EMPLOYMENT TRIBUNALS

Claimant: Mr. K.B. Gorman

Respondent: Cory Brothers Shipping Agency Ltd.

HELD AT: Liverpool **ON:** 30th January – 1st February 2019

BEFORE: Employment Judge T. Vincent Ryan

REPRESENTATION:

Claimant: Mr. J. Crosfill, Counsel
Respondent: Mr. Forshaw, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that the claimant was fairly dismissed by the respondent on 1st December 2017 for a reason related to his conduct. The claimant's claim of unfair dismissal is not well-founded, fails, and is dismissed.

REASONS

1. **The Issues**

These are the issues identified by the parties and set out in an agreed list as follows:

1.1. The claimant brings a claim for unfair dismissal contrary to sections 94 and 98 Employment Rights Act 1996.

1.2. The reasons for the claimant's dismissal relied upon by the respondent are the following matters of conduct:

1.2.1. Failing to disclose to Share Trades undertaken in August and November 2016 ("the Share Trades") and that such failure to

disclose the Share Trades was a lie by deliberate omission showing a lack of honesty and integrity on the claimant's part;

1.2.2. Failing to follow the respondent's policies and procedures in relation to the Share Trades which brought or could have brought the respondent into disrepute;

1.2.3. Failing to seek or obtain authorisation in relation to the Share Trades in circumstances where it was alleged that the claimant was fully aware, or should have been aware of the Group Share Dealing Code; and

1.2.4. A resultant breakdown in trust and confidence in the claimant's judgment and capabilities in the conduct of future business for the respondent.

The respondent contends that it dismissed for a potentially fair reason in accordance with section 98(2)(b) ERA 1996, and/or some other substantial reason in accordance with section 98(1) ERA 1996. The claimant contends that the respondent did not dismiss for a potentially fair reason in accordance with section 98 ERA 1996.

1.3. The following issues arise:

1.3.1. Did the respondent have a reasonable belief that the claimant had committed the acts charged? The claimant contends that no reasonable employer would have found the disciplinary charges made out in the circumstances.

1.3.2. Did the respondent conduct a reasonable procedure encompassing a reasonable investigation? The claimant says that the decision to dismiss was predetermined and a sham.

1.3.3. Did the decision to dismiss fall within the reasonable band of responses open to the respondent? The claimant contends that:

1.3.3.1. The claimant was treated unfairly in comparison with others. He relies on:

1.3.3.1.1. The way in which the respondent dealt with the claimant's own share dealing in January 2017;

1.3.3.1.2. The manner in which the respondent dealt with Mr James Kidwell in January 2004 when his wife purchased shares triggering enquiries from the FSA (now the FCA);

1.3.3.1.3. The treatment of employees "in respect of paying expenses for prostitution, corruption and bribery".

1.3.3.2. The respondent's treatment of the "others" referred to above created a "false sense of security in respect of matters which would or might amount to misconduct";

1.3.3.3. The decision was unfair because the respondent had taken insufficient steps to explain to the claimant:

1.3.3.3.1. The Market Abuse Regulation and how it impacted on him;

1.3.3.3.2. That the respondent was in a closed period;

1.3.3.3.3. That the respondent was deemed to have inside information and therefore must not trade in shares; and

1.3.3.3.4. His admitted conduct did not justify dismissal.

1.4. The hearing is set down to consider liability issues only. However, if the Tribunal was to find that the claimant's dismissal was unfair, it would probably wish to consider, in this hearing:

1.4.1. Whether any **Polkey** deduction should be made on the basis that the respondent could and would have dismissed the claimant fairly. The respondent contends that the claimant would have been dismissed at or around the same time he was dismissed and for the same reasons or, to the extent that the following differs from the reasons for dismissal, for a failure to inform the respondent of the August and November trades shortly after 31 May 2017 meeting with the FCA, notwithstanding that the FCA had invited the claimant to so inform the respondent;

1.4.2. Whether any reduction should be made under sections 122(2) and 123(6) ERA 1996 on the basis that the claimant caused or contributed to his dismissal;

because those issues are intimately "wrapped up" with the **Burchell** questions. The mechanics can, if necessary, be left over to any remedy hearing.

2. **The Facts**

2.1. The respondent company is part of the Braemar Group (referred to throughout as either "Braemar" or "the Group"); it is an international logistics and maritime service provider; the respondent has approximately 195 employees and there are approximately 800 people employed by the Group. It has an executive committee (Exco) and it relies on senior managers who are designated as being Persons Dismissing Managerial Responsibility (PDMR); being a PDMR carries with it particular duties, responsibilities, and obligations as a senior employee. The Group has its own professional in-house HR Department and its services were available to and used by the respondent throughout the matters described below; as circumstances dictate it relies on a private HR consultancy and takes legal

advice in respect of employment law matters from its solicitors, who were again involved throughout. The Group, and by extension the respondent, operate under documented policies and procedures including an operations Handbook, a Management Framework which includes a Share Deal Policy (page 125 of the trial bundle, to which all further page references refer unless otherwise stated) and a Share Deal Code (pages 126 - 133). The implications of breaching the policy and/or code are set out therein.

2.2. The Group is a public limited company; share-dealing is regulated by the Financial Conduct Authority (FCA, formerly the Financial Services Authority (FSA)). The Market Abuse Regulations (MARs) were introduced on 1 July 2016 being safeguards against insider-trading of shares in public companies; MARs set out specific requirements and obligations with regard to share trading. The respondent's internal share-dealing policy and code predate MARs; since 2004 the respondent's policies and code have required senior employees such as PDMRs to inform the respondent of any intended sales of shares in the company, to obtain consent, to sell within a limited time scale and then to report to the company upon that sale; in addition there are known closed periods when share transactions are not permitted and they are during the period from the financial year end to the publication of financial results (28 May in each year to mid-May) and in the period between the midyear and the interim results (1st September – approximately late October). MARs overlaid this policy with further requirements as a result of which the respondent introduced an administrative set of documentation to record matters. Share trading in breach of the policy and code is a misconduct matter and one that could amount to gross misconduct leading to summary dismissal; breaches of the policy and code that amount to breaches of MARs could be criminal offences and matters of interest to, and sanction by, FCA.

