Case No: 2206316/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr O Argence-Lafon

Respondent: Ark Syndicate Management Ltd

Heard at: London Central

On: 8, 9, 10, 11, 12, 15 August 2022
16 & 17 August 2022
(in chambers)

Before: Employment Judge H Grewal
Mr S Pearlman and Mr D Shaw

Representation

Claimant: In person

Respondent: Mr N Siddall, QC

JUDGMENT

The unanimous judgment of the Tribunal is that:

1 The Tribunal does not have jurisdiction to consider the Claimant's complaint of having been subjected to a detriment on 20 November 2020 on the grounds of having made protected disclosures.

2 The Claimant's complaint that he was subjected to a detriment on 6 May 2021 (put on a Performance Improvement Plan) because he had made protected disclosures is not well-founded;

3 The complaint of unfair dismissal under section 103A of the Employment Rights Act 1996 is not well-founded; and

4 The complaint of unfair dismissal under section 98 of the Employment Tights Act 1996 is well-founded.

REASONS

1 In a claim form presented on 17 September 2021 the Claimant complained of unfair dismissal and having been subjected to detriments for having made protected disclosures. Early Conciliation ("EC") was commenced on 15 July 2021 and the EC certificate was granted on 18 August 2021.

Application to amend response

2 At the outset of the hearing we considered the Respondent's application amend its response made on 29 July 2022. The amendment that it was seeking to make related to remedy. The Respondent wished to plead that if the Claimant succeeded in his complaint of unfair dismissal it would seek to argue that any compensation should be reduced on *Polkey* grounds (i.e that the Claimant would have been dismissed in any event), on the grounds that the Claimant's conduct had contributed to his dismissal and because of subsequently discovered misconduct. The Respondent had become aware of the misconduct when disclosure in this case took place in April 2022. It set out the facts upon which it relied in support of each contention. Many of the facts in support of the *Polkey* and conduct reduction were already live issues in the liability hearing. It also appeared to us that the Tribunal would have to consider those matters under section123(1) and (6) of the Employment Rights Act 1996 when considering what compensation to award even if the Respondent had not pleaded them in the response. They were not aware of the misconduct on which they wished to rely at the time when they presented the response. We had already decided that we would be dealing with liability only at the hearing. The Claimant would have ample time to prepare to respond to those points. We decided that greater hardship would be cause to the Respondent if we refused the application than to the Claimant if we allowed it. We gave the Respondent leave to amend its response.

The Issues

3 It was agreed at the outset of the hearing that the issues that we had to determine were as follows.

Protected disclosures

3.1 Whether the Claimant made the following disclosures:

(a) On 27 November 2021, following a presentation about the ENI claim by Elliot Burton, the Claimant immediately told Mr Burton and everyone else at the meeting that the ENI claim was probably not valid ("the claim concern") as ENI had been vague in its presentation of the ENI claim. The Claimant stated that the failure of the well was most likely caused by a loss of circulation and not an underground blowout;

(b) On 27 November 2019 the Claimant repeated the claim concern to Paul Dawson;

(c) On 4 May 2020 the Claimant emailed Christine Fenner confirming an earlier discussion in which he stated that he believed that Matthews Daniel could have "willingly not challenged the facts" in their assessment of the claim, therefore participating in a fraud;

(d) On 14 September 2020 the Claimant repeated his belief to Mr Burton that the ENI

claim amounted to a fraud and that this was supported by evidence;

(e) On 16 September 2020 the Claimant said to Mr Burton that they could not pretend that there was no loss and ignore potential fraud. He informed Mr Burton that ENI was being investigated in Italy for corruption in Nigeria and that it was possible that evidence of fraud in Vietnam would emerge relating to the ENI claim;

(f) On 27 April 2021 the Claimant met with Mr Beaton and explained to him why he believed that the ENI claim was fraudulent and stated that Messrs Burton and Dawson had not carried out their roles correctly. In response to Mr Beaton's question whether the loss adjustment could be a mistake made by the loss adjuster from Matthews Daniel, the Claimant said that he was sure that the loss adjuster would have known from the beginning that the ENI claim was not valid and that it was a fraud;

(g) On 4 May 2021 the Claimant provided Mr Beaton with a document titled "Why I consider the ENI Ken Bau loss is fraudulent".

3.2 If he did, whether any of them amounted to "qualifying disclosures" within the meaning of section 43B(1)(a), (b) or (f) of the Employment Rights Act 1996 ("ERA 1996"). The Claimant's case was that he believed that the disclosures tended to show that the ENI claim amounted to the commission of a criminal offence in that it was fraudulently claiming the recovery of the insurance monies in the knowledge that the claim was not valid, by not challenging the claim the Respondent was failing to comply with its legal duty to act in the best interests of its shareholders and other stakeholders in Lloyd's market whose interests would be affected by the ENI claim and that there was an obvious risk that information relating to the above two matters was likely to be concealed by inactivity on the part of the Respondent.

Detriments for having made protected disclosures

3.3 If the Claimant made any protected disclosures, whether the Claimant subjected him to the following detriments because he had made the protected disclosures:

(a) Setting the Claimant the objectives that it set on 20 November 2020;

(b) Putting the Claimant on a Performance Improvement Plan on 6 May 2021.

Unfair Dismissal

3.4 What was the sole or principal reason for the Claimant's dismissal on 9 August 2021? The Claimant contended that it was the fact that he made protected disclosures. The Respondent contended that it was either capability or some other substantial reason of a kind such as to justify dismissal ("SOSR""). The SOSR relied upon by the Respondent was that the Claimant's refusal to engage with the PIP resulted in a breakdown of the working relationship and a breakdown of trust and confidence between the Claimant and his line managers, Messrs Burton and Dawson.

3.5 If there was a potentially fair reason for the dismissal, whether the dismissal was fair or unfair under section 98(4) ERA 1996.

The Law

4 Section 43B(1) of the Employment Rights Act 1996 ("ERA 1996") provides,

> "*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.*
> *…*
> *(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."*

A qualifying disclosure is a protected disclosure if the worker makes the disclosure to his employer.

5 The onus is on the claimant to establish all the elements of section 43B(1) ERA 1996. In **Boulding v Land Securities Trillium (Media Services) [2006] UKEAT/0023/06/0305** HHJ McMullen said,

> "*As to any of the alleged failures, the burden of the proof is upon the Claimant to establish upon the balance of probabilities any of the following.*
> *(a) There was in fact and as a matter of law, a legal obligation (or other relevant obligation) on the employer (or other relevant person) in each of the circumstances relied on.*
>
> *(b) the information disclosed tends to show that a person has failed, is failing or likely to fail to comply with any legal obligation to which he is subject.*
>
> *25. "Likely" is concisely summarised in the headnote to Kraus v Penna PLC 2004 IRLR 26- EAT Cox J and members:*
>
> *In this context "likely" requires more than a possibility or risk that the employer (or other person) might fail to comply with a relevant obligation. The information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is probable, or more probable than not that the employer (or other person) will fail to comply with the relevant obligation. If the claimant's belief is limited to the possibility or risk of a breach of relevant legislation, this would not meet the statutory test of likely to fail to comply."*

6 In **Kilraine v LB of Wandsworth [2018] EWCA Civ 1436** Sales LJ stated,

> "*The question on each case in relation to section 43B(1) (as it stood prior to the amendment in 2013) is whether a particular statement or disclosure is a "disclosure of information which in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in sub-paragraphs (a) to (f)]". Grammatically, the word "information" has to be read with the qualifying phrase "which tends to show [etc]" (as, for example, in the present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal obligation to which he is subject"). In order for a statement or disclosure to be a qualifying disclosure according to this language, it*

has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)

… If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief." .

