Case No: 2200423/2024

EMPLOYMENT TRIBUNALS

Claimant: Mr Brian Wong

Respondent: Tradition Management Services Limited

Heard at: London Central (by CVP)

On: 12, 13, 14, 15, 16 and 19 May 2025

Before: Employment Judge Murdoch

Representation
Claimant: Mr Scott-Joynt, counsel
Respondent: Mr Green, counsel

JUDGMENT

1. The complaint of unfair dismissal under Part X Employment Rights Act 1996 is well-founded. The claimant was unfairly dismissed.

2. In respect of the calculation of remedy for unfair dismissal:

    a. Had a fair procedure been followed, it is 50% likely that the respondent would have dismissed the claimant in any event, and this would likely have taken one month (Polkey deduction). The compensatory award will be reduced accordingly.

    b. A 25% uplift will be made under section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 to the compensatory award for unfair dismissal with regards to the requirements of the ACAS Code of Practice on Disciplinary and Grievance Procedures in respect of the claimant's dismissal. The compensatory award will be increased accordingly.

    c. The claimant contributed by his conduct to his dismissal by 50%. Both the basic and compensatory award will be reduced accordingly.

3. The complaint of breach of contract in relation to notice pay is well-founded and is awarded for a period of 17.5 weeks.

4. The counter claim in relation to repayment of a proportion of a sign-on bonus is not well-founded and is dismissed.

5. The Tribunal will decide the quantum at a remedy hearing on **8 October 2025**.

REASONS

Introduction

1. The claimant was employed by the respondent, a company which belongs to a group of financial and commodities brokers, from 6 January 2020 until his dismissal on 31 August 2023.

2. The claimant was summarily dismissed following an investigation in relation to his work in brokering deals in relation to a complex equity financial product called collateral baskets. The claimant has made a claim of unfair dismissal. The respondent has conceded that the claimant was unfairly dismissed on procedural grounds but argues that claimant's dismissal was nevertheless the result of his own gross misconduct. In the circumstances, the respondent's position is that no compensation should be awarded because claimant's blameworthy conduct caused his dismissal, or alternatively because a procedurally fair dismissal would have occurred at around the same time.

3. The claimant claims wrongful dismissal / notice pay. The parties agree that the correct notice period is 17.5 weeks. The respondent disputes that the claimant was entitled to notice pay given that he was dismissed for gross misconduct.

4. The respondent has made a counter claim in relation to repayment of a proportion of a sign-on bonus, capped at the Tribunal's jurisdiction of £25,000.

The hearing

5. I heard evidence and submissions on 12, 13, 14, 15, and 16 May 2025.

6. The claimant was represented at the hearing by counsel, Mr Scott-Joynt. The claimant gave sworn oral evidence.

7. The respondent was represented by counsel, Mr Green, and called sworn evidence from five witnesses as follows: Mr Michael Anderson (dismissing officer and CEO of Tradition London Group), Mr Rob Kitchin (previously GTI appeals officer and currently co-CEO of Tradition London Group), Mr Matthew Hancock (investigation officer and solicitor and partner at Greenberg Traurig LLP), Mr Tristan de Saint Quen (CEO of Tradition London Clearing Limited) and Mr Michael David (Operations Supervisor of Tradition London Clearing).

8. I considered documents from an agreed 1025 page bundle, and a supplementary bundle of 25 pages, which the parties introduced in evidence. I further considered six witness statements from the claimant, and the above named people. I also considered the cast list, chronology, agreed statement of facts, opening notes from both parties, and detailed written and oral closing submissions from both parties.

9. I gave oral judgment on 19 May 2025.

Credibility of the claimant as a witness

10. The respondent invited the Tribunal to find that the claimant was an unreliable witness. The respondent argued that the claimant made no attempt to assist the Tribunal, avoided answering questions, evaded questions, refused to accept points that were unambiguously spelled out in documentation, and made incredulous claims. The respondent also alleged that the claimant misled the Tribunal in failing to disclose all the correct documentation in relation to the Schedule of Loss.

11. I disagree with the respondent on this matter. I found the claimant to be a credible witness and I found that he did his best to answer questions when giving oral evidence. When he did not feel able to answer with a simple yes or no response, he provided what he felt was the necessary clarification, which he is entitled to do, and which the respondent's witnesses also did. The subject matter of this hearing was unusually technical and complicated, and the elaboration was (mostly) helpful.

12. I do not find that the claimant deliberately misled the Tribunal in relation to the calculations in the Schedule of loss. It appears as if the claimant's solicitor did not disclose a pay slip that showed the claimant's signing bonus in his new employment, but has now done so, and has accepted responsibility for that mistake.

Definition of splitting and switching

13. At the outset of the hearing, I noted the complex and technical nature of this case, and that it seemed to me that definitions were sometimes being used inconsistently in the paperwork. I stated that it was imperative that we all used the same definitions throughout the hearing to ensure precision and accuracy. I agreed with the parties that the following three terms had the following meaning:

    a. Splitting: This is when large trades are split into a number of smaller components ("shapes"). This can be done for legitimate corporate purposes or for the sole purpose of reducing a projected Crest fine.

    b. Switching: This is where the trade moves in one direction: from seller to buyer. There is an extra step in the middle between two separate entities within the Tradition group (but they remain different companies).

    c. Internal switching: This is not a one-way trade flow because a single company within Tradition buys and sells to itself.

Issues for the Tribunal to decide

14. The parties agreed that this case concerned three claims, namely unfair dismissal, wrongful dismissal / notice pay, and the respondent's counterclaim for in relation to repayment of part of a bonus.

15. In relation to unfair dismissal, as the reason was **misconduct**, the key issue was whether the respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will decide, in particular, whether:

    a. Was there a genuine belief that the claimant was guilty of misconduct?
    b. Was that belief based on reasonable grounds?
    c. Had the employer carried out a reasonable investigation into the matter?
    d. Had the employer followed a reasonably fair procedure?
    e. Was the decision to dismiss the claimant within the band of reasonable responses?

16. In relation to the unfair dismissal remedy, I stated that I wanted to be addressed on the Polkey no difference rule, the ACAS Code, and contributory fault. If the dismissal is unfair, the Tribunal would need to decide whether:

17. The claimant contributed by his inappropriate conduct to his dismissal. The respondent asserted that the compensation should be reduced in full to reflect the claimant's contributory conduct. The claimant asserted the opposite.

18. The claimant would have been dismissed in any event (this is often referred to as a *Polkey* reduction). The respondent asserted that the claimant would have been dismissed in any event and compensation should be reduced in full accordingly. The claimant asserted the opposite.

19. The respondent failed to comply ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015).

20. In relation to the wrongful dismissal / notice pay claim, the issue is whether the respondent has shown that the claimant fundamentally breached his contract of employment by committing an act of gross misconduct entitling it to dismiss him without notice. Unlike for the claimant's claim of unfair dismissal, where the focus is on the reasonableness of management's decisions, and it is immaterial what decision I would myself have made, for the breach of contract claim, I am required to decide for myself whether the claimant was guilty of conduct serious enough to entitle the respondent to terminate the employment without notice.

21. In relation to the counterclaim, the issue is whether clause 5.6 of the contract entitled the respondent to partial re-payment of signing-on bonus, regardless of whether the respondent acted in breach of the same agreement.

