EMPLOYMENT TRIBUNALS

Claimant:	**Mr P. Remillard**
Respondent:	**JP Morgan Chase Bank, N.A. – London Branch**
Heard at:	**East London Hearing Centre (in public, by CVP)**
On:	**3-5 and 9-10 December 2024 and 8 January 2025; 9, 13, 15 and 20 January 2025 (in chambers)**
Before:	**Employment Judge Massarella**

Representation

Claimant:	Mr T. Ogg (Counsel)
Respondent:	Mr A. Nawbatt KC
	Mr S. Purnell (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. **the Claimant's dismissal was procedurally unfair because of the Respondent's failure to disclose to him, during the disciplinary process, documents which he was entitled to see;**

2. **the dismissal was also unfair because of the unreasonable delay in providing the Claimant with the outcome of the disciplinary process;**

3. **in relation to the *Polkey* issue, there was a 95% chance that the Claimant would have been dismissed, had there been no procedural unfairness;**

4. **the Claimant contributed to his dismissal by his own conduct; the level of any reduction to compensation on this ground will be determined at the remedy hearing.**

REASONS

Procedural history

1. The claim form was presented on 28 April 2023, after an ACAS early conciliation period between 16 February and 30 March 2023. The claim is of unfair dismissal. The remedies sought are reinstatement/re-engagement and compensation.

2. There was a preliminary hearing for case management on 20 October 2023 before EJ Shore, at which this hearing was listed. There was originally a second respondent, JP Morgan Securities PLC, which was removed by consent. The Claimant was given permission to submit amended particulars of claim, and the Respondent amended grounds of resistance.

3. This hearing was listed for liability, *Polkey* and contribution. The original listing anticipated that five days would be enough for evidence and submissions, deliberation, formulation of the judgment, oral judgment and case management of any further remedy hearing, if appropriate.

The hearing

4. I had a bundle of documents of 1735 pages; 183 pages of witness statements; an agreed cast list and chronology; a pre-reading list; and a short opening note from Mr Ogg (Counsel for the Claimant).

5. Given the volume of documentation, I agreed with Counsel that my focus would be on completing the evidence within the five days allocated; an additional day was listed for oral submissions; judgment was reserved, and further days listed for deliberations.

6. I heard evidence from:

    6.1. the Claimant;

    and, on behalf of the Respondent, from:

    6.2. Mr Jason Sippel (Global Head Of Equities Trading, Global Credit Markets and Public Finance; dismissing officer);

    6.3. Mr Charles Bristow (Head of Treasury and Chief Investment Office; appeal officer);

    6.4. Mr Mark Catana (Global Head of Markets Compliance; participated in the Red Team review of the Claimant's trading and order placement activity);

    6.5. Mr Matthew Howard (Global Head of Surveillance; involved in the data re-run exercise);

    6.6. Ms Rachel Wellen (Head of International Employee Relations for EMEA at the time; line manager of Ms Emma White).

7. The hearing was conducted by CVP. Mr Howard and Mr Catana gave evidence from the US. The Respondent provided written confirmation that there was no legal, diplomatic or practical reason to prevent them from doing so; the Foreign, Commonwealth and Development Office guidance provides that individuals in the US can voluntarily give evidence from that country by video link in Employment Tribunal cases; both witnesses were giving evidence voluntarily and were resident in the US. The Claimant's representatives confirmed in writing that it had no objection.

8. Counsel for both parties provided detailed written submissions with appendices, running to 90 pages, and a joint bundle of authorities. They made extensive oral submissions. I am grateful to them both for their assistance.

9. Given the large volume of documentation, it has not been possible in this (already very long) judgment to refer to every piece of evidence and every submission made. I apologise to the parties for the delay in the promulgation of this judgment.

UNFAIR DISMISSAL

Findings of fact

10. The Respondent is the London branch of the US investment bank, JPMorgan Chase & Co. ('the firm').

11. The Claimant was employed as a trader from 16 June 2016 until 1 December 2022. Between 2016 and 2018 he worked for other companies in the JPMorgan group in Singapore and New York. From April 2018 he worked for the Respondent in London as an agriculture trader, working on commodities including cocoa.

12. The Claimant was summarily dismissed on 1 December 2022 after an investigation into instances of alleged spoofing (a form of market manipulation explained under the next sub-heading) in trading sequences on dates between 1 June and 27 December 2018. The various buy and sell orders which were the subject of the investigation will be referred to below as 'the impugned orders.'

The precious metals scandal

13. Spoofing is when a trader feigns interest in certain assets and creates a false impression of supply and demand, which affects the market price of the security being traded; the trader aims to take advantage of price moves triggered by the spoof trade. Spoofing is a criminal offence in the US and may be treated as a criminal matter (fraud) in the UK.

14. By way of example, a trader may place a large order to sell without intending to execute the order. In fact, he is looking to execute an order to buy, which he has already placed, and which is waiting to be filled. The order to sell affects the market price to the trader's benefit. He then executes the genuine order to buy and cancels the spoof order to sell. The same strategy can be deployed by placing a spoof order to buy, combined with a genuine order to sell.

15. In 2020 the firm agreed to make payments of more than $920 million, and to admit wrongdoing, to settle allegations of spoofing on the firm's precious metals

desks in New York, London and Hong Kong and the Treasury securities desk in New York and London between 2007 and 2016. The firm entered into a Deferred Prosecution Agreement ('DPA') with the US Department of Justice ('DOJ') after criminal charges had been brought in the US against it.

16. The DOJ found that in tens of thousands of trading sequences traders placed deceptive orders that amounted to spoofing in relation to precious metals. The evidence included electronic communications containing explicit references to spoofing by traders.

17. The firm accepted obligations under the DPA, which it was required to comply with over a three-year term, expiring on 29 September 2023. This included that they:

> 'continue to undertake in the future, in a manner consistent with all of their obligations under the DPA, a review of their existing internal controls (including their trade surveillance tools), policies and procedures regarding compliance'.

The DPA also required the firm to:

> 'Institute appropriate disciplinary procedures to address … violations of the Securities and Commodities Laws and the Company's […] compliance code, policies, and procedures […]'

18. Although the Claimant worked on the precious metals desks in 2019 (after the material period in these proceedings), he did not work on the desks when the conduct occurred for which the firm was fined.

<u>The firm's anti-manipulation policy</u>

19. The Anti-Fraud, Anti-Manipulation and Other Prohibited Trade Practices policy ('the Anti-fraud policy') provides at para 6:

> **'6. Manipulative Market Activities Are Prohibited**
>
> It is prohibited to trade or accumulate a position solely to raise or lower prices, to fix or stabilise prices (except as explicitly permitted in regional policies and procedures related to syndicate activities) or to create or exacerbate inadequate supply in any financial instrument. Trades should have a legitimate business purpose independent of their market impact. In certain circumstances, trading activity could be deemed to be manipulative based on its effect on the market, irrespective of the specific intent of the trader.'

20. The Anti-fraud policy specifically prohibits spoofing:

> 'Examples of spoofing include, but are not limited to, entry of bids or offers (on either one or both sides of the market) with the intent to cancel the bid or offer prior to execution or in order to achieve any of the following: give the false appearance of greater trading activity, take advantage of resulting price moves, move the price of a product or related product (e.g., barrier option), move the price of a benchmark, or create latency in or overload quoting systems. Partial or complete fills of an order are not necessarily sufficient proof that spoofing or layering did not occur. Spoofing or layering can occur either through manual entry or through electronic or algorithmic strategies.'

21. The Anti-fraud policy then identifies factors which, among others, may be indicative of spoofing or layering:

- 'Frequency and pattern of orders and cancellations submitted;

- The size and or number of orders relative to market conditions, including, but not limited to, at the time the order(s) was placed;
- Length of time orders remained active prior to cancellation;
- The change in the best offer price, best bid price or last sale price that results from the entry of an order;
- Communications which indicate an intention to cancel would be an author at the time it is placed;
- Behaviour that indicates intent to alter prices, disrupt the market, or create misleading market conditions;
- The Workforce Member's activity in related markets; and
- The ability of the Workforce Member to manage the risk should all the bids or offers be filled.'

22. During the hearing, and now in this judgment, the first four bullet points have been referred to as 'the hallmarks of spoofing'.

23. The amounts involved in any single attempt to spoof may be small, but it is no less prohibited.

24. Only the trader knows what his purpose/intention is in placing an order. In the absence of either an alert to another person, or a record made by the trader, anyone reviewing his trades would be reliant on the trader's recollection and/or inferences which may properly be drawn from the pattern of trading.

The firm's Code of Conduct

25. The opening section of the Code of Conduct, 'It Begins with Me', states:

> 'It is your responsibility to fully understand and comply with our Code. It's how we do business with the highest levels of transparency and accountability - and how JPMorgan Chase continues to be a company of which we can all be proud […] A company is only as good as its people, and our people are the best. Our integrity begins with you.'

26. In the section 'Our Code Principles: A Shared Responsibility', the Code states:

> 'We must never underestimate the importance of our conduct and always take personal responsibility for our actions – it is how we do business. The Code of Conduct is our *shared* commitment to operate with the highest level of integrity and ethical conduct'

27. The Code states that it is the individual's responsibility to:

> 'Comply with applicable laws, regulations and policies wherever you operate in the world
>
> […]
>
> Practice sound ethical decision-making and take actions that will preserve an ethical workplace.
>
> […]
>
> Follow the letter and spirit of the Code and related policies.
>
> […]
>
> Annually train and affirm to the Code of Conduct.'

28. The section 'Personal Integrity' states:

> 'All who work for, or on behalf of, JPMorgan Chase have a duty to demonstrate the highest standards of business conduct.
>
> […]
>
> Every employee has at least one Code Specialist who is a representative from the Compliance Department. Your Code Specialist can answer questions about the Code, Company policies and procedures and can explain how the rules apply in a specific situation. Contact the Code Specialist assigned to your region, Line of Business or Corporate Function group for help with any Code-related matter or ethical issue. You can also reach out for assistance to other resources at the Company including your Compliance Officer or Human Resources.'

29. The section 'Ethical Decision-making' states:

> 'We rely on you to practice sound decision-making and take actions that will preserve an ethical workplace. Remember, you are in charge of your decisions […] if you are ever unsure of the proper course of action, a decision tree can help.'

30. The relevant decision-tree contains a series of questions including:

> 'Does it comply with our Code and our Company policies, and principles of ethical behaviour they reflect?
>
> Am I sure it would not cause loss or harm to our Company and its shareholders?
>
> Would it be okay if everyone did it?
>
> Am I sure I would not feel uncomfortable or embarrassed if I read about it on the front page of the newspaper?'

<u>The Claimant's understanding of his obligations</u>

31. The Claimant confirmed that he had been familiar with these provisions since early in his career.

32. He received extensive training from the Respondent, several times each year in the years 2016 to 2018, including compliance induction and annual training, Code of Conduct, new hires and annual training, market abuse training, business conduct training and FCA/PRA conduct rules training.

33. The Claimant made an annual affirmation that he had read and understood the Code of Conduct. He knew that compliance with the Code was a term of his employment contract and that violations of the Code could result in disciplinary consequences, up to and including dismissal.

34. He confirmed in oral evidence that he understood, at the material time, the definition of spoofing, had received training about it, knew it was prohibited and was familiar with the hallmarks of spoofing, set out above. He knew that, when in doubt about a compliance matter, including issues arising under the Anti-fraud policy such as spoofing, he should escalate it to his supervisor, a Code of Conduct specialist, a compliance officer, or HR. He accepted that he had been trained to escalate to line management and Compliance 'actual or potential breaches of law, regulation [and] suspicious employee behaviour such as fraud, […], market manipulation or other forms of market misconduct'.

35. The Anti-fraud policy does not contain an express requirement that, if a legitimate trade is made which might give the appearance of impropriety, the trader must keep a record of his reasons for making it. However, Mr Sippel's evidence was that, as part of their compliance training - before the Claimant's trading activity in 2018, and before the events described in the *Jones* case (for which, see below at para 215 onwards) - traders were trained to make notes in relation to all types of potential impropriety. He had taken such training himself and managed thousands of trainers who were aware of that practice and who had taken such notes; he had written notes himself when he had a concern about optics. The contemporaneous recording of potentially problematic trading activity was the minimum standard expected; the 'gold star' was escalation to Compliance in the moment, or shortly thereafter. Mr Catana also emphasised that traders were trained prior to 2018 that they should be able to explain any trading activity which could be perceived as spoofing. I accept that evidence.

36. The Claimant accepted that he had received training that, if a trade was suspicious or unusual, he should document the reason for it, so that both he and the firm would be able to explain it later.

37. The Claimant stated that 'throughout the disciplinary process I was asked if I understood why these trades had been flagged and investigated and I said at every point that I did and that I was not surprised I was being investigated. There were hallmarks which were concerning, and the bank would want to ask more questions.'

<u>The Claimant's trading activity on the cocoa markets in 2018</u>

38. During 2018, the Claimant was working for the Respondent trading cocoa on the London and New York markets. It is during this period that the impugned orders occurred, all of them on the New York market.

39. A potential buyer of cocoa enters bids ('buy orders') on the exchange to seek to purchase a certain number of lots; a potential seller enters asks ('sell orders') on the exchange, offering up a certain number of lots for sale. The price attached to any buy or sell order is the price at which that trader is prepared to trade those lots. As the Claimant explains in his witness statement, there is, in fact, no formal price for a commodity at any given time; what is meant by the term 'price' is the most recently traded price of the commodity; there is, however, no guarantee that anyone will buy or sell at that price in the future.

40. One lot of cocoa is equivalent to 10 metric tonnes; the price used on the cocoa exchanges is the price per metric tonne and therefore the real price of each lot is 10 times the price listed.

41. At any time, a trader may accept a buy or sell offer, resulting in a successful purchase or sale; the trade is 'executed'. A buy or sell order can also be partially executed, for example if a buy order is entered for 50 lots, someone might only sell 20 lots to the bidder.

42. The Claimant's role primarily involved monitoring the New York and London markets for price fluctuations, identifying opportunities to buy and sell products for profit and executing trades for that objective. He describes his work as 'fast paced and reactive'.

Move to precious metals

43. In July 2019, the Claimant's role changed, and he became a precious metals trader, initially at an executive level then, from 2020, as an associate. He worked on this desk as the precious metals scandal was unfolding but he had not been working on it at the time the unlawful conduct took place.