2.3. The claimant was employed by the respondent from 1 March 2006 until his dismissal on 1 December 2017. His service agreement is at page 337. The claimant had been employed by the respondent company when it was a small, private, family run company. It was bought by Braemar and in 2013 the claimant was appointed managing director of the respondent company. At all material times in respect of this judgment the claimant was managing director of the respondent company, a member of Exco and a PDMR. In those circumstances the claimant's evidence to the tribunal and given during the internal disciplinary proceedings that he was unaware of his PDMR status, duties and responsibilities until 2017 was unconvincing. He was clearly aware that he was discharging managerial responsibilities throughout the period in question. The claimant maintained in evidence that his sole focus at work was making a lot of money for the respondent company; it is common ground that he did make a lot of money for the respondent company. The claimant was clearly self-aware of his commercial value to the respondent and Braemar. All the respondent's witnesses, who held positions in the respondent and/or Braemar, shared their appreciation of the claimant's commercial success and value to its business. They enjoyed good personal and business relations. The claimant's colleagues were appreciative of his efforts and successes and this was reflected at least in part in a generous share allocation made to the

claimant together with payment of at least one substantial financial bonus and his promotion to the role of managing director. The respondent's and Braemar's high regard for the claimant in respect of commercial matters affecting the company's profitability, and his dealings with clients on behalf of the respondent, continued up to the date of dismissal. The only matter of concern to the respondent and to the Group in respect of the claimant was in and around certain share transactions detailed below and there was no ulterior motivation on the part of the respondent for subjecting the claimant to disciplinary proceedings that ultimately led to his dismissal.

2.4. In his role as managing director and a PDMR the claimant was responsible to ensure the respondent's compliance with all applicable policies and codes and to oversee and ensure compliance by subordinate employees who reported to him. On 22nd of July 2016 the claimant received documentation explaining the implications of MAR's (113 – 118); the documents were self-explanatory and were accompanied by a memorandum inviting the claimant to raise any questions he may have about the documentation and requirements; he was asked to sign and return a receipt. The claimant signed the receipt to the effect that he had read and understood the obligations imposed. He also signed a memorandum on insider trading that appears at page 134 – 136 in which is stated in emboldened print "you must read this memorandum carefully and sign and return the acknowledgement slip at the end of this memorandum to the company secretary as soon as possible". The memorandum covered topics such as the applicable laws and possible sanctions, market abuse, insider dealing, duty of confidence, insider obligations and commercial requirements. The claimant signed the document at page 136 acknowledging receipt, confirming that he had read it and acknowledging his awareness of the duties and applicable sanctions. He sent the documentation back to the company secretary in or about November 2016 in response to a reminder asking him for it. He did not tell the company secretary or any other colleague that he had not read and understood the documentation provided to him and at no stage prior to the disciplinary process did he disabuse the respondent's management of its genuinely held belief that the claimant had not only received but had read and understood the respondent's policy, code, and MARs. The rationale for these requirements was clear and obvious; the administrative requirements were not complicated or onerous. I find that the claimant knew and understood the requirements of the code, policy and MARs at the times that he became subject to them; his evidence to the contrary was not convincing and belied his obvious management acumen and experience. At very least, and whilst he may not have read the literature thoroughly I am satisfied from the evidence before me, including the claimant's, that he was aware that the signed documentation was important, committed him to abide by obligations and signified to the respondent and the Group that he was sufficiently conversant and knew his obligations; I am also satisfied that he knew that the respondent and the Group relied upon that assurance and that he delivered the documentation for that effect as requested. I did not find him to be naive, easily lead to the point of gullible compliance with a request for his signature, or likely to sign such documentation in complete ignorance of the implications; he was not.

2.5. In 2004 Mr J Kidwell (JK), Chief Executive Officer of the Group, wished to sell some shares in the group either held in the name of or for the benefit of his wife; he sought permission and notified the Group; his sale was duly authorised; he made the sale and reported upon it to the Group. His timing was fortuitous as it happened to coincide with a transaction that resulted in an enhancement of the value of his sale, albeit he commenced the internal procedure in accordance with the applicable code and policy at that time in advance of the agreement upon that transaction. This aroused the interest of FSA who investigated the transaction and satisfied itself that JK was not responsible for or guilty of wrongdoing.

2.6. In the 2013 the claimant was allocated 40,000 shares in the Group which would vest in May 2016. The claimant was made aware that he could not sell the shares until May 2016. He subsequently made threes sales or trades:

2.6.1. On 24 August 2016 the claimant sold 2,221 shares ("the August trade") in part for his son's 18th birthday present, his birthday being at the end of August, and in part to fund a Spanish holiday that summer;

2.6.2. On 10 November 2016 the claimant sold 4,664 shares ("the November trade") specifically to fund Christmas expenditure that year;

2.6.3. On 18 January 2017 the claimant sold 15,356 shares ("the January trade") to replace a damaged boiler and make good the loss of some £12,000 as a result of the theft and misuse of credit cards, in addition to which he wished to fund holidays, (skiing, and to visit Thailand), at about that time.

2.7. The claimant made all three trades in breach of the respondent's policy and code and MARs in that he did not notify the company of the sales, obtain consent or report upon the sales; he did not complete any documentation for the company in respect of those trades.

2.8. 24 January 2017 the company secretary, AV, sent an email to the claimant and certain of his colleagues (page 146) enclosing a Request to Deal form emphasising its significance to them should they wish to sell shares (and this had nothing to do with the fact of the claimant having made his three share trades already). In response the claimant informed AV of the January trade which had been made shortly before a company announcement about profits that resulted in a reduction in value of the shares by some 20%; the claimant made a profit of approximately £9,000 over and above what he would have made had he not sold the shares on 18 January 2017. In the light of this disclosure the respondent took financial and legal advice and considered issuing the claimant with a formal disciplinary warning. The respondent however accepted, following an interview conducted by SM on 2 February 2017 that the claimant had made a genuine error and oversight. The financial regulators were informed. SM conducted a formal

investigation and interview at which he specifically asked the claimant whether he had made any prior transactions, that is prior to the January trade. The claimant confirmed that he had done so "once or twice" in respect of shares that had been allocated to him as described above; he said he had paid capital gains tax on the trades; he said that he was not sure if he had notified anybody because it was "quite a while ago…… certainly before July 2016". He confirmed that he had received AV's email of July 2016 concerning MARs. He was aware of the significance of that email and the date of July 2016 at the time that he reassured SM that the earlier trades were made "quite a while ago" and were "certainly before July 2016". The claimant said to SM that he fully accepted his fault in respect of the January trade, explaining away what he considered to be a naive mistake although he conceded that he was not normally naive when it came to business matters. He said that share trading was "new territory" for him. The claimant did not disclose, during this interview on 2 February 2017 with SM, any details of the August trade or November trade either with specific details or any reference to having made sales in or about the time of his son's recent birthday five months previously, the Christmas just past, or relating to a boiler replacement, holiday expenditure or credit card theft of £12,000. In consequence the respondent dealt formally by making required public disclosure only relating to the January trade, as a result of which there was adverse publicity in the London Evening Standard that was critical of the claimant and identified him and the respondent.

