JJE

EMPLOYMENT TRIBUNALS

Claimant: **Mr P Ktorza**

Respondent: **JP Morgan Securities Plc**

Heard at: **East London Hearing Centre**

On: **19-23 February 2018**

Before: **Employment Judge C Lewis, sitting alone**

Representation

Claimant: Ms D Romney, QC
Respondent: Mr Bruce Carr QC

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

The Claimant's claim for unfair dismissal fails and is dismissed.

REASONS

Issues

1. The Claimant brought a complaint of unfair dismissal. The Respondent relied on the Claimant's conduct and/ or some other substantial reason, namely a break down in trust and confidence, as the reason for dismissing him.

2. The issues that the tribunal had to decide are as follows:

2.1 What was the reason for dismissal?

2.2 Did the Respondent have a genuine belief in the Claimant's misconduct and/or that there was a break down in trust and confidence?

2.3 If so, did the Respondent act reasonably or unreasonably in treating this as a sufficient reason to dismiss the Claimant? In particular:

2.4 Did the Respondent carry out a reasonable investigation into these allegations?

2.5 Did the Respondent have reasonable grounds to believe that the Claimant was guilty of this misconduct and/or that there was a break down in trust and confidence?

2.6 Did the Respondent follow a fair disciplinary procedure?

2.7 Did the decision to dismiss fall within the range of reasonable responses to the Claimant's misconduct?

3. If the Tribunal finds that the Claimant was unfairly dismissed because the Respondent failed to follow a fair procedure, should any compensation be reduced to reflect the chance he would have been dismissed in any event?

4. If the Tribunal finds that the Claimant was unfairly dismissed should any compensation awarded to him be reduced for contributory fault?

Procedural Matters

5. The first day of the four day hearing was listed as a reading day with the parties not attending. The parties attended on the second day. Two procedural matters were raised at the outset of the hearing. This hearing was following a remittal from the EAT, on this occasion the Respondent intended to call a witness, Mr Wacker, who had not been called at the original hearing. Ms Romney QC objected to this (the Employment Judge had not included his statement in her pre-reading).

6. At the previous hearing much criticism had been made in the Claimant's submissions of the Respondent's failure to call Mr Wacker to give evidence. He was someone who had provided training in respect of 'Project January' and the Respondent's rule or policy on 'short fill'. The Respondent intended to call him on this occasion to introduce evidence as to the training he had provided. Ms Romney sought disclosure of Mr Wacker's disciplinary record in order to attack his credit. In essence submitting that as Mr Wacker was being called to attack the Claimant then it was right to have his own honesty put into question.

7. The Respondent resisted that submission and informed the Tribunal that the Respondent's legal team had considered the question of disclosure and were satisfied that there was nothing in any disciplinary record relating to Mr Wacker that brought his honesty or integrity into question. Mr Carr QC submitted that the Claimant was simply on a fishing expedition.

8. The Claimant's application was refused for reasons given orally at the hearing.

9. The Respondent then made an application under Rule 50 for a Restricted Reporting Order in respect of Mr Wacker's evidence which was in turn refused for the reason s given orally.

Evidence before the Tribunal

10. The Tribunal was provided with a bundle containing witness statements from the Claimant, from Mr Ryan O'Grady, Mr David Hudson and Mr Scott Wacker. The Tribunal was also provided with two lever arch bundles of documents and a bundle of authorities from the Claimant.

Findings and Facts

11. The Tribunal made the following findings based on the evidence before it.

12. The Claimant was employed by JP Morgan Securities Plc from 10 June 2008 until 11 September 2015. At the time of his dismissal, he held the title of Executive Director and worked in the Europe, Middle East and Africa (EMEA) Foreign Exchange (FX) Sales within JP Morgan's Corporate and Investment Bank at 25 Bank Street, London. The Claimant's role was a controlled function regulated by the Financial Conduct Authority.

13. The Claimant's line managers were Mr Leffen, Managing Director EMEA FX Sales Head and Matthew Wiltz, Managing Director EMEA FX Sales, Head of Markets, France BeNeLux. The Bank's Global Head of FX Sales was Scott Wacker.

14. On 31 October 2014 there was an incident which eventually led to the Claimant's dismissal. It is accepted by the Respondent that this incident caused no loss to the Bank, or customer complaint or regulatory investigation.

15. On 10 November 2014 the Claimant was informed by Mr Leffen that he was being suspended on full pay pending investigation into his alleged conduct in relation to a recent trade (the trade on 31 October). This was following a report to Mr Leffen on 3 November 2014 by a trader involved in the transaction, Karim Mir, who raised a concern about the Claimant's conduct with his line manager and the Trading team which had been brought to Mr Leffen's attention as manager of the Sales team. The concern raised was that the Claimant had acted inappropriately in relation to a client FX transaction and that the Claimant may have, without first consulting with the relevant trader and without authorisation, withheld "fill" of 5 million euros/US dollars from the client, contrary to JP Morgan's practices and the position conveyed as part of **"**Project January" associated training delivered to Sales and Trading staff.