List of issues

22. The list of issues as set out in Judge Connolly's case management order dated 22 November 2024 is as follows:

> *Unfair Dismissal: the Employment Rights Act 1996 ("ERA 1996"), ss 94 and 98*
>
> a. The respondent admits that the claimant was unfairly dismissed on the basis that the claimant did not have a formal disciplinary hearing at which he could contend with an allegation which was expressly said to place him at risk of dismissal, nor was the claimant given the opportunity to appeal his dismissal.
>
> b. Should a deduction to the claimant's compensation be made for **contributory fault** (pursuant to ERA 1996, ss 122(2) and 123(6)), and if so by how much? respondent contends that the following issues and/or facts should be considered:
>
> i.Did the claimant carry out any of the acts pleaded at paragraph 64 of the Grounds of Resistance?
> If so:
> ii.Were any such acts (whether individually or combined) blameworthy;
> iii.Did any such blameworthy acts cause or contribute to the dismissal to any material extent; and
> iv.To what extent, if any, is it just and equitable to reduce the award in light of the foregoing?
>
> c. Should a deduction to the claimant's compensation be made to reflect the alleged fact or possibility that the claimant would have been dismissed had a fair procedure been deployed (the **Polkey reduction**) and if so by how much? The following issues and/or facts should be considered:
>
> i.Considering the range of reasonable responses test and Burchell guidance, and to the extent that claimant is found to have carried out any of the acts alleged at paragraph 64 of the Grounds of Resistance, do any of those acts (individually or in combination) provide a basis on which the claimant could fairly have been dismissed for conduct; and
> ii.If so, would it have taken any longer than the date of termination to complete a fair investigatory and disciplinary process; and
> iii.If so how much longer; and/or
> iv.What is the probability that – if a fair disciplinary process had been followed – the result would have been the claimant's dismissal?
>
> d. Should any deduction or uplift be made for respondent's alleged failure to follow the **ACAS Code of Practice** on Disciplinary and Grievance Procedures (the Code) and, if so, what should that deduction or uplift be? claimant contends that the following features

of respondent's conduct are relevant (in breach of paras 7, 9-17, 23, and 26-28 of the Code:

i.respondent failed to carry out any, or any adequate disciplinary process before termination, having invited having conducted an investigation whose scope was expressly limited to fact-finding in connection with a request (not an investigation) by the Financial Conduct Authority, and having assured claimant when inviting him to interview that formal disciplinary proceedings would follow if required.
ii.respondent failed to inform claimant of the basis of its concerns prior to summarily terminating him in writing or at all, despite having assured him (when inviting him to an investigation meeting) that there was "no suggestion of wrongdoing" on his part.
iii.respondent failed to give claimant an opportunity to put his case in response to any such concerns.
iv.respondent failed to provide claimant with any of the evidence on which his termination was based before the termination; and since the termination has provided only a small sample of this evidence.
v.respondent failed to undertake a disciplinary meeting in any form prior to summarily terminating claimant's employment.
vi.respondent failed to give claimant any opportunity to appeal his dismissal.

e. Accounting for the foregoing, to what sum is the claimant entitled as a **Basic Award**?

f. Accounting for the foregoing, to what sum is the claimant entitled as a Compensatory Award? The scope of the dispute on past and future loss should be determined by considering the schedule of loss and any counter schedule, and any updates to those schedules.

Wrongful Dismissal (Breach of Contract for Failure to Give Notice)

a. Did the claimant carry out the acts alleged at paragraph 64 of the Grounds of Resistance?

b. Did any such acts found to have been carried out (whether individually or combined) amount to gross misconduct and/or breach the mutual term of trust and confidence?

c. If not, what sum should be awarded for the claimant's notice period? The scope of this dispute should be determined by considering the schedule of loss and counter schedule (yet to be ordered) and any updates to those schedules.

The counterclaim for breach of contract

Does clause 5.6 of the 2022 Service Agreement entitle the respondent to payment on demand, regardless of whether the respondent has acted in breach of the same agreement as a result of any of the following:

i.Unfairly dismissing the claimant;

ii.(If the Tribunal finds the claimant was wrongfully dismissed) wrongfully dismissing the claimant?

b. If not, is any such entitlement extinguished?

c. If the respondent's entitlement under clause 5.6 of the 2022 Service Agreement survives, should any repayment by the claimant be reduced to reflect notice period and/or the length of time it would have taken to undergo a fair dismissal process and/or the respondent's procedural failings? If so, what reduction should be made?

The law

Unfair dismissal

23. Section 94 of the Employment Rights Act 1996 gives employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to an employment tribunal under section 111. The claimant must show that he was dismissed by the respondent under section 95.

24. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

25. Section 98(4) deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.

Misconduct dismissals

26. In misconduct dismissals, there is well-established guidance on fairness within section 98(4) in the decisions in **Burchell 1978 IRLR 379** and **Post Office v Foley 2000 IRLR 827**. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the

Tribunal must not substitute its view for that of the reasonable employer (**Iceland Frozen Foods Limited v Jones 1982 IRLR 439**, **Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23**, and **London Ambulance Service NHS Trust v Small 2009 IRLR 563**).

Gross misconduct

27. Gross misconduct may result in summary dismissal (i.e. dismissal without notice), thus relieving the employer of the obligation to pay any notice pay. Exactly what type of behaviour amounts to gross misconduct is difficult to pinpoint and will depend on the facts of the individual case. However, it is generally accepted that it must be an act which fundamentally undermines the employment contract, and the conduct must be a deliberate and wilful contradiction of the contractual terms or amount to gross negligence.

Law on compensation and adjustments

28. In circumstances where it is found a decision to dismiss was unfair, the tribunal must consider how much compensation to award in accordance with sections 122 and 123 the Employment Rights 1996.

29. In respect of the basic award, section 122 (2) ERA 1996 provides:

    a. "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 or further reduce that amount accordingly."

30. In respect of the compensatory award, section 123 ERA 1996 provides:

    a. "(1) Subject to the provisions of this section and sections …, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
    b. ...
    c. (6) 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."

31. There are three potential adjustments commonly at play in unfair dismissal cases:

32. **Polkey:** The first is where a deduction is made from a compensatory award in an unfair dismissal case to reflect the chance that although a dismissal was procedurally unfair it would have happened in any event. This is often referred to as a *Polkey* reduction by reference to the **Polkey v A E Dayton Services Limited [1988] ICR 142.**

33. It is clear from **Hill v Great Tey Primary School [2013] ICR 691** that a Tribunal is not answering the question what it would have done if it were the employer: it is assessing the chances of what 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.

34. The 'range of reasonable responses' test is not relevant in relation to the Polkey test.

35. **ACAS Code:** The second is where an award may be increased or reduced by up to 25% if the employer/employee has unreasonably failed to comply with the ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015), if it is just and equitable in all the circumstances to do so. This is set out in section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992. This adjustment can only apply to the compensatory award, not the basic award, and is applied before any reduction for contributory fault (section 124A of the Employment Rights Act 1996).

36. Relevant circumstances will vary from case to case, but can include: (a) whether the procedures were ignored altogether or applied to some extent; (b) whether the failure to comply with the procedures was deliberate or inadvertent; (c) whether there were circumstances which mitigated the blameworthiness of the failure *(***Lawless v Print Plus (Debarred) [2010] 4 WLUK 420***)*. The size and resources of the employer are also relevant.

37. **Contributory fault:** The third is where the claimant by their inappropriate conduct contributed to their dismissal. This adjustment can apply to both the basic award (section 122(2)) and the compensatory award (section 123(6)). The Tribunal will consider this potential deduction by: i) identifying the relevant conduct; ii) assessing whether that conduct was culpable or blameworthy; iii) for the purposes of the compensatory award under section 123(6), decide whether the culpable conduct caused or contributed to the dismissal; and iv) if so, determine to what extent it is just and equitable to reduce the award.

38. The employee's blameworthy conduct must be considered to determine the extent to which it has caused or contributed to the *dismissal*, not to the *unfairness* of the dismissal (**Ingram v Bristol Street Parts UKEAT/0601/06/CEA** at [29]).

39. "Culpable and blameworthy conduct" is not defined but the conduct has to be within the person's control so as to find a reduction on the grounds of contribution (**Langston v Dept for Business, Enterprise & Regulatory Reform UKEAT/0534/09/ZT** at [37]).

40. The Tribunal is entitled to take a broad view of the conduct that contributed to dismissal. As per **Robert Whiting Designs Ltd v Lamb [1978] ICR 89**, at 92: "[t]he proper approach is to decide first what was the real reason for dismissal and then to see whether the employee's conduct played any part at all in the history of events leading to dismissal... In our view the weight to

be given to the employee's conduct ought to be decided in a broad common sense manner."

Wrongful dismissal / notice pay

41. The breach of contract is the failure by the employer to give the claimant the notice of termination to which they were entitled under the contract. In this case, this is alleged because the employee has been dismissed without any notice (summary dismissal). An employee will not be entitled to notice of termination if they have fundamentally breached the contract e.g. the contract is terminated because the employee is guilty of gross misconduct.

42. The amount of notice to which the employee was entitled should be set out in the written statement of employment particulars which employers are required to give employees (s.1 Employment Rights Act 1996). In this case, the parties agree that the relevant period is 17.5 weeks.

