YG/MF

EMPLOYMENT TRIBUNALS

Claimant: **Mr D Fotheringhame**

Respondent: **Barclays Services Limited**

Heard at: **East London Hearing Centre**

On: **8 – 12 and 15 – 16 January 2018**

Before: **Employment Judge Brown (sitting alone)**

Representation

Claimant: In Person

Respondent: Mr A Blake (Counsel)

JUDGMENT

It is the judgment of the Employment Tribunal that:-

1. The Respondent dismissed the Claimant unfairly.

2. If the Respondent had acted fairly it would not have dismissed the Claimant.

3. The Claimant contributed to his dismissal in the order of 20%. It is appropriate to reduce the basic and compensatory awards by 20%.

4. The Remedy Hearing will proceed on 9 – 11 May 2018.

REASONS

Preliminary

1. The Claimant brings a complaint of unfair dismissal against the Respondent, his former employer.

2. The parties agreed the issues in the case. They were:

    2.1. the reason for dismissal

    2.2. if it is misconduct:

        2.2.1. Did the decision-makers believe the Claimant was guilty of misconduct?

        2.2.2. Was this belief based on reasonable grounds, in particular was there an adequate investigation and/or a fair procedure?

        2.2.3. If the answers to the preceding questions is yes, did the decision to dismiss fall within the range of reasonable responses?

    2.3. If the dismissal was in some way unfair:

        2.3.1. Would the Claimant have been dismissed anyway for some other substantial reason?

        2.3.2. Judged objectively by the Tribunal, was the Claimant's conduct blameworthy such that it contributed to his dismissal?

        2.3.3. What compensation, if any, is just and equitable?

3. It is the Claimant's case that he was not dismissed for misconduct, but was sacrificed to appease the New York State Department for Financial Services ("DFS"). He maintains that the Respondent could not reasonably, and did not, believe that he was guilty of the misconduct alleged.

4. The Respondent contends that the decision makers, Mr Mahon and Mr Mbanefo (on appeal), reached a decision open to them on the evidence, following an adequate investigation and fair procedure. It denies therefore that the dismissal was unfair.

5. I heard evidence from the Claimant. I also heard evidence from: John Mahon, formerly Head of Corporate Banking at the Respondent and the dismissing officer; and Arthur Mbanefo, Head of Financial Resource Management at Barclays Capital Securities Inc. and the appeal officer. I read the witness statement of Paul Exall, Head of Reward and Performance for Barclays International and grievance officer.

6. The parties agreed that, at this hearing, which was listed to consider liability and issues of *Polkey* and contributory fault only, the Respondent would not rely on the argument that the Claimant would have been dismissed for some other substantial

reason on the ground that the New York State Department for Financial Services ("DFS") Consent Order prevented the Claimant from working in US dollar foreign exchange. The Respondent conceded that the procedure to consider an SOSR dismissal would have been likely to have taken longer than two and a half months, during which time the Claimant would have earned compensation to the statutory cap. That argument, if successful, would not reduce the Claimant's compensatory award. The Respondent did not wish to call complex evidence at this stage on the effect of the Consent Order and its interplay with the regulatory regime in the UK. However, the Respondent said that, in the event that the Claimant pursued reinstatement or reengagement at a Remedy Hearing, the Respondent would call evidence in relation to the DFS Order, regulatory issues and *Polkey*.

7. At the start of the hearing, the Respondent conceded that Mr Mahon, the dismissing officer, had seen a spreadsheet linked to the Respondent's Subpoena response to the Attorney General of New York, before Mr Mahon made his decision to dismiss. The Respondent apologised for having told Employment Judge Foxwell, at a Preliminary Hearing regarding specific disclosure, that Mr Mahon had not seen this document. The Claimant was unhappy that the Respondent had apparently misled the Tribunal over this matter. He said that, if Employment Judge Foxwell had not ordered that the document to be disclosed to the Claimant, the Respondent would never have made this concession.

8. The Claimant had obtained an opinion from a lawyer in New York on the legality of the DFS Order, particularly in relation to the Claimant's rights. I read the relevant letter from the American lawyer. I considered that it was only tangentially relevant to the issues in this case.

Findings of Fact

Background and Context

9. I heard a great deal of evidence in this case and was referred to a very large number of documents. These findings of fact are the facts which I considered to be most relevant to the issues I had to decide.

10. The Claimant began working for the Respondent on 13 September 2010. At the time of the matters in issue in this case, he was employed as Head of Automated Flow Trading within the Respondent's Electronic, Fixed Income, Currencies and Commodities Trading Business ("eFICC"). His Corporate Title was Managing Director. The position was very well paid; his gross pay was over £1 million in 2014.

11. The Claimant worked in the Respondent's electronic Foreign Exchange ("FX") trading group. His role had direct supervisory responsibility over London based traders in that team and had indirect supervisory responsibility over technology and quantitative research groups. The Claimant's role thus included oversight of electronic currency trading.

12. Electronic trading is driven by algorithms and is conducted at lightning speed with electronic decisions made in milliseconds. The Bank (which includes a number of corporate bodies, not just the Respondent) is a Market Maker, which that means that it provides "buy" and "sell" quotes for prices at which it will buy and sell currency to a party *("the counterparty"*). The counterparty can choose if and when to send an order to

try to execute a trade at one of the Bank's published prices. The speed of electronic trading is such that, if a counterparty has an algorithm which is fractionally faster than the Bank's, then it will have a competitive advantage, enabling it to profit at the Bank's expense. All the Bank's FX customers are corporate clients, not private individuals.

13. The Bank's clients can trade electronically using different "channels". The Bank's GUI channel is an application designed by the Bank which clients can install onto their computers, in order to execute trades with the Bank. The GUI channel is used by human beings, rather than computer programs. Clients can also trade through "ECNs" – Electronic Communication Networks. These are electronic brokers or third parties which sit between the client and the Bank. All quote and order messages pass through the ECN's systems. The main ECNs are "Currenex" and "Integral." Yet further clients trade through the "FIX" channel (or "API" channel). Clients, or ECNs, which use the FIX/API channel write their own computer programs to send the Bank orders for trades.

14. The Bank has technology known as "Last Look" or "LL", which enables the Bank to pause a request for a trade from a counterparty for a moment, to determine whether the price requested is within the Bank's trade tolerance. During the time pause, the Bank's electronic systems check whether the market has moved beyond a particular price tolerance for the trade. The length of the pause can be adjusted electronically. The longer the pause, the more information and thinking time the Bank's algorithm has. If the market has moved beyond the Bank's price tolerance for execution of the trade during the pause, Last Look will reject the trade.

15. Last Look is used by the Bank to protect it against trading on stale prices due to latency (delays in a Market Maker updating its prices), but also against trading behaviours such as "aggregation" and "order splitting". The latter occurs where a counterparty splits an order for 10 million of a particular currency, into 10 orders of one million, and sends each smaller order to 10 different Market Makers. A counterparty splits its orders to obtain a more attractive price than would be offered to a single order for 10 million. There are numerous such trading behaviours which can result in Market Makers losing money on trades. Last Look is widely used by Marker Makers to protect them against adverse changes in market price between generating a quote for a trade and executing the trade.

16. Last Look was introduced into the Respondent's technology systems before the Claimant was employed by the Respondent.

17. The Respondent has two technology systems controlling its eFX business: "BARX" and "BATS". LL was originally implemented in BARX in 2008 and, later, in BATS in 2010. BATS LL introduced several new, different rules for determining whether a trade should be rejected. The settings of the LL algorithms in both BARX and BATS could be adjusted to vary the behaviour of the algorithms.

18. Almost without exception, Last Look is <u>not</u> applied to trades executed through the Bank's GUI channel. It is applied to trades executed through other channels.

19. At about the beginning of 2015, the New York State Department for Financial Services ("DFS") began an investigation into the Bank's use of its LL system. The risk to the Bank in the DFS's investigation was the potential revocation of its banking licence for New York State. This would affect its activities in New York City, one of the principal financial centres in the World.

20. On 17 November 2015, the Bank entered into a Consent Order with DFS under which it paid a civil penalty of $150 million and agreed, under the heading *"Employee Discipline"*:

> *31. A Barclays Managing Director and Global Head of Electronic Fixed Income, Currencies, and Commodities ("eFICC") Automated Flow Trading has been suspended but remains employed by the Bank. The Department orders the Bank to take all steps necessary to terminate this individual, who played a role in the misconduct discussed in this Consent Order.*

21. That provision referred to the Claimant. The Consent Order also provided, at paragraph 33:

> *33. If a judicial or regulatory determination or order is issued finding that the termination of any of the above employees is not permissible under local law, then such employee nevertheless shall not be allowed to hold or assume any duties, responsibilities, or activities involving compliance, FX benchmarks, or any matter relating to US or US dollar operations.*

22. A separate investigation was started by the Attorney General for New York (*"NYAG"*). This led to no further action. No regulatory action was taken in relation to the Respondent's use of Last Look by, either the Financial Conduct Authority in the UK, or the United States Department of Justice. Both the latter bodies have relevant regulatory authority over the Respondent's FX business.

23. On 30 November 2015, the Respondent commenced disciplinary proceedings against the Claimant. These led to his dismissal with notice, allegedly for misconduct. His effective date of termination was 15 December 2016.

24. The Respondent contended that, in broad summary, it dismissed the Claimant because the Claimant (i) showed a lack of transparency about Last Look and encouraged his team to do the same, in a way which fostered a distrustful and "closed" environment which was not professional, transparent or collaborative (allegations 2 and 3 against him); had a negative attitude towards clients and misused LL as a profit opportunity (allegation 4); (iii) failed to drive forward the plan to make BATS and BARX symmetrical (allegation 6); and (v) failed to implement appropriate systems and controls (allegation 7).

Relevant Procedures and Policies

25. During his employment, the Claimant was subject to a number of policies and contractual duties, including the Respondent's Global Supervision Policy, its Global Code of Conduct, the Respondent's Disciplinary Policy and the Claimant's contract of employment.

26. During the Tribunal proceedings, the Claimant highlighted the following provisions of those documents:

> *"**Global Supervision Policy** – (Tab 5A, Bundle B2)*
>
> - *P388: 'The firm's internal control mechanisms rely on appropriate*

segregation of duties between functions'.

- *P399: 'proprietary information on positions and trading strategies and any deal related hedges must also be kept strictly confidential'*

- *P401: "Need to know policy. This policy requires that information held by a representative of the firm should only be disclosed where there is a legitimate need to know'*

- *P401: 'As a supervisor you should frequently remind your team of the following guidelines with respect to handling confidential information. Avoid discussing confidential matters…'*

- *P423: 'Information Barriers …… electronic separation to ensure that electronically stored material should not be accessible by personnel without a legitimate need to access such information'*

Contract of Employment *– (Tab 4A, Bundle B2)*

- *P296: 'you have a personal responsibility to protect and maintain confidentiality belonging or relating to the company … You must use your best endeavours to prevent the unauthorised publication or disclosure of any such confidential or secret information'*

- *P 297: 'keep confidential all intellectual Property created or conceived by you alone or with others'*

Global Code of Conduct *– (Tab 5B, Bundle B2)*

- *P465: 'The information you obtain through your employment by the firm will almost always belong to the firm…and is therefore considered to be confidential'*

  'Presume that information is confidential and always treat it as such…Do not communicate confidential or commercial information to other people within the Investment Bank unless: (i) there is a clear need to know on the part of the recipient'

- *P466: 'Do not disclose any confidential information to anyone outside the firm or anyone inside unless they have a need to know'*

Disciplinary Policy *– (p21, Bundle A1)*

The following are Gross Misconduct:

- *'Unauthorised disclosure, or use, of Barclays' confidential information'*

- *Non-compliance with rules on 'confidential information'*

- *Breach of Code of Conduct*

- *Breach of conditions in contract of employment"*

27. The Respondent highlighted that the Claimant was also subject to the following duties under the Policies:

***Global Supervision Policy**:*

27.1. To take all reasonable steps to establish a strong culture of compliance in his business area [B2/383];

27.2. To take all reasonable steps to ensure that employees supplied all required information to clients to enable them to understand the features, risks and rewards of the particular product being marketed to them [B2/392]; and

27.3. To execute client orders as soon as practicable in the circumstances, unless there were reasonable grounds to believe it was in the best interests of the client to postpone execution [B2/397];

***Global Code of Conduct**:*

27.4. To engage in transactions at market prices, except in certain circumstances where reasonable steps had been taken to ensure the transaction is not being entered into for an improper purpose [B2/463];

27.5. To avoid action/inaction which might have the potential to incur reputational risk for the Bank [B2/470]; and

***Barclays Group: Statement on Corporate Conduct and Ethics**:*

27.6. To treat customers fairly [B2/475]; and

27.7. *To contribute to a safe and healthy working environment in which employees are treated fairly and with respect [B2/476].*"

The Investigatory and Disciplinary Process

28. During 2015 the Claimant was interviewed by the New York State Department for Financial Services ("DFS"), the Department of Justice in America and by representatives of the Attorney General for New York. He was also interviewed by external and in-house lawyers for the Bank. During each of these interviews the Claimant was supported by independent legal advisors funded by the Respondent. The DFS, Department of Justice and Attorney General for New York all had regulatory responsibility in relation to financial services.

29. The Claimant helped the Respondent prepare a Subpoena response to the New York Attorney General, including files showing Last Look reject statistics in relation to counterparties' trades.

30. The Respondent suspended the Claimant on 13 August 2015. On 16 November 2015, following an internal investigation at the Respondent, a recommendation was made that the Claimant be referred to a disciplinary hearing (Bundle A1 pages 43 –

51). The allegations against the Claimant referred to in the recommendation were later set out in writing to the Claimant. The recommendation detailed various emails and communications which underpinned reference to disciplinary proceedings. Again, these were later brought to the Claimant's attention. The recommendation also said this:

> *"42. The communications detailed above, particularly those concerning the level of transparency with colleagues and customers, need to be balanced with the following factors:*
>
> *(a) The number of 'problematic' communications is relatively small when balanced with the overall population of communications reviewed by the investigation;*
>
> *(b) There are many examples of open and transparent communications with BARX users about rejects and Last Look, as well as examples of clients negotiating or seeking to negotiate their Last Look settings – suggesting a high degree of awareness amongst customers of Last Look and its relevance to their order flow; and*
>
> *(c) Sales were generally aware of Last Look;*
>
> *(d) Last Look has been commonly understood in the market for many years and market participants were well aware that Barclays, and other banks, had a discretion to reject trade requests, and reject requests using Last Look;*
>
> *(e) The clients affected by rejections were overwhelmingly the most sophisticated BARX counterparties and, therefore, the group most likely to take advantage of any information about Barclays' Last Look settings to the detriment of Barclays (and BARX pricing). With that in mind, it may have been appropriate to withhold information in order to maintain the integrity of Last Look as a legitimate defensive tool for Barclays.*
>
> *43. In addition, there is evidence to suggest that Mr. Fortheringhame was aware of Barclays supervisory expectations, as detailed in the GSP, and that he spent a considerable amount of time monitoring Last Look data and directing his team to ensure settings were appropriate for clients."*

31. On 30 November 2015, Sonya Bonniface, Director of Human Resources at the Respondent, wrote to the Claimant, inviting him to a disciplinary hearing. She said that the purpose of the hearing would be to consider whether disciplinary action should be taken against the Claimant in relation to the following allegations concerning his conduct as Head of Automated Flow Trading in the Respondent's eFICC Trading Business:

> *"1. Inappropriate or injudicious use of language in that you sent a number of communications that created reputational risk for Barclays, particularly regarding the language used and the impact of those communications on*

your reports. For example, your emails dated 7 February 2011 and 29 June 2012.

2. *Inappropriate directions and guidance to staff regarding disclosure to customer and colleagues in that, over a period of several years, you repeatedly instructed your reports to withhold information regarding Last Look from their counterparts in Sales. For example, your emails dated 6 June 2011, 18 July 2011, 10 October 2011, 7 November 2011 and 29 November 2011.* (In the 6 June 2011 email the Claimant had said, "In fact avoid mentioning the existence of the whole BATS Last Look functionality. If you get enquiries just obfuscate and stonewall." On 18 July 2011, the Claimant had said, *"*Do not discuss any part of this work with Sales… changes are neither driven nor notified to Sales,*"* and, in the 10 October 2011 email, the Claimant said, "Please remember do not discuss BATS LL with Sales at all. They don't need to know it exists." In his email of 7 November 2011, the Claimant had said, "Do not discuss Last Look with Sales." In his email of 29 November 2011, the Claimant had said, "Can you try and make sure that Sales don't ever contact anyone in BATS IT or QA directly… It would be best if they don't even know the names of people in those teams..").

3. *These instructions contributed to an environment in which your team was not transparent with client-facing employees in Sales regarding Last Look (for example, the email from Lionel Ebenezer Raj dated 24 April 2012) and may have contributed to an environment in which your reports encouraged Sales to falsely blame Last Look rejects on technical glitches (for example, the email from Sharad Arora dated 24 June 2011).* (In 24 June 2011 email, the member of the Claimant's team had said, "If you don't want to tell him about Last Look we can always tell him there is an IT glitch etc etc.")

4. *Inappropriate direction and guidance to your team regarding treatment of customers and management of conflicts of interest. For instance:*

    (a) *You portrayed the potential lack of transparency over Last Look rejects for clients trading through ECNs (such as Currenex and Integral) as a P&L opportunity for Barclays (for example, your email of 12 March 2012);* (In the Claimant's 12 March 2012 email he had said, "If a client hasn't complained consider raising the reject ratio and re-calculating the optimal LL settings… really squeeze them on rejects.")

