Case Number: 2207054/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Z Yang	**v**	**Credit Agricole (Corporate & Investment Bank) London Branch**

Heard at: London Central

On: 7, 8, 9, 10,11, 14, 15, 16, 17, 18, 21, 22, 23, 24 and 25 March 2022
In chambers 28, 29, 30 March 2022

Before: Employment Judge A James
Mr P de Chaumont-Rambert
Mr J Carroll

Representation

For the Claimant: Ms C D'Souza, counsel

For the Respondent: Ms C Davies QC, counsel

JUDGMENT

(1) The claim for unfair dismissal (s.94 Employment Rights Act 1996) is upheld.

(2) The claim for direct race discrimination (s.13 Equality Act 2010) is upheld in relation to the allegation that Tony Botting commenting to Laurent Chedin when interviewed on 14th May 2020 that: *"I worked in Asia for 5.5. years, so I'm used to working with Asian people. The cultural aspect is something you need to be aware of in terms of loss of face. They can sometimes be reluctant to agree to something that has gone on".*

(3) All other claims - for whistle-blowing detriment (s.47B Employment Rights Act 1996); automatically unfair dismissal for whistle-blowing (s.103A Employment Rights Act 1996); for direct race discrimination (s.13 Equality Act 2010); and for victimisation (s.27 Equality Act 2010) - are not upheld and are dismissed.

REASONS

The issues

1 The agreed issues which the tribunal had to determine are set out in Annex A. Some of the issues were withdrawn during the hearing, and those are shown as being struck-through on the list.

The hearing

2 The hearing took place over 18 days. Evidence and submissions on liability/remedy were dealt with on the first 15 days. Three further days were subsequently arranged for the tribunal to deliberate and reach its conclusions on the issues. Judgment was reserved.

3 The tribunal heard evidence from the claimant. For the respondent we heard from Walid Assaf, Global Head of Macro Trading; Laurent Chedin, Head of CVA and Scarce Resources Management; Eric De Lambilly, Global Head of the Transversal Function Group; Donald McLean, Employment Relations Manager (now Head of Employee Relations); and Philip Cooper, Head of Compliance UK. The tribunal was asked to take into account the written evidence of Sarah Henchoz, Partner in Allen and Overy's employment team and Francois Racine, Head of Global IT and Information Systems Security (ISS) UK and EA. Ms D'Souza questioned the relevance of their evidence in the light of the amended list of issues but did not have any questions for those witnesses and nor did the tribunal, hence they were not required to attend the hearing.

4 There was an agreed hearing bundle of nearly 3,000 pages. A limited number of documents were added to the bundle during the hearing. References to the bundle as set out below here the tribunal considers that it may help the parties to understand the decision.

5 The claimant indicated on the first day of the hearing that an application was to be made to admit a set of documents, and to be allowed to cross examine on them [the GENPRU documents); and an application for inspection of the recording of a telephone call between Laurent Chedin and Rita Sqalli on 26 May 2020. The tribunal agreed to hear that application on the morning of the third day, at which time the Panel would have a better grasp of the issues and evidence in the case. The respondent also applied to add a further single page document, which was not opposed, and that was added at page D2263.

6 The application for inspection of the recording was granted, for reasons given at the time. In the event, the claimant's transcription and translation of that document was not materially different from that of the respondents. The tribunal also agreed that the GENPRU documents should be added to the bundle, and that Ms D'Souza would be allowed to ask limited questions of some of the respondent's witnesses in relation to those documents. This was because it appeared to the tribunal that those documents might be relevant to the issues in the case. In the event, cross-examination on those documents was relatively limited. The documents were added to the end of Bundle D.

7 As the decisions in relation to inspection/admissibility of the GENPRU documents has not in the event materially affected the outcome of the case, the Tribunal does not set out in any detail the reasons for the decisions made in respect of them. The parties are at liberty to ask for written reasons in relation to those decisions if they see fit.

8 During the hearing, further letters between the parties regarding the issues and witness evidence were added to the end of Bundle B.

Fact findings

The claimant

9 Mr Yang (referred to in the rest of this judgment as 'the claimant') is a Chinese national. He was born and raised in China.

10 The claimant commenced his first job in finance in July 2000 at the Bank of China in Shanghai as a Foreign Exchange (FX) Trader. In 2003 he transferred internally to the Precious Metals trading desk (PM Desk). After that, the claimant spent about 5% of his time at the Bank of China on FX Trading.

11 In February 2006 the claimant moved to the United Kingdom as an expatriate, working at the Bank of China in London. Since February 2006, he has worked in various banks in London, always as a precious metals trader.

Employment by the respondent

12 The claimant commenced employment on 3 June 2011 with the respondent (referred to below as the respondent, CACIB, or the Bank). The claimant was initially employed as a Trader in Commodities Precious Metals within the Fixed Income Markets business, with the corporate title of 'Director'.

13 On 2 July 2012 the claimant transferred to the FX Precious Metals Trading department. All other terms and conditions of employment remained the same.

14 Whilst work on the PM Desk took up most of the claimant's time, the PM Desk is part of the FX department at the respondent. The claimant attended meetings with FX traders and he acted as a mentor to one of them.

15 On 1 January 2015 the claimant transferred to the FX Spot G10 department. All other terms and conditions of employment remained the same. At that time, there were three precious metals traders, Stephen Pender, Cadence Donaldson and the claimant. Mr Donaldson and the claimant reported to Mr Pender and he reported to Mr Tony Botting.

16 Mr Pender left in November 2015 and was not replaced. Mr Botting took over the Head of PM Desk role. The claimant subsequently covered Forward pricing and managed the Forward book as the chief Forward trader. He became the Senior Metals Trader and the Chief Forward Trader. He took on the responsibility for management of the traders on the PM desk.

17 The claimant's 2017 appraisal stated [C108]:

> *Sam has grown more confident in his abilities as a manager. This is pleasing to see. The goal in 2018 will be to ensure that flows down to each team member in turn. His own individual performance has been strong but there are still some weak points in the team which will need to be worked*

such as HK in general, options in London. A managers role is not just to highlight issues, but to come up with solutions that work. Sam has also worked very hard on the depos and loans project which is almost ready to go. Well done on this.

14 On 1 January 2018 the claimant was promoted to Executive Director. The change was confirmed in writing on 2 March 2018.

15 All of the appraisals we were referred to were positive, save that as noted above, it was acknowledged that the claimant's management skills could be improved. Training was promised in 2020 but due to the events that subsequently unfolded, never materialised.

The Senior Manager's and Certification Regime (SMCR)

16 The Senior Manager's and Certification Regime (SMCR) was introduced in 2016 by the Financial Conduct Authority (FCA) following the financial crash in 2008. The aims of SMCR include the protection of consumers; to improve accountability; and to improve conduct. The SMCR applied to the claimant. He was classed as a Senior Manager in his role at the respondent bank.

17 Under SMCR, the FCA conduct rules (COCON) apply to traders. They therefore applied to the claimant in his role. If any trader subject to COCON is found by a bank to have breached the conduct rules, the bank is obliged to report the matter to the FCA. This is known as the regulatory reference regime (see further, Section 15.11.6 below).

18 The FCA's individual conduct rules (COCON) include the following:

Rule 1 - You must act with integrity.

Rule 2: You must act with due skill, care and diligence.

Rule 5 - you must observe proper standards of market conduct

19 COCON 3.1.2 G states that in assessing compliance with, or a breach of, a rule in COCON, the FCA will have regard to the context in which a course of conduct was undertaken, including:

(1) the precise circumstances of the individual case,

(2) the characteristics of the particular function performed by the individual in question, and

(3) the behaviour expected in that function.

20 As for the business itself, the general organisational requirements include the following:

4(1) A firm must have robust governance arrangements, which include a clear organisational structure with well defined, transparent and consistent lines of responsibility, effective processes to identify, manage, monitor and report the risks it is or might be exposed to, and internal control mechanisms, including sound administrative and accounting procedures and effective control and safeguard arrangements for information processing systems.

21 Page 4 sets out the principles for business which include:

1 Integrity - A firm must conduct its business with integrity.

2 Skill, care and diligence - A firm must conduct its business with due skill, care diligence and diligence.

3 Management - A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.

11 Relations with regulators - A firm must deal with its regulators in an open and cooperative way, and must disclose to the FCA appropriately anything relating to the firm of which that regulator would reasonably expect notice.

22 Chapter 15 deals with notifications to the FCA. Section 15.6.1 states:

A firm must take reasonable steps to ensure that all information it gives to the FCA in accordance with a rule in any part of the Handbook (including Principle 11) is:

(1) factually accurate or, in the case of estimates and judgements, fairly and properly based after appropriate enquiries have been made by the firm; and

(2) complete, in that it should include anything of which the FCA would reasonably expect notice.

23 Section 15.11.6 requires in respect of disciplinary action against traders that:

If a reason for taking disciplinary action as referred to in section 64C of the Act (Requirement for authorised persons to notify regulator of disciplinary action) is any action, failure to act or circumstance that amounts to a breach of COCON, then the SMCR firm is required to notify the FCA of the disciplinary action. [i.e. the regulatory reference]

<u>The Precious Metals Desk</u>

24 The Precious Metals desk trades four different metals, gold, silver, platinum and palladium. The respondent's PM Desk held four books, London Forward, PM Options, London Spot and Hong Kong Linear. Forwards were held on all four books. The agreed limit for forwards was 25,000 lots in total across all four desks, at the time of the matters to which this claim relates. That limit was discussed with Mr Botting and Mr Mostachfi and validated with the market risk committee [D1634 and 474].

25 The two major centres for gold trading are the London Gold market and COMEX (which is part of the Chicago Metals Exchange (CME) group, located in New York). Gold is traded in two principal ways. First, by buying or selling gold which delivers the metal as soon as possible, in the London gold market. This is called 'spot' (or Over the Counter - OTC). Second, buying or selling gold at a priced fixed today but which does not deliver the metal until some future date. This is called a forward or future. The standard gold futures contract represent 100 troy ounces of gold. Each such contract is referred to as a 'lot'.

26 On expiry of a Futures contract, the contract is enforceable as between buyer/seller and the Exchange. Under the exchange rules, traders must either deliver or exit all positions by buying or selling back to the market by the last business day of the month.

27 This means that a buyer (with a 'long' position) is obliged to take delivery of the metal, and a seller (with a 'short' position) is obliged to make delivery. In the gold Futures market, the active contracts are February, April, June, August and December.

28 'Closing a position' means taking an opposite position in the same futures contract which has the effect of cancelling out the initial position. 'Rolling/switching a position' means instead of making/taking delivery of gold bars at the end of a futures contract, a bank buys back the future it has sold and sells the next month's future. The cost of rolling over a Futures contract is called the switch price (also referred to as the spread), and describes the cost to roll over: e.g. the Apr-Jun switch price is the cost to roll over from April to June. 'Squaring or flattening' a position means that instead of making/taking delivery of gold bars at the end of a futures contract, a bank just buys back the future it has sold without selling the next month's future. Most contracts are rolled, with the result that the investor takes the gain or loss arising from the cost of rolling, and rolls their position to a future month.

29 An Exchange of Futures for Physical trade (EFP Trade) is a trade which allows one party to swap a Futures contract for the underlying spot commodity, in this case gold. The EFP is the price of refining and delivering the gold from London to New York for settlement, or vice versa. Gold traders also use the term EFP to refer to the difference (or spread) between the spot price and futures price. In geographical terms, the spot price is the price of physical gold in London in the present, and the futures price is the price of physical gold delivered to New York at the relevant date in the future.

The respondent's London PM Desk

30 The London based PM Desk in 2020 consisted of four traders - the claimant, Louis McCauley, Joseph Ward and James Donaldson. The latter three reported to the claimant. The London team were assisted by William Benguerel in the Banks's Hong Kong office.

31 The claimant reported to Tony Botting, Head of CEEMA EM FX & Rates Trading, Global Head of G10 Spot, G10 Forwards & Precious Metals) who in turn reported to Behnouche Mostachfi; who in turn reported to Mr Walid Assaf and to Eric Etienne (Global Head of Non-Linear Trading).

32 The claimant was primarily responsible for the London forward book, which typically traded Futures, assisted by James Donaldson. Mr McCauley primarily traded Options on the London spot market, assisted by Joseph Ward. During Asia time, Mr Benguerel in Hong Kong helped to manage the forwards book. Mr Assaf reported to Thomas Spitz, Global Head of Hedging and Investment Solutions

33 Trading is an intense exercise. The claimant used seven and a half screens (the half screen being shared with Mr McCauley) when working for the respondent. These are used to keep a close watch on any movements in the market. A trader needs to stay at their desk most of the day during trading periods to keep watching for any movement in the markets. If a trader needs to take a break of any description, a colleague needs to take over whilst they are away from their desk.

Mark to Model/Mark to Market Valuation models

34 There are two principal methods used by banks to value a book – Mark to Market and Mark to Model. In a Mark to Market valuation, the valuation of a bank's portfolios is based on the market closing prices, every day. Those prices are input into the system to produce the valuation of Profit and Loss (PnL). The purpose of the valuation is to ensure the Bank's positions and PnL is accurate and up to date.

35 By contrast, in a Mark to Model valuation system, a theoretical price is used to achieve a valuation. The model implies a theoretical price to certain instruments. If the theoretical price diverges from the market price, the theoretical price needs to be recalibrated. At the time of the matters with which we are concerned the PM Desk used theoretical prices to value PnL rather than being pegged to the actual Exchange market. This was described for example by Mr Assaf, as a mark to market model but using theoretical rather than actual prices. For shorthand below, we refer to the PM Valuation method as 'Mark to Model'. The PM desk was the only desk in London to use that valuation model. All other desks used actual prices to value PnL, i.e. Mark to Market.

36 The software system used by the Bank to manage risk is Murex. That is accessible to the front line traders, to the Market Activity Monitoring department (MAM) and to senior managers. MAM is known in SMCR terms as the 'second line of defence'. Traders are known as the 'first line of defence'

The Precious Metals Valuation Policy

37 The Precious Metals Valuation Policy states, under the heading 'General Principles:

> *The valuation and the reserves are calculated independently by MAM on the basis of the rules defined in this document, and in accordance with the methods and procedures validated by the Valuation Committee. On a monthly basis the results and parameters used for their calculation are presented for validation to the Pricing Committee, which opines on any exception or corrective measure proposed by the attending parties. …*

38 Under the heading 'B. Revaluation Marks' the Policy states:

> *The valuation of the portfolio is marked to market and performed by MAM by feeding Murex with the revaluation marks, which are directly available in the market and sourced from independent contributors where possible. [D787]*

39 The following is set out at D787-8:

> *b) Monitoring of contango curves*
>
> *The purpose of the monitoring is twofold. On a daily basis, it is essential for the purposes of the Historical VaR, to build up a database of reliable surfaces in the system; misfed or non-updated data can distort the VaR. On a monthly basis the emphasis is on producing a P&L based on reliable data that is independent, to as great an extent as possible. This emphasis extends to the daily P&L that will be built using same independent parameters at the month end each time it appears feasible. …*
>
> *c) Futures and Listed Options:*

Futures and Listed Options are valued:

- using the theoretical price deriving from the marks maintained in Murex, which would be used to value equivalent OTC transactions, the volatility surface will be the one applicable to the same underlying currency pair.

- using settlement prices if the marks available are not independent and reliable information.

- last traded price if the settlement price is not available or outside the market range.

40 These provisions make clear the process that MAM as the second line of defence must independently carry out in accordance with independent sources to produce daily PnL figures. As will become apparent below, those checks did not identify the EFP divergence in w/c 23 March 2020.

41 As will become clear from what follows, particularly the exchanges on 30 March 2020, Mr Assaf, along with all other CACIB senior managers, was not aware prior to 30 March that theoretical prices were being used to value PM Futures PnL. The Desk had come under Mr Assaf's overall management from the end of summer 2019. Tony Botting was aware of the use of the Mark to Model valuation method and was aware of the approach of Mr Pender to MAM in 2014/15 which is discussed below.

Concerns raised about the use of Mark to Model

42 In an email dated 16 December 2014, Mr Pender, the previous Head of Desk, raised the following in relation to the Mark to Model valuation method.

As discussed we are starting to see more variation in the movement between OTC and Futures curves. As murex is only able to value both of these deal types against a single curve (OTC) we are concerned that this affecting the accuracy of the reported PnL and we would like find a way to reflect the price differential within the published PnL. … We are not talking about large differences but I do think it is important to try to find a solution as these numbers are likely to increase significantly as our business grows.

43 Mr Pender chased Mr Lawrence for a response on 27 January 2015 and was told he 'had not got to it yet'. Mr Pender asked for it to be looked at when Mr Lawrence had time as he was keen to find a solution. For reasons unknown to us, no change was made at that time and Mark to Model continued to be used.

44 During 2019, Mr McCauley attended month end valuation committees on two or three occasions, to raise potential problems with the valuation model. This is discussed further below in relation to the Risk Committee meeting of 1 April 2020. The claimant was not aware that approach had been made. He was not aware of any concerns about the Mark to Model valuation method, prior to the matters raised by this case. The claimant had only ever used 'Mark to Model' to value the PnL of gold futures.

GMD Culture Guidelines

45 The PM Desk comes within the respondent's Global Markets Division (GMD). There are weekly meetings of GMD Comex. Attendees include Pierre Gay, Mr Spitz, Mr de Lambilly, and Ms Sqalli.

46 GMD introduced new Culture Guidelines in August 2018, due to a perception that the previous practice of employees being encouraged to work out solutions themselves – under the strapline 'bring me solutions not problems' – discouraged employees to come forward with perceived problems. The amended culture guidelines state:

> *Against this backdrop, and in line with our GMD Culture initiatives and values, we want to change this approach within GMD. I strongly encourage all of you to alert your direct management, your local/regional management or the GMD Comex of potential issues that could impact our business.*

47 The guidelines encouraged employees, for example to:

> *Own your mistake*
>
> *Be accountable for your actions;*
>
> *Don't blame others*
>
> *Don't deny your mistakes;*
>
> *Don't hide facts or bad news*

CACIB – Behaviours – Global Charter

48 The respondent's Behaviours Global Charter refers to a zero tolerance policy in relation to discrimination. The Charter states [D2190]:

> *Biases, whether positive or negative, affect human behaviour.*
>
> *A bias is an inflexible belief about a particular category of people. It's a belief or attitude, not a behaviour.*
>
> *We should operate in an environment of mutual respect and professionalism, leaving our biases at the door when we come to work.*

49 Later on it is stated [D2193]:

> *Any complaints relating to non-acceptable behaviours should be immediately reported to the Human Resources Department.*

Data Protection Policy

50 The respondent's Data Protection Policy gives the right to employees to access to personal data in line with their statutory rights. Personal data is defined as data in which the employee is identified or from which they are identifiable.

Volcker Mandate

51 On 25 October 2019 the Respondent contends that the Claimant was identified as Head of Desk/'Supervisor' in the PM Desk Volcker Mandate in place of Tony Botting.

52 It is not in dispute that on 8 January 2020 the claimant signed the LBF Precious Metals Volcker Mandate. This identified for the first time that the

claimant was the Head of Desk. There was no formal communication to the claimant to inform him that he was now formally the Head of Desk. This is a surprising omission. Nevertheless, the claimant's status as the Head of Desk was placed into CACIB's Market Risks Limits System [D18-23 and D45].

53 We accept the claimant's evidence that whilst he signed the mandate, acknowledging that he was head of desk, he did not read the document carefully, and the change in status was not noticed by him. Regardless of that fact however, the claimant accepts that both before and after 8 January 2020, he was the most senior person on the desk – in effect, the team leader, or supervisor. As noted above, the claimant carried out the appraisals for James Donaldson and Joseph Ward; and from 2019, after he joined the team, for Louis McCauley. They reported to the claimant. The claimant reported to Mr Botting.

54 The Volcker Mandate states, under the heading 'Monitoring':

> *The Supervisor is in charge of performing its own assessment of P&L and monitoring of Market Risk exposures. He also receives an independent report on P&L and Market Risk monitoring prepared on daily basis by Market and Counterparty Risk department (MCR). The report is Day+1 and is based on validated positions captured in the FO tool. The Supervisor is also responsible for escalation of discrepancies between these two computations. [D22]*

No such discrepancies were reported to the claimant by MAM during the period 23 to 30 March 2020.

The claimant's job description

55 The claimant signed an updated job description naming him as an Executive Director on 14 February 2020. This states that the claimant is a Trader and Executive Director reporting to Head of FX Linear Trading (Tony Botting). Under the heading 'Management and Reporting' it is stated:

> • *Report Daily P&L, risk and key market movements to management by email*
>
> • *Report to the Head of FX Linear Precious Metal Trading on an informal basis on the progress of the business and specific issues.*

56 Under the heading 'Mandate' it is stated:

> *Ensure strict compliance with the mandate attributed to the desk.*

57 Under the heading 'Risk it is stated:

> *Ensure adherence with regard to position and risks limit.*

58 Under the heading 'Communication' it is stated:

> *Ensure that the relevant managers are made fully aware in a timely fashion of all matters that might have a material impact on the desk FX Linear Precious Metal group performance, risk position or compliance with legal or regulatory requirements.*

59 The claimant was also required to comply with all applicable conduct rules (including COCON). Louis McCauley's job description was identical, save that his stated that he reported to 'Global Head of Precious Metals'. The claimant accepted that this is a reference to him.

Covid-19

60 On 4 March 2020 the FCA issued a Statement on Covid-19. This confirmed:

> *We expect all firms to have contingency plans in place to deal with major events. Alongside the Bank [of England] we are actively reviewing the contingency plans of a wide range of firms. This includes assessments of operational risks, the ability of firms to continue to operate effectively and the steps firms are taking to serve and support their customers.*
>
> *We expect firms to take all reasonable steps to meet their regulatory obligations. For example, we would expect firms to be able to enter orders and transactions promptly into the relevant systems, use recorded lines when trading and give staff access to the compliance support they need. If firms are able to meet these standards and undertake these activities from backup sites with staff working from home, we have no objection to this.*

61 The Covid-19 pandemic affected global financial markets. The pandemic caused significant instability in the financial markets. The specific effect on the pandemic on Gold trading is discussed further below.

62 On 9 March 2020 Behnouche Mostachfi sent an email to all traders within Global FX Trading headed: 'P&L, Positions and Franchise in these volatile markets' urging caution and, amongst other things, stating:

> *Please be reminded that in these volatile markets … traders first priority remains protecting the bank's P&L, ensuring positions are appropriate with traders views and markets behaviour while respecting all limits and finally, providing CACIB's franchise with the liquidity available to traders, so that traders can remain on top of their own risks and would not find themselves in positions they would not choose to be in.*

63 The World Health Organisation (WHO) officially declared a pandemic on 11 March 2020.

UK Government work from home advice – 16 March 2020

64 On 16 March 2020 the UK government issued work from home advice. This led to a telephone conference call the same day between Ian Rowland, Local Head of GMD UK, Thomas Spitz and all GMD staff announcing the COVID measures that would take effect from 17 March. The claimant did not attend that conference because he was on annual leave that day.

65 Mr Rowland said during the call:

> *We will implement three types of set up, in addition to the BCP. So, some people will continue to remain in Broadwalk House and in our BCP site in Mansell Street. Secondly, we will trigger working from home for activities that do not require monitoring, or have significant infrastructure or operational risks, and thirdly, we will also introduce rotations for some staff within business areas between home and office. These will be weekly, so that will involve working one week at home, then one week in the office and then one week at home again.*

66 There was nothing to stop ad hoc arrangements, as reflected in the following statement made by Mr Rowland as the meeting concluded:

So if there are no other questions, again just to be clear there's probably a lot of information there, please contact your direct managers, they can tell you exactly what the plan is for your particular desks

67 Mr Spitz was on the call and stated:

… our number one priority is maintaining, minimising, after the health of our staff which is our first priority, minimising any operational risk. …

68 On 17 March 2020 the claimant again signed the LBF Precious Metals Volcker Mandate which named him as Desk Head. Again, there was no formal change to the claimant's Job Description and no formal notification that his role had changed.

69 On the same day, Mr Mostachfi sent an email to Tony Botting and other direct reports requesting a reduction in the FX and PM risk limits given the increased level of volatility, wider spreads and reduced volumes. Ian Rowland emailed GMD staff regarding remote access for staff advising that staff should disconnect from work systems when not required.

70 Also on 17 March 2020, an email was sent by Mr Mostachfi to Tony Botting and Neil Maddocks, stating that the vega limits for amongst others, the PM Desk, was to be reduced by half. The Contango limit remained the same.

71 Mr Mostachfi also emailed Tony Botting and others, with the subject heading "Metals rotations", confirming the split rota of working from home/in the office.

<u>PM Desk Team rotation - 18 March 2020 onwards</u>

72 The PM Desk team rotation began on 18 March. Between 18 and 20 March 2020 the Claimant worked in the office and Joseph Ward worked from the alternate site at Mansell Street. Louis McCauley and James Donaldson worked from home.

73 On 19 March 2020, Mr Mostachfi sent an email to all traders within Global FX Trading and others headed: 'Liquidity, Staffing and eTrading' urging caution and, amongst other things, stating:

In these exceptional circumstances where we are faced with very rapidly deteriorating market liquidity, similar to the worse periods of the 2008 financial crisis (but just occurring much faster) and staffing shortages due to the isolation policies linked to the pandemic, CACIB's senior management's message is clear that traders first priorities are to protect the bank's positions, and ensure our positions remain liquid and manageable in nature and in size at all times.

74 On the same day, Tony Botting forwarded to the Claimant and other direct reports an email from Mr Mostachfi emphasising the need to protect the Respondent's position and P&L and instructing traders to reduce all flows and to reduce operational risk and all non-core risk reducing flows, operational risk and all non-core risk. The covering email stated:

"If there are any issues or concerns let me know. The number 1 priority is CA-CIB and we have to be prepared for any eventuality."

75 A telephone call took place between Tony Botting and the PM Desk on 20 March 2020 in which, amongst other things, Mr Botting noted that liquidity was challenging, and the desk should be alert to heightened risk profiles or

anything which needed reducing. Mr Botting noted that the Claimant was in charge, and any concerns should be raised with him:

> *[What] I do expect is for everybody to work as a team under Sam's management and Sam is the boss, he is in charge of the metals both here and also globally, if anybody has got any concerns they can always raise it with me, I'm always here to help, but the first port of call should be Sam. If problems can't be sorted out, come to me.*

The Gold Volatility Episode or EFP breakdown

76 Between 23 and 27 March 2020, the EFP (i.e. the difference between the price of spot gold and gold futures) increased to unprecedented levels. Typically, due to the relatively low cost of shipping between London and New York, the difference was plus or minus $1 to $2 when the contract was approaching the delivery window (although it could vary more widely in the middle of the contract period).

77 The Covid-19 pandemic led to a much greater dislocation between the two prices, for a number of reasons. These included:-

77.1 reduced flights between London and New York;

77.2 the market in general was in a state of panic;

77.3 increased social distancing measures creating a bottleneck;

77.4 the FCA introduced limits on the number of people allowed in the office at any one time;

77.5 major refineries, which converted 400 troy ounce gold bars used by London into 100 troy ounce bars used by New York, shutdown for two weeks from 23 March, bringing concerns about delivery on April futures; and

77.6 travel bans.

78 At its maximum, on 24 March 2020, the difference between the spot and future price (on the April contract) was USD +80 per troy ounce of gold, which meant that for every ounce of gold that CACIB was obliged to deliver, it would cost USD 80 more to buy back the future which is USD 78 (or 40 times) more than would ordinarily be expected.

79 Attempts were made to reassure the gold market by the London Bullion Market Association (LBMA) and the Chicago Mercantile Exchange on 24/25 March. These included that there was no longer a need to change the size of gold bars (by melting down and re-forming the bars), on delivery to COMEX.

23 to 25 March 2020 – continued team rotation

80 Between 23 and 25 March the claimant worked from home. Louis McCauley and James Donaldson worked from the office. Joseph Ward worked from CACIB's BCP site as well as from home, using a Home Trading Platform (HTP) kit provided by the bank. At the time, there were only a limited number of such kits available. Mr Ward was the only member of the PM Desk to be given such a kit at that stage. In any event, Mr Ward struggled to use the kit due to teething problems with it.

81 When he was working from home, the claimant's access to the data needed to assess the state of the gold market was much reduced. The claimant, like

the other team members, had access to a company mobile. He could access and contribute to Bloomberg chats with the team. No live free information was available on the internet. Bloomberg shows 'live' futures prices but we accept the claimant's evidence that quite often the indication price in Bloomberg can be quite different to the live market price. The latter is only available to those paying a subscription, and accessible to the bank's traders on equipment available only, (for most including the claimant), in the office. As noted above, when in the office, the claimant used 7.5 screens which enabled him to have a much greater 'feel' for the market than when he was at home.

82 In the early stages of the pandemic, there were issues with the capacity of the bank's server. This is reflected for example in an IT Service Alert referring to: '*multiple email delivery delays occurring for some users in the last few minutes. Many mails were backlogged, believed to be due to excessive anti-virus scanning. There is a backlog of Outlook email which is being rapidly reduced and normal operation should be restored in the next few minutes*'. [D2206] The claimant also had limited access to risk management tools – Murex and risk management. Whilst those could be accessed on his company mobile, they were extremely difficult to read on a small screen.

83 Inevitably, in the early stages of the pandemic, the bank struggled with IT issues. Mr Assaf was open and frank with the tribunal about logistical issues with IT in the first few weeks. The respondent had to adjust systems, bandwidth, and networks to be able to support a much larger number of people connecting to the bank's systems remotely. Following the claimant's suspension, more HPT kit was made available to staff when working from home.

<u>23 March 2020 Bloomberg chat</u>

84 On 23 March 2020 the PM Desk traders and the Claimant engaged in Bloomberg chats and exchanged emails in relation to the gold EFP figures, the volatile market and poor liquidity. On that day, James Donaldson – referred to a 'crazy move' in the EFP [D153].

85 At 7.21 am Joseph Ward stated: '*The group faces a lot of losses on this efp. What do you think we should do'* to which the claimant replied: *'calling you'*. The call was made via the claimant's Samsung smart phone. It was suggested by the respondent that the claimant was trying to hide the advice given on the call, by using his personal mobile, instead of putting the advice in the chat or calling Mr Ward's office number. We accept the claimant's evidence that he had quickly searched his mobile, found Mr Ward's mobile number, and called that. The purpose of the call was to communicate with Mr Ward in the most efficient way possible. During the call, the trade was discussed, and Mr Ward took action on the basis of their conversation. We find that there was no intention to deliberately hide the content of the call from the Bank.

86 Joseph Ward stated in an email sent on 23 March at 19:04:

> *The single greatest risk we face in my opinion is the efp. Until further notice I think we need to the best offer for spot and use every opportunity we can (fixings, delta hedges, etc.) to reduce ego shorts.*
>
> *There are many reasons to believe this trade is over and not just for Aprils. Given reduced worldwide travel and shipping market participants who can*

perform the physical arb may no longer be able to. This means we could see the same situation in june if the world is in a similar state. In addition, margin is up and banks want risk to be at a minimum. The last point could work in our favour and may mean a majority of shorts are closed now.

Let's be all over this and keep communicating.

Let's also not be afraid to close it down, even at these levels, if it means protecting the house. [153]

87 While this may have been primarily a reference to the Options Book, the comments were equally applicable to Futures.

24 March 2020 calls and emails

88 On 24 March 2020, 7:11 am, there was a telephone call between William Benguerel and the claimant. The shift in the EFP was discussed during that call. During the call Mr Benguerel described the shift as '*a disaster'* and as '*insane*' [D190]. It was apparent that the Options desk was going to make a relatively small loss before the end of the month, and the situation was managed as best it could be, in order to minimise any loss. That was the priority at that time.

89 Later in the day the claimant also spoke with James Donaldson. The claimant spoke about a '*lot of noise*' in the market. Mr Donaldson described it as '*carnage*'. There was a discussion about the proposal by LBMA/COMEX to accept large sized bars which it was expected would calm the markets. They agreed to '*give it more time to see*' and '*worst scenario … we switch June to August at a cost'*. The April futures contracts were not an immediate worry to the PM Desk at this time since they had already been switched.

90 On 24 March 2020 Tony Botting forwarded his direct reports (including the Claimant) an email from Thomas Spitz [D216-7] which stated:

All, over the past couple of days we have had a few issues regarding books not marked accurately

We would like to remind everybody a few things :

- *It is the responsibility of each head of desk to make sure their positions are properly marked daily*
- *In the current market it is not surprising that there may be some issues marking accurately given market illiquidity.*
- *In these situations it must be explained and documented properly to the relevant head of trading and discussed with MAM/DRM*
- *Also as a reminder on a daily basis the heads of desk are responsible to check their PnL explains and make sure differences with MAM are investigated immediately*

91 When Mr Botting forwarded the message to Heads of Desk/Books, he stated:

Can you please ensure attention is paid to the below. If there are any concerns flag it early and we will deal with it with assistance of MAM/DRM.

Shortly after he added in an email to the claimant alone:

This is esp important on options. Please make sure everything is ok with this futures move as well.

92 The reference to the 'futures move' was to the EFP dislocation which the email indicates Mr Botting was aware of. In a reply sent about 30 minutes later at 16:19, the claimant told Mr Botting:

We use daily premex reval to mark forward, and trader mark option curve ourselves. Both forward and option curve are checked by MAM on daily basis, and we are not seeing any major failure so far. Yes today Futures gapped higher than OTC spot gold due to refineries closure worries. But murex treats future as outright forward and apply the same forward curve, we will square or switch any contract before first notice day (as we don't take delivery), and we are nearly flat in April GC and PT by the end of today, first notice date is 31 Mar.

93 In so doing, the claimant was indicating that for April, the remaining positions were small and manageable and were covered. He did not consider it necessary at that time to say anything extra about the June Futures. The email also indicated that in the claimant's mind, the Bank used Mark to Model, not Mark to Market to value forwards. He did not mention the number of lots they were carrying as forwards (about 15,000) but that figure was not mentioned as a risk factor in any of the risk limits. The use of forwards to hedge positions was standard practice. The claimant had squared (or closed out) all April Futures contracts in the Global Forward Book by 20 March 2020, and the whole team had reduced the total Futures exposures by almost 40% from 25,000 lots to 14,977 lots as of 30 March 2020. The lots limit had been increased by Compliance to 25,000 in the second half of 2019. That followed following a request by Louis McCauley which was supported by the claimant and Tony Botting. This is a crucial email to which we will return in our conclusions.

94 Shortly after the email to Mr Botting, the claimant spoke with Mr Donaldson [D218]. The claimant said during the call:

What a day, what a day. I know sometimes if banks say mark year differently, then it'll be a disaster.

95 The claimant was asked what he meant by this during cross examination. The Claimant told the tribunal the comment did does not make sense to him, he could not explain what he meant by it; but that he was not referring to mark to model/market. The rest of the call related to remaining trades over the next few days. At the end of the call Mr Donaldson stated:

So I'll roll the last of your stuff and I'll probably aim, I'll leave in order to do mine and then that'll be that. Then we'll move on to June's [laughs].

<u>Bloomberg chat – 25 March 2020</u>

96 During a Bloomberg chat on 25 March Mr Ward remarked:

I think we are getting close to us shutting this whole thing down. Our health is more important and we have the unique position of having done well thus far.[D456]

97 By this stage the LBMA and CME announcement that there was no longer a requirement in the short term to convert 400 oz gold bars to 100 oz gold bars appeared to have calmed the market down slightly.

Mr Assaf's visit to the PM Desk – 25 March 2020

98 During 25 March 2020, Walid Assaf visited the PM Desk to discuss the gold volatility episode (GVE). Mr Assaf spoke with Louis McCauley who responded that everything was okay; that their positions had been managed (as they had been rolled); and that there were approximately 100 lots still to roll, which would cost between USD 100,000 to 200,000 but that was it. In retrospect, Mr McCauley was not sure if Mr Assaf was referring only to the options book or the futures book.

99 For his part, Mr Assaf states in his witness statement at para 44:

> *When I asked Mr McCauley what our position was, I was referring to the position of the PM Desk as a whole (i.e. on both the Options Book and Futures Book). I appreciate that that may not have been entirely obvious to Mr McCauley and I acknowledge that Mr McCauley may have just been referring to the position on the Options Book and may not have included the Futures Book because he may not have been fully aware of the position. If so, this was an unfortunate miscommunication. I would have expected Mr McCauley to be aware of the position on the Futures Book (even at a high level) or to have made clear that he was referring only to the Options Book. At the time, I certainly understood him to be talking about all positions held by the Desk.*

26 and 27 March 2020

100 On 26 and 27 March 2020, the claimant worked from the office. Louis McCauley and James Donaldson worked from home. Joseph Ward worked from CACIB's BCP site. We accept that the claimant spent most of Thursday trying to fix a glitch on the system. Mr Benguerel had made a trade against Mr Donaldson but in the bank's system it was not possible to log an internal trade onto the public system. The claimant sought advice how to fix that. The tribunal takes judicial notice of how time-consuming dealing with IT glitches can be.

101 On 27 March Mr Ward stated in a Bloomberg chat:

> *I think the worst is over; we all rolled too early is what it is. [D2147]*

102 But later on in the chat Mr Ward said:

> *This will likely not work next time since everyone will now have the same plan for June.*

End of day emails – 20 to 27 March 2020

103 It was a requirement for each desk to send end of day (eod) emails after each trading day to their managers. EOD emails were sent by the PM Desk to Mr Botting and Mr Mostachfi between 20 and 27 March 2020. Fifteen eod emails, were sent in total, one for spot and forwards and one for options were sent during the week. These are helpfully summarised in paragraph 47 of Mr Chedin's witness statement as follows. They demonstrate that the EFP dislocation was apparent to the members of the team but none of the eod emails mentioned the potential impact on the PnL valuation:

> 103.1 On Friday 20 March 2020 the claimant reported 'GC[i.e. Gold Comex in New York] efp once bid on 3.85 but given 2.00 last … I

have squared April GC … and look to buy back more June GC in coming days +460k fwds +10k spot [D/974];

103.2 On Monday 23 March 2020, Mr Donaldson reported 'GC efp the main mover of the day printing +5.50 usd [D120]. The daily PnL figures were recorded as '+280k fwds +95k spot' [D120];

103.3 On Tuesday 24 March 2020, Mr Donaldson reported 'GC efp the main mover of the day … printing +80 usd. Madness'. The daily P&L figures were recorded as +150k fwds and <195k> spot [D/234];

103.4 On Wednesday 25 March 2020, Mr Donaldson reported 'GC efp April once again the main mover, after trading +80USD yesterday it relaxed down to +$17 this afternoon in Ldn'. Daily P&L was recorded as '+150k fwds <65k> spot' [D/420];

103.5 On Thursday 26 March 2020, the claimant reported 'GC efp stays high and volatile between +12 usd to 22 usd. P&L was recorded as +65k fwds +160k spot [D/479]; and

103.6 On Friday 27 March 2020 the claimant reported 'Late Apr/Jun GC switch traded 29 usd favour shorts, but Jun GC efp stays higher +150k fwds +30k spot'.

Saturday 28 March 2020

104 On Saturday 28 March 2020, Tony Botting shared an article with the PM Desk entitled 'When a Hot Gold Trade Blew Up, the Rush for 100-Ounce Bars Began' with the Claimant and Louis McCauley[D565] which stated:

The spread between April and June futures contracts on Tuesday jumped to $20 an ounce, meaning it cost that much more to buy metal for April than it did for two months later. That signaled more near-term demand for bullion and the need to soon have physical supply in hand. By the end of the week, though, the situation had flipped. The June contract cost almost $30 more than the April contract, suggesting that traders appetite for physical gold has subsided for now.

29 March 2020 email

105 On 29 March 2020 - Louis McCauley emailed the Claimant at 7.21 pm. The email stated:

The bank has chosen to value the Futures curve using the Gold Contango curve (GOFO's). This relationship has broken down though in the last few days. We probably value the June EFP closer to $4. Namely the bank is over representing the PnL of the metals desk by a significant amount.