Counterclaims

43. In limited circumstances, an employer can bring a contractual claim against an employee in the employment tribunal. The employer's contract claim must arise or be outstanding on the termination of the employee's employment and must relate to: (i) damages for breach of the contract of employment or other contract connected with employment, (ii) a sum due under such a contract, or (iii) the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract. In addition, the employee in question must already have brought tribunal proceedings and the employer's contract claim must arise out of a contract with that employee. Employers can therefore bring counterclaims in order to recover contractual damages or debts from employees or to set off liability against sums owed. The maximum amount that a tribunal can award in respect of proceedings for breach of contract is £25,000.

Findings of fact

44. These findings of facts are set out in chronological order.

45. The respondent is part of the Tradition London Group ("TLG"), a subsidiary of Compagnie Financière Tradition. TLG's business involves the employment of brokers who act as a point of contact for clients seeking to buy or sell financial or non-financial products.

46. The claimant was employed as a broker on 6 January 2020 and latterly as a desk head on the Collateral Baskets Desk dealing with equities. Collateral Baskets have many lines of individual stocks that are priced together as a basket to go to market. The average trade arranged by the Collateral Baskets Desk was more than ten times larger than the average trade arranged by other Cash Equities desks at TLG.

47. The claimant was an FCA regulated employee. Brokers of the claimant's level fall under the FCA's Senior Managers & Certification Regime. As a result of his certified status, claimant was subject to the FCA's Code of Conduct and the requirement to be and remain 'fit and proper'. The FCA

Code of Conduct includes the requirement to act with integrity, and the requirement of fitness and propriety which concerns honesty, integrity and reputation.

48. The trades arranged by the Collateral Baskets Desk in the UK were settled through an external central securities depository known as Crest. Crest operates a system of fines on parties that fail to settle 85% of trades by their intended settlement date. Crest fines are calculated by reference to both the number and value of the failed transactions. Crest fines incurred would be levied against TLG as an inter-dealer broker irrespective of the cause of the settlement failure. TLG was not able to pass these fines on to the buyer or seller responsible for the settlement failure. Crest fines would be deducted from the bonus pool of the desk responsible for the underlying trades. Crest operates a procedure by which fines can be appealed.

49. TLG was not a direct participant in Crest and all trades through Crest were settled through the account of a settlement agent engaged by TLG:

    a. Prior to April 2021, TLG used Bank of New York Mellon ("BNY") as settlement agent principally for gilt transactions and Nomura for equities transactions.
    b. In or around April 2021, Nomura ceased to act as settlement agent for equities and were replaced by BNP Paribas ("BNP"). BNY continued to act as settlement agent for gilts.
    c. On 9 May 2022, BNY gave notice to terminate the services provided to TLG.

Relevant contracts and policies

50. The claimant's employment with respondent was governed by a contract of employment dated 14 January 2022. This included the following material terms:

    a. The claimant was employed for an Initial Term of two years from 1 January 2022 (clause 2.1). Either party was entitled to terminate the contract by giving written notice between 90 and 120 days prior to the expiry of the Initial Term (clause 2.2). As a matter of contract, claimant could lawfully have been served with notice between 3 September 2023 and 30 October 2023, which notice would have run until 31 December 2023.

    b. The claimant was required to comply with all applicable rules and regulations of the FCA and to read and abide by respondent's Compliance Manual and compliance memorandums (clause 3.5).

    c. Clause 3.6 stated: "that you are not aware of and have no grounds to suspect that there are matters, complaints or allegations which the FCA may or are likely to view as adverse or negative for you when considering your fitness and propriety ("Adverse Matters"). For the purposes of this obligation it is irrelevant whether you deny or dispute the accuracy of the Adverse Matters. You undertake to notify the Company forthwith, by contacting the Compliance Department, if you become aware of Adverse Matters at any time during your

employment by the Company. Failure to make such notification forthwith may by itself, render you liable to disciplinary action and could amount to gross misconduct. Any bonus payment received by you during the lifetime of this Contract is deemed to be subject to a warranty by you that you are not aware of and have no grounds to suspect that there are any Adverse Matters on the date of the payment to you."

d. The claimant's salary was £150,000 per annum (clause 5.1). The claimant was also eligible to participate in respondent's interim tri-annual bonus scheme, calculated by reference to the total Net Revenue of the Desk (clause 5.2). Net Revenue was defined as "income billed and received by the Company as a direct result of business generated by you, less any discounts, execution, clearing or settlement fees, regulatory costs, exchange fees, electronic trading costs, difference payments/errors, limit and other internal breach penalties, link or other charges and sums which, in the absolute discretion of the Company, are either written off or discounted."

e. The claimant's share of the Bonus Pool was a discretionary amount decided by agreement between claimant and the CEO. Instances of serious misconduct or underperformance would also be taken in account in determining the amount of any bonus payable (clause 5.3). No bonus would be paid if claimant was not in employment or was under notice "whether given or received for any reason" (clause 5.5).

f. The claimant was paid a Signing Bonus of £200,000 "in consideration for you entering this Contract and in view of your strategic importance to the Group" (clause 5.6). If prior to the expiry of the Initial Term (to 1 January 2024) claimant breached the contract, "including by purporting to terminate your employment, or you otherwise cease working for the Company, the Company may require by notice in writing a repayment of 1/24th of the Signing Bonus for each full month remaining of the Initial Term, which sum shall then fall immediately due repayable by you…"

g. As per clause 12.1, the claimant could be dismissed without notice in various circumstances, including:

    i. If he was guilty of any serious default or misconduct in connection with or affecting the business of respondent or its Group companies;
    ii. If he committed "any serious or repeated breach of your obligations under the contract or are guilty of serious neglect or negligence in the performance of your duties or of conduct… which is likely to bring you, the Company or its Group companies into disrepute or prejudice its interests or which seriously impairs the Company's trust and confidence in you"

iii. If he committed any breach of any rule of any regulatory authority governing the business of the Company or its Group company.

51. The respondent's disciplinary policy included the following examples of gross misconduct: dishonesty; deliberate disobedience or persistent refusal to obey a lawful or reasonable instruction; failure to comply with rules of the FCA (including standards of fitness and propriety); reckless behaviour or serious negligence which causes or might cause unacceptable loss, damage or injury; and a serious act which breaks mutual trust and confidence.

52. The claimant was subject to respondent's Front Office Supervision Manual. Under the section on risk strategy, it made clear that all staff should consider themselves as managers of risk and thereby responsible for their effective mitigation wherever possible. The manual made clear that the claimant was required to thoroughly review the Manual and related documents it referred to. Under the section on ethics, values and culture, the Manual set out the following commonsense principles: (i) do not engage in any transaction which does not have a genuine, legitimate business purpose; (ii) ask yourself whether any contemplated transaction or business transaction would withstand the scrutiny of the public eye if exposed, and (iii) to seek advice when in doubt.

Claimant's two written warnings with previous employer GFI

53. Prior to joining the respondent, the claimant was employed for 6 years between April 2013 and June 2019 at GFI Securities Ltd ("GFI") as Broker (Desk Head) – Equity Hedging UK.

54. The claimant received two written warnings during his time at GFI. He did not disclose these written warnings to the respondent. The respondent sought a reference from GFI at the time of his move to the respondent and GFI also did not disclose these two written warnings. They were discovered when the respondent sought a second reference from GFI on 30 May 2023. GFI sent the respondent the requested second reference on 28 June 2023. This second reference stated that they had not concluded that the claimant was not fit and proper to perform a function but noted that they had taken disciplinary action against the claimant for the following reasons:

> "Two unconnected disciplinary proceedings took place in 2017 and 2018. The first related to conducting trades during a restricted period in breach of internal policy. Following a full investigation and disciplinary procedure, a first written warning was issued and remained on file for 12 months from March 2017. There were no repeat offences. The second related to credit limit breaches. Following a full investigation and disciplinary procedure, a first written warning was issued and remained on file for 12 months from June 2018. There were no repeat offences. There was no reason to raise such matters with the FCA at the times they took place."

55. The claimant states at paragraph 14 of his witness statement that: "While I was at GFI, I had been subject to two separate disciplinary procedures, one

in 2017 and one in 2018. Each resulted in a First Written Warning. In each case, I was told by GFI that the warning would stay on my record for 1 year. This is the main reason why I did not believe they needed to be disclosed: by the time I was hired by the respondent, both of these 12-month periods had expired."

