EMPLOYMENT TRIBUNALS

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

Heard at: London Central
On: 7 July 2020 and chambers 8 July 2020

Before: Employment Judge Hodgson

Representation
For the Claimant: Mr J Cook, counsel
For the Respondent: Mr J Laddie, QC

DECISION

The claimant's application for interim relief pursuant to section 128 Employment Rights Act 1996 fails and is dismissed.

REASONS

Introduction

1. The claimant issued his claim on 28 May 2020. The claimant brings multiple claims which include the following: unfair dismissal; direct age discrimination; and direct race discrimination. He alleges that he was dismissed because he made protected disclosure and brings a claim pursuant to section 103A Employment Rights Act 1996.

The hearing

2. This case proceeded as a remote hearing. There was an initial case management hearing on 25 June 2020. All parties agreed that the claim for interim relief was suitable for a video hearing. To allow the parties to familiarise themselves with the CVP video platform, and to iron out technical difficulties, there was a short further case management hearing the day before the hearing.

3. Witness evidence was filed, but no party sought an order for cross examination. Both parties were ably represented by experienced counsel, both of whom provided detailed skeleton arguments.

4. The case was advertised on CourtServe. Several members of the public, and at least one member of the press, attended the hearing. Three members of the public were not within the jurisdiction: one was in Australia, one Singapore, and one Hong Kong. They were friends or relatives of the claimant. Each of those individuals agreed not to record either the audio or the video, or to capture any images. I noted that they may not be directly subject to the jurisdiction of England and Wales. I was concerned that allowing them to observe the hearing goes beyond any requirement for a public hearing in this country. Neither counsel nor I were aware of any specific directions or guidance given by either the tribunal or the higher courts. Neither party objected to the individuals outside the jurisdiction continuing to watch the proceedings. As each of the individuals confirmed they would observe the prohibition on recording, and given that their interest was personal, I took the view that they should be permitted to observe, albeit I did not consider I had an obligation to do so. I should note that in the absence of clear guidance, I do not consider I have an obligation to prevent the hearing being viewed outside the jurisdiction.

5. During the first case management discussion, we specifically considered the challenges that such video hearings may present in terms of public access. As outlined above, provision was made for the public to join by means of a video link. We considered how documents should be made available to the public. CVP allows presentation of individual documents on screen. Following my request, one of the respondent's trainee solicitors, Ms Ainsley, agreed to assist by taking responsibility for displaying relevant documents on screen, as they were referred to. The net result was all could see the specific document referred to, albeit only the individual page referred to, was displayed.

6. I considered the possibility of a member of the public seeking greater access than could feasibly be allowed by screen presentation. The respondent agreed to keep a hardcopy of the relevant documents, and it was envisaged that if a greater access were requested, or required, it may be possible to allow inspection of those documents, without removal or

copying, at a time to be agreed or directed. However, whilst this contingency existed, it was not necessary to exercise it.

7. I would like to express my thanks to all involved, particularly to both counsel for the constructive and helpful way they dealt with the case and to Ms Ainsley for the assistance she gave. Without the helpful approach adopted by the parties, it would have been difficult to deal with this hearing online.

The legal framework

8. When there is a claim of automatic unfair dismissal contrary to section 103A Employment Rights Act 1996 (generally referred to as dismissal for whistleblowing), section 128 of the same act gives a right to bring a claim for interim relief.

9. Section 103A Employment Rights Act 1996 provides:

> **An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.**

10. Section 128 Employment Rights Act 1996 provides:

> **(1) An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed by his employer and—**
>
> **(a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—**
> **(i) … section… 103A…,**
>
> **may apply to the tribunal for interim relief.**

11. Section 129 deals with the procedure to be adopted when interim relief is granted:

> **129(1) This section applies where, on hearing an employee's application for interim relief, it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find—**
>
> **(a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—**
>
> **(i) section 100(1)(*a*) and (*b*), 101A(1)(*d*), 102(1), 103 or 103A, or …**
>
> **(2) The tribunal shall announce its findings and explain to both parties (if present) …**

12. Interim relief is an exceptional form of relief granted pending determination of a complaint of unfair dismissal see **Taplin v C Shippam Ltd** [1978] ICR 1068. It is common ground that **Taplin** remains good law. When considering whether it is likely the claimant will succeed, it is not enough

to show a likelihood on the balance of probability. The claimant must show that his case has "a pretty good chance of" of success.

13. The principles were reviewed and summarised by the Employment Appeal Tribunal in **London City Airport Ltd v Chackro** [2013] IRLR 610:

> **10. The correct approach to be applied to the meaning of "it is likely" has been a matter of some controversy. It has been argued by some, not least in the relevant passages in *Harvey on Industrial Relations and Employment Law*, that it will be sufficient for the employee to show that, on the balance of probabilities, he or she is ultimately going to win at the subsequent unfair dismissal hearing. However, the weight of authority is against a simple balance of probabilities approach. As long ago as the decision of this Employment Appeal Tribunal in Taplin v C Shippam Ltd [1978] ICR 1068 it was held that the appropriate test is higher than simply establishing that the balance is somewhat more in favour of the employee's prospect of success. It must, on the authority of Taplin, be established that the employee can demonstrate a pretty good chance of success. While that cannot substitute for the statutory words, it has been the guiding light as to the meaning of "likely" in this context that has been applied over the subsequent three of more decades by the EAT. As recently as November 2009, this EAT in a constitution presided over by the then President, Underhill J, upheld the Taplin approach: Dandpat v University of Bath [2009] UKEAT/0408/2009. In that case, the appellant had sought to contend that the authority of Taplin had been undermined by a decision of the House of Lords. This EAT rejected that submission and in due course, held as follows:**
>
> > **"Taplin has been recognised as good law for 30 years. We see nothing in the experience of the intervening period to suggest that it should be reconsidered. On ordinary principles we should be guided by it unless we are satisfied that it is plainly wrong. That is very far from being the case. We do in fact see good reasons of policy for setting the test comparatively high in the way in which this Tribunal did in the case of applications for interim relief. If relief is granted, the respondent is irretrievably prejudiced because he is required to treat the contract as continuing and pay the claimant until the conclusion of the proceedings: that is not a consequence that should be imposed lightly." [20]**

14. The EAT also gave some guidance on the approach to be taken at paragraph 23:

> **23. In my judgment the correct starting point for this appeal is to fully appreciate the task which faces an employment judge on an application for interim relief. The application falls to be considered on a summary basis. The employment judge must do the best he can with such material as the parties are able to deploy by way of documents and argument in support of their respective cases. The employment judge is then required to make as good an assessment as he is promptly able of whether the claimant is likely to succeed in a claim for unfair dismissal based on one of the relevant grounds. The relevant statutory test is not whether the claimant is ultimately likely to succeed in his or her complaint to the Employment Tribunal but whether "it appears to the tribunal" in this case the employment judge "that it is likely". To put it in my own words, what this requires is an expeditious summary assessment by the first instance employment judge as to how the matter looks to him on the material that he has. The statutory regime thus places emphasis on how the matter**

> **appears in the swiftly convened summary hearing at first instance which must of necessity involve a far less detailed scrutiny of the respective cases of each of the parties and their evidence than will be ultimately undertaken at the full hearing of the claim.**

15. Rule 95 Employment Tribunal Rules of Procedure 2013 applies rules 53 – 56, which concern preliminary hearings, to interim relief applications. It specifies the tribunal shall not hear oral evidence, unless it directs otherwise.