7 In **Darnton v University of Surrey [2003] IRLR** HHJ Serota in the EAT stated,

"*for there to be a qualifying disclosure, it must have been reasonable for the worker to believe that the factual basis of what was disclosed was true and that it tends to show a relevant failure, even if the worker was wrong, but reasonably mistaken."*

8 In **Korashi v Abertawe Bro Morgannwg University Health Board [2012] IRLR 4** HHJ McMullen said that in considering whether a person's belief if "reasonable" one needs to consider the personal circumstances of that individual. He continued,

"*To take a simple example: a healthy young man who is taken into hospital for an orthopaedic athletic injury should not die on the operating table. A whistleblower who says that that tends to show a breach of duty is required to demonstrate that such belief is reasonable. On the other hand, a surgeon who knows the risk of such procedure and possibly the results of meta-analysis of such procedure is in a good position to evaluate whether there has been such a breach. While it might be reasonable for our lay observer to believe that such death from a simple procedure was the product of a breach of duty, an experienced surgeon might take an entirely different view of what was reasonable given what further information he or she knows about what happened at the table… It works both ways. Our lay observer must expect to be tested on the reasonableness of his belief that some surgical procedure has gone wrong is a breach of duty. Our consultant surgeon is entitled to respect for his view, knowing what he does from his experience and training, but is expected to look at all the material before making such a disclosure."*

9 Section 47B(1) ERA 1996 provides,

"*A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."*

In discrimination cases it has been held that a worker is subjected to a detriment if the Tribunal finds that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work (**Shamoom v Chief Constable of the RUC [2003] IRLR 285**. In **Jesudason v Alder Hay Children's NHS Foundation Trust [2020] EWCA Civ 73** Elias LJ said,

"*In order to being a claim under section 47B, the worker must have suffered a detriment. It is now well established that the concept of detriment is very broad and must be judged from the point of view of the worker. There is a detriment if a reasonable worker might consider the relevant treatment to constitute a detriment.*

The concept is well established in discrimination law and it has the same meaning in whistle-blowing cases…

Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective."

10 In **Fecitt and others and Public Concern at Work v NHS Manchester [2012] IRLR 64** the Court of Appeal held that section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower.

11 Section 48 ERA 1996 provides,

"…
(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.
…
(2) On a complaint under subsection …(1A) … it is for the employer to show the ground on which any act, or deliberate failure to act, was done.
…
(3) An employment tribunal shall not consider a complaint presented under this section unless it is presented –
(a) before the end of the period of three months beginning with the date of the act or failure to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
(4) For the purposes of subsection (3) –
(a) where an act extends over a period, the "date of the act" means the last day of that period, and
(b) a deliberate failure to act shall be treated as done when it was decided on."

Section 207B ERA 1996 provides for an extension of time to bring a claim in order to facilitate Early Conciliation.

12 Section 103A ERA 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."*

13 In order for a claim under section 103A to succeed the Tribunal must be satisfied that the protected disclosure was the sole or principal reason for the dismissal. That is a different test from the one applied under section 47B(1) where the Tribunal has to be satisfied that the protected disclosure materially influenced the employer's detrimental treatment of the claimant – **Fecitt (cited above), Eiger Securities LLP v Korshunova [2017] IRLR 115**.

14 In **Kong v Gulf International Bank (UK) Ltd [2022] EWCA Civ 941** the Court of Appeal considered previous decided cases in which, when deciding why the employer had taken certain action against an employee, the courts had recognised that there was a distinction between doing so because the employee had engaged in some kind of protected conduct (trade union activities, done a protected act under the Equality Act 2010 or made protected disclosures) and a reason that was in some way connected with the protected conduct but was not because the employee had engaged in the protected conduct. Having done so, Simler LJ said,

> "*… there may in principle be a distinction between the protected disclosure of information and conduct associated with or consequent on the making of the disclosure. For example, a decision-maker might legitimately distinguish between the protected disclosure itself, and the offensive or abusive manner in which it was made, or the fact that involved irresponsible conduct such as hacking into the employee's computer system to demonstrate its validity. In a case which depends on identifying, as a matter of fact, the real reason that operated on the mind of a relevant decision-maker in deciding to dismiss (or in relation to detrimental treatment), common sense and fairness dictate that tribunal should be able to recognise such a distinction and separate out a feature (or features) of the conduct relied on by the decision-maker that is genuinely separate from the making of the protected disclosure itself…*
>
> *Once the reasons for particular treatment have been identified by the fact-finding tribunal, it must evaluate whether the reason so identified are separate from the protected disclosure, or whether they are so closely connected with it that a distinction cannot fairly and sensibly be drawn…*
>
> *In a proper case, even where the conduct of the whistle-blower is found not to be unreasonable, a tribunal may be entitled to conclude that there is a separate feature of the claimant's conduct that is distinct from the protected disclosure and is the real reason for the impugned treatment.*
>
> *All that said, if a whistle-blower's conduct is blameless, or does not go beyond ordinary unreasonableness, it is less likely that it will be found to be the real reason for an employer's detrimental treatment of the whistle-blower. The detrimental treatment of an innocent whistle-blower will be a powerful basis for particularly close scrutiny of an argument that the real reason for adverse treatment was not the protected disclosure … tribunals will need to examine such explanations with particular care."*

15 Section 98 of the Employment Rights Act 1996 provides,

> "*(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 under this subsection if it –*
>
> *(a) relates to the capability or qualifications of the employee for performing work of the kind which he employed by the employer to do,*

…

(3) In subsection 2(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality …

(4) Where the employer has fulfilled the requirements of subsection 9(1), the determination of the question of 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."

16 In **Kuzel v Roche Products Ltd [2008] EWCA Civ 380** the Court of Appeal held that in a case where the employee is complaining of unfair dismissal –

(1) The onus is on the employer to prove that the reason for the dismissal is one that it has put forward and that it was a potentially fair reason. If the employee contests the reasons put forward by the employer, there is no burden on him to disprove them;
(2) 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. That 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;
(3) The Tribunal 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 Tribunal that the reason was what he asserted it was, it is open to the Tribunal 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 Tribunal must find that if the reason was not that asserted by the employer, then it must have been fort her reason asserted by the employee.

17 In **Abernethy v Mott, Hay and Anderson [1974] ICR 323** Cairns LG said,

"*A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."*

In **Royal Mail Group Ltd v Jhuti [2019] UKSC 55** the Supreme Court considered whether in a claim for unfair dismissal the reason for the dismissal could be other than that given to the employee be the decision-maker. Lord Wilson, in giving a judgment with which all the other judges agreed, said (at paragraph 60)

"*In searching for the reason for the dismissal for the purposes of section 103A of the Act, and indeed of other sections in Part X, courts need generally look no further than at the reasons given by the appointed decision-maker… If a person in the hierarchy of responsibility above the employee (here Mr Widmer as Ms Jhuti's*

line manager) determines that, for reason A (here the making of protected disclosures), the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts (here inadequate performance), it is the court's duty to penetrate through the invention rather than allow it also to infect its own determination. If limited to a person placed by the employer in the hierarchy of responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person's state of mind rather than that of the deceived decision-maker."