Considering the volatility of the EFP and the associated PnL implications as described above, I will ask Tony [Botting] for approval to come in tomorrow to fully explain the Options desk positioning, which is short circa 2500 lots of June and the very real actual Mark 2 Market implications based on where the COMEX gold futures are trading.

Please let me know whether you have any issue with this. [D562]

106 We accept the claimant's evidence, on the balance of probabilities, for reasons which follow, that he did not see this email on the Sunday evening that it was sent and nor did he read it on the following Monday morning.

30 March 2020

107 On 30 March 2020 the claimant logged onto Bloomberg at home at 5.25 am. At 6.49 am, he logged in again from the office, having arrived at 6.31 am. Mr Botting had arrived at 5.52 am. Mr McCauley arrived at 7.38 am.

108 On that morning, the claimant drove into work so he did not have the opportunity to read his emails on the train on the way into the office as he would normally have done. When the claimant arrived in the office he started to trade, and had not read the email by the time he was called into a meeting with Tony Botting. In a Bloomberg chat on the Monday morning, the claimant commented that he was surprised to see Mr McCauley in the office. He would not have been surprised if he had read the email.

109 Louis McCauley spoke with Tony Botting and informed him of the PM Desk PnL valuation, arising from the EFP dislocation, if actual prices rather than theoretical prices were used. The claimant was then asked to join the meeting and subsequently calculated the PnL using a mark to market valuation. His calculations showed that due to the dislocation between the price of spot gold and the price of gold futures on 30 March 2020, had CACIB wanted to unwind all 15,306 futures contracts (by going to the market and (a) buying the future and selling the spot, or (b) buying the EFP) this would generate a loss of: 1,530,600 ounces x USD 22 = USD 33,674,200 (because the value attributed to the future by the agreed valuation method was not the actual market price). At the time, this calculation was widely accepted as generating somewhere in the region of a USD 25 - 30 million loss on a Mark to Market valuation of the PM Desk PnL. This was substantially more than the monthly loss alert limit for the PM Desk as a whole of €1 million and annual loss alert limit of €3 million. It also represents about twice the profit generated by the PM Desk per annum. Mr Botting immediately escalated the issue to Mr Mostachfi, who escalated it to Mr Assaf who escalated it upwards. We refer to the gist of those conversations below.

Escalation of the PM Desk PnL issue – 30 March 2020

110 At 14.09, following the meeting with Louis McCauley and Tony Botting, the claimant sent an email to Mr Botting and Mr Mostachfi. This was sent before the teleconference and said:

> *Gold EFP (Exchange for Physical), the link between Futures and OTC spot level, had an usual move on 24th Mar when Apr gold futures contract approaches Delivery window (From 01 Apr to 30 Apr 2020, when a future becomes a spot in theory), as some people worried about the capability of delivery after the headlines that a few Swiss refineries half production due to COViD-19 concerns (Refinery coverts LBMA standard 400oz bars to COM EX standard 100oz bar), such worry was also confirmed by the Apr - Jun switch (Jun is the next active contract) as shorts rushed to pay $20 (the average rate before 24 Mar is about short to receive $4 to compensate the 2 month carry) to roll over, but next 2 days followed by a quick reverse when short received $31 on 27 Mar. However Jun GC EFP stays very high, today traded +$23 compare to +$4 carry. [D577]…*
>
> *Plan to take all chance, including client flows, to reduce short position on daily basis, aiming daily 100-300 lots but avoid panic buying in current poor liquidity market.*

111 During the day, the claimant also spoke with Phil Lawrence in MAM to discuss the problem with the mark to model valuation in the current market and to discuss possible solutions.

112 At 2.45pm, a call took place between the claimant, Mr McCauley, Tony Botting, Mr Mostachfi, Mr Assaf and Pierre Blondeau [D586]. At D592 Mr McCauley is noted as saying:

> *Yep right. Like on average like I'm in precious since 1999 and there have been I'm going to say 2 of these situations one I can remember went 8 dollars and the other went about 3 and it was considered panic but this is the worst I've ever seen it in my life.*

113 Mr Assaf stated after the claimant and Mr McCauley left the call that it was '*a major fuck-up*'. He asked:

> *Yeah but how can we not be able to assess the damage of mark-to-market when I go and speak to these guys about it. I mean what's, this is completely wrong, how can we be 30 million dollars out of our mark-to-market and we have no clue?*

114 Shortly after he confirms:

> *It's Louis, Louis told me I have 100 lots on the roll and that's it and I'm losing 200k he said and I told him I have a friend at another bank who is losing his head off this thing he goes no no we're okay.*

115 At 3.42pm on 30 March Mr Mostachfi had an extended call with Mr McCauley during which the latter stated:

> *Yeah I've had better weekends. But you know, I hope I did the right thing because I had a very restless weekend about this trade and I spoke with my wife who's very, very, very level headed and she said "you need to first thing. . . well at the weekend send Tony and send Sam an email to say that this needs to be reported". I saw what happened with on Turkey with xxx and I've been in the market for too long to risk my reputation and it's quarter end. . . I know how margin [clocks] work, I know how futures work and this gets. . . this gets [inaudible] very quickly and as soon as it didn't converge I'm like we need to let everybody who is important at this Bank know about this threat. [sic] [D602]*

116 The call continued until 4.30 pm, during which there was a very detailed decision about what to do with the Futures contracts. The claimant, despite being in charge of the desk, was not included in that call.

117 At 4.14pm, Mr Assaf spoke with Pierre Gay, Global Head of GMD. Louis McCauley was referred to several times in the call as the person on the desk on 25 March who did not raise the problem with Mr Assaf. Several times during the call, Pierre Gay said this trader should be sacked. He said, for example: '*This evening you get hold of this guy and you sack him*'.

118 At 4.32 pm a call took place between Tony Botting and Mr Mostachfi, after Mr Mostachfi had finished speaking with Mr McCauley. During this call, the draft plan to unwind the position as quickly as possible was further discussed. At 16.20 the claimant was told by email by Mr Botting: '*You are only to reduce risk until further notice*'.

119 At 4.49 pm, Mr Botting emailed Mr Mostachfi as follows [D665]:

Behnouche. Fyi a couple of points. By the 20th March, Sam had no April position . it was mainly switched to June. This was before the blow out on the 23rd. I also understand that Louis also had next to nothing in the April contract which is why he communicated that to Walid. [sic]

120 Between 4.50pm and 4.56 pm Mr Assaf spoke with Thomas Spitz, Global Head of Hedging and Investment Solutions [D646]. The following exchange took place:

WA - Well, no, no, I will do it, don't worry! I'm going to call Varloot. But that one, I expected everything in that book, and every time it made money I said to Benouche go and see, and Benouche looked and said, no it's OK I looked, whatever. But there they have, well really … that a future is not valued at the closing price, I did not expect that to still be in our systems. There's an active future that's trading, there is a settlement and it is not closed at the settlement price. …

WA – *There are two topics to discuss. There is the matter of traders that we will have to fire, so that's clear and we have to choose how we do it, who we fire, and when…*

121 At 4.56 pm, following the call, Mr Spitz emailed Mr Botting as follows:

I am absolutely shocked

Many times You have been asked to make sure this book was under control with very limited position The number of emails I sent re: risk apetite is also significant

The guy has basically run a huge Futur position marked as forward forever without any control. He has aslo apparently lied to Walid last week

I will speak to Pierre asap to let him know then we will talk. I am in a call with FCA until 1700 London time

Make sure we have a detailed proposed plan ready by then. [sic]

122 At 5.10 pm a conference call took place between Mr Mostachfi, Mr Spitz, Mr Botting and Mr Assaf [D656]. There was a discussion about the people on the desk. Mr Spitz stated that the claimant '*will be let go*'. Mr Botting agreed. There was also a discussion about Mr McCauley. Mr Assaf expressed reservations about him because he was the person Mr Assaf spoke to on the Wednesday and who reassured him there was not a problem.

123 Mr Assaf spoke again with Mr Spitz at 5.52pm. Mr Assaf had by that time spoken to Etienne Varloot, Global Head of Risk Management.

WA: Listen I spoke to Etienne … He said he didn't see this one coming and I said me neither. So with the futures, he didn't know they were wrongly valued in the system.

TS: Me neither

WA: Errr. . . Me neither. There you go. So, he wants to understand in a bit more detail [D673]

124 Etienne Varloot and Mr Spitz spoke at 5.56pm. The following was said:

TS - I am really furious. I'm sorry, something like that shouldn't happen.

EV - Yeah, I agree. [For] us, it's not normal not to mark futures at the future price. That sounds completely crazy to me.

Following a discussion about whether to keep the futures position until the EFP stabilised, or sell it now, Mr Varloot stated:

So we have to ask ourselves the question because we are not going. . .. You see, I don't think I'm going to make you cut., or selling the exposure or keeping the

125 Mr Spitz spoke with Carlos Molinas, then Global Head of Compliance, at 5.39pm:

Carlos - But how could he hide the loss

Thomas - He didn't h. . . because in fact, so, that's the point, in the bank system, it closes it in Murex, and Murex, for a reason I do not understand, I did not even know, they do not value the future. They value the future at the same price as cash. Because there is only one value curve. Yes, well, I have learned more about our trading system for precious metals today than in ten years. Because in fact the future is not valued in Murex. It's incredible! It's incredible! [D693]

126 A lengthy call took place between Mr Assaf and Mr Mostachfi between 6.54pm and 7.24pm. Mr Mostachfi suggested: '*someone like Varloot will spark things off*'; to which Mr Assaf replied:

WA: I don't think he will. . . well. . . I don't think there's much intent to spark things off because they know that they have messed up too by not having a correct valuation for these things. …

WA: So. . . there, we just need to keep calm. We need to understand what the real position is and how this position can be managed, if need be. Afterwards, yes, I think that we won't take much additional volatility, well, everyone will get excited at a certain point, but. . . So we have to reduce, definitely, but we need to have a reduction plan instead of just doing a fire sale, if you like

BM: Oh no, I don't think they'll do it, they'll do it, we'll do it as a fire sale, because if we do it as a fire sale. . .

WA: In a fire sale, we won't be able to do it, everyone is at it, well, all the other banks are going in the same direction.

BM: Mmmm. Yeah, yeah, yeah, yeah.

WA: And who do you think, between Sam and the other guy, would know how to guide us as to how to do it?

BM: Well, I think, the person, err. . .

WA: Who has market contacts, if we need to go and ask someone for an offer, that they make us a suitable offer to exit

BM: Well, personally I think Louis, because he's worked at Citibank, at BMA... BMA, I don't remember, er

[After being asked about the claimant, BM replied]: Err. . . Sam, I think he has been basically with us for quite a long time. Then I don't know, I don't know, I don't have much info about him. But his, erm, way of

communicating is difficult, I always found him very vague in his communication.

WA: Ah, well, yes, about 20 million dollar's vague

127 It was agreed that the claimant would be '*sent home*' because he didn't warn the bank about the P&L when Mr Assaf visited the PM Desk on 25 March (even though he was not on the desk at the time).

128 Mr Spitz spoke with Amaury D'Orsay, Global Head of Sales at 6.57pm. Mr Spitz told him.

And we couldn't see anything. So first of all, he never should have had 15,000 lots of futures contracts. In fact he has had an order book of trades for many years, many years! On the 1 of January, there is always the taking of the futures contract on OTC. Always! And no one saw it [inaudible] risk did not see it, [inaudible] and then also the futures contract exploded, and everything went belly-up. I already have that to manage that and then you spend years building [inaudible] and all that, and then an asshole like that, you know. [D750]

129 A further call took place between Mr Assaf and Thomas Spitz at 7.27 pm. The following was said:

TS - So that's why there's no doubt about Samuel in my mind. Well, I say what I think, we're taking Samuel out. And afterwards, we close this mess because no one understands what we're doing on precious metals. We lose twenty million and no one realises that we lose twenty million, we are not going to keep a stupid business like that, I mean at some point

WA - The worst thing was when I called Gregoire. He doesn't. . . well. . . he. . . ok, he's a bit like me, he doesn't look at the detail of that thing. But he said to me: 'When I look at the risk, there's zero risk on. . .'

TS - Well, yes, because there's only one curve, yes.

WA - But how Lilian, Lilian from risk management, who is deep in the deepest detail with Dimitri [a senior operational manager], when they set up this thing, didn't they see this? He said: "I don't know, I'll have to talk to him.". So…

130 By the end of the day, the PM Desk PnL issue had been escalated all the way up to the banks' CEO, Jacques Ripoll.

Discussions about the claimant's suspension

131 At 6:31 pm there was a telephone conversation between Mr Spitz and Ms David, Managing Director and Head of Human Resources [D688]. Mr Spitz was adamant that the claimant should be suspended. Ms David stated that suspension was a serious thing and urged caution. Mr Spitz said that he would call Mr Botting.

132 Mr Spitz and Mr Botting spoke at 6:46 PM [D697]. Mr Botting suggested that the failure to report was not intentional. Mr Spitz stated that the fact that it is intentional or not is irrelevant to not telling them that they are losing money. He suggested that the actions were '*completely dishonest'*.

133 At 6.46 pm Ms David spoke with Mr Mostachfi. The following exchange took place:

Ms David - Right, okay and that's where we're sort of getting a little bit of a mixed feedback and I'll just give you what we have done, is that Tony's version of what happened seems to be more on the fence. So he said that he was in a position that he should have, he was within his risk limit, um that Sam was within his risk limit and that, as of now, we don't know whether it was the market which has caused the losses or Sam's actions that have caused the losses. Now that, that is what Tony's position is. Thomas' position is that he was in a position, he took up a position that he was not supposed to have a few days ago and the position subsequently made a loss and he did not tell anyone and that you found out from some other source.

…. Now obviously, Thomas is at one end of the spectrum and Tony's at the other. Now, it's difficult for us in HR to make a call as to whether this was something that is suspicious activity and therefore calls for suspension. Are you with me?

Behnouche: Can I talk to Walid because I want to make sure, what his and Thomas' intentions are exactly?

134 Mr Spitz and Ms David spoke further at 7.11pm. In relation to the claimant, Mr Spitz stated:

He lost money. He knew it, but he did not tell us. And he lost money, a significant amount of money, so well and beyond his stop loss, so, for me, that is the reason why I want to suspend him, not because he didn't reduce his position enough. It's because he lost money. He started to lose money three days ago and he did not inform his management, meaning Tony or Behnouche or Walid. So, I'm suspending him, because he didn't tell us he was losing money. [D723]

135 The tribunal wishes to emphasise that the actions of the claimant did not cause the respondent any loss. On the contrary, during the last two weeks of March, the claimant and his colleagues on the PM desk did all they could to minimise any losses. The loss realised by the respondent was caused by the Covid-19 pandemic which resulted in the subsequent EFP dislocation. We shall return to this point in our Conclusions.

136 Ms David suggested waiting to hear from Mr Mostachfi. Mr Spitz replied that they needed to do something that day; and that Mr Assaf: '*wants the guy out anyway*'.

137 At 8.04 pm Mr Spitz spoke with Mr Mostachfi:

TS: Yeah, I talked to Anita who says you are not in favour of suspending Samuel and I don't understand why.

BM - Oh. . . er., we will just say he can't come to the office. I don't know whether 'suspension' is the right word to use legally right now

TS: Well in my opinion, given he lost a significant amount of money Wednesday, Thursday, Friday and Monday and is not telling us about it, this is clearly, it's clearly a case for suspension because he hid a loss he had on his books, which, due to a marking method that is not right, but that he knows perfectly well, doesn't show on the bank's books and doesn't warn its management. So, in my opinion, it's a suspension. …

BM But it's true we don't want him to come to the office and. . . um. . . trust has broken down, obviously.

TS: Anyway, we're going to fire the guy …. [D754-5]

138 At 8:07 PM, Mr Spitz spoke again with Ms David. In relation to the suspension he stated:

He knew that there was a shortcoming in the way of the system were [inaudible] at mark to market. . . that marking of position. He knew that given what has happened [inaudible] the shortcoming variation [inaudible] had no impact. He knew that since Wednesday, these shortcomings, variation of position, created a big difference between what P&L was coming out of the system, and the risk [inaudible]. He knew it completely and he [inaudible] failed to escalate it on Wednesday, Thursday, Friday, Monday. And on Monday, someone working for him on the floor came to see Tony to ask if [inaudible] had the position that was mismarked. And then, we investigated. So, for me, I'm comfortable with that, because as head of the desk, you're responsible to proper escalate any marking issue on your books.

139 Ms David agreed that the claimant would be suspended and steps were taken to implement the suspension the following day.

Suspension of the claimant etc – 31 March 2020

140 On 31 March 2020 the claimant was suspended pending investigation into allegations of potential gross misconduct and breach of the respondent's policies and procedures. He was informed that a disciplinary investigation would take place.

141 CACIB's first financial quarter ends on 31 March 2020. Steps were taken to ensure that the accounts posted that day accurately reflected the PnL on the PM Desk using actual prices rather than theoretical prices.

142 At 22.18 on 31 March, Mr Mostachfi wrote to Mr Assaf asking for his comments on a summary report for 'Control Permanent'. In relation to front office staff the draft stated:

As Walid Assaf saw the futures divergence last week (on Wednesday 25th March), he questioned the traders on the desk and Sam Yang did not mention the potential mark-to-market issue.

Louis McCauley was off last Thursday and Friday (26th and 27 March), and was supposed to be off on Monday and Tuesday (30th and 31st March) as well, but requested from tony to come to the office on Monday where he exposed the problem to Tony Botting who escalated the issue to Walid and Behnouche. Given the size of the mark to market issue, management was astounded that Sam Yang had not reported such issue, and as a result, it was decided to suspend Sam Yang until a formal investigation was performed. (sic)

143 Mr Assaf did not spot the error in relation to the Wednesday 25 March visit and agreed the draft. It was subsequently forwarded to a number of senior people within the Bank including Mr Sebastien, members of the Risk Committee and Ms Sqalli.

144 As will become plain from what follows, that paragraph was the subject of an amendment by Mr Assaf on 14 April 2020, in reply to an email from Mr Mostachfi sent on 10 April 2020 referring to a possible 'discrepancy'. That was subsequently forwarded to a number of senior people too including Mr Spitz, Mr Reynier, Ms David and Mr Molinas. The error continued however to be repeated as set out below, even after that correction had been made.

UK Risk Committee meeting – 31 March 2020

145 The respondent's UK Risk Committee met on 31 March 2020. The minutes record the following lessons to be learned:

> • *as highlighted by this crisis, complete review of the valuation policies across product line will be performed in order to ensure that no other Future/listed contracts are valu[ed] using theoretical price without close monitoring.*
>
> • *Communication is key: communication must be fluid on both ways FO vs RM/MAM.*

146 Also on 31 March 2020 the claimant emailed Nicky Smith in HR with his initial response to the allegations against him [D963].

147 Further on 31 March 2020, during a telephone call between Mr Molinas and Mr Spitz at 11.49 am [D842], concerns were expressed that a theoretical price was used when the futures have a price. Mr Spitz stated:

> *In fact there is always a spread of 1 dollar on the contract, between the two and as it never moves, it is worth 1, at least. . .well that's how it is! It's completely fucked-up.*

148 At D844 Mr Spitz is noted as saying:

> *Well, no, but there will be a Rule Breach Committee and we will see what he will have to say but personally my recommendation will be to fire him. One cannot mess about; I do not see what excuse he may have for not disclosing that he had a loss.*

149 He also confirmed that Mr McCauley would be used to '*settle the position*' and '*after we will see exactly what he knew, what he did not know, when*'. Mr Molinas remarked in relation to the claimant: '*If there was a conduct breach, then he is marked, that means that he will no longer have a career afterwards*. Mr Spitz responded: '*His career is not my concern'*.

Risk Committee Meeting – 1 April 2020

150 A further meeting of the Risk Committee took place on 1 April 2020 which Philip Cooper attended.

151 Mr Mostachfi stated during the meeting [D2247]:

> *So as the futures mar.., er moved basically Walid Assaf went to the desk and asked the, the, er, Samuel Yang you know what his positions were and whether he was affected by that move. But Samuel said oh no we're fine, and he, he was mentioning that with regard to the April contract, which yeah they had already unwound. So in that he was correct. But he omitted to say, at the same time, that if we had had a large move, and we had had a large move, and if we were marking our futures to where the futures market was then there would have very, there would be a very*

large loss in the, in the books. For the record, we were far below our er the risk limits that er that the bank had, so there was no foul play from er from er Samuel, you know there was no rogue trading, he was not over limits, he had followed procedures etcetera, etcetera. But he failed to disclose very important information that management should have been aware of.

152 Mr Mostachfi further stated during the meeting [2253]:

Ok, um, that's a good question, actually Louis had come to at least two or three of the month end valuation committees, where I had been present, you know so at month end each time, requesting that the futures should be marked on the futures close. So that debate had happened between the front office and MAM, where front office and Louis specifically had asked for a change of method, methodology which at the end was not accepted. So that um, er debate about markings and stuff like this had er had happened

The Bank rejected the change at the time because it would have cost $50,000 to implement it.

153 Later in the meeting Mr Mostachfi stated:

The point on this one, is because we couldn't see the sensitivity to that basis no one was monitoring it, er, er really. So you see, once we see a sensitivity we follow it, MAM follows it, it's in their systems, it's on their radars, it's on our own radars etcetera, etcetera, so there is a lot of discussions. … The problem on this specific one was that because we were not seeing the basis it was not monitored. Which is a weakness, you know, it's not an excuse at all. It's just er something that we didn't have on the radar because we were not seeing it. That is why we are putting the right systems into place. Not only to follow this one but anything that could look like this in any shape or form, be it on precious metals or on FX within the same Murex FCO system. [D2254]

154 Hubert Reynier stated:

Maybe before we close, I mean maybe just as a general conclusion. I think that er and I guess this is something we all have in mind already but I mean I think it's important to re, reaffirm it. Is the fact that in the present market conditions I think that MAM have to make some extra effort, whatever the methodologies are, whatever the, the procedures that are in place…

RBAC Meeting – 1 April 2020

155 On 1 April 2020 Philip Cooper emailed Hubert Reynier to request that a meeting of the Rules Breach Analysis Committee (RBAC) be convened. He then emailed Rita Sqalli, Ian Rowland and Behnouche Mostachfi to notify them of the RBAC meeting. The meeting took place the same day, after the Risk Committee meeting [D876]. The attendees included Philip Cooper, Mr Sheldon (Head of Legal), Ms David, Mr Spitz, Mr Mostachfi and Mr Molinas. Ms David stated:

David: *My thinking Hubert is that the next step would need to be that the disciplinary process will run its course, the RBAC would be updated as to the overall findings and conclusions of the disciplinary process and at that point, a decision can be made by Compliance as to whether or not,*

depending on the facts and the conclusions, an RBAC sub-co will need to be reconvened to assess the conduct … issue and/or any regulatory notifications.

Thomas: Just to make a point from a business perspective, given what we have seen of our analysis of the situation and we are more than happy to have Samuel interviewed, but the conclusion of the action can only really lead to one outcome. Which will be the termination of the individual. This person is not coming back on my trading floor to be clear.

156 Ms David responded:

Thomas: I can entirely understand where you are coming from on that, I just think we need to follow the process to both protect the Bank, to protect you guys and to give this individual the right to be heard, and then the facts will lean as to whatever decision needs to be taken. But I think we, I would caution against pre-emptive recording of decisions before the process has been conducted.

157 Mr Spitz further stated [D877]:

I know that on Wednesday Walid was on the desk and Louis failed to mention one day last week, and I know Walid spoke to him, and he failed to mention that there may be problem with the book of that trader. But to be fair I am little bit, I am quite on the fence on this one and I would find, so this one may take a bit more time to analyse and I would have a tendency to say that given that he raised his hand, came back to the office quite eagerly to discuss that matter, even if he was maybe doing that to protect himself, at least he did it….

158 Mr Mostachfi added [877]:

One thing to take into account with regards to Louis was that both Louis and Sam were present side by side when Walid was asking these questions so maybe Louis felt that he couldn't override his boss in front of you know, his N + 2 or 3 so I don't know, it's what makes the situation really complex as Thomas was saying

159 The same factual error that the claimant was on the desk when Mr Assaf visited, when it was Mr McCauley, was repeated in an email from Pierre Blondeau to Ms Sqalli, Elena Dobs and others sent on 1 April 2020 [1089]. That email was then forwarded to others including Vincent Thierry and Patrick Papillon. The error continued thereafter.

160 David Sheldon, Head of Legal, stated: [D877]

Yes just if we are, if the view is being taken that this guy Louis is um, falls within the remit of the whistle-blowing policy, OK he didn't go through the formal, there is a number of ways in which someone can be categorised as a whistle-blower, it's not just going through the compliance online tool, if he is to be categorised as a whistle-blower then yes he is entitled to the protections laid out in the whistle-blowing policy of the Bank, so, we must limit the people who are aware of his name, he cannot be the subject of any form of victimisation, in the short-term or the long-term, if there are, if there is a quote case to answer for his own conduct then that needs to be very very carefully managed, not saying you wouldn't do it, but it does need to be taken into, an extra layer of concern and caution, as to how we

would proceed on that. It doesn't mean we can't do it, it just means that it's a finer line of the protections that he is afforded.

161 Ms David remarked that she expected the disciplinary hearing manager to interview Louis McCauley.

162 On 3 April 2020, CACIB introduced a policy regarding BCP Homeworking Arrangements [D893].

163 On 9 April 2020 during a telephone call between Behnouche Mostachfi, Nicky Smith and Donald McLean to discuss the need to conduct an investigation meeting, Mr Mostachfi remarked that his '*blood [wa]s still boiling'*. Despite that comment, Mr Mostachfi was appointed to conduct the investigation meeting.

164 On the same day, the claimant's email of 31 March 2020 to Nicky Smith was sent to Mr Spitz and Mr Mostachfi, stating that the points raised by the claimant needed to be investigated. Instead of investigating them, Mr Mostachfi 'answered' the points himself in an email sent just after midday.

165 In a letter dated 9 April 2020, the Claimant was invited to attend an investigation meeting with Mr Mostachfi on 14 April. Three allegations were set out in the letter:

165.1 *your failure to escalate any concerns regarding the position held by yourself and your team in gold futures to your line manager following the EFP breakdown*

165.2 *the potential significant negative impact to the Precious Metals NBI of approximately 25-30 mio USD as at 30th March, if the position was marked to the futures market and/or closed*

165.3 *The failure to significantly reduce the risk profile of the precious metals in line with directives.*

166 Donald McLean provided Mr Mostachfi and Mr Molinas with a script for the investigation meeting with the Claimant.

167 The clamant emailed Nicky Smith on 13 April 2020, requesting a postponement of the investigation meeting and providing information to be shared with Behnouche Mostachfi and Carlos Molinas.

168 On 14 April 2020 a telephone call took place between Mr Mostachfi, Mr Molinas, Ms Smith and Ms McLean to discuss the template script for the investigation meeting with the Claimant [D966-973].

169 As already noted above, in an email sent on 14 April 2020, Mr Assaf confirmed to Mr Mostachfi that during his visit to the PM Desk on 25 March he had spoken only with Louis McCauley and not the claimant [D999]. Yet the error continued to be repeated.

170 Also on 14 April 2020, there was email correspondence between Hubert Reynier and Philip Cooper questioning whether a report needed to be made to the FCA and PRA and if so, what and when. The day after, on 15 April 2020. a telephone call took place between Hubert Reynier, Jean-Pierre Moine, Thomas Spitz, Philip Cooper, Behnouche Mostachfi and others to discuss further CACIB's regulatory reporting obligations. It was decided at this stage that since there were weekly calls with PRA ay that stage due to Covid, the issue would be raised during that weekly call.

Investigation meeting – 15 April 2020

171 On 15 April 2020 the claimant attended an investigation meeting with Behnouche Mostachfi and Carlos Molinas. The claimant was accompanied by Joseph Ward. Notes were taken by Cari Risk. During the meeting the claimant explained;

171.1 after the initial surge in the EFP, it then calmed down;

171.2 he had already squared his April futures the week before;

171.3 they had reduced the number of EFP lots from 23,500 to 15,000 lots in the two weeks leading up to 20 March;

171.4 the April to June switch was very volatile with thin liquidity. Shorts paid +20 USD on 24th March, but received 30 USD the next day;

171.5 the April EFP itself and the switch changed a lot so it's difficult to say where the June EFP was;

171.6 June came into play formally on 30th of March; that when the EFP peaked, only a very full small volume was traded, which was 'purely noise to me';

171.7 the main risk for forwards was DV01, which reduced to flat after Mr Mostachfi's instruction to reduce risk;

171.8 broker evidence showed April EFP was traded at 3 and 2.75 USD on Friday 27 March;

171.9 that buying at high levels in times of thin liquidity brings the market level higher which in turn brings more valuation pressure and it will become a vicious loop as happened in the 2008 crisis. The lesson is that market participants should not spread the panic, but do its own bit to stabilise the market;

171.10 that in hindsight, he should have sent an email to highlight the EFP dislocation on 26th or 27th of March.

172 On 16 April 2020, Mr Mostachfi spoke with Mr Molinas following the investigation meting on 15 April. Both agreed that the claimant '*has to go'*. Both expressed their frustration at how long the dismissal process was taking. Also on 16 April 2020 a telephone call took place between Mr Mostachfi, Mr Molinas, Ms Smith and Mr McLean to discuss the outcome of the investigation meeting with the Claimant [D1006-1011].

Risk Committee Meeting – 16 April 2020

173 A further meeting of the Risk Committee also took place on 16 April 2020. During the meting:

> *Behnouche Mostachfi confirmed we will introduce a new gold currency in the system to be able to have a better monitoring in place. Looks like the Team made this request last year but was rejected due to budget constraints. Benhouche advised to re-think and review our budget constraints which had a large impact on CACIB P&L (c. 35m) [D995]*

174 Mr Spitz asked Ms David what the next steps would be following the meeting. Ms David suggested there were two alternatives, either to start a disciplinary investigation, or go back to RBAC with a different suggestion. Mr Spitz chased the matter up again on 20 April asking '*where we stand now'*. On 22 April, Mr Spitz suggested that since it had been three weeks since the bank discovered the issue and the claimant was suspended '*can we make sure the process is finished by end of week please'*.

Whistle-blowing report regarding Louis McCauley

175 Also on 16 April 2020, Philip Cooper completed a whistle-blowing (BKMS) report concerning Louis McCauley's escalation to Tony Botting on BKMS. The report repeated again the inaccurate statement that the claimant was on the desk when Mr Assaf visited, not Mr McCauley. It also stated:

> *The trader whose conduct led to the whistleblowing alert is subject to the HR disciplinary process.*

176 Mr Cooper also emailed Anita David to notify HR of Louis McCauley's status as a whistle-blower. Mr Cooper emailed Mr Molinas and Ms David to say that Mr McCauley needed to be treated as a whistle-blower and could not be subjected to victimisation or detrimental treatment. This followed an email from Mr Botting dated 9 April 2020 in which he had stated:

> *I have an employee (not a direct reporting line) who escalated a serious matter to me on the 30th March. This in turn was immediately escalated by me to Senior management in London - Behnouche and Walid. He is concerned around the ramifications for his career from having done this. Perhaps we could discuss this as the individual concerned has asked if this would fall under the criteria of whistle blowing. Perhaps we could talk on the phone.*

177 On 17 April 2020 the claimant emailed amendments and additions to the minutes of the investigation meeting of 15 April with Mr Mostachfi and Mr Molinas to Nicky Smith and provided a number of additional points to clarify/confirm what he had said during the meeting.

> 5. *I understand that questions from Behnouche and Carlos in the factfinding meeting wanted to establish whether I would act differently if this situation were to happen again. My answer, now that I have seen the potential consequences of not maintaining frequent contact, would be yes. I did not fully understand what "in a timely fashion" in my Job Description meant. I believed that because my positions were June and not April positions, I did not need to escalate immediately. I would learn from this suspension that I should escalate more frequently, even in situations where I am not so sure that I need to. I would not take any risk in the future by not escalating.*

178 Mr Mostachfi provided HR with responses to the additional comments provided in the Claimant's email of 17 April the same day. In relation to the paragraph above, Mr Mostachfi responded:

> *Not understanding the implications of a 13 mio USD potential P&L impact, not reporting to management and not respecting the monthly and yearly*

179 In relation to point 6 of the claimant's email, reproduced below, the response was:

[Claimant, point 6] I want to remind Behnouche that in the past, when Tony was not around, I have escalated to him without delay, for example, explaining the technical breach of a stress limit, and reporting big PnL on those days when we had corporate lease trade, and big TRF unwinding trade etc. I do take my reporting obligations seriously.

[BM Comment] The size of the futures or P&L impact though were never reported.

180 Also on 17 April 2020, the (at that stage) routine weekly telephone call between CACIB (including Mr Cooper Hubert Reynier and Mr Spitz) and the FCA and PRA. The impact of the GVE on the bank was discussed. There was no issue raised about the valuation method (i.e. mark to model) being used at the time of the incident. It was reported that the bank had to book a larger reserve of 22 million pounds [D2032 and D1041].

181 Mr Molinas also emailed Mr McCauley on 17 April inviting him to a meeting with him and Mr Mostachfi:

to discuss the recent events on the PM desk, to tell how we value and consider your contribution and overall check out the temperature at the desk'.

We accept the evidence in chief of Mr Cooper that as part of one of their regular one-to-one meetings, Mr Molinas (given his responsibility as Global Head of Business Compliance) expressed the view that no disciplinary action should be taken against Mr McCauley as this could negatively impact the 'speak-up' culture within CACIB. Mr Cooper could not confirm whether it was Mr Molinas who took the decision not to investigate Mr McCauley nor when any such a formal decision was taken at all. The above email suggests that M Molinas was very much involved in that decision.

Appointment of Mr Chedin

182 On 20 April 2020 Mr Chedin attended a briefing call with Nicky Smith and Donald McLean in which he stated [D1051]:

Well … his position was probably difficult to mark and that's probably our views, and of course in retrospect we are all clever, but spot at the time, I am quite sure that the position was very difficult to mark, this being said on the other side, but probably what we need to ensure is whether all this has been this has been disclosed transparently and discussed with management because certainly the position which is difficult to mark especially in that context of the coronavirus crisis, I would say, that can happen, definitely, that's part of life, part of trading, part of the activity we're running but as soon as this kind of difficulty emerge, uh communication to management, transparency to management is absolutely key and the last thing that we want to have is to be in a situation where the trader tries to I would say to fix it, or to massage it down uh and then think maybe if I do that maybe management won't get worried and things will come back and will recover in the future so no need to raise an alert that might prove worthless in future..

183 We accept Mr Chedin's evidence that he was not aware during the disciplinary process of the conversations between others in the bank including Mr Spitz, Mr Assaf and Mr Mostachfi, to the effect that the claimant was to be

sacked. We further accept that HR did not suggest that it was necessary to consider the conduct of others, such as Mr McCauley or Mr Botting. He understood his remit to be to consider the allegations and if they were upheld, to issue an appropriate penalty.

Investigation report 21 April 2020

184 The Investigation Report was concluded on 21 April 2020 and provided by Behnouche Mostachfi to HR [D1064]. This states, under the heading 'Background to the Investigation':

> *Large position not disclosed in timely fashion by the Global Head of the Precious Metal desk despite Global Head of FX asking for large positions to be reduced and reported, leading to very large potential P&L swings in an unprecedented and chaotic market, and ultimately leading to large loss exposures.*

185 The report stated that the persons interviewed were Tony Botting, Mr Assaf, the claimant and Mr McCauley. In fact, only the claimant had been formally interviewed. There were no formal investigation interviews with the others mentioned; Mr Mostachfi was just referring to the call at 2:45 PM on 30 March.

186 The report added a further allegation to the three set out in the invitation letter to the investigation meeting, namely:

> *Failing to communicate the size of the Gold Futures exposure before and during the large [gold] Futures moves, even when the Global Head of FX was asking for large positions to be significantly reduced and whether the desk was holding significant exposures.*

That specific allegation had not been formally put to the claimant.

187 On 21 April 2020, there was a meeting of the Risk Committee. The minutes confirm that the total loss on the PM Desk following the unwinding of the Futures position was €30.3 million. The profit made by the desk of €15 million had become a loss of €15 million. The tribunal considers that it is important to stress that the loss incurred by the bank was in no way caused by the claimant. It was caused entirely by the EFP breakdown. The claimant was not disciplined for causing any loss. He was disciplined for failing to identify, and escalate the loss to the Bank if the PM Desk PnL was calculated on the basis of actual rather than theoretical prices. Even if the claimant had escalated the issue earlier, the loss would not have been any less. Further, the loss incurred resulted from the decision of the bank to unwind the positions in April/May. That was a decision for the bank to make. It was not however a decision which the claimant had any input in relation to because at that stage he was suspended.

188 Following the discovery of the position, the bank decided to reduce the number of lots held by the bank in PM futures from approximately 15,000, to 500, in a relatively short space of time, at a time of thin liquidity. That was of course a decision for the bank to take, and the tribunal pays due deference to the bank's decision in that regard. The loss eventually realised by the respondent however, had nothing whatsoever to do with any action or inaction by the claimant.

189 On 23 April 2020, Mr Molinas met with Mr McCauley (see the email mentioned above dated 17 April 2020). No further details have been provided as to what was discussed during the meeting or as to what decisions were taken. It is apparent from the tone of the 17 April email however that a decision had been taken not to take any disciplinary action against Mr McCauley and that his position within the bank was secure.

Invitation to disciplinary hearing – 24 April 2020

190 On 24 April 2020, the Claimant was invited to attend a disciplinary meeting on 29 April. The same three allegations as set out in the invitation to the investigation meeting were set out but not the fourth, referred to in Mr Mostachfi's report.

191 Donald McLean emailed the Claimant on 27 April 2020 attaching documents that might be referred to in the disciplinary hearing on 29 April. The Claimant subsequently requested a postponement of the disciplinary hearing, which was rearranged to 5 May.

192 On 4 May 2020 the claimant submitted his 'Disciplinary Submission'. This was said to contain the claimant's first and second protected disclosures. This contained the following information [D1136, 1141, 1142]:

> *When I work from home, I do not have access to market trading or internal systems, only my company mobile phone, and internal Bloomberg chat….*
>
> *I have not been given any specific guidelines, nor has my team, on what to do when risk materializes when I am not in the office, or any special arrangements for information sharing….*
>
> *There are two valuation methodologies on futures position among banks:-*
>
> > *1. The first methodology is to use the same OTC contango curve to value futures. This method has been consistently used by CACIB before I joined the bank …*
> >
> > *2. The second methodology is to use CME daily settlement prices to value futures position. But technically CACIB system is not ready for this methodology, and it is not accepted by MAM and DRM….*
> >
> > *My ex-line manager Stephen Pender had raised the advantage and disadvantages of each methodology back in 2015-2016, but the Bank chose not to make any change due to technical problems. Current methodology was chosen by the Bank and I have complied with them.*
> >
> > *Again, had the risk been clearly quantifiable at that time, then the Second Line of Defence would have detected and reported the exposure, which they did not.*

193 Mr Chedin told us that those submissions were read by Mr Chedin prior to the meeting with the claimant on 5 May 2020, but his focus was on the allegations against him, not on the claimant's submissions regarding them. We accept that was how he approached the matter.

194 The Claimant included in his submission a list of people to interview – namely, Phil Lawrence, Head of MAM Murex, Lilian Chaplain Head of DRM and the PMD traders James Donaldson and Joseph Ward. Mr Chedin decided it was not necessary to speak to them. Nor did he consider it necessary to consider the emails from Mr Pender in 2014/2015 regarding the valuation method.

195 Donald McLean sent Laurent Chedin a draft script for the Claimant's disciplinary hearing, which Laurent Chedin amended and returned.