2.9. The respondent commissioned a report on the known matters raised above and the report was critical of the provision of training to PDMRs. In March 2017 the respondent arranged for training and the claimant underwent training on MARs, the policy and code; there was a half hour training session on the requirement to notify, obtain consent, report on sale and the completion of the required form. The claimant made no reference to, or disclosure of, the August and November trades. As a further consequence the claimant agreed to make a voluntary donation of approximately £9,000 to a charity as this was the approximate sum that he gained from the sale of shares in January on the date on which he sold them. The matter was also formally reported to FCA. The claimant still made no detailed reference to, or disclosure of, the August and November trades.

2.10. On 27 March 2017 FCA requested details from the respondent of any prior requests that the claimant had made in respect of any transactions and also for copy documentation. The respondent confirmed that it had not received any other than in relation to the January 2017 transaction and therefore FCA arranged to interview the claimant. The formal interview with FCA took place on 31 May 2017 and the respondent exercised his right to silence answering questions only with "no comment". He read from a prepared statement confirming that prior to the January trade there were two previous unauthorised trades. The claimant refused to confirm whether he had notified Braemar or intended to notify them either of the transactions or of the FCA investigation. FCA requested further information from Braemar, being suspicious of insider trading at the time of the August trade. FCA notified the claimant of a criminal investigation into all three of his trades. That investigation is still ongoing and outstanding. On 7 September

2017 FCA informed Braemar of the investigation for its compliance purposes.

2.11. FCA informed Braemar of the investigation on 7 September 2017. It forbade the respondent from informing the claimant of the situation. The matter was discussed by the board at a meeting held on 26 September 2017. The board noted the FCA investigation and the minutes reflect the view of the board: “it was further noted that if the investigation were to find him guilty of insider dealing, the company would be left with little choice but to terminate his employment” (p169). It was also confirmed that the company must not discussed the matter with the claimant. The minutes record: “if the trades are his, the timing of it looks bad, but there may be an explanation which we cannot explore without the evidence or permission to contact him about these matters” (p171). The respondent was taking legal advice at this time. The above minutes are a true summation of the respondent’s position as at that board meeting. It did not prejudge the claimant or predetermine the outcome of any investigation.

2.12. FCA interviewed the claimant under caution on 18 October 2017 and, again, having read a statement, he gave a “no comment” interview. He did not confirm whether he had told Braemar of the investigation. FCA informed the claimant that it would be telling Braemar, and that the claimant’s actions “had put the company unwittingly in breach of its PDMR reporting requirements”. The claimant was acting on legal advice at the time of the FCA interviews and the statement that he read was prepared with the benefit of legal advice; he was represented by a solicitor at the meetings. On 19 August the claimant informed James Kidwell (JK), (chief executive officer of Braemar) and Louise Evans (LE) (a Braemar board member and a member of the respondent’s board of directors) that FCA would be in touch with the respondent in respect of his trades. There then followed a difficult discussion between them, difficult because the investigation was ongoing, the claimant was being careful about what he said and the respondent was unable to disclose all it knew from FCA; that said it was made clear to the claimant that this was a potentially serious situation that could affect his status within the respondent and the Group. On the same date the claimant sent an email to JK and LE (page 176) in which he complained of a complete lack of support and that he felt that the reaction to his disclosure indicated that the respondent was taking the matter out of all proportion because he had “mistakenly sold 2,220 shares”. He expressed surprise and disappointment at the respondent’s attitude that he may be no longer considered suitable as a PDMR, in which case he could not be the managing director of the respondent.

2.13. On 26 October 2017 JK and SM met with the claimant and notes of that meeting are at page 178 – 179. The respondent’s intention was that this would be a protected conversation; the respondent considered that it would probably be in the best interests of all concerned, including the claimant, to part company amicably with an agreed and negotiated severance package, failing which matters may have to proceed by way of disciplinary proceedings and whatever outcome was then arrived at. JK told the claimant that the purpose of the meeting was to clarify the company’s

position as, having been informed of the August and November trades, the Board considered that these matters were "potentially serious" and would require investigation; he confirmed that the Board was aware of the FCA investigation; he confirmed to the claimant that if a disciplinary hearing was convened the possible sanctions that could be imposed ranged from a warning up to and including summary dismissal; he confirmed to the claimant that he was not saying the claimant would be "fired" as suggested by the claimant, but rather that the potentially serious nature of the matters meant that an investigation had to be undertaken before considering whether the matter was something that should be heard by a disciplinary meeting. The claimant asked JK again whether this meant that he was to be "fired" and SM explained again that if the investigation recommended that a disciplinary meeting should be convened then that would be a matter for the disciplinary meeting. At a hearing of the Employment Tribunal on 31 July 2018 Employment Judge Warren made the following findings of fact:

> "In the meeting the claimant was advised that the Board consider the share dealing to be a serious issue. Mr Kidwell felt the claimant should look at leaving at the end of his notice period (six months) as that would be 'best for all concerned', a comment he later reiterated in 'without prejudice' correspondence with the claimant".

2.14. On 30 October 2017 the claimant formally rejected the offer that had been made to him. The respondent decided to progress the matter through its disciplinary proceedings. In the circumstances of there being an ongoing FCA investigation, a need now for there to be an internal disciplinary investigation and the claimant's seniority, the respondent suspended the claimant on 31 October 2017. The letter suspending him is at pages 181 to 190 and it explains the respondent's reasoning which I find to be genuine and therefore factual.

2.15. On 3 November 2017 the claimant presented a formal written grievance to the respondent about his suspension, the respondent's announcement of his suspension and the commencement of disciplinary proceedings (pages 214-215).

2.16. The respondent commissioned a consultancy called HR Face-2-Face to conduct the disciplinary investigation. DR was the appointed investigating officer and on 14 November 2017 she interviewed the claimant concerning his share trading. DR produced an investigation report dated 21 November 2017 (pages 244 – 268 with recommendations at page 267); she recommended formal disciplinary proceedings in respect of five allegations of misconduct relating to the claimant's share trading. The respondent accepted DR's recommendations albeit the third allegation of causing disrepute was subsequently amended to remove reference to any disadvantage occasioned to Braemar investors. I find this is evidence of the respondent's conscientious approach to the internal proceedings.

2.17. The respondent wrote to the claimant on the 23 November 2017 inviting him to a disciplinary hearing and setting out the five allegations of

misconduct (pages 271 – 272 B), sending to him seven enclosed documents to assist in his preparation for the disciplinary hearing. In the letter the respondent warned the claimant that a finding of gross misconduct could lead to his dismissal; he was informed of the identity of the disciplining officer (LE); he was reminded of his statutory rights, in particular, entitlement to be accompanied and he was invited to bring forward any information that he thought relevant including in mitigation. The disciplinary allegations were as follows:

2.17.1. Allegation 1: "Your failing to disclose your trading of the company shares on 24 August and 10 November 2016 when you were first interviewed by Stuart McKeller on 2 February 2017".

