EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Rupert Parry	**v**	**EDF Trading Limited**

Heard at: London Central

On: 15th May 2023 (by CVP and in Chambers)
16th May 2023 (in Chambers)
17th-19th, 22nd-25th May 2023 (in person)
26th May, 19th-20th July 2023 (in Chambers)

Before: Employment Judge Gidney,
Mr David Scoffield
Mr Terry Cook

Appearances
For the Claimant: Mr Nigel Porter, Counsel, and Bindhams LLP
For the Respondents: Mr Andrew Smith, Counsel, and Clifford Chance LLP

RESERVED JUDGMENT

The Judgment

The Judgment of the Tribunal is that:

1. The claim of automatic unfair dismissal for making a public interest disclosure pursuant to s103A Employment Rights Act 1996 is dismissed;

2. The claim of ordinary unfair dismissal pursuant to s98(4) of the Employment Rights Act 1996 is upheld.

3. The claim of detriments for making protected disclosures pursuant to s47B Employment Rights Act 1996 is dismissed.

4. A Case Management Hearing for the Remedy Hearing will be listed.

REASONS

Background

5. The Claimant notified ACAS of dispute with the Respondent on the 6th of April 2022. ACAS issued the Claimant an Early Conciliation Certificate on the 17th May 2022 **[B1]**[1]. By a Claim Form and Particulars of Claim dated 16th of June 2022 **[B2-40]** the Claimant presented claims of unfair dismissal pursuant to section 98(4) of the **Employment Rights Act 1996** ('the Act'), automatic unfair dismissal for raising protected disclosures pursuant to section 103A of the Act and detriment for raising protected disclosures pursuant to section 47B of the Act.

6. The Claimant provided Further and Better Particulars of his Claim on 30th September 2022 **[B72-76]** and again on the 1st March 2023 **[B96-103]** with an Amended Claim **[B104-128]** and Amended Further Particulars **[B129-136]** both on the 4th of April 2023 before a final Amended Further Particulars of Claim on 10th May 2023 **[B164-171]**. The Claimant's Claim thus progressed through six evolutions prior to the Final Hearing. During the progress of the Final Hearing the Claimant withdrew 3 alleged disclosures upon which he had relied, which were dismissed on withdrawal (refer to paragraphs 5.6, 5.8 and 5.11 above). In addition, during the course of the Final Hearing, the Claimant withdrew 6 alleged acts of detriment upon which he had relied, which were also dismissed on withdrawal (refer to paragraphs 7.1, 7.2, 7.4, 7.5, 7.7, 7.11 and 7.12 above). We felt that these various changes of position on the Claimant's part did degrade the weight that we felt we could attribute to the Claimant's evidence on remaining issues, particularly those issue that were finely balanced.

7. The Case was case managed by Employment Judge Snelson on 30th August 2022 **[B69-71]** who commended the parties on their work and co-operation in preparing the case for trial and we wish repeat and endorse that praise and thank the parties for their work and cooperation that has continued through to the conclusion of this case. We were provided with detailed opening and closing submissions from both Counsel and an Agreed Cast List, Chronology, Trial Timetable and Pre-Reading List. The

[1] All letters and numbers in square brackets refer to section and page numbers within the Agreed Trial Bundle.

Tribunal is grateful for that work, including the preparation of a detailed agreed List of Issues **[B156-163]** which we have found very helpful.

The evidence

8. We were provided with an agreed trial bundle arranged in sections. Section A contained the contemporaneous documents **[A1-588]**. During the course of the hearing and by agreement additional documents were added to section A **[A589-671]**. Section B contained the pleadings and orders **[B1-171]**. Section C contained the inter-parties correspondence. Ultimately we were referred to only two documents from Section C, firstly a letter from Clifford Chance dated 24th March 2023 which set out the precise profit and loss figures of the Respondent during the first week of October 2021 **[C128-131]** and secondly a letter from Clifford Chance dated 23rd May 2023 **[C1250-1255]** which set out the steps taken by Respondent (ultimately unsuccessfully) to locate a message with the words '*are you the new head of checking marks?*' At the conclusion of the hearing the parties agreed with our proposal that those two documents be added to the back of Section A with the rest of Section C being disregarded.

9. In addition to the trial bundle we were provided with a witness statement bundle that contained the signed statements of the following witnesses: On behalf of the Claimant a statement from himself and his flatmate Charles Jones. Ultimately Mr Jones was not called, because the allegation of detrimental treatment by Vadim Arsenie (for which Mr Jones had been called to give evidence) was withdrawn. On behalf of Respondent we were provided with witness statements by the following witnesses: Alex Mouturat (Power Trader), Christophe Balleux (Senior Long Term Power Trader), John Gray (Head of Trading, Power), Vadim Arsenie (Originator), Marcello Romano (Chief Trading Officer Europe), Peter Bonner (Head of Compliance for Europe and Asia), Aleksandra Jakovska (HR Business Partner), Valentino Scavardone (Head of Origination and Disciplinary Hearing Manager) and Jean-Benoit Ritz (Chief Technology Officer and Appeal Hearing Manager).

10. Each of the witnesses (with the exception of Charles Jones) gave evidence from a witness statement and was subject to cross examination.

The Issues

11. This hearing was listed by Employment Judge Snelson to determine the issues of Liability, Polkey and Contributory Fault only. Over the course of the hearing a number of alleged public interest disclosures and a number of alleged detriments relied on by the Claimant were dismissed by the Tribunal upon withdrawal by the Claimant (refer to paragraphs 4 and 5 above). The List of Issues set out below are the Issues that remained for determination by the Tribunal following the withdrawal and dismissal of the above mentioned claims. Whilst the List of Issues provided to us by Counsel included additional information (for example a reply or comment said to have followed the making of an asserted disclosure) we have only set out the Issues to be determined by us and not the associated commentary in the List set out below:

The Disclosures

12. Over the period July to October 2021, did the Claimant make oral or written disclosures of information to Mr Romano, as set out below?

12.1 On a date in or around the week commencing 5 July 2021, telling Mr Romano that the Q1 vs Cal spread was not marked properly, and saying that "*our small short Q1 vs Cal position in our books looks pretty significantly overvalued…Christophe Balleux and Alex Mouturat are marking it*" and highlighting Mr Balleux and Mouturat's mismarking of other spreads including the Cal 22/23 spread, with specific comments regarding them defending and mismarking a loss making spread position against utility and corporate hedging - a speculative position on which the Claimant further commented to Mr Romano that Messers Balleux and Mouturat had done no analysis of, and had little understanding of.

12.2 On a date on or around 5 to 16 July 2021, saying to Mr Romano that the French Desk's1 curves still looked mismarked and highlighting a number of continuing spread marking irregularities, stating, in particular, that the Q1 vs Cal spread was "mismarked" by a specific number of euros, and continuing mismarking of 23/24 spread.

12.3 On 16 July 2021, stating in a Teams chat message to Mr Romano: "*Christophe didn't move the 23/24 but its up*" (Message sent 2021-07-16 04:24:04 PM UTC).

12.4 On a date on or around 12 to 19 July 2021, saying to Mr Romano that "*Christophe & Alex's marks for the quarters are still way off, they're*

consistently not right, and the mismark gets worse the higher the spread is going, you need to take a look, they are short".

12.5 On a date on or around 12 to 26 July 2021, telling Mr Romano of Mr Balleux's evasive and defiant reaction to Mr Romano's instructions to increase the Q1 vs Cal mark.

12.6 On a date on or around 16 to 27 August 2021, telling Mr Romano that the marking issue with Mr Balleux's and Mr Mouturat's Winter vs Cal were back again and raising this in a Teams chat on 23 August 2021 at circa 4pm by highlighting to Mr Romano a specific order of magnitude for the mismarking of winter French spreads and Messrs Balleux's and Mouturat's deliberate mismarking of the Cal 23 French location spreads and stating that *"you've got to show your losses though"* and subsequently informing Mr Romano (in follow up conversations in the mornings thereafter) that in the Claimant's view the French power desk's marks were being consistently and deliberately mis-marked *"way off the market*".

12.7 On a date "approximately in the following days" after the seventh alleged disclosure (in the paragraph immediately above), repeating concerns to Mr Romano regarding the mismarking of the French Desk and reiterating the potentially serious ramifications for EDFT and in relation to the EDF group.

12.8 On 25 August 2021, in Teams chats between the Claimant and Mr Romano, the Claimant stating "*Christophe chatted to me…. Wanted to know if we have a preference for how to make the quarters… it all looks very odd… as in they don't really add up to the cal*" and the Claimant then stating: "*yeh… summer looks ok… 12.25 just looks quite low for Q1 though… it doesn't look like we're marking conservatively given the position, put it that way*".

12.9 On a date on or around 15 to 20 September 2021, having seen the price testing results, discussing mismarking again with Mr Romano.

12.10 On a date shortly after 28 September 2021, saying to Mr Romano that Mr Balleux and Mr Mouturat had been idle in trying to cover the short position and continued to "*pull the wool over [his] eyes*" on the level of the position transfers from their books.

12.11 On a date on or around 4 to 7 October 2021, in response to Mr Romano allegedly asking the Claimant to have a look at what other positions on their books they could transfer to Mr Balleux's and Mr Mouturat's books, saying that he was "*fed up with this" and that "it's a total farce*". Further, in response to Mr Romano allegedly asking the Claimant to step off the

trading floor and go into a meeting room with him, saying "*Why the hell are they both [Mr Balleux and Mr Mouturat] still on the trading floor, they've been mismarking the curves for months and not following instructions and now you want me to give them the rest of our positions. It's a total disaster. I told you this could happen*".

12.12 Did the Claimant make further written disclosures of information as set out in the letter sent on behalf of the Claimant on 28 January 2022 by the Claimant's solicitors submitting grounds of appeal? The Claimant relies upon the section of this letter headed "*1. Public interest disclosures and grievances made by our client*".

12.13 Did the Claimant make further written disclosures of information as set out in the letter sent on behalf of the Claimant on 10 February 2022 by the Claimant's solicitors expanding upon the Claimant's grounds of appeal? The Claimant relies upon the following sections of this letter: (a) page 2, subparagraph 4; (b) page 3, paragraph 6; and (c) beginning on page 14 (internal pagination), paragraphs 60-65, 66 and 67- 69.

13. In respect of the alleged disclosures of information identified above, did the Claimant, on each occasion he disclosed information, subjectively believe that the disclosure:

13.1. tended to show that a person had failed, or was likely to fail to comply with a legal obligation to which he was subject, as detailed in paragraph 9(a)-(c) of the Particulars of Claim; and

13.2 was made in the public interest?

13.3 If so, then the Respondent will not contest that there were reasonable (objective) grounds for such belief for the purposes of section 43B(1) ERA 1996.

<u>Automatically unfair dismissal on grounds of whistleblowing</u>

14. If the Claimant did make a protected disclosure(s), was the reason or principal reason for his dismissal that he had done so?

<u>'Ordinary' unfair dismissal</u>

15. What was the reason or principal reason for the Claimant's dismissal? Was it a reason related to his conduct?

16. If so, in the circumstances (including the size and administrative resources of the Respondent) did the Respondent act reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the Claimant? In particular:

    16.1. Did the Respondent genuinely believe that the Claimant had committed the conduct for which he was dismissed?
    16.2. Did the Respondent have reasonable grounds for its belief?
    16.3. Did the Respondent carry out as much investigation as was reasonable in all the circumstances of the case?
    16.4. Did the sanction of dismissal fall within the range of responses reasonably open to the Respondent?
    16.5. Did the Respondent carry out a fair and reasonable appeal process?

Whistleblowing detriment

17. If the Claimant did make a protected disclosure(s), was he subjected to any detriment(s) on the ground that he had done so, as set out below?

    17.1 On a date before 26 October 2021, Mr Mouturat employee of the Respondent, falsely alleging that the Claimant had disclosed to third parties confidential precise figures of the loss suffered by the French Long-Term Power Desk.
    17.2 During an interview on or about 25 November 2021, Mr Mouturat falsely asserting that the Claimant had disclosed, to third parties, confidential precise financial information as to the losses on the French Long-Term Power Desk.
    17.3 Ms Jakovska and/or Mr Scavardone deciding to dismiss the Claimant, and/or adopting a flawed procedure in reaching that decision as detailed in paragraph 32 of the Particulars of Claim.
    17.4 On or about 12 January 2022, Ms Jakovska and/or Mr Scavardone (or another worker of the Respondent) deciding to notify the FCA (about the Claimant's dismissal) and contending that the Claimant had breached the FCA Code of Conduct as detailed in paragraph 33 of the Particulars of Claim.
    17.5 During an interview (notes of which were provided in anonymised form to the Claimant) on or about 15 March 2022, Mr Mouturat falsely asserting that the Claimant had disclosed, to third parties, confidential precise financial information as to the losses on the French Long-Term Power Desk.

17.6 Mr Ritz deciding to uphold the Claimant's dismissal and to reject his appeal as detailed in paragraph 46 of the Particulars of Claim.

18. If the Claimant was subjected to any detriment(s) by another worker of the Respondent in the course of their employment, on the ground that the Claimant had made a protected disclosure:

18.1 Is the Respondent liable for such treatment pursuant to section 47B(1B) ERA?

18.2 Can the Respondent show that it took all reasonable steps to prevent the other worker: (a) from doing that thing; or (b) from doing anything of that description (section 47B(1D) ERA)?

19. Was the Claimant subjected to a series of similar unlawful acts or failures, and/or any act(s) extending over a period (section 48(3)(a) and/or 48(4) ERA)? **No** If so:

19.1 Which acts or failures formed part of the series, and when was the last such act or failure?

19.2 When was the last day of the period in respect of any act(s) extending over a period?

20. Taking into account the ACAS Early Conciliation provisions, which complaints, if any, were presented outside the time limit specified in section 48(3)(a) ERA?

21. In respect of any such complaint(s), was it reasonably practicable for it/them to have been presented within such period?

22. If it was not reasonably practicable to have done so, was such complaint(s) presented within such further period as the Tribunal considers reasonable?