Disciplinary Hearing – 5 May 2020

196 On 5 May 2020 the claimant attended a disciplinary hearing. This was chaired by Mr Chedin. The Claimant was accompanied by Joseph Ward. Mr McClean was present on behalf of Employee Relations and Laura Barker attended as note-taker.

197 There is a dispute as to how many disciplinary allegations Mr Chedin referred to. The script prepared beforehand referred to four allegations. The notes however do not refer to four specific allegations. Had four allegations specifically been put, we find it inherently improbable that the claimant would not have queried that, given that the letters inviting him to the investigation meeting and disciplinary hearing referred to three allegations only. The script also refers to the purpose of the meeting being to consider the disciplinary allegations referred to in the invitation to the disciplinary hearing letter. We find that though it might have been Mr Chedin's intention to deal with four allegations, it would not have been clear to the claimant that was his intention or that a fourth allegation was being discussed.

198 Mr Chedin summarised the matters discussed at the disciplinary hearing in his disciplinary outcome letter, which is dealt with below.

199 On 5 May 2020, Joseph Ward sent an email to his Gmail account which stated:

> *Granted, the switch was also extremely volatile during this time. No one here is debating what the cost to close the risk positions (mtm) was during this week - it is a basic calculation. However, it is reasonable to me as a fellow precious trader and someone that has worked with Sam since August 2016 that he thought it was prudent to wait to inform managers. With the team nearly flat April contracts and the market being mainly driven by the April contract moves (including the switch) there is a strong argument that waiting to see how the June EFP behaves when it is trading on its own makes sense. There is plenty of evidence submitted that Sam's belief was that the panic was short-term and driven by market participants stopping out of April positions and that when the June contract became the lead contract for the EFP things would settle down. Given Sam's previous record of involving managers in business and market risks I am confident Sam would have informed management the week of 30-Mar once it was clear the EFP was not calming down right away.*

200 The claimant submitted his amendments to the notes of the disciplinary hearing on 7 May 2020 and provided "some further feedback".

201 Laurent Chedin emailed Donald McLean his draft thoughts and findings on the same day [D1153-1156]. The email include the following:

> *… the question directly asked by the Global Head of FX on the desk as to whether any significant exposure was being held should have provided a good opportunity to mention it….*
>
> *… the investigation has not evidenced a deliberate willingness to hide from the desk Head. It appears to the investigation that the desk Head, because it was confident with the position and focused on the DV01 and*

Vega, did not consider this position as requesting, because of its magnitude and different market / product than what it was hedging, reporting to Management. This should be considered alongside the allegation.

202 On 13 May 2020, Mr McLean sent Mr Chedin some suggested questions, prior to the interview with Mr Botting on 14 May 2020. They include questions about the valuation method, about any similar past volatility episodes, and any reporting procedures or past practices in such circumstances. The questions were not asked of Mr Botting. Mr Chedin did not consider them relevant – he thought they were 'naïve', or 'beginner questions'. Mr Chedin decided the issue was a narrow one. That is, why the claimant had failed to notify management of the dislocation in EFP between 23 and 30 March 2020.

Interview with Mr Botting – 14 May 2020

203 On 14 May 2020 Mr Chedin interviewed Tony Botting [D1202]. During the interview, Mr Botting said the following:

I worked in Asia for 5.5 years, so I'm used to working with Asian people. The cultural aspect is something you need to be aware of in terms of loss of face. They can sometimes be reluctant to agree to something that has gone on.

204 Mr Botting also told Mr Chedin:

TB: There was no mention of any loss being built up. If you look at the risk highlighted in the emails, it appeared to be nothing apart from minimum risk. There was very little DVO1. He is in denial that there was an issue with the trading position. This was a once in a decade move, but if he had communicated that earlier, there would still be a loss but less. I have lost confidence in him as a manager and in him communicating the risk.

I sit behind SY; the crux of matter is that there wasn't a communication. He didn't view it as risk. That is the biggest concern. When after LM had quite rightly highlighted the risk and it was escalated, SY was still in denial. Even when I spoke to HR after suspending him, he was still struggling with the loss. This has destroyed my faith in him as a manager.

Interview with Mr McCauley 19 May 2020

205 On 19 May 2020 Laurent Chedin interviewed Louis McCauley [D1212-1214]. Mr McCauley was asked questions about the claimant's leadership style and his handle on risk related to options trading. He was not asked about the gold volatility episode. Nor was he asked about Mr Assaf's visit to the desk on 25 March. Mr McCauley did say:

LM: No, because we have Bloomberg chat, everyone was always on Bloomberg. I would come in and say "Oh wow guys, you made a million this morning". I have a tool called Risk Engine I would come in and ask how did you make that money. He would say the trade is on the chat. I would need to read the chat and see what it is, on Risk Engine, I can see all the risks from all the teams. I would look at that but he wouldn't. I'm a big challenger, but he doesn't ask and doesn't challenge how we make money. [D1213]

Draft disciplinary findings – 19 May 2020

206 Laurent Chedin updated his draft findings to add a 'Conclusion' section and emailed them to Donald McLean [D1181]. The conclusion section stated:

> *As a result, my assessment is that the individual being the object of this disciplinary process cannot be maintained in his current position of Head of the Trading desk.*
>
> *The rationale underpinning this assessment is that the individual has not grown to the task of a Head of Trading by committing the above referred allegations.*
>
> *On the other hand, the investigation has not evidenced anything malicious or dishonest in the behaviour of the individual. If anything, it appeared that the commission of the allegation was the result of judgment calls that were severely erroneous during this severe crisis episode and of an insufficient capacity to put things in perspective by looking at the situation from one step back.*
>
> *Taken this into account, Management and HR should explore whether they deem relevant, appropriate and feasible to, while sanctioning the allegations that have been committed for their gravity, give the individual a second chance by:*
>
> - *Demoting him from his position as chief trader*
> - *Putting him in a trader position devoid of Management responsibility*
> - *Adjust the comp downwards accordingly*
> - *Train the individual and agree with him objectives to be met in term of communication, reporting and Management skills*
>
> *If this is deemed not feasible or appropriate, then the individual cannot be maintained in his current position of Head of the Trading desk and appropriate action has to be taken in that respect.*

207 On 21 May 2020 there was a telephone conversation between Laurent Chedin and Donald McLean to discuss Mr Chedin's draft findings [D1194].

208 Mr McClean told Mr Chedin:

> *I've been keeping Anita David, the head of HR, updated... um and on your current thinking about the outcome. Obviously this is shared with. . .she's had to speak to Rita as COO and I think Rita is going to speak to you about the, you know, the case, just to let you know.*

209 At D1196 the notes record:

> *And there is also no doubt that, [as expected. . .[inaudible] to have been appointed] as head of the desk in a sense there is no real excuse for having committed this mistake and so therefore he has to pay the price for that. The question is now, what is the right price? Is it just to dismiss him for misconduct or can we give him another chance. We have to find what the right answer is …*

210 Mr Chedin continued [D1198]:

It's clear that we judge him on being desk head and we have to …dismiss him for misconduct. There is no way out of that because there have been errors of judgement which were big which happened over a period of time, which was a few days in a row. Anyone can make a [certain] error of judgement but then you would expect people to either [inaudible] to remedy the error of judgement, and say 'ok no, that was the wrong call, I made the wrong judgment, I [inaudible] ...'. Or you would expect him to communicate with peers, colleagues and then to realise that they made an error of judgement and to remedy.

Donald: Yeah.

Laurent: He made a big error of judgement but he did not remedy the error of judgement not just for himself. ..no full communication with peers or with colleagues. For that reason he takes the responsibility, there's no way out of that. That's a big responsibility. Therefore the sanction should be actually quite big and probably the sanction is dismissal for misconduct probably. Then it's a question of context for the bank to find that anyone agrees that [inaudible] . . .and the investigation could not find any malicious intent, it was really error of judgement, nothing malicious. But yeah unfortunately maybe it's not. . .it's not. . .it's not sufficient to make a big change in our final decision making.

211 McLean advised Mr Chedin during this call that if he was sending his written thoughts, not to mention the claimant by name as the claimant 'could put a request in to see any information' (i.e. make a data subject access request – a DSAR). There are a number of other examples where such tactics were used including an email of 9 April 2020 from Mr Maclean to Ms David and Ms Smith [D925]; the script for the investigation hearing (sent 9 April 2020 – D948 and D950); an email from Ms Smith to Mr Mostachfi and Mr Molinas sent 17 April 2020, with the claimant's comments on the gold volatility episode [D1047]; emails sent around 21 May 2020 between Mr Chedin and Mr McLean to discuss the disciplinary penalty; an email between the same on 26 May 2020; the draft disciplinary outcome letter between Mr Chedin and Mr McLean [D1225].

212 On 26 May 2020 a further telephone conversation took place between Laurent Chedin and Donald McLean [D1199-1200]. Mr McLean said he was aware that Mr Chedin was due to speak with Rita Sqalli, Global GMD Chief Operating Officer, but did not know what Ms Sqalli wanted to speak with him about. He stated:

I know you are going to speak to Rita soon and I just wanted to, if she asks, I just wanted to confirm what we have discussed; what this may mean for Samuel. It's not confirmed, in case she asks you, because obviously if. . .just that she will know that whatever the outcome … is, if it is dismissal or final written warning, because we have already started a process against Samuel, disciplinary process, this will be on any reference that is provided for six months. [ET Note - six years in fact, not six months]

213 Mr McLean also stated:

If you are. . . and just, I know that you are very diligent, but don't email maybe Rita or anyone else on this unless we have Lisa Mann, Lisa Mann

from Legal copied on an email otherwise it would be something that we could have to show to Samuel.

214 The purpose of that statement was, again, to further prevent such communications being readily identifiable in a DSAR search. A similar comment was made in an email sent by Mr McLean to Mr Chedin on 3 June 2020 [D1215].

Telephone call – Mr Chedin and Ms Sqalli – 26 May 2020

215 The telephone call between Laurent Chedin and Rita Sqalli (who is still employed by the respondent) took place on 26 May 2020. After the introductions, Ms Sqalli stated [D2007]:

I wanted to understand a little of where you were in your reflection on this case which takes a little time to be settled for reasons that have nothing to do with the subject ...it's rather the current circumstances which are a little more complicated to manage.

216 The tribunal finds that was a reference to the pandemic. Mr Chedin stated [D2013]:

So, as a result, that's why I'm hesitating a little: if basically the bank had done its job of training him, I would have said we must make him leave for gross misconduct and report to the FCA that there was a problem, and then, there you go, there is no doubt. There, I would say, that I think firing him for gross misconduct and ending his career, it's a bit rough because of that. At the same time, we can't leave him in his position, so in fact, I was hesitating a little between – and this is where I no longer know very well what is feasible – not feasible, – the fact of telling him "we have two options. One option gross misconduct, we fire him. Second option, we tell him ok we'll lower your fixed salary, your bonus will be zero, you are no longer a Head of Desk, we'll change your desk, we'll put you at a desk where you will be trained to management clearly, and basically you'll have to deliver within a year and at that time we'll set your counter back to zero, you see? This is a possibility too. So what is right, or not right?

217 Ms Sqalli responded:

And I understand your hesitation. I think, after all I do not necessarily know this case in detail but it seems to me that we were not talking about reporting him to the FCA…. For me, reporting him to the FCA was a little too much …

Rather, it was the options to consider. It was to say "listen, I think that here, what happened is serious enough for us to have a real breach of trust from this point of view etc etc, and therefore what we are proposing is that we leave on good terms, you try to find a job elsewhere", but we did not necessarily report him to the FCA. Me, that was my understanding.

218 A discussion then ensued about a regulatory reference. Mr Chedin stated:

Yes. I understand that and I'm more of the opinion that reporting him to the FCA would be a bit harsh I admit that unfortunately, because I thought of Sam, there is one thing that bothers me. I wouldn't like him - to leave, we say to him, give us your resignation and he leaves; I wouldn't want him to show up to some bank tomorrow, explaining that he was a brilliant Head of Desk at CACIB and that he just left because he was disappointed with the

bonuses. It would annoy me a lot. Because clearly, this guy is unfit to be a Head of Desk, totally unfit. I hope he has understood. But you see, I would be annoyed if he crashed another bank, and then you see?

219 Ms Sqalli replied:

That particular point can't happen because they're going to do the regulatory references, you know, so they're going to ask us. We have an obligation to disclose that there has been a disciplinary that concerned him. What we can do with him - we have already done this in the past - if it is moving towards that - is that we agree with him on the wording - finally we agree, that's a wording that suits us too - but we say to him "listen, this is what we will disclose if we are asked for your regulatory references". But I agree with you, it is out of the question that we say, when we are asked for regulatory checks, that he has a record that is clean and that he is the best Head of Desk that we have ever had. And now, as it happens, that would be doing... we wouldn't like other banks to do it and therefore we shouldn't do it ourselves….

So whatever happens, and independently of the outcome and the decision you'll make, and if I understood correctly at the minimum it's a demotion.

[Laurent : absolutely]

Whatever will be, it will be in his file and so it will be disclosed, not necessarily to the FCA, unless the FCA asks the question specifically about him. But there is no reason why they'll specifically ask us, etc.. But on the other hand, if another bank asks us for his regulatory references because he wants to go and work there, we will disclose that he has been in a disciplinary, and this is where wording is important. And this is what is usually negotiated, discussed anyway, between the two parties to find a common agreement.

220 Mr Chedin replied:

Agreed. OK. A priori, I will probably veer towards this solution. It's the fact of saying in this case effectively, we dismiss him, we will disclose the fact that there was a disciplinary and the terms will be discussed, that seems to me the best solution in this case. Because in fact, I find it a little rough to report him to the FCA and maybe even a little bit unfair to be honest. And at the same time, one, we absolutely can't keep him in that position - that's totally not possible - and two, we don't want him to go and occupy the same position tomorrow with another bank.

221 Shortly after this comment, Ms Sqalli suggested that Mr Chedin should speak to Mr Assaf as she had heard from Mr Spitz that:

Walid would have gone to the desk and would have asked questions, and apparently the answer that had been given to him, I guess it's by Samuel but again you'd have to talk with Walid because I think it's important, it's "it's fine, we have nothing, we are very light" or something like that. And as for me, what that's what I heard and…

Interview with Mr Assaf – 28 May 2020

222 As a result of that suggestion, Mr Chedin interviewed Walid Assaf on 28 May 2020 [D1206-7]. Mr Assaf confirmed that the claimant was not in fact in the office on 25 March when he visited the desk and spoke to Mr McCauley.

There was a dispute as to whether or not Mr Assaf stated to Mr Chedin during that meeting that he had lost trust in the claimant. Mr Assaf could not recall that and we accept that he could not. However, Mr Chedin did recall it, and said as much to Mr De Lambilly when he was interviewed for the disciplinary appeal [D1603]. We find on the balance of probabilities that Mr Assaf did say that he had lost trust in the claimant. Indeed, between two such senior managers, it would have been surprising had there been no such discussion at all.

223 On 3 June 2020 Louis McCauley emailed the notes of his interview to Laurent Chedin. He confirmed in that email that he was Acting Head of Desk.

224 On 8 June 2020 there were two telephone calls between Laurent Chedin and Donald McLean to discuss and conclude the disciplinary findings. In a call commencing at 9.12 am, Mr Chedin confirmed that he had decided that the claimant should be dismissed, but without reporting the case to the FCA. Also:

> *[W]e do not want that he goes to another bank and says "ah you know I was at CACIB, and I just left because I was a bit unhappy about the bonus", right, we want people to know that he's left upon something linked to a disciplinary.*

225 At 2.31pm there was a longer call during which there was a reference to the visit made to the PM desk by Mr Assaf on 25 March:

> *I think clearly this allegation is a, is a, appears warranted and hold it's very clear that we have seen no sign of anything in written nor anything verbally in term of communication to the line manager. There is even worse, when the line manager came on the desk and asked whether there was something the answer was no, not this position, everything under control. [D1223]*

Mr Chedin admitted during the hearing that this was an error.

<u>RBAC Meeting – 10 June 2020</u>

226 On 9 June 2020, Mr Chedin's disciplinary findings were shared with RBAC. They were then discussed at a meeting which Mr Chedin attended on 10 June. Mr Chedin told the meeting:

> *However, for sure we had at the early stage of the crisis, both the Global Head of FX and the Global Head of Macro coming to the desk and asking whether there was any large position, any matter of concern, any negative impact to be expected from the disruption that the gold market was experiencing and this very good opportunity to communicate things to this manager has not been seized by the desk. [D1235]*

227 Then later:

> *So, therefore, I did try to find what has been reported and clearly there has been no report on that by the head of desk, including an occasion where we had global head of Macro and the global head of FX coming to the desk and asking, "guys, how are you performing in the first stage of the crisis?" "Do you have any concerns, any big position?" The reporting opportunity has not been seized, and even worse, the first communication on that situation to management did not come from the head of desk but it came from another person, the Person A. Which, indeed, shows that the*

head of desk has not performed any communication on that, which is, well, which is simply incomprehensible in a sense given the magnitude of the amount. So therefore, clearly, the Allegation 3 appears warranted and should hold. It's very clear that no communication has been made on that amount. [D1241] …

The first thing which is worth again to share with you and which is important for me to voice to each and every [one] of you, is that the investigation has not found any deliberate, malicious or dishonest behaviour from the head of the desk. … When we look at these three allegations, each of them, even if we take it in isolation from the two others, does constitute a major allegation as each of them refers to a key duty which is really at the core of what you expect from a head trader, which is typically informing management without delay of any material exposure and that's even more at the time of a crisis. And that's even more, as soon as there is any concern, any potential concern or any question which is open about the valuation of a large exposure. And clearly, this has not occurred. So, unfortunately, taken in isolation, my professional assessment is that any one of these three allegations is very serious and severe. And then the combination of the three allegations together, unfortunately I have [inferred] by the fact that they have occurred over a significant period of time. Of course, it was one week, one week that might appear to be very short period of time, but for us trading one week is a long period of time and one week during a crisis… [D1242]

228 Mr Chedin told us that he would not have concluded that there was no dishonesty, if he thought the claimant was on the desk on 25 March. We do not accept that those statements are inconsistent. The notes record that Mr Chedin stated twice, in the clearest possible terms, that the claimant was on the desk when Mr Assaf visited. That misapprehension is not inconsistent with a finding that even if the claimant had been on a desk, and had not reported the matter, that was not because he was dishonest or deliberately hiding a loss, but because the claimant did not consider it was necessary to escalate any concerns. See for example the draft conclusion of 19 May, which referred to 'severely erroneous judgment calls' in not reporting, not dishonesty.

229 Mr Chedin went through four disciplinary allegations at that meeting, confirming that three out of four were upheld. He considered that any one was serious and severe, but that:

… with three allegations which are severe when taken in isolation, have occurred in a combination of a significant period of time and then fortunately it's clear that it's not at the initiative of the head of desk that they've been interrupted. (sic)

230 Ms Sqalli confirmed at the meeting that it was GMD's view that the claimant has to be dismissed whether as Head of Desk or as a trader:

But from GMD's view it's of course a dismissal because we cannot have someone who has committed those kind of issues, either as a head of desk or as a pure trader. The fact that he was a head of trading at the time so for us it's kind of clear cut in terms of I would say his future within the bank and then yes it's true we need discuss whether it's pure misconduct or a more, or a gross misconduct. [D1245]

Rules Breach Analysis Sub-Committee Meeting

231 A meeting of the Rules Breach Analysis Sub-Committee (RBAS-C) followed the RBAC meeting on 10 June 2020, to consider whether the claimant's conduct amounted to a Conduct Rule breach. RBAS-C concluded on the basis of a discussion around the report made by Mr Chedin that the failure to escalate came within Rule 2 – due skill, care and diligence. The sub-committee did not conduct any separate investigation itself. A potential breach of Rule 1 was considered but since Mr Chedin had concluded that there was no intent to mislead or hide the loss caused by the EFP dislocation, a breach of that Rule was not found.

Risk Committee meeting 19 June 2020

232 On 19 June 2020 there was a meeting of the Risk Committee. A decision was made that PM Futures were no longer to be marked on a theoretical basis. Four new synthetic currencies were to be introduced, and a new limit on gold Futures was set at 500 lots (previously 25,000). The review had found that PM was the only part of the Bank (at least in London) using Mark to Model for the valuation of futures. All other desks (which we were told were 'several' in number) used Mark to Market [D1261-2]. The main reason for this was said to be the historically close correlation between the Futures and the OTC price of gold.

Disciplinary outcome letter – 13 July 2020

233 On 13 July 2020 Laurent Chedin's disciplinary outcome letter was emailed to the Claimant. The claimant's employment was terminated with immediate effect, with a payment made of three months pay in lieu of notice [D1266-1274]. Mr Chedin noted:

> • *You agreed that you should not have let your uncertainty or your view of the market prevent you from communicating the issue to management and you accepted that you should have handled the situation differently.*
>
> • *You acknowledged that it may have been appropriate for there to have been more frequent reporting and meetings with your manager and said that you could benefit from training on communication.*
>
> • *You said that you did not intend to mislead the Bank, but acknowledged that you should have raised these concerns to management; you apologised for your actions. [D1268]*
>
> *…*
>
> *Whilst I accept that you were working from home on 23, 24 and 2S March 2020 without direct access to the market, and that the working conditions were new and perhaps difficult, this is no excuse for not monitoring closely and reporting duly the position of the market and the exposures of the Desk.*
>
> *You also said that you thought that someone else on the Desk had reported the position and exposure to Mr Botting. However, it is not enough for you to have assumed this. It was your responsibility to ensure that such a communication was made clearly and unambiguously and that your line manager was also aware of the measures taken to mitigate and contain any adverse impact on the Desk positions. …*

I understand that you thought that the situation was uncertain and wanted to wait until you had further information and could present a more detailed account to your line manager. However, in my view, the fact that you had such uncertainty and that you accept that EFP breakdown was "unprecedented" was precisely what should have let you to have appreciated that an escalation was required without delay. A lack of certainty should in no circumstances be an obstacle, nor a justification to delay the prompt conveying of information to your line manager.

Further, you also acknowledged that you were aware that Mr Assaf had come to the Desk on Tuesday 24 March 2020 and asked the team what the positions were due to the fluctuating market and to be kept updated. You said that you presumed that Mr Donaldson and Mr McCauley, who were on the Desk at the time, had informed management of the situation. However, when pressed during the Disciplinary Hearing, you confirmed that you had not checked if this was the case. As I explained above, it is not sufficient or acceptable for you to have assumed this, particularly in these circumstances/given the market volatility. You should have checked that Mr Assaf, a member of senior management having specifically asked for an update, was fully apprised of the position. It was your responsibility as Desk Head to ensure that he was given a full and accurate account of the situation. [ET note – this is not in fact reflected in the disciplinary hearing notes].

… I do not find there was any deliberate or malicious intent on your part to conceal the position and I accept that you were confident the market would recover. However, for the reasons set out above, I find that you made several significant errors in judgment. You clearly failed to appreciate the potential significant adverse impact the EFP breakdown could have on such a sizeable position and failed to escalate this to your line manager in a timely fashion, despite having several opportunities to do so…. [ET note - Allegation one was therefore upheld]

As you are aware, it is therefore also standard operating practice/procedure for all traders and, even more so the Desk Head to check the valuation model (i.e. the theoretical price produced/calculated by the model, its parametrization and inputs) regularly by ensuring that it remains properly representative of the effective Market-to-Market valuation (i.e. the price at which an effective transaction under current conditions would occur) of any significant positions held by the Desk. …

It is an absolute core duty and expectation of a Desk Head that he/she identifies potential risks in a timely manner and escalates them to management without delay. As you are aware, the daily wrap email and the Desk P&L report (which used the theoretical Market-to-Model valuation prices) alone would not have alerted management to the issue. Therefore, it was incumbent upon you to perform this critical role.

Despite the fact that you acknowledged that the markets were volatile, it concerns me greatly that you did not appear to have appreciated the magnitude of the potential risk and, regardless of whether or not you thought the positions would recover. It is, per se, perfectly legitimate and expected for a Desk Head to form an opinion, however, it is

incomprehensible that you considered that an issue of this severity did not warrant immediate escalation to management.

As set above, whilst I do not believe that you have maliciously withheld information, I am of the view that you seriously misjudged the immediate gravity of the situation and, in my view, took improper comfort from the fact that the valuation of the Desk P&L was based on the theoretical Mark-to-Model price rather than on the genuine Market-to-Market price. For the reasons set out above, I uphold … allegation [two].

234 As for allegation 3, Mr Chedin concluded:

Given the lack of instruction as to the size of the risk reduction required, in my view you did as instructed and did use the risk metrics available to you to monitor, assess and reduce the overall risk profile of the Book.

Allegation 3 was not therefore upheld and no more needs to be said in this judgment about that allegation.

235 In the outcome section, Mr Chedin concluded:

Having considered all of the evidence carefully, given the lack of deliberate or malicious intent to withhold information I believe that, whilst very serious, your conduct does not amount to gross misconduct as set out in the Bank's Disciplinary Policy or your contract of employment with the Bank dated 9 May 2011 (your "Employment Contract").

However, given your role and regulatory responsibilities, in my view your behaviour still amounts to serious misconduct. You displayed significant errors in judgment over a material period of time, which was exacerbated by your lack of action. These, because of their nature, have led to the Bank to lose trust and confidence in your ability to perform your role of Desk Head, making your continued employment with the Bank untenable. Consequently, your employment is being terminated immediately from today, for some other substantial reason, being serious misconduct. You will receive three months' pay in lieu of notice in accordance with your Employment Contract, subject to normal deductions for tax and National Insurance contributions.

I have not reached this decision lightly. In coming to my decision I have not only considered the mitigating factors that you put forward at the Disciplinary Hearing, but also whether demotion would have been a more appropriate sanction. I do not believe that demotion to a trader on another desk would be an appropriate option, as your trading skills are specific to precious metals. As to whether you could work as a trader on the Desk, the environment on the Desk is one in which management (and others on the Desk) must be able to trust others to exercise their judgment properly and escalate issues appropriately and promptly. Given the nature and seriousness of your errors of judgment, I do not believe that it is possible or appropriate in the circumstances for you to continue to work on the Desk. [D1273]

236 Mr Chedin was asked during the hearing if he had considered the claimant's CV before making his decision on demotion. Mr Chedin was not sure he did. We find on the balance of probabilities that he did not. Mr Chedin accepted,

and the tribunal agrees, that it would have been more accurate to say that the claimant's current skill set was specific to precious metals.

237 Mr Chedin also set out his conclusion that the claimant's actions amounted to a breach of FCA Code of Conduct rule 2 (although that was a conclusion for RBAS-C to reach, not Mr Chedin).

Appeal against dismissal

238 On 20 July 2020 the claimant submitted his first disciplinary appeal submission raising five grounds of appeal and a grievance. The letter contained the third alleged protected disclosure. The respondent accepts that the appeal letter contains the information alleged to have been disclosed; and that it was also a protected act. The basis of the appeal was that:

> *(i) The Bank applied a procedurally unfair process during the disciplinary process;*
>
> *(ii) It was wrong to treat the events in March 2020 as 'serious misconduct' in the specific circumstances of my case;*
>
> *(iii) However, having decided that my conduct amounted to serious misconduct, and specifically not gross misconduct, it was wrong for the Bank to the decide to dismiss me on grounds of SOSR (arising out of the same serious misconduct);*
>
> *(iv) The Bank did not fairly or properly explore the possibility of demotion as an alternative to dismissal, especially in view of the disastrous consequences of a dismissal to my career in financial services*. [D1278]

239 the claimant asserted that both Mr McCauley and Mr Botting were aware of what was happening in the market. He requested that his colleagues be interviewed about conversations with Mr Botting between 23 and 25 March the claimant refer to his emails of 24 and 28 March which were related to the moon of April AFP and showed that Mr Botting was following the market himself. Further he had been managing the precious metals business since 2014 and knew the valuation methods. He supported and approved Mr McCauley's request for an increase in futures exposures from 10,000 to 25,000 lots in mid-2019. The claimant raised a concern of inconsistent treatment based on race.

240 On 29 July 2020 Anita David emailed Eric de Lambilly asking him to conduct the appeal process. We find that Mr de Lambilly was not aware that the views of senior managers, such as Mr Spitz, Mr Gay and Ms Sqalli, that the claimant should have been dismissed.

241 On 21 July 2020 the Claimant submitted a subject access request ("DSAR"). The request was acknowledged on 22 July 2020.

Project Medway

242 On 23 July 2020 Philip Cooper informed the Claimant that CACIB's Compliance Department would conduct an investigation into his alleged protected disclosures (Project Medway). Mr Cooper delegated the investigation of the project to Philip Walker. Mr Cooper became involved again in relation to the drafting of the final report. Eleven people were interviewed and extracts from some of those interviews are set out below.

243 On 27 July 2020 the claimant submitted an Equality Act Questionnaire. This was acknowledged by Donald McLean. It is accepted by the respondent that this is the claimant's second alleged protected act. The matters raised in the questionnaire were said by the respondent to overlap with the matters raised in the appeal.

244 On the same date, the claimant objected to the proposed three-month period for the DSAR response and requested a response within one month failing which he would lodge a complaint with the ICO.

245 On 29 July 2020 there was an interview between Joseph Ward and Philip Cooper in relation to Project Medway. Mr Ward said:

PC How did you manage the risk positions with others on the desk?

JW With those at home with or without the WFH kit, they could use the phone, log in on Bloomberg, but really whoever was in the office was doing the job for all of us. Generally operating assumption was you were doing everything if you were in, me and Sam and the other two (Options/Linear split) split the work, you can do it but it was super busy.

PC If your covering workload of four with just two of you, how easy was it to manage your positions?

JW We had done it before, for block leave, it was like two being on holiday, but the market was busier but we had enough hands to cover it, not to the same level of normal service with only two on the desk but those who were in did all the pricing, trading and managed the risk and those WFH did admin and advice. When I was WFH I would do my emails, admin and check for credit, that's if you had the WFH kit, if you only had a phone you could only really do emails.

PC What were the communications like with the office at this time?

JW It was dependent on having the kit, I had the kit so I could get chat, Bloomberg, emails and if you didn't have it you could only get emails. With only a phone you only got updates on open chats, so all our hundreds of standing chats were not updated via the phone unless you opened each one.

246 On 3 August 2020 Donald McLean emailed the Claimant to advise that due to the holiday period, CACIB would not be able to provide a response to the Equality Act Questionnaire in the time stipulated by the Claimant.

247 On 5 August 2020, Mr McCauley was interviewed by Mr Cooper as part of Project Medway. He stated:

LM: Confirmed that employees couldn't trade from home, so it would be difficult to monitor the positions with 1 person in the office and the other at the BCP, especially the spot, forward and options. Although the desk covers 3 precious metals (Gold, Platinum and Palladium), the market would typically focus on one at a time. Presently (as covered extensively in the press), the market has been trading gold whereas the other two metals have not moved for a while.

LM: Confirmed that the office would keep in touch with the employee at the BCP via phone or IM's. Most clients were on Bloomberg but his desk

would not normally be client facing (as this would be sales' role) but would be market facing.

248 On 6 August 2020 the respondent requested that the Claimant revise and reduce the search criteria for DSAR given the disproportionately high number of hits generated by the original search criteria and indicated that a response would be provided within three months thereafter. Therefore on 10 August 2020, the claimant provided narrowed search terms for the DSAR requesting a response within a month and repeating his intention to lodge a complaint with the ICO.

249 On 17 August 2020 Mr Walker asked further questions of Mr Ward by email. Mr Ward provided a response on 20 August which included the following:

PW • Were the arrangements in place hampering the efforts of staff to conduct their duties - including management of risk, whilst at home?

JW • Well, if a trader did not have WFH kit they would not be able to even open the risk positions so I think this is true by definition. Even with WFH kit, without the authorisation to trade I would not be able to hedge the underlying position - I would need to ask someone in the main office to make the trade. So I think that the arrangements certainly hampered any individual traders ability to perform their duties. However, the aim was to always make sure the duties could be performed by SOMEONE at any given time since every team was scheduled to have someone in the office on any given day and therefore authorised to trade.

250 On 18 August 2020 when Mr Mostachfi was interviewed by Philip Walker as part of Project Medway, he stated:

[Mr Mostachfi] understood that the bank was being ultra-cautious but in his opinion the set up was not sufficient for risk management - specifically staff risk. The fact remains that the standard practice throughout the banking industry was WFH with trading permitted.

Ongoing arrangements for disciplinary appeal process

251 On 20 August 2020, Sivajini Kanesarajah of HR emailed the claimant to arrange an initial meeting with Eric de Lambilly to better understand the Claimant's grounds of appeal.

252 On 21 August 2020 the claimant informed Sivajini Kanesarajah that he would be on holiday until the end of August and requested that the meeting be scheduled for a date in early September. The initial appeal hearing was scheduled for 9 September.

253 On 25 August 2020 a regular weekly telephone call took place between Nicky Smith and Walid Assaf to discuss HR related matters within the Macro Trading Unit, during which Ms Smith informed Mr Assaf that the Claimant had appealed his dismissal. During the call, Ms Smith told Mr Assaf:

Nicky - Alright. Where else are we? So Sam Yang, obviously he has appealed umm... his termination so, that appeal hearing is either happened or is happening imminently. I'm just waiting for Donald to update me as to the date of that and then I'll let you know. I think, as far as I'm aware, the inclination is that there is going to be no overturning of the original decision, as far as they're aware.

Walid - Ok.

254 Mr de Lambilly told the tribunal that he did not speak to Nicky Smith and was not aware of her views. The views expressed had not come from him. He had only just started to consider the documentation and not begun to form a view at this stage. We accept that evidence.

255 On 1 September 2020 the claimant emailed Sivajini Kanesarajah raising various questions in relation to the initial appeal hearing on 9 September and his Equality Act 2010 questionnaire [D1431].

256 On 4 September 2020 Sivajini Kanesarajah responded to the Claimant's email of 1 September. The initial appeal hearing was postponed to 18 September.

257 The claimant was interviewed by Phil Walker and Philip Cooper as part of the Project Medway investigation on 3 September 2020.

258 On 10 September 2020 a letter was sent from CACIB's legal representatives, Allen & Overy, to the claimant, noting that a considerable amount of documentation had been retrieved using the narrowed search terms provided on 10 August, that a review would be conducted as soon as possible, and it was hoped that documents would be provided within the next four weeks. Documents located from the personnel file or retrieved in connection with the disciplinary process were provided.

259 On 16 September 2020 a letter was sent by the Claimant's legal representatives to CACIB's legal representatives in relation to the DSAR and the appeal hearing date. A postponement of the initial hearing scheduled for 18 September was sought, pending what the claimant considered to be an incomplete response to his DSAR. A complaint was also raised about an alleged piecemeal approach to the DSAR and to redactions made. The letter also noted that the Claimant would be asking for his appeal hearing to be adjourned for at least a week to enable CACIB to address the points in the letter and provide documents.

260 On 22 September 2020 a reply was sent by CACIB's legal representatives to the Claimant's legal representatives about the DSAR, responding to the letter of 16 September and, amongst other things, noting that a DSAR was not intended to be used as a means of acquiring documents for a disciplinary hearing or appeal, or to gain early disclosure of documents that may or may not be relevant to future litigation.

261 The claimant chased for a response to the Equality Act 2010 questionnaire etc on 30 September 2020 by email to Ms Kanesarajah.

262 On 1 October 2020 an email was sent by the claimant to Ms Kanesarajah making various requests for information and documentation. A letter was also sent by the Claimant's legal representatives to CACIB's legal representatives in relation to the DSAR, again taking issue with redactions and piecemeal provision of documentation. Additional search parameters for the DSAR were also provided.

263 Ms Kanesarajah emailed the Claimant on 9 October 2020, asking if he would be available to attend an appeal hearing on 19 or 20 October 2020.

264 CACIB's legal representatives replied to the letter of 1 October on 9 October 2020, confirming that the firm had assisted with the search for, and delivery of, relevant materials responsive to the Claimant's DSAR and denying any

suggestion that the firm or CACIB was attempting to withhold data, or otherwise acting in an underhand manner, to hinder the Claimant's disciplinary appeal or otherwise. The reply also stated again that a DSAR was not to be used as a means of obtaining documents or for some other collateral purpose; and confirmed that CACIB intended to finalise its response to the Claimant's DSAR within 7 days.

265 On 13 October 2020, the claimant emailed Ms Kanesarajah expressing a reluctance to proceed with the appeal hearing on 19 or 20 October until further information and documentation had been provided. The claimant again requested a response to his equality act questionnaire.

266 With a letter from CACIB's legal representatives to the Claimant on 13 October 2020, the DSAR response and a copy of CACIB's Charter for the Protection of Personal Data were provided.

267 On 16 October 2020, Ms Kanesarajah replied to the Claimant's email of 13 October, explaining that the proposed appeal hearing with Eric de Lambilly was not a final appeal hearing but an initial meeting for Mr de Lambilly to gain a firm understanding of the Claimant's grounds of appeal prior to conducting any necessary investigation. Ms Kanesarajah proposed a meeting on 28 October.

268 On 19 October 2020, a letter was sent by the Claimant's legal representatives to CACIB's legal representatives identifying documentation that the Claimant considered was missing from the DSAR and repeating the threat to make a report to the ICO.

269 On 20 October 2020 the claimant confirmed to Sivajini Kanesarajah that he was prepared to attend an appeal hearing with Eric de Lambilly on 28 October. An invitation letter was sent to him on 23 October.

Initial response to Equality Act 2010 questionnaire

270 Donald McLean emailed the Claimant a response to question 2 of the Equality Act Questionnaire, which had been submitted by the claimant on 27 July, on 20 October 2020. Mr McLean suggested that there was substantial overlap between the EQuA questionnaire questions and the Claimant's appeal against dismissal and a number of questions would therefore be dealt with during the appeal process. The claimant was told that an answer would be provided to question 12 once the information was to hand [D1478]. During cross examination, Mr McLean accepted that there was no overlap between questions 1, 4, and 11 and the matters to be investigated by Mr de Lambilly. The panel agrees.

271 The answer to question 2 was as follows:

> *2. Was it a requirement of LM's Job Description to:- "Ensure that the relevant managers are made fully aware in a timely fashion of all matters that might have a material impact on the desk FX Linear Precious Metal group performance, risk position or compliance with legal or regulatory requirements"?*
>
> *No. LM's job description included the following requirement (emphasis added): "Ensure that the relevant managers are made fully aware in a timely fashion of all matters that might have a material impact on the **FX***

> ***Options Trading*** *group performance, risk position or compliance with legal or regulatory requirements".*

272 On 21 October 2020, a letter was sent by from CACIB's legal representatives to the Claimant's legal representatives in relation to the DSAR request, in response to the letter of 19 October.

273 On 23 October 2020 in an email from Phil Walker to Chris Davies it was said (regarding the draft Project Medway report):

> *Looks good, let's put this all together in a "final" version and circulate to the group making clear it absorbs all discussed comments/amendments etc. for a final review.*
>
> *We just need to give some thought to what we think SY should have, I'm included to carve out the conclusions to the three allegations, remove the lessons learnt (or actions to be taken section) and see if we need to redact/ edit that before sending out, thoughts? [D1904]*

274 Between 22 October and 4 November 2020 there was further correspondence between the Claimant and HR/Employee Relations in relation to the Equality Act Questionnaire. The claimant expressed dis-satisfaction [D1491] and disagreed that the EQuA questionnaire be dealt with as part of the appeal. He also queried the answer to question 2. In a further response sent on 23 October 2020, one day later, the claimant stated:

> *I understand that the purpose of the questionnaire is to allow employees an opportunity to ask questions, the answers to which will help them decide whether or not to bring a discrimination claim before the Employment Tribunal, Given the delays in the Bank's response, and further, the failure to answer my questions, I am none the wiser than I was in July 2020, and the inevitable conclusion is that rather than being transparent the Bank is trying to shut off this opportunity to me.*
>
> *The questions that I asked were simple and proportionate, and related to historical fact. Essentially, I wanted to know what steps were taken (or not taken) in relation to Louis and Tony, who took them, and why. These are questions which the Bank already knows the answer to. To put off answering this question until the appeal seems to me to be evasive and tactical, and risks me not being provided with the fullness of answers I was seeking.*

<u>Second disciplinary appeal submission</u>

275 Ms Kanesarajah provided Eric de Lambilly with a file of correspondence and documentation exchanged with the Claimant during September and October on 26 October 2020.