2.17.2. Allegation 2: "Your failure to disclose the trading of the company shares in August and November 2016 but before 18 October 2017 when you were interviewed by the FCA".

2.17.3. Allegation 3: "Your failure to follow the Group Share Dealing Code in relation to those trades could have brought the company's reputation into disrepute".

2.17.4. Allegation 4: "Your failure to seek or obtain authorisation to sell the company shares although you were fully aware of the Group Share Dealing Code".

2.17.5. Allegation 5: "Whether your conduct has resulted in a fundamental breakdown in the employment relationship".

2.18. On 28 November 2017 the respondent held a joint disciplinary and grievance hearing, chaired by LE, that lasted approximately one hour, and the notes of which are at pages 319 – 327. The claimant relied upon and read out a document entitled "Disciplinary Submission" (314 – 317). He submitted in respect of each allegation as follows (submissions the purport of which he maintained throughout the internal and tribunal proceedings including at this hearing):

2.18.1. Allegation 1: he had in fact mentioned earlier trades in the interview with SM on 2nd February 2017; he could not recall whether the notes of 2nd February interview were accurate and he noted that there were some definite inaccuracies (albeit he had previously signed the minutes acknowledging them as an accurate record); in any event the meeting of 2 February was only about the January trades which he had disclosed in detail.

2.18.2. Allegation 2: he had disclosed the August trade and January trade to FCA prior to his disclosure of 18 October 2017 to the respondent, such that he should not be accused of a continuing failure to disclose.

2.18.3. Allegation 3: there was no disrepute to the respondent because no financial harm had been caused to it.

2.18.4. Allegation 4: he was innocently unaware of the applicable code and policy until January 2017 a position that he believed the respondent had positively accepted at the 2 February 2017 interview when he disclosed the January trade. He said the rules had not been made clear.

2.18.5. Allegation 5: there was no breakdown of the employment relationship.

2.19. The respondent (LE with internal HR support) wrote two letters to the claimant regarding the outcome of the disciplinary and grievance hearing; the disciplinary outcome is at pages 331 – 335 and the grievance outcome at pages 329 – 330. I find that LE fully explained her genuine rationale, findings and belief in her dismissal letter, having considered the matter conscientiously and attempting to do so objectively. She was however aware of the view taken by her colleagues on the board that it would have been in the best interests of both the claimant and the respondents (including Braemar) for the parties to have agreed a severance package to avoid a disciplinary hearing and the possibility of this outcome, namely dismissal. Notwithstanding this knowledge I found LE to be a credible and reliable witness who was largely sympathetic to the claimant and that she did not prejudge him or predetermine the outcome of the disciplinary hearing. There is no evidence to support the allegation that she was merely enacting the will of the board or any of the other board members; she did not. In respect of each allegation LE found and believed on the basis of the documentation provided, including Ms Ramsden's report, the claimant's submission and answers to questions, and following careful consideration as follows:

2.19.1. Allegation 1: the claimant failed to make required disclosures, and there was no known, adequate or reasonable explanation for his failure to inform SM on 2 February 2017 of the August and November trades; he was a senior executive with responsibility and an obligation to ascertain the dates of those trades and to inform SM of them; she weighed up whether he had simply forgotten about them or whether this was "a deliberate lie by omission" which would undermine his honesty and integrity, a matter that she specifically put to the claimant twice at the disciplinary hearing (322); she asked the claimant to clarify his denial that this was a question of integrity and honesty which he failed to do to her satisfaction. The claimant explained away any suspicion as to the timing of the trades (that he was selling at times to maximise profit on the sale acting on known inside information) by linking the trades to specific, recent, date-related expenditure; she was not convinced by his assertion that he had forgotten the dates of the trades and that they predated July 2016 when he gave his interview on 2nd February 2017.

2.19.2. Allegation 2: the claimant had failed to make the due disclosure to the respondent and had not acted with integrity and transparency

such as was expected from a senior executive. That said however he had made a disclosure to the FCA and therefore this allegation was dismissed as a matter of misconduct. Ms Evans was still however concerned that the claimant chose not to notify the respondent of his 2016 trading until 18 October 2017.

2.19.3. Allegation 3: The claimant was a senior executive with an obligation to follow various policies and procedures and his actions were subject to both internal and external scrutiny and security. Owing to the claimant's actions the respondent was required to make a formal notification to FCA and he had already been written up in an article in the Evening Standard. This allegation was therefore upheld.

2.19.4. Allegation 4: As a senior executive he was responsible to ensure a proper approach to matters such as share trading from both the regulatory and reputational perspective in a situation where, because of his status, he must set the tone. This allegation was therefore upheld.

2.19.5. Allegation 5: trust and confidence had been destroyed or seriously damaged, the claimant having signed to acknowledge an understanding of the applicable policies and procedures for which he was responsible and his conduct fell significantly below the standards of a senior executive, taking into account that he had accepted the accuracy of the notes of 2 February 2017 interview (and if he thought the notes were inaccurate he ought not have signed them). These matters called into question his judgement and integrity which LE, amicable towards the claimant and sympathetic as I have found above, considered meant that she could no longer trust his judgement and integrity.

2.20. LE found that the claimant's conduct amounted to gross misconduct and that by it he had destroyed the relationship of trust and confidence between himself and the respondent. She had been appointed by the board to conduct the disciplinary hearing and was authorised by the board to sanction the claimant as she felt appropriate. LE was a board member and of sufficient seniority to be an appropriate disciplinary officer. In reaching a decision she considered not only the evidence presented by DR in her report, and the claimant's defence, but also his mitigating circumstances, not least that he was a highly valuable and a valued asset to the respondent. Whilst she may have taken some comfort in knowing that a decision to dismiss the claimant would be approved by the board I find that it was nevertheless an independent decision reached conscientiously and diligently for the reasons I find above. The board had sought to avoid the need for disciplinary proceedings not least in the hope of avoiding acrimony, cost and potential litigation; upon the claimant rejecting the proposed severance deal the board was content to let the disciplinary proceedings run their course again in the hope and

expectation that matters would be dealt with properly so as to avoid the risk of litigation; having heard evidence from JK and David Moorhouse (DM), both directors, in addition to LE, I found no evidence to support the claimant's submission that the board willed the claimant's dismissal come what may; it did not.

