EMPLOYMENT TRIBUNALS

Claimant: **Mr I Weir**

Respondent: **Citibank Global Markets Limited**

Heard at: **East London Hearing Centre (by CVP)**

On: **4, 5 & 6 October 2023, 13 & 20 November 2023, 4 December 2023 (in chambers) & 11 December 2023**

Before: **Tribunal Judge Overton acting as an Employment Judge**
Members: **Ms A Berry**
Ms S Harwood

Representation
Claimant: Mr Jackson, Counsel
Respondent: Mr Forshaw, Counsel

The Tribunal Judge apologises to the parties for the delay in producing these written reasons.

JUDGMENT having been sent to the parties on ***26 March 2024*** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This is a claim for unfair dismissal and breach of contract (wrongful dismissal).

2. The Respondent is a UK subsidiary of Citigroup Inc, a global banking and financial services corporation.

3. The Claimant was initially employed as a trader by Citigroup Pty Limited in Australia from 28 February 2005. He moved to London to become a trader for the Respondent from 4 August 2014. He worked on the Respondent's London Asia Pacific High Touch trading desk ('APAC desk').

4. Following an investigation into the activities of the APAC desk, three allegations were levelled at the Claimant, concerning making misleading statements to clients about the status of trades on three particular dates,

posting misleading Indications of Interest (IOIs) to the financial market and failing to disclose to his line managers that misleading IOIs were being posted. He was invited to a number of investigation and disciplinary meetings, following which he was summarily dismissed for misconduct. Mr Weir appealed against his dismissal but his appeal was not upheld.

5. The Claimant contacted ACAS for the purposes of completing the Early Conciliation process and then presented his ET1 to the Employment Tribunal. In his ET1 he complained of unfair dismissal and wrongful dismissal.

The Issues and the Hearing

6. Case management orders were made on the initiative of an Employment Judge. In response to these orders the parties agreed a list of issues.

7. The parties had prepared an agreed bundle of documents that ran to 3295 pages.

8. As is now normal, the Tribunal read the witness statements and documents referred to in the absence of the parties. We then heard from the following witnesses:

   (1) Rebecca Nelson, who was employed by the Respondent as a Director, Associate General Counsel (Litigation & Regulatory Investigations) and who was the Lead Investigator into activities of the APAC desk.

   (2) Jacqueline Shakspeare, who at the relevant time was employed by the Respondent as an Employee Relations Specialist, supported and facilitated the disciplinary process.

   (3) Fater Belbachir, Global Head of Equities at the Respondent, sat on the Disciplinary Committee which took the decision to dismiss the Claimant.

   (4) Toby Billington, Compliance Risk Lead at the Respondent, heard the Claimant's appeal against the decision to dismiss him on 16 February 2022, following an appeal hearing that took place on 2 September 2021 and 25 January 2022;

   (5) we then heard from the Claimant himself.

9. Counsel for the Respondent had prepared an opening skeleton argument. Counsel for each party made oral and written closing submissions to the Tribunal. Both parties referred the panel to a number of legal authorities. We shall not recite the submissions made to us here but shall refer to the significant arguments in our conclusions below.

10. The list of issues agreed by the parties was contained at page 107-111 of the separate Pleadings Bundle.

11. The agreed list identified the claims as

'(1) unfair dismissal contrary to sections 94 and 98 ERA 1996; and
(2) wrongful dismissal.'

12. The list went on to record that '[t]he parties are agreed that: (i) the Claimant was dismissed; (ii) the Claimant was dismissed for a potentially fair reason for the purposes of section 98 ERA 1996.'

13. The list of issues in the bundle read:

Claims

1. The Claimant brings claims for:
(1) unfair dismissal contrary to sections 94 and 98 ERA 1996; and
(2) wrongful dismissal.

2. The parties are agreed that:
(i) the Claimant was dismissed;
(ii) the Claimant was dismissed for a potentially fair reason for the purposes of section 98 ERA 1996.

3. In particular, the Claimant was dismissed on the following two charges (which were 'allegations 2 and 3' considered in the disciplinary process):
(a) that he posted, or required or encouraged another to post IOIs on Bloomberg that indicated there were genuine client orders or interest in circumstances where he knew and/or suspected that the IOIs did not reflect such client orders or interest;
(b) that he did not inform ICRM (the Respondent's compliance team) or his direct line management that he knew and/or suspected that IOIs being posted by the London APAC Desk were misleading in that they did not reflect genuine client orders or interest. In particular, he engaged in discussions with Stan Stanger (UK ICRM) and attended a meeting on 22 May 2018 with Mr Stanger and Sam Huggins (his direct line manager) during which he sought to obtain approval for the London APAC Desk's approach to posting IOIs on Bloomberg, but failed during those discussions to reference his knowledge or suspicion that IOIs being posted by the London APAC Desk were misleading in that they did not reflect genuine client orders or interest.

Unfair Dismissal

4. Did the Respondent adopt a procedure in dismissing the Claimant which fell within the reasonable band open to it? As to this:
(1) The Claimant contends:
a. The investigation was unfair because the Claimant was not given a fair opportunity to prepare answers to questions.
b. The Claimant was not permitted to be accompanied to investigatory meetings.
c. The Claimant was interrogated with hostility during the process and was not given a fair opportunity to answer points raised.

d. The decision to dismiss was pre-determined and the disciplinary process was a sham. The Claimant says this is evidenced by his role being advertised prior to his dismissal.
e. The process was lengthy with extended delays.

(2) The Respondent's position is that:
a. The Claimant was given a fair opportunity to answer all questions in the course of lengthy interviews and was provided with relevant documents where appropriate before being required to answer questions on the same.
b. The Claimant had no right to accompaniment at an investigatory meeting pursuant to section 10 of the Employment Relations Act 1999.
c. The Claimant was not interrogated with hostility at any investigatory interview. The Claimant was given a fair opportunity to answer points raised and the interviews were conducted by experienced lawyers.
d. The disciplinary process was not a sham and the outcome was not predetermined. The Disciplinary Committee considered the matter carefully and the Claimant's role was not advertised prior to his dismissal
e. The dismissal was not unfair as a result of the duration of the process, which in the circumstances was not unreasonable.

5. Did the decision to dismiss the Claimant fall within the band of reasonable responses? As to this:
(1) The Claimant contends:
a. There was no applicable guidance or training on IOIs.
b. Senior personnel at the Respondent had confirmed to the Claimant that his approach was correct.
c. It was inconsistent for the Respondent to treat the Claimant differently to Jamie Miller.
d. The Claimant was working under extreme time pressure and receiving information from a variety of other sources.
e. The Claimant's reporting lines were not clear and he did not have adequate support from his managers. f. The Claimant was scapegoated and a knee-jerk reaction was applied.