16. The substantive law relating to whistleblowing needs to be considered.

17. Under section 43A Employment Rights Act 1996, a worker makes a protected disclosure in certain circumstances. To be a protected disclosure, it must be a qualifying disclosure. Qualifying disclosures are identified in section 43B Employment Rights Act 1996:

> **(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—**
>
> > **(a) that a criminal offence has been committed, is being committed or is likely to be committed,**
> > **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
> > **(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,**
> > **(d) that the health or safety of any individual has been, is being or is likely to be endangered,**
> > **(e) that the environment has been, is being or is likely to be damaged, or**
> > **(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.**
>
> **(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.**
> **…**
> **(5) In this Part 'the relevant failure', in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).**

18. The following questions must be addressed: first, is there a disclosure of information; second, does the disclosure of that information tend to show one of the relevant failures referred to in section 43B(1)(a)-(e); third, what was the belief of the employee making the disclosure; and fourth, was a belief reasonably held that the disclosure tends to show one or more relevant failures and was made in the public interest. All of these elements must be satisfied if the claim is to succeed at a final hearing.

19. Disclosure of information should be given its ordinary meaning, which revolves around conveying facts. It is possible an allegation may contain

information, whether expressly or impliedly (see **Kilraine v Wandsworth LBC** [2018] EWCA Civ1 1436). Each case will turn on its own facts.

20. It may be possible to aggregate disclosures, but the scope is not unlimited, and it is a question of fact for the tribunal.

21. It may be necessary to indicate the legal obligation on which the claimant is relying, but there may be cases when the legal obligation is obvious to all and need not be spelled-out (see **Bolton School v Evans** [2006] IRLR 500 EAT). However, where the breach is not obvious, the claimant may be called upon to identify the breach of obligation that was contemplated when the disclosure was made. It may be necessary to identify a legal obligation (even if mistaken), as opposed to a moral or lesser obligation (see **Eiger Securities LLP v Korshunova** [2017] IRLR 115, EAT.)

22. The reasonable belief of the worker must be considered. The test is whether the claimant reasonably believed that the information 'tended to show' that a relevant failure pursuant to (a) to (f) existed; the truth of disclosure may reflect on the reasonableness of the belief. Reasonable belief requires a subjective belief that is objectively reasonable (see **Babula v Waltham Forest College** [2007] ICR 1026, per Wall LJ).

23. Reasonable belief is to be considered by reference to the personal circumstances of the individual. It may be that an individual with specialist or professional knowledge of the matters being disclosed may not have a reasonable belief, whereas a less informed, but mistaken individual, might (see **Korashi v Abertwe Bro Morgannwg University Local Health Board** [2012] IRLR 4). Each case must be considered on its facts.

24. The public interest element was added in 2013 to address the decision in **Parkins v Sodexho Ltd** [2002] IRLR 109, EAT. This has been considered by the Court of Appeal in **Chesterton Global Ltd v Nurmohamed** [2017] EWCA Civ979. Underhill LJ gave the lead judgment in the Court of Appeal and addressed whether a disclosure made in the private interest of the worker may also be in the public interest, because it serves the interests of other workers as well (see Underhill LJ, paragraph 32). Underhill LJ declined to interfere with the tribunal's decision and set out guidance at paragraph 37.

> **.. the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B (1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker… The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at para. 34 above may be a useful tool… but that is subject to the strong note of caution which I have sounded in the previous paragraph.**

25. Underhill LJ expressly refused to rule out the possibility that even a disclosure of a breach of a particular worker's contract will not be in the public interest. The tribunal must consider all the circumstances; Underhill LJ gave some general guidance. Starting at paragraph 26, he dealt with some "preliminaries." He reiterated that the tribunal must first ask whether the worker believed, at the time he was making the disclosure that it was in the public interest and if so, whether that belief was reasonably held. At paragraph 27 he stated:

> **First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of section 43B as expounded in Babula ... The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable…**

26. When considering the dismissal, it is necessary to consider the thought processes of the individual or individuals who dismissed.

27. I should have in mind the case of **Kuzel v Roche Products** [2008] ICR 799, in which LJ Mummery gave the leading decision. The following paragraphs are particularly helpful.

> **52. Thirdly, the unfair dismissal provisions, including the protected disclosure provisions, presuppose that, in order to establish unfair dismissal, it is necessary for the ET to identify only one reason or one principal reason for the dismissal.**
> **53. Fourthly, the reason or principal reason for a dismissal is a question of fact for the ET. As such it is a matter of either direct evidence or of inference from primary facts established by evidence.**
> **54. Fifthly, the reason for dismissal consists of a set of facts which operated on the mind of the employer when dismissing the employee. They are within the employer's knowledge.**
> **…**
> **56. I turn from those general comments to the special provisions in Part X of the 1996 Act about who has to show the reason or principal reason for the dismissal. There is specific provision requiring the employer to show the reason or principal reason for dismissal. The employer knows better than anyone else in the world why he dismissed the complainant…**
> **57. I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.**
> **58. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.**
> **59. The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it**

> **was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.**
> **60. As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason.**

28. To determine this interim relief application, it is necessary to take a view on the likelihood of the 103A claim succeeding. I am considering how the case appears to me at present, and then I am projecting forward to consider the likely findings of the final tribunal. This involves considering what must be established, forming a view on the likely strength of the evidence, and forming a view on how that evidence will be interpreted.

29. For the purposes of this application, it is necessary for me to identify the main points about which the tribunal must be satisfied before a claimant can succeed. I should then consider the nature of the dispute in relation to each matter and the likelihood of the issue being decided in the claimant's favour.

30. First, there must be a disclosure of information.

31. Second, the disclosure of information must be protected. In order for it to be protected, it is necessary to look at the thought processes of the claimant at the time when the disclosure was made. In this case, the main dispute, at present, is whether, in the reasonable belief, of the employee the factors stated in 43B(1)(a)–(f) applied (the relevant failure). It is not conceded that the alleged disclosures were made in the public interest, and it is implicit that the respondent alleges there was a significant degree of self-interest.

32. Third, one or more of the protected disclosures must be the sole or principal reason for the dismissal. It is for the final tribunal to decide, as a question of fact, what is the reason for dismissal. In deciding that reason, it may be appropriate to draw secondary inferences from primary findings of fact. The reason for dismissal is disputed. I must ask if it appears to me likely that the final tribunal will draw an inference, or find directly on the primary finding of fact, that the sole or principal reason for dismissal was the protected disclosure.

Documents

33. I received the bundle of documents which includes the claim form and the claimant's response to the respondent's request for further information, which purports to expand on, or explain, the alleged protected disclosures.

34. No response has been filed. The claimant agreed at the case management hearing to an extension of time until 23 July.