2.21. By letter dated 8 December 2018 the claimant appealed against LE's decision (354 – 358). He appealed on the basis that:

2.21.1. The decision to dismiss him was predetermined, believing that LE "unfortunately had to go along with [the company's] song and whatever Mr Kidwell and Mr Moorhouse wanted" (the claimant's oral evidence at the hearing);

2.21.2. He queried the respondent's integrity and transparency in respect of how historic comparators were dealt with (by which he meant other employees who had been accused of misconduct albeit none was in respect of share trading, save for JK who was only accused of misconduct by the claimant);

2.21.3. There was no evidence of any actual disrepute to the company other than that it was obliged to make a report to FCA;

2.21.4. He did not know that permission was required and he felt the policy was inadequate;

2.21.5. He considered that the relationship between himself and the company was still in order taking into account all relevant factors such that there should have been consideration of alternatives to dismissal. He raised various allegations of corrupt practices by colleagues that went unpunished, such as expenses' claims being misused, including to pay for prostitutes (about which I heard evidence only of the claimant's allegations and the respondent's refutation of the relevance of those allegations; I am unable to make findings of fact as to whether employees of the respondent and/or the Group did engage in the corrupt practices alleged).

2.22. DM conducted the appeal hearing on 8 January 2018 and notes of that hearing appear at pages 406 – 419. DM's disciplinary appeal outcome is at pages 397 – 403 and his rationale for that outcome is at pages 390 – 395; his grievance outcome is at pages 404 – 405. He reviewed LE's decision to dismiss the claimant to ascertain whether it was reasonable; he found that it was a reasonable decision. His rationale is a truthful account of his analysis and conclusion. His conclusion was however in part coloured by the inevitable involvement of the FCA and he was aware at the time he made his decision of correspondence that the respondent had received from FCA including a chronology and explanation of the claimant's conduct of its investigation (439 – 441). As previously found he had shared the view that it would have been in all parties' interests for there to be a parting of the ways so as to avoid disciplinary proceedings. I find as a fact that notwithstanding these matters, and not because of them or unduly

influenced by them, he genuinely believed LE's decision to dismiss the claimant was a reasonable one. Prior to making his decision he had thought that the disrepute allegation may not have been made out however, unbeknownst to the claimant, he spoke again to LE and she told him of shareholder complaints about the situation and the claimant. He did not put to the claimant his knowledge of the shareholder complaints or that his view was to any extent affected by the FCA correspondence. Regardless of the evolution of his conclusion regarding the disrepute allegation, DM considered that the decision to dismiss the claimant was reasonable, that the grounds of appeal failed and that the dismissal should be upheld. He also rejected the claimant's appeal against his grievance outcome. DM acted conscientiously in reaching his conclusion.

3. **The Law**

3.1. Section 94 Employment Rights Act 1996 (ERA) states that an employee has the right not to be unfairly dismissed, while s.98 ERA sets out what is meant by fairness in this context in general. Section 98(2) ERA lists the potentially fair reasons for an employee's dismissal, and these reasons include reasons related to the conduct of the employee (s.98(2)(b) ERA). Section 98(4) provides that once an employer has fulfilled the requirement to show that the dismissal was for a potentially fair reason the Tribunal must determine whether in all the circumstances the employer acted reasonably in treating that reason as sufficient reason for dismissal (determined in accordance with equity and the substantial merits of the case).

3.2. Case law has provided guidance but is not a substitute for the statutory provisions which are to be applied. Case law provides that the essential terms of enquiry for the Employment Tribunal are whether, in all the circumstances, the employer carried out a reasonable investigation and, at the time of dismissal, genuinely believed on reasonable grounds that the employee was guilty of misconduct. If satisfied of the employer's fair conduct of the dismissal in those respects, the Employment Tribunal then has to decide whether the dismissal of the employee was a reasonable response to the misconduct. The Tribunal must determine whether, in all of the circumstances, the decision to dismiss fell within the band of reasonable responses of a reasonable employer; if it falls within the band the dismissal is fair but if it does not then the dismissal is unfair.

3.3. Questions of procedural fairness and reasonableness of the sanction (dismissal) are to be determined by reference to the range of reasonable responses test also (**Sainsbury's Supermarkets Ltd v Hitt [2002] EWCA Civ 1588** and **Iceland Frozen Foods Ltd v Jones [1983] ICR 17**).

3.4. The Tribunal must not substitute its judgment for that of the employer, finding in effect what it would have done, what its preferred sanction would have been if it, the Tribunal, had been the employer; that is not a consideration. The test is one of objectively assessed reasonableness. **In *Secretary of State for Justice v Lown*** [2016] IRLR 22 , amongst many others, it was emphasised how a tribunal can err in law by adopting a "substitution mindset"; the point was made in **Lown** that the band of

reasonable responses is not limited to that which a reasonable employer might have done. The question was whether what this employer did fell within the range of reasonable responses. Tribunals must asses the band of reasonable responses open to an employer, and decide whether a respondent's actions fell inside or outside that band, but they must not attempt to lay down what they consider to be the only permissible standard of a reasonable employer.

3.5. Under the **Polkey** principle it may be appropriate to reduce an award by applying a percentage reduction to the Compensatory Award to reflect the risk facing a claimant of being fairly dismissed or to limit the period of any award of losses to reflect this risk, estimating how long a claimant would have been employed had he not been unfairly dismissed, in circumstances where the respondent would or might have dismissed the claimant. I must consider all relevant evidence, and in assessing compensation I appreciate that there is bound to be a degree of uncertainty and speculation and should not be put off the exercise because of its speculative nature.

3.6. Where a Tribunal finds that a complainant's conduct before dismissal was such that it would be just and equitable to reduce a Basic Award it may do so (s.122 ERA). Where a Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce any compensatory award by such amount as it considers just and equitable having regard to that finding (s.123 ERA). In doing so a Tribunal must address four questions (**Steen v ASP Packaging Ltd [2014] ICR 56 EAT**):

3.6.1. What was the conduct giving rise to the possible reduction?

3.6.2. Was that conduct blameworthy?

3.6.3. Did the blameworthy conduct cause or contribute to the dismissal?

3.6.4. To what extent should the award be reduced?

3.7. When a claimant argues that a respondent's disciplinary decisions were inconsistent and that this gives rise to unfairness, it is important that the dismissing and/or appeals officers who are accused of being inconsistent are actually aware of the comparator cases. It is also essential that the comparators relied upon are in comparable situations to the claimant. Because of the need for respective facts to be truly comparable, arguments of inconsistency are difficult to maintain. That said, inconsistency of treatment in truly comparable situations may give rise to a finding of unreasonableness and unfairness on the part of the respondent, such as to render the decision to dismiss unfair.