The re-run of trading data in late 2021

44. In 2021, the firm identified an issue with the way some of its systems had been configured with the Intercontinental Exchange (ICE). As a result, not all the data relating to trading activity had been fed through the firm's electronic surveillance systems and there was a possibility that improper activity may have been missed as far back as 2014. Pursuant to its obligations under the DPA, the firm self-reported those deficiencies. The US regulators imposed a fine of $450m.

45. The firm decided to re-run all the trading data from ICE through the firm's surveillance systems for the whole of the affected period (2014-2021). I accept Mr Nawbatt's submission (Counsel for the Respondent) that, given the regulatory action to which the firm had already been subject, and the self-reporting requirements contained within the DPA, it is unsurprising that it undertook this course of action.

46. The surveillance team analysed over 120,000 alerts. In relation to spoofing, the team looked for any mitigating factors which tended to suggest that the activity was not spoofing; absent such factors, the alert was discussed with the team lead to decide whether it should be escalated for further review. The system could not distinguish between data which had previously been raised and data which had been missed; thus, data in relation to alerts which had previously been considered by the surveillance team and closed with no further action were necessarily included.

47. The surveillance team identified fifteen alerts related to cocoa trades made by the Claimant on the New York market on seven dates between 1 June 2018 and 27 December 2018. Alerts in relation to these trades had been triggered in 2018. A surveillance analyst had reviewed some of them then, but had closed them with no further action, meaning that they were not escalated to Line of Business ('LOB') Compliance for further review. On enquiry, Mr Howard discovered that the analyst in question had looked at the alerts in isolation from each other and had not seen the overall pattern; even so, an isolated instance of spoofing was a potential policy violation in 2018 and remained so in 2021. In his view, the alerts should have been escalated in 2018 and should be escalated for further review now; they had many of the hallmarks of spoofing.

The escalated trades

48. Twelve trading sequences were escalated, each recorded in a 'blotter', which is as Excel spreadsheet showing in detail the order placement activity on the account which led to the alert. The eight blotters which Mr Sippel (the dismissing officer) later relied on in reaching his decision to dismiss are summarised below; I do not deal in this judgment with the other blotters.

49. The Claimant had not made a record of any of the trades in the activity in the blotters, nor had he raised them with his managers or with Compliance. He

denied throughout the disciplinary process that he had placed the orders with no intention to execute them.

50. Blotters 1-3 all relate to 1 June 2018.

Blotter 1, 1 June 2018 ('B1')

51. On 1 June 2018 at 7:34:56:233, the Claimant placed an iceberg order to sell 10 lots at $2,454, with only 1 lot disclosed (i.e. visible to other traders). An iceberg order is when only part of the order is visible to the market. That was equal to the best sell order at the time (i.e. the lowest price any party was willing to sell).

52. Seven seconds later, at 7:35.03.095, he entered a fully disclosed order to buy 100 lots at $2,452 per metric ton. 100 lots equate to a thousand metric tonnes of cocoa; the deferred costs (bearing in mind that these were futures contracts) of the Claimant's buy order for 100 lots, had it been fully executed, would have been $2,452,000. The order was far greater than any other bid created at that time and shown as the best bid; the next highest-sized bid was for 6 lots at the same price.

53. Immediately, the Claimant's sell order of 10 lots was executed in three smaller lots of 3, 1 and 6.

54. At 7:35:03:827, the Claimant cancelled the fully disclosed buy order of 100 lots, which he had placed less than a second earlier, without having executed any part of it.

Blotter 2, 1 June 2018 ('B2')

55. The actions in B2 took place 7 minutes after the deletion of the buy order in B1.

56. At 7:42:34:525, the Claimant entered an iceberg sell order of 17 lots at $2,452 with only 5 lots disclosed; the best sell order in the market at the time was $2,451.

57. At 7:43:08.825 (about 30 second later) the Claimant entered a buy order for 100 fully disclosed lots at $2,450; at the point when he did so, his sell order for 17 lots had not been executed at all; the market price moved up.

58. 0.2 seconds later, the Claimant's 17 lots were executed (in two lots of 11 and 6) at $2,452.

59. At 7:43:20:656, the Claimant cancelled the buy order he had placed 12 seconds earlier, without having traded any part of it.

Blotter 3, 1 June 2018 ('B3')

60. At 8:51:42:447 (one hour and eight minutes after the Claimant cancelled the order in B2) he placed an iceberg order to sell 17 lots at $2,455 (lower than the best ask in the market) with only 5 lots disclosed.

61. At 8:52:03:412 (less than a minute later) one of those lots was executed.

62. At 8:53:13:665 (just over a minute later) the Claimant entered a fully disclosed buy order for 112 lots at $2,452. That bid was greater than any of the other bids on the blotter.

63. At 8:53:13:666 (within two milliseconds) 9 of the Claimant's remaining 16 (of 17) lots executed. At 8:53:21:737 (six seconds later) the Claimant deleted the remaining 7 (of 17) lots.

64. At 8:53:32:606 (ten seconds later) the Claimant entered a further sell order of 12 lots (1 lot visible) at $2,456; four lots immediately executed.

65. At 8:53:36:509 (four seconds later) the Claimant deleted his 112-lot buy order, without having traded any portion of it.

Blotter 4, 6 June 2018 ('B4')

66. B4 relates to 6 June 2018.

67. At 5:15:40.353, the Claimant entered a fully disclosed sell order of 100 lots at a price of $2,363.

68. The Claimant immediately executed buy orders, totalling four lots, at $2,361.

69. At 5:15:41:940, the Claimant deleted the 100-lot sell order (less than two seconds after placing it) without any of it having traded.

Blotter 9, 6 July 2018 ('B9')

70. B9-B11 all relate to 6 July 2018.

71. At 9:18:05:205, the Claimant entered an order to sell 34 fully disclosed lots at $2,467; 0.1 seconds later 8 lots executed at that price in six transactions.

72. At 9:18:17:128 (eleven seconds later) the Claimant entered an order to sell 5 fully disclosed lots at $2,468.

73. At 9:18:22:890 (five seconds later), he entered a buy order for 130 fully disclosed lots at $2,462, which was lower than the best bid in the market (of $2,463 for 8 lots).

74. One millisecond after that bid was placed, the market price moved up to $2,467.

75. At 9:18:23:371 (less than a second later), 1 of the Claimant's lots sold at that price; at 9:18:25:823 (two seconds later), 25 of the Claimant's lots sold at that price.

76. Nothing happened for fourteen seconds.

77. At 9:18:39:186 the Claimant cancelled his bid for 130 lots (17 seconds after it had been placed).

Blotter 10, 6 July 2018 ('B10')

78. At 9:19:09:166 (less than a minute after the cancellation of the bid in B9), the Claimant entered a sell order of 38 lots at $2,466, of which ten were disclosed; within a second 7 lots sold.

79. Nothing happened for 11 seconds. At 9:19:20:299, the Claimant entered a buy order for 132 fully disclosed lots at $2,462, which was lower than the best bid in the market ($2,464); it was by far the largest order in size in the blotter around that time.

80. In the next 2 seconds, all the remaining 31 lots sold.

81. At 9:19:35:118, the Claimant cancelled his large buy order (13 second after the remaining lots sold, 15 seconds after the large bid was placed, without having executed any portion of it).

82. The sequence in B10 played out within less than a minute of the sequence in B9.

Blotter 11, 6 July 2018 ('B11')

83. At 9:20:21.488, the Claimant entered a further sell order for 13 lots at $2,472; immediately, 8 lots sold at that price.

84. At 9:20:23.467 (less than two second later), the Claimant entered a sell order for 16 further, fully disclosed lots at the same price, 5 of which executed immediately.

85. Over the course of the next two minutes, the price dropped below the Claimant's selling price for the 16 outstanding lots, without the Claimant executing any of them.

86. At 9:22:05.833 (less than two minutes later), the Claimant entered a buy order for 80 fully disclosed lots at $2,468; at the same time, he entered three further sell orders to a total of 42 lots.

87. The market reacted and 24 of his outstanding sell orders executed immediately.

88. In the following 40 seconds, the Claimant entered (and twice deleted) further sell orders and sold a total of 61 lots.

89. At 9:22:46.749, the Claimant deleted his buy order of 80 lots (just under 41 seconds after he placed it), without having executed any part of it.

Blotter 12, 27 December 2018 ('B12')

90. B12 relates to 27 December 2018.

91. At 10:37:08.985 the Claimant entered a buy order of 50 lots at $2,360, of which 5 were disclosed.

92. By 10:38:24.885 (over a minute later), 30 of those lots were executed.

93. At 10:38:28.886 (four seconds later), the Claimant entered a large, fully disclosed sell order of 180 lots at $2,363; this was above the best ask in the market of $2,361 for 16 lots.

94. By 10:38:28.887, a further 20 of the Claimant's bid of 50 lots executed at $2,360.

95. At 10:38:41.612, the Claimant cancelled his large sell order, without any portion of it having been executed.

<u>The compliance investigation</u>

96. In early January 2022, a Red Team was established in accordance with the firm's Market Conduct Violation Framework (MCVF) procedure to review the trades described above. A Red Team is a cross-functional team led by LOB

Compliance; it may also include subject-matter experts who can provide specialist, technical advice. The team gathers and analyses information from a variety of sources, including interviewing the employee who is the subject of the investigation. The participants review the information gathered and reach a consensus as to whether a policy breach has occurred and, if so, the appropriate level of the violation. Outcomes may include no further action, a policy reminder or a violation notice, whether Level 1 (low), Level 2 (moderate) or Level 3 (high). Spoofing, including a single violation, is regarded as Level 3.

97. The review was coordinated by Ms Jodie Ryan of the compliance team. Also on the team were: Mr Trevor Mullin (Managing Director, Co-Head, EMEA Markets Compliance); Mr Vincent Leale (Executive Director, Commodities Compliance); Mr John Rahulathan (Executive Director, Rights Compliance), who had particular expertise in spoofing cases; Mr Matthew Howard (Managing Director, Global Head of Surveillance for the CIB); Mr Ryan Gaubert (Executive Director and Assistant General Counsel, Markets Legal); Ms Jessica Stokes (Executive Director and Assistant General Counsel, Securities Services Legal); and Mr Mike Barletta and Mr Jonathan Lloyd Jones, who were both former traders, to provide subject-matter expertise.

98. The team met on 7 January 2022 and evidence was gathered, including the blotters, in the following days; it was then summarised in the Red Team binder, which was prepared by Ms Ryan. It included copies of the Claimant's training records and details of his compliance history during his employment by the firm, which showed that, although there had been some previous escalations, none had resulted in sanctions.

<u>The compliance interview on 18 January 2022</u>

99. On 12 January 2022, Mr Willig (Manging Director, Head of Precious Metals Trading) invited the Claimant to a video call, at which he told him that some of his cocoa trades from 2018 had been flagged. The Claimant made a note of the conversation, which recorded Mr Willig saying that 'I'm sure they will show you all the data, emails, bbg [Bloomberg] chats.' I accept the accuracy of that note.

100. On 13 January 2022, Ms Ryan notified Employee Relations of the investigation.

101. On 17 January 2022, Mr Catana invited the Claimant to a meeting the following day; he attached the trade blotters. In his witness statement, the Claimant wrote that, when he saw the blotters, his immediate reaction was 'what were you doing here?'; he stated that he was 'very worried'. In oral evidence, he stated that his first thought was 'Oh, wow, this looks like spoofing'. He confirmed that this instinctive reaction applied to B1-4, as well as B9-12, which the Claimant said were 'similarly suspicious'.

102. The compliance interview took place on 18 January 2022, attended by Mr Catana, Mr Mullin, Mr Gaubert and Mr Leale.

103. The Claimant said that he did not specifically recall the activity on the blotters, but he was certain that he had intended to trade. He had been a relatively inexperienced trader at the time. There was no single way to trade the cocoa market and there were many possible reasons for his trading strategy: he may have been reacting to the market based on factors such as risk in other markets and volatility. He said that he could not reconstruct why he had entered the bids

and offers he had without his communications from the dates in question being provided. He confirmed that he had received training on spoofing and understood why the activity had been flagged as potential spoofing.

104. Most of the time at the meeting was spent discussing B1-4; the Claimant raised B5. Mr Catana made clear to the Claimant that the Respondent had the same concerns in relation to the other blotters, particularly regarding the three blotters on 6 July 2018 (B9-11) which had a similar pattern to the three blotters on 1 June 2018 (B1-3). Mr Catana accepts that he probably said that some of the blotters were less clear-cut, but he was clear that he did not make that comment in relation to the blotters which Mr Sippel later found disclosed spoofing.

105. Mr Catana said in evidence that he appreciated that the activity under scrutiny took place over four years earlier. However, he would expect the Claimant to be able to explain his intentions based on the data in the blotters and his recollection of his general trading strategy, without reference to wider data. Further, the activity displayed multiple indicators which were consistent with spoofing. Mr Catana would expect a trader to recognise the potential for the trades to be perceived as spoofing; for the same reason, he would also expect this pattern of activity to be memorable, even some years after the event.

106. Mr Catana and his colleagues did not consider that the Claimant had given a credible explanation for the activity, which would enable them to conclude that it was part of a legitimate trading strategy.

Suspension

107. On 20 January 2022, Mr Willig suspended the Claimant on full pay (excluding bonuses) and told him that a disciplinary investigation had begun into his trading activity in 2018. This was confirmed by letter of the same date.

Further data gathering by the Red Team

108. Over the following days, Ms Ryan updated the binder and circulated it for comment and amendment. Members of the team also gathered further data, including the following: client order data; electronic communications, including emails, instant messages and Bloomberg messages; risk reports relating to the cocoa market; and emails which the Claimant had sent regarding his end of day risk position on the dates in question.

The outcome of the Red Team investigation

109. The Red Team agreed that the conduct should be characterised as follows: ‘deliberately or recklessly engaging in spoofing or layering activity’; and ‘trading activity that exposes the firm to undue risk, including the possibility of being perceived as potentially fraudulent and manipulative to a client, counterparty or intermediary or the market … even if it does not constitute a violation of an applicable rule or other specific provision of policy’.

110. Aggravating features were identified: there were multiple instances of the same or similar behaviour, demonstrating a course of conduct; the Claimant did not self-report the conduct in issue; the Claimant had been unable to articulate a credible explanation that the trading activity constituted *bona fide* order placement and trading; and the heightened potential reputational, regulatory or

legal risks associated with market manipulation including spoofing or layering activity.