35. Both parties served statements. Neither party applied to rely on oral evidence.

36. The claimant filed a statement.

37. The respondent supplied statements for the following: Mr Reed Landberg and Ms Emma Ross-Thomas.

38. I received skeleton arguments from both counsel. I received various authorities.

39. The bundle of documents supplied was extensive, running to over 600 documents. It included reviews of the claimant's performance, various articles, numerous emails, grievances, appeals, relevant responses, and documents relevant to dismissal.

The factual background

40. I did not hear evidence; I cannot resolve any disputed facts. There is significant agreement; it is appropriate for me to outline the relevant circumstances, and indicate where there is dispute. If I set out, incorrectly, any matter which appears to be agreed, it is not my intention to bind a future tribunal.

41. The respondent is a global news and information supplier. It has a substantial London office. One department is Bloomberg News. It employs journalists who provide copy that is disseminated through the respondent's terminals and other outlets. It has its own journalistic code of practice, which is referred to by the claimant, but which he has neither described nor produced. Mr Laddie's unchallenged submission was the code of conduct is not legally binding.

42. Both parties referred to the general journalistic code of conduct, but neither party produced it, nor relied on any specific section. The respondent contends, it appears without contradiction, that the journalism required by the respondent is fact-based and not campaigning.

43. The claimant was employed as a journalist and commenced employment in 2000. At the date of dismissal, he was a reporter within the respondent's European gas, power and renewables team. His primary responsibility was to cover the gas markets. He was permitted to report more widely on carbon emission issues. The team leader who exercised editorial control was Mr Reed Landberg.

44. It is the respondent's position that the claimant's performance had been unsatisfactory for a number of years and was under scrutiny. It is agreed there are interim and year end evaluations, and some alleged that his

work was unsatisfactory. It is the respondent's case the claimant responded poorly, and sometimes abusively, to feedback.

45. The respondent alleges that on 12 July 2019, following discussions with his manager, Mr Will Kennedy, it was decided to place the claimant on a performance improvement plan (PIP) I do not need to record the detail. It is accepted by the claimant that a PIP was instigated, albeit there is a dispute as to when this was decided on, and the motivation for it.

46. It is common ground that between 8 June and 8 July 2019, the claimant contacted the Navex ethics hotline, a whistleblowing hotline. He raised various complaints, which he now alleges to be protected disclosures.

47. It is the respondent's case that Mr Landberg was not permitted to, and did not, view those alleged disclosures, albeit that he was interviewed as part of the claimant's grievance, and would have gained some understanding of the claimant's complaints, as they impinged upon his editorial decisions.

48. The respondent believes the claimant's complaints related to the breadth and depth of the respondent's climate coverage and there were specific complaints about Mr Landberg's editing of the claimant's work. The grievance was rejected on 23 August 2019. The claimant appealed, and the appeal was dismissed on 4 December 2019.

49. The respondent alleges that throughout the PIP, Mr Landberg offered close constructive guidance during both informal meetings and, I understand, eight minuted meetings.

50. The PIP ran from 30 August 2019 to 13 May 2020. During this time, there were disciplinary hearings which led to an initial warning and then a final warning. Whilst these are described as disciplinary hearings, it appears to me that they were largely concerned with the claimant's performance, which is put forward primarily as a capability matter and not specifically as conduct. I observe, this may suggest some procedural confusion, or unfairness.

51. All appeals were unsuccessful. The final disciplinary hearing which led to his dismissal was conducted by Ms Emma Ross-Thomas. It is alleged that she concluded the claimant's performance had not improved sufficiently and she dismissed him.

52. It is the claimant's position that he had a history, dating back to 2016, of raising weighty concerns about the respondent's coverage of climate change. He alleges he repeatedly expressed concerns in emails to HR and senior managers, including the editor-in-chief of Bloomberg news, Mr John Micklethwaite.

53. He alleges on 8 June 2019 he made a whistleblowing report via the Navex global website, which is an external whistleblowing hotline. His concerns are recorded as follows at 35.2 of Mr Cook's submissions

> **35.2 On 8 June 2019 the Claimant made a whistleblowing report via the Navex Global website ("Navex") [243]-[244]. The whistleblowing report was apparently updated on 19 June, 2 July and 9 July [245]-[250]. Navex is an external whistleblowing hotline service which provides a vehicle for employees of the Respondent to raise concerns. The Claimant's Navex disclosures raised, inter alia, "a culture of retaliation" with specific reference to the fact that the Claimant had been retaliated against for his prior disclosures; Bloomberg was failing to cover climate change stories properly; certain managers were potentially improperly boosting the values of oil customers and fossil fuel companies in contravention of the Bloomberg Journalistic Code of Conduct; and Bloomberg managers had "campaigned for fossil fuels and delayed climate action". The Claimant specifically identified his line manager, Reed Landberg, and other senior leaders at Bloomberg News, as parties involved or potentially involved in this wrongdoing.**

54. He accepts his concerns were investigated as grievances; he alleges that, whatever may have been said in response to his grievances on appeal, that the respondent, resolved to manage him out because it did not believe he would cease raising concerns about its own climate change coverage. He says that is the true reason why he was put on the performance improvement plan. He alleges the performance improvement plan was instigated on 30 August, one day after he had appealed the 23 August 2019 outcome. He does not accept that the decision had been made earlier, but that any implementation had been delayed pending consideration of his grievance.

55. The claimant's skeleton argument says this at 35.6:

> **35.6 The Respondent, chiefly through the person of Mr Landberg, manipulated the PIP process. Mr Landberg set quantitative targets which were likely to be difficult for the Claimant to attain. When the Claimant met those targets, Mr Landberg simply shifted focus and said that the Claimant was not meeting "qualitative" targets that had also been set. The balance of the evidence suggests that Mr Landberg was primarily, if not solely, responsible for determining whether the Claimant had met those targets and that Mr Landberg consistently "moved the goalposts". This represented a concerted attempt to manage the Claimant out of the business, chiefly because of the Navex disclosures.**

56. The main focus in the skeleton argument concerns Mr Landberg's position and the allegation that he manipulated the process.

57. The claimant's submissions say of Ms Emma Ross-Thomas, who dismissed the claimant:

> **35.7 While Emma Ross Thomas, now Managing Editor for Energy and Commodities, ultimately held the final meeting with the Claimant on 13 May 2020, it is apparent from the evidence that Mr Landberg exercised significant control over the outcome by his subjective interpretation of the Claimant's performance against the PIP. Mr Landberg had effectively already taken the decision to dismiss in February 2020, prior to Ms Ross Thomas becoming involved. Further, the documentary evidence suggests that Ms Ross Thomas was, herself, aware of the Claimant's Navex disclosures.**

58. It follows from the skeleton argument, that it is the claimant's case that Ms Ross-Thomas's decision was, in some manner, directly and consciously manipulated by Mr Landberg. He therefore invites the tribunal to conclude that it is Mr Landberg's actions, thought processes, and motivation which falls to be considered, and that in some manner Ms Ross-Thomas was manipulated. I should note that the respondent alleges that this submission in the skeleton argument is in conflict with the claimant's case. At paragraph 82 of his statement the claimant says the following:

> **82. Ultimately, it wasn't Reed who dismissed me, but Emma Ross-Thomas, who knew about my protected disclosures because I told her in a meeting on or around 4 February 2020., and in subsequent emails. Reed was ultimately shooting down my contributions to our news and he was able to manage me in such a way as to create the illusion of poor performance.**

59. It is unclear how the claimant is putting his case. The submissions in the interim relief hearing do not acknowledge the claimant's case that he told Ms Ross-Thomas of the disclosures, but do assert that there is documentary evidence that she knew. This is puzzling. Why the claimant needs to rely on inferences to be drawn from documentary evidence, when his statement is that he expressly told, is unclear.