Project January

16. In early 2014 the Bank was in the process of formulating a new mandatory training programme under the name 'Project January'. The programme was being rolled out to all Corporate Investment Bank Sales and Trading staff globally. It covered a number of

themes and was aimed at reminding everyone of the Bank's expectations around sales and trading practices, enforcing expectations on certain areas such as confidentiality, client communications and also confirming the Bank's specific sales and trading practices. This was against a background of increased scrutiny by regulatory and law enforcement bodies across a number of jurisdictions including the US Department of Justice (DOJ) and the Financial Conduct Authority (FCA) in the UK; financial scandals and prosecutions for example, Libor, price fixing and market manipulation allegations and against the background of prosecutions in the US in respect of misleading or lying to clients.

17. Project January was led by the Sales and Trading business in partnership with Oversight and Control, Legal and Compliance Practices within JPM and was over and above regulatory or legal requirements.

18. Mr Wacker was one of a number of senior managers who was designated as a trainer. He ran a number of training sessions on Project January in July and August 2014. He co-presented with Howard Lello, an Executive Director from the Bank's compliance function. The training sessions were given to around 15-20 people at a time, each session followed the same format and lasted 1-1.5 hours. Mr Wacker used the slide deck which is in the bundle (pages 511-517). Copies of this presentation were made available at the start of the session but had to be returned at the end of each session. The bundle (page 519) also contains the Claimant's training record which records that he attended the relevant session on 27 August 2014. This was Mr Wacker's final session in the series of training sessions and he believed it included some non-FX sales people as well as members of the EMEA FX Sales team.

19. Mr Wacker explained that he worked his way though each section of the training document in each session and emphasised that Project January was not about changing JPM culture but re-enforcing enhanced expectations around the conduct of Sales and Trading personnel, clarifying the Bank's position on certain specific practices and the key do's and don't's. Moving into communication and then trading practices, he drew particular attention to the obligation not to mislead clients and to the information that could be provided to clients. The final section was on trading practices (found at page 517 of the bundle). The first topic under that section was under the heading "*Order Management*" which was about filling client orders. Mr Wacker had previously conducted specific training sessions in April for his FX Sales teams which had gone into detail about order-filling practices and his expectations, including the practice of short-filling. The Project January slide deck was for general use across Sales and Trading and short-filling was limited to the FX business. The Project January slide deck did not talk specifically about short-filling, but it did cover the filling of all client orders. The Respondent's position was that it was Trading who had the right to decide if and when to fill a client order and that although Sales and Trading could consult on how to fill orders, Trading would have the final say. The reason for this was explained by reference to the fact that Trading would have the full set of information about all client orders and the Bank's risk position, this was consistent with the Respondent's position that running risk was the sole domain of Trading and not Sales.

April/May 2014 Training

20. Before the delivery of the Project January training programme, and whilst it was being formulated, Mr Wacker decided that he wanted to deliver some focussed training to

his FX Sales team to describe and work through some of the more nuanced sales practices and his expectations about them. His intention was that every FX Sales person would know with clarity which activities were permissible and which were not. He also wanted to reinforce existing messages and expectations around other important topics, particularly communication with clients, confidentiality and market colour. Mr Wacker delivered this training to all of his EMEA FX Sales team and attendance was mandatory. He put together a series of 15 worked examples, copies of the template from these training sessions were in the bundle (pages 495-496); the document from the 29 April 2014 training session (pages 503-504) includes the Claimant's initials PK in the initials of the attendees at the top of the page. Example 6 of the 15 examples was specifically a scenario addressing short fill: on the second page, of the document from 29 April is an annotation "short filled orders-disallowed" from which Mr Wacker concluded that the discussion on that occasion specifically addressed the prohibition on short fill by Sales. The Claimant did not remember attending this training, he suggested that he may have left the training session part way through to take a client call or for some other reason.

Trading Concern 31 October 2014

21. The concern raised by Mr Mir about the Claimant's actions on 31 October 2014 was that he had, without first consulting the trader and without authorisation, withheld fill (5 million euros/US dollars) from the client contrary to JPMorgan's practices and in particular, contrary to the position conveyed as part of Project January and the associated training delivered to Sales and Trading staff. This led to the Claimant being suspended on full pay on 10 November 2014 by Mr Leffen. The suspension was described by the Respondent as a "neutral measure" pending an investigation/review of the issue in question. In accordance with regulatory obligations, the suspension of the Claimant was notified to the FCA on 13 November 2014.

22. The Claimant attended what has been described as a 'fact finding' interview led by external lawyers acting for JPMorgan on 26 November 2014. This fact finding interview discussed the transaction in question amongst other matters and was not simply confined to that transaction. The Respondent asserted legal privilege with respect to this interview, that assertion was not challenged before me.

23. On 24 November 2014, Mark Goulden, Managing Director of EMEA Marking and Investor Services Compliance wrote to the FCA in the following terms in respect of the Claimant's suspension:

> "*Mr Ktorza was executing an institutional client instruction to buy 50m Euro vs USD at a limit of 1.2549. It is understood that a JPM trader informed the salesperson that he filled an initial 10 million at the limit price. Thereafter, the exchange rate moved up to 1.2557. It appears that the salesperson then attempted to sell 5m of the initial 10m back to the trader. The JPM trader declined and after further discussion between the trader and salesperson the original 10m was left in place and we don't believe, at this point, there was adverse impact for the client. The matter escalated to Trading and Sales management over the course of the following business days. The issue was escalated to Compliance on the afternoon of Friday 7th November. Mr Ktorza is under a live Final Written Warning under the JPM Disciplinary Procedure for running an authorised [sic] risk position following an error on a previous occasion. The firm is evaluating whether*

his conduct may have been contrary to the JPMorgan Code of Conduct as regards fair dealings with clients and internal practices vis a vis the filling of a client instruction at trader discretion.