The Evidence

18 The Claimant gave evidence in support of his claim. The following witnesses gave evidence on behalf of the Respondent (their positions given are those that they held at the relevant time) – Elliot Burton (Senior Underwriter), Paul Dawson (Managing Director), Neil Brothers (Chief Risk Officer), Christine Fenner (Senior Energy Claims Adjuster), Ian Beaton (Chief Executive Officer) and Rupert Atkin (Chairman). The documentary evidence in the case comprised nearly 2,000 pages. Having considered all the oral and documentary evidence, the Tribunal made the following findings of fact.

Findings of Fact

19 The Claimant commenced employment with PartnerRe (an international reinsurance company) on 16 October 2003 as an Underwriter. He was subsequently promoted to Senior Underwriter. He worked mainly in the Marine and Energy (oil and gas) line of business. The Claimant is French and worked in Paris until September 2013, when his team moved to London. Although the Claimant's English is very good, it is not his first language and sometimes he does not understand what is said to him and at times it is difficult to understand him.

20 The Respondent manages the underwriting of Syndicates 3902 (Energy) and 4020 at Lloyd's and provides underwriting and operational resources for all reinsurance and insurance business written by the Syndicates.

21 In about April 2018 the Respondent (Syndicate 3902) acquired part of the Marine and Energy (oil and gas) portfolio of PartnerRe. On 1 May 2018 the employment of the Claimant and one other employee transferred under the Transfer of Undertaking (Protection of Employment) Regulations 2006 to the Respondent. The Claimant was a Senior Underwriter in Syndicate 3902. His annual salary was £189,453 and he was guaranteed a minimum bonus of £24,082 for 2018 payable in March 2019. The Claimant's salary had increased from £137,676 as it incorporated a figure that had previously been paid to him separately for his children's school fees. Hence, his salary was significantly higher than that of some of his colleagues.

22 Paul Dawson (Active Underwriter in 3902) was the Claimant's line manager until about 1 March 2019 when he was appointed Managing Director of the Respondent. There was for a period of about one year a phased handover of the team from Mr Dawson to Elliot Burton, who had joined Syndicate 3902 in 2014 as an Underwriter and had progressed to Senior Underwriter in April 2018. Mr Burton formally became head of the team and the Claimant's line manager in February 2020.

23 During 2018 there were discussions about the underwriting strategy of the team and discussions about individual risks. There were also discussions about personal

underwriting franchise. The Claimant's view was that the portfolio should be allocated risk by risk to each underwriter, either by geography or alphabetically. Mr Dawson believed that each underwriter should build a personal franchise with their broker counterparts. He believed that it was for the brokers to decide with whom they wished to negotiate risks and that any form of forced distribution would potentially stifle flexibility and competition.

24 In March 2019 Paul Dawson had a verbal discussion with the Claimant about his salary and bonus review. The meeting was not documented. Mr Dawson did not raise any specific performance concerns but made general observations that the Claimant needed to be more outcome focused. The Claimant received a bonus of £30,312, which was a little more than the minimum bonus guaranteed. He was not given any personal objectives for the next year,

25 In June 2019 ENI, an Italian oil company, experienced serious technical difficulties while drilling an exploratory well (Ken Bau-1x) offshore Vietnam. ENI decided to plug and abandon the well. ENI Vietnam was insured with Petro Vietnam Insurance, which reinsured 50% of that with ENI's own captive insurer and 40% share with the commercial reinsurance market. The insurance covered both ENI Vietnam and its Joint Venture partner, Essar E&P. The commercial market placement was handled by the broker Willis Towers Watson. On 18 July 2019 ENI Vietnam submitted an insurance claim to Willis Towers Watson for an "underground blowout" while drilling well Ken Bau-1x. On the same day Willis informed Zurich Insurance, who was the overall lead on the placement. Zurich was not a Lloyd's insurer. Lloyd's insurers were also involved in the placement. The Lloyd's lead was Antares and the second lead was Aegis. The Respondent was one of Lloyd's insurers on this placement.

26 On 22 July 2019 Zurich instructed Matthews Daniel, one of the pre-agreed loss adjusters written into the policy, to investigate the claim.

27 On 9 September 2019 Matthews Daniel ("MD") completed a preliminary report They stated that the insured believed that a crossflow situation occurred in the Ken Bau-1x, ultimately leading to the well being lost prior to achieving all its objectives. A crossflow would indicate an underground blowout and would be covered by the insurance policy. MD's preliminary view was as follows,

> "*We note, however, they have not yet provided a detailed account of what they believe was taking place sub-surface. Whilst there were clear periods of influx into the well-bore and losses to the formation, we would suggest that, given the complicated nature of this claim, further technical discussion is required to establish the likely scenario of what was taking place sub-surface and the relevance of this with respect to the policy. We would also suggest that further discussion is required regarding the end date of any potential crossflow in the well."*

28 On 16 September 2019 Mr Dawson sent an email to the six underwriters in Syndicate 3902 saying that he would appraise Elliot Burton and that Mr Burton would appraise everyone else. The Claimant expressed dissatisfaction with that as he did not consider that Mr Burton to be senior to him and the best person to appraise him. His view was that he should still be appraised by Mr Dawson. The Respondent's appraisal process was very informal and nothing was recorded or documented. There was no evidence of objectives being agreed and set at the start of the year and performance being assessed against those objectives at the end of the year.

29 The Respondent became aware of the ENI claim on 7 October 2019. Mr Burton was of the view that as the Respondent had the second biggest line on the policy, it should be the Lloyd's second lead. Christine Fenner, the Senior Energy Claims Adjuster at the Respondent, liaised with the broker on the issue. Aegis indicated that it was happy for the Respondent to be Lloyd's second lead and it was agreed that the Respondent would replace Aegis. However, that was not recorded on the system.

30 On 11 November 2019 MD issued its first interim report. It was a detailed technical report. It stated that discussions with the insured were still continuing but it noted the following,

> "*Shortly after the initial influx on June 9, 2019 the insured attempted to kill the well using the Wait and Weight method and experienced significant losses in the process. At the same time the SCIP dropped, and the Insured have suggested that this and the losses may indicate the breakdown of the weakest formation, leading to the development of a thief zone. Further efforts were made to try to circulate the influx out of the well, during which the drill string became stuck in the well and could not be recovered. On balance, it seems likely that there was a cross-flow in the well from this date, and that it continued until a cement plug was successfully set in the well on July 3, 2019, following several efforts to kill the well.*
>
> *A whipstock was then set in the well in an effort to initiate a side-track and drill the well to TD. The side-track, however, was unsuccessful and also experienced* well control issues. *The insured took the decision to plug and abandon the well prior to reaching TD and achieving the full well objectives. They have suggested that the formation around the side-track was contaminated from the well control issues experienced around the original well bore, and have evidenced this with the presence of CO2 in the side-track which was not present until the deeper reservoir formations in the original well. The insured have suggested that the cross-flow was the mechanism for bringing the CO2 to the shallower formations in the area."*

The total potential costs of the claim were said to be around US$53,600,000.

