EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Carr	**v**	**Bloomberg L.P.**

Heard at: London Central (in person and via video)

On: 6, 7, 8, 9, 10 and 13 December 2021

Before: Employment Judge P Klimov, sitting alone

Representation:

For the Claimant: in person

For the Respondent: Mr James Laddie QC (of Counsel)

JUDGMENT having been sent to the parties on 13 December 2021 and written reasons having been requested by the respondent on 23 December 2021 and by the claimant on 24 December 2021, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Background, Issues and Procedural Matters

1. By a claim form (Case No: 2203206/2020) presented on 28 May 2020 the claimant brought various complaints, including under s. 47(B) and s.103A Employment Rights Act 1996 ("ERA") ("**whistleblowing complaints**"), together with an application for an interim relief pursuant to s.128 ERA.

2. Except for the whistleblowing complaints, other complaints were rejected by the Tribunal, because in bringing those the claimant had failed to comply with the ACAS early conciliation rules.

3. The interim relief application was heard on 7 July 2020 by Employment Judge Hodgson. EJ Hodgson's judgment, dismissing the claimant's application, was sent to the parties on 17 August 2020. In his judgment EJ Hodgson said that

he thought it was "*unlikely that the claimant will demonstrate that there was a disclosure of information*". He went on to say: "*Even if I were to take likely as meaning on the balance of probability, I have no doubt that this interim relief application fails. The claimant does not approach the threshold for demonstrating the claim is likely to succeed*."

4. On 1 September 2020, the claimant applied for reconsideration of the EJ Hodgson judgment, which was refused on 30 April 2021.

5. On 11 September 2020, the respondent made a costs order application in relation to the interim relief hearing, which as at the date of this judgment is still pending determination.

6. On 20 August 2020, having gone through the ACAS early conciliation process, the claimant presented his second claim (Case No: 2205003/2020). The second claim contained essentially the same whistleblowing complaints, alleging seven protected disclosures and 18 alleged detriments, including dismissal, and a complaint for "ordinary" unfair dismissal. However, it did not contain age and race discrimination complaints the claimant had made in his first claim.

7. There was a case management hearing on 18 November 2020 before EJ Adkin, at which the claimant sought to make minor amendments to his claim, which were allowed, and to add four individual respondents, which was refused.

8. On 20 October 2020, the respondent applied to strike out the claimant's whistleblowing complaints on the basis that the claimant's case that any of the seven alleged disclosures were "qualifying disclosures" within the meaning of section 43B of the Employment Rights Act 1996 ("ERA") have no reasonable prospect of success. The application was heard by EJ Adkin on 28 April 2021. EJ Adkin struck out two out of seven alleged disclosures and made a deposit order in relation to two further alleged disclosures. The claimant appealed the strike out judgment, and the respondent cross-appealed the EJ Adkin's decision not to strike out the five remaining alleged disclosures.

9. There was a further case management hearing on 24 September 2021 before EJ Burns, at which the claimant sought, *inter alia*, to join six individuals as respondents, including Mr. Michael Bloomberg, to amend his claim, an order for specific disclosure, and an order to strike out the respondent's defence, all of which were refused. EJ Burns gave further case management orders. In giving his reasons EJ Burns observed: "*The Claimant seems to be trying to use the Tribunal proceedings as a platform for the ongoing dissemination of his views, and to try to obtain an audit by the Tribunal of the environmental merit of the Respondent's media output over recent years. That is not the proper purpose of a tribunal claim.*"

10. Having heard this case over five days I find EJ Burns' observation insightful. The claimant's apparent attempts to turn this case into something akin to a public inquiry into the adequacy of the respondent's environmental agenda had the unfortunate effect of him repeatedly straying into the areas that had no relevance to the issues in the case and expending the Tribunal's time on those.

Bearing in mind that the claimant is a litigant in person and considering the Tribunal's duty under Rule 2 of the Employment Tribunals' Rules of Procedure 2013, I had to intervene several times to assist the claimant in re-focusing his cross-examination of the respondent's witnesses and his submissions on the relevant issues.

11. On 1 December 2021, the claimant's appeal and the respondent's cross-appeal were heard by the EAT. On 3 December 2021, Heather Williams J handed down her judgment dismissing the claimant's appeal and allowing the respondent's cross-appeal in full, resulting in the claimant's whistleblowing complaints being struck out in their entirety. Therefore, the case proceeded to the final hearing as "ordinary" unfair dismissal only.

12. The final hearing of the case was listed over 10 days, starting on 6 December 2021. In the afternoon of day one of the hearing, which was reserved for the Tribunal's reading up, I held a short case management hearing with the parties to discuss the remaining issues in the case, the composition of the tribunal, whether the hearing should be in person or by video, timetabling and other preliminary matters.

13. The respondent was neutral as to whether the case was heard by the full panel or a judge sitting alone. The claimant expressed his preference to have the case heard by the full panel. Under section 4(3) Employment Tribunal Act 1996 ("ETA") this case should be heard by an employment judge sitting alone, unless the employment judge decides that it should be heard by a full panel. Having considered the parties' views and other factors set out in s4(5) ETA, I decided that the case must be heard by an employment judge sitting alone. Having read the papers, it appeared to me that, with the whistleblowing complaints no longer being part of the claim, the case was a regular "ordinary" unfair dismissal complaint with no significant dispute on key facts. As the general rule, such cases are heard by an employment judge sitting alone, and I saw no compelling reasons to depart from that rule and to exercise my discretion in favour of a full panel hearing.

14. It was agreed that the hearing should be in person at London Central Employment Tribunal. However, after the second day of the hearing I received an email from the respondent's solicitors stating that one member of their legal team, who had attended the hearing, had received a positive Covid-19 test, and requesting that the hearing be converted to video. That unfortunate development coincided with the Prime Minister's announcement on 8 December 2021 re-introducing the working from home guidance.

15. The claimant opposed the respondent's application and sought a stay of the proceedings "*for a day or two*" to get informal advice. I decided that the hearing should proceed by video. I decided that in the circumstances it would be irresponsible to continue with in person hearing, thus subjecting the parties, their representatives and witnesses, and the Tribunal's staff to potentially life-threatening health risks.

16. By that stage of the proceedings, the respondent's key witnesses had given their evidence and had been cross-examined by the claimant. The remaining

respondent's witness was giving evidence on the narrow issue of the claimant's appeal against dismissal. The respondent was content to cross-examine the claimant by video. There were no apparent technical or organisational issues preventing the parties from joining and effectively participating in the hearing by video. There were no good reasons to delay the hearing, and any such delay would have inevitably resulted in further unnecessary costs. Therefore, considering the overriding objective under Rule 2 of the Employment Tribunals Rules of Procedure 2013, I decided that it was in the interests of justice to convert the hearing to video and proceed on the following day without an adjournment.

17. As a result of the whistleblowing complaints being struck out, the hearing timetable was shortened, and the case was heard over five days, with the oral judgment delivered on the morning of the six's day.

18. The claimant initially insisted that the originally allocated ten days should be used for the hearing in full. However, the respondent indicated that it was not planning to call all of its witnesses, because their evidence was largely to deal with the whistleblowing complaints. Furthermore, with the whistleblowing complaints being stuck out, the remaining factual and legal issues in the case were much narrower and required far less time to investigate.

19. At the end, the respondent called four witnesses (Mr R. Landberg, Ms E. Ross-Thomas, Mr W. Kennedy and Ms C. Cotterill) and invited me to read witness statements of its other five witnesses and to give such weight to those statements as I consider appropriate. The claimant cross-examined all four witnesses called by the respondent.

20. The claimant was not happy with the respondent's decision not to call all of its witnesses. He said that he wished to cross-examine all nine of the respondent's witnesses. I explained to the claimant that it was the respondent's choice who they call, and that if he thought that the reason for the respondent not calling those witnesses was to avoid them being cross-examined on relevant issues in the case, he could invite the Tribunal to draw adverse inferences from that fact. I also explained that the claimant had the right to apply for a witness order and the basis upon which the Tribunal would decide any such application.

21. The claimant gave evidence and was cross-examined. The claimant also sought to introduce witness evidence of Mr Alexei Komarov, an ex-employee of the respondent. Mr Komarov's is a claimant in a separate and unconnected Tribunal claim against the respondent. His witness statement dealt with his alleged poor treatment by the respondent and had no information in relation to the claimant's case, either with respect to events, people involved or other circumstances. It short, it was totally irrelevant to the issues I needed to decide in this case. Furthermore, allowing Mr Komarov evidence in these proceedings on the matters concerning his separate claim against the respondent could prejudice the parties' position in Mr Komarov's case. That would be inappropriate and not in the interest of justice. For these reasons I decided not to allow Mr Komarov to give his evidence in these proceedings.