56. I accept the claimant's oral and written evidence and I find that he did not breach clause 3.6 of his contract with the respondent, as he was not aware of any adverse matters (i.e. matters, complaints or allegations which the FCA may or are likely to view as adverse or negative when considering fitness and propriety). GFI expressly noted in the second reference that there was no reason to raise such matters with the FCA at the time they happened. Furthermore, the written warnings were spent, as a year had passed in each case.

57. For the avoidance of doubt, I find that at no time during the claimant's tenure at GFI was he subjected to disciplinary proceedings relating to splitting or switching.

Notification of potential Crest rule change in 2020

58. Settlement Discipline is addressed by Rule 6 of the Crest Rules, which provides:

> *"2. The Rules seek to ensure high standards of input, matching and settlement of transactions through the Crest system and are intended to benefit all users and participants. The principal benefits envisaged are that they will:*
> *2.1 enhance the integrity of the settlement process by providing a high degree of certainty of the timeliness of settlement;*
> *2.2. reduce the need for manual intervention in relation to unmatched and unsettled transactions;*
> *2.3 provide a firm basis for member's cash management; and*
> *2.4 reduce the position risk and counterparty risk to members which can arise from late settlement."*

59. On 29 January 2020 (a few weeks after joining the respondent), the claimant was forwarded an email chain about a proposed Crest rule amendment. The bulletin itself (dated 22 July 2019) stated as follows:

> *"It has recently come to our attention that certain Crest members have structured transactions so as to circumvent the framework established by Crest Rule 6 and obviate the financial penalties being triggered. Whilst such behaviour is not currently an express breach of Crest Rule 6, it is against the spirit of the settlement discipline regime and has the potential to undermine the integrity of the Crest system.*
>
> *In order to minimise the risk, we propose to add the following provision to Crest Rule 6:*
>
> *"3A Crest members shall not structure transactions for the purpose of avoiding fines in respect of the Matching Rules and/or the*

Settlement Rules which would otherwise be payable in accordance with the terms of this Crest Rule 6.""

60. I find that the claimant was not on notice from January 2020 (as is claimed by the respondent) that Crest rules did not permit transactions that were structured to reduce or avoid fines. This is because this bulletin was simply forwarded to him without comment or explanation during the first few weeks of his employment with respondent, and the email chain simply stated that Crest were *considering* changing the rules. It was not clear what implications any such change would have. Within emails in the chain (on top of the bulletin), it was noted that: 'there [was] a lot of uncertainty around [the bulletin]' and there were various requests for 'more information'. The email chain specifically notes that no action is needed at this point in time. And we know that Crest did not, in fact, implement this proposed rule change.

Switching practices from April 2021 to April 2022

61. The loss of Crest settlement expertise (Mr David Wright) happened alongside the service transfer from Nomura to TLC, which coincided with a fast growth of Collateral Baskets business. This triggered recurring exposure to Crest fines and a pressing need to find a solution.

62. In April 2021, Mr Michael David received notice that a significant Crest fine of some £175,000 would be levied in respect of unmatched trades belonging to another desk, arising from the migration from Nomura to TLC. Mr Michael David sought advice from the claimant about potential solutions to mitigate this fine. The claimant noted that one potential solution was to move stock between Crest accounts held by two separate entities: respectively by TFSD and by Tradition Securities and Futures ("TSAF"), another company in the CFT Group in Paris. The claimant was suggesting the practice of switching, as we defined it at the outset, as it would involve actual trades between two separate entities, albeit both Tradition entities. Michael David admits that it was him that raised the idea that they could use the two Tradition Crest Accounts (with BNP and BNY) and switch stock back and forth between them. Mr Michael David in his witness statement states that the trades that occurred in late April 2021 involved TFSD only and not TSAF. This is what we defined at the outset as internal switching.

63. Mr Michael David reported the switching idea to Mr Tristan De Saint Quen the same day via email. Mr Michael David also talked it through with the settlement team and they did not object. It was also referenced in the weekly reports. I find that, at this time (April 2021), no one thought Crest fine mitigation practices was wrong.

64. As to whether or not the claimant was aware of the occurrence of internal switching for this particular trade in April 2021, I find that the claimant was fully involved in this April 2021 Crest fine mitigation issue and would have been aware that TSAF was not involved. The large April 2021 fine was avoided. The claimant was praised for this, which he accepted, and said that it was a team effort, as Mr Michael David had done a great job too.

65. The claimant and Mr Michael David then continued to reduce Crest fines by switching *and* internal switching. This was regular practice from April 2021 until April 2022. I understand that the level of reduction achieved up to April 2022 was approximately £596,000 (as set out in the Project May assessment).

66. The claimant says that he was unaware that internal switching was happening over this entire period of time. I find against the claimant on this point. I find that it more likely than not that both the claimant and Mr Michael David – who worked together on a regular basis to arrange suitable transactions and coordinate the process – knew that both switching and internal switching were occurring during this period from April 2021 to April 2022. The claimant also had access to Sphere, the back-office system used by settlements, that desk could have oversight of all transactions, their settlement status and that the status of purchased securities.

BNY concerns in April 2022

67. On 21 April 2022, BNY emailed Mr Michael David to say that they are not supportive of trades simply to avoid a Crest fine. That was how BNY expressed their concern: there was no mention or distinction between splitting and internal splitting. This email to Mr Michael David was then forwarded to Mr Tristan De Saint Quen who emailed BNY and asked them for more information on what they were not supporting. Mr Tristan De Saint Quen further stated in this email: "another example of arbitrary BNY management decisions taken without consultation or dialogue with Tradition".

68. The following day, BNY responded by suggesting a call so they could explain why they believe these types of transactions to avoid Crest fines were not appropriate. And Mr Tristan De Saint Quen responded as follows: "With upmost respect, I don't know where your information is coming from, but I don't have another day to waste presently arguing the case for and against any particular action. We are a UK FCA regulated firm and we understand our regulatory and compliance responsibility very well. These are administrative processes which we are comfortable with and also formed part of due diligence in assessing moving more significant Crest activity to BNY… I'd appreciate this batch being let through, for which I take responsibility. We can discuss thereafter what BNY is and isn't comfortable with."

69. This email chain clearly shows that Mr Tristan De Saint Quen is taking personal responsibility for the correctness of the respondent's actions, because as far as he was aware at the time, there was nothing wrong with the respondent's Crest fine mitigation practices. The tone of these emails also clearly show that there were pre-existing frustrations between the respondent and BNY. Mr Tristan De Saint Quen explained in his witness statement that there was tension between BNY and the respondent at this time because of the Russia/Ukraine war. Mr Tristan De Saint Quen stated that the respondent was left in a position where the respondent had a lot of transactions outstanding in Russian government bonds, and the respondent was being prevented from unwinding transactions and restoring the status quo. Mr Tristan De Saint Quen had hoped that BNY would put pressure on

the depository to achieve a fair outcome but BNY were not doing this. Mr Tristan De Saint Quen therefore took the view that BNY were looking to exit the relationship with the respondent because of the exposure to Russian transactions in the context of the war.

70. On 9 May 2022, BNY served notice of termination. I find that this notice of termination cannot fairly be attributed to the claimant. Mitigating Crest fines appeared to be accepted as a respondent-wide practice at this time. There were clearly already pre-existing tensions between BNY and the respondent. Mr Tristan De Saint Quen's own view was that this notice of termination was served because of the Russian/Ukraine war situation. It is also clear that BNY were unhappy with Mr Tristan De Saint Quen's inaccurate and over-due responses to their questions, which Mr Tristan De Saint Quen was later disciplined for.

71. Importantly, the claimant was not copied to any of these emails, so he did not know at this time that BNY were not supportive of trades to avoid a Crest fine.

Project May (May 2022)

72. I accept the respondent's evidence that BNY serving notice of termination was a very serious matter for the respondent. I accept the claimant's evidence that he was aware of this termination notice but he thought it had been caused by Mr Tristan De Saint Quen's inaccurate response to BNY's questions. I find that the claimant was not informed by anyone at this point in time that BNY were not supportive of trades to avoid a Crest fine.

73. BNY's notice of termination led to PWC Paris being commissioned by senior Group management to understand what had happened and why. This was called Project May, and it was an investigation into the circumstances surrounding the decision taken by BNY to serve notice of termination on the respondent. The focus of this investigation was on systems - not on individual people. The claimant, Mr Michal David, and Mr Tristan De Saint Quen, amongst others, were interviewed.