Compliance has commenced a review of the conduct of the individual and associated communications and bookings, including interviews with other individuals involved in the matter. It is planned that Mr Ktorza will be interviewed later this week."

It was common ground that the description of the final written warning should read 'an *un*authorised risk position'.

Final Written Warning

24. The reference to a live Final Written Warning was to the warning issued to the Claimant dated 3 February 2014 [p131-134] for conduct which, amongst other matters, was found to have '*breached business practices with regards to unauthorised running of risk'*, specifically the conduct in question, which was admitted on that occasion by the Claimant, was that when executing a trade with the client the Claimant "*intentionally decided to 'run risk' on the trade … . The correct process would have been to cover the risk with the trading desk prior to trading. Running risk is not within the remit of Sales role and therefore it is alleged that you have acted outside your authority*"

25. The Claimant was given a final written warning which '*given the seriousness of the issues raised*," was to be live for a period of 24 months The warning letter also stated that "*Any further incidents of misconduct during this 24 month period is likely to result in further disciplinary being taken, including, if circumstances warrant it, your dismissal'.*

26. The Claimant did not appeal that Final Written Warning nor did he dispute that it was live at the time of the trade on 31 October 2014. His Counsel however, on his behalf, sought to distinguish the conduct for which it had been given from that of the October incident.

Disciplinary process

27. The Claimant remained on suspension from 10 November 2014 until 11 May 2015 when he was invited to attend a hearing at 3 days notice on 14 May. This was re-arranged at the Claimant's request to the 22 May 2015.

28. The Claimant's suspension had a number of financial implications for him. He was advised on 16 January 2015 that the vesting of outstanding restricted stock unit awards scheduled to take place on 30 January 2015 had been suspended pending the outcome of the ongoing review into his conduct and that a decision on his total compensation effective from 1 February 2015 and any discretionary incentive compensation for the year 2014-15 and his bonus would also be suspended.

29. The Claimant acknowledged that the period of suspension coincided with a period of widespread press comments regarding FX trading practices at the Bank and other investment Banks with related regulatory investigations. The Respondent's own internal

investigations resulted in the issuing of a number of "Disclosure Notices" including one on 20 May 2015 [p175-176] which acknowledged the practice of "partial filling" of client orders without informing clients as to the reasons.

30. Mr O'Grady, Co-Head of the Global Fixed Income Syndication business, was approached by Suzanne Bywater (then Vice President Employee Relations) in late March 2015 and asked to chair the disciplinary hearing. He did not hear anything further until late April when Ms Bywater contacted him to arrange a date for the disciplinary hearing. He pointed out that he had not received any documentation about the case and this was provided to him by Ms Bywater shortly thereafter. On 11 May 2015 Mr O'Grady wrote to the Claimant [p156-158] inviting him to attend a disciplinary hearing and setting out the allegations he had to meet. The first allegation set out the circumstances of the trade itself, which was not disputed by the Claimant; the second was that

> "*under JP Morgan's practices, Sales personnel are not authorised to withhold fill from a client that the trader has conveyed to the salesperson without first consulting with the trader. At JPMorgan, the trader, and not the salesperson, is ultimately responsible for determining the volume of fill to be provided to the client. You were made aware of this restriction on at least one occasion prior to the transaction, including a training session on 27 August 2014. … in conveying only a portion of the fill to [the client] in connection with this transaction, and without consulting the trader, you acted without authorisation and in breach of JPMorgan's express policy as announced in 2014*."
>
> The letter also informed the Claimant that
>
> *"[the] alleged conduct, if upheld, reflects a breach of the standard of behaviour and conduct which is expected from all JPMorgan employees, and may be sufficient to amount to gross misconduct and/or to irreparably damage the trust and working relationship between yourself and JPMorgan. It may also amount to a material failure to comply with your obligations under JPMorgan's Code of Conduct to comply with the Firm's business practices, policies and procedures that apply to you.*
>
> *You should be aware that, as a result of this meeting, disciplinary action may be taken in line with JPMorgan's Disciplinary Procedure, including, if the circumstances warrant it, your dismissal*"

30. Also enclosed with this letter was a copy of the Final Written Warning which was issued to the Claimant on 3 February 2014 and which remained live. The Claimant was informed that:

> *"The relevant documentation in relation to the ……. transaction, which was shown to you during the investigation stage, will be available at the disciplinary hearing. If you require additional time to review these documents please contact Susan Bywater……..to arrange a mutually convenient time"*

31. On 13 May the Claimant sent an email requesting some documents that his lawyers had been trying to contact Ms Bywater about. On 12 May Susan Bywater emailed

the Claimant confirming their telephone conversation the previous day in which he had asked for more time to prepare for the disciplinary hearing. She also asked the Claimant to confirm when he would like to attend the office to review the pack of information [p174]. The pack included documentation supporting the transaction itself and the chat between the Claimant and the trader involved and the Claimant and his client. The Claimant also requested a copy of the Project January documentation. Ms Bywater sought authorisation to release the Project January document (the slide deck) outside the business and later attempted to send it attached to an email but this was prevented by the Respondent's firewall and the document was sent by courier to the Claimant's solicitors. The Claimant had the Project January document prior to attending the disciplinary meeting but only at the last minute, however he was able to produce a 4-page statement addressing the allegations and referred to the contents of the Project January documentation in that statement, [Page 189-192].