60. It is clear the claimant asserts the PIP was a sham process. He alleges that the final review pre-dated the final written warning.

61. The claimant does not accept that his performance was poor. He says this at paragraph 30 of his statement:

> **30. I was issued with an unfair and inaccurate 2018 performance appraisal in early 2019, even though my performance metrics surged to record levels. The number of my stories that won "breaking news" and "top worldwide'' performance indicators jumped 60% and 30% year on year in 2018. It wasn't appropriate that all three of my line manager Reed Landberg, Will Kennedy and Stuart Wallace declined to show how they concluded my performance was "steady on the low end of what's expected" [181-184 JHB]. They were dismissive when I asked how they concluded I underperformed.**

62. As noted above, paragraph 82 of his statement refers to the respondent creating the "illusion of poor performance."

63. The claimant does not accept that the PIP was appropriate or reasonable. He says that it contained quantitative and qualitative measurements. He refers to the plan (R1/311) and states that he largely fulfilled the quantitative objectives, which concerned the number of articles delivered. I do not need to give the detail. He says he was unfairly criticised on the qualitative analysis. It is the respondent's case that there were there 'qualitative' areas. The first two concerned pitching ideas and conducting interviews, which the respondent maintains are measurable. The third item is termed as follows

> **Filing coherent copy that's complete and well organised, where assertions are supported by facts and quotes, and where a constant theme is maintained and developed throughout the piece**.

64. My understanding of the detail of the dispute between the parties must be, to a large extent, impressionistic. However, it is clear to me, on the basis of all that I have read, and having regard to the submissions, that there is a fundamental dispute between the parties concerning the quality of the claimant's journalism. In brief, it is the respondent's case that the claimant consistently and persistently produced poor quality journalism which is characterised by lack of coherence, poor organisation, and inadequate structure. It is respondent's case that it was necessary to heavily edit the claimant's copy.

65. I sought clarification as to whether the claimant's case was based on or supported by any allegation that there was any specific alteration of any fact he advanced, or the suppression of any article he wrote. The claimant has identified no single piece of journalism which he proposed for publication which was suppressed. He has identified no editorial intervention which changed the meaning of any single piece of journalism. He has identified no fact advanced in any piece of journalism which was suppressed or removed by the respondent.

The disclosures

66. The claim form identifies the following disclosures at paragraph 39

> **39. The Claimant relies upon the following protected disclosures:**
>
> **39.1. The email to Ms Mills on 20 May 2016 about the Respondent's coverage of climate change.**
> **39.2. The early January 2017 email to Mr Micklethwait regarding coverage of climate issues.**
> **39.3. The 20 January 2017 email to various recipients regarding the carbon budget and the Respondent's coverage of climate issues. Nations have agreed to protect the budget so policy needed to be reported on by media companies, without bias.**
> **39.4. The 13 March 2019 letter to HR.**
> **39.5. The Navex reports of 9 June, 19 June and 9 July 2019.**
> **39.6. The 29 August 2019 appeal against the grievance outcome.**
> **39.7. The oral disclosures to Mr Fraher in the meeting on 21 October 2019.**

67. It was accepted on 25 June 2020 that the information had not been adequately identified. The claimant agreed to answer the respondent's request for further information, and this is now set out at pages 36 to 57 of the bundle. The claimant has not applied to amend the claim. For the purpose of the interim relief application, the claimant has relied only on disclosure 5. It is unclear why he has ignored the other disclosures. They have not been withdrawn.

68. The further particulars given by the claimant in relation to disclosure 5 are extensive. They are discursive and unfocussed. I have not been able to

summarise them. I have set them out below. First, he deals with the date of the disclosures.

> **Here are some of the key parts of the reports relied on: 19 June 2019:**
>
> **"I'd like to highlight possible problems in the culture, including behavior by managers that potentially contradicts company policies, including rules that prevent retaliatory conduct.**
>
> **Behaviour of some managers that needs to be investigated:**
>
> ***Culture of retribution; I've attempted to do the right thing and point out flaws in our news sense and focus to higher-up managers**
>
> ***After doing so I receive unfair performance evaluations that downplay key metrics. In follow-up meetings with managers I find managers evasive and unwilling to engage properly; address key issues (they are helpful to some extent)**
>
> ***Needs to be looked into whether there's a culture of bad news story management that's retaliatory...potentially designed to frustrate reporters and lower their work satisfaction, potentially even prod them to move teams or resign**
>
> ***Yes man culture; people who speak out are potentially hounded to dissuade them from speaking out"**
>
> **19 June:**
>
> **"Big picture is I've been blowing the whistle on Bloomberg's failure to tackle the climate change story properly for years. It needs to be investigated whether my higher ups don't like it and are continuing to retaliate against me."**
>
> **"Last week, I challenged a senior manager about the inadequate quality of our climate coverage. A few hours later a group email was sent by Reed to our team about a new team member, who will perhaps be focussing on green issues. This is a good thing. But it also occurs to me that I was never asked if I'd like to do that job. I'd like someone completely neutral to look into how clever this communication**
> **was, and whether it's part of a retaliatory pattern. It might be incompetence, too, which perhaps I've put up with for too long."**
>
> **June 19 attachment:**
>
> **"The possible retaliatory behavior I'm experiencing might be related to the fact that I'm pushing my managers to report the climate action story in a better way…and the retaliatory behavior follows my assertion to senior managers that the Financial Times seems to have overtaken us on this front and is doing a better job than us."**
>
> **"I've spoken to a few people about my situation and it seems that instead of dealing with the issues I'm bringing up, middle management and HR may be attempting to SPIN THE STORY to focus on MY PERFORMANCE."**
>
> **"Months ago, my double skip manager said he may replace my team leader, yet it has not happened. Meantime, the retaliatory behavior toward me seems to be ramping up. Is it too much to ask for the retaliatory behavior to stop and high-quality management installed?"**

19 June continued:

**"*Improved coverage of the UN climate talks (or is this difficult given Mike Bloomberg's role in helping to replace US funding for the UNFCCC?). Climate protection will only work if it's global. It puzzles me that we are not describing the process better for our readers. Every pension fund in the world is grappling with the energy transition and is wanting to know how UN rules and guidelines might shape future national policy for all nations. It's not reader numbers that are
important here. It's quality of readers. Ie if 100 of our pension fund customers want a story, surely it's worth doing, even if it only gets 100 hits.**

***We need to do more market structure stories because it is the structure of energy markets (and others) that will determine how investors make money/lose money during the climate transition over time. I'm a bit shocked that my managers still argue against this.**

***Improved coverage of banking, insurance, pension funds, prudential regs and finance and their role in enabling the climate crisis…and potentially their role in enhancing the energy shift. (Maybe Mike Bloomberg's role in the on the Task Force on Climaterelated Financial Disclosures is also making this difficult. If so, why is this not being more openly discussed and addressed within Bloomberg News?) Senior executive editor John Fraher says he has been looking into expanding the finance team to include climate – he's been doing this for many months."**

"I've already pushed our oil team to include the climate frame in their stories. While I've had some success, the retaliatory behavior seems to continue/get worse. I thought this sort of behaviour from a senior reporter would be rewarded, but it appears to me that it's punished. This is despite the fact we very consistently get told to ``do the right thing.''