22. On the second day of the hearing the claimant applied for a witness order to compel Mr. Reierson to attend the tribunal and give evidence. I refused his application for the reasons stated in my judgment dated 13 December 2021.

23. Despite whistleblowing complaints no longer being part of the case, the claimant refused to concede that the reason or the principal reason for his dismissal was related to his capability/performance and insisted that he was dismissed for raising issues about the respondent's inadequate coverage of harmful effects of fossil fuels on the environment.

24. Therefore, there were two principal questions I needed to answer:

    (i) what was the reason, or if more than one – the principal reason, for the claimant's dismissal?, and
    (ii) if the respondent can show that it was a potentially fair reason (the respondent advanced reason was the claimant's poor performance), whether in the circumstances of the case the responded acted reasonably or unreasonably in treating that reason as sufficient to dismiss the claimant (s.94 ERA)?

25. I was referred to various documents in the bundle of documents of 1707 pages and the claimant's supplemental bundle of 294 pages.

26. Evidence taking and final submissions were concluded on Friday, 10 December 2021. I indicated to the parties that I would be ready to give my judgment at 9am on Monday, 13 December 2021.

27. On 13 December 2021 at 8:48am, the claimant sent an email applying for a two-day stay of the proceedings. The claimant argued that the stay was necessary because the respondent "sought to reintroduce whistleblowing into the hearing" and he needed more time to consider the transcript of the EAT decision and take "informal advice on the Respondent's move". He also stated that he had received a Covid booster jab and had other personal events over the past weekend, that he had not been given enough time to present his case, that he wanted to make sure that his complaint about Mr Laddie, the respondent's Counsel, was dealt with properly, and that Mr Laddie's assertion that he had spent the past year doing nothing but working on his tribunal case was demonstrably false because he had set up a successful website in that time.

28. I refused the application. None of the reasons advanced by the claimant were sufficient or relevant to order a stay of the proceedings. Whistleblowing complaints were not live matters in front of me. My judgment was on the claimant's "ordinary" unfair dismissal claim only. The claimant was given sufficient time to present his case. He was given time for an oral opening statement. He asked for 30 minutes, which I allowed, but used only about two. The claimant was given sufficient time to cross-examine all the respondent's witnesses over three days. All cross-examinations ended with the claimant stating that he had no further questions to the witness. I gave the claimant sufficient time to re-examine himself. I gave him twice as long as to the respondent for the closing submissions. The claimant's apparent threat to

make a complaint to the Bar Council with respect to a without prejudice conversation Mr Laddie had with the claimant was an irrelevant matter. The claimant did not claim that as a result of the Covid booster jab he was medically unfit to hear the judgment. It appeared that this last minute application was yet another attempt by the claimant to prolong the proceedings. The judgment was ready, and I decided that there were no good reasons not to deliver it to the parties, as planned.

Findings of Fact

29. I record my findings of fact in so far as these are relevant to the issues I must decide in this case. As the parties have prepared their respective cases to primarily deal with the whistleblowing complaints, there was substantially more evidence in front of me (both in witness statements and documents) than what was required for the purposes of dealing with "ordinary" unfair dismissal complaint.

30. The respondent is a global news and information provider. It focuses on providing fact-based reporting, analysis and commentary to the worldwide financial markets.

31. The claimant started his employment with the respondent in June 2000 in Sydney, Australia. At the time of his dismissal on 14 May 2020 he held the position of a reporter covering natural gas and carbon power sector in Europe, based in the respondent's London office. The claimant's main responsibilities were to produce written content (news stories of various kinds and formats) focusing on that sector. That, in the terminology adopted at the respondent, was his "beat".

32. The respondent's news teams produce a wide range of stories. There are quickly produced "BFWs" (Bloomberg First Words), which are very brief market updates where information is stacked up point by point and not as a narrative, that move within a very few minutes after news breaks. There are short news stories written in prose with full sentences that fill out the details of more substantial news stories. There are "scoops", or "exclusives", which are news stories obtained exclusively by the respondent's reporters. And there are "enterprise" stories, which are more substantial analysis pieces, profiles or stories framed around people or anecdotes that draw in a broad audience. All reporters are expected to produce each kind of story. The news teams reporters covering a specific market, are expected to produce a couple of BFWs each day, mainly wrapping up daily developments, along with a steady stream of exclusives and enterprise stories. More experienced reporters, such as the claimant, are expected to rely on contacts they build up over the years to drive the conversation within the beat they cover and produce the more high-value work, a few exclusives a week that get on TOPWW (Top Stories Worldwide), and a couple of more enterprising stories that draw a big web audience or are published in BusinessWeek (the respondent's weekly business news magazine).

2015-2018, First PIP

33. In February 2015, Mr. John Micklethwait became the new respondent's Editor-in-Chief. Under his leadership there was a wide reorganisation within the respondent. As part of the reorganisation, the Industry and Markets teams were joined together to provide more coordinated coverage across both energy and commodities companies and markets. A much stronger focus was placed on improving writing and narratives in stories to create more engaging and impactful journalism. That resulted in a cultural shift for reporters in the Markets teams, including the claimant, as prior to 2015 the Markets teams had less focus on enterprise writing and more on technical market reporting.

34. Following the reorganisation, the claimant became part of the Gas and Power Europe team, reporting to Mr Lars Paulsson, the Team Leader.

35. The respondent operates an annual performance appraisal system, known as "EVAL". Until 2015 the claimant's performance was good. He received positive EVAL ratings.

36. After becoming the claimant's manager Mr Paulsson expressed concerns with the quality of the claimant's writing ("copy"), which ultimately led him to give the claimant a negative EVAL rating and place him on a formal Performance Improvement Plan in January 2016 ("the first PIP"). The main performance concern of Mr Paulsson was that the claimant's writing was too complicated, hard to follow, and required a considerable amount of time to edit. The same concern was expressed by other respondent's editors, who worked with the claimant at different times. In the first PIP The claimant was given qualitative and quantitative targets against which his performance would be measured.

37. In May 2016, not being satisfied with the claimant's performance improvements, Mr Paulsson issued a first written warning to the claimant. The claimant unsuccessfully appealed the warning.

38. The claimant continued under the first PIP until July 2016, when Mr Paulsson decided that the claimant's performance had improved sufficiently to take him off the first PIP.

39. From 2015 the claimant became increasingly active in, using his words, "agitating" for better climate coverage by the respondent with emphasis on highlighting harmful effects of fossil fuels on the environment. He wrote several emails to various senior managers in the respondent's organisation advocating his views, at times using rather emotive and not business-like language. In one of such emails, he stated that any story about new fossil fuel projects should include an assessment of the impact on the global carbon budget, like "*a warning label on cigarette packets*", suggesting that otherwise the respondent would be open to criticism and reputational risk in the future because omitting this information would deprive investors of the necessary context.

40. The respondent's executives responded to the claimant's emails. The general tenet of their responses was acknowledging the importance of coordinated and considered reporting on climate change issues, but at the same time remaining true to the respondent's way of a neutral and objective news organisation and not a lobbying group.

2018, Mr Landberg becomes the claimant manager

41. In February 2018, Mr Reed Landberg, European Gas, Power and Renewables Team Leader, became the claimant's manager in the newly created European Gas, Power and Renewables Team. The team's core responsibilities were to cover natural gas and electricity markets and to feed news on renewable energy to the respondent's business newsletters. The goals set for Mr Landberg by his management were to broaden the appeal of the respondent's stories, to address a wider audience and drive up reader interest in the coverage.

42. Mr Landberg cascaded those goals by way of setting corresponding performance targets for his team, including the claimant, and in particular stating that the reporters needed to connect events in separate markets and write in a more lively and readable style. That was recorded in the claimant's EVAL for 2017.

43. The claimant's 2017 performance was evaluated by Mr Paulsson with the rating of 3.58 (with 1 being the highest and 5 – the lowest score), which was a minor improvement on his 2016 performance (3.62).

44. Mr Landberg kept a detailed written log of all his interactions with the claimant since becoming his manager. In many discussions with Mr Landberg concerning the claimant's work, the claimant took defensive and adversarial approach, refusing to accept criticism and feedback and accusing Mr Landberg of undermining him and sabotaging his efforts ("*throwing sand in the gears*").

45. At the interim performance evaluation in July/August 2018 by Mr Landberg gave the claimant a preliminary performance rating of 3.74, placing him within the bottom 88th percentile of the peer group of 1661 staff. In appraising the claimant's performance, Mr Landberg gave the claimant feedback on areas of improvement, in particular on quality of writing and focusing on the gas sector.