32. The disciplinary meeting was held on 22 May and attended by the Claimant, Mr O'Grady and Suzanne Bywater. The minutes of that hearing are in the bundle (at pages 221 -225). The arrangements for the meeting and the decision that it would not be appropriate to allow the Claimant's line manager Mr Leffen to accompany him was discussed at the outset. Mr O'Grady explained in his evidence that this was because Mr Leffen was the Claimant's line manager and it was thought there might be a conflict between the two roles. Mr O'Grady told the Claimant that he had read through the pack and had spoken to people to get context around various areas of the business and an understanding of the market practices. He invited the Claimant to give a summary of what had unfolded. The Claimant asked to be able to read out his statement, which he did making additional comments as he went through. Mr O'Grady queried the Claimant's recollection of the Project January training being that the guidance was ambiguous at best, Mr O'Grady pointed out that the risk-taking remit seemed to be clearly defined. The Claimant response was that at no point was he spoken to about the risk-taking remit. Mr O'Grady probed with Claimant as to his understanding of risk and what was expected following Project January and also asked him whether he felt the outcome of the disciplinary in February was fair. The Claimant acknowledged that what he did last year was an issue as he was running risk which was not in his mandate, but that this had happened for specific reason, he then explained the circumstances. Mr O'Grady explained that he was trying to understand why the Claimant would be taking on risk, the Claimant responded by asking how there could be a big change which was unclear with no policy. Mr O'Grady repeated that he wanted to focus on how running risk works in the Claimant's part of the business, that he'd had initial conversation with Mr Hamilton to understand basic parameters and he would also speak to Mr Leffen, the Claimant's line manager. The Claimant suggested that he could speak to a number of people.

33. The meeting was adjourned for Mr O'Grady to consider what had been discussed. The Claimant's responses to Mr O'Grady's questions about the connection between short-filling and risk taking had given him some concern. The Claimant's view was that short-filling was not risk-taking and that it could be a 'win-win' situation benefitting both the client and the Bank, that he knew the market well and would only short- fill if he felt he would create a 'win-win situation and that there was no risk to the client or the Bank– this was consistent with the Claimant's evidence to the tribunal. Mr O'Grady was concerned that the Claimant did not show an awareness that all of this activity involved risk which needed to be considered and judgement applied.

34. Having reflected on the information in the pack and what was said at the meeting, Mr O'Grady thought there were three or four issues which he needed to follow up. He first wanted to speak to Mr Leffen who sat next to the Claimant and managed him and to Mr Mir to get his perspective from the trading side in respect of the specific transaction and short filling generally. He also wanted to speak to a cross section of senior management on sales and trading sides to revalidate some of the points raised about market practice and short-fill, the approach to risk and the remit for taking risk as between sales and trading, the level of clarity on the changed short-fill rules after Project January as well as the relationship dynamics. He decided to speak with Steven Jefferies (Managing Director, Head of EMEA Currencies and Emerging Markets Trading) and again with Mr Hamilton (Managing Director , Head of EMEA Rates and FX Sales). Mr O'Grady decided that it was not necessary to speak to Ms Jury as he had spoken to Mr Jefferies in the senior management perspective on the trading side. Mr Jefferies reported to Ms Jury her Co-Head, Mr Wacker and was based in London whereas Ms Jury was not and Mr O'Grady did not think that she would have any alternative view or other pertinent information. Given the seniority of those he needed to speak to, it took some time to arrange to have those meetings. Mr O'Grady believed they all took place in June 2015.

35. Mr O'Grady did not think it was necessary to speak to each of the people suggested by the Claimant but he spoke to those that he thought could add anything relevant: for instance he did not speak to the Claimant's peers to find out their understanding of short fill and Project January but he did speak to Mr Leffen who managed the Sales team. As a result of those discussions, Mr O'Grady came to the following conclusions – Mr Leffen recognised that the short fill incident was serious, he took the view that all of his team with the apparent exception of the Claimant, knew about the new guidelines and had modified their daily activity accordingly. He pointed out that short filling had been a widespread practice within EMEA FX Sales but that practice had ceased some time before the training in Project January was delivered in the summer of 2014. Mr Leffen told Mr O'Grady that this was evident in the fact that the Claimant's short fill on 31 October was the first occasion of a short fill by any member of the Sales team since the Project January training. Mr Leffen did not seek to advance any justification for the Claimant's conduct but did however explain that in his view the Claimant's actions were an oversight as opposed to a deliberate contravention of the rules and that he believed the Claimant when he said he had not been aware of the rules. Mr Leffen acknowledged that the Project January training had generated discussion on the desk which had taken people aback, but he could not recall any specific conversation with the Claimant. Mr O'Grady formed the view that Mr Leffen wanted to help the Claimant but that Mr Leffen was also aware that the Claimant's activity generated strong feeling by Trading peers and senior managers within Sales and Trading and this might have a detrimental impact on their level of trust.