74. Project May resulted in a 49 page report which identified various systematic and governance related weaknesses that allowed internal switches to happen and to continue for around one year. Project May also noted that employees lacked risk and compliance awareness and sufficient knowledge of relevant matters. The report noted, for example, that employees were openly emailing about it, which suggested no clear understanding about the potential inappropriateness of internal switches.

75. Importantly, the claimant was not given sight of the Project May report at the time, so again, he was not made aware that that switching and splitting for purpose of Crest fine mitigation were inappropriate or prohibited.

Respondent's dissemination of new Crest fine mitigation policy from May 2022 onwards

76. I accept Mr Michael David's evidence that, in June 2022, Mr Michael David had a meeting with Ms Silvana Bozier, Head of Compliance and Operational

Risk, who made it very clear that attempting to manipulate the Crest fine system was completely wrong and should not happen again in any circumstances. I find that Mr David was expressly put on notice from June 2022, and was therefore clear in his own mind from that point in time that Crest fine manipulation was no longer permitted.

77. The claimant was not invited to this meeting and was not given any express notice of the respondent's new policy on this matter.

78. Training was organised on compliance issues generally across the London office in the autumn of 2022. Both Mr Michael David and the claimant attended. I find that this training did not cover the practice of splitting or mitigation of Crest fine more generally. Mr Mike Anderson admitted in cross-examination that when training occurs in a regulated entity and is supposed to address a potential regulatory issue, it would be sensible to create a document and record of the training, as well as a list of attendees, so that the regulator can be satisfied that the training had been done. This was not done. Mr Mike Anderson further admitted in cross-examination that there was no documented evidence to show that this training included anything about Crest fine mitigation. Mr Mike Anderson also admitted in cross-examination that he had no confidence in this training that was given.

79. Mr Hancock also conceded in cross-examination that the proper thing to do for such training would have been to record both the content and attendance, and he also conceded that, in his detailed and thorough investigation, he had not encountered a single written document expressing any such prohibition.

80. I find that the respondent did not clearly and consistently disseminate their new policy on Crest fine mitigation practices to the company at large, or to the relevant people. Some people, like Mr Michael David, were informed that the switching to reduce Crest fines was no longer acceptable, and some people, like the claimant, were not.

81. The claimant claimed that Mr Michael David had told the claimant over a drink in June 2022 that there was no issue with splitting trades (see notes of Argent interview and amended version of the Project Greenwich interview). I do not find this plausible. I find that it is, at best, a mistaken memory. I prefer Mr Michael David's evidence on this point which is that he categorically denies telling the claimant it was still okay to split trades, as he had personally been instructed clearly in a meeting in June 2022 to not manipulate Crest fines anymore.

Splitting incident in autumn 2022 that led to desk suspension

82. On 27 October 2022, Mr Michael David and the claimant were in the pub with several members of the claimant's team. Mr Tom Grant, one of the members of the claimant's team, asked Mr Michael David to keep informing them of the projected Crest fines, so that they could arrange trades in a way to improve the ratio of successful transactions. The claimant was party to this conversation. I accept that Mr Michael David was surprised by this conversation because he *himself* knew that splitting was prohibited – as he had been specifically told that in a meeting in June 2022 – but I do not

accept that Mr Michael David (during this informal chat in a pub) gave the claimant and his team a specific, formal and/or clear instruction that splitting was prohibited.

83. Mr Michael David made a note to himself about the pub conversation on 1 November 2022, which is five days after it had taken place, and this delay remained unexplained. Mr Michael David then checked to see if there was any evidence of Crest fine mitigation. When Mr David found a split trade with JP Morgan, he escalated matters to Tristan De Saint Quen, and Tristan De Saint Quen escalated this up the management chain to Mr Mike Anderson.

84. On the same day that Mr Michael David had reported the claimant for splitting (1 November 2022), trading for the desk was suspended with immediate effect. On 3 November 2022, Mr Mike Anderson took the decision to suspend the claimant and the whole Collateral Baskets Desk team, until the suspension was lifted on 8 November 2022. I accept the claimant's evidence that he was shocked because he had still not received a clear instruction from his employer not to split. He had been splitting openly, which shows he did not know it was prohibited. For example, Ms Martha Owen, settlement team leader, sent an email on 14 October 2022 asking desk to limit the splitting to less than 99 shapes as their system could not cope. Clearly, it was not just the claimant but other employees too that had not been told with sufficient clarity that splitting was not allowed.

85. I find that it was not until the start of November 2022 that the respondent finally made clear to the claimant that splitting was prohibited. Suspending the claimant and his entire team is certainly one way of disseminating clear information to your employees that splitting/switching is prohibited. Another way would have been to simply write a letter or email to the claimant, his team, or better still, the whole company, explaining clearly that splitting and switching (with accompanying definitions) were prohibited and should not be done anymore under any circumstances without the approval of senior management. If the respondent had taken this simple step of adequate dissemination of their new policy, they would have been able to establish that their employees were on notice that Crest fine mitigation practices were prohibited.

Argent investigation in autumn 2022

86. The respondent's HR department asked Mr John Argent (senior Executive Business Manager at Tradition) to undertake an investigation to establish what had happened in the lead up to Collateral Baskets Desk's suspension following the detection of splitting practices. This investigation looked at individual conduct.

87. The claimant met with Mr Argent on 4 November 2022 as part of the investigation. In this interview, the claimant stated that he had not been instructed by his employer that splitting was no longer permitted until his suspension.

88. Mr John Argent produced his report on 17 November 2022.

89. The Argent report noted that the decision to make switching no longer acceptable "was not adequately disseminated throughout the Company, including to the Desk Members… As a result, there are fundamental differences about this in the accounts of those I have spoken to and, therefore, what some may have understood as being acceptable compared to others…"

90. The Argent report noted that desk members were not given clear guidance that splitting was not allowed but stated that "it would be a reasonable expectation, as Desk Head, for [the claimant] to have enquired as to whether the desk could continue splitting".

91. The Argent report is consistent with my own findings of fact in that I have also found that the claimant had not been told with sufficient and consistent clarity that splitting was not allowed, but equally, the claimant could have sought further clarification about the rules from seniors. As set out in the Front Office Supervision Manual, employees should seek advice when in doubt.

92. The claimant was not aware of the content or outcome of this Argent report as he was not shown it at the time. No disciplinary action was taken against the claimant. The respondent waited until 27 January 2023 to confirm this to the claimant.

FCA contact with respondent in autumn 2022

93. On 24 October 2022, the FCA emailed Mr Mike Anderson setting out 15 questions to help FCA understand the respondent's use of internal switches from March 2021 to April 2022. This email followed a meeting that Mr Mike Anderson had had with FCA. Mr Mike Anderson sent back answers to the 15 questions on 4 November 2022.

94. It is important to note that this exchange between FCA and the most senior person at the respondent was happening at the same time as the desk suspension and Argent investigation referred to above.

95. I find that the respondent's decision to suspend the entire desk on 3 November (when they could have just sent them an email or letter clarifying what was and was not allowed) was driven by the fact that, at that very moment in time, the respondent was drafting responses to the FCA, asserting that their *historic* Crest fine mitigation practices were no longer in use, and that they had tackled and overcome the problem.

96. The FCA's second question in the list of 15 questions is 'please confirm that you have stopped the internal switches'. And Mr Mike Anderson's response on 4 November 2022 is to confirm that the internal switches have stopped. So, Mr Anderson, the most senior member of the respondent, told the FCA that switching does not happen anymore, the day after he suspended the entire desk for switching (a practice for which they had not been explicitly prohibited from doing).

Instruction of Greenberg Traurig in December 2022

97. I accept that in early December 2022, Mr Anderson received a call from Richard Westlake, the Head of Supervision at the FCA. Mr Anderson said that Mr Westlake wanted to discuss the claimant, his actions, and the failure by Tradition to prevent inappropriate behaviours. This conversation was not recorded and no note was made. Mr Anderson said in oral evidence that he did not tell anyone about this call from Richard Westlake because, after the conversation, 'he did not trust anyone'. Not legal. Not compliance. Not settlements. Not even his direct management. No one.