31 On 15 Nov 2019 ENI and Willis Towers Watson hosted a meeting at the ENI offices in Milan. Mr Burton was invited to the meeting and attended. Other attendees included ENI Insurance representatives, ENI Drilling Engineers and Zurich's Drilling Engineer. There was a presentation at the meeting entitled "ENI Vietnam Exploration Activities". The Ken Bau 1-x was the second ENI oil well in Vietnam in respect of which an insurance claim had been made for a blowout. The presentation dealt with these and the lessons learnt from them in the context of ENI's well operations worldwide and its risk mitigation actions. ENI were keen to talk to underwriters ahead of their renewal as they were concerned about the impact of the claims on their renewal.

32 On 27 November Mr Burton organised a meeting of the Energy 3902 team to share with them the presentation of ENI. He did so because he thought that it was a good example of how a major oil company assessed risk and complexity when drilling wells. He used the slides which ENI had used in its presentation. These included the eight slides which dealt with the incident at the Ken Bau 1-x oil well. Following the presentation the Claimant told those present, including Mr Burton, that

the claim was probably not valid as ENI had been vague in its presentation about its claim. He said that he did not think that it was covered under the policy. He did not explicitly allege that it was fraudulent but Mr Burton understood it to be implicit in what he said.

33 Following the meeting the Claimant spoke to Mr Dawson about the ENI claim. He repeated what he had said to Mr Burton and said that the problem with the well might be a "kick". A "kick" is an influx of formation fluids or gas into a well bore. It is considered a drilling hazard and on its own is not covered as an insurance claim. If there is a cross-flow in the well whereby formation fluid or gas moves from one sub-surface interval to another via the well-bore, that is an underground blowout ("ugbo") and is typically covered by an insurance policy. A cross-flow is required in order for there to be an underground blowout. A kick or a loss of mud through a thief zone is not covered. Mr Dawson suggested that the Claimant should speak to Christine Fenner about it. He said that it might be difficult to prove anything more than lack of due diligence.

34 Later that evening Mr Burton sent the Claimant MD's interim report of 11 November 2019. A second interim report was issued on 2 December 2019.

35 Around 20 December 2019 Zurich, Antares and Aegis agreed a payment on account of US$10,500,000 to ENI on the claim. Willis Towers had not informed Antares that the Respondent had replaced Aegis as second Lloyd's lead, and the Respondent only became aware of the payment on account after it had been agreed. Ms Fenner informed Zurich that the Respondent was the Lloyd's second lead and that she needed time to review it. She subsequently agreed with the payment being made.

36 On 14 January 2020 Clyde & Co advised all the insurers on two aspects of the claim – (i) whether the costs pf approximately US$1.9 million for the failed side-tracking attempt were recoverable, and (ii) whether the costs of approximately US$ 2.5 million for the plugging and abandonment of the original well were recoverable. Their advice was the former were recoverable under the policy but the latter were not. They advised on the basis of the two interim MD reports that had been provided to them. Clyde and Co advised on the basis that there had been an underground blowout. Mr Burton shared the Clyde & Co advice with the Claimant who asked him whether he agreed that it was an underground blowout. In the intervening period the Claimant, who had a degree in engineering but (as he accepted) was not a drilling engineer or a drilling expert, had discussed the matter with drilling engineers which had strengthened his view that the claim was probably not valid.

37 In February 2020 the Claimant and Ms Fenner attended MD's offices on a matter unconnected with the ENI claim. After the meeting the Claimant spoke briefly to Ms Fenner about the ENI claim and expressed to her the same view that he had to Messrs Burton and Dawson about the claim not being valid.

38 In March 2020 the Claimant objected to Mr Burton conducing his salary and bonus review, and it was conducted by Mr Dawson. It was, as in the preceding year, a brief and informal chat. Nothing was recorded or documented. No specific performance concerns were raised, but there were general observations about his needing to be more outcome focused. The Claimant received a bonus of £40,000, which was considerably more than he had received in the previous year. The Respondent contended that that was 20% of his salary. However, the Claimant's

salary was artificially inflated as it included the school fees. It was about 29% of his basic salary. His colleagues received a higher percentage of their salary as bonuses, (between 55% and 100%) but there was no evidence that their overall remuneration package was greater than his.

39 On 21 April 2020, in the middle of an email exchange with Mr Burton and Ms Fenner about another claim in which MD were the loss adjuster, the Claimant wrote to Ms Fenner,

> "*By the way, further to our discussion in February, could you please let me know why MatDan have considered that the Ken Bau well in Vietnam was an ugbo, and not only a thief zone with the drilling fluid then migrating up through fracs within the formation?"*

Ms Fenner raised the question asked by the Claimant with MD and on 22 April 2020 sent him MD's response to it. Having received that, the Claimant raised various other points with Ms Fenner and Mr Burton. He questioned why the loss adjuster was not challenging the insured's data and assumptions and not considering other possibilities when there was no certainty, and why they were not considering the possibility of the formation being broken at bottom hole and the fluids migrating through the formation and not through the borehole. Mr Burton responded on 29 April 2020,

> "*Contact the adjuster directly then on ENI. It's a big claim so worth asking these questions.*
> *Christine can provide contact for him, it is fine to discuss."*

40 Ms Fenner arranged a meeting with MD on 5 May 2020 for her and the Claimant to attend. The Claimant and Ms Fenner met on 30 April 2020 and the Clamant provided her with a copy of the presentation that ENI had made in November 2020. Prior to the meeting on 5 May there was an exchange of emails between Ms Fenner and the Claimant as to how the meeting should be conducted and who should raise what issue. Ms Fenner's view was that she could ask some general questions about how MD had come to the conclusions that they had and whether they had used any data other than that provided by the insured or whether they had challenged the insured's data and assumptions. If the Claimant had any specific technical questions or bases for suggesting that their conclusions were wrong, he should raise them because he had discussed the matter with drilling engineers and she was not a drilling expert. The Claimant concluded the conversation on 4 May 2020 by saying,

> "*I am not saying that I am concerned they may have pressures* [put on them on how to conduct the investigation] *and we should therefore be questioning their job. I am saying that:*
> 1. *There is a possibility that the fluids migrated through the formation which they may prove wrong (because they are the experts), then all good and the case is closed.*
> 2. *If the possibility is confirmed, then we can question their job:*
>   a. *They didn't do their job properly, or*
>   b. *They have willingly not challenged the facts.*
>
> *I don't have a preference a priori for one option or the other.*
> *Because they always insist the scenario of the ugbo is the one defined by ENI without validating it, I would choose b) if we are in 2). Then b) could be*

explained by corporate issues, which I agree would have serious consequences."

41 The meeting with MD took place via MS Teams. It lasted two hours. The Claimant asked questions and MD answered them. Following the meeting the Claimant continued asking questions and Ms Fenner forwarded them to MD who responded to them. The Claimant had a second meeting with MD on 18 June 2020 which also lasted about two hours.