276 The claimant's submitted his second disciplinary appeal submission, expanding upon his original five grounds of appeal, on 26 October 2020 [D1499]. The document raised the following further matters, amongst others:

276.1 that Mr Mostachfi had failed to investigate;

276.2 that Mr Chedin was not an independent decision maker, and did not ask about Mr McCauley's failure to escalate;

276.3 that none of the claimant's suggested witnesses were interviewed;

276.4 the suggestion at the RBAC meeting that the claimant was present when WS visited the desk on 25 March was not correct; and that Mr Spitz influenced Mr Chedin through Ms Sqalli.

277 On the last point the claimant stated:

> *I believe that Thomas Spitz may well have influenced the outcome of my case, as can be seen from the RBAC notes of 10th June 2020:-*
>
> *"R Sqalli explained to the Committee that she was fully aligned with L Chedin on his conclusions, and that S Yang should be dismissed."*
>
> *Rita Sqalli is Thomas' COO, and she would not have expressed that view without Thomas' blessing. More than that, I believe that Thomas may have driven the decision, with Laurent (his direct report) simply being his mouthpiece.*

278 The claimant accepted in cross examination, and we find, that he was not asking for Ms Sqalli to be interviewed, in making that allegation.

279 At paragraph 63 of the submission, the claimant questioned [D1507]:

> *Was I seen as an easy target because my demeanour is that I am a quiet and hardworking manager who presents himself with modesty and humility (as many Chinese people do), or that my English language skills would not allow me to defend myself as well as others?*

280 A letter was sent by the Claimant's legal representatives to CACIB's legal representatives on 26 October 2020, asserting that following review of the DSAR response, the Claimant remained concerned that key documents and recordings concerning his data were not provided.

281 On 28 October 2020, the initial appeal hearing took place, chaired by Mr de Lambilly. Ms Kanesarajah was in attendance on behalf of HR.

282 The respondent provided clarification of question 2 of Equality Act questionnaire response on the same date, regarding Mr McCauley's job description [D1526]. It was asserted that a previous version of the job description had been relied on, in error.

283 On 30 October 2020 a letter was sent by CACIB's legal representatives in response to the letter of 26 October, explaining that the requested documents were the subject of legal professional privilege.

284 On 1 November 2020 the claimant was sent a copy of the notes of the appeal hearing of 28 October.

Submission of Form H to the FCA

285 When completing form H, 2,000 characters are allowed (about 300 words, including spaces). In completing the form, a statement must be signed which includes the following warning:

> *It is a criminal offence, knowingly or recklessly, to give us information that is materially false, misleading or deceptive. Even if you believe information has been provided to us before (whether as part of another notification or otherwise) or is in the public domain, you must nonetheless disclose it clearly and fully in this form and as part of this notification. If there is any doubt about the relevance of information, it should be included.*

286 On 2 November 2020 the respondent submitted a Form H (Conduct Rule Breach) to FCA [D1481]. This reflected the content of the disciplinary hearing outcome letter. There was an error in the date of the incident – it should have referred to 24 March, not 14 March. The report states in column L:

> *Failure to escalate/communicate to management (i) the extreme volatility within the market from 14 March 2020; (ii) that there was a real loss/exposure which was not showing in the Desk P&L because of the use of the Mark-to Model valuation model; and (iii) the potential significant loss of approximately $25-30 million resulting from the gold futures/swap dislocation during this period.*

In column M it was reported: '*Employment terminated for Misconduct'*.

287 On 3 November 2020 the claimant returned his amendments and additions to the notes of the appeal hearing of 28 October and requested various documents, including Form H. On 13 November 2020 the claimant was provided with screenshots of Form H.

288 On 4 November 2020 a letter was sent by CACIB's legal representatives to the Claimant's legal representatives in relation to documents requested with regards to Rita Sqalli and reiterating that a DSAR was not intended to be used as a means of gaining early disclosure of documents under the disciplinary appeal, or to obtain early disclosure of documents that may or may not be relevant to future litigation.

289 Also on that date, an answer was provided to Q.12 of the EQuA questionnaire:

> a. the number of dismissals by the Bank in the last three years on grounds of conduct: *There were seven dismissals on grounds of conduct between 2017 and 2020.*
>
> b. the number of dismissals by the Bank in the last three years on grounds of SOSR; *In addition to your dismissal, there was one other dismissal on grounds of SOSR between 2017 and 2020 (excluding the expiry of fixed term contracts/internships).*
>
> c. of the number given at (b), how many dismissals were on grounds of serious but not gross misconduct. *The other employee referred to at (b) was dismissed for SOSR following a loss of trust and confidence. Additionally, one of those employees referred to in (a) was dismissed for reasons relating to conduct that did not amount to gross misconduct.*

290 The ET1 Claim Form was presented to the Employment Tribunal on 4 November 2020.

<u>Interview of Tony Botting by Mr de Lambilly</u>

291 On 5 November 2020, Mr de Lambilly interviewed Tony Botting [D1543 to 1550]. Mr Botting incorrectly asserted on no less than three occasions that the claimant was on the desk when Mr Assaf visited it.

> *TB continued, speaking frankly, that there was no bucket risk, or any concerns raised by Sam. In the last week of March, before March 30, TB saw EFPs had blown out. TB flagged this to Walid. When TB spoke with Sam about this, and Walid spoke with Sam, Sam was clear the position had been rolled, there was no risk, and everything was okay. ….*

EL summarised that TB was aware that the EFP was blowing up on uphill contracts, there were no flags on Samuel, that June was blowing up also. TB explained Sam did not raise any concerns around this at all. EL asked if Samuel disclosed an EFP position. TB did not believe Sam did. EL explained he had an email March 26 mentioning that the June EFP stays volatile between +12-+22. TB agreed but stated that the risk contained in this email did not mention anything of the outstanding EFP contract or mention any mark to market concerns. TB felt this, especially after he had already spoken to him, and Walid spoke to him, showed ample opportunities not taken…

EL asked, when Walid came to the desk and discussed with Louis, whether Louis should have mentioned the EFP breakdown. TB stated Walid was aware of the EFP breakdown just not the significant market loss in the books. On the question of Louis saying something, TB felt Louis did the right thing by raising the concern March 30th, although he could have done it earlier, although he was out of office Thursday and Friday. TB felt Sam was dominant in his thinking around the EFPs, and adamant there was no risk, and that they would close down on $1-2 on each contract. TB relayed that this dominant line of thinking permeated through the desk. TB noted several conversations with Behnouche in May or June where Metals guys were denying an issue with EFP in the first place. [D1548]

292 In relation to the alleged stereotyping, the following discussion took place:

EL noted Sam alleged his race was a consideration in his dismissal. EL asked if TB felt there was any truth to this statement. TB said no, absolutely not. EL mentioned that as part of Sam's development plan, there was to be some training. Sam complained he did not receive any management training upon his appointment. EL asked if there was any reason, or if Sam asked for this. TB noted Sam did not ask for training and it was something he suggested after Sam took sole charge of the desk. TB noted this business previously had 2 co-heads. TB relayed that Sam did not mention concerns, it was something TB raised and spoke to HR about. TB reflected that when one was appointed to a senior management position, it was because they were appropriate for the role. TB stated becoming a manager was natural progression if one demonstrated the right ability and set of skills, and training was not something that was routine. [D1550]

293 Mr de Lambilly was asked in cross examination whether he considered the possible impact of the statement by Tony Botting about the claimant's race on Mr Botting's loss of confidence. He replied that it appeared to him that the loss of confidence came from the failure to escalate, but he accepted that he did not ask the question. Nor did he consider how the comment might have affected Mr Botting's alleged loss of confidence.

294 Mr de Lambilly also accepted that he did not ask Mr Botting about the difference between mark to market and mark to model, how PnL was to be reported or the practice on the desk. He confirmed that he did not as he did not see how it would be relevant. The matter was escalated (by Mr McCauley) on 30 March 2020.

Project Medway Final Report – 11 November 2020

295 In answer to a query from the claimant on 2 September 2020, Mr Cooper emailed the claimant stating:

> *I can confirm that once the whistleblowing investigation has concluded, I will share information from the outcome of my investigation that is relevant to your appeal with both you and the appeal manager*.

On 11 November 2020, the final version of the Project Medway investigation report was finished. A list of those interviewed is at page 1552 of the full report. Eleven people were interviewed including JW, LMC, BM, John Davighi. Ms Sqalli, Perrick Fennon, Neil Maddocks and Paul Lynn. A summary of the report was provided to the Claimant on 12 November and to Eric de Lambilly on 17 November.

296 We were taken to the interview of Mariano Goldfisher and Bertrand Delauney in which it was stated:

> *Those WFH could still look at trades, their positions etc. but would have to pass on any trading details/requests to those staff members in the office.*
>
> *PW: For those WFH with access to a mobile phone only, what were they allowed/able to do?*
>
> *BD: Not much, they could track critical messages then escalate it back to the staff on the desk in the office but couldn't do much. [D1310]*

297 John Davighi said in his interview on 19 August 2020,

> *Those WFH on just a mobile would be able to advise and call clients and/or the office but some had little or nothing to do.*

298 Perrick Fennon, during his interview on 5 October 2020 said:

> *Team members were very frustrated when WFH without the kit, as they were not able to assist, do their jobs or feel part of the team. They could not assist with the position, PnL or risk management as they could not analyse the required excel spreadsheets on a mobile phone. [D1437]*

299 Paul Lynn on 6 October 2020, suggested that staff WFH without the HTP kit were '*only 10% productive*'.

300 The draft report had concluded, presumably on the basis of such interviews:

> *Due to the scarcity of IT equipment when WFH, traders would only have access to emails and Bloomberg Chat via their work issued mobile device. This would have severely limited the employee WFH being able to assist with any administrative duties or risk mitigation. [Emphasis added - D1394]*

301 The final report dated November 2020 concluded:

> *The lack of IT equipment in the early stages of the crisis, clearly reduced the ability of staff WFH to manage risk and assist those team members in the office (who would be covering all the relevant books and executing trades). [Emphasis added - D1557]*

That finding was not included in the summary provided to Mr De Lambilly.

302 The final report also concluded:

However, GMD Senior Management did mitigate this initial lag by reducing non-core trading and taking other options to reduce the workflow on those working from the office and the Risk Management teams WFH.

303 In the penultimate version of the report dated 29 September 2020, allegation 2 was partially upheld. Allegations 1 and 3 were not. In the final version, none of the allegations were upheld. The allegations and findings on them were in any event removed from the summary. As were the lessons learned.

304 On the issue of risk management, paragraph 38 of the report concluded:

GMD senior management confirmed that risk management was a priority for the Bank and it would be for senior managers to determine the best method of communication between their respective team members. In order to enforce the Banks' priorities, each desk was split into teams according to their rotation on the GMD rota, one senior member of each sub-team would be in the office. This individual would be the primary contact for queries and have responsibility for reporting and escalating any potential or actual issues, however, it is a general principle in CACIB and the wider banking industry that anyone in the team (both during the Coronavirus pandemic and BAU) would be expected to raise an issue immediately, should it arise. [D1558]

Further disciplinary appeal interviews – November 2020 onwards

305 On 12 November 2020, Ms Kanesarajah responded to the Claimant's email of 3 November. On 13 November Mr de Lambilly interviewed Walid Assaf, Louis McCauley and Joseph Ward.

306 During the interviews with Mr McCauley and Mr Ward, Mr De Lambilly had access to the Bloomberg chats and emails he was referring to. Those he was interviewing did not, and nor were they provided with a copy. The interviews took about nine months after the events being discussed. Mr Ward stated [D1583]

JW … felt Tony should have had a much better understanding of the business in general. JW added that Tony's style of management was not from an interest in precious metals, and JW felt Tony did not seem interested in things, and that Tony could have shown interest before this happened.

JW felt the team, Sam included, felt a false sense of security because of the contracts, which may have led to this delay. JW felt as soon as the next week commenced, April 1st or the end of March, and the June EFP opened up and was above normal levels, around 20, trading 22 that day, Sam would have done something. [D1585] ….

Regards Sam's management style, EL asked if JW had any concerns. JW replied yes and no, yes because Sam did not have a lot of options background and they were growing the options business which made it harder for Sam to be Head of the Desk. JW noted that this was not Sam's fault and they had guys on the desk to look after risk, and JW reflected that it was good Sam felt happy to talk to them about risk. Regards futures, JW felt Sam was very knowledgeable and had a proven track record in growing the franchise with salespeople and staying within risk levels. JW felt Sam waited too long to act which put him in a difficult light. JW noted

issues regards managing but nothing to do with product and risk, more to do with compensation. JW noted some shortcomings in Sam's ability to manage someone's career but JW felt Sam had an acceptable level of overall expertise regards managing the business. In summary, JW felt Sam's overall approach was okay in general. [D1586]

307 The interview with Mr McCauley contains the following passage:

ED referred to an email sent by Joseph on 23rd March stating the single greatest risk is the EFP and that until further notice he felt they needed to use every opportunity they had to fix the delta hedge to reduce the EFP shot. ED asked LM what he understood from the email and what he discussed with Samuel. LM stated that he could almost recall the email from hearing it read out but he was unsure when it was sent and whether Samuel had replied. LM added that if Joseph had presented this then it was a good thing. ED questioned LM on whether he raised a concern following the email. LM suggested that things started to move on 24th March and that his role was how to best manage the risk with the April contract. LM stated that he remembered being busy on 24th March as the options expiration was on 26th March and that he remembered on 24th March there were long pull options that were worth a lot of money. LM explained that his main concern was how to monetise the new value that the EFP moving had created, he recalled telling Tony the EFP moved and that the market had moved a lot so he would need to work hard for the rest of the trading day to ensure he could hold them properly. …

ED questioned whether LM had discussed the EFP breakdown risk with Walid. LM confirmed that they spoke about the dislocation that the AP had gone from flat and they discussed it going from close to 0 to a lot higher. LM added that he spoke about the options and that Walid had asked him about the positioning in the options book for the active month. LM explained that he spent a lot of 24th March closing positions and closing a lot of open interest that they had on the book. The options positions were going to be close to flat and the futures position was going to be close to flat. Any small residual would naturally be rolled.

LM explained that there were strict rules about coming into the office at this time and he wasn't sure if his pass would work, which was why he sent the email to Tony to say he would be coming in. LM remarked that he was unsure if Tony had replied but he drove in the next day and asked to see Tony, who asked him to come into the office. LM stated that they spoke for a few minutes where he told him that he hadn't been in for 2 days, that he thought there was a loss on the options book and wanted to clear it.

308 A letter was sent by the Claimant's legal representatives to CACIB's legal representatives in relation to the DSAR on 16 November 2020, requesting further documentation and threatening again to submit a complaint to the ICO.

309 The claimant emailed Sivajini Kanesarajah on the same days with comments in response to her email of 12 November.

310 On 17 November 2020, Mr de Lambilly was provided with the summary outcome of the protected disclosure investigation (Project Medway) as sent to

the Claimant. Mr de Lambilly did not ask Mr Cooper for a copy of the full report as he assumed that Mr Cooper's summary was accurate.

Interview of Mr Chedin by Mr de Lambilly

311 On 18 November 2020 Eric de Lambilly concluded an interview with Laurent Chedin. The following is recorded:

> *ED noted the mail sent to SY regarding giving him a second chance with being demoted and given training and asked why he had changed his mind. LC explained that he suggested a demotion and training as it was agreed by Tony, Louis and Joseph that SY is a good trader. LC added that it was also agreed that SY is a poor chief trader and manager, stating that he didn't feel SY should've been appointed as head of training [sic], something he felt was obvious after talking for him an hour. LC stated that he didn't understand why SY had been appointed as head of trading given that it's not what he likes to do and prefers to be trading. LC felt that SY couldn't continue as head of trading due to the significant error of judgement he made, but felt that he could possibly progress as a trader with no management responsibilities. LC confirmed that SY was interested in this when it was mentioned to him, but when he discussed with Tony, Tony thought while it was feasible to demote and retrain SY, given the size of the bank, he couldn't be deployed to another area given its experience on PM. LC noted that Tony, Behnouche and Walid also stated they could no longer work with SY as they had lost their trust in him…*
>
> *ED noted that SY alleges that LC was influenced by others in his decision. LC confirmed he wasn't influenced by others and came to the conclusion himself. ED asked LC if he was told the demotion was too lenient. LC stated that he didn't speak to Thomas about it, and Behnouche and Walid hadn't said anything. LC added it was only Tony who he asked about demoting SY to a junior trading position and potentially retraining him. ED queried if LC took advice from Tony but made the decision himself. LC explained that, if he was asking for advice, he wouldn't take it from Tony and wouldn't take advice from anyone involved in the situation, but given that he was unable to speak to anyone else to preserve confidentiality of the case, the decision was entirely his own….*
>
> *LC brought up his impression, which might be wrong or right, but impressed that he had not investigated this, was that Louis could have done more to escalate. LC added that Louis could have done more earlier, but this was only an impression. LC said regardless, there was nothing there that could release SY from his duty as Head of Desk to report, as such a duty is permanent and personal, and one can only be discharged of it after clear and unequivocal written delegation to another individual, approved by the Manager.*
>
> *LC stated that whatever they thought of Market risk and MAM's job of reporting, it could not provide any excuse to a Head of Trading for not reporting an issue to management. LC relayed the view he gave to SY that this excuse might be acceptable for junior staff, but it was completely unacceptable from the Head of Trading that has experience, management responsibility, and a duty to report. LC repeated his view that this was SY trying to deflect the blame from himself. LC explained SY wanted him to see his personal relationship with members of the team and felt LC would*

get nice words from him from the desk. LC explained the matter was not about nice words, but was about fact-finding, and he did not think he would find additional facts by doing additional interviews. [D1603]

312 In relation to the allegation of less favourable treatment, the following exchange took place:

ED noted SY's allegation that he was treated differently to others because of his race and asked LC if there was any truth in this. LC replied that he wasn't involved in the treatment of Tony or Louis. LC added that he paid attention to the possibility that, given his Chinese culture, SY may have a different style of communication and it may be said that Asian people are less comfortable in reporting issues to management, but he didn't think SY being of a different race would've changed his findings in any way. LC confirmed that SY's race didn't influence him in either being more severe or lenient.

313 On 19 November 2020 Ms Kanesarajah responded to the Claimant's email of 16 November.

314 On 20 November 2020, Mr de Lambilly interviewed Behnouche Mostachfi and conducted a second interview with Tony Botting. Mr Mostachfi was not asked by Mr de Lambilly about the comment at 877 i.e. the N+2 or 3 comment (see above).

315 The claimant was provided with further comments by way of email in response to Sivajini Kanesarajah's email of 19 November.

316 On 24 November 2020, Mr de Lambilly interviewed James Donaldson. Mr Donaldson confirmed that he did not have any concerns about the claimant's abilities as the head of desk.

317 Mr de Lambilly interviewed Phil Lawrence and Lilian Chapman on 25 November. During his interview, Mr Lawrence expressed surprise when the claimant was described as the head of desk, stating that he didn't think it ever been told he was in charge of the activity. He confirmed that he had never seen any communication that stated that fact. Lilian Chapman confirmed that in their view, when asked who was head of the precious metals desk, Mr Botting was in charge of everything. Further, that they had first discovered the issue on the valuation of the futures on 30 March following a call from Gregoire Mazuel.

<u>Ongoing correspondence – DSAR, appeal etc – November/December 2020</u>

318 On 26 November 2020 there was a letter from CACIB's legal representatives in response to the letter of 16 November and the additional DSAR request made in that, amongst other things requesting that the Claimant provide a list of reasonable search terms and date ranges.

319 On 27 November 2020 Philip Cooper refused to provide any further information about Project Medway.

320 On 30 November 2020 the claimant emailed Sivajini Kanesarajah complaining about the delay in concluding his appeal.

321 On 1 December 2020 Ms Kanesarajah replied to the Claimant's email of 30 November (and chasing emails of 24 and 27 November), assuring him that

the appeal was being taken seriously but it was taking time to work through the volume of document requests made by the Claimant.

322 On 2 December 2020 the claimant emailed Sivajini Kanesarajah with a list of all the document requests he considered were still outstanding. There was email correspondence between the Claimant and Philip Cooper regarding the content of Form H. More search terms and date ranges for the DSAR were provided by the Claimant's legal representatives.

323 On 8 December 2020 Ms Kanesarajah replied to the Claimant's email of 2 December (and chasing email of 7 December) responding to the Claimant's document requests and assuring him that CACIB was doing its best to expedite the appeal process, but it was important for Eric de Lambilly to conduct such interviews/investigations as he considered relevant and necessary.

324 Eric de Lambilly interviewed Thomas Spitz and Gregoire Mazuel on 10 December. Mr Spitz is noted as saying:

> *ED stated that SY alleged that Rita was the mouthpiece driving Laurent's decision at the 10lh June meeting for SY to be dismissed. TS said he did not agree with this statement at all. TS said he gave his view to the committee for SY to be dismissed because his behaviour was not consistent with what's expected from a senior trader and head of desk. TS said he was not invited back to subsequent committees and never spoke to Laurent on how to conduct the investigation. TS added that there was a clear process to handle these situations (RBAC) designed to ensure independent assessment.*

325 On 11 December 2020, the claimant emailed Philip Cooper asserting that the content of Form H was incorrect.

326 The claimant emailed Sivajini Kanesarajah on 14 December 2020, expressing concern about what he considered to be the provision of inconsistent and contradictory information by CACIB.

327 On 16 December 2020 Ms Kanesarajah emailed the Claimant confirming that Eric de Lambilly would be on annual leave between 21 December 2020 and 3 January 2021 and asking him to provide a date in early January 2021 for the final appeal hearing to take place.

328 On 17 December 2020 Mr Botting's employment with the respondent ended on mutually agreed terms, following three month's garden leave due to a redundancy situation. No one has been hired to replace him.

329 On 18 December 2020 the claimant replied to Sivajini Kanesarajah's email of 16 December to the effect that he would require sufficient time to read and digest information/documentation prior to a final meeting with Eric de Lambilly, but not identifying the date on which he would be available to meet.

330 On the same date, Philip Cooper replied to the Claimant's email of 11 December, advising him that no amendment would be made to Form H until after the conclusion of the disciplinary appeal.

331 The ET3 and Grounds of Resistance were presented by CACIB on 24 December 2020.

332 On 30 December 2020 the claimant was provided with the first set of interview notes on the appeal.

333 On 31 December 2020 a letter was sent by CACIB's legal representatives to the Claimant's legal representatives in response to the letter of 2 December, noting that additional time was required to respond and a response would be provided by no later than 21 February (being 3 months from the date of the request plus 5 days when the time limit was paused pending receipt of the letter of 2 December). Additional documents were provided as a result of further searches.

Ongoing investigations etc – January 2021 onwards

334 On 4 January 2021 the claimant emailed Ms Kanesarajah and Mr de Lambilly requesting further documentation/information.

335 Sivajini Kanesarajah emailed the claimant on 5 January 2021, acknowledging receipt of the claimant's email of 4 January, noting that she had just returned from annual leave and providing a response to the claimant's email of 18 December.

336 On 7 January 2021 the claimant emailed Sivajini Kanesarajah requesting further documentation/information. He requested that both Ms Sqalli and Mr Spitz be interviewed. On 29 January 2021 Ms Kanesarajah provided the Claimant with further information/documentation. On 2 February 2021 the claimant emailed Sivajini Kanesarajah requesting further documentation/information.

Second interviews with Joseph Ward and Louis McCauley

337 On 9 February 2021 Eric de Lambilly conducted a second interview with Joseph Ward. The following was said:

> *EL stated that on the morning of March 24th, JW had written to Sam at 7.20am, asking what to do in the face of the group facing EFP losses, and asked JW if he recalled sending this message or his concern for group losses. JW explained that, by that date, it had become clear that the mark to market losses were serious, and thus he had asked Sam, as head of the desk and his superior, what to do. JW noted that he had asked Sam more than once. EL asked JW to explain what had happened next. JW stated that not much had happened on the day in terms of action, but that he did not have the chat in front of him, so could not be certain. EL stated that Sam had written in the chat that he would call JW. JW agreed that they must then have talked. JW explained that Sam believed that the situation would be short-lived, and that the impact was on the April contract, in which the group did not have a big position. JW noted that on the other chat, they had seen that it was flat, and noted that the options book got out of its remaining April futures position through the option expiry. JW noted that the majority of the group's position remained in the June futures, and that Sam thought that the squeeze in the position would apply to April only, and that it was too early to know what would happen in June….*
>
> *JW went on to state that he had asked Sam on 2 occasions between March 24th and March 27th about what should be done JW explained that Sam had wanted to wait to see how the market would trade on the June contract, and that Sam's goal had been to use every available opportunity*

to reduce the risk and use the franchise to reduce their positions. EL confirmed that, when JW had asked Sam what to do, the instruction had been to wait and see if the market came back. [D1762-7]

The tribunal notes that Mr Ward's recollection of this call as noted above is different to the claimant's.

338 On 10 February 2021, Mr de Lambilly conducted a second interview with Louis McCauley. 1768-1771. During the interview Mr McCauley told Mr de Lambilly:

LM stated that he had had many conversations with Walid and Behnouche, such as on the Friday after Monday 30th. On this date, LM reported that they had had a meeting in which Walid and Behnouche had asked him to manage the closure of the EFP as the bank had needed a smaller risk appetite as too much money had been lost. LM stated that Walid and Behnouche had expressed that they trusted him, as he had shown integrity by having told Tony about the money lost in the options, and was a whistleblower. LM stated that they had said that, on the other hand, Sam had not been honest and that they valued honesty in a trader. LM explained that Tony had not been involved in these conversations, rather he had just asked LM about which trades had been done. LM stated that the majority of conversations he had had with Walid and Behnouche were with the pair of them together, although he had had a couple of conversations with just Behnouche.

The tribunal notes that there was never any finding of dishonesty made against the claimant and nor in the tribunal's judgment would there have been any reasonable basis for such a finding to have been made.

Ongoing disclosure/DSAR requests

339 On 17 February 2021 Rhea Kushin provided the Claimant with further DSAR information/documentation. A Response to additional DSAR requests was provided on 18 February 2021.

340 On 25 February 2021 the claimant sent two emails to Sivajini Kanesarajah requesting further information/documentation. A response was provided on 2 March 2021 in two emails.

341 The claimant emailed Sivajini Kanesarajah on 3 March 2021, noting that there remained some outstanding requests for information/documentation and noting that he would require time to review the information/documentation and then prepare his submission for the final appeal hearing before attending that hearing. A response was provided on 9 March 2021.

342 On 26 March 2021 the third tranche of disclosure was provided by the respondent. The respondent disclosed documents created or located since 19 February and proposed that documents created or located after 26 March be provided on 16 April.

Third appeal submission – 8 April 2021

343 On 8 April 2021 the claimant submitted a third appeal submission expanding further upon the original 5 grounds of appeal and raising 4 new grounds of appeal. The respondent accepts that this document disclosed information which is relied on by the claimant in relation to the first, second, fourth and fifth alleged protected disclosures [D1821]. The further submission followed

the receipt by the claimant of thousands of pages of documents from the DSAR and disclosure in the Employment Tribunal case. Amongst other things, the claimant asserted that there had been a systems and control failure regarding mark to model:

> *I believe that the evidence provided by the Bank shows beyond doubt that the Bank had breached the FCA's systems and controls requirements by using a risk valuation model which was not fit for purpose. It had been alerted to the risks of the existing system, and failed to take any action to remedy it for financial reasons.*

344 The claimant also mentioned the Covid situation, the EFP reduction plan, and alleged untruths around key facts, all derived from documents he had received after his previous two appeal submissions.

345 The final appeal hearing took place on 13 April 2021 between Eric de Lambilly and the claimant. William Le Prado attended on behalf of HR. Notes of the hearing were sent to the claimant on 20 April [D1840 to 1856]. The claimant was told at the end of the meeting that: '*EL would need to interview further people following this meeting and it was too early to give further information'*. As it turned out, no further interviews took place after this interview with the claimant on 13 April.

346 On 22 April 2021, the claimant returned his amendments/additions to the notes of the final appeal hearing of 13 April and also provided further documents, questions and comments to be considered by Mr de Lambilly.

347 Sivajini Kanesarajah confirmed to the Claimant on 23 April 2021, that Eric de Lambilly would consider the information/documentation provided by the Claimant the day before. On 28 April 2021 Ms Kanesarajah emailed the Claimant to inform him that Eric de Lambilly anticipated that he would be in a position to provide a response to the Claimant during the week commencing 10 May 2021.

348 The claimant submitted a fourth appeal submission on 10 May 2021, requesting that it be considered for both his appeal and his grievance [D1860].

Disciplinary appeal outcome

349 On 13 May 2021 Mr de Lambilly's appeal outcome letter was sent to the claimant. The disciplinary appeal and grievance were not upheld [D1865 to 1882]. The decision letter confirmed that Mr de Lambilly interviewed eleven witnesses in total, as part of the appeal process. The following conclusions were reached by Mr de Lambilly.

Benouche Mostachfi's investigation

350 Mr de Lambilly accepted that Mr Mostachfi was not independent and the original investigation was insufficient. He concluded however that had someone more independent been appointed to investigate, that a recommendation would still have been made to convene a disciplinary hearing.

Alleged influence on Mr Chedin

351 Regarding Mr Chedin being influenced by others, Mr de Lambilly concluded:

> *I have seen no evidence to suggest or demonstrate that the decision to terminate was not his own, and I found Laurent's responses at his interview to be credible when I put it to him that his decision had been influenced. Notably, he said to me that: "if he was asking for advice, he wouldn't take it from Tony and wouldn't take advice from anyone involved in the situation, but given that he was unable to speak to anyone else to preserve confidentiality of the case, the decision was entirely his own" which I found to be convincing and genuine.*

352 Mr de Lambilly accepted before the tribunal that it was not correct that he was not able to speak to others to preserve confidentiality; and the fact that that Mr Chedin spoke to Ms Sqalli should have been mentioned. Had it been, questions would have been asked of Mr Chedin about that call, and potentially an interview would have taken place with Ms Sqalli.

Failure to interview other witnesses

353 Regarding the failure of Mr Chedin to interview witnesses suggested by the claimant in his disciplinary hearing submission, Mr de Lambilly concluded:

> *I agree with you that Laurent, as part of the disciplinary process, should have asked Louis about the liming of his escalation and should not have focused on questions relating to your management style. He should have also conducted the interviews as you had requested with Phil Lawrence, Lilian Chaplain, James Donaldson and Joseph Ward. I have sought to address both of these deficiencies in the original disciplinary process with my fulsome investigation and broad lines of inquiry.*

Walid Assaf's visit to the desk

354 Mr De Lambilly concluded in relation to the suggestion that Mr Chedin's presentation to the RBAC meeting was incorrect because he stated that the claimant was present when Mr Assaf visited, that these factual inaccuracies were not fundamental or troubling and did not prejudice his final decision. Mr de Lambilly stated in cross examination that this was because the claimant failed to escalate the EFP issue on three occasions, namely in the email to Mr Botting of 24 March, and when he was back in the office on 26 and 27 March.

The fourth allegation

355 As for the fourth allegation, Mr De Lambilly concluded that the fact that this did not materially affect Mr Chedin's decision, since it was:

> *quite clearly an amalgamation of the three allegations that were put to you at disciplinary and on which Lauren made his findings*.

Covid-19 working arrangements

356 In relation to Covid 19 arrangements Mr de Lambilly concluded that whilst the pandemic caused serious disruption to normal working practices, that did not excuse the claimant's failure to escalate. He was able to respond to Mr Botting's email of 24 March whilst working from home and could have escalated the EFP dislocation by email, text, a phone call or in person when he was in the office on 26 and 27 March 2020 [D1871-2].

Risk escalation

357 The following passages were quoted from the interview with Joseph Ward on 9 February 2021:

JW explained that, by that dale, it had become clear that the mark to market losses were serious, and thus he had asked Sam, as head of the desk and his superior, what to do. JW noted that he had asked Sam more than once.

- *"JW explained that Sam believed that the situation would be short-lived, and that the impact was on the April contract, in which the group did not have a big position. JW noted that on the other chat, they had seen that it was flat, and noted that the options book got out of its remaining April futures position through the option expiry. "*
- *"JW noted that the majority of the group's position remained in the June futures, and that Sam thought that the squeeze in the position would apply to April only, and that it was too early to know what would happen in June. JW explained that, due to the efforts by the LBMA and CME to fix the discrepancy, Sam did not think it an appropriate time to escalate the situation."*
- *"JW went on to state that he had asked Sam on 2 occasions between March 24th and March 27th about what should be done. JW explained that Sam had wanted to wait to see how the market would trade on the June contract, and that Sam 's goal had been to use every available opportunity to reduce the risk and use the franchise to reduce their positions "*
- *"JW slated that, if plus 80 were used as a high point, the P&L would be at approximately minus $100 million. JW stated that he did not think this was a fair figure to use. JW expressed his doubt that June was trading at a rate like plus 80, but noted that, if they had even been plus 30, it would still have been a serious loss of $45 million, an enormous sum for their desk. "*
- *"JW responded that, though he could not speculate, there was no doubt that Sam knew the potential size of the losses. "*
- *"JW explained his belief that Sam had felt positive and relieved about how little April exposure the team had, due to the contract going on to trade up to plus 80. JW expressed his belief that Sam regretted that he did not escalate to management faster."*
- *"JW explained that Sam had never explicitly said why he wouldn't raise the alarm but based on JW's own speculation and experience in Sam's appeal meetings, JW stated his belief that Sam had felt the market was in the process of correcting, would have raised the alarm in time, and regretted not having done so. JW stated that during that week, it did not seem that Sam had planned to escalate, though JW had asked him more than once "*

Differential treatment/race discrimination

358 In relation to alleged differential treatment/race discrimination Mr de Lambilly concluded the following. In relation to Tony Botting, Mr de Lambilly concluded:

When the scale of the unrealised mark-to-market losses on your desk were raised to Tony on 30 March 2020, he immediately raised this to senior management (as you should have done following your interaction with Joseph on 23 and 24 March 2020). He realised that the Bank was significantly exposed to the dislocation in the gold futures market and that this needed immediate escalation and rectification, even if it meant

realising an actual loss. You did not share this view. Tony did not, based on the facts and information available to me, breach any of the stipulations of his job description. These are the key points of distinction between why your conduct resulted in a disciplinary hearing, and his did not.

Tony's comment on 14 May 2020 regarding Asian people is regrettable and wrong. If he were still with the Bank I would be recommending that he attend appropriate training and coaching to ensure that that this concern was addressed appropriately.

359 In relation to Mr McCauley it was concluded:

Although Louis was the most senior person in the office when Team B was working from the office, this did not equip him with greater powers or responsibilities and nor did it change his existing obligations which, in terms of reporting, was to escalate concerns to you. There had been no formal or informal delegation of duty from you and, therefore, by escalating matters to you as Head of Desk, I consider Louis acted in accordance with his obligations. In other words, Louis's presence in the office and you working remotely did not stop you from being the Head of Desk and having the obligation to escalate matters in line with your own reporting obligations. …

Louis did escalate his concerns to you on email on 29 March 2020 stating "...the bank is over representing the PnL of the metals desk by a significant amount" and that there were "very real actual Mark-to-Market implications based on where the COM EX gold futures arc trading". Whilst I acknowledge that this was sent at 9.21pm on a Sunday night, you advised me that the reason you had not replied, or forwarded this escalation email to Tony or senior management was because you had not checked your emails that night, or that morning, as you drove to work rather than taking the train (when you would normally review emails sent overnight). I note, however, that you were logged in to Bloomberg Chat at 5:25am and at 6:50am on 30 March 2020, and active on your work email account at 7:32am that same morning emailing William Benguerel. Furthermore, you were in the office with Tony an hour before Louis arrived on 30 March 2020, so you had the opportunity to raise the critical issue of unrealized material loss in the perimeter under your direct responsibility with Tony first before Louis arrived.

Louis then raised his concerns with Tony on 30 March 2020 when you had failed to do so, and was therefore seen by many in the Bank as a whistleblower, entitling him to protection from victimisation and retaliation. [D1877]

The Bank's Risk Valuation Model

360 As to the inadequacy of the Bank's Risk Valuation Model. Mr de Lambilly concluded:

I have considered whether your points regarding the "inadequacy of the Bank's Risk valuation model" namely its use of the mark-to-model risk valuation model rather than the mark-to-market valuation model - justify or explain why you did not escalate matters. As I established during my investigation, even if the Bank's systems were not showing the unrealised loss, you were aware, on 23 March 2021 and thereafter, that the desk PnL

would have shown tens of millions of losses, when calculated on a mark-to-market basis. You asked, in your appeal submissions:

> *"The purpose of MAM (Market Advisory Monitoring) and DRM (Market Risk Department) is to form the Second Line of Defence (within a Three forms of Defence model of risk management). In the event that the First Line of Defence (Trading) does not identify risk, then the Second Line should. Why therefore is MAM or DRM not under the same scrutiny as me?"*

This is, in my view, a further attempt by you to deflect away from your own failure to escalate, given that you had irrefutably identified a risk, and had been asked what to do about such risk by Joseph on multiple occasions. You have failed to appreciate that as a first line of defence, you have a responsibility to make sure that the valuation policy of the bank is as accurate as possible and this is the reason why you have the duty to escalate any material issue that could lead to an adjustment of the valuation. Naturally, and in accordance with good governance and franchise-risk management, the Bank is going to take steps to ensure that a similar issue cannot arise again. The fact it is doing so does not exculpate you. Rather, it shows the severity of your misconduct.

361 Mr de Lambilly noted that in his written disciplinary submission, the claimant states:

"It should also be noted that during the week, multiple PnL reports were generated, but at no stage was there any discrepancy between the PnL computed by MAM, and the PnL estimated by the team ... There was no major failure in daily Contango curve checking by MAM Murex"

In your investigation meeting minutes dated 15 April 2020, you state:

"Back to 2015-16, we proposed to switch the method to base on CME settlement prices, that would allow better daily PnL calculation if we looked to sell EFP at 0.40, and looked to buy back at -I. In normal markets, -1/+1 always the range for EFP on expiry. Our proposal was turned down, because Murex has difficulties. "

As Behnouche summarised, "you asked to change method because you knew' there was a valuation problem in MUREX." I therefore do not find your points regarding the Bank's valuation system to be a credible ground of appeal. [D1879]

Some other substantial reason, demotion as alternative, unfair sanction

362 Mr De Lambilly did not specifically consider the question of demotion as such or what the claimant's skill set was. During the interview with Mr Chedin, Mr De Lambilly did not ask him about the claimant's skill set. He concluded that his actions warranted summary dismissal in any event:

One of the most troubling aspects of your case is that you have refused to acknowledge that you failed to escalate at the correct time, maintaining that you had nothing of concern to raise to management prior to 30 March 2020. This stance makes your position or employment as a trader at the Bank (even without management responsibilities) untenable. [D1879]

363 Mr de Lambilly accepted that he did not investigate the allegations raised in protected disclosure 5, namely, allegations of dishonesty by Mr Mostachfi, Mr

Assaf and others by continuing to state that the claimant was on the desk when Mr Assaf visited on 25 March 2020. Mr de Lambilly held that any confusion around that visit was corrected by Mr Chedin in the disciplinary hearing outcome letter.