46. Mr Landberg also looked back at the claimant's previous EVALs. He saw that his concerns around the claimant's quality of writing was shared by his previous managers, in particular Mr Paulsson, and even when the claimant had been given "distinguished" rating in 2011, the EVAL report stated that more was expected from him and that he needed to move from "*rush-fill to the big-picture with bells and whistles when needed*". Mr Landberg was concerned that the claimant was not living up to that expectation, whereas, following the 2015 reorganisation, the focus was much more on such "big-picture" stories.

47. During the remainder of 2018 Mr Landberg continued to monitor and provide feedback on the claimant's performance, which continued to be ill-received by the claimant. For example, in December 2018 in response to Mr Landberg's

feedback that the claimant in his reporting should be focusing more on the current events in the carbon market and not on long-term trends, the claimant accused Mr Landberg of being patronising and said that Mr Landberg should "*stop treating [him] like a dick*". The claimant continued to challenge Mr Landberg's editorial judgment, and on some occasions went to other editors as a way of getting around Mr Landberg's editorial decisions.

First part of 2019

48. In February 2019 Mr Landberg gave the claimant the final EVAL performance rating for 2018 as 3.79. He met with the claimant on 21 February 2019 to discuss his rating and set the performance targets for 2019. Mr Landberg explained to the claimant his concerns, in particular with respect to the quality of the claimant's writing, which required extensive editing, the claimant's tendency to stray into campaigning on issues such as climate change, whereas the respondent's role as an independent news outlet was to analyse, observe and report, not to campaign, and the claimant's defensive and aggressive attitude towards editorial and management feedback.

49. Mr Landberg set performance targets for the claimant for 2019, including focusing on natural gas market, making stories more interesting and relevant to professional investors, delivering more Market Moving Wins ("MMWIN") – stories that move the markets, improving the claimant's writing, with a focus on making it clear and coherent, embracing the respondent's role as dispassionate observers, not campaigners, and considering the claimant's attitude towards editors, avoiding confrontation.

50. There was a follow-up meeting on 28 February 2019, at which the claimant challenged Mr Landberg's evaluation of his performance. The claimant also made a complaint to HR concerning his EVAL 2018, which, with the claimant's agreement, was dealt with by HR informally. The outcome of that process was accepted by the claimant.

51. In the first half of 2019, Mr Landberg continued to have regular meetings with the claimant, at which he gave feedback on the claimant's performance, which in Mr Landberg's assessment remained below the required level. The claimant continued to challenge Mr Landberg on his edits and to try to get his way by going to other editors. The claimant's attitude towards Mr Landberg's feedback remained dismissive and aggressive. For example, at a 1-2-1 meeting on 25 June 2019, in response to Mr Landberg's feedback on the quality of the claimant's story, the claimant told Mr Landberg that he was "*repeating crazy stuff and crazy babble that doesn't make any sense*" and that he was "*irrational*" and "*trying to throw sand in [the claimant's] face*".

52. On 12 July 2019, Mr Landberg gave interim EVAL rating to the claimant as 4.62, which placed him within the bottom 97th percentile within his peer group of 1661 staff. The score meant that immediate improvements were needed through a formal Performance Improvement Plan.

53. In July 2019, following further examples of the claimant not accepting Mr Landberg feedback and becoming more confrontational with Mr Landberg and

using inappropriate language towards Mr Paulsson, Mr Landberg issued the claimant with a formal verbal warning for insubordination.

Second part of 2019, Second PIP

54. On 30 August 2019, following a discussion between Mr Landberg and his manager - Mr Kennedy, Managing Editor, Energy and Commodities, the claimant was placed on a formal Performance Improvement Plan ("the second PIP"). The second PIP contained detailed quantitative and qualitative performance targets against which the claimant's performance was going to be assessed over the month of September ("the first review period"), and a meeting was set for 26 September 2019 to formally review the progress.

55. There were three categories of the performance targets with detailed descriptions of the exiting performance concerns and objectives for each category:

    a. ***Breaking News***

       Objective:
       • Deliver at least 1-2 significant exclusives a week that go beyond the weekly analyst survey. These should be on the gas and power beat and predominantly with you as the lead reporter.
       • Produce 2 FOLLOWs where you are the lead reporter over the course of the one-month plan.
       • Produce 4 TOPWW stories where you are the lead reporter over the course of the one-month plan.
       • Produce 1 MMWIN story where you are the lead reporter over the course of the one-month plan

    b. ***Enterprise***
       Objective:
       • Pitch original ideas at least twice a week, for stories that go beyond day-to-day breaking news that you cover. You should aim to turn at least one of these into a story. The pitch can be made by sending me a message. These should include a draft headline, lead paragraph and some idea of the voices you'd have in the work.
       • Conduct, in person or via telephone, interviews with senior market participants or industry executives over the course of this plan, and write a story based on those contacts. I suggest that a minimum of four interviews per week would garner the level of breaking news and enterprise we expect.
       • Filing coherent copy that's complete and well organized, where assertions are supported by facts and quotes, and where a constant theme is maintained and developed throughout the piece.

    c. ***Communication and Behavior***

       Objectives:

• Working constructively with editors, absorbing feedback and acting on suggestions with the spirt of delivering the best possible product.
• Develop stories and enterprise linked mainly to the heart of your beat, which is European natural gas and emissions markets. Where you wish to derogate from this brief, you must agree a way forward with your team leader before discussing with other editors

56. During the first review period there were regular meetings between Mr Landberg and the claimant, at which Mr Landberg gave the claimant feedback on the claimant's performance. In those discussions Mr Landberg continued to raise his concern with the level of editing that the claimant's stories required, for example, with the "*Banks Lending $100 Billion to Shipping Get Strict on Climate*" and "*Germany Poised*" stories. Mr Landberg also gave positive feedback on the claimant's stories, for example, "*Brexit Ruined*" and encouraged the claimant to file more stories of that quality.

57. On 1 October 2019, Mr Landberg and the claimant had a meeting to review the claimant's performance over the first review period. Mr Landberg noted that while the claimant had met most of the quantitative targets, except on "Follows" and behavioural targets, he was still falling short on qualitative targets (all three Objectives under the "*Enterprise"* category). Therefore, Mr Landberg concluded that the claimant's performance had not improved sufficiently, as required by the second PIP, and as a result he would be invited to a disciplinary meeting to discuss his performance and consider a possible disciplinary sanction.

First Disciplinary Meeting/First Written Warning

58. On 10 October 2019, the claimant was invited to a formal disciplinary meeting to be held on 11 October 2019. The letter of invitation set out the three key areas of performance failings: (a) failure to pitch original ideas at least twice a week; (b) failure to conduct interviews with senior market participants or industry executives; and (c) failure to file coherent copy that's complete and well organized and noted that the outcome of the meeting could be a first written warning.

59. On claimant's requests the meeting was postponed to 15 and then to 18 October 2019. On 18 October 2019, the claimant called in sick. The claimant remained on sick leave until 22 November 2019.

60. Following a phased return to work arranged by the respondent for the claimant, the disciplinary meeting was held on 11 December 2019.

61. At the meeting, attended by the claimant, his companion Mr A Nair, Mr Landberg and Ms. L Mills, Employee Relations Manager, the claimant's performance was discussed. The outcome of the meeting was a first written warning and the continuation of the second PIP.

62. On 27 December 2019, the claimant appealed the first written warning. The appeal was heard on 10 January 2020 by Ms. Lynn Thomasson, European Commodity Markets Team Leader, and Ms Priya Vora, Employee Relations

Manager. They rejected the claimant's appeal and confirmed the decision to issue the first written warning.

Second Review Period/Final Written Warning

63. Mr Landberg continued to meet with the claimant through December 2019 and January 2020 to assess the claimant's performance during the second review period from 1 October 2019 to 10 January 2020 and to give feedback.

64. On 10 January 2020, Mr Landberg had a 1-2-1 meeting with the claimant to formally review his performance over the second review period. They discussed three stories filed by the claimant, and Mr Landberg gave his feedback on each of them. The claimant did not accept Mr Landberg's criticism and reacted aggressively, suggesting that Mr Landberg was deliberately "*underselling [his] story*".

65. On 17 January 2020, Mr Landberg emailed Ms Mills summarising his assessment of the claimant's performance during the second review period. Mr Landberg's conclusion was that the claimant was still falling short on two out of three performance improvement targets in the second PIP.

66. The claimant was invited to attend a disciplinary meeting on 22 January 2020 to discuss his performance. The letter inviting the claimant to the meeting set out the areas of performance concerns, which in addition to the three key concerns discussed at the first disciplinary meeting, also included "*failure to deliver the requisite number of stories that are followed by our competitors, indicating the value of the scoops*". The letter included a warning that if the charges were proven this could result in a disciplinary action, up to and including a final written warning. The meeting was twice postponed due to the claimant calling in sick and eventually took place on 11 February 2020.