111. The agreed, proposed outcome was a Level 3 Violation Notice.

112. The final stage in the MCVF process was consideration by the Corporate and Investment Bank (CIB) Quality Control (QC) forum of the sufficiency of the MCVF review and the consistency of outcomes across CIB. Ms Ryan produced a document for the forum, summarising the information gathered and the proposed outcomes. She also prepared a slide deck, which was presented at a meeting on 9 February 2022. The forum approved the proposed Level 3 Notice.

113. The MCVF procedure also stipulates that, before a Level 3 policy violation notice is issued, Compliance must inform the LOB Chief Compliance Officer, the firm's Government Investigations and Regulatory Enforcement Group and HR, including the Employee Relations team. If a Level 3 notice is issued, Employee Relations will consider whether further action should be taken under the firm's disciplinary procedure. In fact, Employee Relations had already been notified on 13 January 2022 by Ms Ryan (para 100).

Level 3 Violation Notice

114. On 14 February 2022, the Claimant was issued with the Level 3 Violation Notice, which stated that Compliance had determined that his escalated activity, including on 1 June 2018, 6 July 2018 and 27 December 2018 violated the firm's market conduct policies, specifically the Anti-fraud policy. He was informed that the matter had been referred to HR and LOB management for further review.

115. The Claimant says that this shows that he had been found guilty before the disciplinary proceedings had concluded, indeed when they had barely begun.

The disciplinary process

116. From 1 February 2022, Ms Ryan and Mr Gaubert had been liaising with Ms Emma White (Executive Director, Employee Relations Investigations). Ms White reviewed the compliance investigation and outcome and decided that there was a disciplinary case to answer, and a hearing should be held.

117. Ms Celia Connelly (Managing Director, Global Head of Human Resources) asked Mr Sippel to conduct the disciplinary procedure. Mr Sippel has worked for the Respondent since 2002 in various roles, beginning as a trader and working his way up to the position of managing director, the most senior corporate grade within the Respondent. His background as a trader, and as a manager of traders, meant that he was well-placed to consider the issues which arose in this case.

118. Mr Sippel had never met the Claimant; he had not been involved in the matters which led up to the disciplinary hearing. Ms White sent him a disciplinary pack on 21 February 2022. Among other things, it contained the Red Team interview with the Claimant, the blotters, the market conduct violation notice and the draft disciplinary invitation letter, which was due to be sent to the Claimant.

Invitation to the disciplinary hearing

119. On 22 February 2022, the Claimant was invited to a disciplinary hearing on 1 March 2022. The attached pack included the documents set out above, as well as the full day's trading data for the days in question, and the Claimant's end of day summary emails for each day, which the Claimant accepted provided a contemporaneous record of his views as to risk; these were provided in response to his having raised the issue of risk at his Red Team interview. He was also sent the relevant policies, including the disciplinary procedure, the Code and the Anti-fraud policy.

120. The invitation letter set out the charges, which were that on 1, 6, 8, 22 and 27 June, 6 July and 27 December 2018 he engaged in potentially inappropriate trading practices involving the placing and cancelling of orders in Cocoa Futures on ICE exchange; the allegation was that his conduct was in breach of the firm's Anti-fraud policy, specifically section 6.2 which deals with spoofing, and the Respondent's Code of Conduct. The letter warned that, if upheld, these charges may amount to gross misconduct; there was a range of possible sanctions up to summary dismissal; he had a right to be accompanied to the hearing.

<u>The Claimant's statement for the disciplinary hearing</u>

121. On 28 February 2022 Mr Sippel received a copy of a statement which the Claimant had sent for his attention (drafted with the assistance of his solicitor). Mr Sippel read it before the hearing.

122. The Claimant said in his statement that he probably submitted between 100 and 200 orders to buy or sell each day, half of which would probably have been traded. The high number of orders meant that he was very unlikely to remember why he had made specific trading decisions. The Claimant went through each of the allegations and outlined possible explanations.

123. His primary position was that he would have cancelled orders due to price changes in the market which meant that he no longer wished to execute the trades. In some instances, he referred to the fact that he had executed a similar trade later in the day as evidence that he must have had an intention to execute the earlier order at the time that he placed it. He said that 27 December 2018 (Blotter 12) had been a volatile day of trading as the London market had been closed the day before; this might be a further explanation for his patterns of trading on that day. He also argued that the increased profit generated by the trades in question was minimal compared to the total revenue generated by the agriculture desk in 2018; he queried why he would have taken the risk of spoofing in these circumstances.

124. The Claimant also stated that the data that had been included in the disciplinary pack was incomplete. He identified a number of different categories of data that he said it would be helpful to have in order to consider possible explanations for his patterns of trading, including: trading data from the New York and London markets; information about whether the orders in question had been placed on behalf of the firm or clients or brokers; his opening and live positions for the day's trading and details of any news events.

125. The Claimant also referred in his statement to the *Jones* litigation and asserted that he was the next employee the firm had decided to dismiss for spoofing to appease its regulators.

Messaging at senior level

126. The Claimant suggests that messaging around this time at senior level shows that there was a link between his case and the DPA and precious metals scandal.

127. The DOJ was clearly made aware that an investigation into potential spoofing by the Claimant was taking place; there were written communications between the firm and the DOJ, which were not in the bundle.

128. Mr Sippel accepted that Mr Daniel Pinto (President and Chief Operating Officer) almost certainly knew that a Level 3 Violation Notice had been issued to the Claimant. He thought it unlikely that Mr Pinto would have gone through the Claimant's trading patterns himself, in order to take an independent view as to whether the Claimant had spoofed. It was more likely that he was notified by Red Team that a finding of spoofing had been made, and that he would have supported that finding. I found that evidence credible.

129. There was no evidence before me of any direct communication between Mr Pinto and Mr Sippel about the Claimant's case.

Call with Mr Dolan on 23 February 2022

130. On 23 February 2022, the Claimant had a call with Mr Paul Dolan (Managing Director, EMEA Co-Head of Markets Compliance) about the market conduct level 3 violation notice. The Claimant suggested at the later disciplinary hearing that Mr Dolan told him that he did not understand the MCVF notification and the allegations. Mr Sippel made enquiries through Ms White, who informed him that Mr Dolan's recollection was that he had not discussed the specifics of the Claimant's trading with him; he had told him to raise any points he wished to make in the disciplinary process.

131. Mr Sippel's evidence was that whatever was said between the Claimant and Mr Dolan, it would not have influenced his judgment. I accept his evidence.

The disciplinary hearing

132. The Claimant attended the disciplinary hearing on 1 March 2022. The attendees were as follows: Mr Sippel and Ms White; Ms Rawson and Mr Gamboa (notetakers); and Merya Zogheib (Vice President, Commodity Investor Products, accompanying the Claimant).

133. The Claimant read out parts of his written statement during the hearing; he denied the allegations.

134. Mr Sippel acknowledged that Claimant would probably not be able to remember the specific details of orders he had made (in terms of their size, timing etc.). However, he explained his view, which was that the Claimant - or indeed any trader, including himself - would be able to recognise his own pattern of trading from the trading data and would be able to put forward possible explanations for trades which, on their face, looked suspicious. The Claimant disagreed and said that the information had been provided with was superficial; he would not be able to provide further explanations without more data.

135. Mr Sippel considered that the blotters were the single most important category of data because they showed the bids and offers that the Claimant was placing and which orders were being fulfilled. The approach the Claimant had taken of placing orders on opposite sides of the market with one order displayed and one order not seemed to him obviously problematic. It would have been foreseeable that it gave the impression of spoofing. If a trader was going to trade in this way for a legitimate reason, he would need to be very clear what that reason was so that it could be explained later. It would be inherently memorable because it is so obviously suspicious. He encouraged the Claimant to engage with this point, but the Claimant replied that he had placed thousands of trades using different strategies and the fact that only 12 trades were being looked at in this process showed that his other strategies had been legitimate.

136. The Claimant reiterated his wish to be provided with additional data, without which he could not be expected to identify legitimate reasons for the trades. They then went through the trades in detail.

The notes of the meeting

137. At the beginning of the disciplinary hearing, Ms White said that Ms Rawson and Mr Gamboa of HR would be taking non-verbatim notes 'which would be shared with [the Claimant] as part of the process'. The Claimant emailed Ms White, asking for the notes of the meeting by the end of the day; Ms White replied saying that they would not be finalised by the end of the day, but would be shared 'in due course as part of the process. Once they are complete, we will notify you and share across'. Ms White sent a draft of the notes to Mr Sippel on 21 March 2022; they were not sent to the Claimant until 1 December 2022, nine months later, attached to the disciplinary outcome letter.

138. When he eventually received them, he made some observations on them. Mr Sippel states that they would not have altered his decision on the outcome, had he seen them at the time.

Provision of further data to Mr Sippel

139. On 9 March 2022, Ms White sent Mr Sippel trading data between August and early December 2018, so that he could see if anything looked similar to the trades in the allegations. That data was not sent to the Claimant.

140. This data revealed two further trades when the Claimant had cancelled orders without having traded. No action had been taken in relation to them Mr Sippel was taken to these instances in cross-examination; he said that the likely explanation for this was that, on these occasions, the Claimant had not placed orders on the other side of the market, which points away from spoofing.

141. Mr Ogg put to Mr Sippel that, if this data had been provided to the Claimant, the Claimant could have pointed to it as showing that he had a trading style under which he would change his mind about his bid and cancel it within seconds for legitimate reasons. It was put to Mr Sippel that this was why he did not give the Claimant this data. Mr Sippel responded that, if the Claimant had such a trading style, he would not need a spreadsheet to tell him that.

142. I accept Mr Sippel's evidence on both points; I found it cogent and credible.

Further data provided to the Claimant at his request

143. The Claimant asked for his trading data from the London cocoa futures market on the relevant dates. Mr Sippel considered that this data was not relevant because the New York and London markets are mutually exclusive; a trader must trade in an appropriate way in the market in which he is operating, regardless of what was occurring in other markets. Nonetheless, Mr Sippel instructed that it should be provided to the Claimant.

144. Ms White provided the data to the Claimant on 13 April 2022. There was no London trading data for 6 July 2018 because surveillance did not find any activity by the Claimant on that date in London.

145. At the same time, Ms White sent data showing the Claimant's trading across other cocoa contracts he was working on in the New York market, as well as some emails with market commentary from commodities brokers, which he had received on the relevant dates.

146. The Claimant had also asked for live broker chats for the relevant dates, but these were not provided.

The Claimant's supplementary statement

147. Ms White gave the Claimant an opportunity to comment on the new data. On 5 May 2022, he sent Ms White a supplementary statement, drafted with the assistance of solicitors.

148. In relation to B1-3, the Claimant argued that the data from his trading on the London Cocoa market suggested that he had been entering large orders in New York to test the liquidity of that market and to see if there was more liquidity in New York than in London. He also maintained that the data showed that he was trying to achieve a spread position between New York and London to manage his risk exposure which he said was a legitimate trading strategy.

149. In relation to B1 and B2, he referred again to the fact that he had made 'equivalent' trades later that day which showed that he had intended to execute the orders that he had withdrawn at the time that he had placed them.

150. In relation to B12, the Claimant said again that 27 December 2018 had been a volatile day for trading and that his London cocoa trading data showed that he was trading across both markets interchangeably and at high volumes throughout the day. He stated that, within one minute of cancelling the offer that he had placed on the New York market, he had entered an offer on the London market. He maintained that this showed that his reason for cancelling the offer in New York was that he had had a change of mind and decided to switch his offer to the London market instead.

Further data not provided to the Claimant

151. In the supplementary statement the Claimant asked again for further disclosure.

    151.1. the full log of his broker chats from the relevant dates, which would allow him to identify what other brokers and traders were doing in the market; such chats might have influenced his trading decisions;

151.2. data showing his overall risk position across the many contracts that he traded; his opening risk position, the live risk position at the moment of each relevant trade, the full history of trading on each day which might show trades that were not in the blotters, his end of day position, his 'gamma' position and his 'run-off' position;

151.3. his London trading data for 6 July 2018;

151.4. the New York and London market ladders, which show all the bids and asks on the market at the relevant time, not only the best bid and best ask (shown on the blotters);

151.5. client orders relevant to the dates in question.

152. Ms White forwarded the supplementary statement to Mr Sippel, and they discussed the Claimant's requests for further data. Mr Sippel decided to refuse the requests for reasons he explained in his statement and in his oral evidence:

152.1. as for the broker chats, he considered that, given the very short timescales of the trading, the Claimant could not possibly have been influenced by chats with other traders;

152.2. as for the opening and closing risk positions because, in his view they would not explain decisions taken over very short periods of time during the day; Mr Sippel could not see how the Claimant's gamma position (a high gamma indicates great volatility in pricing) could justify patterns which was specific across such short periods of time; as for his run-off position, Mr Sippel considered that what the position was at the end of the day could not shed light on why Claimant had made, and quickly withdrawn, orders during the course of a trading session;

152.3. in relation to the London trading date of 6 July 2018, Mr Sippel was informed that there was no such data because he had not traded in cocoa on the London market on that day;

152.4. as for the ladders, the Claimant already had (in the blotters) information on the best bids and asks in the market at relevant times, which was the primary source of information on the changing pricing environment; Mr Sippel did not consider that the ladder data could explain why the Claimant would have decided to cancel orders almost instantly after he had placed them;

152.5. Mr Sippel was told by Ms White that no client orders had been placed on the dates in question; in any event he could not see how client data that did not directly concerned the order flow in question could have supported his case, as it would have been too remote to explain the decision to withdraw certain orders during specific timeframes.

153. In short Mr Sippel considered that the additional documents the Claimant was seeking were simply not capable of providing an innocent explanation for the impugned trades.

154. The Claimant points out in his witness statement that, in the course of these proceedings, he discovered that the Respondent had requested and reviewed some of the data he was seeking:

154.1. the risk positions and risk reports had been requested by Mr Gaubert on 3 February 2022 in respect of some of the dates;

154.2. the Claimant's emails, instant messages and Bloomberg instant messages had been collected for the whole of 2018;

154.3. client order capture data had been received by Ms Ryan on 9 February 2022;

154.4. there appeared also to have been a significant quantity of other information relating to his case, attached to an email of 15 February 2022, whose contents were uncertain.

155. The Claimant says it was unfair that he was not provided with all the data that was looked at by the Respondent. He also points out that, in the precious metal scandal, there were Bloomberg chats in which traders explicitly alluded to spoofing; no such documents had been produced in his case.