Findings of Fact

23. We have not recited every fact in this case, or sought to resolve every dispute between the parties. We have limited our analysis to the facts that were relevant to the Issues that we were tasked to resolve. We made the following findings of fact on the basis of the material before us, taking into account contemporaneous documents, where they exist and the conduct of those concerned at the time. The Tribunal

resolved such conflicts of evidence as arose on the balance of probabilities, taking into account its assessment of the credibility of the witnesses and the consistency of their evidence with the surrounding facts.

24. EDF Trading Limited ('EDFT') is a subsidiary of Electricity de France SA, known as EDF or EDF Group. EDF Group is a French multinational electric utility company largely owned by the French state. EDFT describes itself as '*a wholesale energy market specialist*' that is '*global asset backed and operates from source to supply in wholesale power, natural gas, oil, LPG, environmental projects and LNG and coal*'. One of its principle activities is the speculation on the price of wholesale energy prices, most notably electricity and gas. EDFT's trading activity in Europe is split into desks including the French Power Trading Desk. One of its sub-desks is the French Long Term Power desk. Between September 2019 and June 2022 the Senior trader on the French Long Term Power Trading Desk ('the French Desk') was Christophe Balleux. Alex Mouturat was the trader on the French Desk. He reported to Mr Balleux.

25. Speculative trading in the energy market is essentially placing a bet or a series of bets on the price of energy contracts for the relative value of energy contracts at a certain point in the future. The French Desk placed long term bets on future energy prices. As the tenor of the products goes further out into the future, prices become less visible and there is generally less market activity, or frequency of trades. This is known as less liquid and less observable, in other words there is less price transparency or visible prices. There is a greater degree of risk in placing long term bets on future energy prices.

26. One of the responsibilities of the traders on each trading book was to mark the value of their trading position at the end of the day. 'Marking' is the reporting of the prices / value of the contracts at a specific time of day. These marks report the traders' profit and loss position for the day. All contracts (type, location and tenor) are then combined to form what is referred to as the curve / price curve. The French Desk would normally be responsible for marking the long term French Power contracts. These price curves are then used by Product Control to mark-to-market the daily value of all EDFT's books / positions. The longer less observable marks are easier to manipulate. As France and Germany are the main power markets in Europe, all of the other trading desks would use the marks of the French Desk to mark their own positions in turn.

27. We find as a fact that there is an element of professional judgement in where to mark a trade. Different traders can legitimately mark a trade in different places. Errors in marking can occur but these are generally swiftly corrected, normally on the same day. This means that providing information that a trade has been mismarked does not of itself tend to show that a person failed, or was likely to fail to comply with a legal obligation. Something more is needed. Consistent or frequent errors in marking, especially skewed errors where the distribution of Euros is skewed to one side to consistently undervalue the scale of a loss, would be suspicious and are more likely to be deliberate. Given that marking a trade's position involves judgment and skill and that there can be permissible differences in opinion between traders on the position, to qualify for protection a disclosure of information must go further than simply noting or recording a mismarked trade. It must also disclose a consistent or frequent mismark or in a some other way suggest that deliberate mismarking has occurred and/or may have serious consequences for EDFT. In answer to a question from the panel Mr Romano accepted that persistent mismarking would be a breach of a legal obligation. Mr Gray said in evidence that '*it was a complex marking scheme that we wanted to simplify. I did not believe there was deliberate mismarking, there is an element of judgment … if there was mismarking it was not deliberate*'.

28. By following a similar analysis we find that simply disclosing a mismark, or difference of opinion on a marked position, cannot be said to be in the public interest. It will not be in the public interest until a disclosure of a failure to comply with a legal obligation is made. Such a disclosure, would, in our opinion, be in the public interest. It is not simply an internal matter. Intentionally mismarked trades, particularly from a trader of the size and reputation of the EDFT's French Long Term Power desk, has the ability to affect the market. There can be no doubt that such a disclosure would be in the public interest.

29. Such trading in the UK is regulated by the Financial Conduct Authority (FCA). EDFT, it's senior managers and it's Traders, including the Claimant, are regulated by the FCA. Both parties accepted that the FCA's rules placed a legal obligation on the entities and individuals to which they applied. The importance of proper marking is not simply prudent commercial practice, but a requirement of the FCA regulatory regime. The relevant regulatory framework is as follows:

The Regulatory Framework

30. The FCA Individual Conduct Rules are made pursuant to statutory powers in the section 64A of the **Financial Services and Markets Act 2000**.The Claimant and the traders on the Respondent's French Power Desk were regulated by the FCA Conduct Rules, including the individual conduct rules COCON (Code of Conduct):

> *COCON 2.1.1 Rule 1: You must act with integrity.*
> *COCON 2.1.2 Rule 2: You must act with due skill, care, and diligence.*

31. The senior manager conduct COCON rules state:

> *COCON 2.2.1 Rule SC1: You must take reasonable steps to ensure that the business of the firm for which you are responsible is controlled effectively.*
>
> *COCON 2.2.2 Rule SC2: You must take reasonable steps to ensure that the business of the firm for which you are responsible complies with the relevant requirements and standards of the regulatory system.*
>
> *COCON 2.2.3 Rule SC3: You must take reasonable steps to ensure that any delegation of your responsibilities is to an appropriate person and that you oversee the discharge of the delegated responsibility effectively.*
>
> *COCON 2.2.4 Rule SC4: You must disclose appropriately any information of which the FCA or the PRA would reasonably expect notice.*

32. The general rules are amplified in COCON 4.1: Specific Guidance on Individual conduct rules, which state:

> *COCON 4.1.1 Rule 1: You must act with integrity. The following is a non-exhaustive list of examples of conduct that would be in breach of Rule 1.*
> *(1) Misleading or attempting to mislead by act or omission.*
> *(5) Mismarking the value of investments or trading positions.*
> *(12) Misleading others in the firm about the nature of the risks being accepted.*
> *(14) Failing to inform with without reasonable cause, the firm for whom the person works or its auditors or of the fact that their understanding of a material issue is incorrect despite being aware of their misunderstanding, including but not limited to, deliberately failing to rectify mismarked positions immediately.*
>
> *COCON 4.1.2 Rule 2: You must act with due skill, care, and diligence.*
>
> *COCON 4.1.3 The following is a non-exhaustive list of examples that would be in breach of Rule 2.*
> *(1) Failing to inform their firm or its auditors of material information in circumstances where the member was aware or ought to have been aware of such information and*

of the fact that they should provide it, including the following: mismarking trading positions.
(4) Undertaking transactions without a reasonable understanding of the risk exposure of the transaction to the firm, including trading on the firm's own account without a reasonable understanding of the liability, either potential or actual of the transaction.

COCON 4.1.4 Rule 2: Acting with due skill, etc as a manager.
It is important for a manager to understand the business for which they are responsible. A manager is unlikely to be an expert in all aspects of a complex financial services business. However, they should understand and inform themselves about the business sufficiently to understand the risks of its trading, credit or other business activities.

COCON 4.1.8 The following is a non-exhaustive list of examples of conduct by a manager that would be in breach of Rule 2.
(1) failing to take reasonable steps to ensure that the business of the firm for which the manager has responsibility is controlled, effectively complies with the relevant requirements and standards of the regulatory system applicable to that area of business and is conducted in such a way to ensure that any delegation of responsibilities is to an appropriate person and is overseen effectively.
(2) Failing to take reasonable steps to adequately inform themselves about the affairs of the business for which they are responsible including (a) permitting transactions without a sufficient understanding of the risks involved, (b) permitting expansion of the business without reasonably assessing the potential risks of that expansion, (c) inadequate monitoring of highly profitable transactions or business practises or unusual transactions or business practises, (d) accepting implausible or unsatisfactory explanations from subordinates without testing the veracity of those explanations and (e) failing to obtain independent expert opinion where appropriate.
(3) Failing to take reasonable steps to maintain an appropriate level of understanding about an issue or part of the business that the manager has delegated to an individual or individuals, (whether in house or outside contractors).

33. The Respondent's Code of Conduct **[A434-436]** imposes legal obligations on employers to comply with the FCA conduct rules:

'*Carry out your responsibilities with due care and diligence in accordance with the professional body or the Financial Conduct Authority applicable to your role whilst exercising your professional judgement at all times'*
'Not misrepresent or withhold information on the performance of products, systems for services'.
'Any breach of the Code of conduct for which EDF Trading becomes aware will be considered under the disciplinary possibility of policy and in serious cases could lead to dismissal'.

34. In addition to the regulatory rules, EDFT had a Code of Conduct which included the following unnumbered requirements (as set out at **[A98.C]**):

'accept your personal duty to uphold the reputation of EDFT and not take any action which could bring the company into disrepute;

not disclose or authorise to be disclosed, or use for personal gain or to benefit a third party, confidential information except with authorised permission'.

35. The Tribunal was provided with what was described as an extract from the Claimant's Contract of Employment **[A98.F]**. We were not provided with the original signed Contract in full. However neither side disputed that the extract included within the bundle was accurate and taken from the Claimant's contract. In the circumstances we find as a fact that the terms of the Claimant's Contract included the following terms as set out below:

> '*You undertake during and after the termination of your employment, not to copy, use or disclose to any persons, organisations or other body.... any confidential information concerning the business of the company or its affairs which comes to your knowledge during the course of and in connection with your employment or your holding office. Confidential information also includes any trade secrets or confidential information relating or belonging to the company or any of its group companies including, but not limited to, such information relating to customers, customer lists or requirements, price lists or price structuring, marketing or sales information … financial information and plans, designs, formula and product lines …or any information which you have been told is confidential, or which you might reasonably expect the Company would regard as confidential … .*
>
> *This clause shall not apply to information which issued or disclosed in the proper performance of your duties or with the consent of the Company, ordered to be disclosed by a Court of competent jurisdiction, or otherwise required to be disclosed by law, comes into the public domain (otherwise than due to default by you). Commercial Interests: During the continuance of your employment under this Agreement, you shall not without the prior written consent of the Company (b) engage in any activity which the Company reasonably considers may be or become harmful to the interests of the Company or any Group Company'*.

36. The Respondent has a Disciplinary Policy **[A500-507]** which contained the following unnumbered provisions:

> *'Dismissal will only occur where there are reasonable grounds for believing you are guilty of gross misconduct based on a thorough investigation and after a disciplinary hearing at which you have been able to put your case forward.*
>
> *Summary dismissal (ie dismissal without notice or payment in lieu of notice) may be necessary in cases of gross misconduct. For guidance only, the following non exhausted list contains example of these offences which will normally result in summary dismissal: (i) Unauthorised disclosure of confidential business matters.*
>
> *Employees will be given reasonable notification of any disciplinary hearing, specifying the complaints which are required to be answered. Together with any relevant evidence.*

No disciplinary sanction will be imposed until the employee has been informed in advance of the disciplinary allegations and has been given the opportunity to make representations at a disciplinary hearing.

Where is the witnesses or documents are relevant a statement and all copies of documents will be made available to employees in advance whenever possible.

The purpose of the investigation is for us to establish a fair and balanced view of the relevant facts and information relating to the disciplinary allegations against you before deciding whether to proceed with a disciplinary hearing. The amount of investigation required will depend on the nature of the allegations and will vary from case to case. It could involve, for example, holding investigatory meetings with and taking statements from you and any other individuals involved in the matter, and collecting and reviewing relevant documents or records as such, such as timesheets or expenses claims.

Investigation interviews are solely for the purpose of fact finding and no decision on disciplinary action will be taken until after a disciplinary hearing has been held. Following any investigation, if we consider there are grounds for disciplinary action, you will be required to attend a disciplinary hearing. You will receive a written communication setting out details of the conduct or other issues which is are being considered under this procedure and stating a time, date and location for the hearing to take place. A summary of relevant information gathered during the investigation and any relevant documents or statements which will be considered at the disciplinary hearing will be attached where appropriate.

During the hearing details of the allegations against you and of the evidence gathered will be provided to you and you will be given every opportunity to respond and ask questions.

If you are unhappy with the decision following a disciplinary hearing, including any decision to impose a disciplinary sanction, you can appeal against this decision in writing within seven days of being notified of the decision. We will consider your appeal through a formal appeal hearing and you will be given written notice of the date, time and place of the hearing. … if you raise any new matters in your appeal we may need to carry out further investigation. If any new information comes to light we will provide you with a summary, including, where appropriate, corpus of additional relevant documents and witness statements. You will have a reasonable opportunity consider to consider this information before the appeal hearing'.

37. The Respondent has a Reporting of Serious Concerns (Whistleblowing) Policy **[A542-548]** which contained the following relevant provisions:

'1. EDFT believes that speaking out and reporting serious concerns is essential for safety, legal and financial compliance, and ultimately for a successful business. This policy sets out the way in which you may raise any serious concerns that you have and how these concerns will be dealt with. It also give details of a legal protection available to individuals who raise serious concerns. The process of raising serious concerns in a confidential manner is often known as whistle blowing.

All EDFT employees and contractors are responsible for raising any serious concern they become aware of in accordance with this policy.

2.1 A reportable concern is a disclosure of information that the worker reasonably believes is in the public interest. This can be related to a number of matters including a criminal offence, a failure to comply with a legal / statutory obligation (like for example insider trading) and a damage to the health and safety of an individual.

2.2 If you have a serious concern to raise, there are several possible pathways that you can use, which are listed below. If you do not feel able to put your concern in writing, please raise it verbally.

2.3 There are several ways to raise any serious concern that you have.

2.3.1 Your line manager. If you have a serious concern, your first port of call should be your line manager.

2.3.2 HR or the whistle blowing champions. If you do not feel comfortable raising a serious concern with your manager, you should feel free to speak to or contact anyone in the HR team. If you do not consider this is a viable route. You can raise your concern with our Whistleblowing champions, Guido Santi, Chief Legal Officer, or Darren Woods, Global Head of Human Resources.

2.3.3 The DF Trading whistle blowing helpline. In situations where you prefer to place an anonymous report in confidence, you can use our whistle blowing helpline which is run by an independent organisation called EthicsPoint.