67. At the meeting, attended by the claimant, his companion – Mr M. Gilbert, Mr Landberg and Ms Mills, Mr Landberg reviewed the claimant's performance over the second review period concluding that the claimant had failed to meet the targets set out in the second PIP and issued him with the final written warning, which was confirmed in writing on 13 February 2020.

68. On 27 February 2020, the claimant appealed the final written warning. The appeal was heard by Ms C Gage, Executive Editor, Global Finance/Investing/Real Estate, and Ms P Vora, and dismissed on 25 March 2020.

Third Review Period/Dismissal

69. Through February and March 2020, Mr Landberg continued to meet with the claimant to discuss his performance. On 28 February 2020, Mr Landberg met with the claimant to discuss his 2019 EVAL. Mr Landberg rated the claimant's overall performance in 2019 as 4.62 placing him within the bottom 98th within his peer group of 1661 staff.

70. The claimant's third review period under the second PIP ran from 12 February to 9 March 2020. During that period the claimant's performance has

deteriorated and he failed to meet the qualitative and most of the quantitative targets, including scoring zero on Follows and MMWINs.

71. A further disciplinary meeting was arranged with the claimant on 30 April 2020. The letter inviting the claimant to the disciplinary meeting detailed the performance concerns, which in addition to the four concerns discussed at the second disciplinary meeting included: "*Failure to deliver the requisite number of stories tagged as market-moving wins during the performance period, another indicator of the value of the scoop*". The letter warned the claimant that if the charges were proven a possible outcome of the meeting could be his dismissal.

72. The claimant raised objections with Mr Landberg chairing the disciplinary meeting. The respondent agreed to appoint Ms E. Ross-Thomas, Managing Editor, Energy and Commodities, EMEA, who took over Mr Kennedy as Mr Landberg's direct manager, to chair the meeting.

73. The disciplinary meeting was postponed and eventually held on 13 May 2020. It was attended by the claimant, his companion – Mr J Carrigan, Ms Ross-Thomas and Ms. Mills. Ms Ross-Thomas reviewed the claimant's performance from the beginning of the third review period (12 February 2020) to the date of the disciplinary meeting (13 May 2020) and concluded that the claimant continued to fail to meet the PIP performance targets. She then proceeded to decide what sanction to apply and decided to dismiss the claimant because of his poor performance and failure to improve it to the required standard during the second PIP period. She concluded that the claimant was unlikely to attain the required performance standards even if more time were given to him.

74. Ms Ross-Thomas delivered her decision to the claimant verbally on 14 May 2020 and confirmed it in writing on 21 May 2020.

75. On 28 May 2020, the claimant appealed his dismissal. The appeal was heard by Mr B Bremner, Executive Editor for Global Business, and Ms C Cotterill, Employee Relations Specialist, and dismissed on 7 September 2020.

76. Between January 2017 and October 2019, the claimant sent various other communications and complaints to the respondent's senior managers, including via the respondent's confidential "whistleblowing" Hotline – Navex. Because the claimant's whistleblowing complaints have been struck out, I do not need to make detailed findings in relation to those communications and complaints.

77. However, as concerned: (i) the claimant's being placed on the second PIP, (ii) evaluations of his performance by Mr Landberg, (iii) feedback and coaching given to him by Mr Landberg and other managers of the respondent during the entire PIP period, (iv) the first and the final written warnings issued to the claimant by Mr Landberg, (v) dismissal of the claimant's appeals against the first and the final written warnings, (vi) the claimant's dismissal, and (vii) the dismissal of the claimant's appeal against the dismissal - having considered the evidence in front of me, I am satisfied that the claimant's alleged whistleblowing complaints/disclosures played no part in those acts and

decisions by the respondent. The reasons for that finding are explained later in my judgment.

The Law

78. The law relating to unfair dismissal is set out in S.98 of the **Employment Rights Act 1996 (ERA)**.

> *"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
> *(a) The reason (or, if more than one, the principal reason) for the dismissal; and*
> *(b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
> *(2) A reason falls within this subsection if it –*
> *(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do;*
> …..
> *(3) In subsection (2)(a)—*
> *(a) "capability" , in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and*

79. The relevant case law tells me that a reason for the dismissal "*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*." (***Abernethy v Mott, Hay & Anderson [1974] ICR 323*).**

80. This requires me to consider the mental process of the person, who made the decision to dismiss and to identify the relevant decision maker was. (***Orr v Milton Keynes Council 2011 ICR 704, CA*).**

81. However, when the real reason is deliberately "hidden" from the decision maker behind an invented reason it is the tribunal's duty to penetrate through the invention rather than to allow it also to infect its own determination. In such a case the reason for the dismissal would be the hidden reason rather than the invented reason (***Royal Mail Ltd v Jhuti [2019] UKSC 55*)**.

82. If the employer shows that the reason for the dismissal is a potentially fair reason under section 98(1), the tribunal must then consider the question of fairness, by reference to the matters set out in section 98(4) ERA which states*:*
Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer

acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

83. The test of a fair capability dismissal (aside from procedure) has two elements:

    a. does the employer honestly believe the employee is incompetent or unsuitable for the job?

    b. are the grounds for that belief reasonable? (***Alidair Ltd v Taylor 1978 ICR 445, CA***)

84. In the great majority of cases employers will not be considered to have acted reasonably in dismissing for incapability unless they have given the employee fair warning and a chance to improve (***Polkey v AE Dayton Services Ltd 1988 ICR 142, HL***)

85. In ***James v Waltham Holy Cross UDC [1973] ICR 398, at 404 E***, Sir John Donaldson in the NIRC said (***my emphasis***): "*In the field of capability similar problems frequently arise. It an employee is not measuring up to the job, it may be because he is not exercising himself sufficiently or it may be because he really lacks the capacity to do so.* ***An employer should be very slow to dismiss upon the ground that the employee is incapable of performing the work which he is employed to do, without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground, and giving him an opportunity of improving his performance****. But those employed in senior management may by the nature of their jobs be fully aware of what is required of them and fully capable of judging for themselves whether they are achieving that requirement. In such circumstances, the need for warning and an opportunity for improvement is much less apparent. Again, cases can arise in which the inadequacy of performance is so extreme that there must be an irredeemable incapability. In such circumstances, exceptional though they no doubt are, a warning and opportunity for improvement are of no benefit to the employee and may constitute an unfair burden on the business*".

86. Further, in looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the tribunal's view, have been appropriate, but rather whether dismissal was within the range of reasonable responses that an employer could reasonably come to in the circumstances. The tribunal must not substitute its view for that of the reasonable employer. (***Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563***).

Discussion and Conclusions

87. There are two principal questions I need to answer to decide this case.

88. First, what was the reason or, if more than one - the principal reason for the claimant's dismissal?

89. The respondent says the reason was capability (which is a potentially fair reason under s98(2)(a) ERA, namely the claimant's unsatisfactory performance of his job and his failure to improve it despite being given every opportunity to do so in the course of the formal PIP.

90. The claimant says that the real reason for his dismissal was a retaliation by the respondent for him, as he put it, "agitating" for a better climate coverage by the respondent, especially with respect to harmful effects of fossil fuels on the environment.

91. The burden of proof is on the respondent. If the respondent cannot show, on the balance of probabilities, that the reason (or the principal reason) for the dismissal was one of a potentially fair reasons (in this case related to the claimant's capability), the dismissal will be unfair, and the tribunal is not required to go on and find the true reason for the dismissal.

92. If, however, I find that the reason was related to the claimant's capability, the next question I need to answer is - did the respondent act reasonably or unreasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? This question should be answered considering all the circumstances of the case, including the size and administrative resources of the respondent, and in accordance with equity and substantial merits of the case.

What was the reason for the claimant's dismissal?

93. I shall first deal with the claimant's theory that the real reason for his dismissal was retaliation for him raising concerns and agitating for a better climate coverage by the respondent.

94. I reject this. There is simply no credible evidence, which would allow me to come to such a conclusion.

95. The claimant claims that there was some elaborate ploy by senior executives at the respondent to force him out of the company because he was (in his words) "a pest", writing emails to senior executives agitating for a better climate coverage.

96. The reality, however, was that the respondent was very much aligned with the claimant's proposal to increase its climate coverage. However, it wanted to do that in accordance with its principles of neutrality, as a news organisation and not as a lobbying group.

97. It was developing its climate reporting initiative - Bloomberg Green. Mr Kennedy's email to Mr Fraher, Senior Executive Editor, Global Business, Finance, Legal, Energy & Commodities, of 18 February 2019 clearly shows that the respondent was very much interested in developing a more strategic and holistic approach to reporting on climate change issues. Far from trying

to undermine the claimant, Mr Kennedy's email refers to the claimant's "*Oil's Twilight*" story as an example of a good story on that subject.