9 July:

"It's against Bloomberg's News - Journalistic Code of Conduct policy to cause Bloomberg to disseminate news for the sole purpose of affecting securities prices.

It needs to be investigated whether certain managers (maybe not those listed above) are doing this to boost the value of oil companies and other fossil fuel companies, against the interests of customers that do not benefit from fossil fuel money/profits and against the interest of the company founder's philanthropic efforts.

It is also against the code to campaign on behalf of a particular issue in a way that could give rise to the appearance of partiality. It needs to be investigated whether Bloomberg managers have campaigned for fossil fuels and delayed climate action even though the they knew the world struck a deal in 2015 to limit greenhouse gas emissions.

It needs to be investigated whether those who spoke out against the apparent campaign and its potential harm to customers (eg pension funds) have been harassed and retaliated against."

"Also it needs to be investigated whether – instead of rationally listening and responding to fair suggestions and criticisms – the managers sought to distract from their failings by inventing performance problems in those calling out their bad behavior."

July 9 on some of the retaliation against the Claimant:

‘’Bad 2018 evaluation after I went to senior management with concerns about the Financial Times beating us on the climate story. Please read my evaluation to see how much nonsense is contained in it. Where is there mention of my surge in exclusives and to pww play ...helped by some very kind and talented team members to be sure?;

Please read emails sent by me to John Fraher, Will Kennedy ...and not just the recent ones...check out the ones from more than a year ago pertaining to climate talks in Bonn (emails that apparently have the magic quality of coming back after disappearing)

Managers turn other managers and reporters against reporters they don’t like

Stories can be edited with a pro-U.S. bias?

Do managers get work colleagues to send coded messages to reporters down the pub? Do managers seek to entrap reporters by getting contacts to make unethical requests?

I write these words with some regret, because it underpins my inability to address this stuff better directly with management. I really do just want to do the right thing. I hope Bloomberg does too, but I'm beginning to doubt it.”

69. As to the alleged breach, the further and better particulars state:

Section 43B(1)(e) – damage to the environment; section 43B(1)(f) – concealment of damage to the environment.

As PDs 1-4 above.

Section 43B(1)(b) – breach of a legal obligation under s.47B Employment Rights Act 1996. The information disclosed tended to show that the Respondent was in breach of s.47B ERA because the Claimant was being subjected to retaliation due to prior protected disclosures regarding damage to the environment and/or deliberate concealment of damage to the environment and this represented a cultural issue at the Respondent.

Section 43B(1)(b) – breach of a legal obligation. Bloomberg Journalistic Code of Conduct. Specifically that disseminating news for the sole purpose of affecting securities prices was a breach of that code and may breach rules designed to prevent market manipulation. Also that the way in which climate and carbon issues were covered was a breach of the requirement for impartiality in the code.

70. Mr Cook’s skeleton argument describes the relevant information as follows:

38. It is submitted that the Navex disclosures, both individual and collectively, contained sufficient factual content to amount to disclosure(s) of information. The following passages are particularly salient:
38.1. “It needs to be investigated whether certain managers (maybe not those listed above) are doing this to boost the value of oil companies and fossil fuel companies, against the interests of customers that do not

> **benefit from fossil fuel money/profits and against the interest of the company founder's philanthropic efforts." (9 July) [249].**
> **38.2. "It's against Bloomberg's News (sic) - Journalistic Code of Conduct policy to cause Bloomberg to disseminate news for the sole purpose of affecting securities prices" (9 July) [249].**
> **38.3. "It needs to be investigated whether Bloomberg managers have campaigned for fossil fuels and delayed climate action even though the they knew the world struck a deal in 2015 to limit greenhouse gas emissions" (9 July) [249].**
> **38.4. "Needs to be looked into whether there's a culture of bad news story management that's retaliatory...potentially designed to frustrate reporters and lower their work satisfaction, potentially even prod them to move teams or resign…Yes man culture; people who speak out are potentially hounded to dissuade them from speaking out" (19 June) [246].**
> **38.5. "Related is a repeated failure to tackle the climate change story properly: Examples just in recent days…Big picture is I've been blowing the whistle on Bloomberg's failure to tackle the climate change story properly for years. It needs to be investigated whether my higher ups don't like it and are continuing to retaliate against me" (8 June) [244].**

71. He goes on at paragraph 40 to deal with the reason for the belief as follows

> **40. The Claimant's case is that he subjectively believed that the Navex disclosures tended to show the following:**
> **40.1. That the climate (and therefore the environment) was being damaged by carbon emissions and a lack of awareness of the damage to the environment caused by fossil fuel companies and polluters (s.43B(1)(e)).**
> **40.2. That the Respondent was contributing to damage to the environment by campaigning for fossil fuels, or at least directing its coverage in such a way as to minimise criticism of fossil fuels, and thereby contributing to delaying climate action (s.43B(1)(e)).**
> **40.3. That Bloomberg managers were deliberately concealing damage to the environment caused by carbon emitters, for fear of upsetting fossil fuel clients and investors (s.43B(1)(f)).**
> **40.4. That he had been retaliated against for making protected disclosures and that this evidenced a "culture of retribution" at the Respondent contrary to s.47B ERA (s.43B(1)(b)).**

72. It is clear from the alleged breach for disclosure 5 that the Bloomberg journalistic code is said to be a legal obligation. Any suggestion that the code amounted to a legal obligation was not pursued in submissions. The code has not produced. There was no attempt to counter Mr Laddie's assertion that it created no legal obligation. It is unclear why this has been advanced, and then ignored, but not abandoned.

73. I sought clarification of the claimant's case from Mr Cook. I asked about the journalistic code, there is no suggestion that it created legally binding obligations, and the code has not been reviewed by counsel.

74. As to the legal obligation relied on, Mr Cook referred to section 47B Employment Rights Act 1996, and his right not to be subject to a detriment for making a protected disclosure. He agreed that there was no legal obligation identified in the claim form.

75. The damage to the environment relied on is a general assertion that burning fossil fuels leads to an increase in global temperatures and causes consequential environmental damage. It was agreed that the claimant has identified no specific act of an individual, company, or country on which he relies; he relies only on the general principle.

76. I enquired what was being concealed. Mr Cook stated the concealment concerns the contribution to environmental damage caused by burning fossil fuels. It is said there is a lack of awareness amongst companies about the effect of emissions on global warming. This lack of awareness is caused by the failure to disseminate sufficient information by appropriate reporting from the respondent, and particularly, underreporting of matters relevant to the Paris agreement.

77. Mr Cook agreed that, in principle, journalistic outlets are subject to editorial control and may choose what stories to run, and within those stories, the weight to be given to particular stories or facts.