364 Mr de Lambilly's overall conclusion [D1865] was summarised as follows:

> *My overall finding can be summarised as follows: you knew' that the Bank had exposure to significant losses on the Precious Metals desk, for which you had overall responsibility, and you failed to escalate it to senior management in accordance with your contractual obligations and duties. I have considered each of the grounds that you have raised in support of your appeal but ultimately I find that your failure to escalate, even during the unprecedented times in which this episode arose, is grounds for summary dismissal. Your race and/or any alleged protected disclosures that you made played no part in Laurent's decision, or mine.*

Response to Equality Act Questionnaire

365 On 20 May 2021 the remaining response to the Claimant's Equality Act Questionnaire was provided to the Claimant.

366 In relation to question 5 - *Was any consideration given by the Bank to whether LM's non-escalation of risk to(a) me (b) Tony Batting and/or (c) Walid Assaf amounted to misconduct?,* the answer was as follows. Having confirmed that Mr McCauley had not been the subject of a disciplinary investigation; because *"The Bank considered that LM's actions - having escalated the issue to management first - did not warrant formal investigation in the circumstances".* Mr de Lambilly accepted during the hearing that he did not in fact know whether any formal decision was made; if so, by whom; or for what reason(s).

367 In answer to question 6. "*If so, please identify all of those involved in any discussion relating to LM 's conduct and whether it amounted to misconduct".* the answer given was:

> *There was not, insofar as i am aware, a formal meeting or hearing in which allegations of misconduct were discussed, for the reason set out in 5) above. Based on the evidence I have seen in preparing the appeal outcome, I have seen that LM's actions were discussed by WA, TB. BM. Thomas Spitz, Carlos Molinas, none of whom concluded that any disciplinary action was warranted in the circumstances.*

368 Mr de Lambilly accepted during the hearing that he did not ask WA, TB or BM or TS or CM whether they considered the possibility of an investigation before answering.

369 As for question 8, the reply confirmed:

> Q8 *Was any consideration given by the Bank to Tony Botting's handling of any risk arising from the Gold EFP breakdown, and whether his actions amounted to misconduct or management failing, having particular regard to the fact that both he and LM were together in the office from 23-25th March 2020?*
>
> *The Bank did not consider that TB's actions warranted formal investigation in the circumstances*.

370 Mr de Lambilly confirmed that he did not specifically interview Mr Botting's managers to check whether a decision was made and if so why. He did go on however to distinguish why in his view Mr Botting's actions did not result in disciplinary action whereas the claimant's did – see above [D1888].

Grievance appeal

371 On 27 May 2021 the claimant submitted a grievance appeal. That was conducted by Francois Rancine. Since none of the issues before us require any fact findings in relation to that appeal, nothing more need be said save that the grievance appeal was rejected by Mr Rancine on 10 September 2021.

Further representations regarding Form H

372 On 28 May 2021 the claimant emailed Philip Cooper alleging that Form H was incorrect. A reply was sent on 10 June 2021 [D1907-8].

373 On 5 July 2021, Philip Cooper updated Form H and sent it to the FCA. The changes made are reflected below:

> *"~~New notification~~ Updating a previous notification*
>
> *Failure to escalate/communicate to line management:*
>
> *(i) any concerns regarding the position held by the individual and his team in gold futures following the EFP breakdown ~~the extreme volatiity within the market from 14 March 2020;~~*
>
> *~~(ii) that there was a real loss/exposure which was not showing in the Desk P&L because of the use of the Mark-to-Model valuation model;~~ and*
>
> *(ii ~~i~~) the potential significant negative impact to the Precious Metals NBI ~~loss~~ of approximately US$25-30 million as at 30 March 2020, if the position was marked to the futures market and/or closed ~~resulting from the gold futures/swap dislocation during this period.~~*
>
> *~~Mr Yang has disputed the Bank's findings and submitted an appeal in writing. The appeal is underway and the FCA will be informed about the final determination of that appeal in due course.~~*

374 On 20 July 2021 the claimant emailed Philip Cooper objecting to the revised Form H that had been provided to the FCA. The email disclosed information which the claimant relies on as his sixth alleged protected disclosure [D1951]. The claimant asserted that SUP 15.6.4 states:

> *If a firm becomes aware, or has information that reasonably suggests that it has or may have provided the FCA with information which was or may have been false, misleading, incomplete or inaccurate, or has or may have changed in a material particular, it must notify the FCA immediately. Subject to SUP 15.6.5R, the notification must include: (1) details of the information which is or may be false, misleading, incomplete or inaccurate, or has or may have changed; (2) an explanation why such information was or may have been provided; and (3) the correct information*

375 On 21 July 2021, Philip Cooper emailed the Claimant to advise that all further correspondence in relation to Form H should be dealt with by the respondent's legal advisers. The claimant emailed Philip Cooper on 28 July, objecting to Philip Cooper's email of 21 July. On 29 July, Philip Cooper

emailed the Claimant reiterating that any further correspondence in relation to Form H should be conducted by the legal advisers. In line with that, on 3 August 2021, a letter was sent by CACIB's legal representatives to the Claimant's legal representatives requesting that any further correspondence regarding Form H and/or CACIB's correspondence with the FCA in relation to the Claimant's dismissal or Conduct Rule breach to be directed to them. The letter also confirmed that CACIB did not consider that any further amendments to Form H were required and CACIB was satisfied that it had complied with its regulatory obligations. The letter concluded:

> *As your client is aware (having been provided with a copy of Mr Cooper's correspondence with the FCA) our client has requested that the FCA update the content of Form H. Whilst it is clear that our clients disagree on this topic, our client does not consider any further amendments to Form H are required and is satisfied that it has complied with its regulatory obligations.*

376 On 6 August 2021 a letter was sent by the Claimant's legal representatives to CACIB's legal representatives in relation to Form H, seeking responses to a number of questions and noting that in the absence of a response the Claimant would be left with no choice other than to take up the shortcomings in the Form H directly with the FCA.

377 A letter was sent by CACIB's legal representatives to the Claimant's legal representatives on 19 August 2021, in response to the letter of 6 August in relation to Form H and explaining why no further changes/additions to Form H were required. The letter concluded:

> *Our client is aware that the FCA is authorised to make enquiries of them and to seek further information if it thinks appropriate in order to verify information that our client has provided in Form H, including requiring our client to provide further documents at any time. Our client will of course co-operate fully with the FCA should such enquiry be made. In addition, your client is of course free to provide such other information to the FCA as he considers appropriate.*

378 On 26 November 2021 the claimant's legal representatives wrote to the FCA regarding Form H [D2050-2054]. It was asserted on the claimant's behalf that the notification should have included relevant information about Covid 19 arrangements and project Medway, the valuation method, and Mr McCauley's failure to escalate.

379 On 17 December 2021 Philip Cooper emailed the FCA regarding Form H stating:

> *I do not propose to respond to each of the assertions or representations made in that letter, save to say that we have been in protracted negotiations with Mr Yang regarding the Conduct Rule Breach and the contents of Form H. A number of the points that Mr Yang seeks to include in the Form H submission as detailed in the letter are provided out of context, potentially misleading, and/or are the subject of the Employment Tribunal proceedings.*
>
> *I am confident that the Bank and I have fully complied with our regulatory obligations with respect to notification to the FCA in the annual Form H submission of the Conduct Rule Breach in respect of this matter.*

380 On 20 December 2021 the FCA emailed Philip Cooper seeking a summary of the bank's position on the issues relating to Form H. Mr Cooper accepted during the hearing that this was the first time he had communicated with the FCA about mark to model as used on the PM Desk. He further accepted that this was the first communication with the FCA in relation to Covid 19/Project Medway. He had expected the FCA to request an audit as to how the bank responded to see whether it was robust. There had been no request before then.

381 On 17 February 2022 Mr Cooper submitted a response to the FCA on Form H.

Legal principles

382 The tribunal was referred to a large number of legal authorities. The relevant legal principles are set out at length in Ms Davis' Opening Submissions on behalf of the respondent and further authorities are referred to in Ms Davis' closing submissions. Those principles are largely agreed, save that Ms D'Souza referred us to further legal authorities in her Closing Submissions on behalf of the claimant. Both counsel subsequently agreed to provide their submissions as Word documents. Since the legal principles are largely agreed, they are reproduced in Annex B. The tribunal is grateful to both counsel for their detailed exposition of the law and their co-operation in that regard.

383 In deciding the issues before us, the tribunal confirms that the legal principles set out in Annex B, as expanded on by both counsel in oral submissions at the conclusion of the hearing have been carefully considered and applied.

Conclusions

384 Bearing in mind the facts found above and the relevant legal principles, our conclusions on the issues before us are as follows.

Protected Disclosure Detriment/Dismissal

(a) Protected disclosures

Issue 1 - Disclosure 1 – disciplinary submission 4 May 2020 and appeal submission 8 April 2021 – did those submissions contain the information set out below?

That when on 'Be At Home' status, the Claimant and others did not have access to market trading or internal systems, but only a mobile phone and Bloomberg chat;

Neither the Claimant nor his team had been given any specific guidelines as to what to do when risk materialised when not in the office, or any special arrangement for information sharing.

385 We conclude that the disciplinary submission of 4 May 2020 clearly disclosed the information set out above – see our findings of fact above and D1136. It is admitted that the 8 April 2021 submission disclosed that information.

Issue 2 - Disclosure 2 – disciplinary submission 4 May 2020 and appeal submission 8 April 2021 – did those submissions contain the information set out below?

That the Respondent had chosen to measure risk associated with futures positions using the OTC contango curve (i.e. Mark to Model methodology), and not EFP ("Exchange for Physical") levels (i.e. the Mark to Market model);

That the Respondent had actively chosen not to measure risk using the Marked to Market model in 2015/2016 for technical reasons;

That had the risk been clearly quantifiable, the Respondent's Risk Management function (also known as the Second Line of Defence) should have detected the risk (which they did not).

386 Again, we conclude that the disciplinary submission of 4 May 2020 disclosed the information set out above – see our findings of fact above and D1141 and 1142. It is admitted that the 8 April 20201 submission disclosed that information.

Issue 3 - Disclosure 3 – appeal submission 20 July 2020

387 It is admitted, and we accept, that the document contained the disclosures of information set out below:

That those on 'Be At Home' status had no access to the Respondent's trading and market information systems. Accordingly, when on 'Be At Home' status, employees were not working from home in a manner deemed acceptable by the FCA, in line with its guidance dated 4th March 2020;

That team rotation arrangements in place during the week commencing 23rd March 2020 meant that the team in the office had custody of the desk book, and attendant risk reporting obligations and any failure by the Respondent to have communicated such obligations to the team in the office, would of itself amount to a systems and controls failing;

That the Respondent had failed to provide any guidance as to communication and risk reporting in light of the changed working arrangement described above;

That the Claimant understood there to have been a number of complaints from other traders on other desks about the inadequacy of equipment when working from home;

That such failings added up to a systems and controls failure on the part of the Respondent;

That the Claimant considered that he had been treated as a scapegoat by the Bank, and that the Bank was sidestepping by the Claimant's dismissal any proper examination of the adequacy of its Covid-19 working arrangements in order to avoid regulatory scrutiny;

That the Claimant had made a protected disclosure in his written disciplinary submission, which had gone uninvestigated in order to reduce regulatory and reputational risks to the Respondent.

Issue 4 - Disclosure 4 - Appeal submission 8 April 2021

388 It is admitted and the tribunal accepts that the document contained the disclosure of information set out below:

> That Mr Cooper's summary outcome letter on Project Medway had glossed over highly pertinent evidence relevant to the Claimant's appeal, namely evidence that showed that those working from home without an HTP kit were disadvantaged in relation to seeing position and P&L, and risk management.

Issue 5 - Disclosure 5 - Appeal submission 8 April 2021

389 It is admitted and the tribunal accepts that the document contained the disclosure of information set out below:

> That various senior managers of the Respondent (namely Mr Behnouche Mostachfi, Mr Walid Assaf, Mr Thomas Spitz and Mr Laurent Chedin) had advanced or perpetuated untruths around key facts relating to the Claimant's conduct (namely that he had been on the desk when Mr Walid Assaf visited the desk) and were thereby to be regarded as dishonest or negligent, contrary to Individual Conduct Rule 1 (Integrity).

Issue 6 - Disclosure 6 – letter to Mr Cooper of 20 July 2021

390 It is admitted and the tribunal accepts that the document contained the disclosures of information set out below:

> The Respondent had, in breach of FCA rules, (a) failed to disclose to the FCA why inaccurate information had been originally supplied to it, (b) had failed to provide 'complete' information to the FCA about the gold volatility episode, and (c) the reason for the Respondent's failure to provide 'complete' information about the gold volatility episode, was that the Respondent wished to avoid providing information to the regulator which showed a systems and control failure by the Respondent.

Issue 7 – were the disclosures of information made?

391 Yes – see above.

Issue 12 – were the disclosures made to the claimant's employer in accordance with S.43C ERA?

392 Yes. All the documents were sent to individuals working for the Bank, in their capacity as employees/officers of the bank.

Issues 8, 9 10, 11 and 13

393 Having found that the documents referred to above contained the disclosures of information set out, and it being clear to the tribunal that the disclosures of information were made to the claimant's employer (see issue 12 below), the tribunal considered whether it was proportionate and necessary to consider the issues related to section 43B Employment Rights Act 1996; and/or the issue of reasonable belief that the disclosures of information were made in the public interest.

394 The tribunal decided that this would not be proportionate and necessary, if the tribunal were able to arrive at clear conclusions as to whether or not any of the disclosures of information made, regardless of whether or not they were protected disclosures, had the required causative influence on the detriments

alleged and/or the dismissal – 'the causation questions'. That is, in the case of the alleged detriments, that they were done on the ground that the employee had made the protected disclosures; and, in relation to the dismissal, that the relevant protected disclosures were the reason/principal reason for the dismissal. Having considered the causation questions, the tribunal concluded, for the reasons set out below, that there is no causal link between the disclosures of information and the alleged detriments/dismissal. In those circumstances, the tribunal did not consider it proportionate or necessary to reach any firm conclusions in relation to issues 8, 9, 10, 11 and 13 since, regardless of our conclusions in relation to those issues, the protected disclosure detriment/dismissal claims would still have been bound to fail.

(b) Detriment

395 The claimant alleges that the following alleged detriments were done on the ground that the claimant made the disclosures of information which in turn amounted to protected disclosures. For short-hand, protected disclosure 1 will be referred to below as PD1 etc.

Issue 14a. The disciplinary officer (Laurent Chedin) glossing over whether the Respondent had, in the circumstances, failed to implement adequate systems or controls;

396 The Tribunal concludes that this was potentially a detriment. The tribunal further concludes that Mr Chedin did not seriously consider whether the respondent had, in the circumstances, failed to implement adequate systems or controls because he approached the disciplinary allegations with a narrow focus. The tribunal further concludes that he did so because to him the issue before him was simple, namely, why had the claimant not escalated the potential loss caused by the EFP dislocation? There was therefore no causal connection between the narrow focus and alleged PDs 1 and 2.

Issue 14b. The disciplinary hearing officer (Laurent Chedin) failing to consider meaningfully whether and to what extent any systems and controls failures had contributed to the Claimant's conduct as alleged

397 Again, the Tribunal concludes that this was potentially a detriment. The tribunal further concludes that Mr Chedin took the view that regardless of the valuation method used, the claimant should have been aware of the effect of the EFP dislocation on PnL and he should have escalated that issue. He would have reached that view, regardless of whether the claimant raised PD1 and/or PD2. Whether that was reasonable is considered below in relation to the unfair dismissal claim. There was, however, no causal connection between the claimant raising PD1 and/or PD2 and the view taken by Mr Chedin as to whether alleged systems and control failures had contributed to the claimant's conduct as alleged.

Issue 14c. The disciplinary officer (Laurent Chedin) failing to conduct any proper investigation following receipt of the Claimant's disclosures, particularly:

i. Failing to consider, as directed by the RBAC on 1st April 2020, whether Louis McCauley had culpably failed to escalate risk and/or by failing to ask Mr. McCauley any questions about his conduct;

ii. Failing to interview any witness suggested by the Claimant, including anyone from Risk Management who could have explained the Respondent's risk models.

398 Again, the Tribunal concludes that these were potentially detrimental to the claimant. The tribunal concludes however that there was no causal connection between the matters alleged above and PDs 1 and 2. Mr Chedin did not consider whether Mr McCauley had culpably failed to escalate risk; and nor did he fail to ask any questions about his conduct; because in both cases, his focus was on the disciplinary allegations against the claimant. Mr Chedin was not asked/directed, either by RBAC or anyone else, to investigate any culpable conduct by Mr McCauley.

399 As for the failure to interview the witnesses suggested by the claimant, including anyone from risk management, that again arose from Mr Chedin's narrow focus and approach to the disciplinary allegations, as discussed above, and had nothing to do with alleged PDs 1 and 2. The tribunal concludes that there is no causal connection between these alleged failings in the disciplinary process and the protected disclosures made. Mr Chedin did not think the witnesses would help him to decide on the disciplinary allegations. As he told Mr de Lambilly in his interview with him on 18 November 2020, Mr Chedin felt that the claimant was just hoping to get 'nice words' out of his team. We will return to these matters in relation to the unfair dismissal claim issues. Our conclusions in relation to those issues do not impact on our conclusions in relation to the protected disclosure detriment claims.

Issue 14d. Philip Cooper failing to consider the full and precise circumstances of the case (including systems and controls failures) before advising the RBAC that the Claimant had breached FCA Conduct Rule 2;

400 In relation to this particular allegation, the Tribunal concludes that this could potentially amount to a detriment. The Tribunal concludes however that there was no causal connection between the protected disclosures made by the claimant and the approach taken by Mr Cooper at the RBAC meeting. The approach taken by RBAC, where disciplinary allegations have been upheld following a disciplinary investigation and hearing, is to consider whether, in the light of the disciplinary findings made, there has also been a breach of the FCA Conduct Rules.

401 That general approach is what happened in this case. The RBAS-C followed the RBAC at which Mr Chedin had presented his disciplinary findings. Mr Chedin's report had been circulated before the meeting. The tribunal is satisfied that the approach by RBAS-C had nothing to do with the claimant's protected disclosures. To the contrary, it simply followed the same approach it would have adopted in relation to any employee against whom disciplinary findings had been upheld.

Issue 14e. Mr Chedin's original proposal of demotion being increased to dismissal at the behest of third parties, namely Mr. Spitz

402 The tribunal accepts that this is potentially a detriment. The telephone conversation between Mr Chedin and Ms Sqalli on 26 May 2020 will be considered in much more detail in relation to the unfair dismissal claim. Suffice to say at this stage that we have not been presented with sufficient evidence that either Ms Sqalli or Mr Spitz were aware of the claimant's disclosures of information in PD1 and PD2, at the time of that conversation. Even if we had been, the tribunal panel are satisfied that Ms Sqalli did not influence Mr Chedin's decision, for the reasons set out below. The tribunal is satisfied therefore that there was no causal connection between the first two protected disclosures and the content of that telephone call on 26 May 2020.

Issue 15 – post-termination detriments

403 We are asked to reach conclusions in relation to the following alleged post-termination detriments.

Issue 15 b. Unreasonable delay in acknowledging and providing a response to the Claimant's Equality Act questions

404 The tribunal accepts that the failure to provide early answers to many of the Equality Act questions is unsatisfactory and amounts to a detriment. We refer to our findings of fact above, that contrary to the respondent's assertion, it was not necessary to wait until the conclusion of the appeal to answer many of the questions, because the answers to those questions were not dependent on the findings in relation to the appeal.

405 Having said that, the tribunal also concludes that when the decision was made to delay the reply to most of the EQuA questionnaire questions, no-one had envisaged that the appeal process was going to take until May 2021 to complete. We are reminded of the advice from the appeal courts that in a discrimination case, a difference in treatment, and difference in protected characteristic, is not sufficient to raise a prima facie case of direct discrimination. We consider that a similar approach is appropriate in relation to a protected disclosure detriment/dismissal claim.

406 In cross-examination, the claimant was not able to say what the connection was between his protected disclosures and these alleged detriments. Similarly, the tribunal cannot see what the potential connection is between the respondent's admitted failure to answer the EQuA questionnaire questions earlier, and any of the protected disclosures having been made. Indeed, the tribunal concludes that it is far more likely that the reason was a matter of tactics; and/or that the Bank wanted to protect its position in relation to the appeal and the tribunal proceedings. A prima facie case not having been made out, the tribunal does not consider that the burden of proof has shifted to the respondent.

Issue 15c. When a response to the Equality Act questions was eventually provided on 22nd October 2020:

i. answering only some of the Claimant's questions;

ii. diverting others to be determined by the appeal officer;

iii. setting out incorrect facts in answers which were given; and

iv. the appeal officer in the appeal hearing having no knowledge of the Equality Act questions which he had been apparently tasked to answer.

407 We refer to our above conclusions in relation to these detriments (which we conclude they were). We conclude that the decision to answer only some of the questions was partly tactical, and partly because of the erroneous belief that there was a link between all of the other questions which remained unanswered, and the issues raised by the appeal. As for the incorrect answers, that was because of an honest mistake made by the respondent. It had nothing to do with the protected disclosures.

408 As for the appeal officer not being aware of the Equality Act questionnaire questions during the first meeting with the claimant, that was because he was not at that stage fully on top of his brief. That was understandable, given the complexity of the issues and the amount of documentation provided to him. Again, the tribunal is satisfied that his lack of knowledge had nothing to do with the appeal officer knowing that the claimant had raised potential protected disclosures, and being determined to subject him to a detriment by not being on top of his brief.

409 Finally, on this issue, we again note that when questioned by the respondent's counsel at the hearing, the claimant was not able to say what the possible causal connection was between any of the protected disclosures and the above issues.

Issue 15 f. Withholding important documents which were properly responsive to the Claimant's Subject Access request

410 We refer to our conclusion above in relation to issues 15b and c. Similar considerations apply here. We accept that this is a detriment.

411 It is accepted that Mr McLean could have been more proactive, in bringing to the attention of those dealing with the claimant's DSAR, some of the documents which were not provided initially. However, this was an extremely complex and time-consuming request, involving the disclosure of, we were told, about 15,000 pages of documents. It is not surprising, in a disclosure exercise of that magnitude, that there were some documents missing. Indeed, it would be surprising if there were not. The claimant was able, through his solicitors/on his own initiative, to point out where he considered documents were missing. Further searches were subsequently carried out.

412 Again, the Tribunal concludes that the making of the alleged protected disclosures, and the late disclosure of certain documents, is not enough to raise a prima facie case. Again, the tribunal can in any event find no apparent connection between the detriment alleged, and the alleged protected disclosures. Yet further, the tribunal has not found as a fact that any documents were deliberately withheld. The tactics used by Mr Maclean and colleagues in emails to make certain documents less likely to be identified in a DSAR search, we accept on the basis of his evidence, are standard practices. The tribunal would question whether or not such practices are appropriate. Regardless of the answer to that question, it is apparent that the application of those standard practices had nothing to do with the alleged PDs. The claimant was not treated any differently to the way any of his colleagues would be treated, if they raised a DSAR.

Issue 15h. Failing to provide prompt and/or promised replies to the whistleblowing investigation

413 The tribunal accepts that this could be a detriment. Again however, the tribunal concludes that a prima facie case has been made out. At the outset of Project Medway, it was agreed that the claimant would be provided with a summary of the findings. A summary is what was provided. It is clear from the facts found above, that consideration was given as to what the claimant should be told, once the final report had been concluded. In principle, the tribunal considers that the full report, suitably redacted, could have been provided to the claimant, rather than a summary. There are perhaps lessons to be learned in that regard. However, the tribunal concludes that there is no causal connection between any of the alleged protected disclosures having been made, and the decision to provide a summary report.

Issue 15i. In relation to the Project Medway findings, providing Mr de Lambilly with only the limited summary outcome, which failed to identify any of the disadvantage experienced by those working from home without an HTP kit

414 See 15h above. The same conclusions apply.

Issue 15j. Mr de Lambilly accepting without further questioning Mr Chedin's evidence that the introduction of a fourth allegation was insignificant and '*quite redundant*', in circumstances where the fourth allegation had been set out in terms to the (i) RBAC, (ii) RBAC Sub-Committee, and (iii) the FCA

415 The tribunal accepts that this was a detriment. Again however, the tribunal cannot find any causal connection between the detriment and the alleged PDs. The issue is potentially relevant to the unfair dismissal claim and will be discussed further below.

Issue 15k. The appeal officer, Mr de Lambilly, failing to conduct a genuine investigation, or to give genuine consideration to the matters raised on appeal, instead adopting an approach which was designed to superficially remedy the palpable defects in the disciplinary process (and thereby defeat the Claimant's unfair dismissal claim) but without genuinely considering the issue of substances to which the appeal gave rise

416 The tribunal accepts that this is potentially a detriment. However, the tribunal does not accept that the investigation was not genuine or that Mr de Lambilly did not give genuine consideration to the issues. The interviewing of eleven witnesses, the consideration of thousands of pages of documentation and four separate appeal submissions, which were comprehensively dealt with in an 18 page appeal outcome decision letter, cannot reasonably be described as disingenuous, or superficial.

417 Mr de Lambilly properly conceded during cross examination that more could have been done. For example, by requesting a full copy of the Project Medway report and interviews; and providing Mr McCauley and Mr Ward with copies of the Bloomberg chats and emails referred to, when questioning them about them. The potential relevance of such issues to the unfair dismissal claim will be considered in due course. Further, in relation to the Covid-19 working arrangements, Mr de Lambilly concluded that the claimant could still make phone calls, send and receive emails whilst working from home, and was physically in the office on 26 and 27 March. Further, he found that the claimant could have used those methods to escalate the EFP dislocation

issue, had he considered it necessary to do so. Seeing the full Project Medway report and interviews would not, in the Tribunal's judgment, have changed Mr de Lambilly's conclusions in that regard.

Issue 15l. Failing to overturn the Claimant's dismissal, despite the starkly disparate treatment of Mr Louis McCauley and/or Mr Tony Botting which the Claimant had raised as a ground of appeal

418 it is accepted that this is potentially a detriment. Again, we will look in more detail at Mr de Lambilly's conclusions about the claimant's appeal against dismissal in relation to the unfair dismissal and discrimination/victimisation issues. Suffice to stay at this stage, that on the basis of the evidence before the tribunal, the Tribunal accepts that Mr de Lambilly's decision in relation to the appeal was based on his view that there were important differences between the claimant, Mr McCauley and Mr Botting.

419 As for Mr McCauley, Mr de Lambilly took the view that whilst Mr McCauley could be criticised for not raising the matter earlier, he did raise the PnL issue on 30 March, whereas the claimant did not. The tribunal is not convinced that had Mr McCauley not raised the issue on 30 March, that the claimant would have done so on that day. We note that according to Mr McCauley's interview with Mr de Lambilly in February 2021, that Mr McCauley said that when Tony Botting had asked the claimant what the position was in relation to futures, the claimant had at first denied that there was any loss at all.

420 Whether those were reasonable conclusions for Mr de Lambilly to come to will be considered in due course. At this point, however, it suffices to say that the Tribunal does not consider there to be any causal connection between the conclusions that Mr de Lambilly came to on the appeal, and the claimant's alleged protected disclosures.

Issue 16 a – Refusing to correct the terms of the Form H (as set out in the Respondent's representative's letter dated 19 August 2021), in particular failing to provide 'complete' information about the gold volatility episode to the FCA, or to provide an explanation of why inaccurate information was originally supplied in November 2020, and in fact misleading the regulator that any corrections were linked to the appeal process.

421 The tribunal is not convinced that this amounts to a detriment. From evidence given by the claimant during cross examination, it appears that the main impediment to him finding other work, is that when he mentioned he had been dismissed for misconduct, potential employers and/or head-hunters were no longer interested in his application. It is that fact that appears to have been the main impediment, to him obtaining other work, rather than the fact that a conduct rule breach has been found. Further, the lack of information has not led the FCA so far to undertake an investigation into the claimant's conduct.

422 In any event, the claimant has failed to raise a prima facie case in relation to this issue. Yet further, the tribunal is quite satisfied that the reason Mr Cooper provided the limited information that he did in Form H, was that he considered, on the basis of his knowledge and experience, that it was the appropriate thing to do. The tribunal further accepts Mr Cooper's evidence that he was simply treating the claimant's case in the same way he would treat any other employee, in a senior manager role, against whom disciplinary allegations had been upheld. His practice is to provide limited information and

his experience is that the more information provided, the more likely it is that the FCA will investigate further. The Tribunal is satisfied that none of this is connected in any way to the claimant's alleged protected disclosures.

(c) Automatically unfair dismissal

Issue 17 - Was the reason or principal reason for the Claimant's dismissal that he had made a protected disclosure (namely Disclosures 1 and/or 2)?

423 By the time of the claimant's dismissal, the disclosures of information which form PD's 1 and 2 had been disclosed. Regardless however of whether they amount to protected disclosures, the tribunal concludes on the basis of the findings of fact, that the reason for the claimant's dismissal was his failure to escalate the issue a reason related to conduct. The tribunal considers the fairness of that dismissal for that reason below. The tribunal concludes however that the reason for the dismissal was the failure to escalate. Further, the Tribunal is satisfied that the dismissal was not connected to the claimant's alleged protected disclosures.

Unfair dismissal – (s.94 ERA)

Issue 18 – potentially fair reason

424 The Tribunal concludes that the reason for the claimant's dismissal was a reason related to conduct, namely the alleged failure to escalate the EFP breakdown with Mr Botting prior to 30 March 2020.

425 The tribunal was unconvinced by the respondent's alternative argument that the reason was some other substantial reason (SOSR) due to loss of trust and confidence. Any purported loss of trust and confidence was linked to the alleged conduct issue and that remains therefore the substantive reason for the claimant's dismissal.

Issue 19 - fairness (s98(4) ERA)

Issue 19a - was the investigation undertaken by Behnouche Mostachfi unfair, having regard to the following contentions by the Claimant:-

i. Mr. Mostachfi was not independent or impartial, and had wrongfully informed others (including Ms David, Mr Blondeau and Mr Spitz) that the Claimant failed to inform Mr Assaf of any risk;

ii. He did not conduct any interviews of any witnesses;

426 We start by noting that the range of reasonable responses test applies and that is referred to for reasons of brevity below as 'The Range'.

427 The tribunal concludes that it was manifestly inappropriate for Mr Mostachfi to have been appointed to carry out the investigation. He had taken the view that the claimant was dishonest and that he had failed to escalate the EFP breakdown on 25 March when Mr Assaf visited the desk. He remarked on 9 April that his 'blood [wa]s still boiling'. He clearly lacked the objectivity necessary to carry out an independent and reasonable investigation.

428 That lack of objectivity and lack of reasonableness in the investigation is reflected in Mr Mostachfi's failure to carry out interviews with key witnesses, namely Tony Botting, Mr Assaf, and Mr McCauley despite his report stating that he had.

429 We conclude that the investigation was unfair for these reasons. We further conclude however that had an independent investigation been carried out, it is still likely that the matter would have been escalated to a disciplinary hearing.

Issue 19 b - was the disciplinary process undertaken by Laurent Chedin unfair, having regard to the following contentions by the Claimant:-

i. Mr. Chedin failed to conduct any interviews with witnesses suggested by the Claimant;

ii. Mr. Chedin laboured under fundamental misapprehensions of fact throughout the disciplinary process, namely:-

(a) reporting to the RBAC that 4 allegations of misconduct were considered by him, when only 3 were ever put to the Claimant;

(b) reporting to the RBAC that 3 allegations had been upheld, when in fact he had upheld only two;

(c) basing his advice on a mistaken view that the Claimant failed to escalate to Mr. Assaf in person on his visit(s) to the desk, when in fact the Claimant was not present for any such visit.

430 It is not disputed that Mr Chedin did not interview witnesses suggested by the claimant, in particular, Phil Lawrence, Head of MAM Murex, Lilian Chaplain Head of DRM and the PMD traders James Donaldson and Joseph Ward. We conclude that was unfair.

431 We have found that Mr Chedin was, until after his decision to dismiss had been taken, proceeding on the basis that there were four allegations, not three. The tribunal does not accept that this made no difference on the basis that one of the allegations was simply an amalgamation of the other two. Since that was indeed the case, there were in effect three allegations and only those three allegations should have been put to the claimant, not four. Had the allegations which had been set out in the invitation to the disciplinary hearing letter been considered by Mr Chedin, he would have told the RBAC meeting on 10 June that two out of three allegations were upheld (two thirds), not three out of four (three-quarters). That does in the tribunal's judgment matter. As does Mr Chedin's failure to make it clear to the claimant that he was considering four and not three allegations during the disciplinary hearing. The fact that the dismissal letter correctly referred to three allegations does not change the fact that when the decision was made, Mr Chedin had in mind four allegations, of which three were upheld.

432 The tribunal further concludes, on the basis of our findings of fact, that Mr Chedin did believe, at the time that he made the decision to dismiss, that the claimant was present on the desk during Mr Assaf's visit on 25 March. Again, that was corrected by the time that the dismissal letter was sent out but the decision to dismiss had been taken well before that.

Issue 19b.iii. Mr. Chedin glossed over the Claimant's disclosure that the Respondent had failed to implement adequate systems or controls by its rotation arrangements;

433 The tribunal concludes that Mr Chedin did not gloss over that disclosure. Mr Chedin was aware from his own experience in the early stages of the

pandemic that there were issues with working from home. The members of the tribunal experienced the same difficulties during the same period. The respondent's rotation arrangements were implemented in order to protect the health of staff. That was bound to affect productivity, but the health of staff was the priority at that time.

434 The move to a an effective working from home environment inevitably took some time to implement, given that home working was previously very much the exception and traders were not allowed to trade from home. The tribunal further concludes that whilst understandably, it did take some weeks for the respondent's employees to be able to work from home effectively, it was not that which prevented the claimant from escalating the EFP breakdown issue. Had the claimant considered that he needed to report the issue, he could have done so by phone or email between 23-25 March or on 26 or 27 March, by talking to Mr Botting. We note that the claimant was able to email Mr Botting on 25 March in reply to his email on the issue.

Issue 19b.iv. Mr. Chedin failed to consider (as directed by the RBAC on 1st April 2020) whether Louis McCauley had culpably failed to escalate risk;

435 The tribunal has not found as a fact that the RBAC on 1 April 2020 directed Mr Chedin to consider whether Mr McCauley failed to escalate risk. On the contrary, we find that no such direction was given. Mr Chedin was only asked to investigate allegations against the claimant, which he did. Whether there was inequitable treatment will be considered below.

Issue 19b.vi. Mr Chedin's decision making in general, and the increase in his original proposal of demotion to dismissal, was influenced by third parties, namely Mr. Spitz, in circumstances where Mr Spitz had decided that the Claimant was to be dismissed by 30 March 2020 (prior to any disciplinary process starting);

436 This allegation is predicated on the theory that there was a strategy by senior managers to remove the claimant from the start of the escalation of the PnL issue on the PM Desk. It is the case that a number of senior managers made a number of unguarded comments to the effect that the claimant should be sacked. Such comments were in part due to an assumption at that stage of possible 'rogue trading' and/or dishonesty on the part of the claimant. Further, they were made on the day when it had been discovered that the bank was facing a potential loss of tens of millions of dollars, and those managers seemed determined that someone should 'pay' with their job.

437 Such comments, though understandable in the heat of the moment, were nevertheless unfortunate. It is not surprising that the claimant concluded, on the basis of the transcripts of those interviews, that the outcome of the disciplinary process had been pre-determined. On the basis of the facts found by the tribunal however, the tribunal concludes that senior managers, and in particular Mr Spitz, did not exert any material influence over Mr Chedin following his appointment. We conclude, on the basis of our fact findings, that the dismissal decision was taken by Mr Chedin alone. That the clamant was sacked no doubt aligned with the views of GMD (including those of Mr Spitz and Ms Sqalli). But it was not GMD's decision to make.

438 We note that after Mr Chedin's appointment, Mr Spitz no longer appeared to be taking an active interest in the process. We conclude that was because of

an acceptance by him that the disciplinary process had to be allowed to take its course, rather than because he had told Mr Chedin to sack the claimant and he knew Mr Chedin would comply.

439 The Tribunal notes that the conversation with Ms Sqalli on 26 May 2020 took place on her instigation, not Mr Chedin's. Having considered the transcript of the conversation between Mr Chedin and Ms Sqalli extremely carefully however, the Tribunal concludes that Mr Chedin was not influenced by Ms Sqalli in relation to the decision to dismiss. We conclude that during the conversation, Mr Chedin used Ms Sqalli as a sounding board. The decision to dismiss remained his alone. Had there been an intention by Ms Sqalli during that conversation to directly influence Mr Chedin, we would have expected there to have been much more direct language used. Such language is notably missing from the transcript. The transcript is discussed in more detail below.

440 A legitimate question was raised on behalf of the claimant as to why Ms Sqalli was not called as a witness. The Tribunal concludes however that the most likely explanation for this is because Mr Chedin would have confirmed to the bank's legal advisers, just as he confirmed to us, that the decision was his alone. We have concluded that is the case, having considered the transcript.

441 A further question was raised as to why Mr Chedin failed to mention the call to Mr de Lambilly or the respondent's solicitors. We conclude that was because he had forgotten about the call, not because he was deliberately concealing it. There was, in the Tribunal's judgment, nothing to conceal.

442 As noted in the fact findings, Ms Sqalli made a comment at the outset of the call as follows:

> *I wanted to understand a little of where you were in your reflection on this case which takes a little time to be settled for reasons that have nothing to do with the subject ... it's rather the current circumstances which are a little more complicated to manage [D2007].*

The Tribunal concludes that this is a reference to the pandemic affecting the timescales of Mr Chedin's investigation.

443 Mr Chedin did discuss during the call [D2013] the possibility of either dismissing the claimant or demoting him. There then followed a discussion of how to avoid a situation whereby the claimant remained in the Bank's employment but then left of his own accord, and represented to a new employer that there had been no disciplinary issues during his employment with the respondent.

444 The tribunal also notes at [D2015] Ms Sqalli stated to Mr Chedin:

> *So whatever happens, and independently of the outcome and the decision you'll make, and if I understood correctly at the minimum it's a demotion.*

Ms Sqalli then confirms that whatever the outcome, there would still be a regulatory reference in the claimant's file, which would be provided to any prospective employer. We conclude that Ms Sqalli would not have used the words quoted, if it was her intention during the call to ensure that the outcome was dismissal and not demotion. We further conclude that the facts of this case do not suggest a plan by GMD to dismiss the claimant, as a result of protected disclosures made by the claimant; a plan which Mr Chedin then

simply went along with (see *Fairhall*). The facts found do not in the tribunal's judgment come close to establishing that sequence of events.

Issue 19c - was the RBAC's involvement in the disciplinary matters relating to the Claimant flawed and unfair, having regard to the following contentions by the Claimant:-

ii. Mr. Cooper (UK Head of Compliance) advised the RBAC, based on wrong information presented by Laurent Chedin, that the Claimant had committed three very serious breaches amounting to a Conduct Rule breach;

iii. Mr. Cooper was then appointed to independently investigate and determine the Claimant's whistleblowing concerns, when he was not properly independent;

445 The Tribunal has already concluded that the decision to dismiss was made by Mr Chedin. Mr Chedin reported his findings to the RBAC on 10 June 2020, in relation to a possible conduct rule breach. Mr Chedin's decision to dismiss the claimant had already been made by then.

446 As for the claimant's whistleblowing concerns, Mr Cooper was not appointed to lead the Project Medway investigation (although he did have oversight of it). In any event, the tribunal concludes that the Project Medway investigation was not connected in any way with the claimant's dismissal.

Issue 19d - did the Respondent unfairly classify as serious misconduct the Claimant's failure to escalate risk in accordance with a valuation model which the Respondent (a) did not utilise in relation to gold futures positions, and (b) had refused to adopt in 2015/2016?