98. Mr Kennedy in that email, recognises the Paris climate accord as "*a significant milestone*", and suggests that the climate coverage for the respondent's audience should be in business and finance and gives examples, which appear closely aligned with what the claimant was agitating for.

99. The claimant relies on Mr Kennedy's email to Mr Wallace, then Executive Editor, Global Energy and Commodities, of 27 January 2017, as showing that the respondent was dismissive of his better climate reporting ideas. He argues that his eventual dismissal was because of him pushing these ideas up the respondent's management structure.

100. In that email, in reference to the claimant's email to Ms Harris, then Senior Executive Editor EMEA, in which the claimant, amongst other things, suggests that when reporting news on new fossil-fuel projects Bloomberg must "*insist that the reporters consider including the impact of such projects on the global carbon budget, like putting "warning labels on cigarette packets*", Mr Kennedy says that "*it's just all a bit bonkers*".

101. However, firstly it was in January 2017, almost three and a half years before the claimant's dismissal. Secondly, and more importantly, I accept Mr Kennedy's evidence that it is not the claimant raising these issues that he considered wrong, but some of the claims the claimant was making in his email that Mr Kennedy considered were misconceived, betraying the claimant's lack of understanding, and going contrary to the respondent's principles of neutrality in reporting.

102. In any event, Ms Harris, who was the most senior editor in EMEA, responded to the claimant thanking him for the message, stating that she was ready to discuss his ideas further and referring to the climate coverage as a "*critical area*". Hardly a response from someone wanting to retaliate.

103. During the course of the hearing, the claimant kept changing his story as to when the so-called retaliation started and who was involved in the "conspiracy" and the "cover up" to oust him. At one time, it was going all the way to Michael Bloomberg himself, at others - it was some of the respondent's employees who happened to be tuning into the hearing via video. He also suggested that the "conspiracy" potentially spread even to web designers, who presented his graph on the respondent's website in a way that some of the columns got cut off, and the occupational health nurse, who changed a sentence in his health appraisal form.

104. In his closing submissions the claimant for the first time said that it was Ms Zelenko, a Global Standards Editor, (who until then had hardly been mentioned in evidence) who was responsible for his dismissal. The reason being, her writing an email on 9 August 2019 to Leslie Paul, of the respondent's HR, and saying that some of the claimant's story "*could have benefited*" from the context on climate the claimant had wanted to include, but

in her subsequent paragraph to be used by HR, in what appears to be a response to the claimant's Navex grievance, saying: "*certain oil industry stories could benefit from more context on climate*", and going on to say that there were no evidence that the context had been omitted intentionally because of bias or conspiracy.

105. I am puzzled as to why the claimant thinks that the use of "could benefit" instead of "could have benefited" makes a significant difference, and how all that relates to his dismissal. He was not able to explain that to me, when I asked him.

106. The claimant also claims that the respondent's motivation for retaliation was because the claimant's ideas, if implemented, were going to make the respondent to lose millions in terminal revenue from its energy customers (presumably by such customers becoming upset by the respondent more prominently reporting on climate issues).

107. This, however, does not sit well with the claimant's own assertion in his email to Mr Micklethwait of 18 January 2017 that by not reporting on climate in the way suggested by him the respondent risks "*missing out on scores of millions of new revenue*".

108. The claimant was also unable to explain why the respondent's management in the business unit, in which he worked and which was not responsible for the terminals revenue, would be retaliating against him for that reason, except by suggesting that "the cover up" might have gone up to the very top, and that the respondent was too big and needed to be broken up.

109. The start date of "the retribution campaign" was also sliding from the start of the second PIP in August 2019 to 2016, to 2015, to 2012 and "*may be even earlier*".

110. The claimant says that he cannot be sure because the respondent hid all that information from him and did not produce all the witnesses it had originally intended to call.

111. He also claimed that the clear disconnect between his "conspiracy" theory and the documentary evidence in the hearing bundle was because the respondent had been creating such documents on purpose to cover up "the conspiracy", and because "*you cannot believe everything you read*".

112. I reject this. There is simply no evidence of any improper behaviour by the respondent in relation to these proceedings. Further, the respondent has been represented throughout by a firm of solicitors and Queen's Counsel. They are very well aware of the disclosure obligations and their professional duties to the tribunal. I have no reason to doubt their integrity.

113. The disclosed documents (and there were almost 1800 pages in the main bundle of largely the respondent's documents) included documents that are clearly not helpful to the respondent's case.

114. The respondent's decision not to call all of its witnesses was based on the simple fact that those witnesses' evidence was predominately for the purposes of the claimant's whistleblowing complaints and not his "ordinary" unfair dismissal, and as such became redundant with the claimant's whistleblowing complaints being struck out.

115. The claimant also appears to allege that the respondent deliberately started to create documentary evidence, going back to 2016, to cover up its tracks and firmly having in mind the current tribunal proceedings. This allegation is bizarre, far-fetched and not supported by any evidence. I reject it.

116. The claimant's claim that document in the bundle showing his falling performance rating from 2012 was "*doctored*" by the respondent is yet another example of the claimant simply not being prepared to accept the reality of the situation. I have no hesitation in rejecting it.

117. If the respondent was indeed, as Mr Laddie put it, "*gunning*" for the claimant, it had a far easier route to get him out. The claimant's abrasiveness with his direct manager and his style of email communications with his other superiors gave the respondent a perfect opportunity to use the claimant's conduct as a good reason for initiating a disciplinary process against him which could have resulted in much speedier dismissal. The respondent, however, did not do that.

118. The claimant says that there were a lot of "*weird things*" happening, but he did not have any direct evidence of "*the conspiracy*" because, he says, it was "*a cover up*".

119. It is an impossible task to disprove a conspiracy theory, because by the very nature of such theories it can always be said that the absence of evidence of conspiracy is the best evidence of a sophisticated and well-organised conspiracy. I am not going to spend any more time on this pointless exercise.

120. Suffices to say that I have no hesitation in rejecting the claimant's allegation that his dismissal was an act of retaliation by the respondent for his "agitating" for a better climate coverage or in any other way connected to him raising climate issues. I find that the claimant raising these issues played no part whatsoever in the respondent's decision to dismiss him.

121. As the saying goes, "*it is very difficult to find a black cat in a dark room, especially if it is not there*". It seems to me that the claimant's continuing refusal to take things at their face value, and to accept that other people might have valid views even if he disagreed with them, was what caused him to embark on that downward spiral of tilting at windmills.

122. I equally have no difficulty in concluding that the real and the only reason for the claimant's dismissal was his unsatisfactory and falling performance. And that was also the real and the only reason for him being placed on the performance improvement plan in August 2019 and being given the first written warning and the final written warning under the PIP.

123. Even without hearing the respondent's witnesses, whose evidence I accept, the documents alone speak for themselves. The claimant's performance was falling. His previous manager, Mr Paulsson put him on the first PIP in 2016 for essentially the same performance issues that caused his new manager, Mr Landberg, to initiate the second PIP in 2019.

124. Mr Paulsson's and Mr Landberg's concerns about poor quality of the claimant's copy were shared by other editors who worked with the claimant.

125. The claimant's EVALs from the year 2017 placed him amongst the worst performing reporters, sliding in 2019 to the fourth position from the bottom.

126. The fact that his stories regularly featured on TOPWW does not tell the full story. I accept Mr Landberg's and Ms Ross-Thomas evidence that many of those were news flashes of a few characters long, which might stay on the TOPWW only a few minutes. That, of course, does not mean that the claimant producing news that the respondent found sufficiently important to be on its TOPWW screen should be disregarded, but it was not disregarded by the respondent.

127. However, on the other hand, it does not mean that the frequency of the claimant's stories appearing on TOPWW shall be taken as the conclusive evidence of the claimant's adequate performance.

128. In any event, it is not for me to decide whether the claimant's performance was satisfactory or not. My task is to decide whether the respondent genuinely believed that the claimant's performance was unsatisfactory and whether it had reasonable grounds to hold that belief.

129. Having heard evidence of Mr Landberg, Ms Ross-Thomas and Mr Kennedy and having considered numerous documents in the bundle, to which I have been referred during the course of the hearing, including the claimant's EVALs, PIPs, Mr Landberg's log, emails from Mr Landberg, Mr Kennedy and other editors concerning the quality of the claimant's copies, I have no hesitation in answering both questions in affirmative.

130. I find that the respondent genuinely believed that the claimant's performance was unsatisfactory, and that it had reasonable grounds for holding that belief.