    (b) *You similarly instructed that ECN clients should be targeted for higher rejection rates (for example your emails of 2 August 2011, 27 March 2012 and 14 February 2013);* (In the Claimant's email of 27 March 2012 he had stated, "I think we just go ahead with it and then gradually tighten the rule until someone complains.") *and*

    (c) *You instructed that fixed delays be added to customer's Last Look hold times to hide the time improvements gained*

from the Project Marlin Infrastructure upgrade, in order to 'make more money' (your email of 15 March 2012) (The Claimant's email of 15 March 2011 to Mike Bagguley had said of Project Marlin, "From a revenue perspective the main effects will be: 1. Longer last look times will enable us to make more money with the same number of trade rejects and the same trade confirm times...*".*

5. *Inaccurate marketing materials being issued that inaccurately described the execution of stop loss orders on Powerfill marketing materials (see BARX FX Order PowerFill materials).*

6. *Inadequate resolution of IT issues concerning the failure to implement a decision in September 2014 to make BARX Last Look symmetrical and a bug which affected Stop Loss Capping from September 2014 to October 2015. Whilst these two oversights may have been the result of issues with the IT function, which you did not oversee, they were matters which directly affected your business area and its clients. Consequently, they raise concerns with regards to the extent to which you managed the Automated Flow Trading business and ensured that risks were properly monitored and, where identified, mitigated.*

7. *Inadequate supervision:*

   In addition to the evidence detailed above, there appear to have been potential gaps in the systems and controls of the Automated Flow Trading business for which you may have been accountable. For example, it appears that:

   There was no written procedure detailing the change management process for Last Look, including the process for approving changes to Last Look settings and determining whether settings were suitable for particular client types, such as Real Money and Corporate clients.

   (a) There were no written supervisory procedures for the introduction and periodic review of Last look settings to assure that they continued to be appropriate and consistent with the stated rationale for Last Look;

   (b) There were no written procedures governing the management of risks associated with inconsistencies arising from the interplay between BATS and BARX FX.

   (c) There were no written procedures or guidelines in place to ensure that the configuration of pricing for clients was fair and reasonable.

   The absence of documented procedures of the type detailed above raises concerns as to whether you had complied with the expectations detailed in Barclays' Global Supervisory Policies for the Investment Bank (the 'GSP'), for instance the expectation that you would:

> *(d) take reasonable steps to ensure that your business was organised so that it could be controlled effectively and that it complied with relevant legal and regulatory requirements and standards (2009 GSP); and*
>
> *(e) be able to demonstrate and evidence the controls and procedures used in order to meet your supervisory responsibilities (2012 GSP)*
>
> *Without adequate supervisory systems in place, there was a risk that you would be unable to manage and control the risks associated with the use of Last Look, including the risk that it could be used inappropriately and the risk that clients would be inadequately informed as to the use and effect of Last Look.*
>
> *Please note that the documents referred to above are a non-exhaustive example of the evidence that may be referred to at the hearing and that all the documents we will sent through to you shortly may also be taken into consideration)..”*

32. Ms Bonniface told the Claimant that, because of the serious nature of the allegations, if disciplinary action was decided to be appropriate, sanctions up to and including dismissal, with or without notice, would be considered. Ms Bonniface told the Claimant of his right to bring a Barclays’ employee as a companion to the hearing.

33. In the Claimant’s 13 August 2015 letter of suspension however, the Respondent had said that, during the Claimant’s suspension, *“You may not…contact any clients, or employee of Barclays or the Barclays Group to discuss your leave…”*. The letter also said, *“You must not discuss the circumstances connected to your suspension or this investigation. Also you must not, therefore, discuss these matters with any others either inside or outside the Bank…”* (Bundle A1, pages 30 – 31).

34. On 2 December 2015 the Claimant replied to Ms Bonniface. He said that he had received 2 lever arch files containing documentation and asked that the disciplinary hearing be postponed. The Claimant requested additional documents which he said he required in order to prepare adequately for the disciplinary hearing. The Claimant said that he had seen a New York State DFS press release dated 18 November 2015, which confirmed that the Bank had been ordered to take all steps necessary to terminate the employment of the Managing Director and Global Head of Electronic Fixing Currencies and Commodities, as well as the DFS Order dated 17 November, which repeated that requirement. The Claimant said that he believed that he was the individual referred to and it seemed clear that the outcome of the disciplinary action was a foregone conclusion, in that the Bank was simply going through the motions, to give the appearance of acting reasonably (bundle A1, p.60).

35. The Claimant requested the following documents: missing emails exhibited to the memorandum of the Claimant’s first interview; “*A database copy of all the emails I sent while at Barclays in an electronically searchable format; A copy of all electronic chats and emails between Barclays employees and clients…contain any reference to Last Look…or the terms “reject”, “reject ratio”, “hold time/period”, “holding time/period*” (The Claimant also asked that, in addition, all the search terms that were used by the Bank in its investigation be used); “*The documentation describing the policy on Written*

Supervisory Procedures" when the policy went live and how it was notified to the Claimant; "All *WSPs in the FX and eFICC businesses*" and the date when they were formally signed off; … "*All the contents of the eFICC team wiki referencing in any way practices, policies, procedures etc. and the date of any changes*"; full audit reports for Audit Department investigations into eFX business during the Claimant's period of employment; all reports by the Operational Risk Department on the eFX business during the Claimant's employment; all communications with regulators concerning the operation of the eFX business during the Claimant's employment; … The Desk Procedure document for the eFX business; "*All documents and emails/BRDs sent or received by Nick Wells, Daron Bowes and Nick Shires concerning the request to make BARX LL symmetric and to make the Stop Loss gapping logic fully symmetric. All mention of this request and its remediation. The transcript of the interviews with the above personnel regarding how the error occurred and whose enquiry brought it to light and what involvement [the Claimant] had in directing that it should be remedied";*…documents describing the exact legal and regulatory requirements referred to in allegation 7(d) against the Claimant; a full list of all compliance breaches recorded against the Claimant's name; the complete Subpoena response to the New York Attorney General including all the excel files describing the statistics around Last Look; copies of all communications from the DFS to Barclays concerning Last Look and notes of meetings and conversations, and correspondence, between the Bank and DFS in which the Claimant's conduct and/or requirement in paragraph 31 of the DFS order were discussed; transcripts of interviews with other witnesses who participated in the DFS investigation; and notes of internal bank meetings/ conversations/ correspondence in which the Claimant's conduct and the requirement of paragraph 31 of the DFS order were discussed.

36. On 3 December 2015, Ms Bonniface wrote to the Claimant, agreeing to postpone the disciplinary hearing and saying that she would respond in due course to the Claimant's request for further documents (A1, p.63).

37. On 25 February 2016 Ms Bonniface wrote again to the Claimant (A1, p.64-68). Ms Bonniface responded to the Claimant's document requests. She provided the missing sets of exhibits associated with the Claimant's first interview memorandum but said, in relation to the Claimant's request for all emails he sent while at Barclays, that it was a very broad request, likely to generate hundreds of thousands of irrelevant documents. She said that the communications which were relevant to the issues to be determined at the hearing were provided to the Claimant on 30 November 2015, as part of the disciplinary hearing bundle. Ms Bonniface said that if there were other documents or matters which the Claimant felt were relevant, then he would have the opportunity to raise them at the disciplinary hearing with the hearing manager, who could then consider whether further enquiries or documents were required before reaching a decision. Ms Bonniface said that the Claimant's request for a copy of all electronic chats and emails between Barclays employees and clients and other employees containing any references to Last Look or terms "reject", reject ratio", "hold time/period" and "holding time/period" was also overly broad, but that, again, the Claimant could raise any matters, or documents, in the hearing.

38. Ms Bonniface provided the Global Policies and relevant policies requested by the Claimant and said that she was currently retrieving copies of relevant written supervisory procedures in the eFX and eFICC business. She also enclosed a copy of the Respondent's Global Electronic Trading Policy.

39. In respect of the Claimant's request for the contents of the eFICC team wiki referencing any practices, procedures and policies, Ms Bonniface said that the Claimant's request referred to the internal web page created by the eFICC Trading Desk to store procedures, control documents and related materials. She said that those materials contained proprietary and confidential information, as well as information which was likely to be irrelevant, and that the Respondent did not intend to provide the Claimant with anything further.

40. Ms Bonniface said that the Respondent was not aware of any audits by Barclays internal Audit which included a review of Last Look or eFICC trading during the relevant period, or of any reports by the Operational Risk Department on Last Look, or its use. She said that all communications between the Bank and its regulatory supervisors were confidential and would not be disclosed. Ms Bonniface said that algorithmic reference sheets and control reference sheets (ARS and CRS) documents for the eFICC business contained propriety and confidential information and that the Respondent was not aware of any which specifically concerned Last Look.

41. Regarding the Claimant's request for desk procedures for the eFX business, Ms Bonniface said that she was enclosing a copy of the BATS/BARX FX algorithmic desk procedures dated October 2013.

42. In respect of the Claimant's request for documents and emails and BRDs sent or received by Nick Wells, Daron Bowes and Nick Shires, concerning the request to make BARX LL symmetric and transcripts of interviews, Ms Bonniface said that transcripts of interviews with Barclays staff during the course of its investigations into Last Look were legally privileged and confidential and that the Respondent had provided all relevant communications with staff.

43. Ms Bonniface specified the legal and regulatory requirements relied on by the Respondent, including extracts from Barclays Global Code of Conduct.

44. Ms Bonniface said that the complete Subpoena Response to the New York Attorney General, including Excel files, were confidential as between Barclays and one of its regulatory supervisors and that the Respondent did not propose to provide copies to the Claimant.

45. Ms Bonniface also asserted privilege in relation to communications between the DFS and Barclays concerning Last Look and meetings, conversations and interviews between the Respondent and DFS and internally in the Respondent relating to the requirement of the DFS order at paragraph 31.

46. Ms Bonniface said, in response to many of the Claimant's requests, that the Claimant could raise any other relevant documents or matters with the hearing manager, who would consider whether further enquiries or documents were required, before he came to a decision.

47. The Respondent did not provide the Claimant with its Subpoena Response to the Attorney General New York, nor the Excel spreadsheets attached to it. The Respondent did not provide the Claimant with any additional correspondence or interview transcripts regarding the implementation of Last Look symmetry. These documents were only disclosed to the Claimant during disclosure and/or specific disclosure in these proceedings.

48. The Claimant was not provided with all documents concerning Last Look stored centrally on the Claimant's team intranet site (the wiki). He obtained these on his application for specific disclosure in these proceedings (bundle A3, p.1287-1332). These documents comprise a BATS Last Look log, recording changes to Last Look framework during 2014. They record various occasions upon which clients' Last Look settings in BATS were changed. The documents also include a list of BATS clients with Last Look exceptions (p.1296) and their required reject ratio. The documents also comprise a BATS Last Look rule change log for 2012, recording changes to settings for clients during that year.

49. In addition, the documents obtained on disclosure included a BATS Last Look Support Document, which the Claimant told the Tribunal he had been responsible for creating. The Last Look Support Document set out 10 principles to be applied in determining Last Look settings. These included:

> *"1. The longer the holding period and the higher the target reject ratio, the more revenue we make from a client. Be firm when specifying these parameters.*
>
> *…*
>
> *4. There are just 2 Default groups…*
> *5. The exceptions list should be as short as possible. All clients should try to be put on their default setting.*
>
> *…*
> *8. Always fill in the reason why a client needs to be on the exception list in the comments section…*
>
> *9. (Reject ratios) for exception clients will be monitored regularly to identify deviations from target reject ratios. Setting will be adjusted to achieve target reject ratios.*
>
> *10. Reject ratios for all 'default' clients will be monitored. Increases in reject ratio are often indicative of increased toxicity of flow or technology/pricing problems." (A3, p.1316)*

50. The Support document also contained links to a guide to assessing if the Last Look settings are correct for clients "Last Look Optimisation" (page A3/1318). The Support document dealt with client exceptions and stated:

> "*Firstly, it must be said that we want to keep the number of exception clients as low as possible. If there is a business reason for putting a client on an alternative setting. The correct procedure is:*
>
> *1. Email London with the client, the reason and expected reject ratio required.*
>
> *2. Analysis will be done and findings sent back.*
>
> *3. London will amend the codebase to reflect any change.*
>
> *4. The exceptions page will be updated and monitored weekly to make sure*

the expected Reject Ratio is being met." (p.A3, 1319)

51. Ms Bonniface confirmed that the Claimant's disciplinary hearing would take place on 15 March 2016. She said that no decision had been taken by the Respondent in relation to the allegations against him. Ms Bonniface said that the Respondent acknowledged the New York State Department of Financial Services press release and the Order dated 17 November 2015. She said that the Bank had appointed John Mahon as the independent hearing manager to consider the allegations against the Claimant and determine the outcome. She said that the decision would be independently determined by Mr Mahon, on the basis of the evidence set out in the disciplinary file and any further representations that the Claimant wished to make.

52. Mr John Mahon, then Co-Head of Barclays Non-Core Business, held a disciplinary hearing with the Claimant on 22 March 2016. At that time, Mr Mahon was a member of the Respondent's Regulatory Investigations Oversight Committee, "RIOC". The RIOC was a standing body to provide oversight, direction and supervision of significant internal and external regulatory investigations and remediation.

53. The RIOC had approved the agreement of the Consent Order with the DFS.

54. The Claimant prepared a written response to the allegations, to which he appended documents on which he relied in support of his contentions. The Claimant's response was contained in Tribunal Bundles labelled, "Claimant's Defensive Script Volume C1 & C2". The attached pack of documents was contained in Tribunal Bundle volumes D1 and D2. Volumes C1 and C2 were about 580 pages long. Volumes D1 and D2 were about 550 pages long.

55. In relation to the allegation that he had "given inappropriate directions and guidance to staff regarding disclosure to customers and colleagues," in that he had, "repeatedly instructed his reports to withhold information regarding Last Look from their counterparts in sales including .. emails of 6 June 2011, 10 October 2011, 7 November 2011 and 29 November 2011", the Claimant said, in his written response, that he was duty bound to keep algorithmic implementation details confidential, but that he had actively informed and trained sales employees about the general principals and properties of Last Look. He said that Sales employees fully understood these.

56. The Claimant said that he had created a Sales training role. He referred to an email of 22 June 2012 (bundle D1, p.74) wherein he had set up a Last Look oversight role for a trader, whose duties included leading the education of Sales about Last Look, its benefits and why the Respondent needed to be firm. The Claimant said he had organised meetings with Sales management with the specific discussion item "Last Look/Rejects" (D1, p.14). The Claimant also said that Sales had tools which allowed them to view Last Look details, including BARX Trading Report reject ratio reports, which were supported by a PowerPoint training understanding BARX Trading Reports, in which reject ratio reports were explained (bundle D1, pgs.42-43). The Claimant also pointed to evidence of a Sales person using the reject ratio report (bundle D2, pgs.471-472). The Claimant also said that he had designed a toxicity index tool and pointed to an email of 15 June 2012 (bundle D1, p.186) in which the Claimant had set up a project to create a toxicity index for client flow. The Claimant also said that there were tools used by the Protection Support Team, to check reject logs and look at configurations, to use the information to inform sales. The Claimant further referred to

an email chain on 12 July 2011, which showed Sales employees seeking the reasons for a reject and BARX support supplying the reason as Last Look, along with the Last Look settings for the client (bundle D2, pgs.485-486).

57. The Claimant also attached 23 emails in which the Claimant had communicated with sales staff about Last Look. These included an email to Marek Robertson, Head of Sales, on 20 June 2012, setting out how Last Look operated saying, "*There is a Sales Reject Ratio report on BTR which should provide transparency about the rejects…Clients who give us sharp flow will get higher rejects – that's the deal*" (Bundle D1, p.71). Another email from the sales team to the Claimant showed the sales team requesting that the Claimant ensure that Last Look was put in place in respect of particular clients (bundle D1, p.81).

58. An email of 29 October 2012 showed a member of the Claimant's team asking whether the Claimant was happy if the "hold times" on Last Look were sent to the members of the Sales team and the Claimant replying that he was (bundle D1, p.87). The emails also included one from the Claimant to Mr O'Sullivan of the Sales team on 15 June 2012, wherein the Claimant provided Sales with an in-depth analysis of the Last Look Rejects for a client (bundle D2, p.473).

59. The Claimant said in his written response, "*There are literally hundreds of records showing sales discussing Last Look,*" which the Claimant said had been denied to him. The Claimant also said that clients knew about Last Look and gave references for three emails in which clients were discussing Last Look with the Respondent (bundle C1, p.7).

60. The Claimant also responded to the allegation that, on 6 June 2011, the Claimant had said in an email:

> "*Do not involve Sales in anyway whatsoever. In fact avoid mentioning the existence of the whole BATS Last Look functionality. If you get enquiries just obfuscate and stonewall.*"

The Claimant said that this was completely consistent with the standard policy concerning technical algorithm details (bundle C1, p.7).

61. The Claimant addressed an email on 10 October 2011, in which the Claimant had said (bundle A1, p.168):

> "*Please remember do not discuss BATS Last Look with Sales at all, they don't need to know it exists. It's a tool that we will apply systematically within QA and BATS Trading. Putting Sales in the loop will just add noise to the process.*"

Again, the Claimant said, in his response, that this was consistent with the standard policy concerning not disclosing algorithm details.

62. The Claimant also addressed an email he had sent on 7 November 2011, in which he had said:

> "*Do not discuss Last Look with Sales. If there has been a spurt just blame it on the weekend IT release and say it's being fixed.*" (bundle A1, p.191).

The Claimant commented that he had also said, in the email, that there should not have been an increase in Last Look rejects. He said that the email was completely truthful. He said:

> "*The spurt in rejects that occurred on this occasion was due to a slight error in a "widely known" IT release as is quite clear in the immediately preceding email to which this is a response.*
>
> *For this technology release great effort was made beforehand to try and ensure that there was no such change in the reject rates…*"

The Claimant referred to a number of emails showing proof of the effort to keep Last Look reject rates constant (bundle D1, pgs.55, 233, 239 and 241).