156. Mr Sippel considered whether a further hearing was needed before he proceeded to consider his decision but concluded that there was no need: he believed that he had given the Claimant a proper chance to respond to all the allegations and there was nothing more that he needed to discuss with him.

157. On 6 June 2022, Ms White wrote to the Claimant to confirm Mr Sippel's decision on the provision of further data. She offered to convene a further hearing, if the Claimant wished to make any further submissions which were not covered in his supplementary statement; he did not ask her to do so.

158. On a related point, the Claimant was not told that alerts had been made in relation to the trades in 2018, but an analyst had taken a decision not to escalate them. There was a policy requiring records to be kept when analysts dealt with alerts; no records were provided to the Claimant, so he did not see what conclusions the analyst came to in 2018.

<u>The delay in providing the disciplinary outcome</u>

159. Mr Sippel said in his witness statement that he wanted to provide an outcome to the Claimant as soon as possible, but that he also needed to take time to consider all the evidence carefully. He had a meeting with Ms White on 30 May 2022, at which he told her that he thought he had sufficient information from the Claimant. It then took until 1 December 2022 (some six months) for the outcome letter to produced. His only explanation for this delay was that it was complex and that he and Ms White spent a considerable amount of time working on the outcome letter.

160. The Claimant suggested in his statement that the delay in providing him with the disciplinary outcome was connected in some way to the *Jones* case. I asked Mr Ogg whether this point would be pursued in cross-examination; he confirmed it would not.

<u>The disciplinary outcome</u>

161. In a call on 1 December 2022, Mr Sippel communicated the disciplinary outcome to the Claimant. He told him that he had upheld the allegations of spoofing relating to Blotters 1, 2, 3, 4, 9, 10, 11 and 12.

162. Mr Sippel dismissed the Claimant for gross misconduct. This was confirmed in an outcome letter of the same date, to which were attached the notes of the disciplinary hearing. The letter confirmed the Claimant's right of appeal. The latter was drafted by Ms White, with input from legal, based on Mr Sippel's instructions; it was approved by him. Mr Sippel's reasoning is summarised below.

B1 and B2

163. In relation to B1, the Claimant had argued that he placed the bid to test liquidity in the New York market; that the data indicated that he was trying to ensure he had a spread position between New York and London; he also relied on the fact that he executed a bid later the same morning, which he regarded as equivalent to the impugned bid; he considered this showed that he had intended to trade earlier in the day; he argued that the data showed that his overall priority on 1 June 2028 was probably to buy rather than to sell.

164. In relation to B2, the Claimant argued that he might have reassessed his trading position due to a rise in the price of cocoa; he relied on the same arguments (testing liquidity in New York; spreading his position between London and New York) as in relation to B1.

165. Mr Sippel considered the Claimant's explanations and concluded that they were not credible explanations for B1 or B2. He acknowledged that traders constantly re-evaluate their trading positions as the market moves up and down. However, the fact that the Claimant moved so quickly and cancelled both orders to buy so soon after he had executed orders to sell mean that it was not a plausible explanation. He also concluded that the fact that the Claimant had used fully disclosed orders when placing the buy orders and iceberg orders when placing the sell orders would have strengthened the impression that there was a demand to buy, rather than sell, in the market, which he was able to use to his advantage. As for testing liquidity, he considered that the fact that the buy order in London was a large iceberg order (which was more likely to be filled), while the buy orders in New York were fully disclosed (less likely to be filled, given their size) supported his conclusion that the Claimant was not intending to buy in New York. As for the Claimant's argument that he was spreading his position, he also rejected this: London and New York are separate markets and traders are obliged to trade appropriately in each market in which they participate; as he explained in his oral evidence, he believed that that the Claimant 'spoofed the New York market to get the execution of the risk-reducing trades in New York'. He concluded that, even if the Claimant had an overall strategy to buy, it did not follow that any bid placed on that day must be genuine; traders are both buyers and sellers on any given day as they react to the markets. He did not accept that a bid made later in the day, in a different price environment, showed that the impugned bids were genuine; his focus was on why the Claimant's buy orders had been placed and cancelled so quickly, immediately after his sell orders had been executed.

166. In relation to B1 and B2, Mr Sippel concluded that the Claimant had entered the cancelled buy orders without intending to trade them, but in the knowledge that they would impact the market, and had used them to execute his sell orders at a higher price than he otherwise would have been likely to achieve. He regarded

this as classic spoofing activity, which would have rung alarm bells for anyone trading in this way.

B3

167. The Claimant made similar points about B3 to those he had made about B1 and B2; all three blotters relate to the same date: 1 June 2018. He argued: that he might have reassessed his position after the price rose; he thought the very specific number of lots (112) indicated that he may have needed to hedge his position; he made an equivalent bid later the same day; he had placed a large bid on the London market, which continued to be executed until 09:12 New York time, which indicated he may have been trying to ensure a spread position between London and New York; he argued that the data suggested that he had primarily been a buyer on this day and that the large bid in New York may have been to test liquidity.

168. Mr Sippel rejected the Claimant's arguments for similar reasons as B1 and B2. The fact that he may have placed a sell order for 17 lots in New York to balance out buy orders he had executed in London did not support his argument that his subsequent buy order for 112 lots in New York must have been genuine when he entered it. On the contrary, it suggested to him that he would have been a motivated seller, wanting to sell the 17 lots at the best price he could achieve. He rejected the argument that the buy order of 112 lots was placed to test liquidity: the bids the Claimant placed in London were iceberg orders; the New York order was fully disclosed (and so, less likely to be filled). He rejected the argument about the large buy order placed and executed later in the day: it was several hours later, at a much lower price and appeared unrelated.

169. In relation to B3, Mr Sippel concluded that the timing of the Claimant placing the large buy order and then deleting it less than 30 seconds later, after executing sell orders, suggested that the Claimant knew that placing a buy order in this way would have an impact on the market.

B4

170. The Claimant stated that he may have reassessed his position after the market moved down to a new best price of $2,362; and that he may have withdrawn the 100-lot sell order, hoping to execute it later at a higher price. He pointed out that he had placed two equivalent sell orders later the same day and suggested that this was evidence that he had intended to execute the impugned order when he placed it. He also suggested that there could have been wider market factors which explained his pattern of trading.

171. Mr Sippel considered that the position was essentially the same as with B1-B3, in particular that the sell order was deleted just after he had executed buy orders at a price which appeared to have been impacted by his sell order, while it was in place and before it was cancelled. Mr Sippel noted that the Claimant did not sell, even once the market had reverted to the price at which he said that he would have been inclined to sell, which undermined his assertion that, at that time, he had had an intention to sell.

B9-B11

172. B9-B11 all related to the same day (6 July 2018). In all three of them the Claimant entered large buy orders for fully disclosed lots; he then executed smaller sell orders; he then deleted the buy orders without having traded any portion of them.

173. The Claimant said that he might have had to reassess his position due to price movements in the market. For B9, he said that the best price being offered in the market moved from $2,464 to $2,467 and that he may have considered it unlikely that it would revert to his bidding price, and so he decided to withdraw the bid. In relation to Blotter 10, he said that, even though the price had increased, it very quickly came down again and he may have judged that it was better to withdraw his bid to allow the downwards momentum to carry on before resubmitting his bid later that day for an even better price. As for B11, he said that the data showed an increase in liquidity in the market and that this may have caused him to conclude that his bid was unlikely to be executed and that he would be better withdrawing it.

174. He also said that he had gone on to place another large buy order and subsequent smaller buy orders that day, which he said was strong evidence that he had intended to execute the impugned orders when he entered them. He contended that the specific number of lots in B10 suggested that he might have been trying to hedge his position. He also asserted in relation to all three blotters that wider market factors which were not discernible from the blotters might explain his decisions.

175. Mr Sippel did not accept the Claimant's explanations: he concluded that the market was not hugely volatile on the date in question; he did not find the specific number of lots in B10 significant and the trading data did not suggest to him that the Claimant was trying to hedge his position; he did not believe that the Claimant deleted the orders in question because of the price movements that caused him to reassess his position, when it would have been obvious to him that his own orders would have caused price movements when he placed them.

176. In relation to B11, the Claimant had said that it was likely that he had assessed the market and decided that his buy order for 80 lots was unlikely to be executed so he had cancelled it. However, the market data showed that his bid would have become marketable only 5 minutes later at 09:27 when the price was $2,465, yet there was no buying activity from the Claimant for over two hours. This suggested to Mr Sippel that the Claimant was not genuinely looking to buy a large quantity of cocoa at that time.

177. Mr Sippel was not convinced by the Claimant's reliance on the fact that he had placed further buy orders later in the day, for the same reasons which applied to the other blotters.

B12

178. The Claimant argued that his trading pattern had to be seen in context. He stated that trading on 27 December 2018 had been volatile because of the closure of the London cocoa market the previous day, which was a bank holiday. On 26 December 2018, the New York market had been open and had experienced a very large price rally; this had resulted in a large discrepancy

between the two markets which needed to be bridged, hence the fact that he had been placing and/or withdrawing large orders on 27 December 2018.

179. The Claimant also relied on the fact that, within one minute of cancelling the sell order in B12, he had placed an offer for 120 lots on the London market; this demonstrated that his New York order had been genuine, but that he had decided to switch his offer from the New York market to the London market.

180. Mr Sippel concluded that the data did not support the Claimant's explanation. It did not fit with his pattern of trading in the New York market at the time; his sell orders in New York were fully disclosed, and so likely to have a low rate of success. He considered that he would not have done so if he had genuinely intended to sell. Mr Sippel noted that the Claimant had sold 150 lots in London on 27 December 2018 but that in New York he was only buying and had accumulated 491 lots. The data also showed that the Claimant had cancelled the sell order in New York just at the time when it became marketable and was thus potentially capable of being filled. Mr Sippel did not believe that the Claimant treated the London and New York markets interchangeably.

181. As for the Claimant's argument that the New York cocoa market had been particularly volatile on 27 December 2018 because the London cocoa market had been closed the previous day, when Mr Sippel looked at data on Bloomberg, he saw no evidence that the market was particularly volatile.

182. Mr Sippel also considered how the passage of time had affected the Claimant's ability to explain his patterns of trading. He concluded that the trading patterns so obviously suggested that the Claimant had placed orders without intending to execute them that there were two implications: firstly, the pattern itself compelled the conclusion that the Claimant had engaged in spoofing; secondly, that cancelling orders shortly after they were placed without executing them - having executed opposing orders - would have been a significant event which would have rung alarm bells for even the most junior of traders. Mr Sippel was sure that it would have either have stuck in the Claimant's mind or that his memory would have been prompted by reviewing his trading data.

183. Mr Sippel acknowledged that there was no evidence of previous or subsequent wrongdoing of a similar nature. He accepted that the financial gains were modest but, while he did not know why the Claimant had behaved in this way, that did not outweigh the evidence that the Claimant had entered orders that he did not intend to execute.

184. When Mr Sippel reviewed the data, together with everything the Claimant had said, he concluded that the Claimant had engaged in spoofing. He reached the conclusion on the balance of probabilities; in fact, as he wrote in his witness statement 'in my view, the evidence overwhelmingly pointed to this conclusion'.

185. Mr Sippel was criticised in cross-examination for using the term 'balance of probabilities' in the outcome letter and it was suggested this was not his term but was provided by someone else. That is not correct: he used the expression twice during the disciplinary meeting (page 959 in the bundle).

Appeal against dismissal

186. The Claimant submitted an appeal against dismissal on 15 December 2022. In summary, the grounds of appeal were as follows: the decision to dismiss him had been a foregone conclusion; Mr Sippel had incorrectly defined spoofing, had misapplied the relevant policies and reversed the burden of proof; there were errors in the factual findings; there was missing trading data which could have exonerated him; the allegations were irrational for reasons including the fact that the profit derived from the alleged spoofing was small; dismissal was a disproportionate sanction; the delay in providing the disciplinary outcome caused him prejudice, as did the delay in providing the minutes of the meeting. The Claimant attached his proposed amendments to the notes of the disciplinary hearing.

187. The appeal was acknowledged on 20 December 2022. On 18 January 2023, HR confirmed that the appeal would be heard by Mr Bristow. He had not heard of the Claimant before being asked to hear the appeal. The appeal was by way of review, rather than re-hearing.

188. Ms Gina Newman (Vice President, Employee Relations Investigations), who assisted and advised Mr Bristow throughout the appeal process, provided him with the following documents: the grounds of appeal; the Claimant's comments on the note of the disciplinary hearing; the disciplinary invitation letter and accompanying disciplinary pack; the Claimant's disciplinary statement; the additional data sent to Claimant after the disciplinary hearing; the Claimant's supplementary statement; and the disciplinary outcome letter.

The appeal hearing

189. The appeal hearing took place on 3 February 2023. The Claimant chose to attend unaccompanied.

190. In relation to his ground appeal alleging predetermination, one of the issues the Claimant raised was the fact that the firm advertised a role on his desk shortly after he was suspended, which he believed was his role.

191. The Claimant explained that he believed that the burden of proof had been reversed. He said that he strongly believed that the evidence he provided showed that he had not been spoofing, but that this had been dismissed out of hand. He stated that he had been dismissed to appease the regulators.

192. In relation to analytical flaws, he suggested that trading data which showed that he had made the same trade later in the day as one of the cancelled orders showed that he had not been spoofing, but this had been rejected. He considered that Mr Sippel had made many generalisations.

193. He raised the question of missing data, in particular risk position data. He considered that Mr Sippel had been wrong to conclude that this was irrelevant, as it could have shown why he wants to buy or sell cocoa at the relevant times.

194. He challenged Mr Sippel's conclusion that there was not much volatility in the New York market on 27 December 2018, which did not accord with his memory.

195. He contended that dismissal was a disproportionate sanction, given his clean disciplinary record.

196. Notes were taken at the meeting, which were not provided to the Claimant until he was sent the appeal outcome on 15 September 2023.

The job advertisement

197. After the appeal hearing, the Claimant forwarded a screenshot of the job advertisement he had referred to, which he believed was for his role, to Ms Newman, who sent it on to Mr Bristow.

198. The key responsibilities of the role were 'making markets in both vanilla and exotic options on precious metals and crosses.' One of the Claimant's primary responsibilities was managing the crosses trading (crosses means trading precious metals in other currencies which are not US dollars, therefore there is a 'cross' between the metal price and the Foreign Exchange currencies).

199. The job was advertised as being at the Associate or Vice-President level; the Claimant was an Associate but was eligible for promotion in 2023 to Vice-President.