131. Before turning to the question of the procedural fairness of the dismissal, for the sake of completeness, I shall say that I reject the claimant's allegation, which he appears to have later withdrawn, that Ms Ross-Thomas was "*duped*" into dismissing him.

132. I accept Ms Ross-Thomas evidence, which are corroborated by contemporaneous documents, that the decision to dismiss the claimant was hers and hers alone.

133. I find that before making her decision to dismiss the claimant Ms Ross-Thomas thoroughly and conscientiously reviewed all the relevant materials

and listen to the claimant. Ms Landberg presented his materials to Ms Ross-Thomas in a neutral fashion, without making any suggestions on what the outcome of the disciplinary meeting should be. Mr Ross-Thomas was not in any way predisposed against the claimant.

134. On the evidence in front of me, I am satisfied that no one else interfered with Ms Ross-Thomas' exercise of her judgment. I shall deal with this issue in some more detail later in my judgment when addressing the procedural fairness.

135. I find that Ms Ross-Thomas did not know about the claimant's Navex complaints. I accept her evidence that she did not read his six-page email of 27 February 2020 to Mr Canty, Global Head of Employee Relations, where at the very end of the email the claimant's refers to evidence presented via Navex. In any event, Ms Ross-Thomas evidence, which I accept, was that at that time she did not even know what Navex was.

136. Mr Landberg was equally unaware of the claimant's whistleblowing complaints, and, in any event, it is my finding that he had not in any way influenced or tried to manipulate Ms Ross-Thomas decision to dismiss the claimant.

137. Leaving the conspiracy theory to one side, which I have already dealt with, I see no reasons why Ms Ross-Thomas would decide to dismiss the claimant other than because of her genuine assessment that the claimant had failed to improve his performance to a satisfactory level despite the previous warnings, feedback and coaching my Mr Landberg and that he was unlikely to reach the required standard even if more time were given to him.

Procedural Fairness

138. Now, having found that the real and the only reason for the claimant's dismissal was his poor performance and therefore he was dismissed for a reason related to capability, which is a potentially fair reason under s98(2) ERA, I now need to decide whether in the circumstances of the case it was reasonable or unreasonable for the respondent to treat this reason as a sufficient reason to dismiss the claimant.

139. As stated above, I find that the respondent honestly believed that the claimant was incapable or incompetent, that is to say that his performance was unsatisfactory by reason of his capabilities and competencies, and that the respondent had reasonable grounds for holding that belief.

140. However, that is not enough for the dismissal to be fair. Procedural fairness is an important element for the overall conclusion on the issue of s98(4) fairness.

141. In capability dismissals, the usual elements of the procedural fairness are:

a. adequate evaluation of the employee's performance,
b. discussion with the employee about the performance concerns,
c. warning of the consequences in the event the performance does not improve, and
d. giving the employee a reasonable opportunity to improve.

142. In dealing with these elements, I shall, at the same time, address the specific criticism raised by the claimant in his particulars of claim.

143. The claimant's claims that the respondent "*did not have any or any adequate justification to place the Claimant on a performance improvement plan in August 2019*".

144. The reasons for my conclusion on the real reason for the claimant's dismissal equally answers this point. I am satisfied that the respondent had adequate reasons to place the claimant on the PIP in August 2019.

145. Next, *the claimant claims that his performance was not fairly assessed and that he was dismissed despite meeting the quantitative targets*.

146. Firstly, at the date of his dismissal in May 2020 the claimant was not meeting the quantitative targets in the third review period. Yes, he had met them in the first two review periods of the PIP, but then his performance, measured by the quantitative targets, had fallen below the required standard (zero Follows and zero MMWINs).

147. Secondly, the quantitative targets were only part, and perhaps the least important part of the PIP. The main area of concerns for the respondent was the quality of the claimant's copies, and therefore the qualitative targets were at least as important, and possibly more important, than the quantitative. The claimant failed to meet any of them in the three consecutive review periods.

148. In any event, the PIP required the claimant to meet all the targets – quantitative and qualitative, and he clearly failed to do so.

149. I reject the claimant's contention that Mr Landberg's assessment was not fair. It is not for me to re-assess the claimant's performance against the PIP. However, having listen to Mr Landberg's and other witnesses' evidence, and that includes the claimant himself, and having considered contemporaneous documents, in particular Mr Landberg's logs, his emails to the claimant following numerous 1-2-1 sessions, EVALs documentation, notes from the claimant's appeals, I find that the assessment was fair and not in any way contrived or aimed to make the claimant to fail the PIP.

150. In his evidence the claimant was prepared to admit that his performance was not up to scratch and that "*the PIP could be a useful tool*".

151. Mr Landberg discussed his concerns with the claimant, gave the claimant constructive feedback on how to improve his performance, coached him, helped him on many occasions to improve his copies. Mr Landberg was readily recognising and congratulating the claimant on good stories.

152. I, therefore, find that the claimant was given all reasonable information he needed to improve. He might not have used it to his advantage (probably because of his continual denial that his performance was unsatisfactory), but that is a different matter and the blame for that cannot be laid at the respondent's doorstep.

153. I reject the claimant's contention that *"the qualitative targets were insufficiently clear and open to subjective interpretation"*.

154. The targets were clearly spelled out in the PIP and other documents provided to the claimant during the PIP process. These were not materially different to the targets given to the claimant back in 2016 in the first PIP and in his EVAL reports since then. Other than challenging the entire process as unfair, the claimant did not appear to be seeking any specific clarifications on any of the qualitative targets.

155. Even on cross-examination the claimant was unable to explain what it is he found not clear in the targets. He said that the term "*significantly exclusive*" was open to interpretation, the word "*predominately*" was vague, and the word "*should*" should have been "*must*" (presumably to give the sufficient imperative effect to the set target). This is simply nit picking. The substance of what was expected from the claimant was clearly spelled out in the PIP. In any event, if these were important "interpretation issues", the claimant could have and should have raised them during his PIP, but he did not.

156. The fact that there is a degree of subjectivity in assessing the targets does not make them or the evaluation unfair. As long as the assessor genuinely and honestly applies his or her mind to the task, and has the necessary competence to do that, the assessment is fair. I find that Mr Landberg had all the necessary expertise and gave his honest assessment of the claimant's performance.

157. The fact that he did not have as in-depth knowledge of the carbon or natural gas markets as the claimant had, is not relevant. He was assessing the claimant's copies as an editor from the point of view of their structure, style and their "readability" by the intended audience. As an editor with a considerable experience, he was more than qualified to do that.

158. Mr Landberg was ready to acknowledge good work done by the claimant, gave the claimant constructive feedback and encouragement. I reject the claimant's contention that Mr Landberg was biased against him, abused his power, or that Mr Landberg wanted somehow to ascribe to himself all good work created by the claimant and then dispense with the claimant because of professional jealousy.

159. Mr Landberg was clear in his evidence, which I accept, that he genuinely wanted the claimant to improve his performance and regarded the claimant's failure to improve as part of his management failure to find a way to make the claimant to improve.

160. Ms Ross-Thomas was equally competent and open-minded in assessing the claimant's performance during the final disciplinary meeting.

161. I reject the claimant's allegations that Mr Landberg bullied him. Having gone through Mr Landberg's log and having listen to his and the claimant's evidence, I do not accept that Mr Landberg's instructions to the claimant, his feedback on the claimant's copies and his criticism of the claimant's performance and his professional decisions not to run certain of the claimant's stories could be reasonably characterised as bullying.

162. The claimant's bullying allegations had been properly investigated by HR and not upheld. I note from the interview notes of the claimant's meeting with Mr Canty that the claimant was unable to give clear examples of the alleged "bullying" and was referring to a pattern of behaviour but without specifying what exact actions by Mr Landberg he considered "bullying".

163. The subject of "bullying" came up in the claimant's appeal against his dismissal. The allegations were investigated by Ms Cotterill and Mr Bremner and dismissed. Having heard Ms Cotterill evidence and having examined the relevant documents in the bundle, I am satisfied that the investigation was reasonable, and the conclusion not to uphold the claimant's allegation of bullying was fair. In fact, based on the evidence in front of them, I find that it was the only reasonable conclusion in the circumstances.

164. The claimant's claim that the respondent was moving goalposts is not supported by any evidence. The PIP and the targets there remain constant through the whole process. The claimant was assessed by Mr Landberg and Ms Ross-Thomas against those targets. There is no evidence in front of me to show that in assessing the claimant's performance either of them acted arbitrary or inconsistently.

165. The claimant was clearly warned that his failure to improve could result in his dismissal. He was given the first and the final written warnings. He unsuccessfully appealed against both. I find that it was clear to the claimant that dismissal was a real possibility if he failed to improve. I, however, will return to the issue of the final written warning in greater detail later in the judgment.