2.3.4 The FCA Whistleblowing line. In addition to the EDFT and EDF Group Whistleblowing processes any UK employee who thinks that an FCA regulated firm or individual is involved in wrongdoing may take an alternative approach and report the activity directly and in confidence to the FCA Whistleblowing team. Concerns can be raised with EDF trading and to the FCA simultaneously or consecutively.
However, a concern is raised if it is raised within a company of the EDFT Group it will be investigated by the relevant company where the concern is raised within EDFT. This investigation may be formal or informal, depending on the nature of the concern raised. We will indicate as soon as possible how we propose to deal with the situation and will provide you as much feedback as possible.

3. EDFT's Global Whistleblowing champions are Guido Santi, Chief Legal Officer, Darren Woods, Global Head of Human Resources.
These individuals are responsible for confidential investigation and reporting of all whistleblowing concerns. They are also responsible for protecting individuals who raise alerts. They will do this by ensuring your name is kept confidential and minimising the number of people who know about any investigation. This will be restricted on a need to know basis'.

38. On 23rd April 2014 Rupert Parry ('the Claimant') commenced employment with EDFT in its Treasury Department. In January 2016 he moved to Front Office Risk. In September 2018 the Claimant was hired by the Head of Trading, Mr Romano, to the role of Junior Trader with EDFT. During 2021 he was promoted to the role of Trader.

In that role he had responsibility for pricing and management of structured long term power and gas deals. In conjunction with Mr Romano, the Claimant also marked the long term power and gas curves. On 10th January 2022 the Claimant was summarily dismissed for the gross misconduct offence of the unauthorised disclosure of confidential business matters, after 7 years continuous service. He was born on 10th November 1990 and was 31 years old at his effective date of termination. The Claimant notified ACAS of a dispute with his employer on 6th April 2022 and was granted his ACAS Early Conciliation certificate on 17th May 2022. Within 1 month, on 16th June 2022 the Claimant presented his Claim Form. Any acts of detriment occurring before 3 months less one day of the ACAS notification, i.e. 7th January 2022, would be out of time unless we extend the time limit for such further period as we consider reasonable, if we are satisfied that it was not reasonably practicable for the detriment complaints to have been presented before the end of that period of three months, pursuant to s111(2)(b) of the Act.

39. It is the Claimant's case that between July 2021 and October 2021 he made a number of disclosures to EDFT. He asserts that these disclosures qualified for the protection offered by section 43B **ERA**. In paragraph 19 of his statement the Claimant categorised his disclosures and/or asserted that their overall effect was to make the following points:

    39.1 That the traders on the French Desk, Mr Balleux and Mr Mouturat had adopted positions that were reckless and unreasonably risky;
    39.2 That the effect of such risks were seriously detrimental to EDFT;
    39.3 That there was inability for the French desk to cover the risk if the market became short or the participants were required to buy urgently.
    39.4 That the marking of curves undertaken by the French desk was seriously inappropriate and were overvaluing a short French power position and that marks were being rejected by the external price testing process and were inconsistent with the observable market.

40. The factual circumstances concerning each disclosure (that remain in issue, after the withdrawal of the disclosures said to have been made to Mr Gray) is set out below.

41. In assessing the recollection of relevant witnesses regarding the disclosures we found that the Claimant could be relied on as providing an honest and reasonably reliable account of the disclosures that he made. In cross examination the Claimant,

who is clearly very intelligent and well aware of the issues in the case and how any answer could affect those issues, appeared to think of the best answer for his case rather than simply give his recollection of what had happened. The two were not necessarily inconsistent but we noted that Counsel had to press quite hard for fairly straightforward answers that the Claimant was reluctant to give if he perceived they might degrade his case. The response of Mr Romano, being the manager to whom the disclosures were made, can, in general in terms (with one exception that he could recall well) be categorised in the following way: '*I do not recall the actual conversation, however it is of the type of discussions that I would have with the Claimant*'. Given that the conversations occurred just under two years before Mr Romano gave his evidence we do not draw any adverse inference from his lack of ability to recall any specific detail. In considering his recall, and the Claimant's recall, assisted where we are by the occasions documentary evidence is available, we tended to accept the Claimant's evidence of when and in what circumstances he told us disclosures had been made.

The 1st Disclosure.

42. This was made verbally to the Claimant's line manager, Mr Marcello Romano during the week commencing 5th July 2021. The Claimant pointed out what he considered to be a small short on the French Long Term Power Desk Quarter 1 vs Calendar position (referred as Q1 vs Cal). We find on the balance of probabilities that the Claimant did raise this with Mr Romano, and that in so doing he disclosed information to Mr Romano that the Q1 vs Cal position had been mismarked at a lower position than he felt was appropriate. We do not find that this disclosure tended to show that there had been a failure to comply with a legal obligation and/or to be in the public interest because there is nothing about it that suggests that the mismark was intentional. In the circumstances we find that this disclosure does not qualify for protection.

The 2nd Disclosure

43. This was made verbally to Mr Romano on or around 5th to 16th July 2021. The Claimant remarked that the French Desk curves looked mismarked. We find on the balance of probabilities that the Claimant did raise this with Mr Romano, and that in so doing he disclosed information to Mr Romano that the French Desk curves looked mismarked. Whilst we find that this does suggests a trend, it is also expressed that they *looked mismarked*. We conclude that the Claimant in making this disclosure in these terms did not feel it appropriate to disclosure that they *were* mismarked, let

alone mismarked deliberately. We do not find that this disclosure tended to show that there had been a failure to comply with a legal obligation and/or to be in the public interest because there is nothing about it that suggests that any mismarking was intentional. In the circumstances we find that this disclosure does not qualify for protection.

The 3rd Disclosure

44. This was made in writing to Mr Romano on 16th July 2021 by Teams chat message **[A31]** in which the Claimant stated '*Christophe Balleux didn't move the 23/24 but its up*'. Of this disclosure Mr Romano stated[2]:

> *'Given the passage of time, I do not now recalling receiving this Teams message, although I typically read Teams messages and I accept that it was written by Mr Parry on 16th July 2021. According to the written record of this chat, I did not respond to any of Mr Parry's eight messages in the chat, but we may also have had a verbal conversation given that the we were sat next to each other on the trading floor. I understand that by the message 'Christophe didn't move the 23/24, but it's up' Mr Parry was referring to the mark of a position on the French Desk and was saying that Mr Balleux had not moved the mark up when Mr Parry thought he should have done. Again, it was not unusual for Mr. Parry to express a view that a mark was wrong, and ordinarily if a trader has mismarked a spread they tend to catch up in the next few days. Mismarking becomes a serious issue if it continues over extended period of time and/or there is a concern that a trader is deliberately concealing a loss making position in the hope that the price rebounds. From the teams message we would not have understood Mr Parry to be raising such a concern with me. Rather, from my perspective, he was simply flagging his view on the French Desk's marking of the 23/24 spread on that particular day.'*

45. We find on the balance of probabilities that the Claimant did raise this with Mr Romano, via Teams, and that Mr Romano received it. The Claimant disclosed information to Mr Romano that the French Desk had not moved the mark to the position that he thought it should be. However we accept the evidence of Mr Romano that Mr Parry was stating his view that the mark was in the wrong position and not disclosing information tending to show a breach of a legal obligation. In the circumstances we find that this disclosure does not qualify for protection.

The 4th Disclosure

46. This was made verbally to Mr Romano on or around 12th to 19th July 2021 that Christophe Balleux and Alex Mouturat's marks are still off, consistently not right and the mismark gets worse the higher the spread is going and that you (Mr Romano)

[2] At paragraph 18 of his witness statement.

needs to take a look. We have found this a harder disclosure to classify. We find as fact that the Claimant made it. On its own we would have found that it disclosed no information, but was merely a statement of Mr Parry's opinion, however when read in the context of the prior disclosures we conclude that it is disclosing information of consistent mismarking by the French Long Term Power Desk. On balance however we conclude that it was still exploratory in nature, ie asking Mr Romano to look at the curve and, by implication, share his professional opinion on the mark's position. It still falls within the realm of acceptable differences in professional judgment as to the mark, and does not tend to show a breach of a legal obligation. In the circumstances we conclude that it does not qualify for protection.

The 5th Disclosure

47. This was made verbally to Mr Romano on or around 12th to 26th July 2021. The Claimant observed that Christophe Balleux was evasive and defiant to Mr Romano's instruction to increase the Q1 v Cal mark. We find as a fact that the Claimant raised this fact with Mr Romano and that in so doing he was disclosing information to him of that the fact that Mr Balleux was 'pushing back' on Mr Parry's instruction to increase the position of the mark. Mr Romano told us in evidence[3] it is possible that Mr Balleux pushed back on the instruction, stating that it was not unusual for traders to take different views (and by our implication) defend their position on any particular mark. In cross examination the Claimant accepted that he did not mind Mr Balleux pushing back on his instruction. Taking both those together we conclude that, at its highest, that this disclosure tended to show a disagreement between professional traders as to the position of a mark and did not tend to show a failure to comply with a legal obligation. In the circumstances we find that it does not qualify for protection.

The 6th Disclosure

48. This was made verbally and in writing to Mr Romano on or around 16th to 27th August 2021 that the marking issue with Mr Balleux and Mr Mouturat's Winter v Cal were back again. On a Teams chat message exchange between the Claimant and Mr Romano on 16th July 2021 **[A41]** the relevant exchange was as follows:
[MR]: *I am aware of his position it is big and difficult*.
[RP]: *I don't get why he's so defensive about moving the marks though*.
[MR]: *P&L hit*.
[RP]: *yeh exactly*.

[3] At paragraphs 22-23 of his statement

[RP]: *you've got to show your losses though.*

49. We accept that this exchange took place. It disclosed information on continued mismarking to the Claimant's line manager, Mr Romano. Mr Romano is the Claimant's first port of call for making a disclosure pursuant to the terms of the Respondent's Whistleblowing procedure **[A542-548 at para 2.3.1]**. For the first time it raises an element of intentional mismarking, in so far as the Claimant is telling Mr Romano that the traders have to show their losses (a legal obligation) and that they are in breach of that obligation. It is also clear that Mr Romano accepts that point, suggesting an impermissible motive of the French Long Term Power Desk to prevent a P&L hit, i.e. to avoid a recorded loss of the Desk's Profit and Loss account at the end of trading on that day. In cross examination Mr Romano accepted that by August running risk positions was a concern and that 'it felt like a risk'. This discloses information which tends to show a breach of a legal obligation and it is made in the public interest. We note that the Respondent, in the event that a disclosure is found by us to have been made, that is in the public interest and discloses a breach of a legal obligation, does not challenge that the Claimant had a genuine belief of that fact. We should say that had that point remained a live issue for us we would have had no hesitation that the Claimant had that belief. We note that when asked about this specific disclosure Mr Romano said in evidence that '*he had no reason to think that Mr Parry did not genuinely believe that there had been a mismark*'. In the circumstances this disclosure qualifies for the protection offered by section 43B of the Act.

<u>The 7th Disclosure</u>.

50. This was made verbally to Mr Romano in the days following the 6th disclosure (referred to above) repeating concerns regarding the mismarking of the French Desk positions. In respect of this disclosure, Mr Romano gave the following evidence:

> *'Mr Parry claims that in the days following [the 6th disclosure, above] he repeated concerns to me regarding the mismarking of the French desk, which I acknowledged. Mr Parry claims to have reiterated the potential serious ramifications for EDFT and in relation to the EDF Group. I'm not sure what Mr Parry is referring to here. I do not recall Mr Parry referring to serious ramifications of EDFT and in relation to the EDF Group, and I think it is unlikely that he would have used those words (not least because I was well aware of the importance to EDFT of trading books being accurately marked).*

51. In his evidence Mr Parry recalls:

> *'I repeated concerns to Mr Romano in the following days when we went for morning coffee. This time I specifically addressed the size and recklessness of the Long Term French Power Desk's position. It was confrontational. I took issue with the size of their position, stating the French desk are seriously short on winter and it's dangerous because it's all concentrated in France, it's huge.'*

52. On balance we prefer the evidence of the Claimant on this issue. Mr Romano has generally had a poor recollection of his conversations with the Claimant, but has, for the most part, not doubted that they were probably said. Whilst he does doubt the Claimant's account here, it appears to be because he recognises the seriousness of what was being said, however we note that Mr Parry in evidence accepted that Mr Romano had sought to defend the position, suggesting perhaps that Mr Romano did not view the concern as raising a breach of a legal obligation. However, we find that this was a serious issue for the Claimant and that he did raise it again in the days that followed. He disclosed information that tended to show a breach of a legal obligation and in the circumstances this disclosure qualifies for the protection offered by section 43B of the Act.

The 8th Disclosure.

53. This was made in writing to Mr Romano on 25th August 2021 in a Teams chat **[A43]**, in the following terms: '*Christophe chatted me … wanted to know if we have a preference for how to mark the quarters … it all looks very odd … as in they don't really add up to the Cal*.' In this witness statement[4] Mr Parry opines that Mr Balleux was attempting to manipulatively involve him by asking for his opinion on the position of the mark. That belief was not shared within the disclosure itself. It is not easy to discern information from this disclosure, it appears to be recounting the Claimant's opinion on being asked if he had a preference on how to mark the quarters. Given the professional scope for a range of legitimate positions it cannot be said that this disclosure tends to show a breach of a legal obligation. On the contrary it tends to show Mr Balleux seeking advice on where to mark the trade. In the circumstances we conclude that this disclosure does not qualify for protection.

The 9th Disclosure.

54. This was made verbally to Mr Romano on or around 15th to 20th September 2021 discussing mismarking having seen the price testing results. In his witness statement (paragraph 104) the Claimant attributes the originator of this conversation as Mr

[4] At paragraph 84

Romano when he asked about the price testing results, i.e. it was not a point raised by the Claimant. The Claimant said he was asked for his opinion and he said that the marks were 'still miles out'. The Claimant ends his recollection of the disclosure by recalling that Mr Romano asked him to go over to the Long Term French Power Desk and speak to them about their marks. Mr Romano had no recollection of the exchange (paragraph 33 of his statement). We accept the Claimant's factual account. However, taking the Claimant's account at its highest, he did not make a disclosure. He responded to a question by Mr Romano by expressing his opinion. His answer was too vague to amount to information. Even on the Claimant's account he was asked to speak to the French Long Term Desk, suggesting that this was a matter for professional judgment rather than a disclosure of a breach of a legal obligation. In the circumstances this disclosure does not qualify for protection.