200. The first document referring to this recruitment was dated 7 February 2022, shortly after the Claimant was suspended on 20 January 2022. If this was an additional role, I would expect there to be evidence of a management case for the recruitment, however brief, including budgeting considerations; there was no such evidence. The Respondent flew in a trader to cover the Claimant's role on 17 January 2022. Although there was an increase in headcount to accommodate the advertised role, no replacement was recruited when the Claimant was dismissed.

201. Mr Sippel's evidence was that he knew nothing about the advertisement/recruitment when he made his decision.

The interview with Mr Sippel

202. Mr Bristow conducted an interview with Mr Sippel, which took place on 2 March 2023.

203. Mr Sippel told Mr Bristow that he had not known that the firm was advertising a role on the Claimant's desk at the time of the disciplinary hearing. He was adamant that he had not gone into the disciplinary process with a predetermined outcome and that his decision had nothing to do with regulatory pressure. He rejected the suggestion that he had reversed the burden of proof; he said that he had been trying to solicit information from the Claimant about his intention when placing trades. He believed that traders could recognise their order flow and trading patterns from data showing their trading activity, even long after the event. He had not found the Claimant's explanations satisfactory. He considered that the order flow and the timing does were almost textbook spoofing. On some occasions, the Claimant had pulled an order within a second or two of placing it; he could not possibly have ingested new information in that time and acted on it. The evidence suggested to him overwhelmingly that it was a case of spoofing. As for the data which had not been provided, Mr Sippel accepted that he had not agreed to all the Claimant's requests because he did

not think the data concerned would be relevant to the issue of the Claimant's intent when placing the orders.

204. As for the delay in providing the outcome, Mr Sippel accepted that the process had taken longer than it should have done but noted that it taken a considerable amount of time to recreate the datasets that the Claimant wanted; his deep review of data had also taken a lot of time.

Further investigations by Mr Bristow

205. Mr Bristow met with Ms Newman on 27 March 2023 to go through the grounds of appeal, discuss his thoughts and consider whether any further enquiries were needed.

206. Ms Newman told him that she had spoken to Ms Nadia Titarchuk (Managing Director, Head of Precious Metals Derivatives Trading and Agriculture Trading) to ask about the advertised position. Ms Titarchuk told her that the role was a new position and the headcount of the team had increased by one role. Ms Newman later sent Mr Bristow a screenshot of information entered into the firm system, which showed the role being posted as a 'new' position, not a replacement position, it was also advertised with the corporate title Vice President, whereas the Claimant had been an associate. She said that the headcount figures showed that the Claimant's team had increased by one person once the hiring process was complete.

207. Mr Bristow looked into the question of the volatility of the market on 27 December 2018. He asked Compliance to provide him with relevant information. Mr Lloyd Jones (Executive Director, EMEA markets) put together three graphs to assist Mr Bristow, who asked Ms Newman to forward them to the Claimant, which she did on 2 June 2023. The Claimant then provided his own graphs and also requested further disclosure in relation to 27 December 2018. Mr Bristow and Ms Newman made further enquiries of their own.

The second meeting between Mr Bristow and the Claimant

208. There was a further meeting with Mr Bristow on 6 July 2023. There was a discussion of the volatility issue on 27 December 2018: the Claimant said that he believed it had been the single most volatile day of the year.

209. At that meeting the Claimant was shown copies of his emails with Mr Jeff Katz on 26 December 2018. This was done by sharing the documents on screen. The Claimant believed that the emails showed that the two-day period had been incredibly significant, which is why it was so memorable to him several years later. Mr Bristow considered that they showed that there had needed to be some adjustments in the market on 27 December 2018, given that the London market had been closed the day before, but he did not agree that the email suggested that trading on the market would be hugely volatile throughout that day or that this was what actually happened; rather they suggested that the Claimant anticipated the markets would correct themselves on 27 December 2018 and that the overall position would be flat. He considered that the market settled down and came back to where the Claimant had anticipated.

210. Mr Bristow was satisfied that the Claimant had been given a full and fair opportunity to put forward any further points he wished to make.

Deliberations and the appeal

211. Mr Bristow was on leave for two weeks and then Ms Newman went on holiday in the latter part of August 2023. This delayed their meeting to discuss the outcome. They met towards the end of August and Mr Bristow discussed his thoughts on each of the grounds of appeal. I accept his evidence that he was the decision-maker and made the findings in relation to each point. After their meeting, Mr Bristow finalised the appeal outcome letter with assistance from the firm's external legal advisers.

The appeal outcome

212. The Claimant was sent the appeal outcome on 15 September 2023. Mr Bristow concluded that the review which gave rise to the disciplinary charges against the Claimant resulted from the discovery of the issues within the ICE exchange and had nothing to do with the Claimant as an individual. He agreed with Mr Sippel that, once the concerns about the Claimant's trading activities came to light in 2021, it was appropriate for them to be investigated, even though the trading had taken place in 2018. In his view, the Respondent could not simply ignore evidence of spoofing because of the circumstances in which that evidence came to light, or because there had been an earlier mistake which meant that the issue had not been escalated earlier. He saw no evidence that Mr Sippel had decided to uphold the allegations and dismiss the Claimant in order to appease the regulators. Nor was he persuaded that the outcome was a foregone conclusion; he found Mr Sippel's rationale for the conclusions he had reached to be cogent and credible. Moreover, having reviewed the trading data himself, he agreed that it indicated spoofing. He rejected the suggestion that Mr Sippel had been part of a conspiracy, and that the Claimant's dismissal was linked to the *Jones* case. He also rejected the Claimant's argument that the role which had been advertised was the Claimant's role; he concluded that it was a separate and additional role.

213. He did not consider that Mr Sippel had 'reversed the burden of proof'; rather, he had sought to explore with the Claimant possible explanations for what appeared, *prima facie*, to be spoofing. He did not consider that Mr Sippel had made factual errors in his outcome letter.

214. As for the data which had not been provided to the Claimant, Mr Bristow reviewed it himself and concluded that it could not have assisted the Claimant. He did so, having not disclosed it to the Claimant.

The Bradley Jones case; the 'new spoofing policy'

215. Between 13 and 15 April 2021, the Employment Tribunal in East London (EJ Knight, sitting alone) heard the case of *Jones v JPMorgan Securities plc* (Case No. 3201630/2020). The liability decision was promulgated in July 2021.

216. Mr Jones was employed as a local analyst and cash equities trader between 2011 and 2020. He made a series of trades on 6 January 2016, by which he entered and deleted orders in quick succession. The trades were picked up at the time, the Claimant was interviewed, and the investigating officer accepted the Claimant's explanations for the trades as being consistent with the standard practice of traders on the Claimant's desk; no disciplinary action was taken. Training was arranged for the Claimant and many of his colleagues, at which

staff were informed that much of the activity of traders can be perceived as suspicious if looked at out of context and therefore they must take notes of situations about which they might be questioned in the future.

217. The Judge found that, as a result of the DOJ investigation, the Respondent commenced a review in 2019 'a major purpose of [which] was to prove to regulators in both the United States of America and the United Kingdom that the Respondent took its regulatory obligations seriously'.

218. In December 2019, Mr Jones was suspended and invited to a disciplinary meeting in relation to the 2016 trades, which was conducted by Mr Bristow. He was dismissed at the end of January 2017 for gross misconduct.

219. The Claimant claimed unfair dismissal. The Judge concluded that the claim was well-founded: he concluded that the Claimant's explanation for the Respondent's change of approach (that it was to further the Respondent's desire to appease its regulators) was more likely to be true than the Respondent's explanation (spoofing); consequently, the reason for the dismissal was neither conduct nor SOSR; absent a potentially fair reason, the dismissal was unfair. He concluded that neither of the decision-makers had a genuine belief that the Claimant had committed misconduct; rather, what they had was 'a belief that the Claimant could not prove that he had not committed misconduct'. The Judge went on to conclude that the Respondent did not have reasonable grounds to sustain its belief in misconduct: the dismissal letter made a series of series of factual errors; the Claimant had not been trained to take notes of suspicious looking transactions and, therefore, there was never any prospect of the Claimant being able to explain his actions, if he had not engaged in spoofing. Further, the investigation was deficient in several respects, including unreasonable delay and a failure to investigate exculpatory evidence. As for contribution, the Judge found that the Claimant did not engage in spoofing and that his conduct did not cause or contribute to his dismissal, nor was it culpable or blameworthy.

220. After a remedy hearing in December 2021, the Judge made an order for re-engagement.

221. In the *Jones* case, the Judge heard evidence from Mr Mullin. The Judge found at paragraph 88 of the judgment:

> 'As Mr Mullin noted in his evidence, following the Precious Metals Scandal the Respondent changed its approach to investigating market conduct issues. It introduced an enhanced standard for whether a trader had breached the Respondent's policies. Under this new enhanced standard, a breach will occur if trading activity was "potentially consistent with spoofing", even if there was no other evidence of inappropriate intent, unless the Respondent was "confident" the trading was *bona fide* ('the New Spoofing Policy').

222. In answer to a question from me, Mr Ogg confirmed that I would not be referred to a document containing a 'New Spoofing Policy'. I note that in his closing submissions (paragraph 85) Mr Ogg invites me to find that Mr Sippel and his colleagues applied the 'New Spoofing Policy' or:

> 'alternatively, they applied *something very close* to the New Spoofing Policy, under which patterns of trading consistent with spoofing were treated as misconduct without more' [emphasis added].'

223. That is consistent with Mr Ogg's submission (at paragraph 85.1) about Mr Sippel's statement (paragraph 100 of his witness statement) that 'in the absence of some compelling contrary evidence, the pattern itself compelled the conclusion that Phil had been engaged in spoofing' reflected 'the reverse burden under the New Spoofing Policy'.

224. All the Respondent's witnesses before me denied that there was a New Spoofing Policy; I accept their evidence. The fact that Mr Ogg had to make the alternative submission ('or something like it') reflects the fact that there was no evidence before me - apart from the *Jones* judgment, by which I am not bound - that the existing *policies* had been changed. However, this does not prevent me from considering Mr Ogg's submission that Mr Sippel - the person from whom I heard evidence and who took the decision to dismiss the Claimant - improperly reversed the burden of proof, which I do below.

The issue of appeasement

225. Three propositions were put to Mr Sippel in quick succession in cross-examination: that when Ms Connelly asked him to hear the Claimant's disciplinary case, he knew that his role was to ensure that the Claimant was dismissed; that the reason the Claimant had to be dismissed was so that the Respondent could show the regulator that it was taking a harsh line in any spoofing case; and that he did not genuinely believe that the Claimant committed misconduct in respect of any of the allegations on which he relied in his disciplinary outcome.

226. Mr Sipple categorically rejected all three propositions and stated that he 'genuinely believed that the Claimant had spoofed and engaged in misconduct.'

The law

Unfair dismissal

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

228. S.98 ERA provides so far as relevant:

> **(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."**

229. In *Orr v Milton Keynes Council* [2011] ICR 704 at [78], Aikens LJ summarised the correct approach to the application of s.98 in misconduct cases:

> **'(1) The reason for the dismissal of an employee is a set of facts known to an employer, or it may be a set of beliefs held by him, which causes him to dismiss an employee.**
>
> **(2) An employer cannot rely on facts of which he did not know at the time of the dismissal of an employee to establish that the "real reason" for dismissing the employee was one of those set out in the statute or was of a kind that justified the dismissal of the employee holding the position he did.**
>
> **(3) Once the employer has established before an employment Tribunal that the "real reason" for dismissing the employee is one within what is now section 98(1)(b), ie that it was a "valid reason", the Tribunal has to decide whether the dismissal was fair or unfair. That requires, first and foremost, the application of the statutory test set out in section 98(4)(a).**
>
> **(4) In applying that subsection, the employment Tribunal must decide on the reasonableness of the employer's decision to dismiss for the 'real reason'. That involves a consideration, at least in misconduct cases, of three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of; and, thirdly, did the employer have reasonable grounds for that belief."**
>
> **If the answer to each of those questions is 'yes', the employment Tribunal must then decide on the reasonableness of the response of the employer.**
>
> **(5) In doing the exercise set out at (4), the employment Tribunal must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a 'band or range of reasonable responses' to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss will be reasonable. But that is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse.**
>
> **(6) The employment Tribunal must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The Tribunal must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which 'a reasonable employer might have adopted'.**
>
> **(7) A particular application of (5) and (6) is that an employment Tribunal may not substitute their own evaluation of a witness for that of the employer at the time of its investigation and dismissal, save in exceptional circumstances.**
>
> **(8) An employment Tribunal must focus their attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process) and not on whether in fact the employee has suffered an injustice.'**

230. At (4) above, Aikens LJ was summarising the well-known test in *British Homes Stores Ltd v Burchell* [1980] ICR 303 at p.304.