78. I have not found it easy to summarise the claimant's position. However, in order to analyse the claim for interim relief, it is important that I identify the key themes. The following emerges:

79. For the purposes of the interim relief application, the claimant submissions are limited. He relies only on section 43B(1)(e) and (f) he does not rely on (b) as relevant failures.

80. The claimant has not abandoned his assertion that, at the time he made the disclosures, he had in mind a specific legal breach. The nature of that breach is unclear, and it is not referred to at all in counsel’s submissions. This despite the fact the documents do contain clear reference to breach of the Bloomberg journalistic code as being a breach of legal obligation.

81. There is reference to Bloomberg, in some manner, seeking to manipulate news, or failing to publish news, with the purpose of affecting share prices. However, no specific company is identified. No specific article or piece of information, whether said to have been published in order to manipulate, or withheld from publication in order to manipulate, has been identified.

82. As to the effect on the environment, there is no attempt to identify any specific event. The damage envisioned is any damage caused by emissions resulting from the burning of fossil fuels, and any consequential global warming.

83. The allegation of deliberate concealment refers to no specific fact. It is not concerned with the alteration of, or the suppression of, any single piece of journalism. Instead, it is the claimant's argument that, in some manner, companies would either be unaware of, or insufficiently aware of, the potential consequences of global warming from the burning of fossil fuels and that the lack of knowledge or understanding would be caused by a failure of the respondent to publish journalistic reports. As to what journalistic reports, the nature of them, or the content, the claimant is silent.

Analysis

84. I remind myself that this is a summary process. It is necessary for me to look at the claim form, the documents, and the witness statements. I must bear in mind that the evidence is untested. Moreover, there has not been full disclosure, and I cannot assume that I have seen all of the documents that may be relevant. It is possible the documents may be viewed in one light at present, and viewed in a different light when evidence is heard and further documents have been disclosed. Nevertheless, I must do the best that I can on the information before me.

85. Whilst I must focus on the matters raised before me, I must have in mind that neither party is required at this stage to consider in detail each potential point or argument that may be deployed at a final hearing. The fact that a specific point has not been taken, or elaborated on, does not necessarily mean that I should entirely ignore it when considering whether it is likely the claim will succeed. A party's failure to set out adequately a relevant position may be relevant to my consideration of whether the claim is likely to succeed.

86. To succeed in the claim, all necessary elements of the claim must be established. It is appropriate to consider whether the claimant is likely to succeed on each of the relevant elements.

87. The first question is whether there has been a disclosure of information. I am hindered in my analysis by the paucity of the pleading. The claim form refers to seven separate alleged disclosures. A number of emails, letters, and reports are referred to. The claimant has chosen not to rely before me on any disclosures other than disclosure 5, which concerns the Navex reports. There is further elaboration in both the further and better particulars and the skeleton argument.

88. The claimant relies on the case of **Kilraine** and alleges that the principle to be derived is there is no rigid dichotomy between information and allegation. Nevertheless, it is accepted by the claimant that there must be sufficient factual content that is capable of tending to show one or more of the relevant failures. I accept that there is no rigid dichotomy to be drawn between allegation on the one hand and information on the other. It seems to me that the more general the nature of the allegation, the harder it will be to interpret that as a disclosure of information. However, it is important to exercise caution. There are occasions when an employee makes an allegation of some form of wrongdoing which is necessarily based on information that is clear to the parties involved, but may not be readily understood by an observer. The relevant parties may well understand the facts underpinning what may appear to others, at first blush, to be a bare allegation.

89. In this case, I specifically enquired whether, at any time, the claimant had in mind some specific failing either by the respondent, or some other organisation or individual, to which his allegations referred. When making his allegations, he may have had in mind a specific article that he had written which had been suppressed or altered. He may have had in mind

a specific failure of a particular individual or organisation. However, that is not the nature of his case. This is not a case where it is possible to go from the general allegation and dig into the detail which is implied. The allegations are general; there is no detail. It is necessary to stand back and consider the nature of the disclosure in an equally general way.

90. The disclosures are underpinned by a number of assertions and assumptions. It is claimant's case that the respondent receives money from businesses that have an interest in fossil fuel. He asserts that the respondent does not wish to upset those companies. Implicit is an argument that publishing articles or reports concerning carbon emissions, and their effect on global warming, would be unwelcome to companies with a specific interest in fossil fuels. It is asserted the respondent is repressing relevant journalism to avoid upsetting those companies, which he asserts, implicitly, will maintain their income stream.

91. There is another strand to the claimant's argument which says that, in some manner, some reporting, or lack of reporting, has been deliberately undertaken in order to have a direct effect on the market, presumably by reference to confidence held in a company and its reflection in the share price. It is difficult to know exactly what is envisaged, because it is not explained by the claimant at any time, and forms no part of the submissions before me.

92. There are, however, those two distinct strands discernible. One is about not upsetting the company. The other is about deliberate manipulation of the market. When asking whether information has been disclosed, it is necessary to keep those matters in mind.

93. As regards upsetting companies, the information disclosed relates to the totality of the respondent's publications in the field of climate change. I cannot identify any specific allegation that the respondent has suppressed, or materially altered, any of the claimant's work. The claimant's assertions appear to be that the respondent should do more, and in some undefined diffuse way, do better. Perhaps there is some force in this. I say that because when he raised his general concerns about the need for more reporting, at least a number of his managers agreed. It appears that Bloomberg is conscious of its responsibility to report climate issues, but has not necessarily found a way to report on these important issues which will interest its readership.

94. I do have a real concern that the nature of the claimant's disclosures are much closer to what may generally be called allegation than what may be termed information. For example, his repeated assertion, "It needs to be investigated…" does not readily suggest information. Whilst I note that there is no strict dichotomy, I cannot readily see how one can infer from the allegations, as they are set out before me, relevant information. It may be that a tribunal, having heard all the evidence, would accept the general principle that there is sufficient information, albeit I think this unlikely.

95. As to the suggestion that there is some attempt to manipulate the markets, this does not appear to be founded on any information at all. It may be that the claimant has in mind that any failure to reiterate or affirm the contribution of burning fossil fuels to global warming may have some benefit to companies deal with fossil fuels, by maintaining some form of confidence, and thereby not leading to a loss in share price. I am far from satisfied that this is a disclosure of information. I think it unlikely that the claimant would succeed on this argument.

96. It follows that I think it unlikely the claimant will be able to show a disclosure of information.

97. If there has been a disclosure of information, the next question is whether it is protected. The first question is whether the claimant shows one of the relevant failings identified in section 43 B (1) (a) - (f).

98. In his claim, the claimant relies on subsection (b); he says there has been a legal failure. He does not address in submissions what is the relevant legal failure he had in mind when the disclosure was made. I do not accept that the claimant can simply choose to ignore part of his pleaded case when pursuing his claim for interim relief and limit his submissions to one alleged relevant failure. He could have chosen to withdraw this part of his claim. He has not. It therefore remains part of his claim. If he is to ignore it for the purposes of an interim relief application, he must, at the very least, explain the reason. It may be that one aspect predominates and is so strong in itself that it stands alone. However, this is not something that I should be expected to infer or assume.