The 10th Disclosure

55. This was made verbally to Mr Romano on a date after 28th September 2021 that Mr Balleux and Mr Mouturat had been idle in trying to cover the short position and continued '*to the pull the wool over his eyes*'. This conversation arose after Mr Romano had instructed the Claimant to transfer the winter French trades from a number of books to the French Long Term Power Desk. This would have the effect of transferring profits from the Claimant's books to the FLTPD's books. The Claimant states (at paragraph 116) that the French Desk argued over the size of the transfer, which further angered him, causing him to exclaim to Mr Romano '*They have been idle trying to cover their positions, that I couldn't see any bidding on screens or on the lines, they know this transfer is coming and they are continuing to pull the wool over your eyes. They are trying to fleece us on this*'. Mr Romano (again) has no recollection of this, but does not dispute the exchange. He notes that Mr Parry and other traders would have been critical of the French Desk as it was apparent by then that the positions of the French Desk were losing money.

56. We accept that the Claimant made this disclosure. Whilst there is an element that this was being raised in the Claimant's own interest (as moving trades reduced his profits but was being undertaken to reduce the French Desk's losses) we do still consider that this was being raised in the public interest. It disclosed information as to the conduct of the French Desk and suggested impropriety and that intentional mismarking had occurred and that the traders on the Desk were attempting to 'continue to pull the wool over the eyes' of Mr Romano in an attempt to recover their losses. This fell foul of the obligation to act with propriety and tended to show a

breach of a legal obligation. In the circumstances we find that this disclosure does qualify for protection.

The 11th Disclosure

57. This was made verbally to Mr Romano on or around 4th to 7th October 2021 in response to being asked to look for other positions on their books that they could transfer to the French Power Desk saying '*it's a total farce*' and '*why the hell are they still on the trading floor they've been mismarking the curves for months'.* The Claimant states (at paragraph 120) that he added the French Desk traders '*were not following instructions and now you want me to give them the rest of our positions? It's a total disaster. I told you this could happen*'. Mr Romano's evidence was that he recalled this exchange well (paragraph 37). He recalls asking the Claimant to move positions on from their book that could mitigate the risk on the French Desk. He recalls the Claimant getting frustrated as he believed they had a good position on their book. In evidence Mr Romano said '*my view was that the interests of the wider business came first and therefore the position should be moved for the benefit of the business, even if it was to the detriment of a particular trading book*'. In cross examination he said '*look at the firm as a whole, we want to reduce the French losses, we move trades to the French Desk to collapse the French risk*'. We accept the evidence of both parties as to the conversation and what was said. We do not consider that information was disclosed in this exchange. The Claimant expressed his opinion and objected to moving his trades. This was a personal complaint. We do not consider that the exchange tended to show a breach of a legal obligation and accordingly this disclosure does not qualify for protection.

The 12th Disclosure.

58. Following his dismissal, the Claimant's solicitors, Bindmans LLP, submitted an appeal against the decision to dismiss him. This was made in writing to Mr Darren Woods, the Respondent's Chief People Officer, in a letter of appeal dated 28th January 2022 **[A260]**. This disclosure can have no application to the Claimant's s103A claim (automatic unfair dismissal for making a public interest disclosure) as it post-dates the decision to dismiss him, made on 10th January 2022. It may be relevant to the Claimant's post dismissal detriment claims. It recites a number of the disclosures relied upon by the Claimant. We find that whilst the appeal letter recited prior disclosures in general terms, overall it disclosed information that tended to show a breach of a legal obligation, namely the deliberate mismarking of trades by the

French Long Term Power Desk. Accordingly we conclude that this letter does qualify for protection offered by s43B of the Act.

The 13th Disclosure.

59. The Claimant relies on a supplementary letter of appeal, prepared by his solicitors and sent to Darren Wood on 10th February 2022 **[A271]**. It provided further information for consideration at the Claimant's appeal hearing which took place on 7th March 2022 **[A344]**. Section 3 of that letter (at **[A283]**) recites prior disclosures made by the Claimant and the legal obligations that they, and the Respondent, were under. Again, we find that whilst that this supplementary appeal letter recited prior disclosures in general terms, overall it disclosed information that tended to show a breach of a legal obligation, namely the deliberate mismarking of trades by the French Long Term Power Desk. Accordingly we conclude that this letter does qualify for protection offered by s43B of the Act.

Circumstances leading up to the Claimant's dismissal.

60. On 1st October 2021 Mr Balleux, the Senior Long Term Power Trader on the French Long Term Power Desk was suspended by the Respondent. He told us in evidence (paragraphs 1 and 10 of this statement) that from September 2021 the French Desk started to sustain losses in challenging market conditions. He told us that he understood that '*the decision to suspend me was made because there were concerns that I was a contributing factor in the losses sustained by the French Desk*'. He remained on paid suspension until his employment with the EDFT was terminated by mutual agreement on the 10th of June 2022 without any disciplinary action or investigation. He moved on to INEOS Energy as Head of Gas, Power and Renewables Trading.

61. At the close of play on 5th October 2021 the losses on the French Long Term Power Desk were €364,553,755.00 negative **[C130]**. At the close of play on 6th October 2021 that figure had risen to €432,015,058.00 negative. By 7th October the figure stood at €489,539,492.00 negative. By the close of play on the 8th October 2021 losses had recovered slightly to €400,449,786.00 **[C130]**.

62. On 6th October 2021 Michele Reid, the Respondent's Head of Communications had been contacted by journalists from Bloomberg or the Wall Street Journal, who referred to losses of €400 million and that a trader had been fired. A further contact from the Financial Times specifically referred to a €400 million loss. On the same day

an on-line poll invited users to guess the size of EDFT's losses, giving a range of €100m to €600m with €400m-€500m in the middle of the range of options **[A299]**.

63. On the 7th October 2021 (a Thursday) the Claimant attended a lunch with two brokers from Arraco Global Markets Ltd ('Arraco'). One of the Arraco brokers was Nadim Salyem.

64. On 8th October 2021 Peter Bonner, the Respondent's Head of Compliance for Europe and Asia notified the FCA of the losses on the French Power Desk **[A200]**.

65. On 9th October 2021 (a Saturday) the Claimant hosted a houseparty. It was attended by his flat mate, Charles Jones, Nadim Salyem, the Arraco broker and Vadim Arsenie, an Originator employed by the Respondent.

66. At some point over that weekend Alex Mouturat was contacted by Benjamin Edgington and Thomas Soriano, both Arraco brokers. They told him that one of their colleagues, Nadim Salyem had been told by the Claimant at the lunch on 7th October that the French Desk was 150m negative and at the houseparty on 9th October 2021 that the French Desk was 400m negative. Mr Mouturat asked for a text about what they had heard as he might need proof **[A120]**.

67. Benjamin Edgington had a WhatsApp exchange with Nadim Salyem on 10th October 2021 **[A54.A]**. The relevant extract stated:

> *[NS] 'heard the loss was more like 4/500m'.*
> *[BE] 'And after Parry told you the losses were one for Wikipedia and Alex was next to go. It made me really worried for those guys'.*

68. Thomas Soriano had a WhatsApp exchange with Alex Mouturat on 11th October 2021 conducted in French with an English translation accepted by the parties as accurate **[A56.F]**. The relevant extract from the translation stated:

> *[TS] 'This idiot Parry who saw two of our brokers last weekend and who told everything in detail'.*
> *[AM] 'Apparently, yes. I heard about it. Everything spreads quickly. I must get proof that he is telling the whole story'.*
> *[TS] 'He deserves to leave. The guy released the amounts and all'.*

69. In an email to himself dated 11th October 2021 **[A55]** Alex Mouturat said:

'*Few people from Arraco told me this weekend that it's RP telling them what's going on internally, telling them that the PNL's and exact figures and apparently I'm the next one to be gone'*.

70. Benjamin Edington sent Christophe Balleux a test message on 12th October 2021 **[A58.A]** stating:

> *'Market is a mess atm, man, rumours everywhere and it stinks. Nadim saw Parry last Thursday and heard the losses last week 150m and that you would left EDF and that Alex was next. He told me at the desk the next day. …. Latest thing I heard was after Nadim went to Rupert 's house party on Saturday, he said the latest he heard was that loss was 4/500m. Surely that can't be true?'*

71. Mr Edington sent a further text message to Alex Mouturat on 15th October **[A552]** stating:

> '*Nadim saw Parry last Thursday and heard the losses at that point were like 150m and Christophe has been cut form EDFT which was worrying so that's when I tried to get hold of Christophe but he never replied. Last thing I heard was after Nadim went to Rupert 's house party on Saturday, he said the latest he heard was the loss was 4/500m which seems an impossible amount but I heard the power brokers saying the same thing'.*

72. On 20th October 2021 Arnaud Luboinski notified Mr Bonner, by email, that the Claimant may have disclosed confidential information **[A63]**. Mr Bonner reports to Guido Santi, the Respondent's Chief Legal Officer. The email stated:

> *'On Monday, Alex Mouturat, junior long term trader on the French power desk showed me two text messages he had received from brokers. Those messages said that Rupert Parry had, on two instances a few days apart, disclosed to an audience the PnL and the value of losses that the French long term book was suffering. This is clearly highly confidential information which should not be shared with third parties outside of the company'.*

73. On the 22nd October Christophe Balleux sent an email to Aleksandra Jakovska, a Human Resources Business Partner employed by the Respondent, approximately three weeks after his suspension **[A67]**. The email is, in general terms, a complaint about his suspension and the circumstances leading to it. However, it included the following:

> *'The day after I got suspended, I received several messages from ex-EDFT traders. I did not reply, but they seemed to know that something had happened. My assumption is that somebody internally had leaked information. The following week I was*

> *harassed by journalists. … Last week I raised to you my concerns regarding internal confidentiality. … Several days ago I received some unsolicited messages from a trustworthy broker at Aracco, who I thought was in France. He wanted to warn me that one of his colleagues had been updated with our PNL numbers from Rupert Parry, Marcello's Junior. I did not reply to the message I'm taking this very seriously, especially after being threatened. Unfortunately, the lack of internal safeguarding measures allowed at least one individual to leak some damaging information'.*

74. Mr Balleux did not raise this as a whistleblowing complaint, nor did he ask for confidentiality in how it was treated. Ms Jakovska immediately commenced an investigation into the Claimant. That day she asked for his emails and voice calls to be reviewed **[A71]**. It was subsequently confirmed that neither contained anything that was relevant to the investigation.

75. On 26th October 2021 the Claimant attended an investigation meeting with Ms Jakovska **[A72]**. She informed him that allegations had been made that he had disclosed confidential information. It is of note that the Respondent did not suspend the Claimant. On this Mr Romano said in evidence '*Rupert Parry was not malicious. I trusted him not to hurt the business intentionally. He had access to highly confidential information of considerable value to the market, with a risk to EDFT if it got out. From 26th October Mr Parry had full access to all confidential information and continued to trade in the normal way, even effectively, there was no risk to him remaining in work*'. Given that the allegation against the Claimant is that he disclosed confidential information it is unusual that she did not suspend him. We find, on balance, that Ms Jakovska must also have considered that Mr Parry did not present a continuing risk to the business, once the investigation into him had started. Ms Jakovska did not disclose to the Claimant who made the allegations against him. She accepted in evidence that she did not disclose any evidence to the Claimant prior to the disciplinary hearing. The Claimant said that the information regarding the losses on the French Desk was already in the markets and that it was easy for external traders and brokers to work out the exact numbers.

76. Ms Jakovska accepted in evidence that the same people conducted the investigation and as disciplinary hearing, contrary to the ACAS Code. She also accepted that at no point was new evidence obtained during the investigation put to the Claimant for comment, justifying that by stating '*I don't think it would have changed anything*'.

77. Ms Jakovska was questioned about the investigation meeting on 26th October. She said in evidence '*I knew Rupert Parry raised concerns about the French Desk on 26th*

October, he told me in the meeting. He expanded on his concerns, I recall him saying that there had been mismarking of positions on 26th October 2021. He said that he had told Mr Romano about the French Desk and that they were trying to blame him. I didn't make a note of what he said'. This evidence would fix Ms Jakovska with knowledge of the Claimant's prior disclosures regarding the French Desk's mismarking of trades. We have considered carefully whether to accept this evidence as accurate. This exchange did not appear in her witness statement's account of that meeting, nor in the Claimant's witness statement's recollection of the same meeting, nor was it contained in the contemporaneous note of that meeting **[A72-73]**. Ms Jakovska went on to say that she told Mr Scavardone that the Claimant had said that the Respondent was trying to get rid of him due to his concerns over the French Desk. She told us: '*I do recall Mr Scavardone knowing that Mr Parry was under the impression that the Respondent was trying to get rid of him due to what was happening on the French Desk*'.

78. Whilst we would have expected some reference of this conversation to appear in either witness statement of the parties, and indeed, in the notes of the meeting itself, Ms Jakovska did tell us that her focus was the case against Mr Parry, namely the leak of confidential information and as such the Claimant's prior disclosures was not her focus. Mr Parry has given evidence on each disclosure, and has not relied on 26th October meeting as a separate actionable public interest disclosure. This issue here is not whether the meeting could be said to be a new PID, but whether it fixes Ms Jakovska (and by extension Mr Scavardone) with knowledge of the PIDs prior to taking the decision to dismiss. We considered Ms Jakovska generally to be an honest witness doing her best, although there were some concerns as to her reliability after such a passage of time. We note that Ms Jakovska's oral evidence before us that the PIDs were discussed on 26th October is flatly contradicted by paragraph 25 of her witness statement in which she stated '*I did not know about Parry's concerns, he did not tell us what issues he had raised*'. However on this issue in Tribunal she stuck to her guns: the mismarking disclosures were discussed at that meeting. In answers to the panel she stated, '*I knew of the mismarking allegations at the date of the investigation hearing*'. Having watched her demeanour and assessing her credibility, we found that she had been steadfast on this issue (despite it not being in her interest and despite being given opportunities to step back from it) and we accept her account that the mismarking disclosures were raised and that accordingly both herself and Mr Scavardone had knowledge of them during the disciplinary investigation and disciplinary hearing at which the Claimant was dismissed.