98. Without any further information about, or evidence of, what was discussed during this call, and on what basis Richard Westlake was allegedly pinning the blame on the claimant, I find it difficult to believe that this undocumented call from Richard Westlake was only and/or specifically about the claimant. If the call was only about the claimant, Mr Anderson would have presumably felt able to discuss it with compliance, and legal, and his direct management team. I find it more likely than not that Richard Westlake was warning Mr Anderson, more generally, that he needed to get his ducks in a row, as the FCA did not feel the respondent had specifically dealt with conduct issues across the board. That is why Mr Anderson felt he could not trust anyone. Mr Anderson admits that, after this call, he was in no doubt that the FCA were intending to come down hard on the respondent, unless they took matters seriously.

99. This call was followed by an email on 14 December 2022 from the FCA to Mr Mike Anderson asking whether the respondent intended to undertake conduct reviews of the individuals that he (i.e. Mr Mike Anderson) considered to be involved.

100. Mr Anderson then instructed Greenberg Traurig, an external law firm, to undertake a conduct review. This was referred to as 'Project Greenwich'. Mr Anderson told Greenberg to look at everything and everyone, including himself. I accept Mr Hancock's evidence that Greenberg Traurig were not given instructions about how to conduct the investigation, particular conclusions to reach, or who to interview. Mr Anderson said in oral evidence that: i) he told Greenberg about the serious call from FCA where they relayed their concern that the respondent had not specifically looked at conduct issues; ii) he did not mention the claimant by name to Greenberg; and iii) he told Greenberg that they had complete freedom to investigate everyone from top to bottom.

101. Project Greenwich was a significant piece of work that took around eight months to complete. Around 615,000 documents were gathered together with 55,000 Bloomberg messages, and seven witnesses were interviewed. The costs of the investigation exceeded £1m.

Call between Tradition and Crest in January 2023

102. On 25 January 2023, the claimant emailed Tristan De Saint Quen and others asking if he could speak to Crest about how fines were calculated. The claimant said that he wanted to ask Crest whether they can split trades to manage the exposure of the unit fine and ask if there is any guidance as to what splits are acceptable. He said they could draw up a procedure to move forwards based on these answers. It is clear at this point

that the claimant is not trying to hide any intentional malpractice, as he is suggesting reaching out to Crest to ask for guidance. The claimant and Tristan De Saint Quen then spoke to Crest the same day.

103. From Mr De Saint Quen's note of the call with Crest, which he sent to the claimant and others after the call, Mr De Saint Quen states that Crest described the practice of splitting trades to improve settlement ratios specifically with the intent to mitigate penalties as "manipulating", "breach of settlement discipline" and "not acceptable". Mr De Saint Quen goes on to say that it appears Crest's issue was how to strictly enforce their view, which was the purpose of the Rule 6 consultation, which they apparently planned to revisit. Although Crest said in the call they would revisit their suggested rule amendment, my understanding is that they did not implement the new rule. Mr De Saint Quen then states that Crest do not prohibit splitting of trades to manage settlement efficiency and gave an example.

104. The claimant responded to this email twice (once on 25 January 2023 and again the following day) saying that they needed to speak to Crest again to clarify some points so that 'we know exactly what is acceptable' from their perspective. The claimant suggested doing the same with BNP. There is then a back and forth. Mr De Saint Quen disagrees about speaking to Crest again and the claimant stated that he is still unsure what is acceptable and what is not acceptable, without the answers to his three specific questions.

105. So even at this point in time, which is now January 2023, the claimant believed that there was still some ambiguity *in the detail* as to what splits were and were not acceptable. To be clear though, as I have already found, the claimant was aware from November 2022 of the general principle that Crest fine mitigation practices were no longer allowed.

Respondent became aware in May 2023 of alleged BNY complaint to GFI re claimant

106. The respondent alleged that they discovered in May 2023 that the claimant himself was the subject of a historic complaint from BNY to GFI in respect of inappropriate practices to reduce Crest fines. The respondent relies on two pieces of hearsay evidence to support its contention:

a. *Mr Mark Griffiths informally told Mr Michael Davies about the alleged complaint*: I find that Mr Michael David went out for a drink with Mr Mark Griffiths (BNY Senior Relationship Manager) on 3 May 2023. I have no reason to doubt Mr Michael David's evidence in his witness statement as follows: "Mark [Griffiths] told me that they had had exactly the same incident with GFI a few years ago and BNY had refused to settle their trades because they were engaging in inappropriate switching. He told me that there was some sort of an investigation into what had happened, which identified a particular trader named Brian Wong as doing the inappropriate activities." I have no reason to doubt Mr Michael David's evidence that he contacted Mr De Saint Quen that evening and they met to discuss the following morning.

b. *Mr Mark Griffiths informally told Mr De Saint Quen about the alleged complaint*: I find that Mr De Saint Quen, as stated in his witness statement, was informally told by someone at BNY that they had encountered the claimant engaging in Crest fine manipulation whilst at GFI. This conversation happened at some point in May 2023, after Mr Michael Davies had told Mr De Saint Quen about a similar conversation. Mr De Saint Quen did not say in his witness statement who this BNY person was. Mr De Saint Quen also would not tell the Greenberg investigators who this person was. Mr De Saint Quen did tell this Tribunal though, when asked directly in cross-examination. The relevant person at BNY was Mr Mark Griffiths, namely, the same person that had told Mr Michael David the same thing earlier that May. I have no reason to doubt Mr De Saint Quen's evidence that he then reported this directly to Mr Mike Anderson, the most senior person in the firm.

107. I therefore find that Mr Mark Griffiths (BNY) informally told both Mr Michael David and Mr De Saint Quen on separate occasions in May 2023 that the claimant's practice of Crest fine mitigation resulted in BNY having relationship difficulties with GFI. I make no factual finding on whether this rumour spread by Mr Mark Griffiths was in fact true, as I have not been shown any evidence of the alleged complaint.

108. In any event, I find that, even if Mr Mark Griffiths' allegation was indeed true, the claimant was not aware that BNY had made a complaint to GFI about his Crest fine mitigation practice. None of the respondent's witnesses suggested that the claimant had actually been informed of this alleged complaint.

109. Therefore, I accept the claimant's evidence that, while at GFI, he was unaware that his practice of Crest fine mitigation had allegedly led to BNY complaining about him specifically to GFI.

110. Presuming for the sake of argument that Mr Mark Griffiths' allegation was indeed true – namely that the claimant's practice of Crest fine mitigation resulted in a BNY complaint to GFI – it would not have been possible for the claimant to inform the respondent of this complaint at the outset of his employment, nor any time thereafter, because he did not know of any such complaint.

Mr Anderson's decision that he wanted the claimant out in Spring 2023

111. Mr Anderson admits that he had already decided by Spring 2023 that he did not want to retain the claimant as an employee. Mr Anderson says in his witness statement that the claimant was more trouble than he was worth, noting "the cost to Tradition, in terms of the damage to our relationship with BNY, the fines that we were incurring, together with the significant expense we were incurring with Greenberg Traurig." This shows that Mr Anderson blamed the claimant for the relationship problems with BNY, which I have already found cannot fairly be attributed to the claimant, and that Mr Anderson blamed the claimant for the cost of the Greenwich report, which again, cannot fairly be attributed to the claimant alone as the problems were far wider than that.

112. Mr Anderson had already decided by Spring 2023 that he did not want to retain the claimant before his verbal briefing with Greenberg in August 2023 and before he knew about the claimant's two written warnings at GFI.

113. Mr Anderson had a couple of conversations with the claimant about his future in the first half of 2023, which the claimant covertly recorded, where Mr Anderson was trying to help the claimant move on.

Claimant interviewed by Greenberg in July 2023

114. The claimant was invited to interview on 13 July 2023 and the interview itself took place on 26 July 2023. The invite letter stated that the meeting did not constitute disciplinary action. It also stated as follows: "Once the investigation is concluded, a decision will be taken as to whether formal disciplinary proceedings are needed. If we decide that formal disciplinary proceedings are needed, you will be invited to a disciplinary hearing (at which you will be able to respond to any allegation against you)…"

115. Greenberg made a note of the meeting but it was not a verbatim record. The record was provided to the claimant on 11 August 2023 and the claimant sent back his comments and amendments thereafter.

116. Greenberg Traurig reached a number of critical findings about claimant after this interview. It is with some reluctance that I find myself in a position where I have to make findings of fact about a report prepared by a law firm that cost over £1m and took eight months to complete (extracts of which are heavily redacted in the bundle), when I have had less than six days to consider the extensive evidence in this hearing. But, alas, I need to make findings of fact as to what happened here.