36. Mr O'Grady spoke to Mr Mir and described his reaction as visceral. Mr Mir felt professionally compromised by the Claimant. Mr Mir described how when he refused to carry out the short-fill, the Claimant instead of completing the client's fill, left his desk and confronted Mr Mir about the rights and wrongs of the rules. As a result of the Claimant's approach, Mr Mir decided to escalate the matter to his senior manager. Mr O'Grady explored Mr Mir's reaction with him, Mr Mir made it clear that the incident had destroyed his trust in the Claimant, he could not trust him to play by the rules. Mr O'Grady explained that he took what Mr Mir said with a pinch of salt.

37 Mr O'Grady took away from his discussion with Mr Jefferies that his view from a senior Trading management perspective was there was no ambiguity in relation to the policy position, which had been reiterated through the Project January training, that any form of partial filling required prior consultation and approval by Trading. Mr Jefferies made it clear that in his view the Claimant's actions had genuinely damaged trust and confidence. He was aware of the previous final written warning and in his view this latest incident had served to further damage the already fragile level of trust in the Claimant and his ability to adhere to Sales remit and the evolving rules of engagement.

38. Mr O'Grady also spoke to Mr Hamilton on about three occasions after the initial disciplinary hearing to discuss the prevailing practices in Sales and Trading and from those discussions Mr O'Grady was satisfied the he was focussing on the relevant issues and that he had correctly understood what he had learned during the process.

The decision to dismiss

39. The disciplinary hearing was reconvened on 29 June 2015. Mr O'Grady did not set out what he had been told by the people he had spoken to in the interim and give the Claimant an opportunity to respond. He told the Tribunal that he did not see that this would make any difference because he was quite clear as to what the Claimant's position was. The Claimant had set his position out at the initial disciplinary meeting and he had made his further investigations in order to explore the Claimant's interpretation and explanation for his actions against the understandings of those in a position to comment. There was no purpose in simply going back to the Claimant to say they did not agree with him. Mr O'Grady felt that he was able to form a view having spoken to the relevant people, that he had reached a decision, and relayed that to the Claimant.

40. In summary he'd found that the Claimant had failed to distinguish between the Respondent's position on short fills which are permitted and its position on whose remit it is within to decide whether the short fill is appropriate. Mr O'Grady felt that there was no ambiguity either from Sales or Trading that short filling is the express domain of Trading and that in his view the Claimant's failure to distinguish between the remit of the Sales role and the Trading role was the key issue as it brought into question his ability to operate within the remit of his role.

41. Mr O'Grady considered that the Project January training programme provided a framework for employees to follow and at the Claimant's level, he would expect him to be able to properly interpret the firm's guidelines and to modify day to day behaviour accordingly. He also considered that there was a connection with his conduct on this occasion and the previous disciplinary in respect of which the Final Written Warning was live, he found that the Claimant had acted without authorisation and it demonstrated a pattern of unacceptable behaviour. He felt the disciplinary warning in 2013 was for a similar issue and it was reasonable for him to conclude that the Claimant should have been aware of the remit of his Sales role. Taking all that into account including the live Final Written Warning for the related incident, he concluded that the Claimant's conduct reflected a breach in the standard of behaviour and conduct that was expected of all JPMorgan employees and had irreparably damaged the trust and working relationship. He reached the decision to dismiss the Claimant with notice. He did not find that the conduct was gross misconduct but rather found there was a combination of events which led to a breakdown of trust in the working relationship. The Claimant was placed on

garden leave for his notice period

42. Mr O'Grady was conscious of the delay and the length of time that had elapsed between the suspension and the disciplinary. He felt that he progressed matters diligently and as timeously as was reasonable once he had been given the remit of conducting the disciplinary. He was clear however, that had the disciplinary hearing taken place sooner, the decision would have been the same for two reasons, first the underlying factual evidence and the testimonies of those he spoke to would not have changed and secondly there was no reason to think that the Claimant's defence to the allegations would have been any different or that he would have put forward any different grounds than those that he articulated in his written and oral submissions to him.

43. During the course of preparing for this Employment Tribunal hearing Mr O'Grady was made aware of the documents in support of the statement prepared by Mr Wacker, he had not been aware of them when he made the decision. Mr O'Grady also read the statement from Mr Wacker. In his view, the most striking feature of Mr Wacker's evidence was that one of the worked examples covered by Mr Wacker was of short fill unilaterally carried out by a Sales person without the knowledge of Trading; and that Mr Wacker's statement was to the effect that he explained during the training that such a unilateral practice by Sales was not allowed and the annotated copy of the training notes commented "*short fill order disallowed"*. Mr O'Grady was clear that had he spoken to Mr Wacker prior to making his decision to dismiss and been provided with this information, this would have reinforced him in his decision. Specifically, the clarity of the information about the April 2014 training reinforced Mr O'Grady in his conclusion that the Claimant ought to have known that a unilateral short fill by Sales was not permitted. In fact he believed that Mr Wacker's evidence would have removed the benefit of the doubt which he gave to the Claimant at the time, that is, that he did not know he was not allowed to carry out short fill. Mr O'Grady had concluded at the time that the Claimant ought to have known this.