42 In a third interim report on 8 June 2020 MD revised the amount payable on the claim up to US$63,700,000.

43 Following the meeting on 18 June the Claimant sent MD a presentation (entitled "ENI – Ken Bau 1X loss – Why it is not covered.") which he said he had prepared for a discussion with his colleagues about what they should do next. He asked MD to comment on it which they did on 13 July. On 14 July the Claimant sent MD an email that they had had a team discussion that morning and did not understand why MD had disagreed with a certain proposition put forward by him. On 15 July he asked further questions. On 17 July MD responded that they were "*conscious of the seriousness of the issues raised"* and to ensure that the responses that they provided were fully thought through, that had brought in a colleague from Houston to provide a fresh pair of eyes. They said that they would revert to the Claimant after consulting with him.

44 On 23 July 2020 MD provided a detailed response to the questions asked by the Claimant. They concluded by saying that they continued to be of the opinion that a cross-flow had occurred in the well as stated in their first interim report of 11 November 2019.

45 The Claimant's immediate response to it was to highlight a paragraph in the MD email and to suggest to Ms Fenner and Mr Burton that they should appoint an independent expert. Mr Burton's response was that in his view MD had provided a sufficient response to the key questions raised and he could not see any reason to continue any further with it. Ms Fenner was of the same view. The Claimant responded by drawing attention to what he said were unsatisfactory explanations and responses provided by MD. The discussion ended with Mr Burton asking Ms Fenner to look into how much it would cost to get an independent engineer to look at it again.

46 On 27 July Ms Fenner informed Mr Burton that she had spoken to someone at LWI, another loss adjuster, and that they had an adjuster who was a drilling expert. She said that she knew him and he had been appointed on numerous large/complex ugbo claims and was well respected. She said that LWI had proposed, at no charge, considering the pertinent documents to determine whether or not there had been an ugbo situation. On 6 August 2020 Mr Burton told her to go ahead.

47 Between 27 July and 6 August the Claimant continued making points to Mr Burton about why he disagreed with the MD conclusion. On 6 August Mr Burton put forward certain points to counter what the Claimant had said. His conclusion was that while they could not be 100% certain that what MD said had occurred had occurred, the evidence suggested that it was the most likely scenario. He continued,

"*However, given the amount of work and good points you've raised I have agreed with Christine we will get* [LWI] *to perform a review with their drilling*

engineer. If the agree with the Mat Dan hypothesis, I do not want to continue questioning the assessment. If they agree with your proposal, we can discuss in more detail."

48 On 6 August Ms Fenner instructed LWI to conduct a review of the claim. On 7 August she informed the Claimant that LWI would not have any direct contact with either MD or him. Instead, she would get from both of them the pertinent information that they wanted to put before LWI and would pass it on to LWI. She said,

"*their role is to do an independent review as though they were the primary adjuster.*
The main objective for us is to determine whether in all probability an ugbo/well out of control situation occurred as definite within the policy and which triggers coverage." [sic]

Ms Fenner collected from both MD and the Claimant all the information and material that they wanted to put forward and passed it to LWI. MD knew that an expert was reviewing the material but they did not know that it was LWI.

49 On 26 August 2020 Ms Fenner sent Mr Burton LWI's review, which was in the form of a presentation. She said that LWI had done it for them as a favour and did not want it widely known in the market that they had been asked to review MD's work product. She asked him, therefore, not to share it with anyone, even internally Their conclusion was "*Balance of probabilities suggests that cross flows were occurring."*

50 On 14 September Mr Burton advised the Claimant of the outcome of the review by LWI. He said that they had made an assessment that matched entirely the hypothesis put forward by MD. They had pointed out additional indicators suggesting cross flows. He summarised their conclusions to be that it impossible to prove 100% that the casing had been broken at the 9 5/8" shoe, but there was a high possibility that it had been. He said that they could not prove otherwise. Mr Burton concluded his email by saying,

"*Both adjustors have reviewed this independently, as has the leader, and with all parties coming to the same conclusion.*
Claims are grey, we know nothing ever really falls into a perfect box we can tick but fundamentally there is nothing more we can do here.
For your information Matt Dan have submitted a fee bill of $30,000 to ARK only in which they suggest that they have spent almost 100 hours responding to your queries.
This is troubling and while I do not believe the Matt Dan figures (Christine is debating with them), it comes as a reminder that they bill for time (and there is no guarantee that the leader will agree as we are not even a claims agreement party).
Thanks for your efforts, but it is time to move on from this one."

51 The Claimant's response was,

"*Based on the information provided, I am convinced this is not a valid claim."*

He referred to a particular point which he said MD had not clarified and it appeared from Mr Burton's email that nor had LWI. Mr Burton responded that LWI had covered the point in its detailed presentation and he had only summarised the main

conclusion. The Claimant asked for a copy of the presentation and Mr Burton responded that as LWI had done the review as a favour they had not shared the presentation. He also told Ms Fenner that that was the message that should be conveyed internally. As he said to her,

> "*Just keeps things simpler.*
> *Didn't take the news well, didn't agree blah blah blah. Send the LWI report and we're on a never ending journey until we both die of boredom or commit suicide."*

52 On 16 September the Claimant sent Mr Burton a link to an article in the Financial Times about a corruption trial in Italy in which it was alleged that ENI and other oil companies had paid bribes to Nigerian oil ministers and others. Italian prosecutors were requesting an eight year prison sentence for the Chief Executive of ENI. The Claimant said to Mr Burton that the Italian police could also have evidence of fraud in Vietnam. Mr Burton did not consider that the article had any relevance to the claim with which they had been dealing.

53 In about mid-November Ian Beaton made a formal presentation to all employees about the Respondent being in takeover discussions with White Mountains. He reminded them that setting objectives was a critical part of the Respondent's company policies and should be adhered to by all times. In the Claimant's team, as long as he had been there they had never been set personal objectives. There were objectives that the team had to meet.

54 In November 2020 Energy 3902 had two senior underwriters (the Claimant and Mr Burton), an underwriter ("AC") and an assistant underwriter (("SB"). By November 2020 team had underwritten a total of 283 risks. Mr Burton had underwritten 203 risks and the Claimant 22 risks, which was lower than the risks written by AC and SB. It has been suggested by the Respondent that they had underwritten 24 and 57 respectively, but that cannot be correct on the basis of the figures set out above, which have also been given by the Respondent's witnesses in the internal process. The total number underwritten by them must be 58. The risk count, however, was not the best indicator of the amount of business generated as sometimes a number of risks were aggregated in one facility and, therefore, recorded as a single risk. A better indicator was the premium income generated by the underwriter. The premium income written by Mr Burton far exceed that written by anyone else in the team. In 2019 he had written 14.2 million out of the team total of just under 22 million. The Claimant had written just under 3.5 million. In 2020 the total premium income of the team was about 21 million. Mr Burton had written 12.6 million and the Claimant 2.8 million. AC had written 3.6 million and SB 1.8 million. Mr Burton sometimes delegated submissions that brokers sent to him to junior underwriters, but not to the Claimant as he was a senior underwriter and expected to build his own relationships with brokers. The Claimant's submission count for 2020 was 16 out of the team's total submission count of 154.