3.8. The parties' additional submissions on the law:

3.8.1. The respondent:

3.8.1.1. Employees are not entitled to pick at the disciplinary process and point to minor procedural flaws but instead must instead must take a broad brush approach to questions of fairness, the employer only having to show

that the procedure adopted fell within the band of reasonable responses open to the employer (**Sainsbury's Supermarket v Hitt [2003] IRLR 23** and **Shrestha v Genesis Housing Association Limited [2015] IRLR 399**);

3.8.1.2. The Employment Tribunal must consider the entirety of any procedure adopted including any appeal stage (**OCS v Taylor [2006] IRLR 613**);

3.8.1.3. There is very limited scope for employees to contend a dismissal was unfair because other employers were treated more leniently, such arguments only succeeding where the cases said to be comparable are "truly parallel" or are in circumstances where the employer has tolerated the conduct in the past to such an extent that the employee has reasonably come to the conclusion that the conduct will be overlooked (**Hadjioannou v Coral Casinos Limited [1981] IRLR 352**);

3.8.1.4. A finding of misconduct may not be strictly necessary in that the law recognises that an appearance of impropriety may be sufficient depending on one's profession or role where such appearance may cause a breakdown in trust and confidence (**Leach v The Office of Communications [2012] IRLR 839**).

3.8.2. The claimant:

3.8.2.1. The respondent must approach the issues for investigation with an open mind before any conclusions are drawn (**Weddel & Co Ltd v Tepper [1980] IRLR 96**);

3.8.2.2. Such an open-minded approach is necessary and applies to both whether there has been misconduct and what to do about it (**Whitbread PLC (t/a Whitbread Medway Inns) v Hall [2001] IRLR 275 CA**);

3.8.2.3. Suspension is not a neutral act (**Crawford & another v Suffolk Mental Health Partnership NHS Trust [2012] IRLR 402**).

3.8.2.4. It would not ordinarily be considered reasonable to dismiss an employee for matters falling outside the disciplinary charges facing the employee (**Strouthos v London Underground Limited [2004] IRLR 636 CA**);

3.8.2.5. Allegations of dishonesty must be squarely put and not merely alluded to (**Hotson v Wisbech Conservative Club [1984] IRLR 422**);

3.8.2.6. In circumstances where further investigations or conversations are held by the dismissing or appeals

officer without the claimant being aware, it would be unfair for an employee to be kept in the dark about the reasons for that investigation (**Chabra v West London Mental Health NHS Trust [2014] ICR 194**);

3.8.2.7. There is an obligation on an employer to consider exculpatory information and matters (**A v B [2003] IRLR 405 EAT**);

3.8.2.8. An allegation of a breach of the implied term of trust and confidence is not to be used as a shortcut to essential procedural requirements and the usual considerations in respect of dismissals for reasons related to conduct (**Leach v Ofcom [2012] IRLR 839**);

3.8.2.9. "The Tribunal is entitled to (and must) make its own factual findings and is not bound by those found by the employer (**Software 2000 Limited v Andrews [2007] ICR 825**)". The approach to be adopted is set out in **Software 2000 Limited v Andrews** at paragraph 54.

3.8.2.10. It is not inevitable that an employee will be dismissed for gross misconduct (**Brito-Babapulle v Ealing Hospital NHS Trust UKEAT/0358/12/BA**).

4. **Application of law to facts**:

4.1. The claimant knew or ought reasonably to have known the rules that applied to him regarding share trading by no later than the end of July 2016 following receipt of guidance on 22 July 2016. He knew, ought reasonably to have known, and in any event lead and allowed the respondent to believe that he knew, the applicable procedures and obligations in respect of share trading.

4.2. In November 2016 the claimant indicated to the respondent that he was aware of the applicable rules, understood them and was acting in compliance with them; the respondent was entitled to rely upon the claimant's signed assurance to that effect. I conclude that at very least the claimant knew that there was a protocol and procedure to follow that amounted to an in-house rule which was enhanced by legal regulations which bound him and affected how he went about share transfers; he may not have known by heart the effective wording but he knew there were requirements and where he could check them; he chose not to comply with the code/policy/MARs despite this knowledge, he either disregarded the fact of the rules or, having checked their effect he carried on regardless, although I am unable to say which approach he took.

4.3. The respondent trusted and valued the claimant and was prepared at all times until the FCA advised it of the August and November trades to accept at face value what the claimant said, either by way of written or oral assurance.

4.4. In January 2017 the claimant made partial disclosure of share trading to the respondent and reassured the respondent on questioning that any earlier sale of shares predated MARs despite the recency of the events and the significance in each case of the required expenditure including expenditure specifically related to his son's significant birthday and Christmas 2016. It was reasonable for the respondent to conclude that the claimant had not forgotten the trades but that he chose not to disclose them in detail, especially as to their respective dates; to do so would have triggered an enquiry by the respondent as to procedures followed by the claimant once it was aware that they post-dated MARs.

4.5. The claimant only told the respondent fully what he had done after FCA indicated that it was going to do so regardless of his reticence. Prior to that indication from FCA the claimant had been noncommittal and defensive about the suggestion that he ought to make a full disclosure to the respondent. The respondent became aware of this before the conclusion of the disciplinary proceedings. It was reasonable for the respondent to conclude that the claimant was wilfully withholding critical information from it; he was.

4.6. The respondent reasonably, and in order to comply with the law, needed to know about the claimant's share trading. The claimant knew this. The claimant knew its significance no later than the time of the FCA investigation and he knew that what he had done, whether deliberately or unwittingly, negligently or otherwise was not only of interest to the respondent but of considerable and significant importance. The claimant knew or ought reasonably to have known his obligations and responsibilities with regard to share trading in July 2016 and no later than the time of the trades themselves; he was so aware in February 2017 when interviewed by the respondent in respect of the January trade. At all material times the respondent had grounds for its belief and understanding that the claimant had this knowledge.

4.7. The claimant was aware of the risks to the respondent of his unauthorised trading in shares and the risks to his position; this was emphasised to him during the FCA investigation; the claimant withheld this critical information from the respondent until he had no option but to disclose it; the respondent was by then going to hear it in any event from FCA.

4.8. The claimant discovered all the above information set out in paragraphs 4.1 – 4.7 during the course of its investigation by DR and by LE during the course of the disciplinary hearing and enquiries made by DM before his appeal decision. The respondent's investigation was a reasonable one, not least because it was effective in ascertaining what had happened but also in that it involved the claimant who informed the investigating officer of all matters he thought were relevant.