(2) The Respondent contends:

a. Whilst there was no specific policy in relation to IOIs, the Claimant was well aware (or should have been) that the posting of IOIs which did not reflect genuine client interest was grossly inappropriate.

b. The Claimant has not identified any senior personnel who stated that his approach to IOIs was correct, but in any event, the Claimant was or should have been aware that posting of IOIs which did not reflect genuine client interest was grossly inappropriate.

c. The Claimant's position could be distinguished from the position of Jamie Miller.

d. The fact that the Claimant's role was conducted under time pressure did not excuse his approach in posting IOIs which did not reflect genuine client interest. The Claimant was not disciplined in relation to IOIs which were provided to him by other trading desks.

e. The Claimant's reporting lines were not unclear, but in any event, that would not have excused the Claimant's conduct.

f. The Claimant was not scapegoated nor were the disciplinary findings a knee-jerk reaction. On the contrary, those findings were made after a detailed consideration of the matter.

Wrongful Dismissal

6. Was the Respondent entitled to dismiss the Claimant without notice? In particular:

(1) Did the Claimant commit acts of gross misconduct?
(2) Was the Claimant in repudiatory breach of his contract of employment?

14. During the opening remarks of the hearing, and having read Counsel for the Respondent's opening skeleton argument, Counsel for the Claimant clarified that the Claimant did not agree that the Respondent had a genuine belief in the Claimant's guilt or reasonable grounds for such a belief.

15. Counsel for the Claimant argued that their position that the outcome of the disciplinary process had been predetermined and was a 'sham', indicated that the Claimant did not concede that the Respondent had a genuine and reasonable belief, despite the agreed list stating that '[t]he parties agreed that: … (ii) the Claimant was dismissed for a potentially fair reason for the purposes of section 98 ERA 1996'.

16. Counsel for the Respondent pointed out that the list of issues had been agreed between the parties over a year before and the Claimant had not raised an issue with that section of the list or sought to clarify their position.

17. The Tribunal considered that in deciding this case it would have to satisfy itself that the provisions of section 98 Employment Rights Act 1996 had been met and that included the application of relevant caselaw such as *British Home Stores Ltd v Burchell* [1978] UKEAT/108/78. The Tribunal noted that the burden lies with the Respondent to show the reason for the dismissal and that it was a potentially fair reason. The *Burchell* test had not been explicitly addressed in the agreed list of issues and as the Tribunal would have to make findings of fact on the matter, it was appropriate for the Tribunal to hear evidence and argument on those elements of the test.

18. By the end of the liability hearing the issues in dispute had narrowed and the Claimant did not seek to argue that the Respondent did not have a genuine belief in the Claimant's misconduct.

19. As agreed at the outset of the liability hearing, we heard evidence on liability, and on the following remedy issues: (1) if the respondent was found not to have followed a fair procedure, whether a fair procedure would not have made a difference to the outcome; and (2) contributory fault. Our findings and conclusions are on these issues only.

Our Findings of Fact

20. The Tribunal has found the following facts from the evidence.

21. The Respondent is a UK subsidiary of Citigroup Inc. (a global banking and financial services corporation, headquartered in New York).

22. The Claimant was employed by the Respondent as a Sales Trader from 4 August 2014 to 21 June 2021 on the London Asia-Pacific ('APAC') high-touch desk.

23. Before that, the Claimant was employed by Citigroup Proprietary Limited, in Australia, from 28 February 2005.

24. At the time of his dismissal the Claimant's role involved providing the dealers of the Respondent's clients (professional and large-scale investors) with market updates, trade ideas, sourcing buy and sell interest in relevant stock and being a main point of contact for them. Upon his move to London, the Claimant was performing his role in Pan-Asian markets covering twelve markets including Taiwan, Hong King, Singapore, Australia and New Zealand, trading for the Respondent's clients in UK and Europe. The Claimant's job title upon moving to London was Vice President. From 1 January 2019 he was promoted to the role of Director.

25. Global time differences meant that the Pan-Asian markets were open for only a short period of the Claimant's working day.

26. The Claimant worked within a small team - the London Asia Pacific ('APAC') High Touch Desk. When he first joined the desk, the team consisted of two, Stuart Clark and the claimant. Paul Moss replaced Mr Clark as de facto head of the desk in early 2016 and around the same time Jamie Miller joined the desk as a Sales Trader, having recently completed the graduate scheme. Kyle Shah joined in June 2018, as a graduate. He performed a hybrid role, shared with the US desk. The team worked across twelve Asia-Pacific jurisdictions.

27. The Claimant's line manager, for the period we're looking at, was Samantha Huggins (Managing Director and Head of Equity Sales Trading) who was based in London. The Claimant's 'matrix-managers', whom he dealt with on a more regular basis, were Phil Shaw, Managing Director and Head of Execution in Hong Kong and James Gleeson (Head of Sales Trading), both based in Hong Kong.

28. Because the claimant worked across the Asia-Pacific markets on behalf of European clients, he had matrix managers as well as a line manager. There was no formal policy about what issues fell under Ms Huggins' responsibility as line manager and what fell under Phil Shaw and James Gleeson's responsibility as matrix managers and the London APAC desk was given no instruction or explanation about what sort of issue should be raised with which manager.

29. Part of the Claimant's role involved the identification and publishing of Indications of Interest ('IOIs'). IOIs are indications that a client has an interest in buying or selling a particular stock in a particular quantity. The

IOIs are published on Bloomberg's trading platform with the aim of attracting a counterparty. Orders developing from IOIs made up a relatively small proportion of the orders dealt with by the London APAC desk.

30. There was no respondent guidance concerning the publication of IOIs but the Investment Association/Association for Financial Markets in Europe (AFME) produced industry-wide guidance. AFME represents Europe's financial markets and provides expertise to the banks and financial bodies it represents. The AFME guidance explains that in a situation 'where there is no firm underlying order but there is a reasonable expectation of interest from a specific client', that is defined as a Potential IOI and as an 'In Touch With' IOI (also referred to as a P:1 IOI). (p 2480 of the bundle)

31. It was the Respondent's case that to publish IOIs without a client order or client interest would be to mislead the market and this is what the Claimant was accused of.

32. The London APAC desk received these proposed IOIs from the desks physically based in the various Asian markets. The IOIs would then be published by the London APAC desk to the market, on the Bloomberg financial trading platform.

33. There were problems with the proposed IOIs that were sent through by the Hong Kong desk. They sometimes did not come at all and when they did, they were not in the format required for publication and did not come with all the necessary information for publication. The other 11 markets provided their IOIs in the expected format.

34. In order to publish an IOI on the Bloomberg platform, the information required included the stock name, a 'ticker' number and expected volume to be bought or sold. If the volume of a potential order was not known, it was permitted to use the average daily volume ('ADV') of 10% of the average number of shares traded within a day in a given stock.