55 On 20 November Messrs Burton and Dawson had an online meeting with the Claimant to set him personal objectives for 2021. The Claimant was set nine personal objectives. The Claimant raised no issues about six of them, which included endeavouring to maintain signings on key Russian accounts, ensuring that peer reviews were undertaken within specific timescales, ensuring data accuracy standards and ensuring that all data risks were discussed within team at certain meetings. The Claimant expressed reservations about the other three which were (i)

increase written risk count very month by three times or 10 risks whichever was the greater, (ii) increase submission count every month by three times or 10 risks whichever was the greater and (iii) increase written premium every month by 100%. These were to be reviewed monthly. They provided him with his figures so far for 2020 and said that those constituted a small percentage of the team figures and that as a Senior Underwriter he should be underwriting more risks and generating more premium income.

56 AC was due to go on maternity leave in April 2021. Her personal objectives for 2021 in respect of the amount of risks underwritten were to contribute to achieving planned Energy contribution to the Ark Business Plan and to increase her submission count every month vs the prior year from January to April 2021. SB's personal objectives were to achieve full Underwriter status and to contribute to the achievement of the 2021 Business Plan. Mr Dawson set Mr Burton's personal objectives one of which was to hold quarterly appraisals for each team member and to ensure that individual objectives were aligned with team goals.

57 Later that day Mr Burton sent the Claimant an email the subject of which was ""Objectives". He attached to that an Excel sheet which he said should reflect the salient points that they had discussed that morning. The sheet contained the nine personal objectives and the review dates for each of them. He continued,

> "*Please take time to read these objectives and ensure they are understood. We need feedback/agreement to these by end of next week latest. If you feel any of the objectives are unreasonable or unachievable can you give some explanation as to why, by each objective."*

As many of the objectives were to be reviewed monthly, he proposed setting up the first review meeting in mid-December 2020.

58 The Claimant responded on 27 November. In respect of objective 4 (increasing number of risks written), he said, "*as discussed during the meeting, would be more appropriate to be a share of the team's planned growth."* The target of 10 risks a month included new clients and renewals for existing clients. The Claimant misunderstood it and thought that he was expected to underwrite risks for 10 new clients each month. The target for the team was 26 new clients. He made the same point in respect of objectives 5 and 6 (submission counts and premium income).

59 Mr Burton responded on 3 December 2020. He said that objectives 4 and 5 felt appropriate and achievable and suggested that the Claimant had already achieved objective 5 for November-December. He disagreed in respect of objective 6 but said that they could as an alternative set the objective for him to write 30% of the premium income for the team. That would have increased the target that had already been set. He continued.

> "*We feel these are a fair reflection of the role. These objectives are set with a view to aide* [sic] *you improving performance to the base level expected of a Senior. It feels to me like your submission count has already increased significantly following our initial conversation.*
>
> *If you are still in disagreement with these we will need to schedule another meeting with Paul/HR."*

60 The Claimant did not respond and on 14 December Mr Burton sent him another email saying that they needed to get the objectives agreed and asked him to confirm whether he agreed or not. It appeared to the Claimant that Mr Burton was not going to change his mind, so he sent him an email saying, "*Let's go with your choices.".*

61 The Respondent's Staff Handbook has a section dealing with Performance Improvement Process. It provides,

> "*The Performance Improvement process will normally consist of an informal review discussion followed by a formal review process (which is likely to involve more than one meeting) …*
>
> *Informal counselling can occur at any time if an employee's manager has identified concerns about their performance. The purpose of informal counselling is to identify:*
> - *the reasons for poor performance;*
> - *acceptable standards of performance;*
> - *a timeline for improvement; and*
> - *ways to help the employee meet the acceptable standards.*
>
> …
>
> *13.4 First Formal Review*
>
> *Where the Company considers that there are grounds to take formal action over alleged poor performance, the employee will be required to attend a performance review meeting and they will be notified in writing of:*
> - *the standards of performance that have been set and how they have failed to meet them;*
> - *the date, time and location of the meeting and the possible outcomes; and*
> - *the employee's right to be accompanied to the formal performance review meeting.*
>
> *The purpose of the review should be to identify the cause of the employee's poor performance and determine what, if any, assistance can be given to help them meet the expected standards."*

62 The meeting on 20 November was clearly not a first formal review meeting. It was not an informal review discussion either. It was, as the subject matter of the email, indicated a meeting to set objectives. All members of the team had objectives set. There was no discussion at the meting about the reasons for poor performance and ways to help the employee meet acceptable standards. No one told the Claimant that it was an informal performance review discussion. It was a meeting to set objectives at which there was a discussion about areas in which the Claimant's managers expected him to achieve more than he had that year.

63 Mr Burton had an online meeting with the Claimant on 15 January 2021 to review his performance against the objectives. Mr Burton said that the Claimant had met the objective to maintain signings on the key Russian accounts and it was noted that three of the other objectives were ongoing. One of the objectives in respect of peer reviews was not achieved but Mr Burton accepted that it had been an exceptionally busy time of the year and the Claimant's performance was in line with the rest of the team. He said that the Claimant had not met the objectives in respect relating to

risks, submissions and income premiums. He said that the Claimant needed to improve broker relationships with better communications.

54 A further review meeting took place on16 February 2021. Mr Burton pointed out that the objectives regarding risk count, submission count and written premium were not on track for February and along way off track cumulatively year to date. Mr Burton accepted that February was typically a quiet month in terms of business flow, but noted that the risk count for February had dropped to 0 and that the written premium was down 100% from the previous year.

55 At a review meeting on 22 March 2021 Mr Burton said that they were approaching the end of Q1 and the Claimant had written one risk since 2 January, and his income premium was about 12% less than for Q1 in the previous year. His submission count for March was 0 compared to 3 for March the previous year. He was way short of meeting the objectives for risk count, submission count and income premium. As a result, he said that they would be moving to a formal performance review involving HR. The Claimant was taken aback by that and said that the objectives were unfair and he would contact an employment lawyer if the Respondent reviewed his performance against those objectives. Mr Burton pointed out to him that he had agreed the objectives in December.

56 Mr Burton and Mr Dawson met with the Claimant on 24 March and they agreed to meet with the Claimant on 30 March 2021 to discuss the objectives. Mr Burton asked the Claimant to send him prior to that meeting his comments in respect of the objectives and, in particular, whether the metric that they were measuring was valid and, if not why not, whether the objective was achievable and, if not, why not and how he proposed they should measure his performance in an objective format that was specific, measurable, actionable, realistic and time-bound.

57 The meeting scheduled for 30 March was postponed and there followed an exchange between Messrs Burton and Dawson and the Claimant about alternative objectives. The Claimant made it clear that he was happy with all the objectives other than objectives 4, 5 and 6. He said that they were not achievable and objectives 4 and 5 required him to have 120 submissions and underwrite 120 risks a year, He said that the team had a target of 26 new clients for 2021 and the team had managed to write 2 out of the 10 they had chased. The whole team had managed to write 10 new risks since the beginning of 2021. He was being asked to increase the premium by about £3 million which was more than the team's planned growth from new business. He proposed three alternative objectives which were (i) to write a larger share of business already in the portfolio by selecting accounts which he should grow (ii) to chase brokers for targets and (iii) to develop relationships with key brokers whom he did not know.