447 The Tribunal concludes that the disciplinary allegations were properly classed as serious misconduct because the claimant failed to escalate a potential issue with the valuation model which was being used at that time. The tribunal accepts that the claimant genuinely did not believe he needed to escalate the EFP breakdown issue because he considered that it would resolve itself once trading on the June contract commenced, and he was waiting to see what happened when trading on that contract started in earnest, from 31 March onwards. The tribunal also accepts however that the respondent was entitled to consider that to have been an error of judgment on his part. Whether that justified his dismissal is another matter.

Issue 19e - did the Respondent fail to take into account its own alleged failure to comply with the FCA's requirement of adequate business continuity planning, particularly in relation to (a) provision of equipment and resources, and (b) communication methods, in advance of the onset of the Covid-19 crisis?

448 We refer to our conclusions above, that there was a time lag between the commencement of the first lockdown, and the respondent having systems in place to enable effective working from home. Given the unprecedented circumstances of the pandemic, that was understandable. The claimant did have sufficient access to information to know that there was a potential problem. He also had sufficient resources to raise the issue, by phone or by email; or in person on 26 or 27 March.

Issue 19f - did the Respondent unfairly cast the reason for dismissal as 'some other substantial reason' based on 'serious misconduct', thereby circumventing its own disciplinary policy, which fairly applied would not have resulted in the Claimant's dismissal?

449 The tribunal concludes that it was unfair to rely on some other substantial reason namely loss of trust and confidence in the circumstances of this case. Mr Chedin correctly categorised the misconduct as serious misconduct. He did not find that it was gross misconduct. That is inconsistent with a suggestion that there had been a breach of the implied term of trust and confidence; such a breach would by definition amount to a repudiatory breach of contract, and therefore gross misconduct. There is therefore a serious inconsistency in the respondent's position. That is a matter we will return to in our overall conclusion on the unfair dismissal issue.

Issue 19g - was the Respondent's rejection of demotion as an alternative to dismissal based on factually incorrect or otherwise flawed grounds?

450 We refer to our findings of fact. We conclude that Mr Chedin failed to properly investigate this issue. We further conclude that Mr Botting was unreasonably trying to deflect all blame for the failure to escalate the EFP breakdown onto the claimant, to protect his own position, a position which should have been obvious to Mr Chedin. Mr Chedin failed to ask Mr Botting about the claimant's email to him of 24 March. In particular, whether he would have known that the PM Desk was holding forwards contracts for June and beyond, not just April contracts; and why Mr Botting did not question the claimant further, following receipt of the email, in light of that knowledge. Failure to question Mr Botting about such an obvious and important issue was in the tribunal's judgment, outside The Range.

Issue 19h - was the appeal process undertaken by Mr Eric de Lambilly unfair, having regard to the following contentions by the Claimant:-

ii. Mr de Lambilly failed to overturn the dismissal, notwithstanding the significant issue raised by the Claimant on appeal about the starkly disparate treatment of himself when compared with Mr McCauley (who was not disciplined at all, and was in fact promoted) in circumstances where Mr McCauley:

1. Was subject to an identical obligation in his Position Mandate as the Claimant to risk escalation;

2. Mr McCauley was familiar with the Mark-to-Market model, as he had worked with the model in previous employment, unlike the Claimant, who had never worked with it before;

3. Mr McCauley had failed to report on any Mark-to-Market risk in his Options book daily wrap up emails on either 24 or 25 March 2020 (a failure for which the Claimant was criticized in relation to the Forwards daily wrap up emails);

4. Mr McCauley failed to escalate any concerns on 24 and/or 25 March to Mr Assaf when asked specifically about the gold futures position, and possibly during a second visit by Mr Assaf that week;

5. While Mr McCauley denied any knowledge of the desk's Forwards position (this being a matter relied upon by Mr de Lambilly

in his appeal outcome), both Mr McCauley's manager, Mr Botting, and his colleagues, Mr Ward and Mr Donaldson, said in their appeal interviews that Mr McCauley was aware of the desk's position, and Mr McCauley admitted as much in a call with Mr Mostachfi on 30 March 2020;

451 The tribunal's conclusions on the above issues are as follows. First, whilst Mr McCauley's obligation in his Position Mandate was the same as the claimant, the claimant was in charge of the desk and managed the other members of the team. Notwithstanding that, it is still the case that Mr McCauley did not raise any issue with the claimant until his email of 29 March 2020. Further, when he did so, he informed the claimant that he had arranged to go into the office to speak to Tony Botting about it, rather than speaking to the claimant first, by phone or otherwise. Mr McCauley had the opportunity to raise the issue with Mr Botting between 23 and 25 March 2020, when he was in the office.

452 As for the visit of Mr Assaf to the desk, Mr Assaf admitted before us that his question to Mr McCauley could have been clearer, by specifically asking about the effect of the EFP volatility on the June Forwards contracts (having been told that the April contracts had been 'rolled' [D1207]. Had the right questions been asked on 25 March, the PnL issue would probably have been identified earlier. We mean no criticism of Mr Assaf in saying that - it is always easier to be wise after the event. The claimant was not however afforded the same benefit of the doubt during the disciplinary process.

453 It is clear to the tribunal from Mr McCauley's email of 29 March 2020, that he recognised there was an issue, prior to 29 March. Mr McCauley had worked with Mark to Model on a previous occasion, and was aware of previous EFP breakdowns (although not of the same magnitude). The issue would nevertheless have been more readily apparent to him. Yet further, it was Mr McCauley who attended the Risk Committee meetings in 2019, to argue that the risk valuation method used by the PM Desk should be changed.

454 None of the members of the PM Desk, including Mr McCauley, specifically raised the potential issue with the PnL valuation in the eod emails. However, all of the emails between 24 and 27 March, referred to in our findings of fact above, reported the high level of the EFP on those days.

455 Mr de Lambilly agreed during cross examination that Louis McCauley failed to escalate the issue between 23 and 25 March although the size of the loss on his book was smaller, and he did escalate on 30 March. The tribunal notes that the loss on Options Futures still ran into million of pounds, a significant sum. Mr de Lambilly was told by Mr McCauley that he did not know the size of the Forwards position. That was not correct – Mr McCauley told Mr Chedin during his interview that he has access to Risk Engine and he could see the positions. This was made clear to Mr de Lambilly by the claimant during the April 2021 appeal meeting and that inconsistency should have been noted by him.

iii. Mr de Lambilly failed to overturn the dismissal notwithstanding the significant concern raised by the Claimant on appeal as to the starkly disparate treatment of himself when compared with Mr Botting (who was not disciplined at all, and was allowed to exit his employment with the Respondent on agreed terms), in circumstances where Mr Botting:

1. Was aware of the gold futures dislocation as it was happening;

2. Was aware of the size of the desk's position, as he had authorised it only months earlier;

3. Had previously been the Head of Desk for Precious Metals until early 2020, and well understood the technical issues relating to the Mark-to-Model system;

4. Mr Botting had been privy to emails seeking to change the system from Mark-to-Model to Mark-to-Market in 2015;

iv. In relation to the Project Medway findings, Mr Cooper provided Mr de Lambilly with only his limited summary outcome, which failed to identify any of the disadvantage experienced by those working from home without an HTP kit;

v. Mr de Lambilly accepted without further questioning Mr Chedin's evidence that the introduction of a fourth allegation was insignificant and '*quite redundant*', in circumstances where the fourth allegation had been set out in terms to the (i) RBAC, (ii) RBAC Sub-Committee, and (iii) the FCA;

vi. Mr de Lambilly failed to conduct a genuine investigation, or to give genuine consideration to the matters raised on appeal, instead adopting an approach which was designed to superficially remedy the palpable defects in the disciplinary process (and thereby defeat the Claimant's unfair dismissal claim) but without genuinely considering the issues of substance to which the appeal gave rise.

456 The tribunal has found as a fact that the matters set out at iii. 1 to 4 above are correct. Further, we conclude that it would have been clear to Mr Botting from the claimant's email of 24 March 2020 that he was referring to the April Futures contracts only. Mr Botting failed to ask any further questions of the claimant following receipt of that email.

457 Mr Chedin told us that Mr Botting would have been reassured by that email. The tribunal disagrees, in the light of Mr Botting's knowledge and experience and such a conclusion was outside of the Range. Mr de Lambilly told us that the claimant should have mentioned the June position. Equally however, Mr Botting should have specifically asked the claimant about that, given his knowledge of the size of the Futures position on the PM Desk, given the large increase in the number of lots allowed under the risk mandate. As noted above, none of this was considered or explored by Mr Chedin.

458 It is a fact that Mr de Lambilly was only provided with the summary of the Project Medway findings. Both he and Mr Cooper acknowledged that the full report could have been provided. However, even if it had been, then for the reasons given above in relation to issue 19b.iii., the Tribunal concludes that would not have made a difference to the outcome.

459 As for the fifth allegation, the tribunal does consider that to be a significant matter, for reasons which will be further discussed below.

460 Finally, the tribunal concluded that whilst Mr de Lambilly could have done more, his investigation was comprehensive, and it was genuine. It was not superficial. Whether the investigation and appeal outcome, considered in the context of the dismissal process as a whole, means that the dismissal was fair

is an issue to which we now turn, in our overall conclusion on the fairness of the dismissal.

Overall conclusion on the fairness of the claimant's dismissal

461 Before coming to our overall conclusions, the tribunal has again reminded itself of the wording of section 98 (4) Employment Rights Act 1996; and that the range of reasonable responses test applies ('The Range'). The tribunal also notes however that The Range does not amount to a perversity test - see paragraph 49, *Post Office and others v Foley and others, [2000] IRLR 827*. (That was not specifically raised with either counsel, but we do not anticipate that is a disputed principle of unfair dismissal law. If either counsel disagrees, a reconsideration request can be made). The tribunal also notes in particular that where an individual's career could be blighted, as in this case, as evidenced by the claimant's failure to find further employment since his dismissal in a British Bank, the standard of investigation must be high - see paragraph 88 of Annex B below and the reference to the *Raldon* decision.

462 Bearing in mind those legal principles, the Tribunal concludes that the dismissal was unfair for the following reasons:

462.1 As noted above, Mr Mostachfi's investigation was inadequate. The tribunal has concluded that it was likely that a disciplinary hearing would still have been held. The deficiencies in Mr Mostachfi's investigation placed more onus on Mr Chedin to carry out a more effective investigation himself.

462.2 We find however that Mr Chedin's own investigation was also inadequate. He failed to interview witnesses suggested by the claimant, including Phil Lawrence, Lillian Chaplin, James Donaldson and Joseph Ward. The reason for this was Mr Chedin's narrow focus in the investigation. That narrow focus took his investigation outside of The Range. In saying that and what follows, we do not seek to criticise Mr Chedin, who we do not doubt undertook his role with honesty and integrity. It is however our job to analyse carefully Mr Chedin's decision, and the process by which he came to it, in deciding whether the dismissal was fair. That is particularly important where, as in this case, the dismissal of the claimant has made it extremely difficult for him to obtain further employment in a similar role.

462.3 Mr Chedin's interview with Mr McCauley focused on the claimant's capability. That is surprising, since it was not an issue which Mr Chedin had been asked to investigate. Mr Chedin did not put any of his doubts about the claimant's competence as a Desk Head to the claimant, despite forming firm conclusions on them, which then influenced his decision on demotion/re-engagement elsewhere. That was outside the Range.

462.4 As noted in our findings of fact, the claimant did accept during the disciplinary process that, in retrospect, he wished he had escalated the EFP breakdown issue and its potential effect on the PnL of the PM desk before it was raised by Mr McCauley on 29 March 2020. By the time of the appeal, the claimant put forward detailed arguments as to why it was not apparent, prior to that date, that he should have

raised an issue earlier, due to the uncertainty about the price of the June Forwards contracts prior to trading on those contracts commencing in earnest at the end of March. The tribunal accepts that it would be substituting its own opinion for that of the respondent, to find that the respondent should necessarily have concluded that was a reasonable position for the claimant to take. Instead, the tribunal pays due deference to the conclusion of the respondent that the claimant should have raised the matter earlier and that it amounted to serious misconduct. The failure however to consider the allegations in their proper context, as explored further below, takes the decision to dismiss outside of The Range.

462.5 During the disciplinary process, Mr Chedin focused on individual failings by the claimant and failed to consider the actions of the claimant in the context of the unprecedented circumstances of the pandemic; the unprecedented breakdown in the EFP; the failure by Mr McCauley or Mr Botting to escalate the issue (see further below); and the known issues with the valuation model used by the PM Desk, which had been questioned both in 2014/15, and in 2019, at which point a change to a mark to model approach was rejected on the grounds of cost. Again, those omissions were outside of The Range in the circumstances of this case.

462.6 As for the Valuation Policy, the tribunal concludes that it was outside of The Range for Mr Chedin to focus in a narrow way on the claimant's own failure to escalate, when there were clear systemic failures by the bank which led to the failure to identify the PnL loss on the PM Desk before 30 March. These included, as noted above, the two previous occasions when potential problems with the model had been raised. Despite those concerns being raised, a more robust model had not been adopted. The PM Desk was the only desk in London not to use a Mark to Model approach based on actual prices. We also refer to the findings of fact at paragraph 154 above, and the comment by Mr Reynier that MAM should have made some extra effort to check the PM Desk valuation. That was not taken into account.

462.7 The tribunal concludes that none of these systemic issues were properly explored or considered by Mr Chedin because of his narrow focus on the individual failings of the claimant and not the wider context within which they could occur. Again, this was outside of The Range.

462.8 As to the question of inconsistent treatment, the tribunal does not consider that this is a case where it could reasonably arrive at the conclusion that the dismissal was unfair because the claimant was dismissed but Mr McCauley was not. It is apparent that a decision was taken not to carry out any disciplinary investigation in relation to Mr McCauley, because he had, albeit belatedly, raised the issue on 30 March and was subsequently classed as a whistle-blower. That did not however preclude Mr Chedin from questioning Mr McCauley why he failed to escalate the issue between 23 and 25 March 2020, and in particular, during the visit by Mr Assaf to the desk. Nor why Mr McCauley failed to raise the issue in any Bloomberg chats or

emails, prior to his email to the claimant of 29 March 2020. The tribunal concludes that it was outside of The Range for Mr Chedin not to take into account these clear failings by Mr McCauley, despite him knowing that there was an issue, prior to 29 March 2020. That was a consideration which he should have taken into account when considering the allegations against the claimant. The claimant was clearly not alone in failing to escalate. He did not do so because he did not consider it necessary. Mr McCauley did see a problem earlier, but failed it at this time. These failings also took the decision outside of The Range.

462.9 Similarly, we conclude that it was outside of The Range for Mr Chedin not to take into account or explore in any way, the failure of Mr Botting to raise further questions with the PM desk, and/or to raise further questions of the claimant following receipt of his email of 24 March. Those failings on Mr Botting's part should have been readily apparent to him, had he not had adopted such a narrow focus. It is inconceivable that Mr Botting, having previously agreed an increase in the number of lots from 10,000 to 25,000, would not have been aware that the PM desk held significant forward positions beyond the April contracts. Yet Mr Botting failed to ask any follow up questions, although it was clear from the content of the 24 March 2020 email from the claimant, that the claimant was focused in his reply on the April contracts only, and not the June and later contracts. Mr Chedin told us that Mr Botting would have been reassured by the email. Given our findings of fact and conclusions above, we consider that conclusion to be untenable, a consequence of his narrow focus, and outside of The Range.

462.10 Similarly, in the context of the systemic failures, Mr Chedin failed to consider that Mr Assaf, having been specifically told by Mr McCauley that they had rolled what they had on the April contract, failed to ask whether they had any positions for June and beyond. As stressed above, that is not meant as a criticism of Mr Assaf. It is however a further example of systemic failures by the bank. A number of people could have done more at the time; but the focus has been solely on the individual fault of the claimant. The oversights by others including Mr McCauley, Mr Botting, Mr Assaf, MAM and Risk Management, were over-looked or forgiven. Those of the claimant have not and he has paid with his job, and to a large extent, his career. This was outside of The Range.

462.11 Mr Chedin found that the claimant's misconduct amounted to serious misconduct, not gross misconduct. Mr Chedin acknowledged before us that he did not consider the terms of the disciplinary policy before dismissing the claimant. Under the terms of the disciplinary policy, paragraph 5.2.3, a final written warning should have been given. The tribunal does of course accept that section 98(1) refers to 'conduct', not gross misconduct. There will no doubt be circumstances where dismissal for serious misconduct is within The Range. Given the clear terms of the respondent's disciplinary policy however, the length of his employment and his exemplary record and service, we conclude that it was outside The Range for Mr

Chedin not to apply the clear terms of the disciplinary policy in the circumstances of this case. As noted above, we have rejected the alternative suggestion that dismissal could be justified because of a breakdown of trust and confidence.

462.12 In the unprecedented circumstances of the pandemic, the claimant and the other members of the PM desk worked extremely hard, in extremely difficult circumstances, to minimise the losses to the bank, during the period of home working. Again, Mr Chedin unreasonably focused on the failure to escalate by the claimant, without considering at all, the efforts he and his team had gone to during the relevant period to minimise loss. It is worth emphasising again, that the loss that the bank did realise was not caused by the failure to escalate the EFP breakdown issue earlier. The loss was caused solely by the EFP breakdown, and the Bank's subsequent decision (which of course was the Bank's to make) to unwind the positions within weeks of the loss being discovered. That was a decision over which the claimant and his colleagues had no control.

462.13 The claimant had ten year's unblemished service with the respondent, during which he had helped to build up the Bank's business. The increase in the number of lots that could be held by the PM Desk from 10,000 to 25,000 shortly before the pandemic is a reflection of the success of the Desk and the regard in which it was held.

462.14 The conclusion of Mr Chedin that trust and confidence had been lost was outside of The Range in the Tribunal's judgement. Mr Chedin argued that this was because the claimant could not be trusted to raise an issue if there was one in future; that was clearly contradicted by the 15 April investigation meeting see paragraph 171.10 above, when the claimant confirmed that he would escalate in future; and the claimant's email to Ms Smith - see paragraph 177 above - when he also stated that he would escalate. We conclude that Mr Chedin's conclusion on the breakdown of trust and confidence was in those circumstances, a perverse one. Further, it was perverse in circumstances where Mr Chedin had found that the claimant's conduct amounted to serious not gross misconduct.

462.15 Finally, the mistake by Mr Chedin in relation to the number of allegations against the claimant being four not three, and that the claimant was on the PM Desk for Mr Assaf's visit, were, on the basis of our findings of fact and above conclusions, in Mr Chedin's mind when he took the decision to dismiss. Those matters also took his decision to dismiss outside of The Range.

463 As for the appeal, whilst we accept that this amounted to a thorough review of the decision, it did not amount to a complete re-hearing. In any event, in all the circumstances as set out above and as summarised below, we conclude that the appeal process did not rectify the unfairness inherent in the original decision to dismiss. Rather, as a result of the failure to consider the allegations in their proper wider context; to interview all of the other members of the PM desk at the time, when issues were fresh in their mind, rather than eight months later, without having contemporaneous documents to hand; to

consider the various systemic failings as outlined above particularly in relation to the valuation method; or to consider the claimant's failure to escalate in the context of Mr McCauley's failure to do so and as well as Mr Botting's; the flaws in the disciplinary process were repeated.

464 Whilst we acknowledged that Mr de Lambilly did interview Mr Ward, Mr Lawrence and Ms Chaplin, those interviews took place many months after the gold volatility episode. Further, when Joseph Ward and Mr McCauley were interviewed by Mr de Lambilly, they were not provided with copies of the documents which Mr de Lambilly referred to. It is in the tribunal's judgment significant that the information provided by Mr Ward to Mr de Lambilly was very different to the contents of the email sent to his personal Gmail address, at the time - see the facts found at para 199 above. Had the interview with him and his colleagues taken place much earlier, as they should have been, if is more probable than not that the answers would have been very different.

465 In relation to the claimant's argument about the risk valuation method, which was comprehensively changed following the gold volatility episode, Mr de Lambilly concluded that this showed the severity of the claimant's misconduct, rather than exculpating him. In the tribunal's judgement that conclusion was outside of The Range.

466 The appeal process did not therefore, on the facts of this case, correct the combined deficiencies of Mr Mostachfi initial 'investigation', or the disciplinary process conducted by Mr Chedin.

Direct race discrimination

Issue 20 - Did the respondent subject the claimant to the following treatment?

a. Suspending him for a failure to escalate risk on 31st March 2020;

b. Subjecting him to an investigation by Behnouche Mostachfi;

c. Subjecting him to a disciplinary investigation by Laurent Chedin;

d. Laurent Chedin (whether in his own right, or as influenced by Mr. Spitz and/or Mr. Assaf and/or Mr. Mostachfi and/or Ms Sqalli) dismissing him on 13th July 2020;

e. Tony Botting commenting to Laurent Chedin when interviewed on 14th May 2020 that: *"I worked in Asia for 5.5. years, so I'm used to working with Asian people. The cultural aspect is something you need to be aware of in terms of loss of face. They can sometimes be reluctant to agree to something that has gone on."*;

f. Behnouche Mostachfi discounting the Claimant to implement the EFP reduction plan on account of "*his way of communicating*";

g. Rejecting the Claimant's appeal on 12 May 2021.

467 The tribunal concludes, on the basis of the above findings of fact, that all of the above treatment did happen, save that Mr Chedin was not influenced by Messrs Spitz, Assaf of Mostachfi, or by Ms Sqalli.

Issue 21 - Did any such treatment of the Claimant (who is of Chinese nationality) amount to less favourable treatment when compared with the treatment of:-

a. Louis McCauley (who is white and Irish); and/or

b. A hypothetical comparator, whose characteristics are drawn from the treatment of (a) Louis McCauley and/or (b) Tony Botting.

468 The tribunal's conclusions in relation to Mr McCauley are as follows. First, when working from home began, Mr Botting made clear to the PM Desk employees during a conference call, that the claimant was in charge of the desk. We have dealt elsewhere with the question as to whether or not the claimant was formally the Head of Desk. Regardless of the answer to that question however, the claimant was the person in charge of the PM Desk. It is true that Mr McCauley did not escalate the EFP dislocation when he was in the office between 23 and 25 March, nor when he was working from home, with access to his phone and email, on 26 and 27 March. His first communication as to a potential issue with the EFP was on 29 March. The issue was subsequently escalated in person to Mr Botting on 30 March 2020. All of those are in the Tribunal's judgment, material differences between the claimant and Louis McCauley. The tribunal concludes that the claimant was not therefore treated less favourably when compared with the treatment of Mr McCauley.

469 As for the question of a hypothetical comparator, we have not found it necessary to determine that issue because we have been able to make clear findings in relation to the reason for the claimant's dismissal and the reason for the decision to reject the claimant's appeal.

470 Further, in relation to Mr Botting, we refer to our conclusions above in relation to the unfair dismissal claim. We conclude that the reason Mr Chedin dismissed the claimant, not Mr Botting, was because of his narrow focus on the individual failings of the claimant, instead of considering the matter in its proper context. Further, at no stage was Mr Chedin asked to investigate Mr Botting. That did not excuse him from failing to ask relevant questions of Mr Botting during the disciplinary process. It does however in the Tribunal's judgment, mean that Mr Botting's and Mr McCauley's circumstances and those of the claimant were different, and the construction of a hypothetical comparator by reference to their characteristics is not appropriate.

Issue 22 - are Louis McCauley and Tony Botting appropriate comparators and are their characteristics the appropriate characteristics to attribute to a hypothetical comparator?

471 We refer to the conclusions above in relation to Mr McCauley and Mr Botting. We do not consider it necessary to consider this issue in any further detail for those reasons, and because of our clear findings as to the reason for the treatment.

Issue 23 – was any less favourable treatment because of the Claimant's race, such that he was directly discriminated against contrary to s.13 and 39 EQuA 2010?

472 *Suspension*: the tribunal concludes that the reason for the claimant's suspension was that he was seen as the head of the desk, and had failed to escalate. Further, there was clearly some confusion initially, which continued for some time thereafter, as to whether or not it was the claimant who was on the desk on 25 March 2020, when Walid Assaf visited it. Yet further, there were questions initially as to whether or not the claimant had hidden the loss

deliberately, and/or was involved in rogue trading. Whilst ultimately there were no such findings, and nor indeed would there have been any basis for any such findings, it is clear from the discussions that took place on and around 30 March 2020 that there were such suspicions at the time. None of the findings of fact above in relation to the discussions between Mr Spitz and Ms David, nor any of the discussions between Mr Spitz and others, including Mr Mostachfi, suggest that the claimant's race was in any way linked to the decision to suspend him.

473 *Investigation*: whilst, as noted above, the involvement of Mr Mostachfi in the investigation was indeed unfair, and Mr Mostachfi should have recused himself, his appointment to conduct that investigation had nothing to do with the claimant's race.

474 *Disciplinary hearing*: again, we are satisfied that the subjection of the claimant to a disciplinary process conducted by Mr Chedin had nothing to do with his race. Mr Chedin considered that the issue was simple, as noted above, and had a narrow focus in his investigation. The tribunal is satisfied that his narrow focus had nothing to do with the claimant's race. On the contrary, it had everything to do with his failure to escalate an issue which, in Mr Chedin's view, should have been escalated.

475 *Influence by Spitz or others and dismissing him*: we have concluded that Mr Chedin was not influenced by Mr Spitz, either directly or indirectly, via Ms Sqalli, nor by Mr Assaf or Mr Mostachfi. Our conclusion is the same, in relation to Mr Chedin's decision to dismiss, as it is in relation to the disciplinary hearing/process itself i.e. that it had nothing to do with the claimant's race. Mr Chedin did consider whether or not the claimant's cultural background provided any mitigation for his failure to escalate. The tribunal considers that there is an important distinction to be drawn between negative stereotyping of an individual, based on their race; and careful consideration of potential cultural differences, as potential mitigation. The tribunal is satisfied that Mr Chedin's deliberations were firmly in the latter camp, not the former. Further, the tribunal notes that Mr Chedin properly conceded, during cross examination, that his choice of words was unfortunate, when he referred to 'Asian culture', which he acknowledged is not the same as Chinese culture, during that call. Mr Chedin's willingness to do so further persuades the tribunal that he was not influenced by the claimant's race when he came to his decision.

476 *Tony Botting's comment on 14 May 2020:* taking the record of what was said as a whole, as quoted above, during Mr Botting's interview with Mr Chedin, the tribunal concludes that Mr Botting's remark amounted to negative stereotyping. The tribunal has had the benefit of hearing evidence from Mr Chedin in relation to his own consideration of that issue, when questioned about his conversation with Ms Sqalli. The tribunal has not had the benefit of hearing evidence from Mr Botting. We consider that a prima facie case has been established, and the respondent has not provided sufficient evidence to convince the tribunal that the negative stereotyping did not occur on racial grounds. The tribunal is satisfied that a white Caucasian employee would not have been subjected to the same negative stereotyping. The tribunal further notes that Mr de Lambilly concluded that the comment was inappropriate and that Mr Botting would have been subjected to training, had he remained with the business. This allegation is upheld.

477 *Mr Mostachfi discounting the claimant to implement the EFP reduction plan:* we refer to the findings of fact above. The claimant's way of communicating was mentioned by Mr Mostachfi during that call. However, it appears from the rest of that call that the reason for the claimant not being asked to assist was because he was being sent home because he did not escalate the issue. It is also apparent to the tribunal, from all the other conversations that took place on 30 March, that the reason for the claimant being suspended, was, as noted above, because he was suspected of deliberately hiding the loss and/or of rogue trading. We are satisfied therefore, taking into account the whole of the evidence, that the claimant's way of communicating, (even if such a comment was linked directly rather than indirectly with his race), was not the reason why the claimant was not asked to help with the EFP reduction plan.

478 *Appeal:* the tribunal is satisfied on the basis of the findings of fact above that Mr de Lambilly's decision in relation to the appeal was because he took the view, like Mr Chedin, that the claimant did not escalate the EFP dislocation, between 23 and 30 March 2020, whereas Mr McCauley did. That had nothing whatsoever to do with the claimant's race.

Victimisation

Issue 24 – Protected acts

479 It is admitted that the following are protected acts:

479.1 The Claimant's appeal letter dated 20 July 2020, in which the Claimant alleged race discrimination arising out of the differential treatment between him and Louis McCauley;

479.2 The Claimant's Equality Act questions to the Respondent dated 27th July 2020 seeking information on differential treatment between the Claimant and (a) Louis McCauley and/or (b) Tony Botting.

Issue 25 – was the Claimant subjected to the following detriments because of those protected acts:-

a. The Respondent failing to provide any response to his Equality Act 2010 questions until 22nd October 2020;

480 The Tribunal adopts the same reasoning as in relation to the alleged protected disclosure detriment above. The tribunal finds the claimant's arguments in relation to this particular point somewhat circular. In any event, the tribunal is satisfied that the reasons for failing to provide any response to the Equality Act questionnaire questions until 22 October 2020 had nothing whatsoever to do with the nature of those questions.

b. On 22nd October 2020, the Respondent passing responsibility for answering the Equality Act 2010 questions to Mr de Lambilly as part of the appeal investigation;

481 Again, the Tribunal adopts the same reasoning as in relation to the alleged protected disclosure detriment above. In any event, the tribunal is satisfied that the reasons for passing responsibility for answering the questions to Mr de Lambilly had nothing whatsoever to do with the protected acts.

c. At the appeal hearing, Eric de Lambilly saying that he was not aware of the Claimant's EqA questions;

482 Again, the Tribunal adopts the same reasoning as in relation to the alleged protected disclosure detriment above. We conclude that Mr de Lambilly was not aware of the claimant's Equality Act 2010 questionnaire questions because he was, understandably, not completely on top of his brief at that stage. That was not surprising, given the volume of evidence he had been provided with. It had nothing to do with the claimant having done protected acts.

483 In relation to a to c above, the Tribunal's conclusions are further reinforced by the fact that the claimant was not able to say, when asked in cross examination, what the connection was between the protected acts, and these alleged detriments.

d. Mr de Lambilly failing to engage with any of the Claimant's race discrimination concerns during the appeal hearing;

484 The tribunal concludes that this claim should not succeed because Mr de Lambilly did engage with the claimant's allegations of discrimination, and provided reasoned answers to them. The tribunal itself has concluded that save for the comment by Mr Botting, which Mr de Lambilly himself considered was inappropriate, the direct discrimination claims do not succeed.

e. The Respondent failing to provide 'reasoned' answers to his Equality Act 2010 questions until 20th May 2021.

485 We refer to our findings of fact above. The questions were answered. As noted above, Mr de Lambilly did not perhaps do as much investigation as in hindsight he could have done, in answering some of those questions. The tribunal is satisfied however that that had nothing to do with the protected acts themselves. Overall, Mr de Lambilly did undertake a comprehensive and extensive investigation.

Remedy Issues

Issue 26 - In the event that any of the Claimant's claims succeed, would the Claimant have been dismissed in any event due to his performance and/or conduct?

486 The Tribunal concludes that had a fair process been adopted, and had the disciplinary policy been correctly applied in relation to the findings of serious misconduct, the claimant would have continued on the PM desk either as Team Leader, under an improvement plan, or as a trader, and/or been redeployed to another desk as a trader, and placed on a final written warning for 18 months. The tribunal is further satisfied that had that occurred, the claimant would not have committed further acts of misconduct during that 18 month period and the warning would have lapsed without further incident.

Issue 27 - Should any basic or compensatory award to the Claimant be reduced on account of the Claimant's conduct, and if so, by how much?

487 The Tribunal concludes that because the claimant failed to escalate the issue between 23 and 30 March 2020, he did contribute to his dismissal, and any

compensation payable for unfair dismissal should be reduced by one third as a result (i.e. 33.33%).

Issue 28 - In the event that the Tribunal finds that any or all of the Claimant's protected disclosures were not made in good faith (see Issue 9), would it be just and equitable to reduce any award to the Claimant, and if so by how much (not exceeding 25%)?

488 Since the protected disclosure claims have not been upheld, it is not necessary to reach any conclusion on this issue.

Employment Judge A James
London Central Region

Dated: 18 May 2022

Sent to the parties on:

18/05/2022

For the Tribunals Office

ANNEX A – LIST OF ISSUES

[ET NOTE: The following issues are largely agreed. Where not, the respective party's proposed issues are set out. Some of the issues were withdrawn/partially withdrawn during the hearing. Those issues are identified by strike-through.]

Protected Disclosure Detriment/Dismissal

(a) *Protected Disclosures*

1. In respect of **Disclosure 1**, as set out in the Claimant's disciplinary submission dated 4th May 2020, and repeated in his appeal submission dated 8 April 2021, did the Claimant make the following disclosures?-
    a. That when on 'Be At Home' status, the Claimant and others did not have access to market trading or internal systems, but only a mobile phone and Bloomberg chat;
    b. Neither the Claimant nor his team had been given any specific guidelines as to what to do when risk materialised when not in the office, or any special arrangement for information sharing.
2. In respect of **Disclosure 2**, as set out in the Claimant's disciplinary submission dated 4th May 2020, and repeated in his appeal submission dated 8 April 2021, did the Claimant make the following disclosures?
    a. That the Respondent had chosen to measure risk associated with futures positions using the OTC contango curve (i.e. Mark to Model methodology), and not EFP ("Exchange for Physical") levels (i.e. the Mark to Market model);
    b. That the Respondent had actively chosen not to measure risk using the Marked to Market model in 2015/2016 for technical reasons;
    c. That had the risk been clearly quantifiable, the Respondent's Risk Management function (also known as the Second Line of Defence) should have detected the risk (which they did not).
3. In respect of **Disclosure 3**, as set out in the Claimant's appeal submission dated 20th July 2020, did the Claimant make the following disclosures?
    a. That those on 'Be At Home' status had no access to the Respondent's trading and market information systems. Accordingly, when on 'Be At Home' status, employees were not working from home in a manner deemed acceptable by the FCA, in line with its guidance dated 4th March 2020;
    b. That team rotation arrangements in place during the week commencing 23rd March 2020 meant that the team in the office had custody of the desk book, and attendant risk reporting obligations and any failure by the Respondent to have communicated such obligations to the team in the office, would of itself amount to a systems and controls failing;
    c. That the Respondent had failed to provide any guidance as to communication and risk reporting in light of the changed working arrangement described above;

d. That the Claimant understood there to have been a number of complaints from other traders on other desks about the inadequacy of equipment when working from home;

e. That such failings added up to a systems and controls failure on the part of the Respondent;

f. That the Claimant considered that he had been treated as a scapegoat by the Bank, and that the Bank was sidestepping by the Claimant's dismissal any proper examination of the adequacy of its Covid-19 working arrangements in order to avoid regulatory scrutiny;

g. That the Claimant had made a protected disclosure in his written disciplinary submission, which had gone uninvestigated in order to reduce regulatory and reputational risks to the Respondent.

4. In respect of **Disclosure 4**, as set out in the Claimant's final appeal submission dated 8 April 2021, did the Claimant make the following disclosures?

    a. That Mr Cooper's summary outcome letter on Project Medway had glossed over highly pertinent evidence relevant to the Claimant's appeal, namely evidence that showed that those working from home without an HTP kit were disadvantaged in relation to seeing position and P&L, and risk management.

5. In respect of **Disclosure 5**, as set out in the Claimant's final appeal submission dated 8 April 2021, did the Claimant make the following disclosures?

    a. That various senior managers of the Respondent (namely Mr Behnouche Mostachfi, Mr Walid Assaf, Mr Thomas Spitz and Mr Laurent Chedin) had advanced or perpetuated untruths around key facts relating to the Claimant's conduct (namely that he had been on the desk when Mr Walid Assaf visited the desk) and were thereby to be regarded as dishonest or negligent, contrary to Individual Conduct Rule 1 (Integrity).

6. In respect of **Disclosure 6,** as set out in the Claimant's letter to Mr Cooper dated 20 July 2021, did the Claimant make the following disclosures?

    a. The Respondent had, in breach of FCA rules, (a) failed to disclose to the FCA why inaccurate information had been originally supplied to it, (b) had failed to provide 'complete' information to the FCA about the gold volatility episode, and (c) the reason for the Respondent's failure to provide 'complete' information about the gold volatility episode, was that the Respondent wished to avoid providing information to the regulator which showed a systems and control failure by the Respondent.

7. **Claimant's requested entry**: "The Respondent admits that the Claimant disclosed the information contained within Disclosures 1 and 2 on 4 May 2020 and that contained within Disclosure 3 on 20 July 2020."

Respondent's requested entry: "The Respondent does not accept that the disclosures were protected disclosures. In particular, the Respondent does not accept that the Claimant reasonably believed in the truth of the information disclosed and/or that the disclosures were made in the public interest. The disclosures were made to further the Claimant's private interests."

8. Did Disclosures 1, 2, 3, 4 and/or 5 in the Claimant's reasonable belief tend to show that the Respondent, and in respect of Disclosures 4 and 5, Mr Mostachfi, Mr Assaf, Mr Spitz and Mr Chedin, was/were failing to, or likely to fail to, comply with a legal obligation within the meaning of section 43B(1)(b) ERA, namely:-

    a. In relation to **Disclosure 1:-**

        i. the FCA's Principles for Business (enacted pursuant to the Financial Services and Management Act 2000), and specifically:-

            1. Principle 2 (that a firm must conduct its business with due skill, care and diligence);

            2. Principle 3 (that a firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems);

        ii. the FCA's systems and controls regulations, and in particular SYSC 4.1.6 and 4.1.8, which obliged the Respondent to have in place a business continuity policy, and in turn by the terms of that policy to adequately plan for resource requirements (including people and systems), and communication arrangements (internal and external) in the event of disruption.

    b. In relation to **Disclosure 2**:-

        i. Principle 3 of the FCA's Principles for Business (that a firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems);

        ii. SYSC 4.1.1. which required the Respondent to have "*robust governance arrangements, which include … effective processes to identify, manage, monitor and report the risks it might be exposed to, and internal control mechanisms* …"

    c. In relation to **Disclosure 3**:-

        i. Principle 2 of the FCA's Principles for Business (that a firm must conduct its business with due skill, care and diligence);

        ii. Principle 3 (that a firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems);

        iii. SYSC 4.1.6 and 4.1.8 (as above);

iv. SYSC 18.3.2 (the requirement to have arrangements to ensure the effective assessment and escalation of reportable concerns (including to the FCA and PRA).

d. In relation to **Disclosure 4**:-

i. Rule 1 of the FCA's Individual Conduct Rules (that you must act with integrity).

e. In relation to **Disclosure 5**:-

i. Rule 1 of the FCA's Individual Conduct Rules (that you must act with integrity).

9. Did any disclosure of information as advanced by the Claimant at Paragraph 3(f) and 3(g) herein as part of Disclosure 3 tend to show in the Claimant's reasonable belief that any breach of a legal obligation by the Respondent was being, or was likely to be, deliberately concealed by the Respondent?

10. Did Disclosure 6 in the Claimant's reasonable belief tend to show that the Respondent was failing to, or likely to fail to, comply with a legal obligation within the meaning of section 43B(1)(b) ERA, namely that the Respondent was failing to comply with the legal obligations set out at SUP 15.6.1 and 15.6.4 and/or Principle 11 of the FCA's Principles of Business, and/or that it was deliberately concealing information relating to a breach from the regulator?