166. I reject the claimant's contention that he was not given adequate time to improve. The PIP process lasted from the end of August 2019 to mid-May 2020, that is eight and a half months. It was initially envisaged to last 4 weeks but was extended to take into account the claimant's absences.

167. The claimant was not a novice, but a seasoned reporter with 20 years of experience. He was not new to the PIP process either and knew what was expected of him. Further, his EVALs reports from previous years raised the same performance issues. Therefore, these would not have come as a surprise to him.

168. As part of the PIP, he was not asked to do a different job, but to do his job to a satisfactory standard. Even considering the claimant's absences on

sick leaves in 2019 and 2020, I find that the period was adequate, and in any event, the length of the period was a matter for the respondent, and I find that it was well within the range of reasonable responses for the respondent to set that period.

169. I also reject the claimant's contention that he was "too busy" with other matters to meet the targets. The targets were his day-to-day work and that what he was or should have been busy with. He, however, was not doing it to a satisfactory level, as reasonably assessed by the respondent.

170. I also note that during the first written warning appeal meeting the claimant having raised this issue then accepted that additional tasks, he had been arguing distracted him from meeting the PIP targets, "*on the whole did not take much time and perhaps he could have executed on things quicker"*.

171. Next, the claimant complains that his final written warning was issued to him on 13 February 2020 after the end of his third assessment period from 10 January to 13 February 2020. However, in deciding to dismiss the claimant, Ms Ross-Thomas assessed his performance primarily over the third review period. Therefore, the claimant argues "*it was grossly unfair to assess the Claimant's performance in the period prior to date on which he was given a final written warning and further feedback as to the steps required to improve his performance*."

172. He further argues that this approach rendered the final warning "*nugatory and deprived [him] of any reasonable opportunity to improve his performance and implement the feedback given in the 11 February meeting*."

173. I can see some force in that argument. Indeed, if the claimant was given the final written warning for the level of his performance as at 11 February 2020 and then later dismissed by reference to the same period, that would be grossly unfair.

174. Also, even if there were no such "double-jeopardy" (and I accept that there wasn't), it would still be unfair, if the claimant was told only on 13 February that his performance in the second review period was unsatisfactory, and if it had not been improved in the third review period (that is from 11 January to 13 February 2020) he could be dismissed. It would be simply too late for the claimant to react to the final written warning and address the performance issues.

175. It is regrettable that the claimant had not been formally told that his performance in the second review period was unsatisfactory and issued with the final written warning earlier than 13 February 2020. However, there were objective reasons for that, largely of the claimant's making.

176. First, he was absent on sick leave, which resulted in the respondent extending the second review period until 10 January 2020, and then the disciplinary meeting originally scheduled for 22 January had to be re-scheduled three times at the claimant's request to accommodate his search for a companion.

177. Although the formal disciplinary meeting only happened on 11 February, and the claimant was issued with the final written warning on 13 February, the claimant and Mr Landberg had at least two one-to-one meetings in the relevant period. First - on 20 December 2019 and then on 20 January 2020. At both meetings Mr Landberg explained to the claimant that he was still falling short of the targets and gave detailed feedback. The claimant did not accept that, but he was given all the necessary information. It would have been clear to the claimant that Mr Landberg continued to consider his performance as unsatisfactory.

178. The final written warning letter is confusing. The penultimate paragraph reads as if the PIP was at an end, and the only remaining issue is whether the claimant's performance in the third review period improved to the required level. This, however, does not sit well with the first sentence in the same paragraph, which says that the final written warning will be disregarded after 13 February if the claimant achieved, maintained and sustained the objectives in the PIP "*moving forward*". In short, as Mr Laddie put it, it was a mix-up or a confusion or a mess.

179. To make things worse, on 18 February 2020, in response to the claimant's email of 16 February 2020, questioning various aspects of the second warning letter, Ms Mills wrote:

> ***Next Steps***
> *Your final four week review period ran from 13 January to 10 February 2020 inclusive. We have this week undertaken a review of your overall performance during that period and regret that we consider that you have failed to meet the expectations. You will therefore be invited to attend a further disciplinary which as explained at the end of the last meeting could potentially lead to termination of your employment, specifically in relation to your poor performance. You are on leave this week and we will therefore connect with you on your return.*

180. This suggests that as at 18 February 2020 (only 2 working days after the final written warning had been issued) the matter was done and dusted, and there was nothing else the claimant could do by way of improving his performance to avoid a possible dismissal.

181. The claimant appealed his final written warning specifically raising the timing point. His appeal was dismissed. With respect to the timing point, Ms Gage and Ms Vora said that they were "*satisfied that the performance plan has not changed throughout the course of this process. With this in mind, it was clear to you from the outset as to the targets and expectations. A plan of this nature, generally runs for a four week period, however on account of your absence, and in fairness to you, the time period of this was extended and ran from 1 Oct – 10 Jan. This is also referred to in your final written warning outcome letter.*"

182. This, however, with respect, does not deal with the issue. The issue is not whether the claimant was clear or unclear as to the targets and

expectations, but whether or not it was fair to issue him with the final written warning after the PIP had ended, and at the same time saying that there would be a further review of his performance between 10 January and 13 February and if it were to be decided that the performance had not improved he could be dismissed.

183. I find that the appeal panel failed to properly engage with this issue, either because they had not understood it properly or mistakenly thought that the setting of the targets and expectations at the outset of the PIP was the answer to it, or for some other reason. The bottom line - the issue had not been properly dealt with on appeal.

184. I have read Ms Vora witness statement (the respondent chose not to call her and therefore it is up to the tribunal what weight, if any, should be given to her evidence). The notes of the appeal meeting were not available. Ms Vora says in her witness statement she could not locate them.

185. However, in the bundle there are email exchanges between Ms Vora and the claimant following the appeal meeting, her notes of the subsequent meeting with the claimant on 18 March 2020 and her meetings with Mr Landberg and Ms Mills on 20 March 2020. (page 1297-1310P). I have carefully read those.

186. The timing issue was one of the issues raised by the claimant after the appeal meeting, which led Ms Vora and Ms Gage to conclude that a follow-up meeting was required.

187. The claimant wrote to Ms Vora on 12 March 2020:

Priya -- in the meeting today, you repeatedly mentioned a period from Dec. 27 to Feb. 11 and said those dates were in the March 9 letter. They are not.
I still don't understand what you mean. Can you please be clear? You claim you are being sincere, but that claim does not seem credible to me.
My third PIP period ran from Jan. 11 to about Feb. 10 I understand. I'm now in a further period, though this seems to be mostly undocumented because Reed/Bloomberg is not doing the right thing according to the PIP rules:

188. Then he included an extract from Ms Mills email of 18 February 2020 (I quoted above) and said: "*I'm still waiting for that ``further disciplinary,'' am I not?*"

189. From the documents I have seen, it appears that this issue had not been discussed at the follow-up appeal meeting on 18 March 2020, it was not raised by Ms Vora with Mr Landberg. It was raised in her meeting with Ms Mills, and Ms Mills said that the plan had lapsed, and the final written warning had been issued, but the plan had not changed during the whole process and the claimant was clear on the objectives. This, however, again failed to address the real issue of the timing of the final written warning.

190. It seems to me the respondent here got themselves into a real muddle with the dates. It appears the claimant's absences, his appeals and

grievances had thrown the original PIP timeline into a bit of disarray, and the respondent was effectively playing a catch-up against the dates in the PIP. By the time it was issuing its determination on the performance outcome in one review period, it was already passed the end date of the subsequent review period. That created an understandable confusion and the appearance that the claimant was not given proper warnings and an opportunity to improve.

191. However, despite the muddle up with the HR paperwork, the reality of the situation was that after 13 February 2020 the claimant's performance continued to be assessed and he continued to be given by Mr Landberg constructive feedback in their 1-2-1s. The issue had not been foreclosed, as suggested in Ms Mills email of 18 February 2020, and the claimant was still in a position to turn the tide and improve his performance. The claimant knew that. He acknowledges that in his email to Ms Vora of 12 March 2020: "*I am now in a further period*".

192. His performance was assessed at the EVAL meeting on 28 Feb 2020, at the 1-2-1 meeting with Mr Landberg on 10 March 2020, detailing performance between 12 February and 9 March, at a 40-minute phone call on 29 April, at the 1-2-1 meeting on 7 May, detailing his performance up to 7 May 2020.

193. Further, at the final disciplinary meeting on 13 May 2020, his performance was assessed during the entire period from 10 January to 13 May 2020. I accept Ms Ross-Thomas evidence that she also considered the claimant's performance after 13 February and indeed acknowledged that there had been some good work after 10 February 2020, but the overall performance was still falling short of the required standard. Some of examples of the claimant's work after 13 February were specifically discussed at the final disciplinary meeting.