35. In mid 2016 the Claimant raised with Phil Shaw (one of his two matrix-managers, based in Hong Kong) the problems he was having with the Hong Kong generated IOIs. In response, Mr Shaw sent the Claimant an Excel spreadsheet which he said the Hong Kong desk used for IOIs. This spreadsheet had macros embedded in it which drew down information from Bloomberg and Reuters trading platforms and created a list of named stocks along with all the other data needed for the publication of an IOI in respect of each stock.

36. We accept the claimant's oral evidence as to how he made use of this spreadsheet in the generating and publishing of IOIs from the Hong Kong desk. When the Hong Kong desk sent through incomplete IOIs (i.e. stock ticker numbers without the stock name and without expected volume or ADV), the claimant used the spreadsheet to draw down the relevant stock names from Bloomberg and Reuters and to calculate the ADV figure. This use of the spreadsheet greatly speeded up the Claimant's job as he had a small window of around an hour to identify and publish the relevant IOIs given the time difference between the Asian and London markets.

37. The claimant also identified potential IOIs from the London APAC desk's own knowledge of ongoing client orders and client interest, from the Asia top 10 stocks (a list summarising the top ten biggest orders in Asia) and from the Citi 10 stocks (a list of ten Hong Kong stock names in which the Respondent considers that it should concentrate efforts to gain business) as well as from another London-based desk, staffed by Mr Ryan Clendenny. The claimant gave evidence that he cross-checked the potential IOIs he had identified from these other sources against the Respondent's order pad (which showed what client orders were ongoing). Before publication of the IOIs, the Claimant removed all the stock names (whether generated from the spreadsheet or from the other sources identified), which did not reflect a reasonable expectation of interest from a specific client. So, according to the Claimant, at the time of publication, the potential IOIs being uploaded to Bloomberg and being released to the market were supported by a reasonable expectation of interest from a specific client.

38. It was the Claimant's evidence that the Respondent's order pad would show a trend in a particular client making purchases or sales of particular stocks and these purchases/sales could go on for a number of days or weeks. This was not disputed by the Respondent witnesses. The claimant extrapolated from the information on the order pad whether a particular client was therefore likely to continue showing an interest in particular stocks such that it would be accurate to publish an IOI. This 'reasonable expectation of interest' arose from the claimant's knowledge and experience of his clients and the orders that were in progress.

39. This was the IOI process the London APAC desk followed in respect of the Hong Kong IOIs (as the other 11 desks the claimant worked across, produced a list of IOIs ready for publication). The main staff members involved in the publication of the Asia-Pacific IOIs were the claimant and his senior colleague, Mr Paul Moss (Director).

40. The generating and publication of IOIs was not the subject of a Respondent policy at the time under review by the Respondent's investigation – which was February to November 2018. The claimant had learned about the IOI process 'on the job' and from his more senior colleagues.

41. On 19 October 2017 Paul Moss drafted an email to the Hong Kong desk – it explained in broad terms how the spreadsheet was used by the London APAC desk. Paul Moss was not interviewed as part of the investigation and he left the Respondent's employment on 12 September 2019. In the absence of Paul Moss to explain his meaning we must interpret the email as best we can and in light of the evidence available. The email indicates that the spreadsheet provided by the Hong Kong desk generates IOIs and that these are then added to and deleted as considered appropriate. (p2827)

'Attached is the s/sheet we use as a base for IOIs…
It spits out IOI's & then we ([the Claimant] takes the lead on HK & does a v good job) plays around with it in a few ways, mostly listed below…

- Cross check vs HT: Asia Top 10 Summary

- Add in any missing Citi 10 names taking a best guess at which direction most likely to capture flow

- Eyeball it & switch stuff around based on what residuals we know, colour we have ie region telling us proper bid for Insurers we will make sure offering them,…'

42. This is broadly in line with the claimant's explanation of how he makes use of the spreadsheet and indicates that some review and consideration is taken that only the relevant IOIs should be taken forward to publication. The email doesn't specifically say that names are deleted from the spreadsheet, nor that it is used to generate the stock names and ADVs of the potential IOIs sent over by the Hong Kong desk but it does refer to the claimant 'playing around' with and amending the list and the claimant has consistently referred to deleting names from the spreadsheet as well as adding to it and this is confirmed by correspondence relating to at least one occasion when an incorrect IOI was published in error and reference was made to the human review of the stocks generated by the spreadsheet and the removal of irrelevant stocks.

43. On this occasion – 26 October 2017 – a colleague queried an erroneous IOI published by the APAC desk. The claimant responded that he 'generally remove[s] the stocks that I think will have limited interest'. The respondent interpreted this as evidence that the claimant would publish according to what would generate interest ('fishing') rather than reflecting an expressed client interest. The Tribunal finds that this explanation of an IOI published in error reflects the claimant's stated position that he would use various tools to ascertain client interest and would remove those stock names that he did not consider were reflective of expected client interest.

44. The Respondent argues that Paul Moss's reference to 'taking a best guess at which direction most likely to capture flow' and the statement 'telling us proper bid for insurers we will make sure offering them' are indications that IOIs were being posted against the orders being placed and therefore IOIs were being posted that had no reasonable expectation of client interest and were in fact against client interest.

45. The Respondent relies upon email evidence that the claimant was sent a draft of Paul Moss's email about half an hour before it was sent to the Hong Kong desk and the fact that the final version of the email had been edited and was now sent on behalf of the London team. The Tribunal found that there was no reliable evidence that the claimant had contributed to the editing of the document and the claimant denies even seeing the email before it went out and says he would have made more significant amendments to it, if he had. We find on the balance of probabilities that the claimant did not read this email in advance and was not involved in its editing. We accept the evidence we heard that the claimant receives in excess of 500 emails per day albeit that many of them are ignored as being of little relevance to him. He also had just returned to the office from a work trip abroad on the morning that email was sent to him, and he was getting caught up on work. We also considered that Paul Moss was writing for his colleagues in Hong Kong who knew how the system worked and the email closes with a request that the spreadsheet be updated by someone to

ensure that it was capturing the right stocks, an indication that the spreadsheet at that time was generating stocks the desk did not want to publish as IOIs, which is consistent with the claimant's evidence and his description of the human review that took place.