79. On 9th November 2021 Valentino Scavardone, the Respondent's Head of Origination for Europe, was appointed to conduct a disciplinary hearing into the allegations of misconduct against the Claimant. Ms Jakovska sent to him an extract from the Respondent's Code of Conduct and an extract from a disciplinary policy **[A98.E]**. We find that the extract was not from the Respondent's disciplinary policy **[A500]**. The actual EDFT policy included 'unauthorised disclosure of confidential business matters' in its list of gross misconduct offences **[A502]**. The policy extract sent to Mr Scavardone did not **[A98.E]**.

80. On 10th November 2021 the Claimant was invited by Ms Jakovska to a disciplinary hearing arranged for the next day, to discuss allegations that he shared confidential internal information regarding EDF Trading's losses with external parties on two separate occasions **[A99]**. The invitation letter provided no details of the allegations and appended no evidence. At the Claimant's request the disciplinary hearing was put back to 16th November 2021. It was attended by the Claimant, Ms Jakovska and Mr Scavardone. The Claimant was told that he disclosed confidential information on two occasions, at a lunch with external brokers and at a dinner party. The Claimant recalled both events and confirmed he was there. He denied disclosing any confidential information and asserted that knowledge of the losses was already in the market. Ms Jakovska told the Claimant that the information disclosed to them was protected under whistleblowing and that she could not share who had given this information.

81. Vadim Arsenie was interviewed on 25th November 2021 **[A126]**. He was present at the houseparty and gave evidence about the disclosure of confidential information said to have occurred at the party. He told Ms Jakovska and Mr Scavardone that following:

> *'[VA]: I do remember one of his flatmates told me that he was told that the company had lost a lot of money.*
> *[AJ]: was there a specific number?*
> *[VA]: Yes, 400 million. This came from the flatmate. I went outside for a drink and he told me that Rupert Parry mentioned that the company lost 400 million. And what did I know? I said I do not know anything, but this information was mentioned by his flatmate'.*

82. Morgane Trieu-Cuot, the Respondent's Head of Flexibility Optimisation was also interviewed on 25th November 2021. She sounded a note of caution over accepting the evidence of Alex Mouturat, stating:

> *'we need to be careful as Alex Mouturat has a conflict with Rupert Parry. Rupert Parry is keen and is a bit more senior. He feels that what has happened with the French desk is going to have consequences.'*

83. Marcello Romano was interviewed on 2nd December 2021. He also raised a question over the motives of Alex Mouturat.

> *'I said I don't know who the leak is, but Alex Mouturat said it is Rupert Parry. If it is Rupert Parry, it's so concerning as he works directly for me and feel like it's a betrayal. … I think I said to Darren Word that I'm going to talk to Rupert Parry to see what I can find out as this is just an accusation. There was no evidence or anything to base it on. I think there was a lot of animosity between Rupert Parry and Alex Mouturat. … Rupert Parry said he was upset and he felt that they had messed up a great year. A lot of traders felt like that'.*

84. Mr Romano told the investigation that he had contacted Tom Roberts, the owner of Arraco. Together they called Nadim Salyem. He recounted that Mr Salyem remembered seeing Mr Parry at a party. He said that they spoke about the market and that a lot of shops had lost a lot of money. He asked why did you lose a lot and that Mr Parry didn't really say anything **[A178]**. Mr Romano also confirmed that he spoke to a broker at Tullett Prebon who told him that the number they had heard from EDFT was from Magda who said we had lost €700m. Other witnesses were also interviewed. We note that for many of the interviews an investigation script had been pre-prepared by Aleksandra Jakovska. She attended every interview as the HR Business Partner.

85. By letter dated 10th January 2022 Aleksandra Jakovska wrote to the Claimant, summarily dismissing him from the Respondent **[A202]**. We note that the letter dismissing the Claimant was not sent by Mr Scavardone, the disciplinary hearing manager. It is evident that Ms Jakovska initiated the investigation, lead it, attended the disciplinary hearing and was active it and wrote the letter dismissing the Claimant. In evidence Ms Jakovska accepted that she had shared her view that the Claimant should be dismissed and that her view would influence a decision maker that had never done a disciplinary hearing before. She was, we find, the 'eminence grise' in that she exercised power and influence over the Claimant's dismissal without holding the official position of decision maker. The letter of dismissal recounted the

Claimant's assertion that he had not disclosed confidential information and that the French Desk's losses could have been guessed by the market. It confirmed that the review of the Claimant's telephone calls and emails did not reveal anything relevant to the investigation. It concluded by stating that three EDFT employees had recounted that three external sources had told them that the Claimant had shared confidential information at a lunch and house party. The employees and the external sources had not been named and the Claimant was not provided with that information at any point in the investigation or disciplinary hearing. It concluded that a number of traders had opined that it would be highly unlikely, if not impossible that an external broker could accurately calculate the amount of the losses suffered by EDFT without access to confidential information. The letter concluded with the following:

> '*We have found that you have breached the Individual Conduct Rule 2.1.1. You must act with integrity and the individual conduct rule 2.1.2, you must act with due skill, care, and diligence. As part of our obligations as a solo regulated firm, we will notify the FCA of our decision to dismiss you as an outcome of the disciplinary process'*.

86. Peter Bonner emailed the FCA on the same day notifying them of a conduct rule breach by the Claimant **[A210]**. Ms Jakovska told us in evidence this was done with a heavy heart after taking advice from a lawyer. On 13th January 2022 the Claimant's solicitors wrote to the Respondent requesting that the FCA notification be delayed because, they observed, the Respondent had dismissed the Claimant without giving him the opportunity to see or challenge the evidence that had been used to dismiss him **[A214]**. On 17th January 2022 the Respondent stated that it was under a duty to report concerns to the FCA immediately, which was what it had done in this case.

87. As already mentioned in the context of the Claimant's disclosures he submitted a appeal against his dismissal on 28th January 2022 and supplemented it with further information on 10th February 2022. The Claimant's appeal proceeded on 7th March 2022 **[A344]**. It was heard by Jean-Benoit Ritz. During the appeal hearing the Claimant said:

> '*On 7th October, which I believe is the first instance which the alleged incident is made against me, and is described as a lunch which is not a lunch. I met the broken Nadim from Aracco for a beer about 4:00pm ish. He asked if everything was OK at EDF because of the radio silence. I gave a line about some general losses, no details were disclosed and no confidential information. The next key date, Saturday the 9th October this is the house party. … There were two brokers there from Arraco, Nadim*

> *and Will. A colleague from EDF, Vadim Arsenie, was there too. Generally, the brokers just want to know if I was OK. There was gossip talk about losses at EDF in the market. There was a poll which I've referred to my letters and in the appendix of letters. I was shocked it was that big, to be quite honest*'.

88. The meeting ended with the Claimant asking that the Arraco brokers be questioned. The Claimant was told that the appeal officer will decide whether any further investigation is needed, and if so, do it and then give the Claimant an opportunity to consider any new information before convening a further hearing for that.

89. Peter Bonner was reinterviewed as part of the appeal investigation **[A372]**. He told Mr Ritz that the Head of Arraco, Mr Roberts had confirmed that the Claimant had told his broker some information but that they '*weren't discussing positions or anything specific. But more along the lines of it's been a crap week and we've had some heavy losses*'. Mr Arsenie was also reinterviewed **[A387.D]**. He told Mr Ritz that he losses mentioned had been €420m, some five months after the house party. This is different to the €400m figure that he had given to the at his disciplinary hearing investigation, just one month after the house party. In his witness statement (at paragraph 9) he said he had had time to reflect and he believed the second figure was the correct recollection. Mr Scavardone was interviewed. He confirmed that he was the decision maker and that he was not aware that the Claimant and raised any whistleblowing allegations. He also believed that the Claimant had been sent all of the evidence. The Claimant attended a follow up appeal hearing on 6th May 2022.

90. On 1st June 2022 Mr Ritz wrote to the Claimant dismissing his appeal **[A426]**. Mr Ritz accepted that the Claimant had not been provided with the evidence during the investigation and disciplinary hearing and that he had not been given the opportunity to challenge that evidence. He concluded however that any such challenge would have been unlikely to change the outcome and he noted that the Claimant had been given the opportunity to challenge the evidence as part of the appeal. He placed weight on the evidence of Mr Arsenie who said he was 95% sure of his recollection of being told of €420m losses at the houseparty. On the issue of whether the Claimant was dismissed for whistleblowing, Mr Ritz concluded:

> '*I have considered your allegation that you … were subjected to detriment in the form of your dismissal, which you say was the result protected disclosures that you had previously made to Mr Romano. However, Mr Scavardone confirmed to me that he was not aware of your alleged status as a whistle blower. The question of whether or not you made disclosures of information that would qualify as protected disclosures is*

> *outside the scope of my review. In any event however, I'm satisfied that the decision to terminate your employment was taken independently of and not linked to the alleged protected disclosures or any grievance that you have raised EDF Trading at any stage. … I have decided not to uphold your appeal against your dismissal for the reasons set out above.*

91. We turn now to the remaining incidents of detrimental treatment that the Claimant asserts he suffered as a result of making his disclosures. Those assertions that the Claimant withdrew (as recorded in paragraph 6 above) are no longer part of the claim and have not been considered by us here. In this section we set our findings on whether they happened as the Claimant asserts, and what the reason for them was.

Detriment 1: On 26th October 2021 Mr Mouturat falsely alleging the Claimant had disclosed confidential precise figures of the loss suffered by the French Desk.

92. This allegation refers to a report made on 26th October 2021. We have had to determine exactly what detriment the Claimant relies on here. Was it simply that Mr Mouturat reported that the Claimant had disclosed confidential information? Was it that he had reported concerns that turned out to be wrong? Was it that Mr Mouturat had reported that the Claimant had disclosed confidential information, when he knew the report to be false? We have to take the detriment as it is described, including the word 'falsely' and as such conclude that the detriment relied on is the making of a false report, ie one which Mr Mouturat knew to be wrong. We accept that there was element of friction between the Claimant and Mr Mouturat. The Claimant had been raising concerns about his marking of trades. We accept the observations by Mr Romano on 2nd December 2021 that there was a lot of animosity between the two and also the note of caution raised by Morgane Trieu-Cuot on 25th November 2021 that the Respondent '*needed to be careful as Alex Mouturat has a conflict with Rupert Parry'.* Accordingly we reject Mr Mouturat's oral evidence that there was no animosity between himself and the Claimant. He denied any animosity and told us that the '*spot light shone on marking didn't make me angry*'. However we have found that he did push back on marking instructions and on the balance of probabilities we found that he did harbour a certain level of animosity towards the Claimant. As such, he may well have not lost any sleep in forwarding evidence that the Claimant had been the source of the leakage of the confidential Profit and Loss position of the French Desk, but did he do so knowing it to be false? We do not that he did and have not seen evidence to suggest that he knew the evidence he had heard was false. On the contrary the texts themselves (set out above) appear genuine and quite compelling. We accepted his evidence that he did not suggest what should be put

into the texts which he had asked for as evidence that the Claimant was the leak. In cross examination he agreed that he had asked for texts. He was asked whether he assisted in the content of the texts. He replied '*Absolutely not – the texts were genuine. I asked for what was said I and I did not argue*'. We accept this evidence. We also are mindful that Mr Mouturat was himself under an obligation to report such matters, and it makes sense that he would seek supporting evidence before making such a report. Seeking such evidence is inconsistent with the making of a false report. Accordingly this allegation fails.

Detriment 2: On 25th November 2021 Mr Mouturat falsely alleging the Claimant had disclosed confidential precise figures of the loss suffered by the French Desk.

93. This allegation fails for the same reason that the first detriment claim fails. We do not find that Mr Mouturat know the that the allegations that the Claimant had disclosed confidential information to be false.

Detriment 3: Ms Jakovska and Mr Scavardone deciding to dismiss the Claimant and/or adopting a flawed procedure in reaching that decision.

94. It is accepted by both parties that the Claimant was dismissed and that Ms Jakovska and Mr Scavardone took the decision to dismiss the Claimant. For reasons set out below we have found that they adopted a flawed procedure in reaching that decision. As such, as a matter of fact, we find that this incident of detrimental treatment occurred, as the Claimant claims. We have to determine why. Did they adopt a flawed procedure because both were aware that the Claimant had raised disclosures as to mismarking on the French Desk and following a fair procedure would have revealed the process to be a sham, or did they just fail to follow a fair procedure without having a specific motivation? In other words were they just very poor decision makers? We find, for much the same reasons as we dismissed the automatic unfair dismissal claim (set out in paragraphs 139-146 below) that they had a genuine belief that the Claimant had disclosed confidential information. Accordingly, this detriment fails.

Detriment 4: on or about 12th of January 2022 notifying the FCA about the Claimant's dismissal and contending that he had breached the FCA code of conduct.

95. The Respondent plainly notified the FCA that it considered that the Claimant had breached the FCA code of conduct. Having dismissed the Claimant it was required to do so, and upon dismissing the appeal, it was required to stand by its decision to

notify the FCA. The Respondent was required to make such a notification and we think this was the reason that it did. We have grave concerns as to the decision to dismiss, but, on balance, we find that the motivation for reporting the Claimant to the FCA was the disclosure of confidential information and not any prior disclosures of mismarking. This act of detriment fails.

Detriment 5: On 15th March 2022 Mr Mouturat falsely alleging the Claimant had disclosed confidential precise figures of the loss suffered by the French Desk.

96. This allegation fails for the same reason that the first detriment claim fails. We do not find that Mr Mouturat know the that the allegations that the Claimant had disclosed confidential information to be false.