63. On 29 November 2011, the Claimant had said in an email to his direct report:

> "*Can you try and make sure that Sales don't ever contact anyone in BATS IT or QA directly. They always need to go through BATS Trading. It would be best if they don't even know the names of people in those teams.*" (bundle A1, p.172)

The Claimant said of this, in his response:

> "*This is just good team organisation… We don't allow the clients to contact the quants directly with good reason. The best hope of ensuring accurate communication is to observe these organisational principles.*"

He quoted from the Bank's Global Supervision Policy: "*The firm's internal control mechanisms rely on appropriate segregation of duties between functions.*" (bundle C1, p.8)

64. In response to allegation 3, that the Claimant's instructions contributed to an environment in which his team was not transparent with client facing employees in Sales regarding Last Look and may have contributed to an environment in which the Claimant's reports encouraged Sales to falsely blame Last Look Rejects on technical glitches, for example, an email from Sharad Orera on 24 June 2011, the Claimant said that there was no such environment and, in fact, that there was a strong environment of constant open engagement with Sales and support staff and clients. The Claimant provided 42 emails showing what he said was a general knowledge amongst Sales and clients and openness about Last Look. The Claimant said that the emails were the tip of the iceberg, but that the Respondent had refused to provide the Claimant with all Sales and client support emails which referred to Last Look. The emails the Claimant referred to included: an email from Sales person saying: "*Last Look settings reviewed with BATS*" (bundle D1, p.113); an email from a member of the Sales team to other Sales employees and the Claimant, saying that, as agreed with the Claimant, reject rates would be widened and concluding: "*We will still have Last Look protection in the interim*" (bundle D1, p.130) and; an email from the Sales team to many other members of the Sales team saying: "*Last Look settings reviewed with BATS and changes made*". (bundle D1, p.113).

65. With regard to the specific email mentioned in the allegation, sent by a member of the Claimant's team, the Claimant said that the email was not representative of team member's behaviour and was not something that the Claimant had ever encouraged.

The Claimant said:

> "*In his defence he is dealing with a dishonest counterparty and I think this may have clouded his judgment slightly on this occasion. I know him to be an honest professional.*"

66. The Claimant provided 11 emails showing this team member correctly communicating regarding Last Look, including an email of 19 December 2011, in which the team member said, "*We informed the client before we added them on Last Look*" (bundle D1, p.264) and another email which that team member sent on 18 April 2012 saying, "*Yes, imposing Last Look will help. But we need to tell the client about it before we do that*." (bundle D1, p.270)

67. The Claimant also addressed allegation 4. The Claimant said that it was completely clear to all ECN users when they were rejected by the Respondent and what their reject ratios were (bundle C2, p.142). The Claimant said that the high toxicity and unprofitability of the ECN business was directly due to the trading behaviour of the counterparties, "*who by construction deliberately trade not full, sweep the stack, machine gun etc – attempting to get prices for large size trades that are only given to small size trades.*" The Claimant said that profitability of the ECN channel had been consistently at, or below, zero and said that this could be proven by looking at the Profit and Loss reports (the Claimant was not given Profit and Loss reports).

68. The Claimant referred to his 2012 end of year review when he was given the objective, "*Last Look should have several mio extra squeezed out ASAP*." (mio is an abbreviation of million). The Claimant said that he was very open about publicizing a reduced service level and referred to an email where he agreed with his direct report that "*very reduced service levels*" should be given to any aggregator client and that this should be made public (Bundle D1p.194 to 195). The Claimant said that the aim had been to improve client service and protection and again referred to an email dated 9 September 2012 (bundle D2, p.353), where his Last Look coordinator had prepared a year to year summary of Last Look rule performance and concluded the email by saying: "*In summary the trend through the year has been to reduce overall reject ratios to improve client service whilst still offering consistent performance in P & L protection from Last Look*."

69. With regard to allegation 4c, that the Claimant had instructed fixed delays to be added to customer's Last Look hold times, the Claimant said:

> "*The Marlin project was a very expensive and lengthy upgrade to the technology infrastructure. It is totally acceptable that we try to get a return on that investment by strengthening our defences to toxic flow. We achieved this without changing the reject ratio or confirmation time experienced by clients. Any unexpected initial hiccups were corrected immediately.*" Bundle C2, p144.

He referred to emails showing efforts to keep reject ratios constant for clients. The Claimant also referred to the 15 March 2011 email that he had sent to Mike Bagguley, his line manager's manager, about the project Marlin infrastructure upgrade in which the Claimant had said:

> "*From a revenue perspective the main effects will be:*

1. *Longer last look times will enable us to make more money with the same number of trade rejects and the same trade confirm times…*"

The Claimant said that email proved that his approach was fine with senior management level (bundle D1, p.245; C2, p144).

70. The Claimant also provided responses to allegations 1 and 5. Those allegations were not subsequently upheld.

71. The Claimant responded to allegation 6, which alleged that the Claimant had been responsible for inadequate resolution of IT issues regarding BARX Last Look symmetry.

72. The Claimant said that he had specified that BARX Last Look should be made symmetrical in or about March 2014 and that he had discovered that IT had made a mistake and that it had not been implemented. The Claimant said:

> "*I notified compliance and the legal team investigating Last Look. Can prove this when I get all communication records…*
>
> *I repeatedly chased to have it completed…*
>
> *I am confident that when I have access to witness statements and all my emails these statements will be corroborated.*"

He also referred to having noticed a bug in another electronic system and said:

> "*It's quite outrageous that the firm is trying to turn these 2 examples of my extreme diligence and attention to detail into misconduct issues. I should be praised for these actions. There's no-one else at my level of seniority in a business position who would have spotted and dealt with errors down at this level of technical detail. If I hadn't "appropriately monitored" here, these two issues may still be sitting there unnoticed.*" (bundle C2, p.145)

73. Lastly, the Claimant addressed allegation 7, which was, in summary, that the Claimant was guilty of inadequate supervision and implementing inadequate controls for approving changes to Last Look settings and determining whether settings were suitable to particular client types (like Corporate and Real Money); so that the Claimant had not managed and controlled the risks associated with the use of Last Look.

74. The Claimant said that there was a clear policy to assign Real Money and Corporate clients to, either, no Last Look setting, or the loosest setting. He said that he could not prove that the treatment of Real Money or Corporate was deliberately gentle compared to other sharper clients, as he had been unfairly refused access to the relevant documents. The Claimant said, however, that the statistics demonstrated overwhelmingly that this was true: the spreadsheet sent to the New York Attorney General subpoena for US clients sorted by highest rejects numbers in 2014 showed that the first Real Money or Corporate clients appeared at position 99.

75. The Claimant asserted that it was completely untrue that there were no written supervisory procedures for the introduction and periodic review of Last Look settings. He said:

> "*I added a large amount of written procedures and process so this was a closely controlled and monitored activity. As I have been denied access to the main documents that would prove this I am unable to fairly refute this accusation. There were no written procedures when I arrived. All the process surrounding the setting of Last Look was created by me… I rationalised the settings and implemented a clear process. Fair, objective analysis determining settings with a Trader veto overlay to pick up any special cases agreed with clients and clear instructions to process feedback from Sales and clients.*"

The Claimant said that Compliance, Legal, Trading management and Sales management all knew about Last Look, but never once asked for any other controls or written procedures. He referred to his own email to the Head of Electronic Sales, the Head of Compliance and the Head of Legal, explaining what Last Look was and how it worked in July 2014 (bundle D1, p189). In the email, the Claimant set out, for the Compliance and Legal Departments, the Last Look process and justification for making it symmetric.

76. With regard to part (b) of allegation 7, the Claimant commented that it misunderstood the nature of IT systems interactions and that the consequences of BARX and BATS interactions were so numerous and diverse and diffuse in their effects that to have a written procedure to manage all the associated risks was impossible. With regard to the allegation that there was no written procedure or guideline in place to ensure that the configuration of pricing for clients was fair and reasonable, the Claimant said that it should never have been Trading's responsibility to ensure that pricing was appropriate for a client, as Trading did not control it, Sales did. The Claimant listed 25 examples of instructions and processes which he had introduced in his business. He said:

> "*If I hadn't been unfairly denied access to all my emails and calendar records I would be able to demonstrate literally thousands of examples of me working on supervision, organisation, controls and policies for this business. I can prove literally 1000's of meetings and communications with reports and other colleagues in control functions that show me meeting my supervisory responsibilities*." (bundle C2, p.150).

77. The Claimant also listed 20 examples, from his appraisal reviews, where his manager, Tim Cartledge, praised the Claimant's level of supervision and control of his business (bundle C2, pgs.150 to 152). The Claimant referred to a "mountain of policies and procedures on the wiki" and regular weekly meetings with his reports and compliance (bundle c2, pgs.149 to 150). The Claimant said that the Respondent had produced no evidence of clients being unfairly treated. He asked that the Respondent present him with a list of clients who it believed had been treated unfairly and an explanation of why. He said that, then, he would have a reasonable chance of making a specific defence.

78. The Claimant said that his defence had been severely damaged by the firm denying him access to any of the relevant documents (bundle C2, p.154).

79. The Claimant attended a first disciplinary hearing on 22 March 2016. At the start of the meeting, the Claimant said that he would like to have had a colleague to accompany him, but that had been made impossible by the firm's decision to forbid any

of his colleagues to speak to him regarding any work matters. He said that he was not happy to continue without a companion, but would continue nonetheless.

80. At the meeting, Mr Mahon asked the Claimant whether the existence of Last Look was withheld from the Claimant's colleagues. The Claimant referred to the Disclosure of Information Policy at the Bank and said that he had adhered to the principle of confidentiality in his role. He referred to a number of emails in which he implemented confidentiality. The Claimant said that, if a client asked for information relating to themselves, then the Claimant believed that the information should be given to them, but that the Respondent should not discuss propriety details of Last Look. The Claimant said that confidentiality was essential because of the high turnover of employees in the Bank, including Sales, any of whom would take new jobs with Barclay's competitors. He also said that confidentiality was essential because the Respondent needed to ensure that clients were not misinformed. He said that the risk of misinformation was high due to complex algorithms, which would often change.

81. Mr Mahon asked whether clients were aware that they were assigned a profile. The Claimant said that he did not know and that Mr Mahon would need to check with Sales. Mr Mahon asked whether clients knew, or were informed, about Last Look. The Claimant said that he was not sure, but that many clients were aware of Last Look functionality, as many emails demonstrated. The Claimant said that it was not credible that any client receiving more than trivial amounts of rejects would not know that Barclays was using Last Look. He said that Last Look was standard practice in the industry. He said that electronic clients were probably made aware of it and that all orders on the fixed channel were "kill or fill" - it was very explicit. The Claimant said that he had not written the BATS Last Look terms, nor had he introduced Last Look, nor invented it.

82. Mr Mahon asked the Claimant whether he thought it would be alright for Sales to tell clients about Last Look and the Claimant confirmed that this would be OK. Mr Mahon asked what would happen if a client knew that they had a particular "basis point" for Last Look and a particular millisecond time period. The Claimant replied that, if a client knew the shape of the defence, then they could get around it.

83. The Claimant said that he had organised a meeting on 18 July 2012 with the two Heads of Sales with the specific agenda item, "Last Look/Rejects." He said that he was not sure whether or not the whole Sales team knew about Last Look. He was not sure whether they knew that the systems and controls were changed.

84. Mr Mahon asked the Claimant whether particular settings would be abusive settings in relation to a "normal flow" client. Mr Mahon said that a long hold on an asymmetric setting for a normal client would be abusive. The Claimant disagreed. He responded that a large proportion of trades with the shortest hold time would still be loss making – 20-40% loss making. The Claimant also responded that, in his view, there were no "non toxic" clients. He said that clients with low toxicity would have their settings adjusted accordingly. The Claimant said that the settings would discriminate on the basis of toxicity, non toxic clients would have a low level of rejects.

85. The Claimant told Mr Mahon that specific tools were used by Sales to enable them to view Last Look details. The Claimant said that his team had developed BTR (Barts Trading Reports, or Data Reports) tools and a reject ratio report was part of this. He said that the report would break down the number of trades accepted and rejected.

He said that the tool would not tell the Sales team about Last Look settings.

86. Mr Mahon said that trades should not be rejected just because the market had moved against Barclays. The Claimant said that BATS was behind permission walls and Sales were not supposed to know the technical details. He said that the Sales team did not need to know the way that decisions were made in Code. He said that he did not believe that the Sales employees needed to know about BATS Last Look functionality; confidentiality was key, as was emphasised in all the firm's policies. Mr Mahon asked the Claimant why he did not inform Sales about tuning the settings. The Claimant said that this was because the process was very technical and specialised and he did not want this information leaking, as it was intellectual property.

87. Mr Mahon asked the Claimant about 8 November 2011 email, in which the Claimant had told a colleague to blame it on IT. The Claimant said that the increase in rejects was due to a slight error in a technology release (bundle A2, pgs.607 to 624).

88. The Claimant attended a second disciplinary hearing on 23 March 2016. In the interview, Mr Mahon asked the Claimant to define his view of the purpose of Last Look. The Claimant said that, in his view, Last Look was in place to defend revenues against toxic flow by abusive counterparties. Mr Mahon asked the Claimant if clients were bucketed in terms of calibration. The Claimant said that he had introduced default groups for different Channels, depending on the Channel they were connected through. He said that it was a fact that the toxicity flow from different Channels was different, so that it was reasonable for each Channel to go to different defaults. He said that he introduced an exception list. Some clients lobbied Sales for different settings, in order to vary their reject ratios. He said that it was usually the sharpest clients with a toxic flow who would do this.

89. Mr Mahon asked the Claimant how many clients were exceptions. The Claimant said that there were perhaps 50 out of 3,000 who would lobby Sales for different settings. Mr Mahon asked the Claimant if he needed to sign off for each setting change. The Claimant explained that the process for amending settings was that an employee would go on to a wiki page; fill in a form with the client name, a justification for the change and a target reject ratio. The Claimant told Mr Mahon that there was no authority required to do this, although nothing excessive was usually done. Mr Mahon asked the Claimant how many changes were made on average a week. The Claimant replied that he guessed 2 or 3 changes were made per week. Mr Mahon asked what the process was for reviewing these changes. The Claimant replied that he had a reject ratio report which he monitored once a week. He said that, despite this, he could not keep abreast of everyone's changes and that he had delegated responsibility to members of his team to monitor this.

90. Mr Mahon asked if 2 changes to the 50 or so exception clients per week would be deemed high. Mr Mahon expressed his own view that a change every 6 months, per client, seemed quite a lot. The Claimant said, "possibly", although it was not a stationary system and that counterparties were furiously retuning their algorithms and trading flow, to maximise profit for themselves, so that the Respondent needed to make reactive changes. Mr Mahon said he could not see any controls in place to stop a Trader changing the settings to make the reject rates go up, in order to make more money. The Claimant said that Traders did not abuse this and this was evident from the facts. Mr Mahon commented that an absence of control failure did not mitigate an absence of control. The Claimant said that control was a very loose term and that his

team would not abuse it and evidence pointed to the opposite. The team was, in fact, very well controlled.

91. The Claimant said that his team did probe the sensitivity of a trading relationship. He said, however, that there was no purpose in fiddling with Last Look settings for a low toxicity client and that his team were aware of this. The Claimant said that, if Mr Mahon looked at the change logs for Last Look settings, he would see that they were all for toxic hedge funds and banks. He explained that one could compare the toxicity of flow and rejects and this would show that it was the client's behaviour, not the firm's which, was the primary determinant of reject ratio. The Claimant said that only 50 or so clients had bespoke settings and the others were pretty static. He said that amendments to settings would be documented in the e-change records system and wiki.

92. With regard to the Marlin IT update project, the Claimant said that he was duty bound to get a return on his investment. He said kept the client experience the same and went to much effort to do so. He ensured that the reject ratio stayed the same and corrected any deviations.

93. The Claimant said that, if he took a benign Corporate client who traded from an ECN RFQ platform, then the client would pick the lowest price if the client was buying and the highest price if the client was selling. The client would pick up on latency failures and "pick off" the marker makers. The Claimant said that this was known as "winner's curse" and was a large source of peril in market making, but was not malicious.

94. Mr Mahon said that there was a high possibility that a request to trade would be rejected. The Claimant said that this was not the case. He said that the facts were in a spreadsheet he had created for the Attorney General of New York and that Mr Mahon should look at this. The Claimant said that Mr Mahon would see that the reject ratio related to client type. The Claimant told Mr Mahon that he sorted all the clients in 2014 by reject ratio and that it could be seen that 80 to 90% of all rejects came from a tiny proportion of clients.

95. On 31 March 2016, the Claimant emailed Jennifer Knapp, the note-taker for the disciplinary hearings, attaching part 1 of his Defensive Script for allegations 1 and 2 and references to emails (bundle C1, pgs.1 to 9)

96. The Claimant attended a third disciplinary hearing on 5 April 2016. The Claimant produced a Defensive Script in relation to these allegations shortly after the meetings were concluded (bundle C2, pgs.136 to 154) also produced emails in bundles C1, C2, D1 and D2. The whole of the bundles C1, C2, D1 and D2 was relied on by the Claimant as his written response to the allegations.

97. In the third meeting, Mr Mahon asked the Claimant whether clients knew that Last Look was not symmetric. The Claimant said that he did not know, but that he would not have any objection to them being given this information. The Claimant said that the Sales team had never questioned the symmetry of Last Look. Mr Mahon asked the Claimant why he implemented symmetry, if there was nothing in it for him or his team. The Claimant replied that he and his team would occasionally catch random market moves going the other way, which looked unfair. The reason for symmetry was to remove a possible, mostly spurious, objection to Last Look. Mr Mahon asked when

symmetry was implemented, the Claimant said that it was during Q1 or Q2 2014 and that his team had gone through a lot with the Respondent's Compliance Department. He said that the process had taken a long time and that the release had been delayed until June or July, while he had waited for Compliance approval.

98. Mr Mahon asked whether BARX or BATS symmetry was used. The Claimant said that he had specified both BARX and BATS symmetry from the start, but that IT had innocently made a mistake and did not make BARX symmetric. He said that BARX did only a small proportion of trades - about 7%. The Claimant said that he was not sure when the issue was finally fixed.

99. Mr Mahon said that he was aware that the Claimant had discovered that BARX symmetry had not been implemented properly in September or October 2014 and that, 10 months later, it had still not been rectified. He asked why the system had not been properly implemented for so long. The Claimant said that IT often took a long time to implement projects; that it was only very vital things which were undertaken quickly. He said that no Regulator had ever asked the Respondent to implement symmetry, but the Claimant had implemented it regardless. He said that Compliance would be able to help answer some of the questions. He said that he should be praised for his actions, otherwise failure to implement symmetry may have gone unnoticed.

100. With regard to allegation 7, Mr Mahon asked the Claimant whether there were written procedures to ensure that the Last Look settings were fair and reasonable for clients. The Claimant said that there were different categories of change and different procedures for each category. Mr Mahon asked whether Sales could see if a client had been on Last Look. The Claimant replied that everyone knew that non GUI clients were on Last Look, which was standard. There were approximately five GUI clients who were also on Last Look and they had all been notified. The Claimant said that all ECN clients had Last Look.

101. Mr Mahon asked whether the Claimant could turn toxic clients "off," or cut off toxic flow. The Claimant said that he could never have done this as Sales would not agree. He said it would be contrary to the firm's aspirations and image to turn the counterparties off. The Claimant said that they were "forced to swim with the sharks" and had to put up defences.

102. Mr Mahon said that if someone was not in the small client group of about 50, then this would mean that they were not a shark, or visa versa? The Claimant said that this was true. Mr Mahon asked about the clients that were not in this group of 50. The Claimant said that these clients could still be sharks and that they could often pick off a bad price. The Claimant explained that Last Look protected the firm from this. The Claimant said that there was a mountain of procedural and control documentation. He asked where there was any evidence that the business had not complied with appropriate standards. He said there was a long list of processes and procedures that he had introduced for the purpose of control. He said that his business was very hot on Compliance policies, desk control, procedures, documents. The Claimant read out his defensive script in relation to control and reiterated that, if he had had access to emails and calendars, then he would be able to back up his arguments. He explained that his appraisals did not make any mention of his needing to change controls and Compliance issues.

103. Mr Mahon said that he wanted to read over all the evidence and speak to other

people involved.

104. On 23 March 2016, Mr Mahon emailed Sonya Bonniface in Human Resources and several members of the Respondent's Legal team. He said, of the interviews with the Claimant, that the Claimant had seemed to imply that only a small proportion of clients, 50 out of 3,000, had individual settings, as these were the sharpest, most toxic flows. He said: "If this is true, then it gives weight to some of his arguments". Mr Mahon commented that the Claimant had made an "interesting argument" as to how the system's upgrade, which gave extra time to Last Look, was offset by increasing the tolerances, such that reject rates stayed the same. Mr Mahon said that, again, this needed analysis (Bundle A1, p478).

105. Also that day, a member of the Respondent's Legal Department in New York sent Mr Mahon a spreadsheet which the Respondent had produced to the New York Attorney General's office in connection with its Last Look investigation. This spreadsheet was attached to the Respondent's response to New York Attorney General's Subpoena (pgs.478 to 478a). This spreadsheet was not made available to the Claimant until an order for specific disclosure was made by the Employment Tribunal at a hearing on 10 to 11 October 2017.

106. On 5 April 2016, Mr Mahon met with Vidura Seneviratne, the Claimant's direct report. Mr Seneviratne said that Last Look had approximately 12,000 users across 5,000 clients. He said that some clients who went through the electronic route had standard settings and tolerance, but others had more bespoke settings. He said that API channel (fixed channel) were clients or electronic communication networks who wrote their own computer programmes to send the Respondent orders and that they were on more restricted settings. He said that in 2012 to 2013 there were about 600 API clients, of which approximately 40 to 50 clients had bespoke settings. He said that 90% of clients had one of the main 3 – 5 standard settings.

107. Mr Mahon asked for a list of clients with their settings and how often the settings were changed (bundle A1, p.512). On 6 April 2016, Mr Mahon emailed Mr Seneviratne, asking for a list of all API clients, their BARX and BATS Last Look settings, and a GUI client which had a Last Look setting, on the dates 30 October 2011, 31 March 2012, 30 September 2012 and 31 March 2013 (Bundle A1, p.513).

108. On 19 April 2016, Mr Mahon interviewed Mr Seneviratne again (Bundle A1, p.517 to 520). Mr Mahon asked Mr Seneviratne how well he thought clients understood the existence of Last Look. Mr Seneviratne said that a fixed client would be aware of the idea of a Last Look and a trade being held for a period and rejected following the decision of a trader. Mr Seneviratne explained that the industry was not explicitly open about Last Look, but everyone was aware of it. Mr Seneviratne said that, in 2012, a trader could go in and change the settings whenever he liked, but that he would not do so. Mr Mahon asked Mr Seneviratne whether there would be any "sign off" preventing a trader setting an inappropriately long setting. Mr Seneviratne said that there would not. Mr Seneviratne said that, if there was a BATS Last Look change, then the Code would have to be released; it would have to be done through IT and other people, in order to obtain sign off to amend the settings.

109. Mr Mahon told Mr Seneviratne that there were some emails showing that the Claimant did not want to share any information in relation to Last Look. He asked why that was. Mr Seneviratne said that the primary difference between him and the

Claimant was that Mr Seneviratne preferred to be transparent, but that the Claimant did not like to share much information at all.

110. On 19 April 2016, Mr Mahon also interviewed Marek Robertson, Head of Sales, Bundle A1, pgs.521 to 525. Marek Robertson told Mr Mahon that Last Look was viewed as applying to FIX channel, or API flow: a high volume and low return business. Mr Robertson said that Last Look was described to Sales, but not to clients, as a protection mechanism. He said that there was an original mechanism built into the BARX architecture and then another mechanism was built within BATS architecture. Mr Robertson said that the difference between the mechanisms was not something he ever fully understood. The Claimant had told him that it might be better if he did not understand.

111. Mr Robertson said that Sales were aware of the existence of Last Look and many FIX clients discussed Last Look openly. Mr Robertson said that the BARX FX RFQ application had a screen, and some of the Sales team could view "hold time" and "profit check" settings. Mr Robertson explained that what was not well understood was the BATS side of Last Look; this was not visible to Sales. Mr Robertson said that the Claimant was part of a "*tell them what they need to know and no more*" culture. Mr Robertson said that he did not receive reports on reject rates, but that there was a BARX trading reports web tool, where Sales could view the reject rates and the reason for the rejects. Mr Robertson said that, over time, the trading desk had become more opaque as a result of the Claimant's management. He said that the Claimant viewed clients as "*glass half empty*" and that the Claimant had concerns about clients abusing the service that the firm offered.

112. Mr Roberson told Mr Mahon that the profiles he could see in BARX FX RFQ seemed to proliferate over time.

113. On 26 April 2016 Mr Seneviratne sent Last Look data and Excel spreadsheets to Mr Mahon (bundle A1, p.531).

114. On 28 April 2016, Mr Mahon interviewed Mr Seneviratne for a third time (Bundle A1, pgs.534 to 536). Mr Mahon asked Mr Seneviratne if he had access to information about the quantity of rejects in BARX and BATS in his usual course of business. Mr Seneviratne replied that he could view this on the system. Mr Mahon asked Mr Seneviratne if it would be possible to see who was rejected, and why, on any given day. Mr Seneviratne replied that this was possible and that they could also see if they were rejected through BARX or BATS.

115. On 27 May 2016, Mr Mahon emailed Ms Bonniface in HR and a member of the Respondent's Legal Team. He said that data showed that there had been 127 changes to settings in BATS Last Look Max Loss (the major source of BATS rejections) between 30 March 2012 and 1 October 2012 and 429 changes to settings in BARX Last Look. He said that 535 clients were affected and that there were, therefore, about 22 to 23 changes per week. Mr Mahon said that the Claimant had said that there were 2 - 3 changes per week, so either the Claimant was lying, or did not know because he had no control on how people changed the settings (bundle A2, p.588).

116. On 19 May 2016, Sonya Bonniface wrote again to the Claimant, saying that Mr Mahon had completed his further meetings and would like to meet with the Claimant again to discuss. She invited him to another meeting on 26 or 30 May (bundle A2,

p.590).

117. On 23 May the Claimant replied, saying that he had been surprised and disappointed to receive a request to attend yet another meeting after three lengthy meetings. He said that the intolerable stress of repeated requirements to come to the office and the prolonged process was not acceptable. He said that he had looked at the written description of Barclays disciplinary procedure and that there was no provision for an additional meeting, for further questioning, 7 weeks after the completion of the disciplinary meetings. He said, however, that in order to finally close the process, he would provide written responses to any further questions which Mr Mahon wished to pose. The Claimant said that conducting the process in writing would also solve the problem of the inaccuracy of the written records that had come out of the face-to-face meetings (bundle A2, p.589 to 590).

118. It was not in dispute that the Claimant had made substantial amendments to the original notes of the disciplinary meetings. It appears that the notes of the disciplinary meetings were not transcripts and did contain many omissions from the account that the Claimant had given, (bundle A2, p.606).

119. Ms Bonniface replied to the Claimant on 24 May 2016, saying that the meeting was intended for Mr Mahon to clarify some queries following his investigation. She said the meeting was a reasonable request and was intended as a further opportunity for the Claimant to confirm his position. She said that, Mr Mahon had given the Claimant all the time he needed to present his case in full, which had taken a number of hours, over a series of meetings, which the Claimant had willingly attended.

120. On 2 June 2016, Ms Bonniface emailed the Claimant further, saying that Mr Mahon had now confirmed that he did not have any additional queries for the Claimant (bundle A2, p.589).

121. On 6 June 2016, Mr Mahon emailed Ms Bonniface and a member of the Respondent's Legal Team once more (bundle A2, p.595). He said that he was still looking at the data and emails and transcripts, but had some initial thoughts on the Claimant. He set out his thoughts and proposed upholding most of the allegations. He said, "... *Let's start putting the conclusion together*." (bundle A2, pgs.595 to 596)

122. On 11 July 2016, Ms Bonniface emailed the Claimant, saying that she would courier the notes of meetings between Mr Mahon and Mr Seneviratne and Mr Robertson, in advance of Mr Mahon's final decision as to the disciplinary outcome. She asked that the Claimant provide a response to the notes (bundle A2, pgs.598 to 599).

123. On 21 July 2016, the Claimant provided comments on the notes of interviews between Mr Mahon and Mr Seneviratne and Mr Robertson (bundle A2, pgs.600 to 603).

124. On 28 July 2016, Ms Bonniface emailed the Claimant, saying that Mr Mahon had carried out additional investigations. She said that the data involved client data which, due to confidentiality, the Respondent was unable to send directly to the Claimant's home address, but could make available for the Claimant to review at the Respondent. She said that the data covered, amongst other things: API clients with their BARX settings and BATS settings across a number of dates in 2011, 2012 and 2013;

accepted and rejected trades in March and October 2012; the number of BATS rejected trades versus the number of BARX rejected trades in March and October 2012; breakdown of a number of rules and which rule rejected the trades in March and October 2012.

125. On 8 August 2016, the Claimant replied, saying that, at that stage, he did not want to come in to view the data.

126. On 10 August 2016, Ms Bonniface wrote to the Claimant enclosing the Last Look support document for BATS: LL Rule Optimisation. She asked the Claimant to provide comments on them by 15 August 2016 (bundle A2, p.655).

127. The Last Look Rule Optimisation Guide said, amongst other things:

> "*Holding Time:*
>
> - *If a client has excellent flow and extremely low rejects, there is no reason to hold a trade for 300 milliseconds*
> - *Given a proven track record of good flow, we should move clients to a shorter holding time. Reasons for doing this;*
>   - *May be missing out on trades because we're too late to confirm*
>   - *For legacy clients, LL look back times can work against us as liability is only applied after our LL check…*
>   - *For soft retail flow, they want quick confirms*
> - *Sales had indicated that our holding times are excessive and this is a way to accommodate.*")

The Claimant did not respond to Ms Bonniface's letter.

128. On 18 August 2017, Ms Bonniface wrote to Mr Mahon, setting out draft conclusions, upholding all allegations, apart from allegation 5.

129. Mr Mahon replied on 21 August saying that he was considering not upholding allegation 1, otherwise Ms Bonniface's draft looked right in tone and content (bundle A2, pgs.686 to 689).

130. On 7 September 2016 Alison Miln, from the Respondent's Legal Department, emailed the members of the RIOC subcommittee, saying that Mr Mahon had made a recommendation that the Respondent dismiss the Claimant for misconduct on the grounds of the Last Look issues. She said:

> "*The members will recall that the terms of the DFS November 2015 order required Barclays to "take all steps necessary to terminate" DF's employment.*" (bundle A2, pgs.705 to 706)

131. On 12 September 2016, the sub RIOC committee endorsed the

recommendation that the Claimant be dismissed (bundle A2, pgs.710 to 719).

132. On 15 September 2016, Mr Mahon wrote to the Claimant, dismissing him, with notice, for misconduct. He did not uphold allegations 1 or 5 and said that part of allegation 6, relating to the inadequate resolution of a bug which affected stop loss gapping, had been withdrawn. However, he upheld all the other allegations. In relation to allegations 2 and 3 he said that, whilst he agreed that Last Look algorithms are proprietary information and should be kept confidential, the existence of Last Look and its settings and/or changes in the settings were not secret information which must be guarded within trading. He said that it was clear from the Claimant's numerous emails to colleagues in trading that the Claimant actively encouraged hiding and withholding information, for example in his email of 6 June 2011, 18 July 2011, 10 October 2011, 7 November 2011 and 29 November 2011.

133. Mr Mahon said that, taking into account the Claimant's evidence, he did accept that there was some interaction with Sales about Last Look, but found that, more commonly, the Claimant proactively encouraged his team to withhold information about Last Look from Sales. He said that that was inappropriate and unwarranted and fostered a distrustful and closed environment in which, on occasions, team members falsely quoted alternative reasons for Last Look rejections. He gave one example of an email sent by a member of the Claimant's team on 24 June 2011 saying: "*If you don't want to tell him about Last Look we can always tell him there is an IT glitch etc etc*." Mr Mahon said: "*This kind of environment is not profession, transparent or collaborative and is not acceptable at Barclays*".

134. With regard to allegation 4 Mr Mahon said that, in a disciplinary hearing as well as from evidence in the disciplinary file, the Claimant consistently expressed a view of clients which was overridingly negative and that the Claimant considered that clients were not to be trusted. Mr Mahon said:

> "*Last Look is used primarily (and legitimately) to protect against trading on stale prices due to latency, and against more 'toxic' flow trading behaviour. However, I have found that under your leadership Last Look was applied to a much wider client base than just those with 'toxic' order flow, and that there was a lack of clear differentiation between those clients who may have been considered to have more toxic order flow, and those clients whose trade prices may have moved more generally against the firm but in favour of the client.*"

135. Mr Mahon said that the Claimant was clear that his remit was to maximise revenue for the firm. Mr Mahon said that this could have been true if there had been a clear process for highly technical clients, who sought to find inefficiencies in the firm's pricing and take advantage of them, but this was not what had happened in practice. Mr Mahon said the Claimant believed that all clients were suspicious and, therefore, that the Claimant was comfortable with turning up settings for the large majority of clients, in order to maximise the firm's revenue. Mr Mahon said that this was inappropriate. Mr Mahon said that the protective role of Last Look for the firm against a small number of clients had been lost and that it had been applied too widely and too indiscriminately to ECN clients. He said that, on reviewing Last Look settings in BARX and BATS between 31 March 2012 and 30 September 2012, there had been around 535 clients who had their settings changed and that over 95% of those changes were to increase the hold time or to reduce the maximum loss. Mr Mahon said that those statistics seemed to contradict the Claimant's view that there was a small number of

approximately 50 clients who were the main aggressive high frequency trading clients. Mr Mahon said that the evidence would also support the view, expressed in a number of emails, that traders would adjust settings to maximise profit until the client complained. Mr Mahon said:

> "*The actual impact on profit and loss may be small, but the application of Last Look was wide ranging and indiscriminate, resulting in potentially unfair treatment for some clients and inappropriate management of conflicts of interest.*"

136. With regard to allegation 6, Mr Mahon said that, in early 2014, a decision was taken internally to make Last Look symmetrical across BATS and BARX, in order to address the potential inequity with rejection of unprofitable trades. He said that, by 2015, the Claimant had identified that BARX symmetry had not been implemented due to an oversight by the technology team. Mr Mahon said that the error remained outstanding over 10 months later. He said that, as the Head of the business, the Claimant could and should have been more proactive in driving the change forward with technology, given the ongoing risk to the business, rather than leave this to the discretion of technology. Mr Mahon said that the prolonged delay in making the change, "… *demonstrated a general lack of respect for clients, and a de-prioritisation of their interests; they continued to potentially be disadvantaged during this prolonged period*."

137. Regarding allegation 7, Mr Mahon said that he had found there to be gaps in the systems and controls of the Claimant's team. Mr Mahon said that he accepted that some guidelines were available, for example on the Wiki pages. He said that the Claimant had stated that further information was held in various ad hoc emails, but Mr Mahon said there was no central repository for these. Mr Mahon said:

> "*In terms of the Last Look settings per client and any amendments to these, you confirmed that there was nothing stopping a trader from changing a setting to whatever they wanted and neither was there any formal or regular review process in place to consider whether the various client settings were fair and reasonable for individual clients. When asked about the potential opportunity to change settings to inappropriate levels to the detriment of the client, you confirmed that the traders just "wouldn't do that". This absence of controls is insufficient and represents unnecessary and ongoing risk to your business.*"

138. Mr Mahon said that while the Claimant had estimated that there 2 - 3 changes per week to the settings, but that the evidence that Mr Mahon had reviewed showed 10 times that number. Mr Mahon said that he had found that there were frequent changes, mainly against the interests of the client, across a large range of clients with a culture of profit maximisation. Mr Mahon said:

> "*As a supervisor, you were under an obligation to ensure your business was organised so that it could be effectively controlled, and to ensure these controls and procedures were known to your team and could be adequately evidenced. From the evidence I have reviewed, I do not consider that this happened to the required standard*."

139. Mr Mahon said that Barclays expected its employees to act with the highest standards of ethics and professional conduct at all times. He said that employees were

required to be aware of and follow the FCA's Principles for Business. He said that the obligations to which the Claimant was subject were set out in the relevant versions of the Global Code of Conduct/Statement of Corporate Conduct and Ethics and Global Supervision Policy. He said that Barclays expected the Claimant to act in accordance with his obligations, including by acting in fit and proper manner and with honesty and integrity. He said that the Claimant had fallen below the standards required and that his actions were extremely serious and went directly to the relationship of trust and confidence between the Claimant and the Respondent. Mr Mahon said that the Claimant's actions were examples of behaviour that was considered gross misconduct in Barclays' Disciplinary Procedure including:

- "An act which is discreditable, dishonourable or detrimental to the conduct of Barclays' business, its employees, customers, clients and counterparts;
- Breach of the Barclays' Code of Conduct;
- Breach of the terms and conditions of an employee's contract of employment; and
- A serious breach of or non-compliance with Barclays' rules, policies and procedures."

140. Mr Mahon said that he had taken into account the Claimant's mitigation, including the Claimant's position in terms of transparency and culture and the fact that the Claimant believed that he was acting in the interest of Barclays at all times. Mr Mahon said he also noted that, whilst he found the systems and controls in place to be inadequate in terms of the effective risk and control of the Claimant's business, they were not wholly absent. Mr Mahon said that, therefore, he had decided to dismiss the Claimant with notice, rather than without notice (bundle A2, pgs.720 to 727).

141. On 27 September the Claimant notified Ms Bonniface of his intention to appeal against his dismissal. In his grounds of appeal (bundle A2, pgs.740 to 744), the Claimant said that allegations 2 and 3 ignored the large amount of written evidence demonstrating that the Claimant's senior manager took a stricter view about confidentiality concerning Last Look than the Claimant and that the Claimant had made proactive attempts to educate Sales about Last Look. The Claimant also said that Mr Mahon's finding that the climate the Claimant had created was not professional, collaborative or acceptable at Barclays was in direct conflict with the firm's own written policies, which said that the propriety information should be kept on a "need to know" basis within the firm. The Claimant said that he had repeatedly asked for someone to explain to him what was the "need to know" basis for disseminating the information to Sales and clients, but that he had received no answer.

142. With regard to allegation 4, the Claimant said that Mr Mahon's finding that there was a lack of differentiation between toxic clients and other clients was contradicted by the actual settings used and by the actual reject statistics experienced by clients. The Claimant said that no reasonable person could look at those statistics and conclude that there was a lack of differentiation, either in intention or in effect.

143. The Claimant said that naturally he had a focus on profit, in accordance with the

consistently repeatedly defined culture, business incentives and written objectives he experienced within Barclays.

144. With regard to allegation 6, the Claimant said that there was a huge amount of evidence to demonstrate that he had fought to protect and increase the capacity of the overburdened IT teams with whom he worked. He said that, when he had discovered that, due to an accidental oversight by an IT project manager, the work to make BARX symmetrical had not been done, he immediately pressed for this to be corrected.

145. The Claimant's appeal hearing was held on 3 November 2016 (Bundle A2, pgs.775 to 783). It was chaired by Art Mbanefo. Mr Mbanefo was a member of the Respondent's RIOC committee.

146. In the appeal hearing, the Claimant said that he would like to have been accompanied by a colleague, but that this had been made impossible because the firm had ordered his colleagues not to speak to him. The Claimant said that he was prepared to proceed with the hearing.

147. In relation to allegations 2 and 3, the Claimant said that the Last Look system was deliberately designed to enforce confidentiality, as settings were kept behind electronic permissions. The Claimant said that he did not set those permissions up and they existed before his arrival at Barclays.

148. Mr Mbanefo asked the Claimant to clarify the process to change settings. The Claimant said that this was covered in his evidence presented at the disciplinary hearing; there were a lot of control processes dictating how to make changes and that the Claimant had introduced a lot of those. The Claimant said that there was email evidence showing that the Claimant had created a specific role for someone whose responsibility was training Sales about Last Look.

149. With regard to allegation 4, the Claimant said that the best place for Mr Mbanefo to see the facts was in a binder that the Claimant had put together for the New York Attorney General, which Mr Mahon had gone through. The Claimant said that it contained a list of US clients and their reject statistics. He described how the reject ratio worked and that the vast majority of rejections came from trading in certain aggressive styles. The Claimant said that the Last Look rejects were produced as a result of the interaction between the client trading style and the rules applied. This produced a certain number of rejects. The Claimant explained that you could not control the client's trading styles. He said that the reject rates versus settings were highly differentiated. The Claimant said that settings were based on the Channel through which the client connected. He said that certain ECNs (Electronic Trading Networks), on average, produced more toxic flow. He said that the Last Look rules meant that the system automatically calibrated according to the client and would automatically be sharper on clients who were more aggressive. This was inherent in how the algorithm worked.

150. With regard to allegation 6 and the delay in implementing symmetry, the Claimant said that he had asked for the lack of symmetry to be fixed and that he had spoken to Mike Bagguley, his boss's boss, about the issue.

151. With regard to allegation 7, the Claimant said that he had been denied access to evidence to prove his points, but that he had overwhelmingly refuted allegation 7. The

Claimant said that all of the issues regarding Last Look were in place before the Claimant arrived at the Bank and that the Claimant was sure that they were still in place.

152. On 22 August 2016, the Claimant lodged a grievance against the disciplinary process (bundle A2, pgs.691 to 692). The grievance hearing was also heard on 3 November 2016 by Paul Exal (bundle A2, pgs. 786 to 789).

153. On 17 November 2016 Mr Mbanefo interviewed Mr Mahon regarding the disciplinary process and the Claimant's appeal (bundle A2, pgs.946 to 953).

154. On 13 December 2016, Mr Mbanefo held a second meeting with Mr Mahon, during which Mr Mahon went through the data that he had requested from Mr Seneviratne (bundle A2, pgs.1022 to 1023).

155. On 8 February 2017, Mr Mbanefo wrote to the Claimant, dismissing his appeal. He said that he was satisfied that the decision-making of the disciplinary hearing manager was reasonable in the circumstances and that he agreed that allegations 2, 3, 4, 6 and 7 should be upheld against the Claimant. Mr Mbanefo said that the instructions that the Claimant gave his team extended far beyond just keeping Code and propriety algorithms confidential. He said:

> "*You maintained that it was absurd to suggest that your instructions were meant to include Last Look in general… but I am unable to agree with this in light of exchanges such as, "…avoid mentioning the existence of the whole BATS Last Look" (your email of 6th June 2011), "Please remember do not discuss BATS LL with Sales at all, they don't need to know it exists" (your email of 10 October 2011) and "Do not discuss Last Look with Sales" (your email of 7 November 2011).*" *The instructions in these emails including the use of the words "whole" and "at all" and "exists" clearly purport an intention to keep all details of Last Look away from the radar of Sales colleagues."*

156. With regard to allegation 4, Mr Mbanefo recorded that the Claimant had disagreed that there was a lack of differentiation between certain clients and that the Claimant felt that no reasonable person could look at the statistics and reach this conclusion. Mr Mbanefo said that, in coming to his decision, he noted that the disciplinary hearing manager took a thorough step of requesting comprehensive data related to clients who were Last Looked and analysing a sample of BARX settings and BATS settings across a number of dates. Mr Mbanefo said that, as part of his review, he had considered that data. Mr Mbanefo said that the Claimant had significantly underestimated the number of changes per week to settings. Mr Mbanefo said that, put simply, the Claimant did not pay sufficient attention to try to identify which were the most toxic clients, versus those which were non harmful. Mr Mbanefo said:

> "*In my view, in your pursuit of P&L profit, you lost sight of the overriding requirement to treat customers fairly. It is not necessary to provide a list of exact clients to corroborate this finding; it is implicit in this finding that this culture had the impact of potentially being unfair towards all clients. In coming to this view, I note your email of 12 March 2012: "If a client hasn't complained consider raising the reject ratio and re-calculating the optimal LL settings… really squeeze them on rejects" and your email of 27 March 2012 where you stated, "I think we just go ahead with it and then gradually tighten the rule until someone*

> *complains" and your instruction to add fixed delays to counterparties Last Look hold times in order to make more money from improvements in hold times gained from Project Marlin (your email of 15 March 2012).*"

Mr Mbanefo said that the Claimant's conduct reflected, at times, that the Claimant demonstrated an unacceptably negative view of clients.

157. With regard to allegation 6, Mr Mbanefo said that he agreed with the disciplinary hearing manager's findings that the Claimant did not attribute sufficient importance to the implementation of symmetry of BARX Last Look and that as Head of the team, the Claimant should have been significantly more proactive in driving the change forward, given the ongoing risk to the Claimant's business.

158. With regard to allegation 7, Mr Mbanefo said:

> "*I am in no doubt that you were aware of your supervisory responsibilities and the key policies and FCA principles which governed your role. As a Supervisor and Managing Director of the firm, your business area should have been organised with effective controls and these should have been adequately evidenced and written down. I am especially concerned in particular that traders were at liberty to change settings in an uncontrolled way and that there was a complete absence of formal and regular reviews to consider whether settings changes were fair and reasonable.*"

Mr Mbanefo said the Claimant was fully aware of the relevant policies and regulatory obligations and standards which governed his role. Mr Mbanefo said that the Global Supervision Policy required the Claimant as a supervisor to:

> ".. *exercise due skill, care and diligence in managing the business for which [you] were responsible*" *and to take "reasonable steps to ensure that it was organised so that it could be controlled effectively and that it complied with relevant legal and regulatory requirements and standards.*"

He said that the Barclays Global Code of Conduct reiterated the requirement to follow the FSA Principles for Business, including, but not limited to Principle 6, "*A firm must pay due regard to the interests of clients and treat them fairly*"; Principle 7: "*A firm must pay due regard to the information needs of its clients and communicate information to them in a way that is clear, fair and not misleading*"; and Principle 8: "*A firm must manage conflicts of interests fairly, both within itself and its clients and between one client and another.*" Mr Mbanefo said that he could not conclude that the Claimant's conduct met the key required standards and policies in relation to the Claimant's role.

Evidence at the Tribunal

159. During the Employment Tribunal hearing the Claimant drew the Tribunal's attention to the Respondent's current document which describes Last Look to clients (bundle A2, pgs.1106 to 1108). The Claimant cross-examined the Respondent's witnesses in relation to the document. The current document says:

> "*The purpose of Last Look is primarily to protect against trading on stale prices due to latency, and against certain trading behaviour. For instance, activities*

> *such as aggregation, order splitting or previous quote selection may result in more rejected trade requests. Therefore, the proportion of trade requests that are rejected due to Last Look will depend in part on the trading behaviour of the client and the platforms and connections through which the client trades. Also, Last Look rejects trade requests whenever the market price moves beyond the price tolerance in place, so other factors such as technical errors, pricing errors, and market moves may also cause trade requests to be rejected by Last Look.*"

160. The document set out frequently asked questions and answers to them including:

"*Do all clients have the same Last Look settings? No. Last Look settings – including the prescribed time delay and the price tolerance – may vary by client, based on each client's connection type, trading platform, trading pattern, and other factors. Thus, Last Look settings for a single client using multiple connections and trading platforms may differ across those connections and platforms.*"

"*Does Last Look specifically target only certain types of trading behaviours and flow? No. Last Look is agnostic as to the causes of market movements and will reject a trade request whenever the market moves beyond the price tolerance in place during the prescribed time delay.*"

"*Can I trade electronic spot FX with Barclays without Last Look being applied to me? No. Last Look is applied to all electronic spot FX trading. However, the majority of clients are likely to see few, if any, rejects, depending on the way that they trade with us.*"

In answer to the question:

> "*Can I obtain my specific Last Look settings?*"

The document also states:

> "*Barclays will share with clients the amount of time delay and the price tolerance that is applied to a client's trade requests as part of Last Look. Please consult your Barclays sales representatives for information about any rejected trade request.*"

161. In evidence to the Tribunal and under cross examination, the Claimant repeated the evidence that he had included in his Defensive Scripts to the disciplinary hearing.

162. The Claimant also told the Tribunal that, when he had spoken in his emails about Last Look being withheld from Sales, he was referring to BATS Last Look. The Claimant said that confidentiality regarding BATS Last Look was very important.

163. The Claimant said that confidentiality was a fundamental principle in the Respondent's operations and that information should only be shared with other employees on a "need to know" basis. He said that Sales did not "need to know" about BATS Last Look or its functionality. The Claimant drew the Tribunal's attention to the Bank's policies on confidentiality and Chinese walls.

164. The Claimant told the Tribunal that, during the DFS investigation, the

Respondent's lawyers had been confident that there was no case against the Bank. He pointed out that no other regulatory body had taken enforcement action against the Bank in relation to Last Look. The Claimant said that he believed that the Bank did not consider that its use of Last Look was wrong, but that it had agreed to the DFS Order because it did not want the DFS Last Look enforcement action preventing the Bank from coming to a settlement with the DFS in a separate, very serious and costly action against the Bank in relation to its FX Spot trading practices.

165. The Claimant told the Tribunal that he will not be able to obtain another job in the FX industry because of the DFS Order agreed by the Bank and his subsequent dismissal by the Respondent. I accepted his evidence that the combination of the DFS Order and his dismissal make it practically impossible for him to obtain alternative employment in FX markets.

166. Pursuant to specific disclosure ordered in the case, the Claimant obtained the spreadsheet which had been attached to the Respondent's response to the Attorney General of New York Subpoena. He cross-examined both Mr Mbanefo and Mr Mahon about whether they considered that this "factually rich" document was relevant to the allegations against the Claimant. Both responded that it was. They both said that they did not know that the Respondent had refused to provide it to the Claimant in advance of the disciplinary and appeal hearings.

167. The Claimant had analysed data on reject ratios and number of rejects due to Last Look shown in the data on the spreadsheet attached to the Attorney General of New York Subpoena response. The Respondent did not dispute that the Claimant's calculations were correct. The Claimant attached his analysis to his witness statement in an Appendix, "H". He said that, of the trade rejects, 51% of rejects were rejects of broker trades; 46% were rejects of Hedge Funds; 3% were bank counterparties and none were either Corporate or Real Money counterparties. The Claimant also set out the reject ratios. That is, the ratio of rejected orders to total orders submitted for each type of client, for each of the years 2010 through to 2015. This showed that, for example, in 2010 Corporate counterparties had a reject ratio of 0.3% and Real Money counterparties had a reject ratio of 0.1%.

168. In 2010, by contrast, Broker counterparties had a reject ratio of 14.8% and Hedge Funds had a reject ratio of 9.9%. In 2013, Brokers had a reject ratio of 18.1% and Hedge Funds 4.8%; whereas Corporate counterparties had a reject ratio of 0.4% and Real Money 0.7%. In 2014, Brokers had a reject ratio of 19.3% and Hedge Funds 4.7%; whereas Corporate clients had a reject ratio of 0.3% and Real Money 0.4%. In 2015, Brokers had a reject ratio of 17.2% and Hedge Funds 5.6%; whereas Corporate clients had a reject ratio of 0.6% and Real Money a reject ratio of 0.6%.

169. Mr Mbanefo was cross-examined about this. He was asked, with regard to the more benign client types like Corporate and Real Money, what had happened to the reject ratios, between 2010 and 2015. Mr Mbanefo replied that there had been no change, in that the reject ratios had stayed below 1%. It was put to Mr Mbanefo that there was no evidence of more benign clients "being squeezed" (to extract more profit from them). Mr Mbanefo said that, had he had the information he now had, he might have made a different decision. He said that the analysis in the Claimant's witness statement would have helped him.

170. Mr Mbanefo was also cross-examined about the Claimant's appraisal document,

which was in the disciplinary hearing bundle at B2, p.332. In the Claimant's 2012 year end performance review, the Claimant was given an objective of: "*Last Look – should have several mio* (million) *extra squeezed out asap*." Mr Mbanefo agreed that the Claimant's manager had signed off those objectives and was aware of the objective of generating several more £ millions out of Last Look.

171. Mr Mbanefo was cross-examined about the Respondent's current policy directed towards clients. He agreed that the policy was explicit in that Last Look was applied to everyone. Mr Mbanefo said that he did not have that framework when he made his decision and that he was operating with the information he had at the time. He said that the document educated clients.

172. Mr Mbanefo was cross-examined about whether he had found evidence of the Claimant reviewing Last Look rejects. He was directed to pages D1, 75 and D2, 476. He agreed that a year to date overview of Last Look, D1 75, was a periodic review and that D2 475 was evidence of the Claimant reviewing Last Look. Mr Mbanefo was cross-examined about the Claimant setting up a Last Look oversight role in June 2012. He was directed to an email (bundle D1, p.74), wherein the Claimant said to Mr Seneviratne that his ideas for a Last Look oversight role for a trader would be for the role to:

- *"... Ensure new clients get assigned to the correct profiles – should nearly always be the default;*
- *Monitor clients on the exceptions list weekly to check they're close to their reject ratio target. May be able to generate report to simply this. Adjust settings if necessary.*
- *Maintain the Wiki for Last Look. Keep the exceptions list up to date. The object being to keep it as short as possible. Keep the principles/explanation page up to date (not written yet).*
- *Face off against Sales when they have complaints/requests about rejects. Try and lead the education of sales about Last Look – it's huge benefits and why we need to be firm*…"

173. Mr Mbanefo said that he would want to see evidence that this had actually been done, from, for example, calendar entries showing reviews. He said that, if there was evidence that this did happen and that the manager reviewed the activities, Mr Mbanefo would not have made the same decision and would have changed his outcome about controls. Mr Mbanefo agreed that the Claimant had created tools for reviewing Last Look, including BARX trading reports. Mr Mbanefo agreed that there was evidence of the Claimant setting up a process, which Mr Seneviratne would then supervise. Mr Mbanefo said that he would look for training materials to ascertain that this had actually been done.

174. Mr Mbanefo said that it was his understanding that there were two Last Looks, one in BARX and one in BATS. He said that BARX Last Look was known about by Sales; the BATS Last Look was in dispute and was not known by Sales and was not widely talked about.

175. When asked about what Mr Mahon had said to Mr Mbanefo about Sales knowledge about Last Look, Mr Mbanefo said that he understood that Mr Mahon was talking about BATS Last Look, specifically; that was what made sense to Mr Mbanefo. Mr Mbanefo said repeatedly in his evidence to the Tribunal that the Claimant was fully open about BARX Last Look and that Mr Mbanefo had found only that the Claimant had hidden the existence of BATS Last Look from Sales. He said that the Claimant had discussed the settings in BARX Last Look; but not in BATS Last Look. He said that there was evidence to show that the Claimant had facilitated information being disclosed on BARX Last Look. Mr Mbanefo said that the Claimant had been inconsistent about his disclosures on BARX and BATS and that was what Mr Mbanefo's decision was based on – the Claimant's inconsistency in relation to disclosure of BARX Last Look and BATS Last Look. He said that Sales were generally aware of Last Look in BARX and the rationale for Last Look in BARX.

176. Mr Mbanefo was cross-examined about the Bank's agreements with clients relating to the use of BARX for foreign exchange FX trading. The Bank's Operational and Security Terms for Electronic Trading stated, at paragraph 2.5,

> "*We are not obliged to act on any Instruction, or to execute or otherwise enter into any particular transaction, and need not give any reasons for declining to do so…*" (bundle A3, p.1258).

Mr Mbanefo agreed that that contradicted his view that clients should be told the reason for Last Look rejects.

177. Mr Mbanefo was also cross-examined about advice that the Respondent's Compliance and Legal Departments and external Counsel had given to the Claimant about disclosing symmetry to clients. The Legal Department had advised, in relation to symmetry, that unless implementing symmetry represented a change to the terms and conditions with customers, there was no need from a legal perspective to tell the customers of the changes.

178. The Claimant had passed this on to his manager and to members of the Sales team on 17 September 2014 saying, "*Just to confirm that we will be making the e-spot "Last Look" symmetrical from next week. The proposed action has been reviewed by Compliance, Legal and external counsel, as has the decision not to message-out on this under-the-hood change.*" (Bundle A3, p.1194). Mr Mbanefo agreed in evidence that the Compliance and Legal Departments had had actively blocked disclosure about an aspect of Last Look which was directly relevant to clients. Mr Mbanefo agreed that, if changing the symmetry of the algorithm was an under-the-hood change, then changing hold times and threshold would also be under-the-hood changes.

179. During both Mr Mbanefo and Mahon's evidence, they emphasised the fact that Mr Mahon had found that there were over 500 changes in client settings between March and September 2012 and that this represented a number of changes to settings clients which went beyond "exception clients". They both said that the exception clients were the most toxic.

180. Mr Mahon said that he did not accept that all clients were toxic. He said that he believed that it was possible to differentiate between toxic and non toxic clients and that toxic clients were ones who were overtly setting out to exploit latencies and had the most toxic flows.

181. Mr Mahon and Mr Mbanefo both said that they were concerned about the lack of control in the Claimant's business and the ability of traders to change settings. Mr Mahon said that simply because, in fact, a client had not been taken advantage of, this did not mean that the Respondent did not need controls to be in place.

182. Mr Mahon was cross-examined about the Claimant's analysis in his Appendix, showing that there was no increase in the rejects ratio for benign clients over 5 years and, therefore, demonstrating that the Claimant was not "squeezing" those clients in the non toxic group. Mr Mahon replied that he had only seen this analysis in the Claimant's witness statement. He said that, in his own analysis, there were many changes to the settings in the period and that there appeared to him to be minimal and incomplete control to stop that happening.

183. In his evidence, Mr Mahon said that he understood that in BATS Last Look, there were other traps to protect the firm from other behaviours. He had sympathy that that information should be withheld. Elsewhere in his oral evidence, Mr Mahon again agreed that there were some aspects of BATS which should not be explained to clients. He said, however, that the existence of BATS should be disclosed.

184. Mr Mahon was cross-examined about attitudes to confidentiality on Last Look. It was put to Mr Mahon that there was simply a difference of opinion between the Claimant and Mr Mahon about what was confidential and what was not. It was put to Mr Mahon that the Claimant had simply drawn the line regarding confidentiality, in Mr Mahon's view, in the wrong place. Mr Mahon's response was that he had come to his conclusion based on a number of factors, including poor culture towards disclosing information Sales and clients, changing thresholds to make more money, along with a lack of control. He said that all of those had led to his decision to dismiss the Claimant. It was then put to Mr Mahon that, in fact, he had said in his dismissal letter that he would have dismissed the Claimant for each one of the separate allegations (bundle A2, p.726). Mr Mahon conceded that that was what he had said in his letter, and that there was an apparent contradiction.

185. I concluded from this passage of oral evidence that Mr Mahon did concede, in cross-examination, that the Claimant's attitude to confidentiality regarding Last Look was not, on its own, a matter which ought to have resulted in dismissal. Mr Mahon specifically explained that he had considered the Claimant's attitude to confidentiality alongside a number of other things when he decided that dismissal was appropriate.

186. Mr Mahon was also cross-examined about the Respondent Legal Department's advice that the introduction to symmetry to Last Look did not have to be disclosed to clients. He also agreed that, if this was a change which did not have to be disclosed to clients, then changing settings, for example hold times, was similarly required to be withheld from clients. Mr Mahon said that he did not see these emails at the time he made his decision to dismiss.

187. Mr Mahon was cross-examined about the Claimant's 2012 mid-year performance review, in which the Claimant had said to his manager that, following the manager's agreement, the Claimant had tightened the Last Look rules for Currenex and Integral clients (ECN clients). Mr Mahon agreed, in cross-examination, that the manager had seen that part of the performance review and did not object to what was said in it.

188. Mr Mahon was cross-examined about emails which the Claimant obtained on specific disclosure, showing that he had made efforts to implement BARX symmetry. For example, an email which the Claimant sent to an IT manager on 4 February 2015, saying,

> "*Subject: Urgent doc request… I need to get hold of the BRD(s) covering the changes to make BARX Last Look symmetric. Could you send them over ASAP?"* (bundle A3, p.1148).

He was also shown an email from the Claimant to Barclay's external lawyers saying: "*Can I also get a response to my enquiry about correcting the error with BARX Last Look to make it symmetric?* (bundle A3, p.1200), as well as an email from the Claimant dated 20 March 2015 to IT saying:

> "*I have obtained written permission from the external lawyers for us to go ahead with correcting the work on symmetric Last Look for BARX. Can you please schedule this work?*" (bundle A3, p.1219)

189. Mr Mahon was directed to subsequent emails showing that the Claimant was not included in the email circulation regarding implementation of symmetry, but that his direct report, Mr Seneviratne, had taken responsibility for it. Mr Mahon replied, when shown these emails:

> "I would like to have seen this email. I think it shows urgency and the Claimant taking responsibility… the email showed the Claimant giving appropriate instructions and acting promptly… I would like to have seen these."

190. In respect of the Claimant having been excluded from the email chain, Mr Mahon also said: "I would like to have seen these emails."

191. Mr Mahon was cross-examined about an email from the Claimant to Mr Bagguley, his manager's manager, asking him to authorise the change to Last Look logic symmetry, in which the Claimant said he would like to close it off as soon as possible (bundle A3, p.1198) Mr Mahon said:

> "It definitely shows the Claimant is trying to do stuff. I would like to have seen this. He seems to have been left out. I would have liked to have known. It had a bearing on allegation 6."

192. Mr Mahon was asked in re-examination about the relative seriousness of the allegations he found against the Claimant. He said that he had found it difficult to separate allegations 2, 3, 4 and 7 but that 6 was a discreet issue. He said that allegations 6 bothered him least, as it was a stand alone allegation. He said that his conclusion was round culture; the part of the culture being that controls were weak and transparency poor. I noted that Mr Mahon said that allegation 6 was a discreet issue in re examination and had not suggested this is his witness statement, nor in his letter of dismissal.

193. Mr Mahon produced his Excel spreadsheets, showing the number of changes which had been made to Last Look settings. He explained how he had calculated that there had been 22 changes per week to Last Look settings, which was vastly in excess

of what the Claimant had said during the disciplinary hearings. Mr Mahon said that Last Look had been applied too widely and too indiscriminately and that the protective role of Last Look had been lost. He said that Last Look should be used primarily to protect against toxic flow trading behaviour.

194. Mr Mahon and Mr Mbanefo were both adamant in their evidence to the Tribunal that they made their decisions independently of the DFS Order. They both said that, while they were aware of the DFS Order, they had asked for specific assurances from Human Resources that they were free to come to a conclusion which was contrary to the terms of the Order – that is, not to dismiss the Claimant. Both said that they would not have agreed to accept their disciplinary or appeal officer roles unless they had received that assurance. Each of Messrs Mahon and Mr Mbanefo said that they came to their conclusions based on the evidence before them. Mr Mahon said that it was nevertheless relevant to his disciplinary decision that the Claimant's actions, including his failure to implement proper controls, led to the Bank having to agree to pay a $150 million penalty to the DFS.

195. In their evidence, both Mr Mahon and Mr Mbanefo repeated the conclusions, and justifications for them, set out in their respective outcome letters.

196. Mr Mahon told the Tribunal that the Claimant had created an environment which was not professional, transparent or collaborative. He said that Sales needed to be told information by traders so that Sales would, " .. know what is happening to the client." While the Respondent's Global Supervision Policy, Global Code of Conduct and the Claimant's contract of employment stated that confidentiality was vital in the business, Mr Mahon said that the Claimant was required to determine where to draw the line on confidentiality in relation to his area of business.

197. The Claimant's former manager, Mr Cartledge, gave evidence to the Tribunal. He said that he had been responsible for a lot of businesses in Barclays. He said that the number of supervisory systems and policies which the Claimant had implemented in his part of the business were significantly greater than existed in other Barclays' businesses and across the industry. Mr Cartledge said that not all policies needed to be written down in a central document. He said that lower level policies could be contained on emails, or even be verbal. He said that there would certainly not be a written policy touching every aspect of every role. Mr Cartledge said that Sales people did not need to know about BATS Last Look functionality, but that they did, in fact, know that it existed. Mr Cartledge said that the BATS Last Look functionality could have been part of the BARX controls. If there had just been a new piece of Code in BARX, presenting the BATS Last Look functionality, this would not have been mentioned; it would not have been helpful for Sales to have known about that additional piece of Code.

198. The Claimant presented his claim to the Tribunal on 7 March 2017. The Claimant has not been able to obtain any employment in the financial services sector since his dismissal.

Relevant Law

199. By *s94 Employment Rights Act 1996*, an employee has the right not to be unfairly dismissed by his employer

200. *s98 Employment Rights Act 1996* provides it is for the employer to show the reason for a dismissal and that such a reason is a potentially fair reason under *s 98(2) ERA*. Conduct is a potentially fair reason for dismissal.

201. Cairns LJ said in *Abernethy v Mott Hay and Anderson* [1974] ICR 323, [1974] IRLR 213,"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee'. 'These words were approved by the House of Lords in *W Devis & Sons Ltd v* Atkins [1977] AC 931, [1977] 3 All ER 40.

202. If the employer satisfies the Employment Tribunal that the reason for dismissal was a potentially fair reason, then the Employment Tribunal goes on to consider whether the dismissal was in fact fair under *s98(4) Employment Rights Act 1996*. In doing so, the Employment Tribunal applies a neutral burden of proof.

203. In considering whether a conduct dismissal is fair, the Employment Tribunal is guided by the principles set out in *British Home Stores Ltd v Burchell* [1978] IRLR 379, affirmed by the Court of Appeal in *Post Office v Foley* [2000] ICR 1283.

204. Under *Burchell* the Employment Tribunal must consider whether or not the employer had an honest belief in the guilt of the employee of misconduct at the time of dismissal. Second, the Employment Tribunal considers whether the employer, had in its mind, reasonable grounds upon which to sustain that belief. Third, the Employment Tribunal considers whether the employer, at the stage at which he formed the belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

205. The Employment Tribunal also considers whether the employer's decision to dismiss was within a range of reasonable responses to the misconduct.

206. In applying each of these tests the Employment Tribunal allows a broad band of reasonable responses to the employer, *Iceland Frozen Foods v Jones* [1982] IRLR 439.

207. The band of reasonable responses test applies as much to the Respondent's investigation as it does to the decision to dismiss: *Sainsbury's Supermarkets v Hitt* [2003] IRLR 23, LJ Mummery, giving the judgment of the Court, para 30.

208. However, delay can render an otherwise fair dismissal unfair, per Elias LJ in *A v B* [2003] IRLR 405 at para 66.

209. The gravity of the charges and the seriousness of the consequences of the disciplinary proceedings for the employee will be relevant in considering what is expected of a reasonable investigation, *A v B* [2003] IRLR 405. In *Turner v East Midlands Trains Limited* [2013] IRLR 107 at paras 20 – 22, Elias LJ said, "..if the impact of a dismissal for misconduct will damage the employee's opportunity to take up further employment in the same field, or if the dismissal involves an allegation of immoral or criminal conduct which will harm the reputation of the employee, then a reasonable employer should have regard to the gravity of those consequences when determining the scope and nature of the appropriate investigation….The test applied in *A v B* and *Roldan* is still whether a reasonable employer could have acted as the employer did. However, more will be expected of a reasonable employer where the allegations of

misconduct, and the consequences for the employee if they are proven, are particularly serious."

210. It is not for the Employment Tribunal to substitute its own view for that of the employer, but to consider the employer's decision and whether the employer acted reasonably, *Morgan v Electrolux Ltd* [1991] IRLR 89, CA; *London Ambulance Service NHS Trust v Small* [2009] IRLR 563, CA.

211. The ACAS Code of Practice 1: Disciplinary and grievance Procedures (2015) came into effect on 11 March 2015. By *s207(2) TULR(C)A 1992*, in any proceedings before an Employment Tribunal any Code of Practice issued thereunder by ACAS shall be admissible in evidence and any provision of the Code which appears to the Tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining the question.

212. The ACAS Code of Practice 1, paragraph [19] states that, "where misconduct is confirmed .. it is usual to give he employee a written warning. A further act of misconduct .. would normally result in a final written warning." Paragraphs [23] and [24] state, "Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences, that they may call for dismissal for a first offence…. Disciplinary rules should give examples of acts which the employer regards as acts of gross misconduct. These may vary according to the nature of the organisation, but might include things such as theft or fraud, physical violence, gross negligence or serious insubordination."

213. In *Ladbroke Racing Limited v Arnott* [1983] IRLR 154, Ct Session (Inner House) the Court of Session stated that dismissal for breach of a company rule is not necessarily fair – it still has to be decided whether dismissal was a reasonable response to the particular breach. In *Donachie v Allied Suppliers Limited* EAT 46/80 the EAT held that it was unreasonable to dismiss an employee for failure to comply with a material term of the contract of which he was unaware and of which he could not reasonably have been aware.

214. In *Bishop v Graham Group plc* EAT 800/98 the EAT said at paragraphs 23-25 of its judgment, " for a single act of misconduct to justify dismissal, it must be serious, wilful, and obvious. In elaboration of this analysis, Mr Pritchard referred us to the case of Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 1 WLR 698. In that case, Lord Evershed MR made clear that it was insufficient for the misconduct merely to be grave and serious; it had also to be wilful in the sense that there had to be a deliberate flouting of the essential contractual conditions. In formulating that test, the Master of the Rolls referred to a judgment of Lord James of Hereford in Clouston & Co v Corry [1906] AC 122 where he said this:

> "Now the sufficiency of the justification depended upon the extent of misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal."
>
> 24 From these authorities we conclude that, to justify dismissal in the present case, the employers must show that Mr Bishop had, by his own

deliberate act or acts, struck at the root of his contract of employment so as to call into question its future viability. Such would be the case where his actions undermined the trust and confidence which must exist between himself and his employers.

25 The misconduct must be obvious; it must be such that the employee would plainly recognise it as conduct which would merit summary dismissal if discovered by his employers. Such recognition might be either because the employers had expressly made known to their staff that a particular type of misconduct would be treated as a dismissable offence or because the employee, judging the matter for himself according to the ordinarily accepted standard of morality of the time, would recognise dismissal as a predictable consequence of such misconduct".

Polkey

215. If the Tribunal determines that the dismissal is unfair the Tribunal may go on to consider the percentage chance that the employee would have been fairly dismissed, *Polkey v AE Dayton Services Limited* [1988] ICR 142.

216. In *Gover v Propertycare Limited [2006] ICR 1073*, the Court of Appeal held that the *Polkey* principle does not only apply to cases where the employer has a valid reason for dismissal but has acted unfairly in its mode of reliance on that reason, so that any fair dismissal would have to be for exactly the same reason. Tribunals should consider making a *Polkey* reduction whenever there is evidence to suggest that the employee might have been fairly dismissed, either when the unfair dismissal actually occurred or at some later date. In making an assessment Tribunals should apply the principles set out in *Software 2000 Limited v Andrews* [2007] ICR 825.

Contributory Fault

217. By *s122(2) ERA 1996,* where the Tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, the Tribunal shall make such a reduction. By *s123(6) ERA*, where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. *Optikinetics Limited v Whooley* [1999] ICR 984: it is obligatory to reduce the compensatory award where there is a finding of contributory fault. The reduction may be 100% - *W Devis & Sons Limited v Atkins* [1977] ICR 662.

218. In *Nelson v BBC (No 2)* [1980] ICR 110, the Court of Appeal said that three factors must be satisfied if the tribunal is to find contributory conduct:
(a) The relevant action must be culpable and blameworthy
(b) It must actually have caused or contributed to the dismissal
(c) It must be just and equitable to reduce the award by the proportion specified.

219. It is open to a Tribunal to make deductions both for *Polkey* and contributory fault. The proper approach of tribunals in these circumstances is first to assess the loss sustained by the employee in accordance with *s123(1) ERA 1996*, which will include any percentage deduction to reflect the chance that he would have been dismissed in any event. The Tribunal should then make the deduction for contributory fault, *Rao v*

Civil Aviation Authority [1994] ICR 495. However, in deciding the extent of the employee's contributory conduct and the amount by which it would be just and equitable to reduce the award for that reason under *s123(6)*, the tribunal should bear in mind that it has already made a deduction under *s123(1) ERA 1996.*

Discussion and Decision

Reason for Dismissal

220. The Claimant contended that Mr Mahon (and Mr Mbanefo on appeal) dismissed him because of the DFS Order, not because they believed that he was guilty of misconduct.

221. The DFS Order required the Respondent, "*to take all steps necessary to terminate…"* the Claimant's employment.

222. Both Messrs Mahon and Mbanefo were members of the RIOC, which had approved the DFS Order.

223. Both were adamant, however, that they came to their decisions on the evidence before them.

224. I was conscious that another senior employee at the Bank appeared to view the Claimant's dismissal as the inevitable consequence of the DFS Order: On 7 September 2016 Alison Miln, from the Respondent's Legal Department, emailed the members of the RIOC subcommittee, saying that Mr Mahon had made a recommendation that the Respondent dismiss the Claimant for misconduct on the grounds of the Last Look issues. She said: "*The members will recall that the terms of the DFS November 2015 order required Barclays to "take all steps necessary to terminate" DF's employment.*" (bundle A2, pgs.705 to 706).

225. I have found, as set out below, that Mr Mahon's and Mr Mbanefo's decisions were procedurally and substantively unfair in a number of regards.

226. I was troubled by the contradictions in Mr Mahon's and Mr Mbanefo's evidence. It seemed to me that, at times, they were trying to advance justifications for their decisions which had not been in their minds at the time.

227. The extent of the unfairness of the disciplinary proceedings and the contradictions in the evidence could have indicated that Mr Mahon and Mr Mbanefo did not take care to make their own, fair decisions, rather than seeking ways to follow the DFS Order. However, I noted that Mr Mahon and Mr Mbanefo were not responsible for the Respondent's failure to give the Claimant numerous relevant documents during the disciplinary process. Their colleagues in Human Resources appear to have made those decisions.

228. Mr Mahon conducted 3 disciplinary hearings, during which he asked the Claimant about the allegations. His contemporaneous email to Human Resources on 23 March 2016 (Bundle A1, 478), suggested that he had listened to the Claimant's arguments and was open to persuasion on them. Mr Mahon interviewed other relevant individuals, Messrs Seneviratne and Robertson and sought data about Last Look settings from Mr Seneviratne. At that stage, Mr Mahon did not know what the data

would show – it could have corroborated the Claimant's account.

229. Both Mr Mahon and Mr Mbanefo gave detailed reasons for their decisions in their outcome letters. They referred to relevant evidence to support their conclusions.

230. While I had some reservations, I accepted Mr Mahon and Mr Mbanefo's evidence, on the balance of probabilities, that they made their own decisions on the evidence available to them at the time. I accepted that they believed that the Claimant was guilty of the misconduct described in their outcome letters.

231. The Respondent therefore showed that it dismissed the Claimant for the potentially fair reason of misconduct.

Reasonable Evidence and Reasonable Investigation

Allegations 2 and 3

232. Regarding allegations 2 and 3, Mr Mahon decided that the Claimant "encouraged and directed (his) team to intentionally withhold information about Last Look from Sales" and that "this position fostered a distrustful and "closed" environment" which was "not professional, transparent, or collaborative" and was not acceptable at Barclay's.

233. I found Messrs Mahon and Mbanefo's evidence regarding their conclusions on allegations 2 and 3, and their justifications for their conclusions, both opaque and contradictory.

234. Mr Mbanefo told the Tribunal repeatedly that the Claimant was fully open about BARX Last Look and that Mr Mbanefo had found only that the Claimant had hidden the existence of BATS Last Look from Sales. He said that there was evidence to show that the Claimant had facilitated information being disclosed on BARX Last Look. Mr Mbanefo also said that he had understood, from what Mr Mahon told him, that Mr Mahon's conclusions and criticisms of the Claimant related only to the Claimant's secrecy around BATS Last Look.

235. Mr Mbanefo therefore accepted, in evidence, the Claimant's contention that the Claimant had insisted, in his emails, on confidentiality regarding BATS Last Look only.

236. Mr Mbanefo said that Mr Mbanefo's criticism of the Claimant was that the Claimant had been inconsistent in his treatment of confidentiality between BARX and BATS Last Look.

237. By contrast, Mr Mahon did not draw a distinction between the Claimant's treatment of BARX and BATS Last Look, during his oral evidence. However, he accepted, in oral evidence, that confidentiality was indeed required regarding parts of the BATS Last Look functionality. He did not criticise the Claimant for lack of consistency.

238. It was somewhat unclear what Mr Mahon had actually decided regarding allegations 2 and 3. Mr Mbanefo said that he had understood, from talking to Mr Mahon, that Mr Mahon concluded that the Claimant's inappropriate secrecy related only to BATS. Mr Mahon suggested that he had upheld allegations 2 and 3 in relation

to both BARX and BATS, but Mr Mahon acknowledged the Claimant had been correct to maintain confidentiality about parts of the BATS Last Look functionality.

239. Nevertheless, it was clear that, insofar as Mr Mahon found that the Claimant had "encouraged and directed (his) team to intentionally withhold information" and "fostered a distrustful and "closed," in relation to BARX, Mr Mbanefo wholly disagreed with that conclusion, when he looked at the evidence. Mr Mbanefo was emphatic that the Claimant had been fully open about BARX Last Look.

240. If Mr Mahon did uphold allegations 2 and 3 against the Claimant in relation to BARX Last Look, I agreed with Mr Mbanefo that the available evidence did not support such a conclusion. I decided that Mr Mahon did not have reasonable grounds for such a decision and that the conclusion was unfair. There was a very large body of email evidence showing the Claimant giving information to, and seeking to educate Sales about, Last Look. The Claimant had introduced reports, which the Sales team could view, showing Last Look statistics. He had sought to introduce a role which included training Sales regarding Last Look. Of all the emails the Claimant sent during his employment, there were a few in which he instructed withholding information about Last Look from Sales. Almost all (of these few emails) specified "BATS" Last Look, in particular. Put simply, there was very little evidence of the Claimant withholding information about BARX Last Look and, by contrast, extensive evidence showing him disclosing it.

241. I reminded myself that I must not substitute my view for that of the employer, but must consider only whether Mr Mahon's decision was within the range of reasonable responses. I noted, however, that the Respondent's own witness, Mr Mbanefo, was adamant that the evidence showed the Claimant being fully open about BARX Last Look.

242. I decided that Mr Mbanefo did not correct the unfairness on appeal – he upheld Mr Mahon's findings and drew no distinction between BARX and BATS confidentiality at the time.

243. I therefore decided that Mr Mahon acted unfairly if he upheld the allegation in relation to BARX Last Look.

244. In relation to BATS LL, Mr Mahon accepted in his oral evidence that confidentiality was indeed required regarding parts of the BATS Last Look functionality. This was not reflected in his dismissal letter. On his oral evidence, I concluded that Mr Mahon only partly upheld allegations 2 and 3 in relation to BATS Last Look.

245. When it was put to Mr Mahon in cross examination that the Claimant had simply drawn the line in the wrong place regarding confidentiality – and that that was not a dismissable offence – Mr Mahon said that he had relied, not just allegations 2 and 3 confidentiality/withholding information, but on the other allegations, in deciding to dismiss. He accepted that this evidence was different to what he had said in his dismissal letter. In his dismissal letter, Mr Mahon had said that each of the allegations which he had upheld against the Claimant, on their own, amounted to gross misconduct and would have justified dismissal.

246. I accepted Mr Mahon's evidence at the Employment Tribunal that he did not dismiss the Claimant solely relying on allegations 2 and 3. I decided that it was likely

that he was being truthful in his oral evidence, because he conceded that a degree of confidentiality was required. He appeared to acknowledge the Claimant's argument that mistakenly identifying where to draw the line on confidentiality, when confidentiality is vitally important for many of the Bank's operations, was not a dismissable offence.

Allegation 4

247. In relation to allegation 4, Mr Mahon found that Last Look was applied to a much wider client base than just those with toxic flow trading behaviour and that the lack of differentiation between clients seemed to "stem from a lack of general respect for clients as a whole." He said that the Claimant's predominant focus had been on profit, turning up settings until clients complained. Mr Mahon said that the Last Look settings in BATS and BARX had been changed for 535 clients between 31 March 2012 and 30 September 2012, which contradicted the Claimant's view that there were 50 clients who were the main aggressive trading clients. He said that Last Look had been applied in a wide ranging and indiscriminate way.

248. Throughout the Claimant's interviews, and in his Defensive Script, the Claimant said that the figures showed that Last Look was a highly discriminating tool and that it was the main aggressive clients who had trades rejected by Last Look, not the more benign client types. He said that the relevant figures were contained in a spreadsheet attached to the Respondent's Subpoena Response to the Attorney General of New York.

249. On 2 December 2015 the Claimant had asked the Respondent to disclose the Subpoena Response document to him, in preparation for the disciplinary hearing. The Respondent declined to do so, citing privilege.

250. Mr Mahon looked at the Subpoena Response spreadsheet, but Mr Mbanefo did not. The Respondent did not provide him with it.

251. Mr Mbanefo and Mr Mahon were asked, in cross examination, whether they considered that this "factually rich" document was relevant to the allegations against the Claimant. Both responded that it was. They both said that they did not know that the Respondent had refused to provide it to the Claimant in advance of the disciplinary and appeal hearing.

252. I decided that the Respondent acted unreasonably in not providing a document which Mr Mahon had seen, and the Claimant relied on, to Mr Mbanefo on appeal. In my view, this made the appeal unfair.

253. Futhermore, I decided that the Respondent did not provide the Claimant with the document, which contained relevant evidence. In so failing, the Respondent acted outside the broad band of reasonable responses of a reasonable employer.

254. I accepted the Respondent's argument that the Claimant asked for a very large number of documents and that the Respondent was only required to conduct a reasonable investigation, so that it was reasonable for it not to disclose some relevant documents, if to do so would have been unduly onerous.

255. However, this was a case in which the Claimant's ability to work in FX again was likely to be imperilled by a dismissal. The Subpoena Response was a specific

document which was readily available – it did not require a lengthy and expensive search of the Respondent's IT systems. A member of the Respondent's Legal Department in New York was able to send Mr Mahon the spreadsheet attached to the Subpoena response on 23 March 2016, when Mr Mahon asked for it. I concluded that the standard of reasonableness in such a case required the Respondent to give the Claimant documents which were easily identifiable and directly relevant to the Claimant's defence. It was not sufficient for Mr Mahon to look at the spreadsheet himself; fairness required that the Claimant be allowed to present his own arguments and analysis of a document which was relevant to the allegations against him.

256. The importance of the Claimant being able to analyse and explain the spreadsheet was illustrated by the evidence in the Employment Tribunal. Having obtained the Subpoena document on specific disclosure in the Tribunal proceedings, the Claimant analysed the data on reject ratios and number of rejects and attached his analysis to his witness statement. He cross-examined Mr Mbanefo about the data. Mr Mbanefo confirmed that the Last Look reject ratios for more benign client types, like Corporate and Real Money, had stayed below 1% between 2010 and 2015. It was put to Mr Mbanefo that there was no evidence of the more benign clients "being squeezed" (to extract more profit from them). Mr Mbanefo said that, had he had the information he now had, he might have made a different decision. He said that the analysis in the Claimant's witness statement would have helped him.

257. Mr Mbanefo therefore appeared to accept that the Claimant's analysis of the AGNY Subpoena Response contradicted a finding that Last Look had been applied widely and indiscriminately, or that benign clients were "squeezed" to extract more money from them.

258. Mr Mbanefo's answers confirmed the central importance of the AGNY Subpoena Response document to the Claimant's ability to answer the allegations against him. Failing to disclose it to him, when he asked for it, was fundamentally unfair.

<u>Allegation 6</u>

259. Mr Mahon decided that the Claimant could and should have been more proactive in driving forward symmetry in BARX after he discovered that it had not been implemented "given the ongoing risk to your business". Mr Mahon said, ".. the prolonged delayed in making the change demonstrated a general lack of respect for clients and a de-prioritisation of their interests..".

260. On 2 December 2015 the Claimant asked Human Resources for, "*All documents and emails/BRDs sent or received by Nick Wells, Daron Bowes and Nick Shires concerning the request to make BARX LL symmetric and to make the Stop Loss gapping logic fully symmetric. All mention of this request and its remediation. The transcript of the interviews with the above personnel regarding how the error occurred and whose enquiry brought it to light and what involvement [the Claimant] had in directing that it should be remedied…";* his request was refused.

261. The Claimant obtained an order for specific disclosure of precisely these documents, as well as "any documents evidencing the date when the change went live. Any communication with Ed Falinski concerning this piece of work from the date he took over running the eFICC business until it went live into production."

262. The Claimant's other 2 December 2015 requests for documents were wide ranging and likely to include 10,000s of documents. The Respondent contended that, in that context, it was reasonable for the Respondent not to disclose the documents the Claimant requested regarding remediation of BARX symmetry.

263. At the Tribunal, the Respondent contended that the documents disclosed pursuant to the specific disclosure order were not necessarily the same as the documents the Claimant asked for on 2 December 2015. I rejected that argument. The terms of the Claimant's 2 December 2015 request and the terms of the specific disclosure order were very similar. I considered that, if the Respondent had conducted the search that the Claimant requested in December 2015, it is likely that they would have revealed the documents which were available at the Employment Tribunal.

264. I decided that the Respondent acted unreasonably in failing to disclose the documents the Claimant requested. The Respondent was alleging that the Claimant failed to take remedial action to implement BARX symmetry. Conducting a search for emails mentioning symmetry was fundamentally required in order to establish what action the Claimant took. This request covered a discreet topic. It was not an onerous request like some of the Claimant's other requests for all emails covering day to day matters in the business.

265. Mr Mahon was cross-examined about the emails which the Claimant obtained on specific disclosure, showing that the Claimant had made efforts to implement BARX symmetry, for example, emails of 4 February 2015, 20 March 2015. Mr Mahon was directed to subsequent emails showing that the Claimant was not included in the email circulation regarding implementation of symmetry, but that his direct report, Mr Seneviratne, had taken responsibility for it. Mr Mahon replied, when shown these emails:

> "I would like to have seen this email. I think it shows urgency and the Claimant taking responsibility… the email showed the Claimant giving appropriate instructions and acting promptly… I would like to have seen these."

266. In respect of the Claimant having been excluded from the email chain, Mr Mahon also said: "*I would like to have seen these emails*."

267. Mr Mahon was cross-examined about an email from the Claimant to Mr Bagguley, his manager's manager, asking him to authorise the change to Last Look logic symmetry, in which the Claimant said he would like to close it off as soon as possible (bundle A3, p.1198) Mr Mahon said:

> "*It definitely shows the Claimant is trying to do stuff. I would like to have seen this. He seems to have been left out. I would have liked to have known. It had* a bearing on allegation 6."

268. It was quite clear to me that Mr Mahon accepted that the email evidence contradicted and undermined Mr Mahon's decision on allegation 6.

269. I inferred from Mr Mahon's evidence that, if he had seen the emails at the time, he would not have upheld allegation 6 against the Claimant.

Allegation 7

270. Mr Mahon found that there were "gaps in the systems and controls" of the Claimant's team. He said that, when he asked the Claimant about what controls were in place, the Claimant's answers were sometimes confusing and contradictory. He found that there was no regular or formal review process to ensure that client settings were fair and reasonable, which represented an ongoing risk to the business.

271. At the time of the disciplinary hearings, the Claimant had been suspended since 13 August 2015. The Claimant had asked for the Respondent to give him "*The documentation describing the policy on Written Supervisory Procedures*" when the policy went live and how it was notified to the Claimant; "All *WSPs in the FX and eFICC businesses*" and the date when they were formally signed off; … "*All the contents of the eFICC team wiki referencing in any way practices, policies, procedures etc. and the date of any changes*".

272. It was not until 10 August 2016 that Ms Bonniface sent the Claimant the "Last Look support document for BATS: LL Rule Optimisation." The Claimant was not provided with all documents concerning Last Look stored centrally on the Claimant's team intranet site (the wiki). He obtained these on his application for specific disclosure in the Tribunal proceedings (bundle A3, p.1287-1332). These documents included a BATS Last Look Support Document, which the Claimant told the Tribunal he had been responsible for creating. The Last Look Support Document set out 10 principles to be applied in determining Last Look settings.

273. Once more, I considered that the Respondent failed to disclose relevant documents to the Claimant, which he had specifically requested. Once more, I considered that the Claimant's request on this regard was relevant and reasonable and not unduly onerous. I took into account the serious consequences for the Claimant's future employability if the Claimant was dismissed when I determined the requirements of a reasonable investigation.

274. It appeared from the evidence that Mr Mahon criticised the clarity of the Claimant's answers regarding controls, when the Claimant had not had access to relevant documents and when the Claimant had been out of the business, suspended, for at least 7 months.

275. Delay in disciplinary proceedings does not, of itself, render a disciplinary procedure unfair. Nevertheless, I considered that it was unfair of Mr Mahon to criticise the clarity of the Claimant's answers when the Claimant had not been given relevant documents, which could have helped him provide clarity, and when the Claimant could not reasonably have been expected have an accurate memory of relevant documents after a 7 month suspension.

276. I concluded that the Respondent did not conduct a reasonable investigation in relation to allegations 4, 6 and 7. Further, it did not have reasonable evidence to support a conclusion that the Claimant had been guilty of allegations 2 and 3 in relation to BARX Last Look. The unfairness went to the heart of the Claimant's ability to defend the allegations and to the reasonableness of the evidence the Respondent had before it made the decision to dismiss. I considered that, given the extent of the unfairness, the dismissal was clearly procedurally unfair.

277. The Claimant contended that he effectively had been denied the right to be

accompanied at the disciplinary and appeal hearing because the terms of his suspension prevented him from contacting colleagues. I decided that the Claimant could have contacted Human Resources to ask them to arrange for a named colleague to accompany the Claimant at the hearings. I concluded that the Respondent's action in this regard was not unfair. The Claimant indicated to both the disciplinary and appeal hearings that he would proceed in the absence of a workplace colleague.

Decision to Dismiss

Allegation 6

278. I also decided that the decision to dismiss was substantively unfair.

279. The additional email evidence fundamentally undermined Mr Mahon's conclusion that allegation 6 should be upheld. As Mr Mahon conceded that, the new evidence demonstrated that the Claimant was giving appropriate instructions and acting promptly to ensure that BARX symmetry was implemented, rather than failing to be proactive.

280. Allegation 6 was not supportable on the evidence.

Relationship between Allegation 6 and other Allegations

281. Mr Mahon was asked, in re-examination, about the relative seriousness of the allegations he found against the Claimant. He said that he had found it difficult to separate allegations 2, 3, 4 and 7, but that allegation 6 bothered him least, as it was a stand alone allegation.

282. I did not accept Mr Mahon's evidence on this. I noted that Mr Mahon said that allegation 6 was a discreet issue in re examination and had not suggested this is his witness statement, or in his letter of dismissal.

283. Moreover, Mr Mahon's evidence was inconsistent with his letter of dismissal, in which he said, regarding allegation 6, ".. the prolonged delayed in making the change demonstrated a general lack of respect for clients and a de-prioritisation of their interests." "Lack of respect for clients" was a formula which Mr Mahon used to describe his findings in relation to allegation 4. He also said, in relation to allegation 7, that he found that the Claimant held counterparts "in low regard."

284. The true evidence, in relation to allegation 6, was that the Claimant acted proactively, in the interests of clients. It was therefore also relevant to, and undermining of, Mr Mahon's findings on allegations 4 and 7.

Allegations 2 and 3

285. Mr Mahon said that he had relied, not just allegations 2 and 3 confidentiality/withholding information, but on the other allegations, in deciding to dismiss. Mr Mahon appeared to acknowledge that mistakenly identifying where to draw the line on confidentiality, when confidentiality is vitally important for many of the Bank's operations, was not a dismissable offence.

286. Furthermore. in evidence, Mr Mbanefo acknowledged that the Respondent's

Compliance and Legal Departments had actively blocked disclosure about an aspect of Last Look which was directly relevant to clients. Mr Mbanefo agreed that, if changing the symmetry of the algorithm was an under-the-hood change, then changing hold times and threshold would also be under-the-hood changes. That corroborated the conclusion that dismissal would not be appropriate for allegations 2 and 3 alone.

Allegation 4

287. In relation to allegation 4, the case law indicates that dismissal is appropriate for a first offence where the misconduct is "obvious"; "it must be such that the employee would plainly recognise it as conduct which would merit summary dismissal if discovered by his employers. Such recognition might be either because the employers had expressly made known to their staff that a particular type of misconduct would be treated as a dismissable offence or because the employee, judging the matter for himself according to the ordinarily accepted standard of morality of the time, would recognise dismissal as a predictable consequence of such misconduct".

288. At the time of the disciplinary and appeal hearings, Mr Mbanefo and Mr Mahon had sight of the Claimant's 2012 end of year performance review, which was in the disciplinary hearing bundle at B2, p.332. In it, the Claimant was given an objective of: "*Last Look – should have several mio* (million) *extra squeezed out asap*." Mr Mbanefo agreed that the Claimant's manager had signed off those objectives and was aware of the objective of generating several more £ millions out of Last Look.

289. Furthermore, Messrs Mahon and Mbanefo saw the Claimant's email of 15 March 2011 to Mike Bagguley, in which the Claimant said of Project Marlin, "From a revenue perspective the main effects will be: 1. Longer last look times will enable us to make more money with the same number of trade rejects and the same trade confirm times...*".* It is of note that the Claimant did not specify that only "aggressive" or "toxic" clients would be treated in this way. There was no evidence before Messrs Mahon and Mbanefo that Mr Bagguley had disagreed with the Claimant's proposal.

290. The Claimant pointed out, in his defensive script, that both these documents showed that senior managers were aware of the Claimant proposing that the Respondent "make more money" from Last Look. Moreover, the Claimant's performance review actually gave him the objective of doing so.

291. On the evidence available to the dismissing and appeal officer, the Claimant's manager and "grandfather" manager knew and approved of the Claimant using Last Look to generate additional revenue from clients. Mr Mbanefo and Mr Mahon chose not to interview either Mr Cartledge or Mr Bagguley. They therefore did not obtain any evidence to contradict the plain words of the documents to which Mr Cartledge and Mr Bagguley were party.

292. That being so, I considered that it was outside the band of reasonable responses for the Respondent to dismiss the Claimant for such actions. His managers had not indicated that generating extra profit from Last Look constituted misconduct, never mind being a dismissable offence. Further, in light of the managers' attitudes, the Claimant, judging the matter for himself according to the ordinarily accepted standard of morality of the time, could not have recognised dismissal as a predictable consequence.

293. The Respondent relied on the very broad wording of its Policies and Disciplinary Procedure in contending that the Claimant had breached appropriate standards and should thus have been dismissed. However, Mr Mahon said that, given the broad wording of the Policy documents, it was incumbent on the Claimant to judge their particular application to his area of business. I considered that it was unreasonable for the Respondent to decide that the Claimant had misjudged the requirements of fairness towards clients when his senior managers were aware of his intention to generate more money from clients using Last Look.

294. In any event, in relation to allegation 4, Mr Mbanefo conceded that the Claimant's analysis of the AGNY Subpoena spreadsheet would have informed Mr Mbanefo's decision better, in that it showed that more benign client types were not, in fact, being targeted for Last Look rejects.

Allegation 7

295. In relation to allegation 7, both Messrs Mahon and Mbanefo heavily criticised the Claimant for failing to have measures in place for reviewing Last Look settings to ensure that they were fair for all clients.

296. As Mr Mahon himself said, allegations 2, 3, 4 and 7 were interlinked. He conceded that the Claimant had introduced some systems of control.

297. I concluded that the Claimant's AGNY Subpoena analysis was also clearly relevant to the question of whether the business was adequately controlled. If aggressive client types were being targeted and benign clients were not, that would be relevant to a decision on whether the Claimant had avoided, " *action/inaction which might have the potential to incur reputational risk for the Bank [B2/470]* ***Global Conduct Policy****;* or whether he had taken, "*all reasonable steps to establish a strong culture of compliance in his business area [B2/383]* ***Global Supervision Policy****.*

298. It was not possible for the Respondent to make a reasonable decision on allegation 7 when such centrally relevant evidence had been withheld from the Claimant and from Mr Mbanefo.

299. Furthermore, Mr Mbanefo was cross-examined about whether he had found evidence of the Claimant reviewing Last Look rejects. He was directed to pages D1, 75 and D2, 476. He agreed that a year to date overview of Last Look, D1 75, was a periodic review and that D2 475 was evidence of the Claimant reviewing Last Look. Mr Mbanefo was cross-examined about the Claimant setting up a Last Look oversight role in June 2012. He was directed to an email (bundle D1, p.74), wherein the Claimant said to Mr Seneviratne that his ideas for a Last Look oversight role for a trader. Mr Mbanefo said that, if there was evidence that this did happen and that the manager reviewed the activities, Mr Mbanefo would not have made the same decision and would have changed his outcome about controls. Mr Mbanefo agreed that the Claimant had created tools for reviewing Last Look, including BARX trading reports. Mr Mbanefo agreed that there was evidence of the Claimant setting up a process, which Mr Seneviratne would then supervise. Mr Mbanefo said, however, that he would have looked to ascertain whether this had actually been done.

300. I concluded that Mr Mbanefo conceded that the evidence which was available during the disciplinary process showed that the Claimant had set up a system of control

and review for Last Look, which Mr Seneviratne would supervise. Mr Mbanefo conceded that, if what the Claimant had set up had actually happened, Mr Mbanefo would have changed his decision on allegation 7. I considered that it was outside the band of reasonable responses, however, for Mr Mbanefo find that the Claimant was primarily responsible – and therefore dismissable - for any subsequent failure to implement the system of control. Mr Mbanefo had agreed that Mr Seneviratne was responsible for supervising the process after the Claimant set it up.

301. I concluded that there was substantive unfairness in the Respondent's decision on each one of the allegations. I decided that, even taking all the allegations together, the Respondent's decision to dismiss the Claimant was outside the range of reasonable responses.

302. The Respondent dismissed the Claimant unfairly.

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303. In light of my findings on substantive unfairness on all the allegations, I concluded that the Respondent could not have dismissed the Claimant fairly, whatever fair procedure had been undertaken.

Contributory Fault

Allegations 2 & 3

304. I preferred the Claimant's evidence to Messrs Mahon and Mbanefo regarding the Respondent's need for confidentiality regarding Last Look. I decided that the available evidence showed that the Bank's Legal and Compliance Departments insisted on confidentiality regarding Last Look, particularly in respect of clients.

305. The Bank's Operational and Security Terms for Electronic Trading states, at paragraph 2.5,

> "*We are not obliged to act on any Instruction, or to execute or otherwise enter into any particular transaction, and need not give any reasons for declining to do so…*" (bundle A3, p.1258).

306. The Bank's standard terms, not drafted by the Claimant, therefore told clients that the Bank was entitled to refuse a trade without telling clients why. The standard terms did not require any openness about the operation of Last Look.

307. The Respondent's Compliance and Legal Departments had also actively blocked disclosure about an aspect of Last Look which was directly relevant to clients. Mr Mbanefo agreed that, if changing the symmetry of the algorithm was an under-the-hood change, then changing hold times and threshold would also be under-the-hood changes.

308. All this corroborated the Claimant's evidence that confidentiality was a fundamental principle in the Respondent's operations and that Last Look information should only be shared with other employees on a "need to know" basis. These principles are set out in the Respondent's ***Global Supervision Policy*** Bundle B2 *P401: "Need to know policy. This policy requires that information held by a*

representative of the firm should only be disclosed where there is a legitimate need to know'; P401: 'As a supervisor you should frequently remind your team of the following guidelines with respect to handling confidential information. Avoid discussing confidential matters…'; P423: 'Information Barriers …… electronic separation to ensure that electronically stored material should not be accessible by personnel without a legitimate need to access such information'.

309. Mr Cartledge also corroborated the Claimant's evidence. He said that the BATS Last Look functionality could have been part of the BARX controls. If there had just been a new piece of Code in BARX, presenting the BATS Last Look functionality, this would not have been mentioned; it would not have been helpful for Sales to have known about that additional piece of Code. Mr Cartledge said that Sales people did not "need to know" about BATS Last Look functionality.

310. I preferred Mr Cartledge's evidence on this matter to Mr Mahon and Mr Mbanefo's. It seemed to me that Mr Cartledge was a more independent and objective witness. He still works in the FX industry and he appeared not to bear any animosity towards his former employer.

311. I also noted that the Respondent's recommendation that the Claimant be referred to disciplinary proceedings said, of the Claimant's actions:

"42. ….

(a) The number of 'problematic' communications is relatively small when balanced with the overall population of communications reviewed by the investigation;

(b) There are many examples of open and transparent communications with BARX users about rejects and Last Look, as well as examples of clients negotiating or seeking to negotiate their Last Look settings – suggesting a high degree of awareness amongst customers of Last Look and its relevance to their order flow; and

(c) Sales were generally aware of Last Look;

(d) Last Look has been commonly understood in the market for many years and market participants were well aware that Barclays, and other banks, had a discretion to reject trade requests, and reject requests using Last Look;

(e) The clients affected by rejections were overwhelmingly the most sophisticated BARX counterparties and, therefore, the group most likely to take advantage of any information about Barclays' Last Look settings to the detriment of Barclays (and BARX pricing). With that in mind, it may have been appropriate to withhold information in order to maintain the integrity of Last Look as a legitimate defensive tool for Barclays.

312. On all the evidence, I concluded that the Claimant was not guilty of culpable and blameworthy conduct in relation to allegations 2 and 3.

<u>Allegation 4</u>

313. It seemed to me that the Respondent continues to operate many of the practices in relation to Last Look for which the Claimant was criticised. It does not target only "toxic" trading behaviours. Its current document, which describes Last Look to clients (bundle A2, pgs.1106 to 1108), states,

"Does Last Look specifically target only certain types of trading behaviours and flow? No. Last Look is agnostic as to the causes of market movements and will reject a trade request whenever the market moves beyond the price tolerance in place during the prescribed time delay."

"Can I trade electronic spot FX with Barclays without Last Look being applied to me? No. Last Look is applied to all electronic spot FX trading. However, the majority of clients are likely to see few, if any, rejects, depending on the way that they trade with us."

314. Mr Mahon and Mr Mbanefo criticised the Claimant for applying Last Look indiscriminately, to more benign client types, yet the Respondent continues to apply Last Look to all (non GUI) clients.

315. I concluded that the Claimant was not guilty of culpable and blameworthy conduct when he applied Last Look to all clients and did not distinguish between "toxic" and "benign" client types. Seeing that Messrs Bagguley and Cartledge approved him increasing Last Look hold times and generating more income from Last Look, the Claimant was not guilty of guilty of culpable and blameworthy conduct in this regard either.

Allegation 7

316. I also preferred Mr Cartledge's evidence about the standards of control in the Claimant's business. Mr Cartledge said that he had been responsible for a lot of businesses in Barclays, and that the number of supervisory systems and policies which the Claimant had implemented in his part of the business were significantly greater than existed in other Barclay's businesses and across the industry. He said that not all policies needed to be written down in a central document and that lower level policies could be contained in emails, or even be verbal. He said that there would certainly not be a written policy touching every aspect of every role.

317. I again noted the Respondent's recommendation that the Claimant be referred to disciplinary proceedings, which said, of the Claimant's actions:

> *"43. In addition, there is evidence to suggest that Mr. Fotheringhame was aware of Barclays supervisory expectations, as detailed in the GSP, and that he spent a considerable amount of time monitoring Last Look data and directing his team to ensure settings were appropriate for clients."*

318. I concluded that the Claimant had instituted numerous checks and controls regarding Last Look and that his standards of control were comparatively high.

319. However, Mr Mahon did establish that the Claimant's knowledge of the number of Last Look settings changes made each week was significantly erroneous. That indicated that the Claimant did not have accurate oversight of the way Last Look settings were being used and changed by his employees. While the Claimant had

introduced numerous Last Look policies, it did not appear that the Claimant ensured that these were being followed without exception.

320. On the evidence, Mr Seneviratne had taken control of the Last Look oversight role. However, the Claimant was ultimately responsible for the business.

321. The Respondent did not produce evidence to show that any clients had actually been unfairly treated as a result of the Claimant's lack of oversight. Nevertheless, in light of the $150 million penalty, and the Claimant's seniority in the bank, I accepted that the Claimant was, to a limited extent, responsible for failing to protect the Respondent from serious risks associated with the Respondent's use of Last Look. I decided that the Claimant's failures were culpable and blameworthy because of the level of risk, in the form of regulatory sanctions, posed by failures to control the business. They clearly did contribute to his dismissal – Messrs Mahon and Mbanefo referred to them in their outcome letters.

322. I considered that it was appropriate to reduce the Claimant's basic and compensatory awards by 20% for this less extensive failing, in respect of one allegation only. I did not consider that there were grounds, in this case, for a different reduction being applied to the basic, rather than compensatory, award.

323. I decided that the Claimant had not undertaken any other action which was culpable and blameworthy.

Employment Judge Brown

9 March 2018