bank against risks under applicable Data Protection legislation, the Claimant's previous failures in oversight and supervision made him unsuitable for this role. The relevant legislation and regulatory regime is entirely different. The Respondent has not drawn any precise parallels between the Claimant's prospective work as a data processor and his failures and oversight and supervision regarding Last Look. As indicated in my judgment, I considered that the Claimant had instituted a large body of controls in his business. His culpable conduct was 20% only. On balance, the findings and the liability judgment demonstrated that the Claimant was capable of recognising that checks and controls were required and that he himself took measures to implement them.

240 Mr Lewis' evidence did not suggest that the Claimant would be responsible for inventing and implementing his own data protection controls in relation to this post, nor

that he would be responsible for supervising other employees in their implementation of a data protection system that the Claimant had invented. As such, I decided that the Director Data Commercialisation role came within Mr Jain's description of a role which operates in an existing regulatory framework, rather than one which is responsible for setting key risk indicators. More broadly, Data Protection legislation is widely known and understood. A framework is already in place and the Claimant would be working within it.

241 The Director Data Commercialisation role is not subject to the certified person's regime and therefore the Bank does not have to certify the Claimant as fit and proper in order to carry it out.

242 I considered that it would be just to order the Respondent to re-engage the Claimant into this role. Taking into account the DFS Order and the, albeit limited, criticisms I made of the Claimant in my liability judgment, it would not be appropriate order the Respondent to re-engage the Claimant into a role which was of the same seniority to the role he previously held. Re-engagement into the Director Data Commercialisation role therefore did, in my view, take appropriate account of the Claimant's contributory conduct, in that it involved a demotion for him.

243 I also considered that it would be just to order re-engagement, rather than any other remedy for unfair dismissal. Had the Respondent acted fairly, the Claimant would still be employed by the Respondent. Re-engagement is the most appropriate remedy to provide redress for this unfair dismissal.

244 I considered, therefore, that the Claimant wanted to be re-engaged to the role of Director Data Commercialisation, which was suitable employment for him. It is practicable for the Respondent to comply with an order for re-engagement to the role and it is just to order the Claimant's re-engagement to the role of Director Data Commercialisation.

245 The terms on which re-engagement is to take place are as follows:-

(vii) The Respondent shall be the Claimant's employer;

(viii) The Claimant's job title will be Director Data Commercialisation;

(ix) The Claimant's total remuneration annually shall be £150,000;

(x) The Respondent shall pay the Claimant in respect of any benefit which the Claimant might reasonably be expected to have had but for the dismissal from the date of his dismissal to the date of re-engagement. The Respondent shall pay the Claimant arrears of pay on the basis that his loss of earnings and benefits are calculated according to the non-discretionary compensation and benefits (including pension benefits) he would have continued to receive in his pre-dismissal role, had he not been dismissed, during that period.

(xi) The Claimant shall be restored to the position of Director and shall

have the pension rights associated with the Data Commercialisation Director post.

(xii) The order must be complied with by 21 September 2018 [six weeks].

246 The Claimant should be based in London because Mr Lewis told the Tribunal that the job would be based in London or Northampton. The Claimant lives in London.

247 I determined that the pay for the role should be £150,000, which is the midpoint of the salary range. That takes account of the Claimant's superior qualifications and experience in statistical analysis and in the Bank generally, but, on the other hand, the fact that he does not have experience in this precise area.

248 I have applied *Electronic Data Processing Ltd v Wright* [1986] IRLR 8 at 8, EAT, where the EAT held that the benefits which would have accrued to the Claimant if he had not been unfairly dismissed are to be calculated on the basis of the employee's earnings at the date when he was dismissed, rather than on what he would have earned if he had been re-engaged as the Tribunal ordered.

249 I have ordered that the Claimant be paid his fixed, rather than discretionary, compensation from his previous role, on the basis that this is what he was being paid while on suspension, and therefore at the date that he was dismissed. The Respondent should pay the benefits on the same basis that they were being paid during the Claimant's suspension. This accords with the statutory provisions and also with the justice of the matter, taking into account the liability findings in the case.

250 I have ordered the Respondent to comply with the re-engagement order within 6 weeks, as Mr Lewis said that the approval process for a successful candidate would take "weeks".

Employment Judge Brown

9 August 2018