11. Did the Claimant reasonably believe Disclosures 1, 2, 3, 4, 5 and /or 6 to be made in the public interest? The Respondent contends that the disclosures were made to further the Claimant's private interests

12. Were Disclosures 1, 2, 3, 4, 5 and/or 6 made to the Claimant's employer, in accordance with s.43C ERA?

13. Were Disclosures 1, 2, 3, 4, 5 and/or 6 made in good faith, within the meaning of s.48(6A) ERA?

(b) Detriment

14. Was the Claimant subjected to the following alleged detriments as a result of **Disclosures 1** (as made on 4 May 2020) **and/or 2** (as made on 4 May 2020):-

a. The disciplinary officer (Laurent Chedin) glossing over whether the Respondent had, in the circumstances, failed to implement adequate systems or controls;

b. The disciplinary hearing officer (Laurent Chedin) failing to consider meaningfully whether and to what extent any systems and controls failures had contributed to the Claimant's conduct as alleged;

c. The disciplinary officer (Laurent Chedin) failing to conduct any proper investigation following receipt of the Claimant's disclosures, particularly:

i. Failing to consider, as directed by the RBAC on 1st April 2020, whether Louis McCauley had culpably failed to escalate risk and/or by failing to ask Mr. McCauley any questions about his conduct;

ii. ~~Failing to meaningfully question Mr. Assaf about his visit(s) to the desk, and conversations with Mr. McCauley, during the week commencing 23rd March;~~

iii. Failing to interview any witness suggested by the Claimant, including anyone from Risk Management who could have explained the Respondent's risk models.

d. Philip Cooper failing to consider the full and precise circumstances of the case (including systems and controls failures) before advising the RBAC that the Claimant had breached FCA Conduct Rule 2;

e. Mr. Chedin's original proposal of demotion being increased to dismissal at the behest of third parties, namely ~~Mr. Botting, Mr. Mostachfi and/or~~ Mr. Spitz.

15. Was the Claimant subjected to the following further (post-termination) detriments by the Respondent as a result of **Disclosures 1, 2, 3, 4 and/or 5**:-

a. ~~Unreasonable delay in the convening of his appeal hearing;~~

b. Unreasonable delay in acknowledging and providing a response to the Claimant's Equality Act questions;

c. When a response to the Equality Act questions was eventually provided on 22nd October 2020:

i. answering only some of the Claimant's questions;

ii. diverting others to be determined by the appeal officer;

iii. setting out incorrect facts in answers which were given; and

iv. the appeal officer in the appeal hearing having no knowledge of the Equality Act questions which he had been apparently tasked to answer.

d. ~~Unreasonable delay in acknowledging and/or addressing the Claimant's grievance as set out in his appeal letter;~~

e. ~~Eventually informing the Claimant that his grievance would be addressed by the appeal officer as part of the appeal, but then informing the Claimant during the appeal hearing that HR would be handling the grievance separately to the appeal;~~

f. Withholding important documents which were properly responsive to the Claimant's Subject Access request;

g. ~~Improperly redacting several critical documents provided to the Claimant in response to his Subject Access Request;~~

h. Failing to provide prompt and/or promised replies to the whistleblowing investigation;

i. In relation to the Project Medway findings, providing Mr de Lambilly with only the limited summary outcome, which failed to identify any

of the disadvantage experienced by those working from home without an HTP kit;

j. Mr de Lambilly accepting without further questioning Mr Chedin's evidence that the introduction of a fourth allegation was insignificant and '*quite redundant*', in circumstances where the fourth allegation had been set out in terms to the (i) RBAC, (ii) RBAC Sub-Committee, and (iii) the FCA;

k. The appeal officer, Mr de Lambilly, failing to conduct a genuine investigation, or to give genuine consideration to the matters raised on appeal, instead adopting an approach which was designed to superficially remedy the palpable defects in the disciplinary process (and thereby defeat the Claimant's unfair dismissal claim) but without genuinely considering the issue of substances to which the appeal gave rise;

l. Failing to overturn the Claimant's dismissal, despite the starkly disparate treatment of Mr Louis McCauley and/or Mr Tony Botting which the Claimant had raised as a ground of appeal.

16. Was the Claimant subjected to the following further (post-termination) detriments by the Respondent as a result of **Disclosures 1, 2, 3, 4 , 5 and/or 6:**

    a. Refusing to correct the terms of the Form H (as set out in the Respondent's representative's letter dated 19 August 2021), in particular failing to provide 'complete' information about the gold volatility episode to the FCA, or to provide an explanation of why inaccurate information was originally supplied in November 2020, and in fact misleading the regulator that any corrections were linked to the appeal process.

(c) Automatically Unfair Dismissal

17. Was the reason or principal reason for the Claimant's dismissal that he had made a protected disclosure (namely Disclosures 1 and/or 2)?

<u>Unfair Dismissal</u> (s.94 ERA)

18. Has the Respondent demonstrated a potentially fair reason for dismissal, namely conduct or SOSR (based on loss of trust and confidence) within the meaning of s.98(1) ERA?

19. Was such dismissal fair within the meaning of s.98(4) ERA, having regard to the following matters:-

    a. Was the investigation undertaken by Behnouche Mostachfi unfair, having regard to the following contentions by the Claimant:-

        i. Mr. Mostachfi was not independent or impartial, and had wrongfully informed others (including Ms David, Mr Blondeau and Mr Spitz) that the Claimant failed to inform Mr Assaf of any risk;

        ii. He did not conduct any interviews of any witnesses;

b. Was the disciplinary process undertaken by Laurent Chedin unfair, having regard to the following contentions by the Claimant:-

   i. Mr. Chedin failed to conduct any interviews with witnesses suggested by the Claimant;

   ii. Mr. Chedin laboured under fundamental misapprehensions of fact throughout the disciplinary process, namely:-

      (a) reporting to the RBAC that 4 allegations of misconduct were considered by him, when only 3 were ever put to the Claimant;

      (b) reporting to the RBAC that 3 allegations had been upheld, when in fact he had upheld only two;

      (c) basing his advice on a mistaken view that the Claimant failed to escalate to Mr. Assaf in person on his visit(s) to the desk, when in fact the Claimant was not present for any such visit.

   iii. Mr. Chedin glossed over the Claimant's disclosure that the Respondent had failed to implement adequate systems or controls by its rotation arrangements;

   iv. Mr. Chedin failed to consider (as directed by the RBAC on 1st April 2020) whether Louis McCauley had culpably failed to escalate risk;

   v. ~~Mr. Chedin failed to question Mr. Assaf about his visit(s) to the desk and his conversations with Mr. McCauley, during the week commencing 23rd March;~~

   vi. Mr. Chedin's decision making in general, and the increase in his original proposal of demotion to dismissal, was influenced by third parties, namely ~~Mr. Botting, Mr. Mostachfi and/or~~ Mr. Spitz, in circumstances where:

      1. Mr Spitz had decided that the Claimant was to be dismissed by 30 March 2020 (prior to any disciplinary process starting);

      2. ~~Mr Mostachfi had misrepresented to others (including Ms David, Mr Blondeau and Mr Spitz) that the Claimant had failed to inform Mr Assaf of any risk;~~

      3. ~~Mr Mostachfi (together with Mr Assaf) had devised an unfair plan whereby Mr McCauley would be kept on to implement the EFP reduction plan, while the Claimant would go on to face disciplinary charges.~~

c. Was the RBAC's involvement in the disciplinary matters relating to the Claimant flawed and unfair, having regard to the following contentions by the Claimant:-

   i. ~~the Respondent's Head of Legal gave the RBAC incorrect advice about the status and lawful treatment of Mr. McCauley (as a possible whistleblower), which may have~~

~~influenced the course of the disciplinary case against the Claimant;~~

ii. Mr. Cooper (UK Head of Compliance) advised the RBAC, based on wrong information presented by Laurent Chedin, that the Claimant had committed three very serious breaches amounting to a Conduct Rule breach;

iii. Mr. Cooper was then appointed to independently investigate and determine the Claimant's whistleblowing concerns, when he was not properly independent;

d. Did the Respondent unfairly classify as serious misconduct the Claimant's failure to escalate risk in accordance with a valuation model which the Respondent (a) did not utilise in relation to gold futures positions, and (b) had refused to adopt in 2015/2016?

e. Did the Respondent fail to take into account its own alleged failure to comply with the FCA's requirement of adequate business continuity planning, particularly in relation to (a) provision of equipment and resources, and (b) communication methods, in advance of the onset of the Covid-19 crisis?

f. Did the Respondent unfairly cast the reason for dismissal as 'some other substantial reason' based on 'serious misconduct', thereby circumventing its own disciplinary policy, which fairly applied would not have resulted in the Claimant's dismissal?

g. Was the Respondent's rejection of demotion as an alternative to dismissal based on factually incorrect or otherwise flawed grounds?

h. Was the appeal process undertaken by Mr Eric de Lambilly unfair, having regard to the following contentions by the Claimant:-

i. ~~It took an unreasonable amount of time to complete (20 July 2020 – 13 May 2021), particularly in view of the fact that the Claimant was for that period excluded from the financial services market, in light of the circumstances of his dismissal and the terms of the Respondent's notification to the FCA;~~

ii. Mr de Lambilly failed to overturn the dismissal, notwithstanding the significant issue raised by the Claimant on appeal about the starkly disparate treatment of himself when compared with Mr McCauley (who was not disciplined at all, and was in fact promoted) in circumstances where Mr McCauley:

1. Was subject to an identical obligation in his Position Mandate as the Claimant to risk escalation;

2. Mr McCauley was familiar with the Mark-to-Market model, as he had worked with the model in previous employment, unlike the Claimant, who had never worked with it before;

3. Mr McCauley had failed to report on any Mark-to-Market risk in his Options book daily wrap up emails on either 24 or 25 March 2020 (a failure for which the

Claimant was criticized in relation to the Forwards daily wrap up emails);

4. Mr McCauley failed to escalate any concerns on 24 and/or 25 March to Mr Assaf when asked specifically about the gold futures position, and possibly during a second visit by Mr Assaf that week;

5. While Mr McCauley denied any knowledge of the desk's Forwards position (this being a matter relied upon by Mr de Lambilly in his appeal outcome), both Mr McCauley's manager, Mr Botting, and his colleagues, Mr Ward and Mr Donaldson, said in their appeal interviews that Mr McCauley was aware of the desk's position, and Mr McCauley admitted as much in a call with Mr Mostachfi on 30 March 2020;

iii. Mr de Lambilly failed to overturn the dismissal notwithstanding the significant concern raised by the Claimant on appeal as to the starkly disparate treatment of himself when compared with Mr Botting (who was not disciplined at all, and was allowed to exit his employment with the Respondent on agreed terms), in circumstances where Mr Botting:

1. Was aware of the gold futures dislocation as it was happening;

2. Was aware of the size of the desk's position, as he had authorized it only months earlier;

3. Had previously been the Head of Desk for Precious Metals until early 2020, and well understood the technical issues relating to the Mark-to-Model system;

4. Mr Botting had been privy to emails seeking to change the system from Mark-to-Model to Mark-to-Market in 2015;

iv. In relation to the Project Medway findings, Mr Cooper provided Mr de Lambilly with only his limited summary outcome, which failed to identify any of the disadvantage experienced by those working from home without an HTP kit;

v. Mr de Lambilly accepted without further questioning Mr Chedin's evidence that the introduction of a fourth allegation was insignificant and '*quite redundant*', in circumstances where the fourth allegation had been set out in terms to the (i) RBAC, (ii) RBAC Sub-Committee, and (iii) the FCA;

vi. Mr de Lambilly failed to conduct a genuine investigation, or to give genuine consideration to the matters raised on appeal, instead adopting an approach which was designed to superficially remedy the palpable defects in the disciplinary process (and thereby defeat the Claimant's unfair dismissal claim) but without genuinely considering the issues of substance to which the appeal gave rise.

Direct Race Discrimination

20. Did the Respondent subject the Claimant to the following treatment:-

    a. Suspending him for a failure to escalate risk on 31st March 2020;

    b. Subjecting him to an investigation by Behnouche Mostachfi;

    c. Subjecting him to a disciplinary investigation by Laurent Chedin;

    d. Laurent Chedin (whether in his own right, or as influenced by Mr. Spitz and/or Mr. Assaf and/or Mr. Mostachfi and/or Ms Sqalli[1]) dismissing him on 13th July 2020;

    e. Tony Botting commenting to Laurent Chedin when interviewed on 14th May 2020 that: *"I worked in Asia for 5.5. years, so I'm used to working with Asian people. The cultural aspect is something you need to be aware of in terms of loss of face. They can sometimes be reluctant to agree to something that has gone on."*;

    f. Behnouche Mostachfi discounting the Claimant to implement the EFP reduction plan on account of "*his way of communicating*";

    g. Rejecting the Claimant's appeal on 12 May 2021.

21. Did any such treatment of the Claimant (who is of Chinese nationality) amount to less favourable treatment when compared with the treatment of:-

    a. Louis McCauley (who is white and Irish); and/or

    b. A hypothetical comparator, whose characteristics are drawn from the treatment of (a) Louis McCauley and/or (b) Tony Botting.

22. Are Louis McCauley and Tony Botting appropriate comparators and are their characteristics the appropriate characteristics to attribute to a hypothetical comparator?

    Respondent's Requested Entry: The Claimant is required specifically to identify the characteristics which he relies upon as being the appropriate characteristics attribute to a hypothetical comparator as the Claimant's position on this fundamental point remains unparticularized and unclear.

    Claimant's Requested Entry: The Claimant considers that his position on the hypothetical comparator is self-evident and sufficiently particularised. He asserts that a hypothetical comparator (namely a Head

[1] By email dated 14 December 2021 Spencer West requested the Respondent's consent to add the name Ms Sqalli to the List of Issues noting that the allegation arose out of disclosure. While not accepting that Ms Sqalli either sought to influence, or did influence (whether deliberately or otherwise), Laurent Chedin to dismiss the Claimant as alleged, the Respondent is prepared to consent to the addition of Ms Sqalli and does not require the Claimant to make a further application to re-amend his Particulars of Claim for the third time provided that the Claimant acknowledges and agrees that the Respondent denies that Ms Sqalli either sought to influence, or did influence (whether deliberately or otherwise) Mr Chedin.

of Desk not of Chinese nationality) would not have been subjected to the same detriments, and relies upon an evidential comparison of the treatment of Louis McCauley and/or Tony Botting in constructing the hypothetical comparator.

23. Was any less favourable treatment because of the Claimant's race, such that he was directly discriminated against contrary to s.13 and 39 EqA 2010?

Victimisation

24. The Respondent accepts that the following acts amount to 'protected acts' within the meaning of s.27 EqA:-

    a. The Claimant's appeal letter dated 20th July 2020, in which the Claimant alleged race discrimination arising out of the differential treatment between him and Louis McCauley;

    b. The Claimant's Equality Act questions to the Respondent dated 27th July 2020 seeking information on differential treatment between the Claimant and (a) Louis McCauley and/or (b) Tony Botting.

25. Was the Claimant subjected to the following detriments because of those protected acts:-

    a. The Respondent failing to provide any response to his Equality Act 2010 questions until 22nd October 2020;

    b. On 22nd October 2020, the Respondent passing responsibility for answering the Equality Act 2010 questions to Mr. de Lambilly as part of the appeal investigation;

    c. At the appeal hearing, Eric de Lambilly saying that he was not aware of the Claimant's EqA questions;

    d. Mr de Lambilly failing to engage with any of the Claimant's race discrimination concerns during the appeal hearing;

    e. The Respondent failing to provide 'reasoned' answers to his Equality Act 2010 questions until 20th May 2021.

Remedy Issues

At the Preliminary Hearing (Case Management) on 1 April 2021, Employment Judge Burns ordered that the substantive hearing of the Claimant's claims should be listed to be heard between 7 and 25 March 2022 to deal with liability only. However, the Respondent contends that the following issues should be considered and determined at the liability stage:

26. In the event that any of the Claimant's claims succeed, would the Claimant have been dismissed in any event due to his performance and/or conduct?

27. Should any basic or compensatory award to the Claimant be reduced on account of the Claimant's conduct, and if so, by how much?

28. In the event that the Tribunal finds that any or all of the Claimant's protected disclosures were not made in good faith (see Issue 9), would it be just and equitable to reduce any award to the Claimant, and if so by how much (not exceeding 25%)?

29. ~~Did the Respondent unreasonably delay in dealing with the Claimant's disciplinary appeal and, if so, did that amount to an unreasonable breach of the ACAS Code on Disciplinary Procedures?~~

ANNEX B – RELEVANT LEGAL PRINCIPLES

[The respondent's opening submissions refer to the following relevant legal principles.]

Protected Disclosure Detriment/Dismissal

1. Workers have the right under s.47B ERA 1996 not to be subjected to a detriment on the ground that they have made a protected disclosure.
2. Pursuant to s.103A ERA 1996, a dismissal will be regarded as an automatically unfair dismissal if the reason or, if more than one, the principal reason for the dismissal is that the employee made a protected disclosure.
3. A qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the types of wrongdoing or failure listed in s.43B(1)(a) to (f) of the ERA 1996. The Claimant relies in respect of each disclosure on s.43B(1)b). That is, he asserts that he disclosed information in Disclosures 1 to 6 that he reasonably believed was in the public interest and tended to show that the Respondent (and in respect of Disclosures 4 and 5, Mr Mostachfi, Mr Assaf, Mr Spitz and Mr Chedin) had failed, was failing or was likely to fail to comply with a legal obligation to which it/he was subject. He also asserts that in respect of Disclosures 3(f) and (g), he disclosed information that he reasonably believed was in the public interest and tended to show that a breach of a legal obligation by the Respondent was being, or was likely to be, deliberately concealed by the Respondent.
4. In ***Williams v Michelle Brown AM***, UKEAT/0044/19/00 at paragraphs 9 and 10, HHJ Auerbach identified five issues, which a Tribunal is required to decide in relation to whether something amounts to a qualifying disclosure:

   > *"It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub- paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.*
   >
   > *Unless all five conditions are satisfied there will not be a qualifying disclosure. In a given case any one or more of them may be in dispute, but in every case, it is a good idea for the Tribunal to work through all five. That is for two reasons. First, it will identify to the reader unambiguously which, if any, of the five conditions are accepted as having been fulfilled in the given case, and which of them are in dispute. Secondly, it may assist the Tribunal to ensure, and to demonstrate, that it has not confused or elided any of the elements, by addressing each in turn, setting out in turn its reasoning and conclusions in relation to those which are in dispute."*

5. As for what might constitute a disclosure of information for the purposes of s.43B ERA, in ***Kilraine v London Borough of Wandsworth*** [2018] ICR 1850 CA, Sales LJ provided the following guidance:

> *"30. The concept of 'information' as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. Longstaff J made the same point in the Judgment below [2016] IRLR 422, para 30, set out above, and I would respectfully endorse what he says there. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between 'information' on the one hand and 'allegations' on the other […]*
>
> *31. On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute 'information' and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision.*
>
> *[…]*
>
> *35. …In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). The statements in the solicitors' letter in the* ***Cavendish Munro*** *case did not meet that standard.*
>
> *36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by the tribunal in the light of all facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in s43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill J in* ***Chesterton Global Ltd v Nurmohamed*** *[2018] ICR 731, para 8, this has both a subjective element and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."*
>
> *[…]*
>
> *41. It is true that whether a particular disclosure satisfies the test in section 43B(1) should be assessed in the light of the particular context in which it is made. If, to adapt the example given in the* ***Cavendish Munro*** *case [at paragraph 24], the worker brings his manager down to a particular ward in a hospital, gestures to sharps left lying around and says 'You are not complying with health and safety requirements', the statement would derive force from the context in which it was made and taking in combination with that context would constitute a qualifying disclosure. The oral statement then would plainly be made with reference to the factual matters being indicated by the worker at the time that it was made. If such a disclosure was to be relied upon for the purposes of the whistleblowing claim under the protected disclosures regime in Part IVA of the ERA, the*

meaning of the statement to be derived from its context should be explained in the claim form and in the evidence of the Claimant so that it is clear on what basis the worker alleges that he has a claim under that regime. The employer would then have a fair opportunity to dispute the context relied upon, or whether the oral statement could really be said to incorporate by reference any part of the factual background in this manner."

6. The issues arising in relation to the Claimant's beliefs about the information disclosed were reviewed by Linden J in ***Twist DX v Abbott (UK) Holdings Ltd*** (UKEAT/0030/30/JOJ), from which the following principles emerge:

   6.1. Whether at the time of the alleged disclosure the Claimant held the belief that the information tended to show one or more of the matters specified in s.43B(1)(a)-(f) ("**the specified matters**") and, if so, which of those matters, is a subjective question to be decided on the evidence as to the Claimant's beliefs [para.64].

   6.2. It is important for the ET to identify which of the specified matters are relevant, as this will affect the reasonableness question [para.65].

   6.3. The belief must be as to what the information 'tends to show', which is a lower hurdle than having to believe that it 'does show' one or more of the specified matters. The fact that the whistleblower may be wrong is not relevant, provided his belief is reasonable [para.66].

   6.4. There is no rule that there must be a reference to a specific legal obligation and/or a statement of the relevant obligations or, alternatively, that the implied reference to legal obligations must be obvious, if the disclosure is to be capable of falling within s.43(B)(1)(b). The cases establish that such a belief may be reasonable despite the fact that it falls so far short of being obvious as to be wrong [para.95].

7. The Court of Appeal considered the 'public interest' test in ***Chesterton Global Ltd v Nurmohamed*** [2018] ICR 731. The following principles emerge.

   7.1. The Tribunal must ask: did the worker believe, at the time he was making it, that the making of the disclosure was in the public interest? [Para.27]. That is the subjective element.

   7.2. There is then an objective element: was the belief reasonable? That exercise requires that the Tribunal recognise that there may be more than one reasonable view as to whether a particular disclosure was in the public interest [para.28].

   7.3. The necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. According to Underhill LJ (at para. 29):

> *"That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify after the event by reference to specific matters which the tribunal finds were not in his head at the time, he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he*

really thought so at all; but the significance is evidential and not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable."

7.4. While the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it [para. 30].

7.5. 'Public interest' involves a distinction between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest [para. [31].

7.6. It is still possible that the disclosure of a breach of the Claimant's own contract may satisfy the public interest test, if a sufficiently large number of other employees share the same interest [para.36].

8. When considering the question of the Claimant's reasonable belief, it is to be remembered that motive is not the same as belief: ***Ibrahim v HCA International Ltd*** [2020] IRLR 224.

9. Section 47B(1) ERA 1996 provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. 'Detriment' is not defined in the ERA 1996, but applying discrimination case law, the concept is a broad one and there will be a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment: ***Jesudason v Alder Hay Children's NHS Foundation Trust*** [2020] IRLR 374.

10. The initial burden of proof is on the Claimant to establish that a protected disclosure was made and that the ground or reason (that is more than trivial) for detrimental treatment is the protected disclosure. Thereafter, by virtue of s.48(2) ERA 1996, the Respondent must be prepared to show why the detrimental treatment was done and inferences may be drawn in the event that the Respondent's explanations are unsatisfactory.

11. While the threshold of establishing a qualifying disclosure may be relatively low, it is essential that causation is properly considered. In a detriment case, determining whether a detriment is on the ground that the worker has made a protected disclosure, requires an analysis of the mental processes (conscious or unconscious) of the employer acting as it did: ***Chatterjee v Newcastle Upon Tyne Hospitals NHS Trust*** [2019] 9 WLUK 556. It is not sufficient to demonstrate that 'but for' the disclosure, the employer's act or omission would not have taken place. The protected disclosure must have materially influenced the employer's treatment of the worker: ***NHS Manchester v Fecitt & Ors*** [2012] IRLR 164. It is not enough to consider whether the act was 'related to' the disclosure in some looser sense.

12. Further, in order to establish causation in a detriment case, a Claimant must establish that the person who subjected him/her to a detriment was personally

motivated by the protected disclosure. Another person's knowledge and motivation cannot be imputed: ***Malik v Cenkos Securities Plc*** (UKEAT/0100/17):

> *"It is in any event not clear how a decision-maker, who did not have personal knowledge of the protected disclosure, could be said to have been materially influenced by it to make the decision under challenge. If a decision-maker in that position were to be fixed with liability it would have to be as a result of importing the knowledge and motivation of another to that decision-maker. However, it seems to me that such importation is not permissible in considering why the decision-maker acted as he or she did."*

While it would be right to acknowledge that ***Malik*** was decided before ***Royal Mail Group v Jhuti*** [2020] IRLR 129 (see below), ***Jhuti*** was a dismissal case and not a detriment case, the circumstances in which ***Jhuti*** will apply are exceptional and the existence of vicarious liability provisions in relation to detriment claims (but not s.103A dismissal claims) means that there is no obvious reason why the ***Jhuti*** principle should be imported into detriment cases and there is currently no authority that does so import it.

13. In a dismissal case under s.103A of the ERA 1996, there are two questions to be answered: Did the employee make a protected disclosure? If so, was the making of that protected disclosure the reason or principal reason for the dismissal?

14. In a s.103A claim, the 'reason' for dismissal is the factor operating on the decision-maker's mind which causes him/her to take the dismissal decision: ***Croydon Health Services NHS Trust v Beatt*** [2017] ICR 1420. The net could be cast wider if the facts known to, or beliefs held by, the decision-maker had been manipulated by another person involved in the disciplinary process with an inadmissible motivation, where they held some responsibility for the investigation. That person could also have constructed an invented reason for dismissal to conceal a hidden reason: ***Royal Mail Ltd v Jhuti*** [2020] All ER 257. However, the ***Jhuti*** exception to the general rule that the only relevant motivation to consider is that of the decision-maker is of limited application: ***Kong v Gulf International Bank (UK) Ltd*** [2021] 9WLUK 125 (see in particular paragraphs 64 to 78):

    14.1. The general rule remains that the motivation that can be ascribed to the employer is only that of the decision-maker(s).

    14.2. The ***Jhuti*** exception will be *"a relatively rare occurrence"* and the scenario in ***Jhuti*** was a *"highly unusual variation"* and: *"Instances of decisions to dismiss taken in good faith, not just for a wrong reason but for a reason which the employee's line manager has dishonestly constructed will not be common."*

    14.3. There is no warrant to extend the exceptions beyond those envisaged in ***Jhuti*** itself.

    14.4. Two common features of the ***Jhuti*** exception are that (a) the person whose motivation is attributed to the employer sought to procure the employee's dismissal for the proscribed reason; and (b) the decision-maker was peculiarly dependent upon that person as the source for the underlying facts and information concerning the case.

14.5. A third essential feature for the ***Jhuti*** exception is that the role or position of the person providing the underlying manipulated information is such that that their motivation could be attributed to the employer.

Unfair dismissal

15. In a case of unfair dismissal under s.98 ERA 1996 it is for the Respondent to establish the reason for dismissal and that the reason is either one of the potentially fair reasons for dismissal identified in ss.98(2) ERA 1996, or it is *"some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held"* (s.98(1)(b) ERA 1996).

16. If there is a potential fair reason for a dismissal, the fairness of the dismissal is assessed by applying the test at s.98(4) ERA 1996.

17. It is important to note that s.98(2)(b) ERA 1996 refers to dismissal for a reason that *"relates to the conduct of the employee"*. When determining the reason for dismissal, it is the statutory wording that must be applied. Accordingly, there is no legal requirement on an employer to show either that the employee's conduct was culpable, or that he was subjectively aware that his conduct would meet with the employer's disapproval when establishing the reason for dismissal: ***JP Morgan Securities Plc v Ktorza*** [2017] UKEAT/0311/16.

18. Further, the statutory action for unfair dismissal operates on its own terms. It is therefore possible for there to be a fair dismissal for offences falling short of 'gross misconduct' at common law and there is no rule of law to the contrary. Neither s.98 ERA 1996 nor the ACAS Code of Practice draws a bright line between summary dismissal and anything less in a statutory action for unfair dismissal. Quite simply, a dismissal for misconduct which falls short of gross misconduct may or may not be fair, depending on a consideration of all the facts and the application of the range of reasonable responses test: ***Quantiles Commercial UK Ltd v Barongo*** [2018] UKEAT/0255/17.

19. In determining the reason for dismissal, the Tribunal must approach the identification of the reason in a broad and reasonable way in accordance with industrial realities and common sense. In identifying that reason, the Tribunal generally need look no further than at the reason given by the appointed decision-maker.

20. A reason for dismissal is the factor or factors operating on the mind of the decision-maker which causes them to make the decision to dismiss, or alternatively what motivates them to do so: ***Croydon Health Services NHS Trust v Beatt*** [2017] ICR 1420. While post-***Jhuti*** the net can be cast wider to consider the motivations of others involved where it can be said that the dismissing officer was deliberately misled, Tribunal's should remember the unusual nature of the ***Jhuti*** exception and be wary when it is raised: ***University Hospital North Tees & Hartlepool NHS Foundation Trust v Fairhall*** [2021] UKEAT/0150/20) at para. 40:

> *"Despite the **Jhuti** situation being unusual, the case is relied upon in pretty much every appeal where there is any issue about decision makers. The arguments about decisions and decision maker have become even more Baroque; often unnecessarily so."*

21. In ***BHS v Burchell*** [1980] ICR 303, the EAT gave well known guidance as to the principal considerations when assessing the fairness of a dismissal purportedly by reason of conduct. There must be a genuine belief that the employee did the alleged misconduct, that must be the reason or principal reason for the dismissal, the belief must be a reasonable one, and based upon a reasonable investigation. The Tribunal may also be assisted by the ***Burchell*** test in determining a SOSR case.

22. If the Respondent satisfies the Tribunal that it dismissed the Claimant for one of the statutory potentially fair reasons for dismissal, the Tribunal must then determine whether, having regard to that reason, the dismissal was fair or unfair in all the circumstances (s.98(4)). It is well-established that the Tribunal is not to substitute its own view for that of the employer. In ***Iceland Frozen Foods v Jones*** [1982] IRLR 439, the EAT held that the Tribunal must not simply consider whether it personally thinks that a dismissal was fair and must not substitute its decision as to the right course to adopt for that of the employer. The Tribunal's proper function is to consider whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. The fact that other employers might have been more lenient is irrelevant. As Phillips J succinctly put it in ***Trust Houses Forte Leisure Ltd v Aquilar*** [1976] IRLR 251:

> *"It has to be recognised that when management is confronted with a decision to dismiss an employee in particular circumstances there may well be cases where reasonable managements might take either of two decisions: to dismiss or not to dismiss. It does not necessarily mean if they decide to dismiss that they have acted unfairly because there are plenty of situations in which more than one view is possible."*

23. The range of reasonable responses test applies to all aspects of the dismissal. In ***Sainsbury's v Hitt*** [2003] IRLR 23, the Court of Appeal emphasised the importance of that test and that it applies to all aspects of dismissal, including the procedure adopted. The question to be determined is whether the employer acted fairly overall. As Richards LJ put it in ***Shrestha v Genesis Housing Association Ltd*** [2015] IRLR 399 at para. 23:

> *"To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwanted gloss to the **Burchell** test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the **Burchell** test will depend on the circumstances as a whole. Moreover, in a case such as the present it is misleading to talk in terms of distinct lines of defence. The issue here is whether the appellant had over-claimed mileage expenses. His explanations as to why the mileage claims were as high as they were had to be assessed as an integral part of the determination of that issue. What mattered was the reasonableness of the overall investigation into that issue."*

24. Similarly, in ***Sharkey v Lloyds Bank plc*** [2015] UKEATS/005/15 noted the wide approach to be taken to procedural failure:

> *"…procedure does not sit in a vacuum to be assessed separately. It is an integral part of the question whether there has been a reasonable investigation that substance and procedure run together."*

Accordingly, a broad approach should be adopted, and any procedural failings should be considered in the context of the case as a whole, including their effects on the eventual decision to dismiss: ***NHS 24 v Pillar*** [2017] UKEAT/0005/16.

25. Arguments of disparity in treatment should be scrutinised with particular care. In ***Paul v East Surrey District Health Authority*** [1995] IRLR 305, Beldam LJ (with whose judgment Sir Christopher Slade and Nourse LJ concurred), having concluded that the employer's appeal panel had considered the question of disparity and reached a rational conclusion, examined the general scope of the argument on disparity in the following terms:

> *"I consider that all industrial tribunals would be wise to heed the warning of Waterhouse J, giving the judgment of the Employment Appeal Tribunal in* ***Hadjiouannou v Coral Casinos Ltd*** [1981] IRLR 352 where, in paragraph 25, he said:
>
> > *'We accept that analysis by counsel for the respondents of the potential relevance of arguments based on disparity. We should add, however, as counsel has urged upon us, that industrial tribunals would be wise to scrutinise arguments based upon disparity with particular care. It is only in the limited circumstances that we have indicated that the argument is likely to be relevant, and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for the argument. The danger of the argument is that a tribunal may be led away from a proper consideration of the issues raised by [s.98(4) ERA 1996]. The emphasis in that section is upon the particular circumstances of the individual employee's case. It would be most regrettable if tribunals or employers were to be encouraged to adopt rules of thumb, or codes, for dealing with industrial relations problems and, in particular, issues arising when dismissal is considered. It is of the highest importance that flexibility should be retained, and we hope that nothing that we say in the course of our judgment will encourage employers or tribunals to think that a tariff approach to industrial misconduct is appropriate. One has only to consider for a moment the dangers of the tariff approach in other spheres of the law to realise how inappropriate it would be to import it into this particular legislation.'*
>
> *I would endorse the guidance that ultimately the question for the employer is whether in the particular case dismissal is a reasonable response to the misconduct proved. If the employer has an established policy applied for similar misconduct, it would not be fair to change the policy without warning. If the employer has no established policy but has on other occasions dealt differently with misconduct properly regarded as similar, fairness demands that he should consider whether in all the circumstances, including the degree of misconduct proved, more serious disciplinary action is justified.*

An employer is entitled to take into account not only the nature of the conduct and the surrounding facts but also any mitigating personal circumstances affecting the employee concerned. The attitude of the employee to his conduct may be a relevant factor in deciding whether a repetition is likely. Thus an employee who admits that conduct proved is unacceptable and accepts advice and help to avoid repetition may be regarded differently from one who refuses to accept responsibility for his actions, argues with management or makes unfounded suggestions that his fellow employees have conspired to accuse him falsely. I mention this because I consider that if the industrial tribunal in this case had had regard to these factors they would not have regarded the actions of the employers in Mrs Rice's case as disparate or have said that Mr Verling's misconduct should have been treated just as seriously, if not more seriously than Mr Paul's."

26. If an employer consciously distinguishes between two cases, the dismissal can be successfully challenged only if there is no rational basis for the distinction made: ***Securicor Ltd v Smith*** [1989] IRLR 356.

Direct discrimination

27. Direct discrimination is defined in s.13 of EqA 2010. A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

28. Although showing direct discrimination will usually involve an analysis of A's reasons for treating B less favourably, it is not necessary for B to show that A discriminated consciously. Subconscious/unconscious discrimination is also prohibited: ***Nagarajan v London Regional Transport & Ors*** [1999] IRLR 36. The Tribunal must therefore enquire as to the conscious or subconscious mental processes which led A to take a particular course of action in respect of B, and to consider whether a protected characteristic played a significant part in the treatment.

29. Where A is the ultimate decision-maker but has been influenced by others, the Tribunal's enquiry should be limited to A's own mental processes (***CLFIS (UK) Ltd v Reynolds*** [2015] ICR 1010), save that the ***Reynolds*** decision should not be allowed to become a means of *"escaping liability by deliberately opaque decision-making which masks the identity of the true discriminator"* (***The Commissioner of Police of the Metropolis v Denby*** (UKEAT/0314/16/RN)).

30. Section 23 of EqA 2010 provides that on a comparison of cases for the purposes of s.13, there must be no material difference between the circumstances relating to each case.

31. In ***Shamoon v Chief Constable of the RUC*** [2003] IRLR 285, Lord Nicholls said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He suggested that Tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was and postponing the less favourable treatment question until after they have decided why the treatment was afforded. At paragraphs 11 and 12, Nicholls LJ said as follows:

> *"…employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others.*
>
> *The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions Employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant…"*

32. Since ***Shamoon***, the appellate courts have broadly encouraged Tribunals to address both stages of the statutory test by considering the single 'reason why' question: was it on the proscribed ground, or was it for some other reason. Underhill J summarised this line of authority in ***Martin v Devonshire's Solicitors*** [2011] ICR 532 at paragraph 30:

> *"Elias J (President) in **Islington London Borough Council v Ladele (Liberty intervening)** [2009] ICR 387 developed this point, describing the purpose of considering the hypothetical or actual treatment of comparators as essentially evidential, and indeed doubting the value of the exercise for that purpose in most cases – see paras 35-37. Other cases in this Tribunal have repeated these messages – see, eg, **D'Silva v NATFHE** [2008] IRLR 412, para 30 and **City of Edinburgh v Dickson** (unreported), 2 December 2009, para 37; though there seems so far to have been little impact on the hold that 'the hypothetical comparator' appears to have on the imaginations of practitioners and Tribunals."*

33. The circumstances in which it is unlawful to discriminate against an employee are, so far as relevant, set out in s.39 EqA 2010. In that regard, something will constitute a *"detriment"* where a reasonable person would or might take the view that the act or omission in question gave rise to some disadvantage: ***Shamoon*** at paragraphs 31 to 35. There is an objective element to this test. For a matter to be a detriment it must be something which a person might reasonably regard as detrimental.

Victimisation

34. Section 27 of the EqA 2010 provides that a person victimises another person if they subject that person to a detriment because the person has done a protected act. A protected act is defined in s.27(2) and includes the making of an allegation (whether or not express) that there has been a contravention of the Equality Act 2010.

35. It is for the Claimant to prove that he did the protected acts relied upon before the burden can pass to the Respondent: ***Ayodele v Citylink Ltd*** [2018] ICR 748(CA):

"Before a tribunal can start making an assessment, the claimant has got to start the case, otherwise there is nothing for the respondent to address and nothing for the tribunal to assess."

36. There is therefore no burden of proof on an employer *"unless and until the claimant has shown that there is a prima facie case of discrimination which needs to be answered."* (See paragraphs 92 and 93 Judgment).

37. In ***Scott v London Borough of Hillingdon*** [2001] EWCA Civ 2005 the Court of Appeal held that knowledge of the protected act on the part of the alleged discriminator is a precondition to liability. The burden of proving knowledge lies on the Claimant.

38. By virtue of s.27(3) of the EqA 2010, giving false evidence or information, or making a false allegation, is not a protected act if the allegation is made, in bad faith. When determining whether an employee has acted in bad faith for the purposes of s.27(3), the primary question is whether the claimant acted honestly in making the allegation. That is not to say, however, that the existence of a collateral motive could never lead to a finding of bad faith. The employee's motive in making the allegation may be a relevant part of the context in which the Tribunal assesses bad faith. The Tribunal might, for example, conclude that the employee dishonestly made a false allegation because he wanted to achieve some other result, or that he was wilfully reckless as to whether the allegation was true (and thus had no personal belief in its content) because he had some collateral purpose in making it: ***Saad v Southampton University Hospitals NHS Trust*** [2018] IRLR 1007; ***HM Prison Service v Ibimudun*** [2008] IRLR 940.

Burden of Proof

39. Section 136 of the EqA 2010 deals with the burden of proof and provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Tribunal must hold that the contravention occurred.

40. In ***Barton v Investec Henderson Crosthwaite Securities Ltd*** [2003] IRLR 332, the EAT set out guidance to Tribunals on the burden of proof rules. These were approved, with minor revisions by the Court of Appeal in ***Igen Ltd & Ors v Wong & Other cases*** [2005] IRLR 258. In essence, ***Igen*** applied a two-stage approach:

    40.1. Can the claimant show a prima facie case? If no, the claim fails. If yes, the burden shifts to the respondent.

    40.2. Is the respondent's explanation sufficient to show that it did not discriminate?

41. However, the Court of Appeal has emphasised that the burden of proof provisions *"need not be applied in an overly mechanistic or schematic way"* (***Khan & Anor v Home Office*** [2008] EWCA Civ 578).

42. In ***Madarassy v Nomura International Plc*** [2007] IRLR 246 it was held that the burden does not shift to the Respondent simply on the Claimant establishing a difference in status or a difference in treatment. Such acts only indicate the possibility of discrimination. A prima facie case requires that: *"a reasonable tribunal could properly conclude from all the evidence"* that there has been discrimination.