4.9. LE, the disciplining officer, was independently minded, fair and reasonable in reaching her conclusions. She was aware of her fellow board members' views but there is no evidence that this influenced her decision. She is no longer employed by the respondent and appeared to give her evidence

freely and without pressure, coercion or undue influence. Her decision was not predetermined. The board had been prepared to give the claimant the benefit of the doubt. JK's and DM's view had been that a clean break would have been better than disciplinary proceedings to avoid publicity, acrimony and potentially litigation but they did not prejudge the outcome or instruct LE as to how she ought to conclude. LE was at all times well-disposed to the claimant; there is no evidence of bias or that her decision was prejudged or perverse. She heard him out. She considered all relevant factors including exculpatory matters and issues of mitigation. Her decision was one she could reasonably reach. She acted fairly and reasonably in finding the claimant's conduct to be sufficient reason to dismiss him.

4.10. DM reviewed LE's decision and found as I have that it was fair and reasonable. There are factors that concern me regarding DM's decision in that he took into account extraneous matters that were not put to the claimant. That said I did not consider he would have decided otherwise, in the light of his satisfaction with LE's rationale and outcome. No dismissing officer approaches an appeal in a complete vacuum; obviously he/she will be aware at very least that someone, often a senior colleague, has considered dismissal appropriate. Even if DM had not been aware of the FCA correspondence and had not been told by LE of shareholder complaints it was much more than likely that he would have upheld the decision to dismiss; I consider that risk to be at 100%. There is no evidence that DM predetermined the outcome, or had a closed mind and in fact he was seen to have changed his mind regarding one of the disciplinary allegations between his draft and final decision. I find that his decision was not predetermined, biased or perverse. He heard the claimant out and he too considered matters of exculpation and mitigation and weighed them in the balance. He too considered his options. DM acted fairly and reasonably in upholding LE's decision.

4.11. *Did the respondent have a reasonable belief that the claimant had committed the acts charged?*

4.11.1. That the claimant's failure to disclose the August and November trades amounted to a lie by deliberate omission showing a lack of honesty and integrity: the respondent had a reasonable belief to this effect. The claimant's action may have been inadvertent but LE's finding as she did was not unreasonable. I find that the claimant did deliberately conceal the August and November trades from the respondent in February 2017 and until such time as FCA was about to reveal them; he disclosed them only because of that, despite his knowledge of the significance of making earlier and full disclosure. In all the circumstances the claimant came across as being guarded and defensive. The only information that he gave to the respondent on 2 February 2017 about the earlier share trading suggests that they predated MAR (including confirmation that he had already paid CGT) whereas in fact he had very good reason to recall that expenditure was needed for an 18th birthday and for Christmas which was his stated motivation for the sales and both of those events tended to

show that the share trading post-dated MAR. It was reasonable for the respondent to conclude that the claimant was not telling the truth. That belief was genuinely held by Miss Evans on the basis of all that she heard and read.

4.11.2. *That the claimant's failure to follow policy and procedures in respect of share trading brought or could have brought the respondent into disrepute:* the respondent had a reasonable belief to this effect. Prior to dismissal the January trade had been adversely criticised in the London Evening Standard and that was before the previous trading became known publicly. All three of the claimant's trades were reported to the regulatory body, FCA. There was a risk of disrepute in the eyes of the public, shareholders and the regulator; the respect and opinion of each was valued by the respondent. There was a foreseeable risk of the earlier trades (August and November) attracting press interest and certainly of the FCA enquiry attracting that attention; this was not least on the back of the reports about the January trade which the respondent had initially accepted was inadvertent. Clearly a series of trading transactions in breach of the rules was more important and significant than a one-off trade. The respondent did not have to be satisfied that it had suffered financially to conclude that the actions of the claimant had the potential to cause disrepute. The fact of the involvement of the regulator in itself caused disrepute in circumstances where FCA has not to date absolved the claimant, the respondent, and the Group of blame (which differentiates it from the case of JK's 2004 trades, made with prior notification, approval, timely sale and reporting).

4.11.3. *That the claimant's failure to seek and obtain authorisation for share trades amounted to misconduct in circumstances where the claimant was alleged to have been fully aware of, or should have been fully aware of, the share dealing code:* The respondent reasonably held this belief. The respondent made known to the claimant its own policies and procedures; he was in a position of responsibility not only to follow those policies but also to ensure that those reporting to him followed them; he had acknowledged receipt of them and an understanding of them. He received a memorandum regarding MARs and he signed for that too. The respondent trusted and believed the claimant; it had reason to believe that he was a successful managing director and had no reason to believe that he would sign an acknowledgement and confirmation in circumstances where he meant neither. Against that background he neither sought nor obtained consent for certain trades and he failed to disclose them despite this until he had no other option. In fact, he gave an explicit indication to the respondent that he had not traded in shares until after MARs came into effect. The respondent's belief was reasonable. I was not convinced by the claimant's evidence on this point and his

diversionary mantra that he was not concerned with bureaucracy because all he did was to make a lot of money for the respondent. I find that he was aware that he was subject to certain obligations concerning share trades, that if he did not know the minutiae of the requirements he knew where to find the guidance and rules and that he ought to have complied, that despite his commercial success he was not above the internal rules and MARs. He answered a question to the effect that an operative should be subject to general rules but because of his status and success he should not be so liable; this illustrated a disregard for procedure rather than ignorance of it.

4.11.4. *That the above resulted in a breakdown of trust and confidence in the claimant's judgement and capability with regard to conducting future business for the respondent:* it follows from the above that an employer's trust and confidence in such an employee in those circumstances could be affected; I find in this case that the respondent reasonably believed that there had been such a breakdown. The reasons are clearly set out by LE and DM in their decisions, rationale, and their witness statements. Bearing in mind the claimant's value and the high esteem in which he was held by the respondent this was not a finding that the respondent company welcomed or one that LE and DM sought.

4.12. *Did the respondent conduct a reasonable procedure encompassing a reasonable investigation?* The claimant complained that DR (the investigating officer) did not know about and understand his payment structure or much about shares and share transactions; he feels that this shows that she was unprepared for the investigation. Conversely, I consider that this could show that she was to an extent "a blank canvas" open initially to the claimant's explanation of all such matters and that it would appear from her report and the claimant's evidence she displayed an open mind during the course of the investigation. I did not hear evidence from DR; there was no evidence that she had been unduly influenced by any of the directors to come to a particular conclusion or to make the recommendations that she made. That said, she ascertained information that reasonably led LE and DM to their respective conclusions and to expose the facts as laid out above. Insofar as it was necessary for clarification or emphasis of any particular point LE and DM continued the investigation during the respective disciplinary and appeals hearings and the claimant was given every opportunity to provide information, answer the charge, defend himself and provide mitigating factors to DR, LE, and DM (save in respect of the extraneous matters known to DM which were not shared with the claimant but which did not ultimately alter his conclusion even though he took them into account in changing his view on at least one allegation).