194. The timing point was also addressed in the dismissal letter:

"*In the meeting we explained that whilst your final written warning was not issued until after the final performance review period had concluded. We are satisfied that you had further opportunities to improve during the period following 11 February up to the date of this hearing. Reed held one to one meetings with you and provided you with feedback against your metrics on or around 10 March and 29 April 2020. In reaching our decision we have taken into consideration your performance during this extended period. Whilst there has been in an increase in productivity you still fall short of the expectations*."

195. The issue was revisited on the appeal. Ms Cotterill and Mr Bremner investigated these issues and found that the claimant's performance continued to be assessed after 10 February 2020, he continued to be given regular feedback on it, and it was taken into account by Ms Ross-Thomas when she had decided to dismiss the claimant. Therefore, they concluded that the claimant had been given sufficient opportunity to improve his performance after the final written warning had been issued.

196. Having considered this matter in the round, I find that although the respondent certainly could and should have done better in addressing the timing issues in the HR paperwork, so to avoid the confusion with the end date of the assessment period, the reality of the situation was that after the final written warning the claimant continued under the PIP and had ample time to improve his performance. He knew that and the respondent continued to assess his performance and to give feedback on the same basis as before 13 February 2020. Therefore, I find that the mix-up with the end date did not create any unfairness for the claimant, and certainly not to the extent to take the whole process outside the range of reasonable responses.

197. The next point I will deal with is the claimant's complaint that "*There is no indication that, in taking the decision to dismiss, the Respondent had any regard to the Claimant's long service, strong historical record of performance, or any other mitigating factors.*"

198. It is true that the claimant was a long-serving employee of the respondent. It is also correct that the length and the quality of the past service of the employer are relevant factors to be taken into account in assessing the overall fairness of the decision to dismiss.

199. Although at the date of the dismissal the claimant had almost 20 years of service with the respondent, the quality of his service in approximately the last 8 years had been constantly deteriorating.

200. I accept Ms Cotterill evidence that it is not that uncommon to see such slide in performance by long-serving employees. I also accept evidence of Mr Kennedy that the downward trend coincided with the respondent in or around 2015 changing its approach on reporting news with far greater emphasis on good story-telling and impactful journalism, the areas where the claimant was performing poorly.

201. Mr Ross-Thomas evidence in chief do not specifically say whether or not she considered the length of service and the claimant's past record in reaching her decision to dismiss. This point was not put to her in cross-examination, and therefore I heard no direct evidence on it.

202. However, there is no law to say that failure to consider the length of service and the past record renders the dismissal unfair. On the contrary, the EAT on a number of occasions (see, for example, **Bevan Harris Ltd (t/a The Clyde Leather Co) v Gair 1981 IRLR 520, EAT**,) emphasised that the correct test tribunals must apply is whether the dismissal fell within the range of options open to a reasonable employer in the circumstances.

203. The same considerations and the overall test apply to the issue of whether or not the employer should have considered demoting or moving the under-performing employee to a different role instead of dismissal. Again, I do not have any direct evidence in front of me whether or not Ms Ross-Thomas applied her mind that that option. That was not put to her in cross-examination, nor was it a specific point raised by the claimant in his case.

204. It is, of course, good practice for employers, especially of the size and administrative resources of the respondent, to always consider these matters before deciding whether dismissal is the most appropriate sanction in the circumstances. Ms Ross-Thomas was supported through the process by Ms Mills of the respondent's HR, and one would have expected such matters to be discussed. I have not been presented with any evidence on that.

205. Mr Laddie in his closing submissions argued that even if these issues had not been considered in deciding to dismiss the claimant, that would have made no difference to the eventual outcome. This, however, is the "Polkey point", and, when determining the fairness or otherwise of a dismissal the tribunal must not take into account the so-called "no difference" rule.

206. However, I am mindful that I must not fall into the error of substitution, and the relevant question is not whether I or a hypothetic reasonable employer in those circumstances would have decided to apply a lesser sanction because of the claimant's length of service, but whether in those circumstances the respondent's decision to dismiss fell within the range of reasonable responses.

207. Considering the circumstances where the claimant's performance had been steadily declining over a number of years, given his specialist knowledge of his "beat" and the qualitative performance issues that led to his dismissal, I find that even if Ms Ross-Thomas did not specifically apply her mind to the claimant's length of service and/or to the possibility of moving the claimant to a different role, those omissions by themselves would not have made her decision to dismiss to fall outside the range of reasonable responses.

208. Now, before coming to my overall conclusion on the fairness or otherwise of the claimant's dismissal, I shall deal with one further aspect, which, I must admit, at first, I found the most troublesome. I am talking about "the exit/no backfill list" and various other emails between higher ranks of the respondent's management suggesting that the decision to manage out the claimant might have been taken as early as February 2019, some 6 months before the start of the second PIP.

209. Mr Fraher and Mr Wallace, who are the main protagonists of those email exchanges, did not give evidence to the tribunal. I have read their witness statements, in which they explain their reasons for writing those emails and what they meant by including the claimant's name on the lists. However, because they were not cross-examined on those, in reaching my decision on this issue, I placed no weight on the contents of their witness statements.

210. Mr Laddie described those emails as the high watermark of the claimant's claim, and I agree. Without full context these emails suggest that the outcome of the PIP had been pre-determined well before it even started.

211. This kind of lists is not an uncommon feature of many dismissal cases, especially related to redundancy dismissals in large multinational employers,

where senior management (often to dismay of their HR and legal advisers) create all kind of lists with names of employees who are likely to be leaving the company.

212. However, such lists, as unhelpful as they are in terms of evidence in possible future employment litigation, by themselves do not automatically mean that the dismissal is bound to be unfair. One must put them into the context and look at all relevant circumstances.

213. In this case, I am satisfied that Mr Landberg and Ms Ross-Thomas were not aware of those emails and the lists until the present tribunal proceedings.

214. For the reasons explained above I am also satisfied that the decision to dismiss the claimant was taken by Ms Ross-Thomas, and she was not instructed or manipulated to make that decision.

215. I also accept Mr Kennedy's evidence that had Ms Ross-Thomas decided not to dismiss the claimant, this would not have been a problem for him or his superiors.

216. Given the claimant's continuing poor performance, it is not surprising that Mr Fraher, Mr Wallace and Mr Kennedy anticipated that a likely outcome of the PIP would be the claimant's dismissal.

217. It is also not unusual for the management to plan for that eventuality discussing future resourcing and financial implications, as can be seen in those email exchanges.

218. For the sake of completeness, I also find that Mr Kennedy's reference to "uncompromising edit" in relation to the Russian gas pipeline story in his email of 11 June 2019 to Mr Landberg, was not an instruction to unfairly edit the claimant's copy, but to give it the best possible job on the edit. In any event, that was almost a year before the claimant's dismissal, Ms Ross-Thomas was not privy to that email, and the story was published.

219. For these reasons I find that there was no "pre-determination" as to the outcome of the PIP, and the claimant was not deliberately "managed out" by the respondent.

Overall fairness

220. Now, having gone through each of the criticisms by the claimant of the procedure and having looked at each relevant aspect of the process, I must step back and look at the entire picture in the round.

221. I find the process was designed to try and get the claimant to improve his performance and not to manage him out. It was not a sham.

222. I also find that Mr Landberg was genuinely trying to help the claimant, and that the targets were clear, consistent and achievable. The claimant was

kept informed of his progress against the set targets. He was not set up to fail and Mr Landberg was not, using the claimant's expression, "*throwing sand in the gears*".

223. He was formally warned twice about him not achieving the targets, he was given the right to appeal the formal warnings. He used that right and his appeals were duly considered.

224. All material decisions during the process were taken based on available evidence and using reasonable management assessment and discretion. I find that all people involved in the PIP process were not biased against the claimant, and there were no apparent conflicts which would have made them unsuitable to deal with those matters.

225. The confusing HR documentation on the final assessment period (the timing point) and the open question whether or not in deciding to dismiss the claimant the respondent considered his length of service, prior record and the possibility of demoting/moving the claimant into another role are the only flaws in the process.

226. However, for the reasons explained above I find that those flaws, did not render the whole process unfair. Therefore, I find that overall the process was fair. That brings home the final element of the exercise I had to undertake in coming to my decision.

227. I find that the respondent's decision to dismiss the claimant in those circumstances was fair. It follows that the claimant's claim for unfair dismissal fails and is dismissed.

Employment Judge P Klimov
24 January 2022

Sent to the parties on:

25/01/2022

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For the Tribunals Office

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