46. The claimant called a meeting on 22 May 2018 with his line manager in London (Samantha Huggins), his matrix manager in Hong Kong (Phil Shaw), a compliance officer (Stan Stanger) and members of the London APAC desk in order to discuss the process of the London desk in generating and publishing IOIs particularly in light of the updated AFME guidance which now required IOIs to be published with 'qualifiers' – i.e. labels attached to the IOI which alerted interested parties to further information about the source of liquidity of the IOI. The conclusion of the meeting was that the London desk could continue to publish IOIs as 'natural' (this 'natural' labeling did not differentiate between an IOI on behalf of a client or on behalf of the bank itself) and that the London desk did nor need to use qualifiers. This was because, according to Mr Stanger, the guidance available to the industry on IOIs was not fit for purpose for IOIs generated by the London APAC desk as they were not 'live' – 'i.e. the desk was publishing IOIs for markets at a time when those markets were closed and there could not be a dialogue with the clients. Mr Stanger specifically says '- London AP Sales Traders for the markets covered can continue to use IOIs in current format within Bloomberg as EMEA/AFME functionality is not fit for purpose at this stage. This is not uncompliant, merely using a tool that is better suited to the markets covered and the time zone issues that arise as previously discussed.' (p782 & 1442)

47. This meeting of 22 May 2018 did not deal with the London desk's use of the spreadsheet for Hong Kong IOIs. The Respondent argues that this was the perfect time for the Claimant to have raised this issue and that the failure to discuss the spreadsheet was an indication that the claimant knew he was making improper use of the spreadsheet. However, we find that this meeting was to discuss the issue of IOIs across the Asia-Pacific region and not the specific issues with the Hong Kong IOIs (the Claimant covered 12 desks across the Asia-Pacific region). And it was not strange for the claimant to fail to mention the spreadsheet when he believed the spreadsheet was being used appropriately and in line with the available industry guidance.

48. In 2018 the Hong Kong office was subject to an investigation by the Hong Kong regulator, SFC. The investigation outcome was that the respondent had failed to implement the changes required following a previous inspection in 2016. As a result of this investigation by SFC, most employees on that desk were eventually dismissed by the Respondent, including the claimant's matrix managers, Phil Shaw and James Gleeson.

49. On 1 November 2018 Mr Shaw of the Hong Kong desk sent the London desk an email stating that '[i]f you tag or refer to an order as Client Natural - this must be factual (i.e. there must be a client order on the pad).' This deviated from the AFME guidance that the claimant had been following (i.e. AFME guidance refers to 'reasonable expectation of interest', as an alternative to an existing client order). As part of this email chain of conversations, Paul Moss writes to James Gleeson in Hong Kong on 12 November 2018 in response to Phil Shaw's statement. Paul Moss says 'We

can generate off the usual spreadsheet but given latest guidance from you & Phil we don't feel comfy going out PI as we really don't have anything to indicate the P nature.'

50. Around the same time the UK compliance officers undertook a review of the London APAC desk's process for publishing IOIs. On 20 November 2018 Stan Stanger (of the Respondent's UK compliance team) writes 'For your information the team here in the UK on the APAC desk put all their IOI's out as PI. This means 'Potential,' so not explicitly linked to a client order.'

51. It was around this time that the London APAC desk stopped using the spreadsheet for its Hong Kong IOIs. These emails reflect the changes that were being implemented by the Respondent and the London APAC desk in order to address the failings identified by the SFC investigation. The respondent's examination of the IOI process led it eventually to produce a procedure that required an IOI to be published only if supported by the written consent of a client, thereby requiring confirmation of client interest rather than the 'reasonable expectation' of client interest and Mr Shaw had already directed that there had to be an existing order leading the London APAC desk to cease using the spreadsheet. We don't accept the respondent's argument that Mr Moss's email of 1 November 2018 was evidence that the process used by the London APAC desk up until then was dishonest. We read that email in the context of the respondent (in this case, Mr Shaw) indicating in an earlier email that a potential IOI now had to have an existing client order on the pad, and not the reasonable expectation of interest that was acceptable under the AFME guidance. Mr Moss appears to be saying that they don't feel they can go out as 'potential' now, because they have no existing order to back it up. (p797)

52. In the second half of 2019 the Respondent published a Lessons Learned Report following the SFC's regulatory inspection of late 2018. This report identified that the Hong Kong equities sales trading desk had been disseminating misleading IOIs. That the compliance unit had failed to fully appreciate the regulatory standards espoused by the SFC and compliance had incorrectly assumed the Respondent's existing framework was sufficient. It was also noted that the Respondent's policies did not clearly identify who had been responsible for taking forward and implementing the changes required by the SFC's circular of February 2018. A lack of training around IOIs was identified as a problem and the report confirmed that the Respondent was in the process of enhancing its compliance monitoring of IOIs and the requirement of prior client consent for IOIs was implemented by the Respondent on 2 December 2018. (p28-30)

53. Paul Moss resigned and left the Respondent's employment on 12 September 2019.

54. The Claimant was first invited to a fact finding interview on 27 September 2019 when he was asked to talk about the London APAC desk's practices across a range of activities in broad terms. The invitation took the form of a tap on the shoulder from Stan Stanger of the compliance unit, with two minutes' notice of the meeting. The meeting itself lasted for around 45 minutes.

55. The claimant did not speak about the spreadsheet he used for the Hong Kong IOIs in this meeting but we accept that he wasn't being asked about the Hong Kong desk in particular but rather about his work practice, processes and understanding in general. The claimant was told that if he heard nothing further from the Respondent, no further action would be forthcoming.

56. On 30 November 2019 the Respondent issued its IOI Global Governance policy. This new policy required a trader to have had a conversation with a client concerning interest in a specific trade before publishing a potential IOI.

57. In January 2020 the claimant was informed by Ms Huggins that his incentive award was being withheld and suspended pending the outcome of the Respondent's investigation.

58. On 17 March 2020 the claimant was invited to an investigation meeting taking place the same day. This meeting spilled over to 18 March with the claimant being questioned for around 10 hours over the 2 days on top of which he had to complete his urgent work. There were a total of 7 people involved in the meeting, in addition to the claimant. Most were on screen and a number were not involved in putting questions to the claimant but nevertheless we find such a meeting to be an unreasonable way of conducting an investigation and the Respondent demonstrated inadequate regard for the likely impact upon the claimant. We accept the Claimant found this meeting to be an intimidating experience and that was a reasonable response to the situation. Whether or not the meeting was objectively hostile in tone, it was to be expected that the claimant would subjectively find a panel interview carried out in such an intensive manner and over a consecutive two-day period to be hostile.

59. We note that Mr Stanger attended an investigation meeting around the same time as the claimant's. He was reported to be shaken by the experience and needed to take time off work afterwards. His meeting had lasted just over three hours.

60. During this two-day meeting, the Claimant was asked whether it was the case that not all IOIs published by the London APAC desk in 2017 were based on potential client orders. The claimant responded that as he was being asked about IOIs published over three years ago, he couldn't say. He also wasn't sure whether the Respondent's Compliance team had been aware of the London APAC desk using the spreadsheet to generate the Hong Kong desk's IOIs. During this meeting he described using the spreadsheet to produce the stock information then deleting stocks that didn't represent a client interest as identified by the Hong Kong team, he then added stocks from the other lists (eg Citi 10) that represented an order or the expectation of an ongoing order. This was recorded in the minutes of the meeting produced by the respondent.