4.13. *Was dismissal within the band of reasonable responses open to the respondent taking into account the respondent's treatment of employees that the claimant considered to be his comparators including himself thus giving the claimant a false sense of security that no action would be taken against him in respect of the August and November trades, specifically:*

4.13.1. *when his admission of the January trade was accepted by the respondent without penalty:* In February 2017 it appeared to the respondent that the claimant had voluntarily come forward with a full and frank disclosure and an explanation of a one-off simple error in not dealing properly with the January trade. The respondent trusted the claimant and took this at face value. That ought not to be viewed in isolation. He also stated categorically that he had not made any other trades since MARs; that too was accepted at face value. The fact that this was untrue affects the respondent's stated acceptance and failure to investigate or impose any sanction. It cannot be said that this gave the claimant a false sense of security; it ought to have alerted him to the risk facing him, and quite probably did from an early stage, because the January trade was just the last in a series of improper trades. In any event he cannot have been lulled into a false sense so as to act improperly in respect of trades predating the respondent's acceptance of the last trade. He cannot reasonably have expected backdated leniency either in circumstances where he deliberately and for a long time kept the earlier trades to himself; he did not assume clemency for the January trade but asked for it; he had no grounds for assuming that he had wiped the slate clean at that point when he had not made a full and frank disclosure. The February 2017 acceptance does not render the respondent's decision to dismiss outside the reasonable range' it was not unfair or unreasonable despite that.

4.13.2. *Mr Kidwell's trading in January 2004:* In 2004 JK had notified the respondent of his intended trade and obtained prior approval, all of which satisfied FSA on enquiry. JK was found to have acted properly. The claimant was found internally to have acted improperly and the FCA investigation has not concluded yet. Their situations are not comparable. This does not render the dismissal unfair or the respondent's actions unreasonable.

4.13.3. *employees claiming "expenses" in respect of alleged corruption, bribery, prostitution:* The claimant alleges that there were examples of corruption that went unpunished. I did not hear direct

evidence other than from the claimant and even so, there was little detail. In any event the allegations were not about share trading, the applicable codes, the involvement of the regulator or issues of full and frank disclosure to the respondent of share trading and matters of potential concern in respect of insider dealing which is illegal. These matters are not comparable to the claimant's situation. Nothing about these allegations can have actually given the claimant a false sense of security when he came to make and then not disclose his trades, which he maintains were innocent anyway. Whatever the respondent did in those incidences does not necessarily render the claimant's dismissal unfair or any of the respondent's actions unreasonable. I was unable to find any unfairness to the claimant or any unreasonable conduct by the respondent such that dismissal fell outside a reasonable range of responses to his conduct.

4.13.4. The claimant was a senior employee. He had acted in breach of very important rules. In consequence of this both he and the respondent came to the attention of the regulator which could have had, and may yet have, serious consequences for the company and further serious consequences for the claimant. Despite having given written and oral assurances in relation to his knowledge, compliance with rules and the dates of trades the respondent was misled by the claimant. The claimant did not accept responsibility either, but relied on his alleged incompetence and being too busy making money to concern himself with legal and company requirements. In those circumstances dismissal was within the range of reasonable responses of a reasonable employer. This would be so whether the claimant acted deliberately in lying to the respondent or negligently, both as regards the trades and his actions thereafter, exacerbated by his obstructive and defensive approach to the enquiry and apparently reluctant eventual disclosure of essential information to the respondent.

4.14. *Was the decision to dismiss the claimant unfair because his admitted conduct did not justify dismissal and insufficient steps were taken to explain the following matters to the claimant?*

4.14.1. The MARs and its impact on the claimant: For all the reasons previously stated the claimant should have been in no doubt as to the effect of MARs, and he told the respondent that he was. The respondent was entitled to rely on his assurances. In these and all the circumstances of the case dismissal was a sanction open to the respondent as it fell within the range of reasonable responses of a reasonable employer.

4.14.2. the respondent was in a closed period for share trading: as 4.14.1.

4.14.3. that the claimant was deemed to have inside information and therefore must not trade in shares at the time that he did: as 4.14.1.

4.15. Albeit this hearing was confined to liability I had heard evidence and have made findings that would be relevant to questions of deductions from Awards had the claimant been unfairly dismissed. Was the claimant at such risk of being fairly dismissed that any compensatory award ought to be reduced not least for failing to disclose the August and November trades after 31 May 2017 meeting with FCA when the FCA had "invited him" to do so? The only unfairness that may have arisen was at the appeal stage when there were matters that DM took into account that he did not put to the claimant. In all circumstances I do not consider that this rendered the dismissal unfair. Even if the dismissal was unfair because of a flaw in the appeal procedure I consider, subject to further submissions that would have followed on remedy, based on what was known to the respondent and the only information that the claimant has yet put forward that would have addressed those points, that dismissal was 100% likely. Again, subject to submissions, I may have assessed that he was at that level of risk. If I had made a finding of unfair dismissal I would have reduced the claimant's compensatory award by up to 100% to reflect the risk and those circumstances. That might lead to an argument as to whether, with such a finding, the dismissal was in fact fair according to s.98 ERA; notwithstanding DM's error; that is what I find.

4.16. Would it be just and equitable to reduce or further reduce any award to the claimant to reflect his contribution in accordance with sections 122 (2) and 123 (6) Employment Rights Act 1996? The claimant's conduct gave rise to his dismissal and his approach to the investigation by the respondent, coupled with his reticence with the respondent during the FCA investigation, caused or contributed to the dismissal to such an extent that it would have been just and equitable to make substantial reductions in any award if the claimant had been unfairly dismissed. He breached the applicable code, policy and MARs in circumstances where he knew or ought reasonably to have known his obligations; he misled the respondent in February 2017 about trades where he ought to have followed procedures and then failed to disabuse the respondent of its belief in him until he had no option when he had had ample opportunity to come clean voluntarily and in a timely manner (not least during the training in March 2017). This amounts to misconduct. Exacerbating that misconduct, he said he had signed essentially important acknowledgments, receipts and confirmations without having read the documents and he refused to accept responsibility or to show insight and contrition (other than for mistake); this destroyed the required inter-party trust and confidence. If there was any unfairness to the claimant and an award was to be made I might well have reduced the Basic and Compensatory Awards substantially and perhaps to nil, subject to

submissions (which would again have called into question whether the decision, though not perfect, satisfied the provisions of s.98 ERA).

Employment Judge T.V. Ryan

Date: 28.02.19

RESERVED JUDGMENT AND REASONS

SENT TO THE PARTIES ON

04 March 2019

FOR THE TRIBUNAL OFFICE

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