231. In *Turner v East Midlands Trains Ltd* [2013] ICR 525, Elias LJ (at [16–17]) cited paragraphs (4) to (8) from that extract in Aikens LJ's judgment in *Orr* and added:

> **'As that extract makes clear, 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.**

232. As for the reason for the dismissal, where a decision-maker goes along with third-party pressure to dismiss, and that third party is motivated by a prohibited reason, so long as the decision-maker is aware of that, there is no difficulty in finding that a prohibited reason was adopted by a dismissing officer (*University Hospital North Tees & Hartlepool NHS Foundation Trust v Fairhall* [2021] 6 WLUK 454, *per* HHJ Tayler at [35]):

> **'There may be circumstances in which people other than the decision maker are involved in the decision making process. Such other people might advise, or even be instrumental in persuading the decision maker to take the decision. If a person charged with taking a decision whether to dismiss (the dismissing officer) decides to dismiss at the behest of another person who wishes the employee to be dismissed for a prohibited reason, in circumstances in which the dismissing officer knows what he or she is doing, including being asked to dismiss for the prohibited reason, there is no conceptual difficulty in finding that the prohibited reason was adopted by the dismissing officer. For example, if a manager tells the dismissing officer that an employee should be dismissed because he or she has made protected disclosures, and the dismissing officer does what he or she been told, the making of the protected disclosures will be the reason why the dismissing officer decided to dismiss, in the sense of being the reason operating in his or her mind, notwithstanding that it may have been put there by someone else. There may be a number of people behind the scenes who have input as advisers or superiors who make it known to the decision maker that they want an employee to be dismissed because of the protected disclosures she or he has made; if the decision maker goes along with the plan the involvement of the instigators does not prevent a tribunal drawing a clear inference that, whatever its precise origin and development, the reason for dismissal operating in the mind of the decision maker was of a prohibited kind.'**

233. In *Sainsbury v Hitt* [2003] IRLR 23 the Court of Appeal held (at [30-34]) that:

> **'The investigation carried out by Sainsbury's was not for the purposes of determining, as one would in a court of law, whether Mr Hitt was guilty or not guilty of the theft of the razor blades. The purpose of the investigation was to establish whether there were reasonable grounds for the belief that they had formed, from the circumstances in which the razor blades were found in his locker, that there had been misconduct on his part, to which a reasonable response was a decision to dismiss him. … In my judgment, Sainsbury's were reasonably entitled to conclude, on the basis of such an investigation, that Mr Hitt's explanation was improbable. The objective standard of the reasonable employer did not require them to carry out yet further investigations of the kind which the majority in the employment Tribunal in their view considered ought to have been carried out.**
>
> **In suggesting further investigations of the kind set out in paragraph 6 of the extended reasons, the majority of the employment Tribunal were, in my judgment, substituting their own standards of what was an adequate investigation for the standard that could be objectively expected of a reasonable employer. On the decision of this Court in**

> **Madden, that is not the correct approach to the question of the reasonableness of an investigation.'**

234. Circumstances will dictate how extensive an investigation is required. In *Shrestha v Genesis Housing Association Ltd* [2015] IRLR 399 at [23], the Court of Appeal held (*per* Richards LJ):

> **'To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the *Burchell* test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the *Burchell* test will depend on the circumstances as a whole.'**

235. In deciding whether the employer carried out such investigation as was reasonable in the circumstances, the relevant circumstances include the gravity of the charges and their potential effect upon the employee. In serious cases, where the finding could affect the employee's reputation and prospects of securing future employment in their chosen field, the allegations must be the subject of the most careful and conscientious investigation. The investigator should focus no less on potential evidence that may favour the employee than on evidence directed towards proving the charges (*A v B* [2003] IRLR 405 at [58, 60 and 64]). If the investigation is defective, it is no answer to say that it made no difference to the decision (*A v B* at [86]).

236. It is impermissible for a Tribunal to substitute its own findings of fact for those of the decision-maker (*London Ambulance Service NHS Trust v Small* [2009] IRLR 563 at [40-43]). Nor is it for the Tribunal to make its own assessment of the credibility of witnesses on the basis of evidence given before it (*Linfood Cash and Carry Ltd v Thomson* [1989] ICR 518). The relevant question is whether an employer acting reasonably and fairly in the circumstances could properly have accepted the facts and opinions which he did. In the Tribunal's consideration of this issue must always be remembered that the employer has "the peculiar advantage over the tribunal of having an intimate knowledge of…the nature and workings of the business" (*Linfood* at p.254)

237. Even if the dismissal decision falls within the band of reasonable responses, it may still be unfair, if the Respondent has not followed a fair procedure. The Tribunal must evaluate the significance of the procedural failing, because 'it will almost inevitably be the case that in any alleged unfair dismissal a Claimant will be able to identify a flaw, small or large, in the employer's process' (*Sharkey v Lloyds Bank Plc* UKEATS/0005/15/JW at [26]). When considering whether the employer acted reasonably, the Tribunal has to look at the question in the round and without regard to a lawyer's technicalities (*Taylor v OCS Group Limited* [2006] ICR 1602 at [48]).

238. A delay in the conduct of an investigation might, in itself, render an otherwise fair dismissal unfair. This is so even if it does not prejudice the employee, though the existence of such prejudice (for example, because of the effect of the delay on fading memories) will provide additional and independent concerns: *A v B* at [66 to 68]; and paras 5 and 6 of the ACAS Code of Practice.

239. An employer should normally provide all relevant evidence, including statements, to the employee (*A v B* at [83]). Further, if someone responsible for

the investigation does not share a material fact with the decision-maker, this can render the dismissal unfair (*Uddin v Ealing LBC* [2020] IRLR 332 at [78-87]).

240. 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. The fact that other employers might reasonably have been more lenient is irrelevant (*British Leyland (UK) Ltd v Swift* [1981] IRLR 91).

Conclusions: unfair dismissal

241. Both conduct and some other substantial reason ('SOSR') are relied on by the Respondent as the potentially fair reasons for the dismissal in its pleadings. Mr Nawbatt confirmed that I need not consider SOSR separately. The Respondent's case is that the Claimant was dismissed for spoofing, which it considered to be gross misconduct.

242. The Claimant advances a different theory: that the Respondent dismissed him to appease the regulators (the DOJ in the US, the FCA in the UK). This case, as articulated by Mr Ogg in closing submissions, was not that any individual instructed Mr Sippel to dismiss the Claimant to appease the regulators. Mr Ogg submits that was not necessary; Mr Sippel knew what was expected of him, which was to dismiss the Claimant, and he went along with it. Mr Sippel categorically denied that.

243. The Judge in *Jones* concluded that the reason for dismissal in that case was appeasement. He reached his conclusion based on the evidence he heard. I am not bound by that judgment. I must decide the case based on the evidence I have heard.

244. Mr Ogg relies on *Fairhall* (para 234 above), in which the EAT held that where a decision-maker goes along with pressure from others within the organisation to dismiss, and they are motivated by a prohibited reason, so long as the decision-maker is aware of that, there is no difficulty in finding that a prohibited reason was adopted by a dismissing officer.

245. Mr Ogg submits that Mr Sippel knew the firm's preference was to appease the Respondent's regulators 'to demonstrate that it was cleaning up its act'. Knowing that preference, Mr Ogg submits, Mr Sippel withheld from the Claimant the relevant data which could have explained his trading.

246. I do not accept that submission. I have concluded that Mr Sippel considered that the additional documents the Claimant was seeking were not capable of providing an innocent explanation for the impugned trades (for the reasons I have summarised above at para 152). That was Mr Sippel's genuine belief; he did not have the ulterior motive for not disclosing the documents alleged by the Claimant.

247. The Respondent was under an obligation under Clause 6 of the DPA to report to the regulators. I agree with Mr Nawbatt's submission that, against the background of the historic compliance breaches, the Respondent can hardly be criticised for taking its regulatory obligations seriously. However, while those obligations included instituting disciplinary procedures in appropriate circumstances in respect of potential compliance breaches (para 17 above),

they did not extend to manufacturing disciplinary cases against, and making scapegoats of, innocent employees.

248. Mr Ogg relies (paras 7.1-7.13 of his written submissions) on evidence that the DOJ had been made aware of the investigation in relation to the Claimant and that there had been discussions between the firm and the DOJ; the content of those discussions was not known. Mr Ogg invites me to infer that the Respondent has not disclosed records of them (insofar as they exist) because they would provide evidence of appeasement by the Respondent.

249. The mere fact that the Respondent communicated about the case with its regulator shows nothing; it was required to do so under the DPA. I decline to draw an inference that the contents of those communications were improper in the manner alleged, based on speculation and the fact that a Judge in another first-instance case has drawn that inference. It is the Claimant who has advanced the appeasement theory; it was open to him to make an application to the Tribunal for specific disclosure of the records in question; none was made.

250. Mr Ogg submits (para 7.6) that the Claimant 'considers that in the light of the Precious Metals Scandal, the Respondent wished to inform the DOJ that it was investigating, and would dismiss, a precious metals trader for historic spoofing.' There is no evidence whatsoever that this is what it did. If it had conveyed that information, it would have been knowingly misleading the DOJ in the crudest way, given that, at the material time, the Claimant was not a precious metals trader; further, it would have been disclosing to its own regulator that it was setting out to conduct a sham investigation with a predetermined outcome. I regard that as highly improbable.

251. Apart from that, Mr Ogg does not identify, other than in the most general terms, what impropriety the documents would have shown, if they had been disclosed; in other words, precisely what inference I am being invited to draw. He submits that 'once [C] had been reported to the DOJ for spoofing by R, his dismissal was effectively inevitable', again with nothing but speculation in support.

252. Some of the matters relied on in support of this theory were fanciful, for example the suggestion that Ms Ryan's use of 'au revoir' in an online chat during the investigatory process with a colleague (which was light-hearted in tone and included another French phrase) meant that that it was 'goodbye' to the Claimant as an employee; in the context it appeared to me far more likely that she was using the phrase because she thought the conversation was over and was saying goodbye to her interlocutor.

253. Even if I were persuaded that any individual within the Respondent other than Mr Sippel believed that he should be dismissed, or even expected that he would be dismissed - given what they knew about the impugned trades - that would not be sufficient to taint Mr Sippel's decision. I remind myself of the scenario HHJ Tayler set out in the *Fairhall* case. He held that the reason for dismissal would be of a prohibited kind if:

253.1. people other than the decision-maker are involved in the process;

253.2. *they advise, or are instrumental in persuading, the decision-maker to take the decision to dismiss* [emphasis added]*;*

253.3. those people want the employee to be dismissed for a prohibited reason; and

253.4. the decision-maker knows that he is being asked to dismiss for a prohibited reason.

254. Mr Sippel's evidence was that no one had advised, or sought to persuade, him that he should reach a particular decision; no pressure had been placed on him by anyone; he believed he had been appointed as an independent decision-maker to make up his own mind; he regarded the Violation Notice as the outcome of a separate compliance process, which was not determinative of the disciplinary process he was conducting; and he understood the seriousness of the charges and the potential consequences for the Claimant. Mr Sippel was adamant that he would:

> 'not have tolerated any sort of interference in my decision-making. I am a senior individual with my own regulatory responsibilities and obligations but, even more importantly, on a personal level I would always want to reach the right decision.'

255. I accept that evidence. I found Mr Sippel to be a careful, thoughtful and credible witness, who made concessions when appropriate. For example, he accepted that it was 'extremely likely' that Mr Pinto (President and COO of JPMorgan Chase & Co.) approved the issuing of the Level 3 violation notice. That does not prove that Mr Sippel was influenced by that fact and/or was setting out to accomplish the unspoken will of Mr Pinto.

256. This is not the situation described in *Fairhall*. I am satisfied that Mr Sippel reached his own conclusion, uninfluenced by any other person or his perception of others' expectations.

257. Further, I am not satisfied that the fact that there had been a determination by Compliance that the Claimant had spoofed meant that the disciplinary process was predetermined. I accept Mr Sippel's evidence that he approached the question with an open mind and conducted his own examination of the evidence, which in my view was more thorough (and more thoroughly reasoned) than that of the Red Team. He did not merely rubberstamp the decision made by Compliance. Had he concluded that the Claimant had not committed the misconduct alleged, he would have dismissed the charges. He did not uphold the allegations relating to blotters 5-8.

258. The Claimant relies on the job advertisement (para 197 onwards). I accept, on the balance of probabilities, that the advertisement was for the Claimant's role, having regard to the particular emphasis it placed on 'crosses' (para 198). In my judgment, this suggests that those responsible for recruiting to Claimant's team anticipated that the Claimant would be dismissed and took steps to recruit a replacement for him.

259. However, there is a difference between anticipation by those not involved in the disciplinary process and pre-determination by the person conducting it. There was no suggestion that Mr Sippel was involved in the advertisement/recruitment to the role; indeed, no evidence that he knew about it when he made his decision (he was not asked about this in cross-examination). Nor am I persuaded that the fact that disciplinary proceedings were contemplated before the violation

notice had been issued (para 100 and 116) shows that the outcome of Mr Sippel's enquiry was pre-determined. I accept Ms Wellen's evidence that this was because the compliance review was in its final stages, and it was likely that a Level 3 violation notice would be issued; that would almost certainly result in disciplinary proceedings. The outcome of those proceedings, however, was a matter for Mr Sippel.

260. I have concluded that the sole reason why Mr Sippel dismissed the Claimant was conduct.

261. The next question is whether I accept that Mr Sippel believed that the Claimant had committed the misconduct. I have no hesitation in concluding that he did. When he reviewed the data, together with everything that the Claimant had said, he concluded that the evidence overwhelmingly suggested that the Claimant had engaged in spoofing, placing orders which he did not intend to execute.

262. As for whether he had reasonable grounds for his belief in the Claimant's guilt, I remind myself of the guidance in *Linfood Cash and Carry Ltd v Thomson* (para 236 above) that it must be remembered that the employer has 'the peculiar advantage over the tribunal of having an intimate knowledge of … the nature and workings of the business.' Mr Sippel had years of experience, both of trading and of managing other traders. He was well-placed to deal with allegations of spoofing.

263. *Linfood* is also authority for the proposition that, in an unfair dismissal case, it is not for the Tribunal to make its own assessment of the credibility of the employee based on evidence given before it; the relevant question is whether an employer acting reasonably and fairly in the circumstances could properly have accepted the facts and opinions which he did.

264. Mr Sippel identified the following grounds for his belief that the Claimant had spoofed (the following is a summary only of his reasoning).

264.1. On some of the occasions in question, the Claimant had entered an iceberg order; he had then entered a large order which was fully disclosed and visible in the opposite direction on the market; he had then executed the iceberg order before cancelling the visible order shortly afterwards without executing it.

264.2. In other instances, the Claimant had placed smaller orders on one side of the order book before placing a large order on the opposite side; he had then cancelled the large order very shortly after having filled the smaller orders in the opposite direction.

264.3. This indicated to him that the Claimant did not have an intention to trade the orders he had placed and then cancelled but had placed them to make market conditions more favourable for executing the previous smaller orders he had placed, including those that were not fully visible to the market.

264.4. He considered that such patterns of trading were likely to be memorable to a trader, who would know that they might appear to an observer to be spoofing. As Mr Sippel explained, placing and cancelling visibly large orders without having traded any portion of them, on the other side of

smaller orders which are outstanding for a period of time, is highly irregular. These patterns do not happen readily by accident. Everyone is trained to know that if they do happen, it is dangerous, both for the individual and for the firm.

264.5. In Mr Sippel's view the Claimant would have known how risky this trading activity looked. The fact that he neither recorded his reasons for trading in this way, nor flagged them up to his manager, nor to Compliance, suggested that he knew that he did not have a legitimate reason for the activity.

264.6. Mr Sippel accepted that the Claimant would be unlikely to remember such specifics as the date and time a particular order was placed and the number of lots involved; on the other hand, he would expect him to remember what he described as 'a pattern which could land [him] in trouble' or a pattern 'which would have rung alarm bells for him and which I am sure would have either stuck in his mind or his memory would have been prompted by reviewing the trading data'. He explained in oral evidence that this was no different from a person remembering any life event which placed them in danger.