61. At the end of this meeting, Ms Nelson advised the claimant that the investigation process would be concluded by the end of the month or soon after.

62. Between March and November 2020 the claimant requested updates on the progress of the investigation and was repeatedly told that a resolution was coming soon.

63. Jamie Miller, a more junior member of the London APAC desk, attended an investigation meeting around the same time as the claimant but his was conducted remotely with Mr Miller attending from home due to the Covid working restrictions and he was provided with the relevant documents the night before the hearing to facilitate the remote meeting.

64. The investigation process and the lack of information about the progress of the process caused stress to the claimant and a deterioration in his mental health and wellbeing. He was seeing a counsellor and when those sessions came to an end, he contacted the Respondent's employee assistance programme for support.

65. In June 2020 the claimant attended his first training on IOIs, provided by the Respondent.

66. Also in June 2020, Mr Stan Stanger was interviewed as part of the Respondent's investigation and he stated that although he had not been aware of the spreadsheet being used by the London APAC desk, it was not outside of their remit to do so. The content of this interview also made it apparent that the London APAC desk had been excluded in error from relevant Hong Kong compliance training in 2018.

67. In August 2020 the claimant commenced sickness absence due to work-related stress. He continued to ask for updates. It is clear from email correspondence between Mr David Haldane and Mr George Kingaby of HR on 20 November 2020, that the decision to proceed to a disciplinary meeting had already been taken by senior people in the New York Head Office, but had not yet been communicated to the claimant. Mr Haldane was the Managing Director – EMEA Head of Equities and Global Head of Derivatives. He was writing to Mr Kingaby to question the fairness of the process against the claimant given the number of enquiries the claimant had made to compliance and to Phil Shaw and the length of time the process was taking.

68. At the end of 2020 the claimant did not receive an end of year rating or review. In January 2021 he was informed by his new line manager (replacing Ms Huggins) that his bonus had been frozen again. Also in January 2021 the claimant asked if he could return to the office if he was no longer signed off by his GP. On 3 February 2021 the claimant proposed to return to work the next day on a phased return and on 4 February he was suspended by his new line manager, Mr Gately. He also received an email informing him that the matter was progressing to a disciplinary meeting with details of 3 allegations against him and a copy of the Respondent's disciplinary procedure. He was informed that he could be dismissed for gross misconduct at the disciplinary meeting but was not given a date for the meeting.

69. On 24 February 2021 the claimant raised a grievance concerning the protracted investigation process and lack of support from the Respondent.

70. On 4 March the claimant was told that he would be invited to a disciplinary hearing on a date to be confirmed. The three allegations against him were repeated. Those allegations were:

> "(i) In relation to trades on 12 July 2018, 21 May 2018 and 29 August 2018, you made ambiguous or misleading statements to clients which can be interpreted in a way consistent with agency trading (despite knowing or suspecting that the trade would be facilitated), or remained silent notwithstanding some indication that the client appeared to believe that it was an agency trade (again, knowing or suspecting that the trade would be facilitated).
>
> (ii) You posted, or required or encouraged another to post, IOIs on Bloomberg that indicated there were genuine client orders or interest in circumstances where you knew and/or suspected that the IOIs did not reflect such client orders or interest.
>
> (iii) You did not inform ICRM or your direct line management that you knew and/or suspected that IOIs being posted by the London APAC Desk were misleading in that they did not reflect genuine client orders or interest. In particular, you engaged in discussions with Stan Stanger (UK ICRM) and attended a meeting on 22 May 2018 with Mr Stanger and Sam Huggins (your direct line manager) during which you sought to obtain approval for the London APAC Desk's approach to posting IOIs on Bloomberg, but failed during those discussions to reference your knowledge or suspicion that IOIs being posted by the London APAC Desk were misleading in that they did not reflect genuine client orders or interest."

71. On 18 March 2021 Ms Shakspeare (Head of UK Employee Relations) passed the claimant's grievance to the disciplinary committee arranged to hear the claimant's disciplinary.

72. On 25 March 2021 the claimant was informed that the disciplinary hearing would take place on 7 April 2021.

73. At the beginning of April 2021 the respondent advertised for a post to work across the London APAC and US desks. This came about following the resignation of Mr Kyle Shah (the graduate scheme member) from the London APAC desk. The post was advertised at director level (the claimant's level). The claimant considered this to be evidence of a predetermined outcome of the disciplinary process. The respondent stated that it is the respondent's policy to advertise at director level when recruiting externally and we accept the Respondent's evidence on this point as it was consistently given by a number of the respondent's witnesses.

74. Taking into account the claimant's sickness absence from August 2020 to February 2021, we still find that the length of time taken to complete the investigation was unacceptable and unreasonable, causing significant stress and worry for the claimant. We acknowledge that Covid contributed to the delay, as pointed out to us by Ms Nelson, but Covid does not explain or justify the length of time taken to progress the matter. The Respondent's argument that it did not immediately have the technical resources to conduct investigations and disciplinary issues remotely and that it took time to put

these measures in place is not accepted by the Tribunal panel as the Respondent was already conducting remote meetings before the lockdown. We do not find it credible that a global organisation such as the respondent with all its human and technical resources, was unable to progress the claimant's situation in a timely manner or respond to the claimant's requests for updates in an accurate and timely manner.

75. On various dates in January, February and June 2021 the claimant's name appeared on the respondent's list of prospective redundant employees.

76. On 1 April 2021 Ms Nelson met with the disciplinary committee so they could ask any questions they had about the case, before hearing from the claimant. During this meeting Ms Nelson stated that the claimant had accepted during the investigations that he had known that the IOIs published from the names generated by the spreadsheet were false and did not have client interest behind them. This was an inaccurate representation of the claimant's position and the minutes of the investigation meetings, which were provided to the disciplinary committee, demonstrated that the claimant did not accept that he had published false IOIs and that he had reviewed the stocks generated by the spreadsheet and removed the ones that did not reflect client interest.

77. On 7 April 2021 the claimant attended a disciplinary hearing with a disciplinary committee of four people, chaired by Mr Fater Belbachir (Global Head of Equities). The other committee members were Gary Rosen (Managing Director, Global Head of Markets and Securities Services Compliance), Diane Arber (Managing Director, Senior HR Officer; Head of HR ICG) and Fran Genesi (Managing Director, Product CFO). None of the committee members had experience of the London APAC desk and only Mr Belbachir had experience relevant to the claimant's role.

78. The disciplinary policy provided to the claimant stipulated the hearing would be conducted by one business manager, supported by HR however the claimant's disciplinary meeting was conducted under a different disciplinary policy which allowed for a disciplinary committee to hear the allegations, consisting of a minimum of three representatives. The policy followed stipulated that the disciplinary meeting must take place no more than 21 business days after the conclusion of the investigation.