117. I will summarise Greenberg's four main critical findings about the claimant and then set out my own findings.

a. Greenberg found that the claimant was not open and honest with the investigation, which amounted to a breach of the FCA Code Conduct rule 1 (integrity). I find that the claimant, in his interview with Greenberg, downplayed his extensive involvement in the management of Crest fines. As I have already found, I find it implausible that the claimant did not know that internal switching was occurring from April 2021 to April 2022, so I agree that the claimant was not fully transparent throughout the process.

b. Greenberg found that in devising the internal switches with Mr David, claimant breached the Code of Conduct rule 1 (integrity), the claimant knew of the material risks that arose from that course of action but nonetheless introduced switching without raising those risks to respondent, and he did so for his own financial interests. My own finding here is that managing risk and making money was the claimant's job. The claimant had been directly asked for advice about Crest fine mitigation by his seniors. It was Mr Michael David that had invented and conducted the internal switches, although the claimant was aware of this practice. And the claimant was not aware that BNY

had allegedly made a complaint to GFI about his Crest fine mitigation practice and so was unable to raise this as a risk because he did not know about it.

c. Greenberg found that the claimant was a Head of Desk and an experienced regulated individual, that the internal switches were important processes that significantly boosted his desk's profitability, and that claimant's failure to raise this with Tradition Legal and/or Compliance was a breach of Code of Conduct rule 2 (due skill care and diligence). My own finding here is that it was Mr Michael David that invented and conducted the internal switches, so it was him that could or should have raised issues about that with legal and/or compliance. I have found though that the claimant was aware of this practice. I have also found that the claimant could have sought further clarification about the rules from seniors.

d. Greenberg found that the claimant was aware that the respondent did not want to be involved in Crest fine avoidance, and that counterparties might object, when he engaged in splitting in October 2022. Greenberg say he deliberately went against the respondent's stance and acted recklessly in exposing them to (at the very least) serious difficulties, which was a further breach of Code of Conduct rule 1 (integrity). My own finding is that the claimant was not aware in October 2022 that Crest fine mitigation was prohibited, which is why he was doing it openly. I have already found that the claimant was not made aware that Crest fine mitigation was prohibited until he was suspended in early November 2022, so he could not have deliberately gone against the respondent's stance if he did not know what the respondent's stance was.

Verbal briefing from Greenberg to Mr Anderson in August 2023

118. In mid to late August 2023, Mr Anderson had a meeting with Mr Mathew Hancock and another partner at Greenberg, as well as Tradition's own in-house lawyer. Mr Anderson received legal advice during the course of that meeting. All witnesses were very careful not to waive privilege in their oral evidence (including by heavily redacting extracts of the Greenwich Report in the bundle). Greenberg set out their conclusions to Mr Anderson verbally, although at that point the report had not been written. Greenberg told Mr Anderson that they had concluded that the claimant had demonstrated a lack of integrity, had acted without due care and attention, and was not a fit and proper person.

119. Mr Anderson said in oral evidence that Greenberg had essentially told him that the claimant was a 'bad apple'. Mr Anderson said in oral evidence that he did not ask for more information on why or how Greenberg had made this finding. Mr Anderson said in oral evidence that he felt misled, as he relies on people being honest, and that he felt 'incredibly let down, shocked and furious.'

Dismissal without notice in August 2023

120. Mr Anderson was aware of the existence of employment law and that normally, he would have needed to suspend the claimant, and then go through a disciplinary process. But Mr Anderson said that he worried that any disciplinary process might be protracted (e.g. by claimant going on sick leave) and felt it was more appropriate – after the verbal briefing with Greenberg – to terminate the claimant immediately.

121. Mr Anderson called claimant on 31 August 2023 and dismissed the claimant for gross misconduct (i.e. without notice). The claimant, again, covertly recorded this conversation. In the transcript, it is clear that the claimant is seeking to understand the grounds for dismissal, but Mr Anderson is not entirely clear, saying that he knew full well what he had done at GFI, and brings the call to an abrupt end. Mr Anderson did not know about the claimant's historic written warnings at GFI at this time, so presumably he must have been referring to the rumour spread by Mark Griffiths (which Mr De Saint Quen had passed on to Mr Anderson) that BNY had allegedly complained to GFI (when the claimant worked there) about the claimant's Crest mitigation practices.

Termination letter in September 2023

122. The next day, on 1 September 2023, the respondent sent the claimant a termination letter summarising the allegations against the claimant as follows:

> "The reason for your dismissal is that Greenberg Traurig (who as you know are carrying out investigation in respect of certain matters) has reached the conclusion that you have: a) been dishonest in failing to disclose your previous involvement at GFI, your previous employer, with certain practices to reduce project Crest fines and the related consequences; b) been reckless as to the significant commercial, financial, reputational and regulatory risks to the Company of splitting trades in the course of 2022."

123. As to the first reason, the claimant was asked for advice about Crest fine mitigation and he did, in fact, disclose that GFI had a practice of mitigating Crest fines. So he did not fail to disclose this. The reference here to 'related consequences' appears to be a reference to the allegation that BNY complained to GFI about his practices. Even if BNY did complain to GFI about the claimant's Crest fine manipulation practices (on which I make no factual finding), the claimant did not know about it and so could not have been dishonest in failing to disclose this.

124. As to the second reason, as I understand it, the claimant's job involved managing risk, which is what he was doing. The claimant was directly asked by seniors for his advice on how to mitigate Crest fines, which he duly gave. If the respondent thinks the claimant was managing risk recklessly in 2022, then the firm at large was doing so recklessly, as they all appeared to think it was permissible (for differing periods of time). I do not consider it reckless that the claimant was splitting trades for the majority of 2022 as the claimant was not properly and clearly informed by his employer that Crest fine mitigation was prohibited until early November 2022. After the claimant knew it was prohibited, he did not do it again. It is

also relevant that the other settlement agent, BNP, had documented no issue with splitting, so it is difficult to argue that the practice of Crest fine mitigation was reckless across the board.

125. Mr Anderson said in his oral evidence that if he had known about the previous two written warnings at GFI, he would have dismissed the claimant for that alone. As I have already found, the failure to disclose these two written warnings was not a breach of contract. The two written warnings at GFI had come off his record by the time he moved to the respondent. They were, in any event, not related to Crest fine mitigation. Furthermore, GFI in its original reference did not mention the written warnings, and clearly stated they had no grounds for concern about the claimant's fitness and propriety. GFI did not express any such concern in the 2023 reference either.

Disciplinary proceedings

126. No disciplinary hearing took place.

Appeal proceedings

127. The claimant was not given any right of appeal against his dismissal.

Payment of bonus

128. The claimant's share of the Bonus Pool was a discretionary amount decided by agreement between claimant and the CEO (clause 5.3 of contract). So the claimant's bonus would have needed to have been agreed by Mr Anderson. The bonus was paid three times a year and the next payment after the claimant's dismissal would have been around 17 October 2023.

129. Mr Anderson's evidence is that if the claimant had not been dismissed on 31 August 2023, he would not have agreed to have paid him a bonus in October 2023. As it is a discretionary bonus, Mr Anderson is entitled to exercise his discretion accordingly. I do not pretend to know anything about how CEOs of companies like the respondent exercise their discretion in allocating bonuses. I find that there is nothing inherently irrational about Mr Anderson's decision to not pay the claimant a bonus. Mr Anderson provided a number of reasons why he would have decided not to pay the claimant a bonus, including that notice would have been served lawfully by mid-October 2023 anyway and once it had done so, a bonus was not payable under clause 5.5, and that instances of serious misconduct or underperformance were one of the matters to take into account when deciding the amount of any bonus payable (clause 5.3).

Conclusions – unfair dismissal

130. I now need to decide whether the respondent acted reasonably in all the circumstances in treating the misconduct as a sufficient reason to dismiss the claimant.

Genuineness of belief and reasonable grounds

131. I find that Mr Anderson held a genuine belief that the claimant was guilty of gross misconduct and I am satisfied that Mr Anderson held this belief on reasonable grounds. This is because he instructed an independent law firm who conducted a lengthy and thorough investigation that went far beyond what would ordinarily be seen in an employment setting, and this law firm called a meeting to tell him that the claimant was dishonest, lacked integrity and was not a fit and proper person.