264.7. Mr Sippel strongly believed that traders have a style in which they trade, which he referred to as a thumbprint, and would be able to recognise from a pattern of trading why they had behaved in that way, especially when it would be obvious that it gave the impression of impropriety.

264.8. He considered that in some instances the periods of time between the Claimant placing the orders and cancelling them were so short that the cancellation could not have been accounted for by external considerations, such as chats with other traders.

264.9. The probability of such trading activity occurring for innocent reasons is very low; the probability of it occurring for innocent reasons three times on the same day on different separate days was (as Mr Bristow characterised it) beyond reasonable coincidence, extraordinarily unlikely and extraordinarily memorable.

265. Mr Ogg submits that Mr Sippel 'applied the New Spoofing Policy to the Claimant (or something like it), which provided a basis on which the Claimant 'legitimately' be found to have committed misconduct'. I have already found (para 224) that there was no change of policy; that does not prevent me from considering whether Mr Sippel impermissibly reversed the burden of proof or applied an inappropriate standard of proof.

266. Mr Nawbatt submits that the relevant trading patterns were so obviously indicative of spoofing that there were three clear implications. First, in the absence of some compelling contrary evidence, the pattern itself was likely to compel the conclusion that the Claimant had engaged in spoofing. Second, given the highly unusual nature of the trading patterns, the Claimant would inevitably have been conscious of the optics of his trading at the time it occurred and should have been in a position to articulate a credible explanation for it, if such an explanation existed. Third, the reason the Claimant did not document the reasons for the trading activity or alert management or Compliance was because he did not have a legitimate reason for the trading activity. Mr Nawbatt

submits that this was not to reverse the burden of proof, nor to apply an enhanced standard of proof; the standard of proof applied by Mr Sippel was the balance of probabilities.

267. I accept those submissions. Mr Sippel considered, reasonably in my view, that the objective data was (in his words) '*prima facie* quite damning'. I have already recorded (para 101) that the Claimant himself thought, when the pattern of trading was initially presented to him, that it looked like spoofing. In the circumstances, it was proper then to look to the Claimant to explain what his intention was. For the reasons set out above, Mr Sippel believed (again, reasonably in my view) that, if there was a cogent, innocent explanation, the Claimant would be able to provide it. When, in Mr Sippel's view, he was unable to do so to his satisfaction in relation to any, let alone all, of the eight impugned trades, it was reasonably open to Mr Sippel to infer that there was no innocent explanation for them, and that the Claimant was guilty of spoofing.

268. I am satisfied that Mr Sippel reached his conclusions after making a careful analysis of the data contained in the blotters (summarised at para 48 onwards); and a careful consideration of the explanations, and potential explanations, which the Clamant advanced in writing and at the hearing (summarised at para 162 onwards).

269. In my judgment, the investigation which Mr Sippel carried out, taking the Red Team's investigation as his starting-point and making his own further enquiries, was detailed and thorough. It fell within the band of reasonable responses: the objective standard of the reasonable employer did not require him to carry out further investigations.

270. However, I have concluded that the decision not to give the Claimant the disclosure he requested fell outside the band of reasonable responses for the following reasons.

271. I accept Mr Sippel's evidence that he genuinely did not believe that the additional data which the Claimant was asking for could realistically provide a legitimate explanation for the trades (see para 152). However, it may have assisted the Claimant in recalling his purpose in making some of the impugned orders, in ways which the Respondent may not be able to anticipate. Compliance had asked to see some of the documents because it considered they might be relevant. Mr Willig had led the Claimant to believe at the beginning of the process that he would be provided with 'all the data' (para 99 above.). The disclosure would not have been unduly onerous or costly because most of the documents had already been assembled.

272. The data/information which in my judgment was unreasonably not disclosed to the Claimant was as follows:

    272.1. the New York and London ladders;

    272.2. the full risk position data;

    272.3. the data Ms White sent to Mr Sippel on 9 and 22 March 2022;

    272.4. the Claimant's Bloomberg messages, emails and broker chats for the relevant days (HN 31);

272.5. client orders; and

272.6. the fact that an analyst had looked at these trades in 2018 and had not recommended any action; the Claimant could have asked to see the records in relation to that, including the analyst's rationale.

273. Further, I have concluded that the delay in providing the outcome to the disciplinary procedure was excessive. The Claimant was prejudiced in that he was suspended throughout the period, causing him considerable anxiety. Mr Sippel accepted that he had all the information that he needed on 30 May 2022, but it took him until 1 December 2022 to produce an outcome. Mr Sippel's only explanation for this delay was that it was a complex investigation and that he and Ms White spent a considerable amount of time working on his outcome letter. I consider that to be an inadequate explanation for a delay of six months; it was unreasonable.

274. For these two reasons, I consider that the dismissal was procedurally unfair.

275. To be clear: I do not consider that the delay in raising these matters with the Claimant gave rise to procedural unfairness. I am satisfied that it was reasonable for the Respondent to investigate them because in its view they had not been properly investigated at the time.

276. Finally, although it was bad practice not to provide the Claimant with the notes of the disciplinary and appeal meetings within a reasonable period of the meetings, so that he could propose amendments, I do not consider that this amounts to a separate ground of unfairness: the Claimant had set out his position at length in writing; Mr Sippel knew what the Claimant had and had not said at the meeting.

POLKEY **AND CONTRIBUTION**

The law

Polkey

277. Where a Tribunal finds that a dismissal was unfair, it must go on to consider the chance that the employment would have terminated in any event, had there been no unfairness (the *Polkey* issue). The relevant principles relating to a *Polkey* deduction, as set out in *Software v 2000 Limited v Andrews & Others* [2007] IRLR 568 at [54] are, insofar as they are relevant to this case:

> **'(1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.**
>
> **(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself.**
>
> **(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on 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.**
>
> **(4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.**
>
> **(5) Having considered the evidence, the Tribunal may determine:**
>
> > **(a) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself.**
> >
> > **(b) That employment would have continued indefinitely.'**

278. However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored.

279. In *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274 the EAT (Langstaff P presiding) noted that a *Polkey* reduction has the following features:

> **'First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between the two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer would have done) … The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand.'**

Contribution

280. S. 123(6) ERA provides, in relation to the compensatory award:

> **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**

281. In order for a deduction to be made, the conduct in question must be culpable or blameworthy in the sense that, whether or not it amounted to a breach of contract or tort, it was foolish or perverse or unreasonable in the circumstances (*Nelson v BBC (No.2)* [1980] ICR 110.

282. S.122(2) ERA provides, in relation to the basic award:

> **Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce that amount accordingly.**

283. The EAT in *Langston v Department for Business, Enterprise and Regulatory Reform*, EAT 0534/09 confirmed that the same criteria ('culpable or blameworthy') apply to deductions from the basic award.

284. In *Steen v ASP Packaging Ltd* [2014] ICR 56 the EAT held (at [10-18]) that it is for the tribunal to:

284.1. identify the conduct which is said to give rise to possible contributory fault;

284.2. decide whether that conduct is culpable or blameworthy;

284.3. ask for the purposes of s.123(6) if that blameworthy conduct caused or contributed to the dismissal to any extent. If it did not do so to any extent there can be no reduction on the footing of s.123(6), no matter how blameworthy in other respects the tribunal might think the conduct to have been. If it did cause or contribute to the dismissal to any extent, then the tribunal moves to the next question;

284.4. to what extent the award should be reduced and to what extent is it just and equitable to reduce it;

284.5. a separate question arises in respect of s.122(2), where the tribunal has to ask whether it is just and equitable to reduce the amount of the basic award to any extent. It is very likely, but not inevitable, that what a tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award, but it does not have to do so.

285. Although it is mandatory to consider making a reduction in such amount as is just and equitable where contributory conduct is found on the part of the employee (*Swallow Security Services Limited v Millicent UKEAT/0297/08*), it is not mandatory actually to make a reduction. The ET may consider it just and equitable for there to be no reduction, although causative and blameworthy conduct is found by the employee (*N Notaro Homes Ltd v Keirle* [2024] EAT 122).

286. A reduction to nil should be an unusual finding. As Langstaff P. put it in *Lemonious v Church Commissioners*, EAT 0253/12:

> **'even if the conduct were wholly responsible for the dismissal, it might still not be just and equitable to reduce compensation to nil. Though there might be cases where conduct is so egregious that that is the case, it calls for a spelling out by the tribunal of its reasons for taking what is undoubtedly a rare course.'**

287. In *Allen v Queen Mary University of London*, EAT 0265/15, HHJ Richardson held at [26]:

> **'… a finding of 100 per cent contribution under section 123(6) is permissible only where the Claimant's conduct was wholly responsible for the dismissal. Even then, it does not follow that the finding must be 100 per cent (see Steen at paragraph 21). But if the Employment Tribunal concludes that the Claimant's conduct was not entirely responsible for the dismissal and that the Respondent shares responsibility for it, then a finding of 100 per cent contribution is not permissible. This question of causation is not to be addressed in a narrow or technical manner. The Employment Tribunal's task is to apply standards of justice and fairness in reaching its conclusion.'**

288. The Court of Appeal in *Rao v Civil Aviation Authority* [1994] ICR 495 (at 502F) held that the deduction from the basic award for contribution may not be the same as the deduction from the compensatory award for contribution, if there has already been a deduction by reason of the Tribunal's conclusion as to the likelihood of the employee remaining in employment (the *Polkey* issue).

289. The EAT in *Lenlyn UK Ltd v Kular* EAT 0108/16 at [81] confirmed that, where there is a significant overlap between the factors taken into account when making a *Polkey* deduction, and when making a deduction for contributory conduct:

> **'the ET should have considered expressly, and did not, whether, in the light of that overlap, it was just and equitable to make a finding of contributory fault, and if so, what its amount should be. That overlap means that there is a real risk, which, I consider again, the ET did not take into account, that the Claimant was being penalised twice for the same conduct. I allow the cross-appeal on this point and remit this case for the ET to consider again, after it has reconsidered the *Polkey* issue, what deduction, if any, for contributory fault is just and equitable, in the light of that overlap.'**

290. However, the principal of moderating a reduction for contribution in the light of a reduction already made for *Polkey* cannot apply to the basic award, which is not affected by the *Polkey* principle: *Granchester Construction (Eastern) Ltd v Attrill*, EAT 0327/12, *per* Langstaff P at [19].

Findings and conclusions: *Polkey*

291. I asked Mr Ogg to address me as to where the burden of proof lies in dealing with the *Polkey* issue. He submitted that, although it is for the Respondent to raise the issue initially, the burden is then neutral; Mr Nawbatt agreed.

292. The Claimant believes that the data which was not disclosed to him during the disciplinary proceedings would provide an identifiable reason for the trades. That is, inevitably, speculation on his part because he has not seen the documents. So, for example, in relation to B1-3, where there were three impugned orders in one day, the Claimant said in evidence that it was '*impossible to say* whether that was a continuing trading strategy or whether each of them was separate without the data I requested throughout the process [emphasis added]'. In relation to Blotter 10, Mr Ogg could only submit in relation to intraday risk data that, if it disclosed a particular exposure, 'it would strongly indicate that it was placed for risk management reasons, but *we don't know because we don't have the data* [emphasis added].'

293. I canvassed with Mr Ogg whether, if I were to find that the dismissal was unfair because of the failure to disclose documents, I would have to know what they contained to conduct the *Polkey* exercise. Mr Ogg replied that my task was to make my assessment based on the evidence already available to me at the hearing. He invited me to draw an adverse inference from the fact that the Respondent had not voluntarily disclosed the documents.

294. I decline to do so. I accept Mr Sippel's explanation as to why he did not disclose the missing documents: his position throughout has been that he did not consider them to be relevant and disclosable. It is the Claimant who has asserted that they are disclosable. An application for specific disclosure could have been made, so that he could point to the material which he believes would

enable him to identify before this Tribunal a legitimate business purpose for all the impugned orders, which he was prevented from identifying at the time.

295. Mr Ogg confirmed that there had been no application for specific disclosure in these proceedings. He sought to dissuade me from drawing an inference from the decision not to do so and to persuade me there was enough in the evidence before me to enable me to conclude, on the balance of probabilities, that the Claimant did not engage in spoofing.

296. Mr Ogg accepted that the fact that the Claimant places so much emphasis on the documents he was not given implies that, without, them, the documents we do have raise a worrying suspicion. He urged me to have regard to the fact that the Claimant was representing himself for part of the proceedings. I am not persuaded by that submission. The Claimant is not without means; he always had access to expert legal advice; the cost of making such an application would not have been great; it would not have been a complex application, and he could have made it himself. I can only assume that he, or his advisors, elected not to do so.

297. Because I have not seen the missing documents, I consider what the likelihood is that they would have enabled the Claimant to identify a legitimate business purpose for the trades. I agree with Mr Nawbatt that I am entitled to have regard to the inherent probability of there being an innocent explanation for all the impugned orders.

298. In reaching my conclusion, I have had regard to my conclusions below under the heading of contribution; I do not repeat them here.

299. I also had regard to the Claimant's own evidence that he would expect trades such as this to occur (innocently) only several times across a trader's entire career (see below at para 309.4). I accept Mr Bristow's evidence that three instances on a single day (B1-3), followed by a further instance less than week later (B4) and three further instances a month later (B9-11) cannot be coincidental.

300. I have concluded that, while there is a chance that further disclosure may have enabled the Claimant to explain one or more of the trades, the chance that it would have enabled him show that there was a legitimate business purpose for all of them, in circumstances where they all display the hallmarks of spoofing, is extremely small. I put it no higher than 5%.

301. In light of this, and the fact that a single instance of spoofing would still be gross misconduct, I have concluded that there is a 95% chance that Mr Sippel would have fairly dismissed the Claimant for conduct, had the procedural unfairness been removed, and that a dismissal in those circumstances would have been fair.

302. Turning to the other ground of procedural unfairness, given my conclusion that the dismissal was unfair because of the unreasonable delay in providing the Claimant with the outcome to the disciplinary proceedings, it must follow that, had there been no unreasonable delay, he would have been dismissed earlier.

303. I will hear submissions at the remedy hearing as to how much earlier and what impact this, and my other conclusions, have on the compensation to be awarded.

Findings and conclusions: contribution

304. The following findings of fact on contribution are made on the balance of probabilities, having regard to the evidence before me at the hearing.