79. The claimant was accompanied to this disciplinary meeting by Mr Haldane and, in acknowledgment of a decline in the claimant's mental health, the respondent deviated from its usual policy and procedure and permitted the claimant's wife to attend the hearing.

80. This meeting lasted approximately 90 minutes and focused mainly on the first of the allegations against the claimant. The disciplinary committee later found this allegation to be unproven and did not uphold it.

81. In this meeting the claimant stated that the spreadsheet was used to identify the names and ADVs of the stock tickers provided by the Hong Kong desk and the other stock names produced by spreadsheet were deleted if they did not represent a client interest.

82. The disciplinary meeting was reconvened on 12 April 2021. This meeting lasted around 30 minutes and focused on the second and third of the allegations against the claimant. The claimant stated that the stock names produced by the spreadsheet were cross-checked with the Hong Kong list and that other stock names were added which reflected a reasonable expectation of client interest.

83. The claimant's grievance was not discussed in detail at either of these disciplinary hearings.

84. On 16 and 19 April 2021 Jacqueline Shakspeare (Head of UK Employee Relations) sent to the disciplinary committee her analysis of the allegations against the claimant and his responses.

85. The disciplinary committee met with the investigation head Rebecca Nelson (Director, Associate General Counsel (Litigation & Regulatory Investigations)), on 21 April 2021 to obtain further information on the investigation background and the allegations against the claimant. Ms Nelson told the committee that

86. Ms Shakspeare met with the claimant on 26 April 2021. She had been asked by the disciplinary committee to carry out some further investigations but Ms Shakspeare, having utilised the wrong script template, informed the claimant that this was a further disciplinary hearing. We find that this error did not prejudice the claimant or impact upon the fairness or otherwise of the process. Ms Shakspeare was to feed back the results of her investigation to the disciplinary committee. She was tasked with exploring the meaning behind Paul Moss's email of 19 October 2017, however the email was not discussed in detail. Ms Shakspeare informed the disciplinary committee that the claimant had agreed that the email accurately reflected the use of the spreadsheet. Ms Shakspeare accepted in cross-examination that the claimant's answers to her about the email had been more equivocal than she had reflected to the disciplinary committee as he had sought to give greater detail when Ms Shakspeare had requested a Yes/No answer to whether the email of October 2017 reflected the process used to generate IOIs for publication. This equivocation is recorded in the minutes of that meeting.

87. On 10 June 2021 the respondent sent the claimant a letter of summary dismissal on the grounds that allegations 2 and 3 had been upheld (that the claimant caused to be posted IOIs on Bloomberg in the absence of genuine client orders or interest and that he did not inform the compliance unit or his direct line management that he suspected misleading IOIs were being published). Allegation 1 had not been substantiated (that particular trades in July and August 2018 could be interpreted as agency trading).

88. With regard to allegation 2, the committee found that in order to publish IOIs the London desk had to have a genuine client interest in the stock. They found that the claimant published IOIs without that interest. However we find that the claimant was reasonably following the guidance set down by AFME which required a reasonable expectation of client interest, something less than a genuine client interest. We find that the processes the claimant utilised in reviewing potential IOIs ensured that he had a reasonable

expectation of client interest, based upon the recent behaviour of clients. The committee found that publishing IOIs based on the Asia Top 10 and Citi Top 10 did not reflect genuine client interest, which failed to address the claimant's position that he cross-checked these stock names with the order pad and removed those stocks that had no entries on the order pad, thereby identifying a reasonable expectation of interest. The committee's conclusion regarding allegation two was based on a misunderstanding of the AFME guidance that the claimant was following or alternatively was based on the imposition of a higher standard than that set down by the AFME guidance, without the Respondent having provided any guidance of its own.

89. With regard to allegation 3, the committee found that the claimant had failed to inform compliance and/or his direct line management that he knew or suspected the London desk was publishing IOIs without genuine client interest. For the reasons outlined in the paragraph above, we find that the committee was unreasonably and unwarrantedly applying a higher standard of 'genuine client interest' than the AFME requirement of a 'reasonable expectation of client interest'. We find that the IOIs being published reflected the AFME requirement and it was not reasonable to find the claimant guilty of misconduct on this basis.

90. We find that it was an unreasonable conclusion that the claimant had failed to inform his direct line management and/or compliance about the spreadsheet in circumstances where his matrix managers were aware and even the claimant's line manager had acknowledged in investigation meetings that she was not clear what should be reported to line managers and what to matrix managers and that there was no written policy or guidance on the matter.

91. It is also of note that IOIs published by Bloomberg are inaccessible after a year. Therefore neither the disciplinary committee nor the claimant were referred to particular IOIs, with the consequence that neither party was able to refer to the Hong Kong spreadsheet, Asia top 10, Citi 10 and the published IOI on any particular day to prove their own case or refute the arguments against them.

92. On 16 June 2021 the claimant lodged an appeal against his dismissal. His grounds of appeal were:

- The claimant's evidence and explanation of events in respect of allegations 2 and 3 were misunderstood/mischaracterised or misinterpreted.

- The claimant had concerns over the investigation process in particular that there was insufficient consideration of contemporaneous evidence and too much emphasis was placed on the evidence of Ms Nelson of Citi Legal, which the claimant considered to be incorrect

- The lack of a clear policy, controls and training at the relevant time should be taken into consideration

- The claimant was the victim of a "sweeping approach" taken to the APAC facilitations trading issue
- The claimant had been treated inconsistently with others, particularly Mr Miller
- The disciplinary decision had been predetermined
- The disciplinary committee did not apply the correct burden of proof
- The use of a disciplinary committee was unfair
- The claimant's grievance was not properly considered.

93. The claimant attended an appeal hearing with Mr Toby Billington (ICG Risk and Controls Non-Financial Risk Lead) on 2 September 2021. The claimant alerted Mr Billington to the fact that his grievance had not been considered at the disciplinary hearing.

94. Mr Billington carried out further research into the claimant's appeal by meeting with Ms Nelson. He also learned that the spreadsheet used by the claimant between 2016 and November 2018 was populated by information pulled from Bloomberg and Reuters and not from information held by the respondent. During this further investigation Mr Billington discovered an earlier draft of Paul Moss's email of 19 October 2017 which had been sent to the claimant approximately 30 minutes before the final version was sent out. As already stated, we find on the balance of probabilities that the claimant did not read this email in advance and was not involved in its editing.

95. Mr Billington also found an email where a colleague was bringing to the claimant's attention, the fact that an IOI had been published erroneously by the claimant. In response the claimant had confirmed that he used the spreadsheet developed by the Hong Kong desk and he attached the spreadsheet to the email. He went on to say that he 'generally remove[d] the stocks that I think will have limited interest, but missed this one.'

96. The appeal hearing was reconvened on 25 January 2022. On 16 February 2022 Mr Billington upheld the disciplinary committee's decision on the grounds that Paul Moss's email of 19 October 2017 showed that the claimant knew or suspected that the IOIs published did not reflect genuine client interest or orders and that the spreadsheet was used as a source of additional IOIs and not just as an administrative tool.