43. The effect of the burden of proof provisions was summarised by Underhill LJ in ***Base Childrenswear Ltd v Otshudi*** [2019] EWCA Civ 1648 at para.18:

> *"It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in* ***Madarassy****. He explained the two stages of the process required by the statute as follows:*
>
> *(1) At the first stage the Claimant must prove 'a prima facie case'. That does not, as he says at para.56 of his judgment (p.878H), mean simply proving 'facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination'. As he continued (pp.878-9):*
>
> > *56. …The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent has committed an unlawful act of discrimination.*
> >
> > *57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it…"*
>
> *(2) If the Claimant proves a prima facie case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para.58 (p.879D). As Mummery LK continues: 'He may prove this by an adequate non-discriminatory explanation of the treatment of the complaint. If he does not, the Tribunal must uphold the discrimination claim.' He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation."*

44. In ***Hewage v Grampian Health Board*** [2012] IRLR 870, the Supreme Court endorsed the approach of the Court of Appeal in ***Igen*** and ***Madarassy*** but made clear that it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence on way or the other.

45. It is not sufficient for a Tribunal to draw an inference based on an *"intuitive hunch"* without findings of primary fact to back it up: ***Chapman v Simon*** [1994] IRLR 124.

Closing submissions - further legal principles

[The respondent's closing submissions contain the following further legal principles.]

46. Since the Respondent's Opening Submissions were sent to the Tribunal on 7 March 2022, two further judgments have been issued by the EAT which the Tribunal may consider of some assistance, albeit both primarily deal with case management matters regarding disclosure and/or redaction: ***Frewer v***

Google UK Ltd & Ors [2022 EAT 34 (17 March 2022) and ***Dodd v UK Direct Business Solutions Ltd & Anor*** [2022] EAT 44 (18 March 2022).

47. In ***Dodd*** His Honour Judge Auerbach, having considered ***Darnton v University of Surrey*** [2003] IRLR 133, ***Chesterton Global Ltd v Nurmohamed*** [2018] ICR 731 and ***Babula v Waltham Forest College*** [2007] ICR 1026, reiterated the position that the statutory definition of a protected disclosure does not, itself, turn upon whether allegations of wrongdoing that are the subject of a claimed protected disclosure are factually true and there is no rule of law that this will necessarily be an issue that needs to be determined by the Tribunal generally or in any particular type of case. Whether the factual truth of a protected disclosure is relevant to any particular issue in a given case, and if so, how, or to what extent, will be fact sensitive to the particular pleadings, and issues, in the given case. See generally paragraphs 53 to 69.

48. The Respondent invites the Tribunal to consider ***Dodd*** with care in view of the extensive time taken in cross examination of the Respondent's witnesses seeking to establish the truth of the systems and controls and other regulatory failings relied on by the Claimant in his post-termination Disclosures (Disclosures 3 to 6). While it is, of course, the Respondent's position that the allegations levelled against it of wrongdoing are wholly incorrect, unsubstantiated and without foundation, the relevant point to note is that the Tribunal must confine its findings to what is required by statute. As His Honour Judge Auerbach puts it at paragraph 67:

> *"In relation to belief in the public interest, as with belief that the disclosure tends to show wrongdoing, the worker must in fact hold the belief at the time of the disclosure. It would not be enough for the tribunal to conclude that, <u>had</u> they held belief, it <u>would</u> have been reasonable. While, again, the reasonableness test is objective, and may be satisfied by considerations that the worker did not <u>have in mind</u> at the time, the test is still whether their belief was reasonable when they formed it. As Underhill LJ put it in* ***Chesterton*** *at [27]:*
>
> > *'The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable."*

49. The Tribunal must, of course, also confine itself to the List of Issues, a document agreed between the parties, and which reflects the Claimant's pleaded case. The Claimant's Counsel appeared at times to consider it an ill-conceived form of criticism when it was noted by the Respondent's Counsel that her cross-examination strayed from the List of Issues, at points considerably. Nevertheless, the fact remains that this Tribunal is bound to limit its findings to the List of Issues.

50. The Respondent would also direct the Tribunal to paragraph 70 and 71 of ***Dodd*** in which His Honour Judge Auerbach restates well-established principles in relation to causation:

> *"As to detrimental treatment, the general principles are well-established. If the tribunal finds that there was a PD or PDs, and the conduct complained of did occur, it must then decide whether it amounted to subjecting the worker to a detriment 'on the ground' of having made the PD(s). That*

requires a consideration of the conscious or subconscious motivation of the actor, and the test is satisfied if the making of the PD(s) materially influenced the conduct. That does not have to be the sole or principal reason….As to [the burden of proof], section 48(2) provides that it is for the employer to show the ground on which the act, or failure to act was done. In relation to unfair dismissal, the PD(s) must be the sole or principal reason for dismissal…

I would add that there is no rule of law, either that if an allegation is in fact true, the conduct of which the worker complains is more likely to have occurred because they made the PD, nor that, if it is not in fact true, that is less likely to be the case. It is easy to think of factual scenarios in which the reverse of either of these things might be the case. These matters are immensely fact-sensitive, and there is great danger in working from assumed paradigms. First intuitions can be a dangerous guide. The currency in which the tribunal must deal is evidence, findings of fact, and inferences or other conclusions properly drawn from those particular findings."

51. In relation to causation, the Tribunal must ensure that the correct test is applied to the protected disclosures identified and relied on by the Claimant:

    51.1. It is only Disclosure 1 and Disclosure 2 which are identified as having been made prior to termination (albeit the Claimant also asserts that they were repeated in the Claimant's third appeal submission dated 8 April 2021 (11 months after they were first said to have been made). Accordingly, if the Tribunal is satisfied (contrary to the Respondent's submissions) that Disclosure 1 and Disclosure 2 are properly to be regarded as protected disclosures, the issue of causation for the Tribunal is whether Disclosure 1 and Disclosure 2 were the sole or principal reason for dismissal.

    51.2. In respect of the other protected disclosures on which the Claimant seeks to rely:

        51.2.1. Disclosure 3 is identified by the Claimant as having been made in his first appeal against dismissal submission dated 20 July 2020 **[D1279-1290]**.

        51.2.2. Disclosures 4 and 5 are identified by the Claimant as having been made in this third appeal against dismissal submission dated 8 April 2021 **[D1821-1831]**.

        51.2.3. Disclosure 6 is identified by the Claimant as having been made in a letter to Philip Cooper dated 20 July 2021 **[D1951]**.

    51.3. In respect of Disclosures 3 to 6, the Tribunal will first have to determine whether they are properly to be regarded as protected disclosures (and the Respondent contends that they are not). The Tribunal will then have to determine whether the matters upon which the Claimant relies are in fact properly to be regarded as detriments and, thereafter, the Tribunal must consider the question of causation.

    51.4. The Tribunal's notes of evidence will no doubt record that during the course of the Claimant's cross examination on Friday, 11 March 2022,

the Claimant was taken to the text message sent by him to William Benguerel on 14 July 2020 **[D1277]**, the day following his dismissal with immediate effect, and in which he stated: *"I'm speaking to lawyer to see what I can do."*

52. The Tribunal's notes will also then record that it was put to the Claimant in cross examination that the information included by him in his disciplinary submission of 4 May 2020 regarding working from home arrangements during the week of 23 March 2020 and the mark to model and mark to market valuation methods was included by way of mitigation for his failure to escalate concerns regarding the Precious Metal's Desk P&L and not because he at the time considered that the Respondent had committed any legal or regulatory breaches and the Claimant conceded that this was correct. He went on to give evidence that following his dismissal, he had more time to speak to lawyers and more time to google and search and to study and learn about all the situations that related to him.

53. When considering the post-termination protected disclosures and detriments that are made in correspondence which the Claimant accepted was drafted for him by his lawyers, the Tribunal may wish to keep in mind paragraphs 49 to 51 of ***Frewer v Google UK Ltd & Ors*** in which His Honour Judge Tayler felt compelled to repeat the observation that he had made previously in ***Vaughan v Modality Partnership*** [2021] ICR 535:

> *"49.…The parties should carefully consider issues of proportionality remembering that they are under an obligation to assist the employment tribunal in furthering the overriding objective. That is not a request, but a requirement. It is also important that the parties keep an overview of the case. If the first respondent establishes that the reason for the dismissal of the claimant was that he had sexually harassed his colleagues the question of whether he made any protected disclosures may end up being moot. The claims all relate to dismissal and rejection of the claimant's appeal, so the focus must be on which of the myriad disclosures now asserted it is contended resulted in the decision to dismiss, and the rejection of the appeal. The claimant now has had the disclosure of a vast amount of documentary evidence that must surely assist in determining which of the multitudinous disclosures asserted may have been causative of his dismissal and the rejection of his appeal. A component of the obligation on the parties to assist the tribunal in achieving the overriding objective includes having regard to the fact that the tribunal's resources are limited and they must be fairly distributed amongst the many parties that have a right to have their claims heard.*
>
> *50. …The claimant…might wish to reflect on the observation I made in* ***Vaughan v Modality Partnership*** [2021] ICR 535 at paragraph 41:
>
> > *'In all public interest disclosure cases the focus should not be on how many disclosures can be asserted and how many detriments can be alleged, but on which disclosures are likely to be shown to have given rise to a detriment. Litigants in public interest disclosure cases often feel with detriments and disclosures the more the merrier, whereas the focus on the principal disclosures that may have resulted in detriment or dismissal is more likely to bear fruit.*

The fact that all relevant detriments are pleaded does not assist a claimant if the disclosure that resulted in them is not pleaded.'

51. I do not raise the issue just because I like the sound of my own voice, but because it often seems that those who draft the enormous schedules of protected disclosures and/or detriments, that are too common a feature of protected disclosure claims, feel that they have done a good day's work when they look at the multitudinous allegations they have tabulated, because they think that the more protected disclosures and/or detriments asserted the greater the prospects of success, whereas experience suggests that the converse is often the case. As the editors of Harvey pithily put it: 'quality, not quantity."

Claimant's Closing Submissions – additional relevant legal principles

[The claimant's closing submissions contain the following additional relevant legal principles.]

54. The Claimant notes that many of the relevant legal principles have been set out in the Respondent's Opening Submissions, and the Claimant therefore does not set out in full his own submissions on the law herein. This section sets out additional authorities not referred to by the Respondent. The only potential point of disagreement with the Respondent's summary of the law is with the description of the burden of proof in a s.48 ERA detriment claim (although it may be that we do not in fact disagree about this).

Whistleblowing: protected disclosures

55. Additional relevant statutory provisions:

    55.1. By section 43L(3), any reference within the whistleblowing provisions to a disclosure of information *"shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention."*

56. [The tribunal notes that in a brief reply at the close of Ms D'Souza's closing submissions, Ms Davis argued that all S.43L(3) does is confirm that a claimant can still make a disclosure of information to an individual, even if the information disclosed is already know by that individual. The sub-section has no impact at all on the issue of causation.]

57. In **Dobbie v Felton (t/a Feltons Solicitors)** [2021] IRLR 679 at [27] HHJ Tayler provided a helpful ten-point summary of the reasoning of Underhill LJ in **Nurmohamed** as follows:

(1) the necessary belief is that the disclosure is made in the public interest. The particular reasons why the worker believes that to be so are not of the essence

(2) while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it – Underhill LJ doubted whether it need be any part of the worker's motivation

(3) the exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one

reasonable view as to whether a particular disclosure was in the public interest

(4) a disclosure which was made in the reasonable belief that it was in the public interest might nevertheless be made in bad faith

(5) there is not much value in trying to provide any general gloss on the phrase "in the public interest". Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression

(6) the statutory criterion of what is "in the public interest" does not lend itself to absolute rules

(7) the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest

(8) the broad statutory intention of introducing the public interest requirement was that "workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers"

(9) Mr Laddie's fourfold classification of relevant factors may be a useful tool to assist in the analysis:

i. the numbers in the group whose interests the disclosure served

ii. the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed

iii. the nature of the wrongdoing disclosed

iv. the identity of the alleged wrongdoer

(10) where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest

58. HHJ Tayler also provided in **Dobbie** at [28] eight further points by way of general observation, which are not set out in these submissions for want of space but which the Tribunal is invited to read, and which will be addressed in oral submissions.

59. When considering whether a belief is reasonable, part of the context is the particular characteristics, knowledge and understanding of the worker at the time of the disclosure. That informs the reasonableness of their belief as well as whether they actually held the beliefs alleged: **Korashi v Abertawe Bro Morgannwg University Local Health Board** [2012] IRLR 4 at [61]-[62].

60. There is no need for the employee to refer directly to the relevant subsection of section 43B(1) in their disclosure: **Twixt DX Ltd v Armes**.

61. There is no separate principle of law which applies where a protected disclosure is made in a grievance or disciplinary submission, or where it is contained with a letter drafted by the employee's lawyers. The same questions apply. The authorities on protected disclosures contained in these categories of documents tend to turn on the question whether there was

sufficient factual content in the relevant document to satisfy the "disclosure of information" limb of section 43B(1). So for example:

61.1. In **Cavendish Munro Risk Management Ltd v Geduld** [2010] ICR 325, a solicitors' letter written in the course of a dispute which alleged that the claimant was an oppressed minority shareholder was not a protected disclosure because it did not disclose any facts: see [28].

61.2. In **Smith v London Metropolitan University** [2011] IRLR 884, the EAT held that a series of grievances relating to the claimant's teaching workload did not amount to a disclosure of information because they had not conveyed facts.

61.3. In **The Learning Trust v Marshall** UKEAT/0107/11/ZT on the other hand, the EAT upheld the tribunal's finding that the claimant's grievances amounted to protected disclosures, on the basis that there *was* sufficient factual content within the grievances.

62. Where lawyers are involved in the preparation of documents containing protected disclosures, but the employee gives evidence that he read, understood and approved the document before it was sent out, then the fact that the lawyer has prepared it is irrelevant to the protected disclosure questions: the letter should be taken to contain the employees own views as of the time the letter is sent (i.e. after he has sent the letter).

Whistleblowing: detriment

63. As for the burden of proof, section 47B(1) contains four elements: (1) an act or omission, (2) done by the employer (including employee or agent etc), (3) which subjects the worker to a detriment and (4) which was done on the ground of making a protected disclosure.

64. The claimant bears the burden in the ordinary way of establishing points (1) to (3). As for point (4)—the ground for the act or omission—section 48(2) provides that on a detriment complaint under that section, it is for the employer to show the ground on which the act or deliberate failure to act was done. The authorities have on the whole interpreted section 48(2) as operating in a similar fashion to the burden of proof on the reason for dismissal, as explained by the Court of Appeal in **Kuzel v Roche Products Ltd** [2008] ICR 799: i.e. the claimant bears an *evidential* burden to raise a prima facie evidential case that the reason for the act or deliberate failure to act was the protected disclosure; the *legal* burden then passes to the respondent to show the reason: see e.g. **Serco v Dahou** [2017] IRLR 71 at [29] per Laws LJ (which deals with similarly-worded provisions in TULR(C)A 1992):

> *"It is plain that both the purpose of an employer's act or omission (ss.146 and 148) and the reason for dismissal of an employee (s.152) consist in the factors operating on the mind of the relevant decision-maker. Both under s.146 and s.152 it is for the employee to raise a prima facie case. In the dismissal case it is perhaps more accurate to say that it is for the employee to show "only that there is an issue warranting investigation and capable of establishing the prohibited reason". If the prima facie case is made out, then it is for the employer to show the purpose of his act or the reason for the dismissal, and therefore to prove what were the factors operating on*

> *the mind of the decisionmaker. The burden of proof only passes to the employer after the employee has established a prima facie or arguable case of unfavourable treatment which requires to be explained. It follows, of course, that in such a case a critical element in the task of the employment tribunal consists in its reasoned assessment of the matters, certainly the central matters, advanced by the employer in proof of those factors."*

65. There is some disagreement in the authorities as to what follows if the employer does not prove the reason for the act or deliberate failure to act. In **Ibekwe v Sussex Partnership NHS Foundation Trust** EAT/0072/14 the EAT held that it is open to the tribunal, *per* **Kuzel**, to find that the reason is not one put forward by either party. However, the editors of *Harvey* at Division D1, para.36 take the view that: *"if the employer fails to prove that the act, or deliberate failure, complained of was not on the prohibited grounds, the question or issue must be determined in favour of the employee."* This paragraph of *Harvey* cites **Fecitt v NHS Manchester** [2012] ICR 372, where at [8] Elias LJ states unequivocally that by section 48(2) *"the onus is on the employer to show the ground on which any act, or failure to act, was done."* This paragraph was approved without criticism by Choudhury P in in **Edinburgh Mela Ltd v Purnell** UKEATS/0041/19 at [59].

66. The Claimant submits that the approach in *Harvey*, based on **Fecitt** and followed in **Purnell**, is the correct approach.

67. Also in **Fecitt**, Elias LJ held as follows at [51]: *"The detrimental treatment of an innocent whistleblower necessarily provides a strong prima facie case that the action has been taken because of the protected disclosure and it cries out for an explanation from the employer."*

Direct Race Discrimination

68. Therefore, whilst the section 13 test requires both (a) less favourable treatment than a comparator in materially the same circumstances and (b) that such less favourable treatment is because of the protected characteristics, these are in reality interdependent elements of a single question.

69. In many cases it may be better to consider these two issues together because it may not be possible to decide the less favourable treatment issue without deciding the reason why issue, especially when there is a question as to which circumstances are material for the purposes of defining a hypothetical comparator (**Shamoon** at [8] and [11] per Lord Nicholls and [125] per Lord Rodger).

70. The cases distinguish between (a) cases of direct discrimination where the reason for the treatment is indissociable from the protected characteristic, in the sense that the protected characteristic is inherent in the explicit reason relied upon, and (b) cases where the question is whether the alleged discriminator was subjectively influenced (consciously or subconsciously) by the protected characteristic). In the latter set of cases, it is necessary for the Tribunal to examine the *"mental processes"* of the alleged discriminator. The protected characteristic must be a material or significant (in the sense of non-trivial) influence on the decision: see **Nagarajan v London Regional Transport** [2001] 1 AC 501 at 510H-511H, 512H-513B (Lord Nicholls).

71. In **Nagarajan** at [11] Lord Nicholls made the following observation, which remains true today:

> *All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. … Members of racial groups need protection from conduct driven by unrecognised prejudice as much as from conscious and deliberate discrimination.*

Comparators

72. The Claimant notes and does not dispute the guidance given in **Shamoon** and **Martin v Devonshires Solicitors**, repeated in paragraphs 72-73 of the Respondent's Opening, as to the value of approaching the question of direct discrimination by focusing on the reason for the treatment—the "reason why" question—in order to avoid *"arid and confusing disputes about the identification of the appropriate comparator"* (**Shamoon** at [11] per Lord Nicholls).

73. Nonetheless, there remain cases in which the Tribunal may be assisted in approaching the case by consideration of comparators, and the Claimant in this case has identified real comparators or alternatively relies on a hypothetical comparator. The following guidance from the appellate courts on the approach to comparators is relevant to that exercise.

74. In **Chief Constable of West Yorkshire Police v Vento** [2001] IRLR 124, Lindsay J confirmed that in deciding how a hypothetical comparator would be treated, the evidence that comes from how real individuals were actually treated is likely to be crucial, and the closer the circumstances of those individuals are to those of the complainant, the weightier will be the significance of their treatment. In particular, comparing the treatment of those in non-identical but not wholly dissimilar cases—i.e. 'evidential' rather than 'statutory' comparators—is a permissible means of constructing a hypothetical comparator and judging how he or she would have been treated.

75. On the same point, Lord Hoffmann held as followed in **Watt (formerly Carter) v Ahsan** [2008] IRLR 243 at [36]-[37]:

> *The discrimination which section 12 makes unlawful is defined by section 1(1)(a) as treating someone on racial grounds "less favourably than he treats or would treat other persons". The meaning of these apparently simple words was considered by the House in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337. Nothing has been said in this appeal to cast any doubt upon the principles there stated by the House, but the case produced five lengthy speeches and it may be useful to summarise:*

> *(1) The test for discrimination involves a comparison between the treatment of the complainant and another person (the "statutory comparator") actual or hypothetical, who is not of the same sex or racial group, as the case may be.*
>
> *(2) The comparison requires that whether the statutory comparator is actual or hypothetical, the relevant circumstances in either case should be (or be assumed to be), the same as, or not materially different from, those of the complainant: section 3(4).*
>
> *(3) The treatment of a person who does not qualify as a statutory comparator (because the circumstances are in some material respect different) may nevertheless be evidence from which a tribunal may infer how a hypothetical statutory comparator would have been treated: see Lord Scott of Foscote in Shamoon at paragraph 109 and Lord Rodger of Earlsferry at paragraph 143. This is an ordinary question of relevance, which depends upon the degree of the similarity of the circumstances of the person in question (the "evidential comparator") to those of the complainant and all the other evidence in the case.*
>
> *It is probably uncommon to find a real person who qualifies under section 3(4) as a statutory comparator. Lord Rodger's example at paragraph 139 of Shamoon of the two employees with similar disciplinary records who are found drinking together in working time has a factual simplicity which may be rare in ordinary life. At any rate, the question of whether the differences between the circumstances of the complainant and those of the putative statutory comparator are "materially different" is often likely to be disputed. In most cases, however, it will be unnecessary for the tribunal to resolve this dispute because it should be able, by treating the putative comparator as an evidential comparator, and having due regard to the alleged differences in circumstances and other evidence, to form a view on how the employer would have treated a hypothetical person who was a true statutory comparator. If the tribunal is able to conclude that the respondent would have treated such a person more favourably on racial grounds, it would be well advised to avoid deciding whether any actual person was a statutory comparator.*

(Emphasis added.)

The reverse burden of proof

76. Of particular importance to cases involving unconscious discrimination is the reverse burden of proof in section 136. The correct approach to this is set out in **Igen v Wong** and in **Madarassy v Nomura International plc** [2007] ICR 867, as recently reaffirmed by the Supreme Court in **Efobi v Royal Mail Group Ltd** [2021] ICR 1263 at [24]-[30] per Lord Leggatt JSC. Many of the relevant points have been identified in the Respondent's Opening, to which the Claimant adds the following:

    76.1. In assessing whether an inference could be drawn from the primary facts, Tribunals should start from the position that, because

discrimination is rarely overt, most cases turn on the accumulation of multiple findings of primary fact and an assessment of what inferences it is proper to draw from those facts: **Madarassy** at [12]. As such, once the Tribunal has made findings of primary fact, the Tribunal should step back and consider those facts in the round, taking account of its assessment of the parties and their witnesses when giving evidence, in order to determine what inferences it is appropriate to draw: see **Qureshi v Victoria University of Manchester & another** [2001] ICR 836 at 875F-876B per Mummery J.

76.2. When considering whether the burden of proof should shift, the Tribunal may take into account the conduct of the disclosure exercise by an employer: **McCorry v McKeith** [2016] IRLR 253 at [42]-[43]. In that case the EAT held that the tribunal was entitled to have regard to *"the reluctant, piecemeal and incomplete nature of discovery"*.

76.3. The Tribunal may not at the first stage draw an adverse inference from the fact that the employer has not provided an explanation for the treatment complained of. However, this does not mean that the tribunal cannot draw adverse inferences at the first stage from the fact that the employer has failed to call the actual person responsible for the alleged detriment: see **Efobi** at [40].

76.4. If the claimant succeeds at the first stage, the burden shifts to the respondent to provide a non-discriminatory explanation. This does not have to be a "good" explanation, although *unexplained* unreasonable conduct may itself be something from which an inference of discrimination can be drawn: see e.g. **Efobi** at [28]; **Bahl v The Law Society** [2004] IRLR 799 at [101] per Peter Gibson LJ.

76.5. In order to discharge its burden at the second stage, the respondent must show (to the civil standard of proof) that the treatment in question was *"in no sense whatsoever"* because of the protected characteristic (see **Igen v Wong** at [37] per Peter Gibson LJ, and [11] of the Annex to the Court of Appeal's Judgment).

77. In **Geller and anor v Yeshuran Hebrew Congregation** [2016] ICR 1028, the EAT held that an employment tribunal had erred in approaching the question of subconscious discrimination by considering the subjective state of mind of the employer's witnesses, rather than determining whether it could conclude that there had been unconscious discrimination by drawing of inferences from objective facts. The tribunal's reasoning in that case was that the claimant's treatment was not related to sex because it found the respondent's witnesses to be honest, truthful and reliable and that they had genuinely believed that the claimant's treatment was based on non-sex-related factors, but this was an error because they did not go on to consider the possibility of unconscious or subconscious discrimination: see **Geller** at [48]-[52] per Kerr J.

Direct Discrimination and Stereotyping

78. On the question of stereotyping, the EHRC Code of Practice on Employment at paragraph 3.15 makes the position clear: *"Direct discrimination also includes less favourable treatment of a person based on a particular*

stereotype relating to a protected characteristic, whether or not the stereotype is accurate."

79. The classic statement of the law on stereotyping and direct discrimination comes from the decision of the House of Lords in **R (on the application of European Roma Rights Centre) v Immigration Officer at Prague Airport** [2005] 2 AC 1 (**"Roma Rights"**).

80. The **Roma Rights** case concerned a challenge to the legality of a pre-entry clearance scheme operated by UK immigration officers at Prague Airport. This scheme had been established with the principal aim of stemming the flow of asylum seekers from the Czech Republic, the majority of whom were Roma. The claimants claimed *inter alia* direct race discrimination on the ground that there was a practice of questioning Roma applicants more intensively and treating them with a greater degree of scepticism than non-Roma applicants. The claimants succeeded on this claim before the House of Lords. Baroness Hale put the point as follows at [74]:

> *74. … The whole point of the law [of direct discrimination] is to require suppliers to treat each person as an individual, not as a member of a group. The individual should not be assumed to hold the characteristics which the supplier associates with the group, whether or not most members of the group do indeed have such characteristics, a process sometimes referred to as stereotyping. Even if, for example, most women are less strong than most men, it must not be assumed that the individual woman who has applied for the job does not have the strength to do it. Nor, for that matter, should it be assumed that an individual man does have that strength. If strength is a qualification, all applicants should be required to demonstrate that they qualify.*

81. Baroness Hale developed the point further at [82]:

> *82. … The Roma were being treated more sceptically than the non-Roma. There was a good reason for this. How did the immigration officer know to treat them more sceptically? Because they were Roma. That is acting on racial grounds. If a person acts on racial grounds, the reason why he does so is irrelevant... The person may be acting on belief or assumptions about members of the sex or racial groups which are often true and which if true would provide a good reason for the less favourable treatment in question. But "what may be true of a group may not be true of a significant number of individuals within that group": see Hartmann J in Equal Opportunities Commission v Director of Hong Kong [2001] 2 HKLRD 690, para 86, High Court of Hong Kong. The object of the legislation is to ensure that each person is treated as an individual and not assumed to be like other members of the group. …*

82. In **Stockton on Tees Borough Council v Aylott** [2010] ICR 1278, the Court of Appeal upheld the tribunal's finding of direct disability discrimination which was based on the employer's stereotypical view of mental illness. Mummery LJ held as follows at [48]-49], before deciding at [50] that there was sufficient evidence from which the tribunal could conclude that the claimant's claim was made out.

> *48. Secondly, I am unable to accept that, in the circumstances of this case, the employment tribunal's reference to the council's "stereotypical view of mental illness" was too vague to support the finding of direct discrimination. Direct discrimination can occur, for example, when assumptions are made that a claimant, as an individual, has characteristics associated with a group to which the claimant belongs, irrespective of whether the claimant or most members of the group have those characteristics: see R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Comr for Refugees intervening) [2005] 2 AC 1.*
>
> *49. I would accept that an employment tribunal can err in law if they conclude that liability for direct discrimination has been established simply by relying on an unproven assertion of stereotyping persons with that particular disability. Direct discrimination claims must be decided in accordance with the evidence, not by making use, without requiring evidence, of a verbal formula such as "institutional discrimination" or "stereotyping" on the basis of assumed characteristics. There must be evidence from which the employment tribunal could properly infer that wrong assumptions were being made about that person's characteristics and that those assumptions were operative in the detrimental treatment, such as a decision to dismiss.*

83. In **Commerzbank v Rajput** [2019] IRLR 772 the EAT (Soole J) made the following observations about stereotyping at [76]-[77]:

> *76. Two matters in this appeal are beyond question. First, that for all the reasons discussed in the authorities, and most particularly through the judgment of Baroness Hale in the Roma case, discrimination in respect of any protected characteristic has normally to be proved by inference rather than direct evidence. Secondly, that the Employment Tribunal is entitled (and to an extent required) to draw on its experience when considering whether it is appropriate to draw the inference in the particular case.*
>
> *77. This process will include assessment of the particular use of language by decision-makers explaining and justifying their decisions. In the experience of the tribunal members, this may be an indicator that, consciously or unconsciously, the decision was made on discriminatory grounds. Furthermore, the particular use of language may be an indicator that the decision-maker was acting on a belief or assumptions about people who share the relevant protected characteristic, without considering whether that was so in respect of the complainant in question. As Baroness Hale stated in the Roma case, 'The object of the legislation is to ensure that each person is treated as an individual and not assumed to be like other members of the group' [82]. If satisfied that there is such a potential assumption, the tribunal then has to consider whether it was an assumption which, consciously or unconsciously, was held by the decision-maker; and if so whether it influenced his decision.*

Reasons and Decision Makers

84. The Claimant notes the Respondent's comments on the Supreme Court's decision in **Jhuti** and in particular the analysis of HHJ Auerbach in **Kong** from [64]-[78]. The Claimant's case is not analogous to the facts of **Jhuti**, and the Claimant does not seek to rely on the approach set out by the Supreme Court in **Jhuti** to make out his case.

85. Far more to the point in the present case are the comments of HHJ Tayler in **University Hospital North Tees & Hartlepool NHS Foundation Trust v Fairhall** UKEAT/0150/20 at [33]-[37]:

> *33. Most people are employed by an employer that is a legal person, such as a company, rather than by a natural person. In this case the claimant was employed by a NHS Foundation Trust. Dismissal involves the termination of the contract between the employer and the employee. The decision to terminate the employment contract, to dismiss the employee, must be taken by a natural person, or persons; the decision maker or makers. In many cases there will be no difficulty in identifying the decision maker or makers. Just as Mummery LJ warned against an excessive fixation on the burden of proof, it is important not to get tied up in knots about reasoning processes if it is clear who took the decision to dismiss and why they did so.*
>
> *34. The paradigm is a hearing at which one person, acting independently, takes the decision to dismiss, so there is only that person's reasoning process to be considered. A disciplinary hearing may be before a panel, in which case it may be necessary to consider the reasoning process of the panel, although often only the chair of the panel gives evidence, the employer presumably accepting the reasoning process of the chair properly evidences that of the panel.*
>
> *35. There may be circumstances in which people other than the decision maker are involved in the decision making process. Such other people might advise, or even be instrumental in persuading the decision maker to take the decision. If a person charged with taking a decision whether to dismiss (the dismissing officer) decides to dismiss at the behest of another person who wishes the employee to be dismissed for a prohibited reason, in circumstances in which the dismissing officer knows what he or she is doing, including being asked to dismiss for the prohibited reason, there is no conceptual difficulty in finding that the prohibited reason was adopted by the dismissing officer. For example, if a manager tells the dismissing officer that an employee should be dismissed because he or she has made protected disclosures, and the dismissing officer does what he or she been told, the making of the protected disclosures will be the reason why the dismissing officer decided to dismiss, in the sense of being the reason operating in his or her mind, notwithstanding that it may have been put there by someone else. There may be a number of people behind the scenes who have input as advisers or superiors who make it known to the decision maker that they want an employee to be dismissed because of the protected disclosures she or he has made; if the decision maker goes along with the plan the involvement of the instigators does not prevent a tribunal drawing a clear inference that, whatever its precise origin and development, the reason for*

dismissal operating in the mind of the decision maker was of a prohibited kind.

36. The very existence of the protection for those who make public interest disclosures shows a recognition of the possibility that managers in an organisation may decide that they want to be rid of a whistle blower. In such circumstances, particularly in a large organisation, the route to the eventual dismissal of the whistle blower may be tortuous and involve a number of people who, to a lesser or greater extent, are in the know about the plan to get the whistle blower out of the door. Such a scenario may involve multiple examples of unexplained unfair treatment. The facts may look much like those found by the Tribunal in this case. As far as the dismissal is concerned, in most such cases the decision maker would be going along with an overall plan to remove the whistle blower. In considering the decision to dismiss, the tribunal only has to determine the reasoning process of the decision maker because that person, as others may have done in taking the decisions leading to the dismissal, acted as he or she did because the employee made protected disclosures. The twists and turns in the journey matter relatively little because it is the destination that counts; the eventual reasoning process of the person who took the decision to dismiss. The fact that the dismissal appears to be the culmination of a plan to get rid of the whistle blower may be circumstantial evidence to support the conclusion that the decision maker dismissed because of the protected disclosure; if there was an overall plan to get rid of the whistle blower, it is plausible that the decision maker was acting in accordance with that plan. Assessing factual scenarios of this nature is precisely what the employment tribunal is there to do.

*37. The situation in **Royal Mail Group Ltd v Jhuti** [2020] ICR 731, where the decision maker is unaware of the machinations of those motivated by the prohibited reason, is probably quite rare. It is only in such cases that it is necessary to attribute a reason to the decision maker that was not, in fact, the reason operating in his or her mind when the decision to dismiss was taken. [the Judge then quotes paragraph 60 of **Jhuti**.]*

38. Thus, it is only in cases where the decision maker is acting in good faith, but has been manipulated by another, that it is necessary to rely on the attribution of the reason of the manipulator to the decision maker.

86. The approach in **Fairhall** was referred to in **Kong** without criticism at [71].

Unfair dismissal: Ordinary and Automatic

87. The Claimant does not dispute the principles contained within the Respondent's Opening Submission, but does offer the following additional authorities.

88. Where an employee's ability to work in his or her chosen career could be blighted by a finding of misconduct, particularly where the facts are disputed, it is of great importance that employers take seriously their responsibility to

conduct a fair investigation, and the standard of investigation must be high: **Salford Royal NHS Foundation Trust v Roldan** [2010] ICR 1457.

89. In **Ramphal v Department of Transport** [2015] IRLR 985, the EAT held as follows in relation to the involvement of human resources in the disciplinary process at [55]-[56]

> *55. … an investigating officer is entitled to call for advice from HR; but HR must be very careful to limit advice essentially to questions of law and procedure and process and to avoid straying into areas of culpability, let alone advising on what was the appropriate sanction as to appropriate findings of fact in relation to culpability insofar as the advice went beyond addressing issues of consistency….*
>
> *56. … an employee facing disciplinary charges and a dismissal procedure is entitled to assume that the decision will be taken by the appropriate officer, without having been lobbied by other parties as to the findings he should make as to culpability, and that he should be given notice of any changes in the case he has to meet so that he can deal with them, and also given notice of representations made by others to the dismissing officer that go beyond legal advice, and advice on matter of process and procedure. … (Emphasis added.)*

90. The Claimant submits that the underlined section of the judgment in **Ramphal** is a principle of general application and is not confined solely to human resources representatives.

91. In **Uddin v London Borough of Ealing** UKEAT/0165/19/RN at [78] HHJ Auerbach held as follows at to the applicability of the approach in **Jhuti** to the section 98(4) fairness question:

> *"It follows from Jhuti v Royal Mail [2020] IRLR 129 that the question of whether the knowledge or conduct of a person other than the person who actually decided to dismiss could be relevant to the fairness of a dismissal could arise, both in relation to the tribunal's consideration of the reason for dismissal under s 98(1) and/or its consideration of the s 98(4) question; and that, in a case where someone responsible for the conduct of a pre-investigation did not share a material fact with the decisionmaker, that could be regarded as relevant to the tribunal's adjudication of the s 98(4) question. The fact that the investigating officer knew that the complainant had withdrawn her allegations from the police, and the fact that the disciplining officer took her decision without taking account of that piece of information, because she was not told of it, was something that properly fell to be considered by the tribunal in deciding the fairness of the dismissal at the s 98(4) stage. Bearing in mind the need for the tribunal to consider the fairness of the end-to-end process, and the high investigative standard that fairness dictated in such cases, those were circumstances which the tribunal should have taken into account. They did not require any finding about why the investigating officer did not share that information with the disciplining officer (or the claimant). It turned simply on the propositions that: (a) given the disciplining officer's role, the information was something that fell to be treated as known to the employer; (b) it was at least potentially relevant evidence that could potentially be argued to*

provide some support to the claimant's case; and (c) because she did not in fact know about it, it was, however, not given any consideration by the disciplining officer, when she came to her decision. The disciplining officer having been made aware of and invited to take into account the complainant's complaint to the police, the tribunal should have concluded that fairness demanded that she also take into account the later decision to withdraw the police complaint."

92. With respect to allegations of inconsistent treatment:

    92.1. Inconsistent treatment can give rise to a finding of unfair dismissal; specifically because the reference to "equity" in section 98(4) imports the concept that *"employees who misbehave in much the same way should have meted out to them the same punishment"*: **Post Office Ltd v Fennell** [1981] IRLR 221 per Brandon LJ.

    92.2. In **Hadjioannou**, decided two months after **Fennell**, the EAT held at paragraph 25 (in a passage quoted in **Paul** and set out in the Respondent's Opening) that where there is an argument for inconsistent treatment the cases for comparison must be *"truly similar or sufficiently similar"*.

    92.3. It is right that in **Securicor Ltd v Smith** [1989] IRLR 356 the Court of Appeal held that where an employer consciously distinguishes between the two cases, the dismissal can be successfully challenged only if there is no rational basis for the distinction made. The Claimant submits that this does not mean the test for unfairness is *higher* in these cases. The test at all times is the range of reasonable responses test, and it follows therefore that if an employer's distinction between two cases is not irrational then it is not outside the range of reasonable decisions open to the employer.

    92.4. If there is inconsistency of treatment, it is no answer for the employer to say that this was because different managers dealt with separate incidents: **Cain v Leeds Western Health Authority** [1990] IRLR 168.

    92.5. In **Newbound v Thames Water Utilities Ltd** [2015] IRLR 734 the Court of Appeal upheld a finding of unfair dismissal based on inconsistency of treatment of a manager and direct report arising out of the same incident, and affirmed that '*the band of reasonable responses has been a stock phrase in employment law for over thirty years, but the band is not infinitely wide*". A Tribunal is entitled to find that dismissal was outside the band of reasonable responses without being accused of placing itself in the position of the employer.

93. With respect to appeals:

    93.1. At a general level, procedural defects at the disciplinary hearing stage may be remedied on appeal provided that in all the circumstances the later stages of a procedure are sufficient to cure any earlier unfairness: **Taylor v OCS Group Ltd** [2006] ICR 1602. The correct approach to deciding this question is not to consider whether the appeal was categorised as a review or a re-hearing, but rather, to consider the appeal's thoroughness and the open-mindedness of the decision-maker. At [47] Smith LJ held:

> *The use of the words "rehearing" and "review", albeit only intended by way of illustration, does create a risk that employment tribunals will fall into the trap of deciding whether the dismissal procedure was fair or unfair by reference to their view of whether an appeal hearing was a rehearing or a mere review. This error is avoided if employment tribunals realise that their task is to apply the statutory test. In doing that, they should consider the fairness of the whole of the disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage. (Emphasis added.)*

94. With respect to the fairness of the sanction:

    94.1. The test is, as the authorities set out in the Respondent's Opening show, the range of reasonable responses test. That band is however not *"infinitely wide"*: **Newbound** at [61]. As Bean LJ in **Newbound** also noted at [61], section 98(4)(b) demands that the question of fairness be determined *"in accordance with equity and the substantial merits of the case"*.

    94.2. Although the cases warn heavily against tribunals *"substituting"* their decision for that of the employer, an employment tribunal is entitled to find that dismissal was outside the band of reasonable responses without being accused of placing itself in the position of the employer: see **Newbound** at [61] and the reference in there to **Bowater v Northwest London Hospitals NHS Trust** [2011] IRLR 331 at [31].