The Claimant's Appeal

44. The Claimant informed Susan Bywater of his intention to appeal on 2 July 2015 and sent in his appeal letter by email on 31 July 2015. Mr David Hudson who at the time was the Managing Director, Global Head of Markets Execution was approached in early August 2015 and asked to hear the appeal against dismissal. The pack of documents was sent to him on 18 August 2015 by Ms Bywater with a reminder that he should not speak to anyone else or make his own enquiries on the matter before he had met with the Claimant at the appeal hearing. Mr Hudson confirmed that under the Respondent's process his role was not to re-hear the disciplinary case but to review the fairness and reasonableness of the decision reached by Mr O'Grady including the process he had followed.

45. The Claimant raised two grounds of appeal: firstly, that the hearing was procedurally unfair, and secondly, the disciplinary sanction was unreasonably severe. In respect of the procedural unfairness hearing he complained of 1) the length of his suspension; 2) the failure to provide him with all relevant documents in advance of the hearing; and 3) Mr O'Grady's failure to consider the position and understanding of the Bank with regard to Sales personnel being allowed to withhold fill at the relevant time and the fact that the position at that time was a change from only a few months previously. In

respect of the sanction, the Claimant took issue with the expectation set out by Mr O'Grady that the Claimant ought to have been aware of the practices and changed guidelines and to have sought clarification where he was unclear; he also sought to distinguish the conduct from the previous conduct for which he had received a final written warning.

46. The appeal hearing took place on 7 September, typed notes were produced and were in the bundle and Mr Hudson made some handwritten notes of his own including points to follow up afterwards. The Claimant's appeal grounds were discussed at some length and Mr Hudson spent some time exploring with the Claimant his understanding of risk and where responsibility for risk lay. In that context the Claimant was asked about the rule on short fill and his lack of knowledge of the change in practice. The Claimant told Mr Hudson that if the change in rule as to who was allowed to carry out short fill had come to his attention, he would have raised his concerns about it as he thought it was a "*ridiculous rule"*. Mr Hudson explored with him why he felt this was.

47. Following the appeal hearing, the Claimant and Mr Hudson then spoke to Mr O'Grady to better understand his reasoning and who he had spoken to in his own enquiries. Mr Hudson then arranged to speak to Mr Leffen to explore the points raised by the Claimant in respect of the practice and awareness of the change in practice pre and post Project January.

48. After speaking with Mr O'Grady and Mr Leffen, Mr Hudson was comfortable that he had sufficient information to make an informed decision on the appeal and did not feel he needed to speak to anyone else, in large part because he was satisfied that Mr O'Grady had spoken to enough of the right people to gain clarity on the relevant issues and what had emerged was a consistent picture in the context of the business with which Mr Hudson was very familiar. No new documents had arisen, and no new information arose which in his mind then needed any further input from the Claimant, only conversations that reiterated points already made. Mr Hudson was fully satisfied that he had understood the Claimant's points and that he had explored those with Mr O'Grady and Mr Leffen. He did not think it necessary to meet with the Claimant again before reaching a conclusion about the appeal. This was not a case where there was a continuing question over the particular facts or the evidence relating to the trade in question which he needed to retest with the Claimant. In Mr Hudson's view the Claimant had maintained his position throughout the internal process namely, that he did not recall short fill being covered in training; he was unaware of the rules applicable to him in this regard; and was critical of the way in which changes had been communicated. There was no new evidence, including anything that was potentially exculpatory in nature, which would need to be shared with the Claimant so that he could refine his appeal accordingly prior to a decision being made. I accept that this was considered by Mr Hudson and accept that his reasons for not going back to the Claimant were genuine.

49. Mr Hudson was also aware, by virtue of his senior management position that the Claimant had been issued with a Final Written Warning in 2012 (as well as the one in 2013) in relation to the management of expenses and the failure to disclose an outside investment activity. He knew that warning was not live in any sense in respect of the disciplinary which Mr O'Grady had considered and had no bearing on his decision. In Mr Hudson's experience it was extremely rare for someone to have more than one written warning or Final Written Warning, and to have two Final Written Warnings in their career

and then be facing a third disciplinary was unheard of.

50. Mr Hudson decided not to uphold the Claimant's appeal. He was satisfied the decision to give him notice was the correct decision and had been carefully and properly considered by Mr O'Grady. He had considered the lengthy period of time between suspension and the decision and whilst this was regrettable, he found this had no bearing on Mr O'Grady's decision or the fairness and reasonableness of the outcome. He was acutely aware that the period of suspension coincided with a period of intense regulatory scrutiny and that as a result of various external investigations and responses required by the Banks to those, there were unavoidable but necessary delays in the process particularly during the period leading up to Regulatory Resolutions.

51. A copy of a resolution from May 2015 was in the bundle which specifically addresses the issue of short-filling and which was issued just prior to the Claimant being invited to a disciplinary hearing. The Tribunal finds that this is consistent with the explanation given by Mr Hudson for the delay. Mr Hudson was aware that there were numerous fact-finding meetings with individuals working within the FX business going on at the relevant time which impacted on the speed at which the proceedings could be progressed. Whilst acknowledging this was a difficult and stressful time for the Claimant, Mr Hudson was satisfied it had not prejudiced his ability to fully respond to the disciplinary case against him. He pointed to the detailed written submissions prepared by the Claimant.