97. Mr Billington acknowledged that the disciplinary committee had failed to consider the claimant's grievance, as it should have done, but he found that the grievance grounds overlapped with the appeal grounds and he dealt with the grounds together, finding no unfairness in the process. None of the claimant's grounds of appeal were upheld.

98. Mr Billington found that there was no misunderstanding of the AFME guidance on the part of the disciplinary committee, but in his appeal

outcome letter he alternates between identifying a requirement of 'genuine client interest' and a requirement of 'reasonable expectation of interest', as if those terms were interchangeable and reflected the same standard. He also finds that the disciplinary committee understood that the standard was one of reasonable expectation of client interest, even though that is not what the disciplinary committee said in its decision letter.

99. Mr Billington found that Paul Moss's email of 19 October 2017 captured the process for which the spreadsheet was used and he concluded that the claimant had received that email in advance and therefore had endorsed the content. We find this conclusion to be unsupported by the evidence and therefore an unreasonable conclusion to reach.

100. Mr Billington also interpreted the email as demonstrating that IOIs were posted, not on the basis of interest from a specific client, but rather on the basis of whether there was likely to be interest in the market generally or whether that interest would be 'limited'. We also find that conclusion to be unsupported by the evidence, particularly in light of the claimant's repeated explanations of the review carried out of the stock names generated by the spreadsheet. We note that in her meeting with Mr Billington, Ms Nelson again stated that the claimant had agreed that he posted as IOIs the names generated by the spreadsheet, unchecked, and that he knew at the time of posting that they were false IOIs and did not reflect client interest or an expectation of client interest. This was not an accurate representation of the claimant's statements at investigation and Mr Billington had access to the minutes of the investigation meetings in the appeal bundle.

<u>The Law</u>

Unfair Dismissal

101. Section 94 Employment Rights Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by his employer.

102. Section 98 ERA provides:

> (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.

103. *Abernethy v Mott, Hay and Anderson* [1974] ICR 323, tells us that the reason for dismissal is the: '… set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee.'

104. *Burchell v British Home Stores* [1980] ICR 303 at 304 instructs the Tribunal that: 'What I 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'.

105. Whereas the burden of proving the reason for dismissal lies on the respondent, the second and third stages of the Burchell test are neutral as to burden of proof and the onus is not on the respondent (*Boys and Girls Welfare Society v McDonald* [1996] IRLR 129, [1997] ICR 693).

106. The range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to the other procedural and substantive aspects of the decision to dismiss an employee for a conduct reason. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. In *Turner v East Midlands Trains Ltd* [2013] ICR 525, Elias LJ (at paras 16–17) held: '… the band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible; it bears upon all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate: see *Whitbread plc (trading as Whitbread Medway Inns) v Hall* [2001] ICR 699; and whether the pre-dismissal investigation was fair and appropriate: see *J Sainsbury plc v Hitt* [2003] ICR 111.'

107. It is the decision makers' reasoning which determines the reason for dismissal *(Orr v Milton Keynes* [2011] IRLR 317) and the employer cannot be said to have acted reasonably if it reached its 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).

108. *Salford Royal NHS Foundation Trust v Roldan* [2010] IRLR 722 and *Crawford and Another v Suffolk Mental Health Partnership NHS Trust* [2012] IRLR 402 remind us that more will be expected of an employer where the allegation of misconduct and the consequences for the employee are particularly severe – as in this case, the claimant being a regulated person, consequences of a gross misconduct finding would have implications for his ability to pursue his chosen career in the UK.

109. Notwithstanding gross misconduct, mitigating factors must be considered in evaluating the fairness of the dismissal, such as the length of service, the employee's record and the consequences of dismissal: *Brito-Babapulle v Ealing Hospital NHS Trust* [2013] IRLR 854.

110. In looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the Tribunal's view, have been appropriate, but rather whether dismissal was within the band of reasonable responses (*British Leyland (UK) Ltd v Swift* [1981] IRLR 91). The question is whether dismissal was within the band of reasonable responses open to a reasonable employer which is answered by the Tribunal assessing whether the respondent's procedure, the facts found and the conclusions reached were those which a reasonable employer could have used and reached. It is not for the Tribunal to substitute its own decision (*London Ambulance v Small* [2009] IRLR 563).

111. The parties referred the Tribunal to a number of authorities, including cases reminding us to take a broadbrush approach to the question of fairness (*Sainsbury's Supermarket v Hiit* [2003] IRLR 23 and *Shrestha v Genesis Housing Association Limited* [2015] IRLR 399) and that we must look at the case in an employment context (*OCS v Taylor* [2006] IRLR 613) and take sufficient account of the appeal stage of the disciplinary process (*Satter v Citibank NA* [2020] 104).

Wrongful Dismissal

112. The Tribunal must ask itself whether there has been gross misconduct on the part of the claimant or a repudiatory breach of contract entitling the respondent to summarily dismiss the claimant.

113. The respondent referred the tribunal *to Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 for guidance on how to approach the evidence.

Conclusions

114. We find that the Respondent had a genuine belief that the claimant had published IOIs which he knew or suspected did not reflect client orders or interest. This is conceded by the claimant and the Tribunal finds that all witnesses for the respondent were credible and their belief in the claimant's misconduct was genuine. We therefore accept that the claimant's dismissal was for the potentially fair reason of conduct.

115. The Tribunal accepts that the outcome of the disciplinary process was not predetermined. The job advertised in March 2021 was Mr Shah's role, not

the claimant's. We accept that the disciplinary panel would have had no knowledge of the claimant's name appearing on a list of potentially redundant roles.

116. The Tribunal finds however that the respondent did not have reasonable grounds for its belief that the claimant had committed the misconduct described in allegations 2 and 3 and that the respondent did not carry out a reasonable investigation.

117. The Respondent argues that the claimant's explanation as to how he generated IOIs was 'inconsistent and evasive' and therefore it was open to the disciplinary panel to place little weight on the claimant's explanations. We find that it is unreasonable to expect a witness to give immediately cogent and coherent evidence about a procedure that was long defunct, in circumstances where the claimant had little or no warning of the investigation meetings and the meetings were unreasonably long and subjectively intimidating and hostile. We find that although the evidence generated by the claimant's investigation meetings was at times unclear and confused, the claimant did explain how he used the spreadsheet and how he reviewed what stock names and details were to be added or deleted, and how the final list to be published reflected the AFME guidance of 'reasonable expectation of client interest'. This was repeated in the investigation meetings, disciplinary and appeal hearings.