305. The Claimant had extensive training from the Respondent. He knew that violations of the Anti-fraud policy and the Code could result in disciplinary consequences, up to and including termination. He knew it was his responsibility: to understand fully, and comply with, the Code, in order to do business with the highest levels of transparency and accountability; that he was required to follow the letter and spirit of the Code and related policies, including the Anti-fraud policy; that 'suspicious employee behaviour such as fraud, insider trading, market manipulations or other forms of market misconduct' should be escalated. Most importantly, he understood from the very beginning of his employment that spoofing was a form of market manipulation and was prohibited.

306. The Anti-fraud policy specifically refers to a trade which 'could be perceived as being potentially fraudulent or manipulative'. The policy does not merely require there to be a legitimate business purpose for a trade, it requires that purpose to be 'identifiable'. I find that any trader reading this policy, including the Claimant, would understand that he may be required to identify the reason for a suspicious pattern of trading. Indeed, the Claimant accepted that if a trade was suspicious or unusual, he should document the reason for it, so that both he and the firm would have a record and would be able to explain it later (para 36 above). The Claimant accepted that timely reporting of unusual or suspicious trading was important from the risk perspective, both his own risk and the regulatory risk to the firm.

307. The Claimant agreed that, in relation to a trade which had all the hallmarks of spoofing, no one else would know his innocent intent (i.e. the identifiable legitimate business purpose) unless he alerted someone to it or wrote it down. He accepted in cross-examination that any of the hallmarks listed in paragraph 6.2 of the Anti-fraud policy may, individually, be indicative of spoofing, but that the more hallmarks are present, the greater the indication of spoofing.

308. I have already recorded (para 101) his evidence that, when he first saw the trading summaries, in particular B1-4 he was very worried and thought 'wow it looks like spoofing, what else could be happening for me to behave in this way? I thought that Blotters 9 to 12 were similarly suspicious.' He understood why the trades were flagged and was not surprised that he was being investigated.

309. The Claimant was asked in cross-examination about each of the Blotters which Mr Sippel had concluded disclosed spoofing.

B1

309.1. The Claimant accepted that this trading sequence displayed multiple hallmarks of spoofing: the pattern of orders; the size of the cancelled lot

relative to other bids created at the time; quick entry and cancellation; the market reaction immediately following entry of the cancelled bid.

309.2. The Claimant had said in his witness statement that, around seven minutes earlier, he had entered a buy order of 220 lots, with 10 lots fully disclosed, in the London market. This suggested to him that he entered the impugned bid in the New York market 'to see what the liquidity was like in New York'. It was put to him that, if that was his intention, it was implausible that he would have cancelled it 732 milliseconds later as this was not enough time to test liquidity.

309.3. The Claimant did not accept that he would have known that such a large, disclosed bid would have a significant market impact. Nor did he accept that a large iceberg order was less likely to create market impact and more likely to be filled, notwithstanding the fact that he said in his witness statement: '*It may be true that large fully disclosed orders will execute less often*, but in the event of a successful trade get a bigger share of the pie' [emphasis added].

309.4. It was put to the Claimant that this pattern of trading was highly unusual. He did not accept that, observing: 'it would have arisen several times in the career of a trader across all the many transactions they make'. Asked what he meant by 'several times' he agreed that he meant perhaps 5 or 6 times, in a career and went on: 'not 1 or 2, but not 50 either'. I accept Mr Nawbatt's submission that 5 or 6 times - across a career in which a trader would make hundreds of thousands of trades – is extremely unusual.

309.5. It was put to the Claimant that he would have known that this activity could be perceived as spoofing; he replied that he 'probably did not know at the time, given that I did not alert them'. He did not agree that it was exactly the type of trading activity for which he would expect to have to provide a legitimate explanation.

B2

309.6. The Claimant accepted that the sequence had the hallmarks of spoofing: the pattern of orders and cancellations; the size of the order relative to market conditions; the length of time the order remained active prior to cancellation; and the market impact resulting from the entry of the order.

309.7. Taking B1 and B2 together, the additional hallmark of frequency was present.

309.8. The Claimant confirmed that the trading patterns in B1 and B2 were deliberate and not coincidental.

309.9. The Claimant agreed that the patterns in B1 and B2 were essentially the same. Having previously said that the pattern in B1 might occur several times in a trader's career, he was asked how he squared that with the fact that it occurred here twice in one day. He gave an explanation which he believed might account for the repetition of the order/cancel pattern: that he was pursuing a trading strategy which failed the first time, which he decided to repeat (and which then failed

again, presumably); however, that would not account for his activity on the other side of the market.

309.10. Asked if it was simply a coincidence that within seconds (B2) or milliseconds (B1) of his sell orders being executed, he cancelled his buy orders, he said it was not, but it was 'as a result of what I had observed'. He accepted that his sell orders being executed was 'part of what I observed among many other things'.

B3

309.11. The Claimant agreed that all the same hallmarks of spoofing were present in B3 as were present in B1 and B2, with the qualification that he re-entered at least part of the sell order after the initial entry of the large buy order of 112 lots.

309.12. He accepted, however, that by that time he had already executed 9 lots of his existing sell orders, as a result of the market move caused by his large buy order.

B4

309.13. It was put to the Claimant that B4 and B12 had the same hallmarks as the other blotters; he agreed.

309.14. In relation to B4, Mr Ogg put to Mr Sippel that the Claimant had made two large fully disclosed sell orders 27 and 17 minutes before the impugned order, and executed both of them, and that this suggested that the Claimant was not spoofing when he made the impugned order. Mr Sippel disagreed; it was the placing and cancelling within less than two seconds, with trades on the other side of the market executed in between, which suggested to him that the intention was to impact the market.

B9 and B10

309.15. The Claimant accepted that the same four hallmarks of spoofing were present in these two blotters which occurred on the same day within a minute of each other.

B11

309.16. It was put to the Claimant that the trading pattern indicated that he was a motivated seller.

309.17. The Claimant disagreed, saying that the 'the small execution of sales show I had an interest to sell, but the attempt to buy large amounts on the buy order show I had a high intent to buy.'

309.18. Mr Nawbatt pointed out the distinction between his selling and his buying activity was that he executed his sell orders but cancelled his single buy order, immediately after the last of the sell orders was executed.

309.19. Indeed, at the time the Claimant placed the large buy order, he already had outstanding sell orders; the Claimant accepted that the effect of the buy order was that those sell orders were executed.

309.20. The Claimant accepted that all four hallmarks of spoofing were present, as they had been in B9-10.

B12

309.21. It was put to the Claimant that B12 had the same hallmarks as the other blotters; he agreed.

310. The Claimant accepted that the impugned orders displayed one or more of the hallmarks of spoofing on each of the days in question. That itself is an indicator that the Claimant was probably spoofing. Mr Ogg accepted in closing submissions that it was difficult to disagree with the Respondent's position that the likelihood of an innocent explanation was lower, the greater the number of sequences there were of this kind.

311. Focusing on B1, the Claimant cancelled the large, fully disclosed buy order less than a second after he placed it. Between the placing and the cancellation, his iceberg sell order executed in full.

312. As for the London buy order on which the Claimant sought to rely, placed 7 minutes before the buy order in B1, it was an iceberg order for 220 lots, of which only 10 were visible to the markets. I accept Mr Sippel's evidence that this suggested that the Claimant intended to execute that bid: the undisclosed volume meant that the order was less likely to impact the market and more likely to be filled. In my judgment, the fact that the large buy order in New York in B1 was less likely to be filled, together with the fact that the Claimant left it in place for less than a second, supports a conclusion that he probably did not intend it to be executed, but placed it to impact the market.

313. The Claimant suggests in his witness statement that:

> 'I likely entered NY Bid 1 to see what the liquidity was like in New York, in case there was greater liquidity there than in London. This is something that traders commonly do. To explain, if a trader is trying to execute a trade on one market (in this instance, London) and there does not seem to be appetite on the market for that trade, it is usual to test another market (in this case, New York) to see if the liquidity is better (i.e. there is more appetite for that trade). If my first priority was to buy coca, with a secondary priority as to which market that was on (with the preference being London), it would be better to buy cocoa in New York than not at all (demonstrating an intent to buy). If the appetite for that trade is not better in New York, then the bid can be cancelled, which is what I believe may have happened in Blotter 1. That is not spoofing as I would have intended to execute the bid when placing it.'

314. Mr Sippel was asked about this in cross-examination. It was put to him that, had the Claimant been provided with the ladders, he may have been able to evidence this by reference to activity shown on the ladders, but not in the blotters; he might have been able to show that his deletion of the order was a reaction to a deletion by another trader of an order in the ladders. Mr Sippel

rejected that proposition for two reasons: firstly, if testing the liquidity in New York was the Claimant's intention, he would be more likely to do it by way of small orders/an iceberg order, rather than a single large, fully disclosed order, which sends a signal to, and has an impact on, the market; secondly, if that was what he intended to do, he simply could not do it (i.e. place an order, observe the responses of other participants in the market, evaluate them and delete his order in response) in less than a second.

315. I found that evidence compelling. In less than a second, there was enough time for the Claimant to see the positive outcome in relation to his sell order (as he acknowledged he did, see para 309.10 above); I consider it highly implausible that there was enough time for him to absorb 'many other things', as the Claimant asserted he did, in less than a second. I find that his purpose when he placed the buy order was to influence the market, in order to execute his sell order at a higher price than he otherwise would have been likely to achieve. The instant that purpose was achieved, he cancelled the buy order.

316. In all the circumstances I find, on the balance of probabilities, that the Claimant's actions in relation to B1 amounted to spoofing; these actions alone were a serious violation of the Respondent's Anti-Fraud policy and contributed to his dismissal.

317. As for the other blotters, in answer to the proposition 'you would have known these trades could have been perceived as spoofing or potential spoofing', the Claimant disagreed and said: 'I probably did not know at the time, given that I did not alert anyone' (para 309.5 above). The logical corollary of this statement is that the Claimant knew at the time that he *was* obliged to alert the firm if a trade *could* be perceived as spoofing.

318. However, elsewhere in cross-examination, the Claimant sought several times to distance himself from this suggestion. When it was put to him: 'You would have understood any trading activity which had the hallmarks of spoofing would be of serious concern', he replied: 'if you are implying the perception of spoofing, I disagree. What would be a very serious concern was actual spoofing; the perception of spoofing, which is not spoofing, is not.' He asserted that he did not accept that suspicious trading would include trading which would give rise to the perception of spoofing; he said that he 'did not read any of the policies like that'. He stated: 'I am saying that the perception of spoofing is not a suspicious or unusual act; many things will give rise to a perception of spoofing; I don't agree that the perception of spoofing is suspicious or unusual'. He also said: 'if I know the intent and I know it is not spoofing, there was no reason to believe this transaction is suspicious in any way'.

319. It seems almost too obvious to say that the fact that a person thinks (or knows) that he is doing something innocent does not prevent it from appearing suspicious to another person. The Claimant knew what the hallmarks of spoofing were. If he made a trade for a legitimate business purpose, but it had one or more of the hallmarks of spoofing, there would be every reason for him to believe that the transaction would appear suspicious to an outside observer, who was not privy to his purpose or intention, and that he might be required to explain the legitimate purpose. If he did so repeatedly in a relatively short period of time, the awareness of the need to do so would, in my judgment, be all the

greater. I found the Claimant's evidence on this issue sophistic; it undermined his credibility.

320. I accept Mr Sippel's evidence that it would have been obvious to any trader, however inexperienced, that the Claimant's pattern of trading was both suspicious and unusual. It was immediately obvious to the Claimant, when he was shown the trades in 2022, that many of them looked like spoofing. His evidence before me was he would expect this pattern of trading to occur legitimately 'five or six times in the course of a trader's career' (see above at para 309.4). In his case, it occurred three times on one day (1 June 2018), once again within a week (6 June 2018) and three times on a single day the following month (6 July 2018); there was then a further instance later the same year (27 December 2018).

321. I have already recorded that the Claimant knew that, when in doubt about a trade, he should escalate to a compliance officer or make a record of it for himself (paras 34-37). There were two line of business compliance specialists in the commodities team in London in 2018. The fact that he did not do so was, in my judgment, a further indicator that he probably knew he was doing something seriously wrong.

322. As for the finding in the *Jones* litigation that the traders in question had been given additional training about note-keeping (para 216), I accept Mr Sippel's evidence that the fact that training about note-taking was arranged at that time does not necessarily indicate that such training had not been given before; refresher training is a common feature in this and many other sectors.

323. I also took into account the conclusions Mr Sippel reached in his outcome letter (above at para 162 onwards) and at the hearing before me (para 264 onwards). Mr Ogg cross-examined him at length and in detail as to the Claimant's analysis of the blotters. I found Mr Sippel's evidence credible and consistent.

324. Nor do I draw an inference from the fact that Mr Ogg identified two occasions on which the Claimant placed and cancelled an order within three or four seconds, without them being escalated to compliance; in those instances, he did not have any orders on the other side of the market; the circumstances were materially different.

325. I have weighed in balance that the Claimant made no material gain from spoofing, but this does not alter my conclusion that the preponderance of the evidence shows that he engaged in spoofing. I do not infer anything from the fact that there was no evidence of the Claimant trading in this way after 2018; that merely shows that the conduct in question was confined to a single year.

326. On the balance of probabilities, I have concluded that the Claimant was engaged in spoofing on all the occasions identified by Mr Sippel. He contributed to his dismissal by his own blameworthy conduct.

327. Further or alternatively, I accept Mr Nawbatt's submission that, by failing to escalate this trading activity, which was so obviously unusual and suspicious, alternatively by failing to make a contemporaneous record of the purpose of the activity, in circumstances when he knew of the requirement to do so, the Claimant's conduct was blameworthy. It contributed to his dismissal.

328. I leave to the remedy hearing the question of whether it would be just and equitable to make a reduction for contribution, and if so, to what extent, and whether in respect of both the basic and compensatory awards. I remind myself of the authorities (*Kular, Attrill*, for which see above at paras 289-290) which caution tribunals against double-penalising a claimant by making reductions on a *Polkey* and contribution basis in relation to essentially the same factors.

Remedy

329. There will be a further hearing to determine the remedy to which the Claimant is entitled.

330. By no later than 28 days from the date on which this judgment is sent to the parties, they shall write to the Tribunal (marked urgent for my attention), with agreed, proposed orders, including: a list of the issues to be determined at the hearing; an estimate of the number of days required for it (to include time for deliberation); and any other necessary case management orders.

Employment Judge Massarella
Date: 13 May 2025