Investigation and procedures

132. As to the investigation conducted by Greenburg, I have already set out where my findings differ from Greenburg's findings. If the respondent had followed through with a disciplinary hearing and an appeal, and the claimant was given a chance to explain, the evidential underpinnings beneath Greenburg's investigatory conclusions might well have been explored and examined, as I have explored and examined them. That is, after all, why employment law endorses three stages (namely, investigation, disciplinary and appeal) and why is it best practice for the three stages to be conducted by a different person each time.

133. Employers are expected to have regard to the principles for handling disciplinary and grievance procedures in the workplace set out in the Acas Code of Practice on Disciplinary and Grievance Procedures ('the Acas Code'). I have taken into account the size of the respondent and the relative administrative resources available to it.

134. The respondent concedes unfair dismissal on procedural grounds. To particularise this, I find that the respondent was in breach of paragraphs 7 (investigatory meeting should not by itself result in discipline), 9-12 (informing the employee of the problem), 13-17 (allowing the employee to be accompanied at the disciplinary hearing), 23 (fair process should be followed before dismissing for gross misconduct), and 26-30 (providing employees with an opportunity to appeal) of the ACAS Code.

135. These breaches are extensive: far closer to total than partial. They were deliberate. There are no mitigating circumstances. And the respondent is not in any way short of resources. I have no hesitation in finding that the uplift should therefore be the full 25%.

Band of reasonable responses

136. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances.

137. I do not think that it is within the band of reasonable responses for the employer to summarily dismiss the claimant in the manner that they did for the reasons that they stipulated. I therefore find that the respondent did not act reasonably in all the circumstances for all the reasons set out above, including the following:

a. The respondent has invited me to find that at all material times Crest disapproved of transactions that were structured in order to circumvent the Crest fine system and, from at least January 2020, the claimant knew (or reasonably ought to have known) that this was the case. I do not accept this. I have found that the claimant did not know the rules around what was and was not acceptable in relation to Crest fine mitigation. The rules around Crest fines were evidentially not clear. The respondent did not make their policy on the matter clear to the claimant until he was suspended in early November 2022. Overall, there is no evidence either that the respondent genuinely took the position that Crest fine mitigation practices were wrong until November 2022, or that the respondent properly and consistently disseminated its stance on this issue to their employees.

b. The procedure in relation to dismissal was an extensive and deliberate breach of the ACAS Code. The ACAS Code is designed to ensure that an employee has a chance to defend themselves. If the claimant had properly known the extent of the allegations against him, had access to the various reports detailing complaints about him, had insight into all the information that had been spread about him on the grapevine in private chats or pub conversations etc, he would have been able to defend himself by explaining, *inter alia*, that:

    i. At no point until November 2022 had it been clear that the respondent prohibited Crest fine mitigation practices;
    ii. He was not aware of the allegation that BNY had complained to GFI about his Crest fine mitigation practices, if indeed that even happened; and
    iii. The two written warnings at GFI previously were not connected to Crest fine mitigation and that they had been spent, so that is why both he and his previous employer did not think it necessary to disclose them.

c. I also do not think it is within the band of reasonable responses for the employer to have decided that it was the claimant responsibility to educate the firm about what was and was not legitimate about Crest fine mitigation. It was unclear what was and was not acceptable. Even Crest itself was unclear as they had notified about a possible rule change on the issue and then not brought the rule into effect. The respondent's witnesses seemed to believe that because the claimant knew more about Crest fines than they did, that it completely absolved them of responsibility. In my view, it did not.

d. I have also found that the notice of termination from BNY to the respondent was not caused by the claimant. It appeared from the evidence that many factors were at play here, including pre-existing high tensions between BNY and the respondent, the Russia/Ukraine war, Mr Tristan de Saint Quen's inaccurate response to BNY's questions, as well as BNY's unhappiness about the respondent's Crest fine mitigation practice (N.B. no one told the claimant about the latter). It is also worth remembering that the other settlement agent, BNP, were not concerned about Crest fine mitigation and had in fact

advised the respondent how to do it. It is therefore not within the band of reasonable responses to pin BNY's notice of termination solely on the claimant.

Conclusions on compensation/adjustments

Polkey (no difference)

138. If the investigation and disciplinary procedure had been conducted fairly, it is 50% likely that this respondent would have dismissed the claimant in any event.

139. I find that a fair procedure would have likely taken one month longer than it did. I accept Mr Anderson's evidence that he would have asked Greenberg for a short version of the report. And I accept Mr Hancock's evidence that it would have taken up to two days to produce such a report just dealing with the claimant. I accept the respondent's submission that they would have gone through the disciplinary and appeal processes, which would have taken a couple of weeks each.

140. I find it would have only been 50% likely to have resulted in dismissal in any event, because if the fair procedure had been followed, the claimant would have been able to show that many of the accusations, including those in the Greenwich report, were substantially unfair. Even if he had shown this, I find that he was 50% likely to be dismissed anyway, because the claimant was not transparent about the fact the he was aware of internal splitting practices as well as splitting practices, that Mr Michael David did not tell him in June 2022 that Crest fine mitigation was allowed, that he did not seek guidance and clarity from management when he could have, and that he underplayed his role in Crest fine mitigation in the Greenberg interview. Additionally, the respondent stated that it wanted to exit the business conducted by the claimant's desk anyway so they could have conducted a fair redundancy process in due course had they wanted to.

ACAS Code of Practice

141. I have already found that the respondent breached relevant ACAS Code of Practice extensively and deliberately. I have no hesitation in finding that the uplift should therefore be the full 25%.

Contributory fault

142. I find that the claimant's conduct was culpable or blameworthy to the extent that he did know that internal switching was happening (when he said he did not), that he should have sought clarity and guidance on Crest fines from management, that it was not correct that Michael David told him in June 2022 that Crest fine manipulation was allowed, and that he underplayed his role in Crest fine mitigation in the Greenberg interview. The contrast between claimant's approach and that of Mr David and Mr De Quen, who both fully accept that they made mistakes, is notable. And Mr Anderson was clear in his evidence that he just did not trust the claimant anymore. I therefore make a reduction to the award for contributory fault of 50%.

Just and equitable as a whole

143. Having looked at these adjustments on a culminative basis and altogether, I find that they are just and equitable in the circumstances of this case as a whole.

Conclusions on notice pay

144. The respondent's policy included as examples of gross misconduct: deliberate disobedience or persistent refusal to obey a lawful or reasonable instruction; reckless behaviour or serious negligence which causes or might cause unacceptable loss or damage; and a serious act which breaks the mutual trust and confidence, or which brings or is likely to bring the Company into disrepute.

145. I have found that the claimant was aware that internal splitting was occurring when he claimed that he was not aware, I have found that he underplayed his role in Crest fine mitigation in the Greenberg interview, that he did not seek guidance and clarity from management about what was and was not acceptable when he could have, and it is a faulty and incorrect memory that Mr Michael David told the claimant in June 2022 that Crest fine manipulation was allowed. I find that none of these acts on their own, or together, amount to gross misconduct. The claimant was not deliberately disobeying the respondent as he did not know what the respondent's position was until he was suspended in November 2022, his behaviour as to mitigating fines was a way of managing risk and if the respondent considered that reckless then the firm was reckless as a whole and it should have made its position on the issue clearer earlier, that there was no act serious enough in and of itself to immediately break mutual trust and confidence or bring the firm into disrepute. It appears that other employees, such as Mr Michael David and Mr Tristan De Saint Quen, made mistakes too, but the respondent felt this was remediable with training or other steps short of dismissal.

146. I therefore find that the claimant's claim for notice pay is well-founded. The relevant notice period in this case is 17.5 weeks.

Conclusions on counter-claim

147. The respondent's counter-claim relies on clause 5.6 of the contract, as set out earlier, which states that if an employee 'otherwise ceases to work for the respondent' they need to repay a pro-rated part of their signing bonus. It would be a surprising and unfair reading of the contractual language to say that the employer can unfairly dismiss an employee and then ask for what is essentially a refund on its signing bonus. The respondent has already breached the contract by terminating the claimant's employment unfairly; and would be seeking, after repudiating the contract, to rely on its terms to claw money back from an employee. This cannot have been the intended meaning and consequence of this contractual term. The respondent's counter-claim is therefore not well-founded and is dismissed.

Approved by:

Employment Judge Murdoch

19 May 2025

JUDGMENT & REASONS SENT TO THE PARTIES ON

20 May 2025

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FOR THE TRIBUNAL OFFICE