58 Messrs Dawson and Burton emphasised to the Claimant that any objectives set had to be measurable, i.e. quantitative as well as qualitative. Hence, the objective that he should write a larger share of the portfolio, he needed to quantify it by saying how much and by when. Developing relationships with key brokers should be part of his daily activities, was not measurable and did not contribute to the team's outcomes. Their view was that to ask him as a Senior Underwriter to write 35% of the team's risk and submission count and 25% of the income was not unreasonable.

59 The Claimant did not receive and pay increase or bonus in March 2021.

60 On 9 April 21 (Friday) the Claimant sent an email to Mr Beaton's PA requesting a meeting with him. She was out of the office on that day. When she returned to work on Monday, she drew it to Mr Beaton's attention and said that the Claimant had been having performance review meetings with Messrs Burton and Dawson and that it might relate to that. Mr Beaton forwarded the email to Messrs Burton and Dawson and asked them for their views. Mr Dawson responded that he would update him at their meeting at 11.30 a.m. At the same time Mr Dawson sent Mr Burton an email and asked him to call him. A few minutes later Mr Burton sent Mr Dawson the notes that he had taken at the performance review meetings with the Claimant.

61 Following Mr Dawson's meeting with Mr Beaton, Mr Dawson called the Claimant and asked him what he wanted to see Mr Beaton about. The Claimant said that he would only discuss that with Mr Beaton. Mr Dawson asked the Claimant whether he was interested in discussing a generous leaving package and the Claimant responded that he was not.

62 On 14 April Mr Dawson forwarded to Mr Beaton the performance review notes that Mr Burton had sent him and said that he had in draft a letter with which to go more formal.

63 Neither Mr Beaton nor his PA responded to the Claimant's email of 9 April. On 20 April the Claimant sent an email to Mr Beaton asking to meet with him. They agreed to meet on 27 April 2021.

64 Mr Burton had a fourth performance review meeting with the Claimant on 23 April 2021. Mr Burton said that that the key objectives regarding risk count, written premium and submission count were not on track for April and a long way off track cumulatively year to date. At the previous meeting the Claimant had questioned the appropriateness of objectives 4, 5 and 6 and despite an ongoing email exchange the Claimant had been unable to provide suitable alternative objectives. He gave the Claimant one further week to come back with a measurable proposal before HR were involved.

65 The Claimant met with Mr Beaton on 27 April at 5 p.m.. The meeting lasted 40 minutes. The Claimant said that there were two main issues that he wanted to discuss – the first one related to an insurance claim that Ark was involved in and the second was around things that were not right in the team. The Claimant spent the first 20-25 minutes on the first issue. He mentioned the Ken Bau claim and said that the Respondent had paid a fraudulent claim to the Vietnamese assured. He provided detailed explanation of his assessments and technical information which he said showed that it was not an underground blowout and hence was not covered and should not have been paid out. Mr Beaton asked whether they had already paid and the Claimant responded the he believed that they had. Mr Beaton surmised from what the Claimant was saying that he felt that Ms Fenner, Mr Burton, Mr Dawson and MD had all been complicit in this fraudulent payment being made. He said that a second loss adjuster's report had been asked for but he had not seen it. Mr Beaton said that he would ask Joe Campbell (Head of Legal) and Neil Brothers (Risk Management and Compliance Director) to investigate and report back. Mr Beaton asked the Claimant why he had not drawn this to his attention before the Respondent had paid, and there was no clear answer. The Claimant was vague about the second issue. He said that negative competition and ego were at play. It was clear to Mr Beaton that he was not getting on with Mr Burton. The Claimant said that certain improvement suggestions made by him had not been actioned and things were

generally not well in the account. Mr Beaton remarked that it was one of their most profitable businesses. He said that he would meet the Claimant in a week's time and asked him to articulate more clearly what he would like him to do.

66 Mr Beaton asked Messrs Campbell and Brothers to carry out an investigation into the Claimant's allegations. They carried out an investigation on 28 and 29 April 2020. They reviewed all the relevant documents and interviewed Mr Dawson and Ms Fenner. The documents reviewed by them ran into around 300 pages.

67 On 29 April they reported the outcome of their investigation to Mr Beaton. The report comprised eight closely typed pages. They set out in detail what Ms Fenner and Mr Dawson had said in their interviews and provided a detailed chronology from the contemporary documents which they said corroborated what Mr Dawson and Ms Fenner had said. Ms Fenner was reported as having said that in terms of MD's reports and the advice from Clyde & Co, the adjustment process followed what they expected an adjuster to do. There were no alarm bells and no one had raised any issues with any of the conclusions. MD had followed the usual protocols, had significant expertise and the person managing the adjustment was a director who had over 30 years' experience of handling high profile claims. She said that they had requested a desktop review because the Claimant had been asking many technical questions, each of which they referred to MD and received their responses only to then get further technical questions from the Claimant. They had not told the lead insurer that they were getting a second loss adjuster to review the original decision as they had wanted to form a view on whether there was weight in the Claimant's points prior to them informing the market that they wanted to challenge MD. She said,

> "*At no point did I act fraudulently in respect of the claim investigation. We went overboard to investigate OAL's queries but the queries became incessant. If a court ultimately vindicates OAL then OK but the court would not find that Ark had acted fraudulently… Where do you draw the line beyond accepting* [the second loss adjuster's] *conclusions."*

The Claimant had not received a copy of LWI's presentation because LWI had not wanted her or Mr Burton to disclose it any more widely than between them. She continued,

> "*If I had any suspicions of fraudulent activity I would have notified compliance. Why would I pay a fraudulent claim? … We did everything we reasonably could have done to investigate OAL's concerns."*

68 The report defined a fraudulent claim as one that was fictitious or exaggerated for the benefit of the person making the claim. It concluded that there was no evidence to support the Claimant's allegation that the ENI claim was fraudulent and no merit to the Claimant's view that there had not been an underground blowout. Two different loss adjusters and Clyde & Co had reached a different conclusion. There was no evidence that the claim had been improperly handled by 3902 and/or the leads. LWI had only permitted Ms Fenner and Mr Burton to see their presentation and hence, sharing the presentation was outside their control. That having been said, Mr Burton and Ms Fenner had fed back their conclusions to the Claimant. The report concluded by saying,

"*Hence, there is no reason to suspect there is widespread fraud involving multiple members of the claims process. And given the evidence and the claims process followed, no reason to suspect negligence of any of the parties in the claims process.*

This is clearly a highly technical and complex claim. Whilst there must be an element of subjectivity over the exact quantum and indeed the cause of the claim, based on preliminary investigation, there is little evidence to substantiate even a suspicion of fraud.

There is also limited value in spending further time investigating (in the absence of any new evidence) whether there has been a potential fraud. If there were conflicting expert opinions over either the quantum or the cause of loss, this would not per se indicate a fraud – but in any case the expert opinions seem to be largely in agreement."