Detriment 6: Mr Ritz deciding to uphold the Claimant's dismissal and reject his appeal.

97. Mr Ritz decided to uphold the decision to dismiss the Claimant and did reject his appeal. This amounted to detrimental treatment. We have to determine whether reason for dismissing the appeal was the Claimant's qualifying disclosures (including the appeal letter itself and the supplementary appeal letter). Mr Ritz was another inexperienced appointment. He had not conducted an appeal before this one. We felt he gave honest evidence and that he had not determined to dismiss the appeal because the Claimant was continuing to make the same disclosures. Mr Ritz failed to give appropriate weight to evidence that he obtained to undermine the original decision. We concluded that the reason for this was that Mr Ritz wanted 'to tow the party line' and support the Respondent's decision to dismiss, and not because of any prior disclosures.

The Applicable Law

'Ordinary' Unfair Dismissal

98. The starting point is section 98 of the **Employment Rights Act 1996** ('the Act') which states:

> ***98 General***
> *(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show: (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within*

> *subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
> *(2) A reason falls within this subsection if it … (b) relates to the conduct of the employee,*
> *(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer): (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case.*

99. The correct approach[5] for the Tribunal to adopt in considering section 98(4) of the **ERA** (as set out in **Iceland Frozen Foods v Jones** [1982] IRLR 439) is as follows:

> *(1) the starting point should always be the words of [s 98(4)] themselves;*
> *(2) in applying the section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;*
> *(3) in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;*
> *(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;*
> *(5) the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair'.'*

100. The ACAS Code of Practice on Disciplinary and Grievance procedures sets out matters that may be taken into account by tribunals when assessing the reasonableness of a dismissal on the grounds of conduct, as follows:

> *'Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.*
> *Employers and employees should act consistently.*
> *Employers should carry out any necessary investigations, to establish the facts of the case.*
> *When investigating a disciplinary matter take care to deal with the employee an affair and reasonable manner. The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against it. Be careful when dealing with evidence from a person who wishes to remain anonymous. In particular,*

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> *take written statements that give details of the time, place, dates as appropriate, seek cooperative evidence check that the person's motives are genuine, and assess the credibility and weight to be attached to their evidence.*
> *Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.*
> *Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.*
> *If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct. And its possible consequences to enable the employee to prepare to answer the case of the disciplinary hearing. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements within the notification. At the meeting, the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should also be given a reasonable opportunity to ask questions, present evidence, and call relevant witnesses. They should also be given the opportunity to raise points about information provided by witnesses.*
> *Employers should allow an employee to appeal against any formal decision made.*

101. For guidance on the level of investigation and on the Respondent's belief that an act of misconduct has occurred, the guidelines provided in **British Home Stores v Burchell** [1979] IRLR 379 still applies:

> *'What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."*

102. As at the time of the Claimant's dismissal, the Tribunal is to ask (i) did the Respondent believe the Claimant was guilty of the misconduct alleged, (ii) if so, were there reasonable grounds for that belief, (iii) at the time it had formed that belief had it carried out as much investigation into the matter as was reasonable in the circumstances, and (iv) was the decision to summarily dismiss the Claimant within a range of reasonable responses open to an employer in the circumstances (**Yorkshire Housing Ltd v Swanson** [2008] IRLR 609)? The range of reasonable responses test applies as much to the procedure which is adopted by the employer as it does to the

substantive decision to dismiss (**Sainsbury's Supermarkets Limited v Hitt** [2003] IRLR 23).

103. The employer cannot be said to have acted reasonably if he reached his conclusion in consequence of ignoring matters which he ought reasonably to have known and which would have shown that the reason was insufficient (**W Devis & Sons Ltd v Atkins** [1977] IRLR 314, HL).

104. It will be possible for an employee to challenge the fairness of a dismissal if an agreed procedure was not correctly followed (**Stoker v Lancashire County Council** [1992] IRLR 75).

105. The Tribunal should be satisfied as to the appropriate thoroughness of the investigation in career ending cases or where some form of professional status is in jeopardy) where the of the *consequences* to the employee of a finding of guilt are likely to be severe. Additional care in the investigation is likely to be required (**Roldan v Royal Salford NHS Foundation Trust** [2010] IRLR 721) in which the Court of Appeal stated:

> 'Section 98(4) focuses on the need for an employer to act reasonably in all the circumstances. In **A v B** [2003] IRLR 405, the EAT (Elias J presiding) held that the relevant circumstances include the gravity of the charge and their potential effect upon the employee. So it is particularly important that employers take seriously their responsibilities to conduct a fair investigation, where, as on the facts of that case, the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite. An **A v B** the EAT said this: '*The investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate, or at least point towards the innocence of the employee, as he should on the evidence directed towards proving the charges against him*' and … '*there will be cases where it is perfectly proper for the employers to say that they are not satisfied that they can resolve the conflict of evidence and accordingly do not find the case proved. In my view, it would be perfectly proper in such a case for the employer to give the alleged wrongdoer the benefit of the doubt without feeling compelled to have to come down in favour of one side or the other*'.

106. On the issue of anonymous informants guidance is provided in the case of **Linford Cash and Carry V Thompson** [1989] IRLR 235, which states:

> 2. In taking statements, the following seem important: … (d) whether the informant is suffered at the hands of the accused or has any other reason to fabricate, whether from personal grudge or any other reasonable principle.

> 4. Tactful inquiries may well be thought suitable and advisable into the character and background of the informant or any other information which may tend to add or detract from the value of the information.
> 6. If it is to continue, then it seems to us desirable that at each stage of these procedures the member of management responsible for that hearing should himself interview the informant and satisfy himself what weight is, is to be given to the information.
> 7. The written statements of the informant, if necessary with omissions to avoid identification, should be made available to the employee and his representative.

107. If it is established that the dismissing officer had a reasonable belief in the Claimants' guilt, it is necessary to consider whether his response to that guilt fell within a reasonable range of responses. In considering the severity of the sanction, it is important that the tribunal does not ask whether a lesser sanction would have been reasonable, but asks instead whether the sanction of dismissal was reasonable **(Securicor Ltd v Smith** [1989] IRLR 356, CA).

108. It will be a very rare case where an employer can reasonably take the view that there could be no explanation or mitigation which would cause him to alter his decision to dismiss (**Sillifant v Powell Duffryn Timber Ltd** [1983] IRLR 91).

109. Finally the fairness of the procedure adopted by an employer is to be assessed at the end of the internal process, which includes any appeal process. (**Taylor v OCS Group Limited** [2006] IRLR 613). The process must be considered in the round. Smith LJ stated:

> '*If [the Tribunal] find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceedings with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or review, but to determine whether due to the fairness or unfairness of the process procedures adopted, the thoroughness or lack of it of the process and the open mindedness or not, of the decision maker, the overall process was fair, notwithstanding any deficiencies at the earliest stage*'.

Polkey and Contributory Fault

110. In the event of an unfair dismissal the Tribunal must determine what would have been likely to occurred in the event of a fair procedure being adopted, in accordance with the guidance in **Software 2000 Ltd v Andrews** [2007] IRLR 569. The EAT stated:

> *'If the employer seeks to contend that the employee would or might have ceased to be employed in any event, had fair procedures being followed, or alternatively, would not have continued in employment indefinitely, it is for him to reduce relevant evidence on which he wishes to rely. … However, there will be circumstances where the nature of the evidence which the employer wishes to reduce or which he seeks to rely, is so unreliable that the Tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made'.*

111. Section 123(6) of the Act states: '*Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding*'.

112. A claimant guilty of culpable, blameworthy and/or foolish conduct is likely to be the author of his own downfall, which ought to be reflected in no or substantially reduced compensation (**Nelson v BBC** [1979] IRLR 346).

Public Interest Disclosures

113. Whistleblowers are protected from suffering any detriment or dismissal from their employer as a consequence of making a public interest disclosure of alleged wrongdoing. The Act defines a public interest disclosure in the following way: Section 43B of the **ERA** states:

> ***43B Disclosures qualifying for protection***
> *(1) In this Part a "qualifying disclosure" means any disclosure of information which in the reasonable belief of the worker making the disclosure, is made in the public interest and, tends to show one or more of the following:*
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
> ***43C Disclosure to employer or other responsible person***
> *(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith:*
> *(a) to his employer.*

114. A protected disclosure may be made during the employment, but also after its termination (**Onyango v Berkley Solicitors** [2013] IRLR 338 EAT).

115. In **Babula v Waltham Forest College** [2007] 346 the Court of Appeal held that '*An Employment Tribunal hearing a claim for automatic unfair dismissal has to make three key findings. The first is whether or not the employee believes that the information he is disclosing meets the criteria set out in one or more of the*

subsections in ERA 1996, section 43B(1)(a)-(f). The second is to decide objectively whether or not that belief is reasonable. The third is to decide whether or not the disclosure is made in good faith'.The 'reasonable belief' statutory test is a subjective one. The **ERA** states that there must be a reasonable belief of the worker making the disclosure (**Korashi v Abertawe Bro Morgannwg University Local Health Board** [2012] IRLR 4, EAT). In **Korashi** the Court of Appeal stated '*as to any of the alleged failures, the burden of proof is upon the Claimant to establish upon the balance of probabilities, any of the following, (a) there was in fact, and as a matter of law, a legal obligation or other relevant obligation on the employer in each of the circumstances relied on; (b) the information disclosed tends to show that a person has failed, is failing, or is likely to fail to comply with any legal obligation to which he is subject.*' The Court continued, '*Belief seems to us to be entirely centred upon a subjective consideration of what was in the mind of the discloser. That again seems to be a fairly low threshold.*'

116. In **Simpson v Cancer Fitzgerald Europe** [2021] IRLR 238 an individual presented whistle blowing claims based on the assertion that he had made protected disclosures in respect of traders engaging an illegal practise is known as 'front running'. The Tribunal rejected the allegation that there was any causal link between these matters and the treatment of the Claimant. It did so on the basis that the communications contained ambiguity and the Claimant had not, as had been his duty as an FCA approved professional, reported his concerns to Compliance. The Court of Appeal, Bean LJ stated '*obviously it was open to the Tribunal to find that his failure to make any explicit report to Compliance indicated that he did not genuinely, unconscious, conscientiously believe that there had been any such breaches*'.

117. Qualifying disclosures must involve a disclosure of information, ie must convey facts, rather than merely raise an allegation. There must be the disclosure of information. In **Williams v Michelle Brown AM** [2019] UKEAT/0044/19 the EAT stated *'If the Tribunal properly concludes that the factual content of the claim disclosure cannot reasonably be construed as tending to show a criminal offence [or other relevant breach of section 43B(1)] then that conclusion will by itself be fatal to the proposition that there was a qualifying disclosure relying on section 43B(1). That will be so regardless of what the Claimant subjectively believed, and regardless of whether or the other elements are shown'*.

118. The distinction between information and comment or assertion was illustrated by Slade LJ in **Cavendish** as follows:

> '*the ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around." Contrasted with that would be a statement that "You are not complying with Health and Safety requirements". In our view this would be an allegation not information.*'

119. The question is whether there is sufficient by way of information to satisfy section 43B. This will be very much a matter of fact for the Tribunal. The more the statement consists of unsupported allegation, the less likely it will be to qualify, but this is as a question of fact, not because of a rigid information/allegation divide (**Kilraine v London Borough of Wandsworth** [2018] ICR 1850). For a statement to be a qualifying disclosure, there must be sufficient factual content and specificity to show that one of the listed matters in section 43B(1) is engaged. '*If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure that he makes has a sufficient factual content and specificity such that it is capable of tending to show that matter listed, it is likely that his belief will be a reasonable belief*'.

120. It is then necessary to determine that the worker has a reasonable belief that the disclosure is in the public interest and tends to show one of the six statutory categories of 'failure'. The definition of a qualifying disclosure is '*disclosure of information which, in the reasonable belief of the worker, is made in the public interest*'. Disputes that are essentially personal contractual disputes are unlikely to qualify (**Millbank Financial Services Ltd v Crawford** [2014] IRLR 18, EAT). It is not sufficient that the Claimant has simply made allegations about the wrongdoer especially where the claimed whistleblowing occurs within the Claimant's own employment, as part of a dispute with his or her employer (**Cavendish Munro Professional Risks Management v Geduld** [2010] IRLR 38).

121. There must be an actual or likely breach of a legal obligation. Under paragraph (1)(b) there must be an actual or likely breach of the relevant obligation by the employer (**Norbrook Laboratories (GB) Ltd v Shaw** [2014] ICR 540, EAT). The word 'legal' must be given its natural meaning. The fact that the individual making the disclosure thought that the employer's actions were morally wrong, professionally wrong or

contrary to its own internal rules may not be sufficient (**Eiger Securities LLP v Korshunova** [2017] IRLR 115, EAT). The source of the obligation should be identified and capable of certification by reference for example to statute or regulation. 'Likely' means probable or more probable than not. It is not sufficient that the Claimant reasonably believed that the relevant disclosure of information tended to show that a person 'could' fail to comply with a legal obligation, or that there was a possibility or risk of non-compliance (**Kraus v Penna Plc** [2004] IRLR 260).

122. In **Norbrook** Slade J said '*… an earlier communication can be read together with a later one as embedded in it, rendering the later communication of protected disclosure, even if taken on their own, they would not fall within section 43B(1). Accordingly, two communications can, taken together, amount to a protected disclosure. Whether they do is a question of fact*'.

123. An employee wanting to rely on the whistleblowing protection before a tribunal bears the burden of proof on establishing the relevant failure (**Blackbay Ventures Ltd v Gahir** [2014] IRLR 416, EAT). As to any of the alleged failures, the burden of the proof is upon the Claimant to establish upon the balance of probabilities any of the following: (a) there was in fact and as a matter of law, a legal obligation (or other relevant obligation) on the employer (or other relevant person) in each of the circumstances relied on; and (b) the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

124. In the event that a qualifying protected disclosure was not made in good faith, at the remedy stage 'the tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the worker by no more than 25%'.