99. In this case, it is difficult to identify the legal obligation relied on. To the extent that he says there is a breach of Bloomberg's code of journalistic practice, this could be a claim with merit. It may be possible for the claimant to argue that he believed there was a legal obligation, even if mistaken, but that is not how he advances this claim. The reality is he does not address the point in any meaningful way. Instead, he seeks to obscure his fundamental failure to identify the legal obligation relied on by saying it is not relied on for the purpose of the application for interim relief.

100. The respondent says it is not a legal obligation. Save for bare assertion, particularly in the further and better particulars, the claimant does not explain the basis for any belief that there is a legal obligation to report in a particular manner, as opposed to some moral or lesser obligation.

101. The claimant also relies on having suffered a detriment for whistleblowing as some form of breach of legal obligation. Mr Cook did not develop this argument. As I have noted, the claimant chose not to rely on this at all. It is difficult to understand the nature of this allegation. It seems to assume that there has been a protected disclosure and that he suffered a detriment. He suggests there is further disclosure of information being he has suffered a detriment because of whistleblowing. I can only guess at the factual basis or how it is advanced. It is a weak argument.

102. The claimant does rely on subsection (e). For the reasons I have already given, I am not satisfied that an assertion that burning fossil fuels leads to global warming and potential environmental damage is a disclosure of information as envisaged by section 43B. The information must tend to show one of the relevant failings. It seems to me that the assertion that burning fossil fuels leads to global warming and environmental damage is a conclusion. I am not convinced that asserting a conclusion, however sincerely held by the claimant, or widely believed in the population, is showing a relevant failure. It seems to me that the nature of the relevant failure is more specific. If, for example, the company was using coal to generate electricity and agreed to limit carbon emissions to a specific amount, disclosing information that that agreement had been exceeded would clearly be disclosure of information. Whilst it may not have any immediate direct effect, it may be possible to argue that the increasing carbon emissions would demonstrate the likelihood of damage. The fact that fossil fuels are burnt generally may not be sufficient. That said, I do not wholly reject the possibility that asserting a general widely held belief could be information that tends to show a relevant failure.

103. If an assertion of a belief in a state of affairs is information which tends to show a relevant failure, it is still necessary to consider what was the belief of the worker, and whether it was both reasonably held and was made in the public interest.

104. There is little or no attempt to explain the nature of any alleged reasonable belief. It seems to me that the statute envisages that the belief must be that the specific information tends to show the relevant failure. It is not enough in my view for someone to simply say they have a reasonable belief that the environment is being damaged and then say that the information relied on is the environment is being damaged. Such an approach lacks the causative progression envisaged by the statute. It is not, in my view, enough to simply assert the damage is happening and therefore disclosing information that some damages is happening to the environment is itself protected. It seems to me a protected disclosure should be firmly founded on information said to cause or be likely to cause the failure.

105. I think it unlikely that the claimant can demonstrate that there is the relevant information, in relation to damage to the environment, or some manipulation of the market, to which the relevant belief could attach. I do not think it is enough to have a belief in the outcome. He must identify some form of contributing factor, which constitutes information, and the reasonable belief should attach to the way the matter detailed in the information tends to lead to the relevant failure. It appears to me the claimant does not come close to showing anything other than his belief in the conclusion he had reached.

106. A similar difficulty arises when considering public interest. I have no doubt that in a general sense the public has an interest in markets not being

manipulated and in the environment not been damaged. However, the disclosure of information must be in the public interest. Disclosure of a specific failure by an individual, organisation, or country which may contribute to climate change undoubtedly could be made in the public interest. I am not convinced it is enough to simply assert that a state of affairs exists

107. The respondent's submissions address this point. Mr Laddie puts it as follows "the essence of granting whistleblowers protection is to recognise the special circumstances of those who are brave enough to speak up." Neither side was able to identify any appellate consideration of subsection (e). Mr Laddie says "It makes no sense to refer to a person blowing the whistle if the matter he is speaking about is being spoken about by hundreds of millions of people across the world." He goes on to suggest that a key element must be novelty. This is an intriguing argument. The claimant suggested it cannot be right because that would lead to a situation where once disclosures are made, another person making the disclosure would not be protected. Mr Laddie suggests that the claimant's submission cannot be right, as the question is one of reasonable belief, and not an absolute consideration of how many people have made the same disclosure. I do think there is force to Mr Laddie's argument. If everybody knows the basic position, a person who reiterates it does not appear to have the fundamental attribute of a whistleblower. Introducing a filter of novelty may be going too far and is unlikely to prove necessary. Whilst making a novel disclosure may well help demonstrate reasonable belief in both the relevant failure and the public interest, I am not convinced that the lack of novelty is fatal, and it may lead to an unhelpful inquiry. It could lead to an unwelcome argument that there can be no protected disclosure, as the failure was well known to numerous people, or that the opportunity for protection is lost, as others have made the disclosure.

108. In this case, it is probably unnecessary to go beyond an analysis of whether the alleged disclosure is truly a disclosure of information. Simply repeating a belief held by millions of people, based on wide scientific consensus, identifies a state of affairs. That is probably not information as contemplated within the act, and I doubt it is necessary to go further.

109. However it is analysed, the claimant's argument is weak.

110. I should deal briefly with the allegation of concealment. It seems to me this allegation is hopeless. The matter which is being concealed, on the claimant's case, is global warming. It does not appear that the argument is nuanced to differentiate between the causes of global warming and the result of global warming. Whatever the claimant may have in mind, it is very difficult to understand why he believes there is deliberate concealment. His journalism dealt with this subject. If he had indicated that there was a suppression of a single article, or fact, he would at least have a starting point. Instead, he suggests that the overall failure of the respondent to do more, or to do what it does better, is concealment. It is

concealment because in some manner relevant companies are not being sufficiently educated and therefore cannot be expected, in some manner, to know the principles or the dangers. It seems to me that this is fanciful. Even if Bloomberg were to have an editorial policy whereby it denied global warming, or the effect of burning fossil fuels in causing global warming, and even if all of its publications tended towards advancing that argument, given all the other sources of information, and widespread common knowledge of the alleged mechanisms, I doubt it could be said that relevant information was being concealed. Even if I were wrong, and there was some prospect of the claimant arguing that the respondent was in the manner suggested seeking to conceal, the evidence I have seen appears to demonstrate that Bloomberg fully understands the arguments concerning climate change and actively promotes platforms to ensure balanced information is disseminated publicly.

111. I conclude that it is unlikely the claimant will show he made protected disclosures.

112. If the claimant can demonstrate he made protected disclosures, the next question is one of causation. It is clear the claimant does not accept any criticism of his work. It is the claimant's case before me that, in some manner, Mr Landberg manipulated evidence against the claimant and manipulated others who were involved in the dismissal. I do not consider it necessary to look at the minute detail of the various references advanced by the claimant in support of this argument. It is apparent that the claimant seeks to extract from a multitude of documents specific sentences and references. It appears to me that much of what he relies on is taken out of context. I do not think it is appropriate or necessary for me to delve into the minutiae of the matters advanced by the claimant. I cannot do so reliably without hearing all the evidence. I can, however, stand back and look at the totality of the information before me.