52. Mr Hudson was satisfied that Mr O'Grady had spoken to the appropriate people from both Sales and Trading side of the business to understand the context of the conduct, the trading environment, and to understand the rules of engagement with clients. Based on his own discussions with Mr O'Grady and Mr Leffen, it was clear to Mr Hudson that Mr O'Grady had reasonably reached the conclusion that at 31 October there was no ambiguity either with Sales or Trading teams within the FX business in the UK that short filing was the express domain of Trading. He was satisfied that the lapse of time had not affected or distorted people's recollections of the policy at the time and that Mr O'Grady had considered this possibility when he conducted his follow up enquiries.

53. In considering the sanction Mr Hudson concluded that he was satisfied that the Claimant had attended the Project January training session in August 2014 and although the Claimant asserted that he did not recall the part of the training relating to short fill, he had not asserted that the topic was not covered. He was not persuaded by the Claimant's argument as to why he could not recall the specific part of the training relating to short fill, nor his assertion that the lack of handout or written material being an explanation for not being aware of the change in policy. He noted that the Claimant was the only individual asserting a lack of awareness of the change in rule. Nobody else in the Sales team had attempted to short fill in contravention of the new policy. No-one else considered there to be ambiguity in the short fill rules. He was satisfied that Mr O' Grady had considered each of the arguments raised by the Claimant and was justified in rejecting them.

54. Having discussed the matter with the Claimant, Mr Hudson was concerned as to the Claimant's attitude to risk. He was particularly concerned that in his defence he relied on the absence of a written rule prohibiting the conduct in order to justify his action. The fact that there had been no loss to the Bank or the client was not the answer that the Claimant had suggested it to be. Mr Hudson was satisfied that Mr O'Grady's decision that

the Claimant's actions did constitute a breach of the standard of behaviour and conduct expected by the Bank was correct and that in the context of the live Final Written Warning, the decision to apply the sanction of dismissal on notice was fair and reasonable and not unduly severe.

55. Mr Hudson accepted that in theory it would have been open to Mr O'Grady to issue a further Final Written Warning but he considered that was not appropriate in the context of the cumulative findings of misconduct and lack of trust combined with the current culture and market dynamics. In that context, Mr Hudson did have in mind the spent warning as being a factor which pointed away from further leniency.

56. It was suggested by Ms Romney QC on behalf of the Claimant that Mr Hudson and Mr O'Grady both had pressure bought on them from external or higher managers due to the increased scrutiny of the Bank's trading environment and that Mr Hudson and/ or Mr O'Grady had in fact used the Claimant as a scapegoat. Mr O'Grady and Mr Hudson both denied this. Mr Hudson pointed out that in his view the Claimant's dismissal for short filling in the environment at the time invited greater scrutiny on the Bank. I am satisfied that the decisions of Mr O'Grady and Mr Hudson were based upon the reasons they gave in their evidence and not for some ulterior motive or due to any external pressure.

The Law and Submissions

57. Both parties produced full written submissions by their leading Counsel which were amplified orally. I was referred to a number of authorities on the application of Section 98(4) of the Employment Rights Act 1996.

58. The reason for dismissal is the set of facts known to the employer or the beliefs held by him which cause him to dismiss the employee (*Abernathy v Mott, Hay and Anderson [1974] ICR 323, CA)* . It is for the employer to show that the reason for dismissal is one of the potentially fair reasons set out in section 98 (1) and (2) of the Employment Rights Act 1996. If this is established the tribunal has to decide whether the dismissal was fair or unfair under section 98(4): did the employer act reasonably or unreasonably in the circumstances, including its size and administrative resources, and taking into account equity and the substantial merits of the case, in treating that reason as sufficient reason for dismissing him**.**

59. In conduct cases the employer must show that it held a genuine belief that the employee was guilty of the alleged conduct; that belief was based on reasonable grounds and following such investigation as was reasonable in the circumstances. *BHS Ltd v Burchell* [1980] ICR 303, EAT.

60. The Tribunal is not to substitute its own view for that of the employer but is to assess the fairness of the dismissal based on the range reasonable responses open to a reasonable employer. (*Foley v Post Office* [2000] ICR 1283, CA). The reasonableness of the procedure by which the decision was reached is also to be judged against the range of reasonable responses (J *Sainsbury plc v Hitt [2003] ICR 111, CA)* .

61. It was accepted by both parties that the role of the Tribunal is not to substitute its own view for that of the employer and that the tests set out in BHS v Burchell [1980] ICR

303 and *Graham v- SSWP (JobCentre Plus) [2012] IRLR 759* apply. In summary, did the employer carry out an investigation in to the matter that was reasonable in the circumstances of the case; did the employer have a genuine belief that the employee was guilty of the misconduct; and was that belief based on reasonable grounds. The Employment Tribunal should consider the investigation as a whole rather than whether an employer has investigated every single possible defence (*Shrestha –v- Genesis Housing Association Limited [2015] IRLR 399*).