Automatic Unfair Dismissal

125. Section 103A of the Act states '*an employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason or, if more than one, the principle reason for the dismissal is that the employee made a protected disclosure*'.

126. The statutory question is what motivated a particular decision maker to act as they did? (**Kong v Gulf International Bank UK Ltd** [2022] IRLR 854). The reason or

principal reason for the dismissal means the employer's reason. This can be the reason of the dismissing officer, but the inquiry may be a broader one (**Royal Mail v Jhuti** [2019] UKSC 55). It is a matter to be explored in evidence:

> '*It might be appropriate for a tribunal to attribute to the employer knowledge held otherwise than by the decision-maker. He [Underhill LJ] was referring to the knowledge of a manager who, alongside the decision-maker, had some responsibility for the conduct of the disciplinary inquiry. … 'Counsel accepted that in such a case the motivation of the manipulator could in principle be attributed to the employer, at least where he was a manager with some responsibility for the investigation and for my part, I think that must be correct'. I respectfully agree that in the situation there identified by Underhill LJ it might well be necessary for the tribunal to attribute to the employer the knowledge of the manipulator*'.

127. On the issue of the burden of proof the Court of Appeal stated in **Kuzel v Roche Products Limited** [2008] IRLR 530:

> 'The Employment Tribunal must then decide what was the reason or principle reason for the dismissal of the Claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the Tribunal that the reason was what he asserted it was, it is open for the Tribunal to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that if the reason was not that asserted by the employer, that it must have been for the reason asserted by the employee. That may often be the outcome in practise but it is not necessarily so. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for the dismissal was not that advanced by either side. In brief an employer may fail in its case for fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason'.

128. A case of whistleblowing dismissal is not made out simply by a 'coincidence of timing' between the making of disclosures and termination (**Parsons v Airplus International Ltd** [2017] UKEAT/0111/17).

Detriments

129. It is for the Claimant to show that he was subjected to a detriment by an act or a deliberate failure to act by his employer or co-worker. The claim would only be made out if the Claimant was subjected to the detriment on the ground that he had made the protected disclosure. The relevant test is whether the protected disclosure materially influenced, in the sense of being more than a trivial influence, the treatment of the Claimant (**Fecit & Others v NHS Manchester** [2011] IRLR 111).

Section 48(2) of the Act states that the onus is on the employer to show the ground on which the act or deliberate failure to act is done. The 'on the ground that' test focuses on the relevant decision-makers mental processes. The test is not satisfied merely because there was some relationship between the protected disclosure and the detriment complained of, or because the detriment would not have been imposed but for the disclosure (**London Borough of Harrow v Knight** [2003] IRLR 140).

130. The Court of Appeal decision in **Jesudason v Alder Hay Childrens NHS Foundation Trust** [2020] IRLR 374 stated '*It is now well established that the concept of a detriment is very broad, and must be judged from the view point of the worker. There was a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment*'.

131. The decision to dismiss can itself be a detriment imposed by the dismissing officer. If established as a detriment the employer will be vicariously liable for that. In **Timis v Osipov** [2019] IRLR 52 the court said: 'It is open to an employee to bring a claim under section 47B(1A) against an individual co-worker for subjecting him or her to the detriment of dismissal, ie for being a party to the decision to dismiss and to bring a claim of vicarious liability for that act against the employer under section 47B(1B). … All that section 47B(2) excludes is a claim against the employer in respect of its own active dismissal.

Time.

132. The time limit for presenting a complaint of unfair dismissal or automatic unfair dismissal or detrimental treatment for whistle blowing is 3 months. Section 48 of the ERA states:

> *'(1) An Employment Tribunal shall not consider a complaint under this section unless it is presented:*
> *(3a) Before the end of the period of three months, beginning with the date or act or failure to act to which the complaint relates, or where that act or failure to act is part of a series of similar acts or failures, the last of them, or*
> *(3b) within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to have been presented before the end of that period of three months.'*

133. The Claimant must establish the each complaint as being presented within the time limit specified in section 48(3)(a) of the Act, or that it was not practicable to do so and

that the complaint was presented within a reasonable period following the expiry of the primary time limit. The test of reasonable practicality is a strict one (**Palmer v Southend on Sea Borough Council** [1994] ICR 372).

Submissions

134. As previously stated we were very grateful to both Counsel for the assistance that they have provided to us during this hearing. In addition to the List of Issues, Reading List, Cast List and Chronology we were provided with written Opening Skeleton Arguments from the Claimant (61 pages) and Respondent (22 pages) and written Closing Submissions from the Claimant (96 pages) and Respondent (38 pages). We also made a careful note of the closing oral submissions from both Counsel. We have not recited each Counsel's submissions in this Judgment, but all points were very carefully considered by us in our deliberations. In addition we carefully considered all of the applicable legal principles recited above when we reached our conclusions on the evidence.

Conclusions

The Disclosures

135. We shall turn first to the disclosures. The disclosures that remained after the Claimant's withdrawals were captured within the List of Issues, recited by us at paragraphs 15.1 to 15.13 above. We set out our findings on each disclosure within paragraphs 45 to 62 above which we do not propose to repeat here. Accordingly we have found that the following disclosures (expressed here in summary form) qualified for the protection offered by the **ERA**:

135.1 Disclosure 6: You've got to show your losses though;
135.2 Disclosure 7: concerns repeated after disclosure 6;
135.3 Disclosure 10: 'they have pulled the wool over your eyes';
135.4 Disclosure 12: the Claimant's first letter of appeal;
135.5 Disclosure 13: the Claimant's supplementary letter of appeal.

Automatically unfair dismissal on grounds of whistleblowing

136. Having found that the Claimant did make five qualifying disclosures, out next task is to determine whether the disclosures was the reason or principal reason for the Claimant's dismissal. Of the five that qualify, for this part of our analysis, we discount disclosures 12 and 13 (made during the appeal process) as these postdate the Claimant's dismissal. The Claimant was dismissed on 10th January 2022. Disclosures 6 and 7 took place between 16th and 27th August 2021, some 5 months earlier. Disclosure 10 took place on 28th September 2021, some 4 months earlier.

137. We have found as a fact that on the 22nd October Christophe Balleux sent an email to Aleksandra Jakovska **[A67]** naming the Claimant as the individual who had disclosed the confidential information as to the losses on the French Desk. Ms Jakovska immediately commenced an investigation into the Claimant. That day she asked for his emails and voice calls to be reviewed **[A71]**. Thus she commenced an investigation into the possibility that the Claimant had disclosed confidential financial information before she was aware of any disclosures made by the Claimant about mismarking.

138. We find that Ms Jakovska only acquired knowledge of the PIDs on 26th October 2021. This was after the disciplinary process had begun, during her investigatory meeting with the Claimant on 26th October 2021. This is supported by the fact that there is no evidence that Mr Romano told anyone of the PIDs that had been made to him and/or that he even realised his conversations with the Claimant amounted to PIDs or should be treated as such. Whilst we have found that the Claimant did make 3 qualifying disclosures prior to his dismissal (in that he disclosed information tending to show a breach of a legal obligation) it is also clear that he did not tell Mr Romano that he was 'blowing the whistle' on the marking activities of the French Long Term Power Desk or give him any indication that the matters he had raised should be treated as disclosures. Whilst it was legitimate for the Claimant to make the disclosures to his line manage (he is the first port of call under the whistleblower policy **[A544]**) it is of note that the Claimant did nothing express them in that way to Mr Romano, nor did he escalate his concerns or raise them with anybody else, as set out in the policy. It states that the Claimant could also have raised his concerns with the HR or Whistleblowing Champion Guido Santi, or the Chief Legal Officer, Darren Woods, or EDF's whistleblowing helpline, or the FCA's whistleblowing helpline **[A544-545]**. The Claimant did not utilise any of these other routes for the purpose of making his disclosures.

139. This means that the original reason for starting the disciplinary investigation could not have been the PIDs. We find that the original reason for starting the process was in response to concerns raised by Mr Balleux and Mr Mouturat that confidential information had been disclosed. Once the disciplinary process was started for a reason that was not linked to the disclosures, but based on information that the Claimant had disclosed confidential information, did Ms Jakovska and Mr Scavardone decide they would use the opportunity presented by that existing disciplinary process to dismiss the Claimant for another reason altogether, namely that he had disclosed mismarking by the French Desk once the PIDs were known? We find that the reason for the dismissal was that the Ms Jakovska and Mr Scavardone felt Mr Parry had been the source of leaked confidential information regarding the Profit and Loss account of the French Long Term Power Desk and had then been dishonest by denying that he was the source of confidential information. Whilst we accept that Mr Scavardone was involved in the decision to dismiss, we do find that Ms Jakovska lead the process, from her first knowledge that there may have been a leak, to the point that she signed the Claimant's dismissal letter.

140. There is no doubt that sharing confidential information is a gross misconduct offence. However flawed the process followed was, we do conclude that Ms Jakovska had the belief that the Claimant was responsible for the leak. The Claimant did raise his concerns about the French Desk with Ms Jakovska, and he did tell her that he had raised them with Mr Romano. However, we find on the balance of probabilities that this information played no part in the decision to dismiss, either in the Claimant's interest or against his interest. It was not the hidden reason for his dismissal. It was also not considered by Ms Jakovska as mitigation, or as a possible reason why the Claimant was being 'scapegoated' or explored by her as an impermissible motive for the complaints made by Mr Balleux or Mr Mouturat. All these matters go to the question of fairness, to which we shall return to later.

141. We were asked by Counsel for the Claimant to consider a **Royal Mail Group v Jhuti** point against Ms Jakovska. We do not accept that such an analysis is necessary given that we have found that, to all intents and purposes, she was the dismissing officer, and thus the Respondent's decision to dismiss was her decision. She ran the process, determined what to ask witnesses, drafted the letter of dismissal without any amends proposed by Mr Scavardone. He could recall seeing it before it was sent to the Claimant. The dismissal letter was sent out in Ms Jakovska's name. The dismissal letter thus represented the true position as to who the decision maker was.

We need only ask what her reason to dismiss was, which, we have found was the confidential information leak and the conclusion that the Claimant had lied about that by denying it.

142. We also considered a **Jhuti** point in relation to Mr Mouturat. However, we find that he was sent apparently credible information that the Claimant was the leak (set out at paragraphs 69 to 74 above) which he felt under a duty to escalate. He did not make up a case against the Claimant. He reported what he had heard. As we have already concluded at paragraphs 95 to 99 above, we do not accept Mr Mouturat's oral evidence to us that there was no animosity between himself and the Claimant. We prefer the observations of Mr Romano **[A178]** and Morgane Trieu-Cout **[A128]** that there was some level of animosity. Whilst we conclude that Mr Mouturat was not concerned about the possible consequences to the Claimant of his actions, we cannot conclude on the balance of probabilities that he made up a false allegation in order to create a false reason for his dismissal.

143. Accordingly, the claim for automatic unfair dismissal pursuant to s103A of the **ERA** fails.

Detriment on the grounds of Whistleblowing

144. We have been asked to determine whether the Claimant was subjected to any detriments on the grounds of the five PIDs that he made. It is necessary to consider each alleged detriment in turn:

145. Detriment 1: On a date before 26 October 2021, Mr Mouturat employee of the Respondent, falsely alleging that the Claimant had disclosed to third parties confidential precise figures of the loss suffered by the French Long-Term Power Desk.
Detriment 2: During an interview on or about 25 November 2021, Mr Mouturat falsely asserting that the Claimant had disclosed, to third parties, confidential precise financial information as to the losses on the French Long-Term Power Desk.
Detriment 3: Ms Jakovska and/or Mr Scavardone deciding to dismiss the Claimant, and/or adopting a flawed procedure in reaching that decision as detailed in paragraph 32 of the Particulars of Claim.
Detriment 4: On or about 12 January 2022, Ms Jakovska and/or Mr Scavardone (or another worker of the Respondent) deciding to notify the FCA (about the Claimant's dismissal) and contending that the Claimant had breached the FCA Code of Conduct as detailed in paragraph 33 of the Particulars of Claim.

Detriment 5: During an interview (notes of which were provided in anonymised form to the Claimant) on or about 15 March 2022, Mr Mouturat falsely asserting that the Claimant had disclosed, to third parties, confidential precise financial information as to the losses on the French Long-Term Power Desk.
Detriment 6: Mr Ritz deciding to uphold the Claimant's dismissal and to reject his appeal as detailed in paragraph 46 of the Particulars of Claim.

146: We set out our findings on each detriment within paragraphs 95 to 99 above which we do not propose to repeat here. Accordingly we reject the Claimant's claim for detriments for making a public interest disclosure, pursuant to s47B **ERA**. In the circumstances we do not have to determine the Respondent's liability for any such detrimental treatment by other workers pursuant to S47B(1B)-(1D) **ERA**.

147. On this issue of time, no time point arises as we have found that there were no acts of actionable detrimental treatment prior to the Claimant's dismissal. The dismissal itself was in time. The Claimant was dismissed on 10th January 2022. He notified ACAS of a dispute within 3 months of that date on 6th April 2022. He presented his Claim Form on 16th June 2022, within a month of his Early Conciliation certificate on 17th May 2022.

'Ordinary' unfair dismissal

148. What was the reason or principal reason for the Claimant's dismissal? Was it a reason related to his conduct? As stated, we find that the reason for the Claimant's dismissal was his conduct, namely that he had disclosed confidential information and when challenged on that point, he had lied about. We have accepted Ms Jakovska's evidence as to the reason at the point of dismissal. She felt he was dishonestly denying he had been the source of the leak, and was dismissed for dishonesty, as much as for the leak itself. As such we find that the Respondent has established conduct as its reason for dismissing the Claimant, pursuant to s98(1)(a) and s98(2)(b) of the **ERA**. We also find, however objectively unreasonable or unfair the process that was followed was, that the belief was genuinely held.