113. There is clear, strong documentary evidence of continuing concerns about the claimant's performance over a period of approximately a decade. The claimant has raised grievances. Those grievances were considered by individuals other than Mr Landberg. He has appealed. Those appeals have been considered by yet more people. The claimant's work has been reviewed by numerous managers. There is a strong body of evidence which suggests that numerous managers found his work inadequate.

114. The claimant criticises the qualitative nature of this analysis, whilst at the same time asserting, qualitatively, that his work was good. It is inevitable that there is a degree of subjectivity when considering the quality of any piece of journalism. However, where there is evidence that a number of journalists have reached the same conclusion about the quality of another's writing, that is strong evidence. It is in the nature of capability dismissals that they may be founded on the opinion of a reasonable manager.

115. The strongest evidence the claimant advances is the proximity of his whistleblowing to the start of the PIP. This evidence relies on a narrow view of the overall relationship between these parties. The respondent's concerns predates the Navex disclosures. The respondent's assertion that it is rational to postpone starting the PIP until the grievance been resolved has force and explains the timing. Had the grievance are been resolved in the claimant's favour, it may not be an appropriate to start the PIP at all.

116. The period of the PIP was extensive. The input appears to have been considerable. If the claimant is right, and his work was good, that explains his rejection of the respondent's concerns. However, his rejection of the respondent's concerns is equally consistent with a failure to respond to the PIP. The reality is that the respondent appears to have strong, cogent evidence that many individuals reached the same conclusion about the claimant's work. The claimant's main arguments about timing does not appear to be strong.

117. Before reaching my final conclusions, I should note that the respondent has raised an argument concerning the Human Rights Act 1998. Article 1 provides:

> **Protection of property**
> **Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.**
> **The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.**

118. The respondent's submissions say the following

> **20. Any interference with the right to property must be lawful, pursue a legitimate public or general interest, and be proportionate to that aim: Beyeler v Italy (2000) 33 EHRR 1224 at [111], ECtHR. It is this tripartite test that is of key significance in this case.**

119. It is the respondent's position that an order for interim relief involves an interference with the respondent's right to property. Presuming a continuation order is made, the respondent may be required to part with its property, with no prospect of recovering it, even if the claimant fails in the 103A claim.

120. The respondent's primary case is that there is no discernible aim to the legislation. Mr Laddie states at para 23 of his submissions.

> **…Indeed, we cannot discern what the aim might be. Any order for interim relief requires the respondent to make an irrecoverable payment to the claimant based on an early assessment of the merits of the claimant's case. We know no other area of law – not just employment law – where a court/tribunal is empowered to require one party to make substantial**

> **payments to another from an early stage of the litigation, based upon a preliminary assessment of the merits, without any power to undo that order if it turns out that the preliminary assessment was wrong. The power to order interim relief is unique and its purpose is entirely elusive.**

121. It seems to me the aims of the legislation are likely to be identifiable. It provides a degree of financial protection to a legitimate whistleblower who can show a likelihood of demonstrating the sole or principle reason for dismissal was the making of a protected disclosure. The protection it affords may encourage legitimate disclosure made in the public interest and discourages unscrupulous employers. The point Mr Laddie makes in paragraph 23 do not support a contention that there is no legitimate aim, but are relevant to whether the concept of interim relief is a proportionate means of achieving that aim. That theme is developed in paragraph 24 of the respondent's submissions, but I do not need to consider the detail.

122. It is respondent's case that interim relief is not a proportionate way of achieving a legitimate aim. The respondent recognises that tribunals cannot make a declaration of incompatibility; instead, it urges the tribunal to interpret section 128 Employment Rights Act 1996 in a way which is compatible with the Human Rights Act. The respondent suggests that the tribunal should reinterpret the meaning of 'likely' as meaning practically certain. I note that such an interpretation is inconsistent with the existing case law.

123. For the reasons I will summarise in a moment, it is clear that this claim for interim relief fails. In the circumstances, I do not have to consider whether the term 'likely' should be interpreted as practically certain.

Conclusions

124. I think it is unlikely the claimant will demonstrate that there was a disclosure of information. Whilst I accept that there is no clear difference between allegation and information, this does not mean that all allegations are information. There is a serious paucity of information in this case, and I do not accept the claimant is likely to demonstrate a disclosure of any relevant information that tends to show a relevant failure.

125. There are serious difficulties in establishing that any disclosure of information is protected. I think it unlikely that the claimant held the relevant reasonable belief that there was information which tended to show a relevant failure. I have no doubt that he believes, probably reasonably, that burning fossil fuels will lead to global warming and damage to the environment. However, it is not sufficient in my view to say that a conclusion about a state of affairs is, in itself, a reasonably held belief as envisaged by section 43B. A reasonable belief must attach to information that tends to show the relevant failure, and not simply be a general conclusion about a state of affairs.

126. I think it unlikely the final tribunal will find that there was a disclosure of information that tends to show a relevant failure which was made in the

public interest. There is an element of causation between the information disclosed and the relevant failure. The reasonableness must attach both to the belief in the causational link and the public interest element. Asserting a state of affairs does not engage the public interest as envisaged by section 43B.

127. Whilst I do not go as far as to say there must be novelty, simply repeating something which is now common knowledge, however important the issue, does not have the characteristic of the disclosure of information and it is difficult to see how this could reasonably have been made in the public interest.

128. The claimant's case concerning concealment lacks rationality. The claimant may believe that the actions of the respondent are either leading to a distortion of the share price or leading to the destruction of the environment; however, I think it is unlikely that a tribunal could find those views are reasonably held or reasonably made in the public interest. Sometimes individuals advance arguments in order to bolster their own positions. They may wish to avoid disciplinary action or to secure some financial gain. There are also individuals who have strong moral or political views. They may wish to advance specific arguments or positions because they believe that, in some manner, there will be benefit to society or individuals. It may be very difficult to understand, in that context, whether the disclosures are being made in the public interest.

129. If the disclosure is about an individual's contract and an individual's own position, then it may be easy to say there is no public interest. It is with that matter that **Chesterton** is concerned. There are other occasions when an individual is primarily advancing an argument because of his or her own strongly held personal, political, philosophical, or religious view. The matter advanced may also be relevant to society in general and therefore viewed one way may have a public interest. Whether that is the public interest envisaged by the Employment Rights Act 1996 in the context of section 43B, I doubt.

130. Finally, there is the question of causation. It seems to me that there is strong evidence that the claimant's performance was poor and had been for many years. It was not poor because of the quantity of work produced; it was poor because of the quality of work produced. Given the number of managers who appear to have reached the same conclusion about the quality of his work, I think it is unlikely that the claimant will demonstrate causation. It is likely that the respondent will demonstrate that the sole or principal reason revolved around the claimant's capability.

131. It follows that I find the claimant is not likely to succeed in his section 103A claim. For the removal of doubt, I should note that this is not based on any nuanced interpretation of the word likely. 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.

132. It follows that I do not have to consider whether likely should equate with practically certain, as contended for by the respondent, whether to give effect to the Human Rights Act 1998 or otherwise.

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Employment Judge Hodgson

Dated: 17 August 2020

Sent to the parties on:

17/08/2020

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For the Tribunal Office