118. The respondent places reliance upon the email of 19 October 2017 from Mr Moss to the Hong Kong desk as evidence that the spreadsheet used by the London APAC desk generated IOIs, that the amendments made to the spreadsheet list were not as the claimant explained in the investigation and disciplinary meetings and the additions made to 'capture flow' were 'fishing' IOIs without client interest and designed to offer what the market wanted, irrespective of client interest.

119. We accept the claimant's evidence that he did not see or edit this email in the half-hour or so between Mr Moss sending a draft to him and Mr Moss sending it to the Hong King desk. We note that this was an email between colleagues, not intended to be poured over and scrutinised in the way we have done during the course of this hearing and the email itself states that the ways in which the spreadsheet is amended is not exhaustively described in the email. And we accept the evidence of both the claimant and the respondent's witness that there could be orders and client interest in a particular stock going both ways – to buy and to sell – but there could only be one IOI published for that particular stock, so a decision would have to be made on which direction to publish, with both directions representing client interest.

120. The respondent's position was that the claimant did not, but should have, discussed his use of the spreadsheet and his system for identifying Hong Kong desk IOIs, with his direct line management, Ms Huggins. The respondent argues that this was a failure contributing to the finding of gross misconduct. It is accepted by the respondent that the use of the spreadsheet was known by the claimant's matrix managers who happened to work on the Hong Kong desk and had provided the claimant with the spreadsheet in the first place. Mr Belbachir gave evidence that the existence of matrix

managers as well as line managers was confusing and there was no clear indication of which type of manager dealt with which kind of issue. He gave evidence that, in his opinion, the existence of matrix managers as well as line managers and the lack of clarity around their role was problematic and he expressed an opinion that the role of matrix manager should be dispensed with.

121. Ms Huggins, the claimant's line manager, had stated in her investigation meeting that it was not clear what matters fell within the line manager's remit and what within the matrix manager's.

122. We find that it was unreasonable for the respondent to conclude that the claimant's failure to discuss the spreadsheet with his line manager was an indication of misconduct when he had told the other managers who had been allocated to him by the respondent. And given the matrix managers' involvement with the Asia Pacific desks and in particular the Hong Kong desk, it was reasonable that the claimant would raise issues concerning his work with the Hong Kong desk, with his matrix managers.

123. Given our findings about the absence of training, the claimant's consistent explanation of his processes, and the higher standard applied by the respondent of genuine client interest rather than the AFME requirement of reasonable expectation of client interest, we find that the respondent did not have reasonable grounds for deciding that the claimant (i) was involved in posting IOIs that he knew or suspected did not reflect client orders or interest and/or (ii) failed to tell his line manager that he knew or suspected IOIs were being posted that did not reflect client orders or interest.

124. With regards to the investigation, it was not unreasonable for the claimant not to be provided with advance notice of the questions to be asked or to be accompanied to the meetings. These are not required by the ACAS Code of Practice, the claimant's contract of employment or the respondent's own procedures. It is acknowledged that Mr Miller was treated differently in that he was given copies of the documents to be used in his investigation hearing, the day before the meeting and therefore had some advance notice of the issues to be covered in the investigation, but this was due to the particular context of the Covid pandemic and the staggering of employees so that not all employees were in the office on the same day.

125. However, we find that the delay in the investigation procedure (the claimant's initial fact-finding meeting taking place in September 2019, other meetings taking place in March 2020 and being informed that the matter was proceeding to disciplinary in February 2021) and the manner in which the investigation meetings were carried out (without notice, with the second meeting taking 10 hours over two days) amounted to an unreasonable investigation. Such a process did not support the respondent in obtaining the best and most reliable evidence or the claimant being able to give the best and most reliable evidence.

126. Notwithstanding the claimant's sickness absence from August 2020 to February 2021, it was not reasonable to conduct an investigation over such a protracted period, particularly when the investigation was itself about historic events that were discussed in the abstract (as the respondent had

not produced for discussion, any published IOIs that the respondent alleged did not reflect client interest or orders). The respondent has attributed some of the delay to the time taken to arrange video-conferencing facilities due to the pandemic, but the fact-finding interview was attended remotely by some and we do not accept that a global enterprise such as the respondent was unable to access video-conferencing facilities in a timely manner. And whereas it is understandable that Covid-19 and the lockdown would cause some delay, unavoidable delay can still affect the reasonableness of the process and the quality of the evidence obtained and can cause prejudice to a party, as it did in this case by causing extreme stress to the claimant and making it more difficult for him to explain his actions.

127. We also find that the investigation meetings would be likely to be viewed subjectively as hostile by the claimant with so many individuals attending the meeting on behalf of the respondent (albeit we accept that not all persons in attendance asked questions of the claimant) and the March meeting taking place over ten hours on two consecutive days, which we find would clearly be putting the claimant under more pressure than had the investigation been conducted differently and with more regard for the claimant's welfare.

128. Given our finding that the respondent had not carried out a reasonable investigation and that the respondent did not have reasonable grounds for its belief that the claimant was guilty of the 2nd and 3rd allegations against him, we find that the respondent acted unreasonably in dismissing the claimant and his dismissal was unfair.

129. As we have found that the claimant complied with AFME guidance in his publication of IOIs and he was cooperative throughout the investigation and disciplinary procedure, as acknowledged by Ms Nelson, we find that the claimant's conduct did not contribute to his dismissal.

130. We also find there is no prospect that the claimant would have been dismissed had the committee hearing the disciplinary and the person hearing the appeal properly considered the difference between a 'reasonable expectation' of interest and the existence of client interest. The repeated inaccurate representation of the claimant's investigation meeting by Ms Nelson was also a contributing factor and the failure at disciplinary and appeal stage to grapple with the lack of clarity around the role of matrix managers and line managers also led both disciplinary committee and Mr Billington hearing the appeal, to reach unreasonable conclusions. It is not appropriate therefore to apply any Polkey deduction.

131. The respondent had relied in its grounds of resistance to the claim both on the alleged misconduct of the claimant, and on the ground of some other substantial reason for dismissal – namely due to a breach of trust and confidence caused by the claimant's gross misconduct, in which the respondent had reasonable belief.

132. Neither the respondent's opening skeleton argument or closing submissions or the agreed list of issues dealt in detail with the ground for dismissal of some other substantial reason.

133. We find that, in the circumstances, it was unreasonable for the respondent to conclude that the claimant's conduct had caused a breach of trust and confidence as it was unreasonable for the respondent to conclude, on the evidence available to it, that the claimant was guilty of gross misconduct.

134. Wrongful Dismissal:

135. We find that the claimant did not commit an act of gross misconduct or commit a repudiatory breach of contract. He used the tools (spreadsheet) given to him by his manager and made amendments to the list of stocks created by the spreadsheet in order to publish IOIs to reflect the AFME requirement of reasonable expectation of client interest. We therefore find that the claimant was wrongfully dismissed.

Tribunal Judge Overton sitting as an Employment Judge
Dated: 17 June 2024