62 I was referred to *The Royal Bank of Scotland -v- Nwosuagwu-Ibe UKEAT/0594/10/ZT* in which the EAT held that not every rule has to be written down before an employee can be fairly dismissed**.** I was also referred to the provisions in the ACAS Code

63**.** Not unsurprisingly, both leading Counsel made submissions as to the effect of a live warning and spent, or lapsed, warnings and I was referred to the cases of *Airbus UK Limited –v- Webb [2008] EWCA Civ 49; [2008] IRLR 309* and *Wincanton –v- Stone [2013] IRLR 178* at paragraph 37 – where Langstaff J summarised the position as to warnings- including the following sub-paragraph,

> "6) *A tribunal must always remember that it is the employer's act that is to be considered in the light of s.98(4) and that a final written warning always implies, subject only to the individual terms of a contract, that any misconduct of whatever nature will often and usually be met with dismissal, and it is likely to be by way of exception that that will not occur*. "

64. It was explicitly accepted by Ms Romney QC that it would be an error for me to conclude that in order for the conduct relied upon to fall within s 98(4) (2) (b) there needs to be some culpability or knowledge of wrong doing on behalf of the Claimant. The EAT in *The Royal Bank of Scotland –v- Donaghay UKEATS/0049/10/B1* in respect of what is meant by the phrase 'relate to conduct' confirming that conduct does not need to be reprehensible

65. The Claimant also contended that he was judged to be culpable on a basis that did not form the basis of the original allegations – namely that he had breached (or as Ms Romney put it in her written opening submissions) deliberately flouted both a practice and an '*express policy'*, and sought argue that because the Claimant was found not to have known about the policy his actions ought to have been classed as capability rather than misconduct. It was submitted by Ms Romney that it was unfair to dismiss someone for not knowing or for making a non-fatal mistake on a new rule to which he had no access, and that he had made an unwitting error.

66. The Claimant also criticised Mr O'Grady's further investigation and maintained that the Respondent did not interview or speak to the right people, in particular Mr O'Grady ought to have spoken to other people on the trading desk who would have witnessed the discussion between Mr Mir and the Claimant – and could attest to whether it had been heated or calm; and to Mr Wacker to investigate the Claimant's claims that the Project January training did not highlight the change to the practice of short fill Mr O'Grady and Mr Hudson were criticised for not speaking to the right people, including Ms Jury, the right people being people who knew the Claimant well in order to get an objective view of him.

Conclusions

67. The Claimant submitted that either there was no investigation before the disciplinary hearing and the investigation was carried out by Mr O'Grady or there was an investigation and its contents were never relayed to the Claimant. I am satisfied that this submission ignores the "pack" which was produced before the disciplinary hearing and which was the basis of the 'case' against the Claimant. The pack contained the printouts in respect of the transaction and the chats between the Claimant and Mr Mir and also with the client. The Claimant did not dispute that the documents showed that he had withheld part of the client's fill without prior authorisation from the trader- that was basis of the allegation that he had to meet. The investigation carried out by Mr O'Grady was in respect of the Claimant's defence- namely that he had not known that what he was doing was wrong or in breach of any new rules or policy.

68. Whilst the Claimant was not given an opportunity to directly comment on the information gathered by Mr O'Grady in his conversation with members of the Sales and Trading team following the disciplinary hearing, I am satisfied having heard the evidence, that in speaking to the people that he did Mr O'Grady was exploring with them the Claimant's own account and explanations for his actions and trying to understand those against the wider context. I have found that Mr Hudson's reasons for not reverting to the Claimant following his conversations with Mr Leffen and Mr O'Grady were genuine, I am also satisfied that the fall within the range open to a reasonable employer in the circumstances.

69. In respect of the delay, which was considerable, I accept the evidence from the Respondent as to the impact of the background context on the investigations and disciplinary proceedings and I also accept Mr O'Grady's evidence that he considered the impact of this on the Claimant's ability to meet the allegations against him and was satisfied it had not prejudiced the Claimant. I am satisfied that was a reasonable view for him to come to. The Claimant was able to give a detailed and account of himself and explain his actions in detail.

70. I am satisfied that Mr O'Grady held a genuine belief based on reasonable grounds, that the claimant ought to have known that he was not permitted to short-fill the order, that he ought to have realised this was running risk and that was something that sales were not supposed to do. I am satisfied that he reached this view following such investigation as was reasonable in the circumstances. The Claimant was not dismissed for gross misconduct but for conduct. Mr O'Grady was entitled to consider the Claimant's conduct in the context of the live Final Written warning and it was reasonable for him to do so.

71. It was suggested on the Claimant's behalf that the decision had been pre-judged based on the final written warning. I do not find that Mr O'Grady approached the matter with a pre-judgement or a closed mind. I am satisfied that he wished to understand the Claimant's response and his defence and took steps to carry out further enquiries to ensure that he fully understood the context in which the Claimant took his actions. It was not a case where the Claimant disputed carrying out the transaction, but rather that the Claimant had disputed the fact that he had done anything wrong in doing so or that he ought to have been aware of the fact that this was now prohibited.

72. The Claimant placed much emphasis on a submission that a final written warning that was live at the time of the disciplinary was for conduct of a dissimilar nature however I am satisfied from the evidence of the Respondent's witnesses that they considered it to be of a similar nature and that belief was based on reasonable grounds. They considered that it related to the Claimant's understanding of and attitude to risk and gave rise to serious concerns to his handling of the role of sales and remit of sales within the Sales team. Had the Final Written Warning conduct been dissimilar, Mr O'Grady would still have been entitled to rely on it. I find that decision of the Respondent was within the range of reasonable responses open to a reasonable employer**.**

73. I am satisfied the decision was fair, both procedurally and substantively. I therefore dismiss the Claimant's claim for unfair dismissal.

Employment Judge C Lewis

3 April 2018