149. We turn now to the question of fairness. We remind ourselves of the principle in **Roldan** that additional care is needed in the investigation in a possible career ending case, or one in which some form of professional status is in jeopardy. We find, in the circumstances of the case (including the substantial size and administrative resources

of the Respondent) that the Respondent act unreasonably in treating the Claimant's conduct as a sufficient reason for dismissing the Claimant. We do not find that the Respondent had reasonable grounds for its belief that the Claimant was guilty of misconduct. There was no fair investigation prior to the decision to dismiss, and the appeal process failed to correct that failure. The appeal process failed to attach any weight to exculpatory evidence and in fact, it appears it took steps to dilute what exculpatory evidence that it had. We think the sanction of summary dismissal fell within the range of reasonable responses to an employee fairly found to have disclosed confidential information (the Claimant accepted as much in evidence to us) however we find that the Claimant cannot be so described.

150. In terms of the dismissal itself, we remind ourselves of the core requirements and safeguards set out in the Respondent's disciplinary policy. The policy sets out various safeguards to employees engaged in a disciplinary process. Its core principle was that dismissal will only occur where there are reasonable grounds for believing an employee is guilty of serious misconduct based on a thorough investigation and after a disciplinary hearing at which they have been able to put their case forward. The disciplinary invitation was wholly inadequate **[A99]**. No details were provided to the Claimant. At the disciplinary hearing, apart for references to a lunch and dinner, and losses and numbers, no documents, statements or other materials were provided.

150.1 The Respondent denied the Claimant this opportunity by failing to let him know the details of the allegations that he faced or what evidence it had gathered was.

150.2 The policy states that purpose of the investigation is to establish a fair and balanced view of the relevant facts and information relating to the disciplinary allegations *before* deciding whether to proceed with a disciplinary hearing. This did not happen.

150.3 The policy required that employees will be given reasonable notification of any disciplinary hearing, specifying the complaints which are required to be answered together with any relevant evidence. This did

not happen. The policy requires that where witnesses or documents are relevant a statement and all copies of documents will be made available to employee. This did not happen.

150.4 The policy mandated that during the hearing details of the allegations against the individual and of the evidence gathered will be provided and that the individual will be given every opportunity to respond and ask questions. This did not happen.

151. Ms Jakovska's rationale for not providing the Claimant with any details of the case against him is flawed and objectively unreasonable. She treated Mr Balleux and Mr Mouturat as whistleblowers and thus entitled to confidentiality, even though neither asked to be treated as whistleblowers and/or in confidence. In so doing she sacrificed any semblance of fairness to the Claimant, notwithstanding the likely career ending consequences that a dismissal would entail. Neither Mr Balleux, Mr Mouturat or for that matter Mr Arsenie asked to be treated as whistleblowers or for their information to be kept confidential. Whilst Mr Mouturat asked if his sources could remain confidential, he did not seek or expect the protection offered to whistleblowers for himself. In any event the rule on anonymity is not as far reaching as Ms Jakovska suggests. It limits information to those who need to know **[A542-546]**. The Claimant was facing a career ending dismissal. He needed to know.

152. The Claimant was dismissed for putting confidential information as to the size of the French Desk's losses into the market. This was objectively unfair. Mr Romano told us in evidence that the numbers were in the market before the Claimant's house party, and it was likely that other information had also leaked out. This exculpatory evidence was not considered. Indeed, we found as a fact that on 6th October 2021 (prior to any disclosure of information alleged against the Claimant) Michele Reid, the Respondent's Head of Communications had been contacted by journalists from Bloomberg or the Wall Street Journal, who referred to losses of €400 million and that a trader had been fired. A further contact from the Financial Times specifically referred to a €400 million loss. On the same day an on-line poll invited users to guess the size of EDFT's losses, giving a range of €100m to €600m with €400m-€500m in the middle of the range of options **[A299]**. This strongly suggests that accurate information as to the French Desk's losses was in the market prior to any allegation made against the Claimant. This was overlooked by the Respondent.

153. Potentially exculpatory evidence was ignored. Mr Romano told the disciplinary investigation that Magda Politanska had disclosed confidential information relating to the French Desk's losses **[A179]**. This is evidence that would, if obtained, had the potential to undermine the case against the Claimant. Remarkably, it decided not to interview her as the Respondent was in crisis mode, and Ms Politanska was on garden leave and was considered low risk. As an explanation for not including her in an active investigation as to the source of the leak, this makes no sense and is unfair. The Claimant was also considered low risk as he was never at any stage suspended. The reason for including her is not to establish whether she would be likely to leak such information again, but to establish whether it could fairly be concluded that the Claimant was the original source. That the Respondent was in crisis mode was irrelevant. It would be making an FCA referral in the event that the Claimant was found guilty as charged. It had a legal obligation to investigate this thoroughly and it failed to do so. We were also concerned that Ms Jakovska accepted in evidence that was an oversight not to notify the FCA of Magda's regulation breach. It appears that this 'oversight' stemmed from an unfair focus on the Claimant.

154. Ms Jakovska accepted in evidence that the 7th October text (said to be based on a leak from the Claimant) stated that losses had been disclosed of €150m. However, she would have known and/or as part of her investigation was in a position to find out that they were in fact €489m. This undermines the assertion relied on to dismiss the Claimant that it must have come from him as the figures were too close to be guessed at by the market.

155. It does appear that Ms Jakovska moved the goal posts in order to justify her dismissal of the Claimant. At the end of her evidence she indicated that the reason for dismissing the Claimant was not so much the disclosures themselves, but that he had lied about making them and/or not admitted making them. She stated, '*we felt that Rupert had not been honest about sharing confidential information*' and '*we felt issue was that Rupert had been dishonest about sharing information*'. In answer to Member Cook, she said, 'Rupert's honesty and integrity were in question, we can't trust him'. This indicates that the dismissal was not so much for disclosing confidential information, but for denying that he had, when such a denial was considered dishonest. This is an almost medieval approach to investigation. Admit the charge and we will dismiss you for being the leak. Deny the charge, and we will

dismiss you for lying. There was no reasonable means for the Claimant to establish his innocence.

156. The Claimant relied on the complete inexperience of Mr Scavadone in conducting disciplinary proceedings. This in itself would not make the dismissal unfair, however it speaks to the imbalance in decision making between Ms Jakovska, who ran the entire process, and Mr Scavadone who described himself in the process as '*more of an observer*'. Whilst he made that point in the context of not being bias, we felt it reflected the reality of the situation. He was observing a process run by Ms Jakovska. We are surprised that in a potentially career ending 'FCA referral case' dismissal, for which the law requires a careful and considered investigation, that the Respondent entrusted the process into the hands of a manager that had never done one before and allowed himself to be lead by others.

157. For all of the above reasons the Claimant's dismissal was objectively unfair. We now turn to consider whether that unfairness was corrected by the Respondent's appeal process.

The Appeal.

158. One unfairness of the disciplinary process was cured by the appeal in that the Claimant did receive the detail of the allegations against him and the evidence. That said we concluded that Mr Ritz could not be relied on as an accurate historian of what had been provided to the Claimant. He told us in evidence that a text appearing at **[A54.A]** was disclosed to the Claimant at the appeal stage. This was disputed by the Claimant. During the hearing Mr Smith, the Respondent's Counsel, accepted that the text had first been disclosed as part of disclosure in the preparation for this Tribunal. Mr Ritz's evidence had thus been contradicted on that point.

159. We find that the curative effect of providing details to the Claimant at the appeal stage that were denied to him at the disciplinary stage was fatally undermined by the failure of Mr Ritz to fairly consider the new exculpatory evidence that was uncovered by the appeal process.

160. Mr Ritz made his decision based on the final versions of the investigation notes taken during the appeal process. We were very concerned about the process followed for Mr Vadim Arsenie's appeal evidence. The final version of the statement **[A328]** records Mr Arsenie has having told the appeal investigation '*he remembered the*

setting very well, that both he and the flatmate were outside and the flatmate asked him whether it was true what Rupert Parry had told him that EDFT had lost €420m'. At the end of that transcript Susan Robinson, the HR Business Partner had added the following: '*following the meeting Vadim raised that the events in question took place in October 2021 and whilst he presented his best recollection during the investigation meeting, his memory was not 100% clear*'. It emerged during the evidence that Ms Robinson's annotation arose because Mr Arsenie, on reviewing the transcript of his evidence highlighted the passage 'what Rupert Parry had told him' with the comment '*I cannot be absolutely certain after thinking over whether that it exactly what was said to me*' **[A341a]**. Thus Mr Arsenie is expressing direct doubt over the evidence that it was the Claimant that disclosed the leak.

161. At its best, Ms Robinson's decision to remove that Mr Arsenie's explanatory comment from the final version of his statement and replace it with far more generalised statement that his memory was not 100% clear was ill judged. At its worst it was a manipulation of the evidence against the Claimant's interests as it removed a clear element of doubt in Mr Arsenie's mind that the Claimant was the source of the leaked confidential information. This was particularly important given that Mr Scavardone had told the appeal investigation that Mr Arsenie's evidence was particularly important **[A332]** and indeed, Mr Ritz, in dismissing the Claimant's appeal, considered Mr Arsenie's 95% recollection as a '*strong level of confidence*' **[A429]**.

162. In evidence Mr Ritz accepts that Mr Arsenie's annotation qualifies or even retracts his evidence that the Claimant was source of leak. He sought to justify that by telling us that Mr Arsenie's actual amends were not seen by him, however this reflects poorly on his control of the process and adds to the concern that Ms Robinson presented evidence to him that she had massaged (whether intentionally or not) against the Claimant's interest.

163. We find that this element of reflection by Mr Arsenie 'after thinking over' what had happened and concluding that his memory could not be fully relied should have sounded alarm bells for Mr Ritz, but plainly it did not. This is all the more so because at the disciplinary stage Mr Arsenie referred to losses of €400m, yet at the appeal stage his recollection was a figure of €420, which was closer to the French Desk's actual losses. Taken together, the only safe conclusion open to Mr Ritz was that Mr Arsenie could not be relied on as a provider of accurate evidence. Mr Arsenie tried to

spin this conflict in his evidence to us (at paragraph 9 of his statement) but we reject the suggestion that his memory improved over time.

164. Mr Ritz also had the evidence of Mr Bonner **[A372]**. He stated that the discussion between the broker and the Claimant had been no more than '*its been a crap week and we've had some heavy losses*' and that the original source of the evidence, Mr Salyem, since confirmed that there had been a discussion but nothing specific was said. In addition Mr Romano told Mr Ritz during the appeal investigation that he had spoken to the head of Aracco and the broker Mr Salyem. They had confirmed that they did not think anything was said **[A335]**. The transcript of Mr Bonner's call with Tom Roberts, the Aracco boss records Mr Roberts saying '*no, like no positions were discussed, no, nothing substantive or concrete was discussed, it was kind of how has the week been, yeah it was pretty crap, you know we've sustained some heavy losses but nothing more, nothing more than that*' **[A563-564]**. Mr Ritz also had a statement from the housemate, Mr Jones, denying that he had given any specific information to Mr Arsenie **[A388]**.

165. Thus the evidential case against the Claimant was falling away. We are at a loss to understand Mr Ritz's rationale for accepting the evidence of Mr Arsenie which by now had become so undermined. This is not the only area in which Mr Ritz's foundations appear to be built on sand. He accepted that the system search showed that the Claimant had no access to the Profit and Loss figures for the French Desk. He assumed that the Claimant had calculated it. This is not good enough in a career ending dismissal. Finally, Mr Ritz told us that the Claimant's proposed motive for his dismissal, that he was a whistleblower, was outside his remit. We tend to disagree. If an employee is proffering another explanation for his dismissal we do consider that it behooves the appeal hearing manager to investigate it. It cannot be dismissed as 'outside his area'.

166. We have to ask ourselves: Are the failures of Mr Ritz so gross as to indicate an ulterior impermissible reason for rejecting the appeal, namely the Claimant's qualifying disclosures. We have considered this carefully. We have concluded that Mr Ritz failed to consider the qualifying disclosures at all, either as a reason suggested by the Claimant for his dismissal, or as his own secret reason to dismiss. On balance we concluded that Mr Ritz, being inexperienced in this process (never having done an appeal or had training in how to conduct them) felt the need to support the business. This failing means that the appeal process cannot fairly be said to have

remedied the failings in the disciplinary process, and as such, the dismissal remains objectively unfair.

Polkey.

167. We remined ourselves of the considerations to be applied when considering whether to make any reductions on Polkey grounds. We have made no reduction for Polkey. We consider that the whole exercise of seeking to reconstruct what might have been in relation to the deficiencies at the investigation, disciplinary and appeal stages is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made, pursuant to the guidance **Software 2000**.

Contributory Fault.

168. Section 123(6) of the Act states: '*Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding*'. A claimant guilty of culpable, blameworthy and/or foolish conduct is likely to be the author of his own downfall, which ought to be reflected in no or substantially reduced compensation (**Nelson v BBC** [1979] IRLR 346).

170. We now turn to the issue of contributory fault. We are no longer considering the reasonable belief of the Respondent. We have to determine whether the Claimant actually was the leak of the confidential information as to the Profit and Loss figures of the French Desk. If he was then he would fall squarely into the category of the culpable blameworthy Claimant who ought to have a very substantial reduction in any compensation.

171. We note that the Claimant was angry when he was told that he had to surrender his profitable trades to the French Desk to reduce their losses at a personal financial cost to himself. We also think that he was angry that the concerns he raised about mismarking was not being acted upon as he may have wished. Both of these points could have provided a motive for being the leak. However, we find on a balancing exercise that he was not a risk. The Respondent was content that he continue to trade and not be suspended. As we have found all of the evidence against him was degraded such that we not consider we have heard any compelling evidence that the Claimant was the source of the leak. Magda was a source of leaked confidential

information and an accurate level of losses was known to the market prior to any suggestion that the Claimant had been responsible for any leaks.

172. Accordingly we find as a fact that the Claimant was not the source of the leaked confidential information. Accordingly there shall be no reduction for contributory fault.

Conclusion.

173. The Public Interest disclosure claims fail. The 'ordinary' unfair dismissal claim succeeds. A Case Management Hearing to determine remedy shall be listed in due course.

4th September 2023

Employment Judge Gidney

Sent to the parties on:
04/09/2023
For the Tribunal: