Gross misconduct dismissal of City trader who had applied industry guidance was unfair

In *Weir v Citigroup Global Markets Ltd*, an Employment Tribunal has held that the dismissal of a City trader for misleading the financial markets was unfair because he had been operating in line with industry guidance and his managers knew of his approach. Further, the employer's lengthy disciplinary process was unacceptable, unreasonable and caused significant stress and worry to the employee.

What happened in this case?

Mr Weir worked for Citigroup as a Sales Trader on its Asia-Pacific High Touch trading desk (the **APAC desk**) in London. His role involved providing professional and large-scale investors with market updates, trade ideas and sourcing buy and sell trade ideas in relevant stock. Part of his role involved the identification and publication of "indications of interest" (**IOIs**). IOIs are indications that a client has an interest in buying or selling particular stock in a particular quantity. The IOIs are published on Bloomberg's financial trading platform with the aim of attracting a counterparty.

Following a regulatory investigation into the activities of the Hong Kong office, Citigroup reviewed the practices of the APAC desk in London. As a result, disciplinary allegations were raised against Mr Weir, chiefly, that he had misled the financial market by publishing certain IOIs without a genuine client interest and that he had failed to tell his line

manager that he knew or suspected that misleading IOIs were being published.

Mr Weir maintained that the methodology he used meant that the IOIs he published were supported by a "reasonable expectation of interest" from specific clients, drawn from his own knowledge and experience of those clients and orders already in progress. Mr Weir argued that his approach was in line with industry-wide guidance in place at the time and Citigroup had not provided any training on IOIs, nor issued any internal policy or guidance to the contrary.

After an extremely lengthy investigation and disciplinary process spanning more than two years, Mr Weir was summarily dismissed for gross misconduct. His appeal against his dismissal was rejected. Mr Weir claimed he had been unfairly dismissed.

What was decided?

The Employment Tribunal upheld Mr Weir's unfair dismissal claim. Although Citigroup genuinely believed that Mr Weir had committed acts of misconduct, the Tribunal found that it did not have reasonable grounds for this belief.

As to the allegation that he had published IOIs without a genuine client interest, the Tribunal held that Mr Weir had acted properly in following industry guidance on IOIs at the time, which required the existence of a reasonable expectation of client interest. Further, the methodology Mr Weir had used was legitimate and ensured that there was a reasonable expectation of client interest. The Disciplinary Committee

had failed to grapple with the methodology he had used in full. Further, they had misunderstood the industry guidance or, alternatively, had *"unreasonably and unwarrantedly"* sought to apply a higher standard of genuine client interest, something which had never been communicated to Mr Weir.

As to the allegation that he had failed to tell his line manager what was happening, the Tribunal held that it was unreasonable to find that this amounted to misconduct given that Mr Weir had believed he was behaving appropriately and in line with industry guidance. Further, it was unreasonable in light of the fact that Mr Weir's "matrix" managers based in Hong Kong had been aware of the methodology being used by the APAC desk. Mr Weir's direct line manager in London conceded that she did not know which matters needed to be reported to matrix managers and which to line managers, since no formal policy or guidance on this matter had ever been issued by Citigroup.

The Tribunal also held that Citigroup had failed to carry out a reasonable investigation. The process started in September 2019, when Mr Weir was given just two minutes' notice of an initial "fact-finding" meeting. There was a hiatus until March 2020, when Mr Weir was invited to a same-day investigation meeting. Seven people attended the meeting on behalf of Citigroup, which spanned two days. Mr Weir was questioned for over 10 hours, on top of his usual workload. The Tribunal was critical about this stage of the process, noting that it was an *"…unreasonable way of conducting an investigation and* (Citigroup) *demonstrated inadequate regard for the likely impact upon* (Mr Weir)". The Tribunal said that it was inevitable that a panel interview carried out in such an intensive manner and over a consecutive two-day period would feel hostile and make it more difficult for Mr Weir to explain his actions.

At end of investigation meeting, Mr Weir was told that the investigation process would be completed by the end of March 2020, however, this was not the case. Again, there was a hiatus. Between March and November 2020, Mr Weir asked for updates about the process and was repeatedly told that a resolution was "coming soon". The Tribunal found that the investigation process and lack of information had caused Mr Weir's mental health to deteriorate, leading him to go off sick with work-related stress. By February 2021, Mr Weir felt better and asked to return to work on a phased basis. Citigroup responded the next day by suspending him and notifying him that a decision had been taken to pursue disciplinary proceedings against him.

The Tribunal had this to say about the investigation process: *"The length of time taken to complete the investigation was unacceptable and unreasonable, causing significant stress and worry for* (Mr Weir)". They also firmly rejected Citigroup's explanation that Covid had contributed to the delays noting that: *"We do not find it credible that a global organisation such as* (Citigroup) *with all its human and technical resources, was unable to progress the…situation in a timely manner or respond to…requests for updates in an accurate or timely manner*".

The disciplinary process eventually began in April 2021. Before the disciplinary hearing took place, the in-house lawyer who had led the investigation met with the Disciplinary Committee and inaccurately represented Mr Weir's position on the disciplinary allegations. The disciplinary hearing took place on 7 April 2021. The Disciplinary Committee was made up of a four-person panel, contrary to the terms of the Disciplinary Policy that had been given to Mr Weir (which said that two people would attend from Citigroup). The hearing lasted for 90 minutes and focussed on

one allegation, which was ultimately not upheld. The hearing was adjourned and reconvened a few days later. It was at this second hearing that the two allegations which went on to be upheld were discussed. That hearing lasted for just 30 minutes.

After the hearing, one of Citigroup's Employee Relations specialists was tasked with undertaking further investigations on a particular issue. She met with Mr Weir on 21 April 2021, but used the incorrect "script template", with the result that she told him the meeting was a further disciplinary hearing, rather than an investigatory meeting. At the meeting, she failed to probe the particular issue in any detail and later misrepresented Mr Weir's position to the Disciplinary Committee (suggesting he had been definitive when, in fact, he had been equivocal). Mr Weir was dismissed for gross misconduct on 10 June 2021.

An appeal hearing took place on 2 September 2021 but was adjourned for over four months before reconvening on 22 January 2022. On 16 February 2022, the appeal officer upheld the Disciplinary Committee's decision to dismiss. Yet the Tribunal held that the appeal conclusion was at odds with what had been said in the dismissal letter, reached conclusions that were unsupported by evidence and demonstrated an acceptance of the in-house lawyer's inaccurate representations of Mr Weir's position (despite the fact that minutes of meetings which had been available to the appeal officer showed Mr Weir's true and consistent position).

The compensation to be awarded to Mr Weir is yet to be decided. However, the Tribunal held that Mr Weir had complied with industry guidance and had been co-operative throughout the investigation and disciplinary process. Therefore, it

could not be said that his conduct had contributed his dismissal, meaning there will be no reduction in his compensation. Nor was there any prospect that Mr Weir would have been dismissed fairly had Citigroup conducted the process in a reasonable manner, again, meaning there will be no reduction to his compensation.

What are the learning points for employers?

This decision underlines the importance of employers not allowing disciplinary decisions to be clouded by wider external events, such as regulatory censure. The evidence must be assessed objectively, and employers should look for and consider evidence which supports the employee's position, and not focus only on evidence which would support the issuing of a disciplinary sanction. This is all the more important where the employee stands to lose their job (and, in regulated professions, potentially their career).

It also illustrates the importance of keeping internal policies and practices under review to ensure that they comply with the law and any regulatory rules and expectations. Such policies and practices should be set down in writing, communicated to staff and training offered as appropriate. Failing to stay on top of this and simply hoping for the best may mean your hands are tied when it comes to disciplinary action later down the line. As seen in this case, trying to change the rules after the event will not justify a disciplinary sanction.

Crucially, this decision reminds employers of the importance of getting the investigation and disciplinary process right. As seen here, Tribunals will have little patience for

employers who have plenty of expertise and resources at their disposal but get things wrong. The key takeaways from this case are:

- **Deal with the issues promptly and without unreasonable delay.** This is a core principle set down in the statutory Acas Code of Practice. To the extent that there is a legitimate delay, tell the employee the reason for it and be clear about when the process will resume. And be prepared to "think outside the box" – could the process be accelerated in a different way? For example, by way of a virtual meeting, conference call, or by allowing the employee to make written representations.

- **Know your own policies and procedures and apply them correctly.** This may seem like an obvious point, but this case demonstrates how even an extremely well-resourced employer can get it wrong. Make sure meetings are labelled accurately and are convened in the right way. Be mindful just how stressful the situation is for the employee. Where appropriate, be flexible about the process, for example, allow the employee to be accompanied by a friend or family member.

- **Conduct the meetings in a reasonable manner.** Give reasonable notice of meetings and keep them to a

sensible length. Equally, don't rush through important meetings. The best approach is to try to agree the length of the meeting with employee in advance but, again, stay flexible. If the employee is upset, offer to take a break or adjourn to another day. Do not turn up to meetings "mob-handed" since this is quite likely to intimidate the employee and have a negative impact on their evidence.

- **Make sure all parties involved in the process understand the scope of their role.** Investigators are there to gather evidence in an even-handed way and report it neutrally to the disciplinary panel. It is not their role to construe the information in a certain way or lobby for a particular disciplinary outcome. The decision on outcome is for the disciplinary and appeal panels. Those decision-makers should weigh up the evidence carefully and take care not to adopt a broad-brush approach in order to get to a desired outcome.

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

SMCR extension: now is the time for firms to prepare

Cerys Williams and Nick Wilcox discuss the steps firms should take to prepare for the extension of the Senior Managers and Certification Regime.

Latest statistics show impact of SMCR

BDBF’s Nick Wilcox discusses the latest statistics on the SMCR and fines issued by the Financial Conduct Authority.

FCA consults on extending Senior Managers and Certification Regime

The FCA is consulting on the extension of the SMCR to almost all financial services firms from 2018, replacing the Approved Persons Regime. HR should act now.

Regulatory reference rules now in force under senior managers regimes

The new regulatory reference regime under the SMCR is now in force. Nick Wilcox considers the impact of the new rules on executives in financial services.

Regulators provide much needed clarity around new regulatory references regime

If you work in a senior role in banking or insurance the chances are that you will be familiar by now with at least some of the principles of the senior managers' regulatory regimes, introduced earlier this year.

Regulators decide not to apply CRD IV bonus cap to

small firms

The Financial Conduct Authority and the Prudential Regulation Authority have announced that they will not be applying the European CRD IV bonus cap to small firms.

FCA and PRA publish first set of rules on regulatory references

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A joint policy statement was published by the PRA and the FCA on 15 February 2016 in relation to the implementation of the new senior managers and certification regime (SMCR), the senior insurance managers regime (SIMR) and the PRA requirement on regulatory references, most of which came into effect on 7 March.

The joint policy statement contains the final rules in relation to the application of the SIMR to Swiss insurers, as well as a first set of rules in relation to regulatory references, which will be implemented at a later date.

An earlier consultation in October 2015 raised some concerns that the FCA and PRA wished to consider further. Thus, only certain provisions came into force on 7 March 2016; namely, the requirement for PRA approved firms to provide a reference to new employers as soon as reasonably practicable in respect of those exercising particular functions, and the requirement to obtain references for candidates in relation to the past five years of their employment and/or holding of non-executive directorships.

Currently, there is no set template for regulatory references; the FCA plans to publish the final set of rules some time around summer 2016.

Strengthening accountability in banking and insurance: Implementation of SM&CR and SIMR; and PRA requirements on

regulatory references, Policy Statement PRAPS5/16, FCAPS16/5

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