EMPLOYMENT TRIBUNALS

Claimant: **Mr K Y Choo**

Respondent: **Citigroup Global Markets Limited**

JUDGMENT

The Claimant's application dated **12 January 2021** for reconsideration of the Judgment sent to the parties on **16 December 2020** is refused.

REASONS

There is no reasonable prospect of the original decision being varied or revoked, for the following reasons (by reference to the paragraphs of the Claimant's application):

1. **Paras 1-7**: The Reconsideration application is correct to note that the Claimant's counsel did eventually argue that the Respondent had waived privilege in relation to the legal advice, as a result of the references to the legal advice by Mr Hewson in the course of his oral evidence. Mr Hewson gave evidence that legal advice was taken on 3 September 2020. Notwithstanding this evidence, it was not suggested on the Claimant's behalf that the result of this evidence was to raise privilege at any point before evidence concluded on 7 September 2020.

2. There was then a gap until 14 October 2020 when the Final Hearing resumed for closing submissions. During that gap no point appeared to be taken by or on behalf of the Claimant that the legal advice privilege had been waived by Mr Hewson. There was no reference to waiver of privilege in the Claimant's lengthy written closing submissions. The point was taken for the first time during oral closing submissions. Having checked the Tribunal's notes of the oral closing submissions, Mr Singh argued that privilege had been waived. Mr Devonshire QC for the Respondent interjected to say that this was the first time that the point had been raised. A mere reference to legal advice did not waive privilege in relation to the

contents of that legal advice. Mr Singh replied that the Tribunal should draw an adverse inference against Mr Hewson from the Respondent's failure to disclose that advice. He did not ask for the advice itself to be disclosed.

3. Closing submissions ended on 15 October 2020. There was then a gap of almost two months before the Reserved Judgment and Written Reasons was sent to the parties. During that period, there was no application by or on behalf of the Claimant for the legal advice to be disclosed. There has never been any reference to the case now relied upon by the Claimant, that of *PCP Capital Partners LLP v Barclays Bank Plc* [2020] EWHC 1393. This is a first instance decision of Mr Justice Waksman given on 1 June 2020. It was therefore a decision which was available to the Claimant and his Counsel before both the evidence and the conclusion of the submissions.

4. The case of *PCP Capital Partners* does not provide any sufficient basis for considering that there is a reasonable prospect that the Tribunal decision should be varied or revoked:

    a. It is a decision on its particular facts, which did not establish any new legal principle;

    b. It concerned an application for disclosure of legal advice on the basis of waiver of privilege, rather than (as in the present case) an argument that an adverse inference should be drawn from a failure to disclose legal advice (which the Claimant had never asked to be disclosed);

    c. In circumstances where the Claimant had never requested disclosure of the legal advice on the basis of waiver of privilege, and therefore no decision had been taken to refuse such a request; and in circumstances where there was no evidence that Mr Hewson was responsible for deciding whether or not to disclose legal advice, there is no arguable basis whatsoever for drawing an adverse inference against Mr Hewson in these circumstances.

5. **Paras 8-10** appear to be a challenge to the conclusion at paragraph 139 of the Reasons that Mr Hewson genuinely believed the Claimant was guilty of spoofing.

    a. The Claimant appears to be arguing that this was a perverse conclusion in the light of the evidence before the Tribunal;

    b. For the reasons given at paragraphs 139-141 of the Reasons, the Tribunal's conclusion is one that was open to it on the evidence.

6. **Paras 11-12** appear to be a challenge to the finding of contributory fault, in that the reconsideration application cross refers at this point to paragraphs 183 and 186 of the Reasons. The Tribunal adopted the correct legal principles (Reasons at paras 179 to 180), and the conclusion as one that was open to it for the Reasons given at paragraphs 182 to 190. In any event,

it was not strictly necessary to make findings in relation to contributory fault in circumstances where there was no finding of unfair dismissal.

7. **Para 13**: In the course of the evidence, there was no detailed comparison of the Claimant's trading with the particular circumstances in PW's case referred to in paragraph 13 of the Claimant's application. It would not have been appropriate to make such a comparison when considering the *Burchill* test, or in considering contributory fault, because an assessment of a pattern of behaviour in each case turns on its own facts and context.

8. **Paras 14-17**: These paragraphs appears to be a challenge to paragraph 172d and to paragraph 175 of the Reasons. This is part of the analysis as to what the outcome of the *Polkey* analysis would have been, if the Tribunal had found that the dismissal was procedurally unfair. The Claimant has not identified any error of law in the analysis and the conclusion was open to the Tribunal for the Reasons given in this section of the Reasons. In any event, a *Polkey* analysis does not need to be undertaken if the decision that the dismissal was a fair dismissal was one that was open to the Tribunal on the evidence.

9. **Paras 18-24**: These paragraphs appear to be an attempt to challenge the findings of fact at paragraphs 150 and 178 of the Reasons. These findings of fact were open to the Tribunal on the evidence adduced during the course of the hearing.

10. **Paras 25-28**: It was open to the Tribunal on the evidence at the Final Hearing to make the findings it did at paragraphs 183-184 of the Reasons about the opportunities to manipulate the market and the Claimant's motives for doing so. Again, given the limited evidence as to PW's trading patterns, it was not perverse to attach no significance to a comparison with PW's trading.

11. **Paras 29-40** appear to be challenging certain of the Tribunal's findings of fact, in order to challenge the conclusion, on the balance of probabilities, that the Claimant was guilty of market manipulation (as recorded in my Reasons at paragraphs 189-190). This conclusion was a conclusion that was open to the Tribunal on the evidence available. These paragraphs of the Claimant's application are an attempt to re-argue this factual issue at much greater length than was done in the written closing submissions provided by his Counsel (covering less than a single page of his 34 pages of written submissions).

12. **Paras 41-48** are a challenge to the propriety of the appeal process. These paragraphs do not disclose any error of law in relation to how the Tribunal analysed the fairness of the appeal process.

Employment Judge Gardiner
Date: 26 February 2021