69 On 30 April 2021 Mr Burton invited the Claimant to a meeting on 6 May 2021 to discuss ongoing concerns about his performance, particularly around the premium written, risk count and submission count which he said fell beneath the minimum level expected of a Senior Underwriter. He attached a copy of the Respondent's Performance Improvement Procedure. Mr Burton said that an HR Advisor would also attend and advised the Claimant of his right to be accompanied. He provided the following details in respect of the three areas of concern:

(a) As at November 2020 the premium written by the Claimant was £2.8 million, compared to a team total of £21.6 million. The agreed objective had been to increase this by 100% every month. As at April 2021 the premium written by him was £2.1 million (down from £2.3 million in April 2020). That equated to a 13% of the team total.

(b) As at November 2020 the total risk count written by the Claimant was 23. The agreed objective was to increase the risk count to at least 10 risks a month. As at April 2021 the total risk count written by him was 16 (up from 12 in April 2020). That equated to 7% of the team total.

(c) As at November 2020 the total submission count received by the Claimant during 2020 was 24. The agreed objective was to increase that to at least 10 submissions every month. As at April 2021 the total submission count received by him was 19. That equated to 13% of the team total.

He said that since November 2020 they had met on four occasions to formally review the Claimant's performance but there had been no significant improvement in those three areas. Hence, he felt that there was no option but to move to a more formal performance improvement procedure. He said that at the meeting on 6 May he wanted to formally discuss the cause of his poor performance and determine what, if any, help could be provided to the Claimant to meet acceptable standards of performance. If he did not meet the desired level of improvement during the process, it could result in a warning or further improvement measures. The Respondent's procedure provides that at the first formal review,

"*If the Company considers that it is appropriate to give the employee time for their performance to improve it will:*

- *seek the employee's commitment to meeting acceptable standards;*

- *set a reasonable timeframe for the employee to meet acceptable standards;*
- *seek to agree how the employee's performance will be monitored (which is likely to include meeting with them); and*
- *tell the employee what will happen if acceptable standards are not met within the required timeframe."*

70 As previously arranged, Mr Beaton met again with the Claimant on 4 May 2021. At the start of the meeting the Claimant gave Mr Beaton a two page document headed "*Why I consider the Ken Bau loss is fraudulent."* The greater part of the meeting was taken up with the Claimant giving examples of things that he felt were not right in the team. They related to actions that had been taken in relation to various businesses. Mr Beaton said that he was unclear what the Claimant wanted him to do. The Claimant discussed possible options – staying on as a technical expert outside but alongside the team, moving to 2020 Energy or elsewhere within Ark, writing energy treaties. Mr Beaton explained why he did not consider that any of those options were viable. The Claimant asked whether he should continue with the performance improvement conversations and Mr Beaton replied that he saw no reason why he should not. Mr Beaton sent notes of the meeting to Joe Campbell the next day. In his email he said that it sounded like there was a breakdown in trust and relationship with the team and that it was not reparable. He also sent Mr Campbell a copy of the document that the Claimant had handed him and asked him to look into it.

71 Between 3 and 6 May Messrs Campbell and Brothers looked into the matters set out in the Claimant's document. They sought further comments from Mr Dawson and Ms Fenner. Mr Dawson said that ENI's 50% share in the well had been re-insured with its own captive insurer and that it was the 40% share of its Joint Venture Partner, Essar E&P, that had been insured with the commercial market though Willis Towers. Hence, if there was any fraudulent activity it was not by ENI but by Essar E&P. On 6 May they sent Mr Beaton an updated version of their earlier report which incorporated comments on the document produced by the Claimant. It did not change their conclusions.

72 On 6 May 2021 Mr Dawson and Mr Burton met with the Claimant to discuss the PIP. E James (from the Respondent's HR Service provider) also attended. Mr Burton explained why they were having the meeting. The Claimant said that he had made it clear many times that three of the nine objectives were not realistic or achievable. He said, for example, he was being asked to write 120 risks a year and the target for the whole team for 2021 was 26 risks. It was pointed out to him that the objectives had been agreed by him. The Claimant said that he had objected but when it was clear that his objections were not being accepted he had reluctantly agreed to accept them. The Claimant pointed out other things which he, as a senior underwriter, had contributed. Mr Dawson acknowledged that but said that there was a chasm between what he believed a senior underwriter needed to contribute in order to fulfil his role and what the Claimant thought a senior underwriter needed to contribute. After they had discussed the objectives for a while, Mr Dawson said that he was concerned that they would be having the same conversation in three months' time. The Claimant agreed that if they did not change the objectives that was likely. Mr Dawson then said that he wanted to have a "protected conversation" with the Claimant. Mr Dawson said that they could continue with the performance improvement process and it was possible that the Claimant would be successful in that process (he was not confident that that would be the outcome) or they could go through a lengthy process and the

Claimant would be unsuccessful and his employment would be terminated. They offered him a settlement agreement that would involve the termination of his employment and the a payment the equivalent of his salary until the end of the year. The Claimant was entitled to three months' notice. The Claimant was given until Monday (10 May) to seek legal advice and to provide an answer.

73 On 7 May 2021 Joe Campbell sent an email to the Claimant in which he drew his attention to the Fraud Invention Policy and explained briefly what constitutes fraud. He offered to discuss it with the Claimant if he so wished.

74 On 20 May 2021 solicitors acting for the Claimant wrote to the Respondent. The letter set out the background in respect of the ENI claim and what happened between 27 November 2019 and May 2020. It continued,

> "*Further investigations and meetings took place between May and July 2020 and our client finally proved that the ENI claim was not valid. Whilst it took time to reach the conclusion, the demonstration was very simple as it was based on very large differences between two pressures recorded when the loss occurred."*

It then talked about the meeting on 20 November 2020 and the fact that some of the objectives set were unachievable. It then talked about the Claimant's asking to meet with Mr Beaton on 9 April 2021 and the meetings that took place after that. The solicitors continued'

> "*Our client believes that his current performance improvement plan and his threat of dismissal is a detriment for his public interest disclosures. Furthermore, any attempt to dismiss him would be automatically unfair."*

They said that the Claimant believed that the targets set for him in November 2020 had been used to put pressure on him to justify his dismissal. He had made it clear that they were unachievable and the situation had declined when he had continued to insist on investigating the ENI claim. They asked for the letter to be treated a grievance and for it to be investigated.

75 Mr Beaton asked Neil Brothers to investigate the Claimant's grievance. Mr Brothers reviewed a lot of the documentation and interviewed Mr Burton and Mr Dawson (separately) on 27 May 2021. Mr Burton said that Mr Dawson had done pay reviews with the Claimant in 2019 and 2020. The Claimant had not written or reviewed any risks for three months in 2020 and he felt that he had "disappeared" over the summer. He had first raised his concerns with the Claimant about his performance in November 2020. Mr Dawson said that at the reviews in March 2019 and 2020 he had told the Claimant that he needed to be more outcome focused and engage less in non-purposeful work. Mr Brothers interviewed the Claimant on 2 June 2021. The Claimant raised the point that that he might not understand everything that was said as English was not his first language. It was agreed that they would proceed slowly as English was not his first language.

76 Mr Brothers sent the Claimant the outcome of his grievance on 11 June. He attached to his outcome the notes of the meetings Mr Burton had held with the Claimant from 20 November 2020 onwards. He said that the PIP had been suspended until the outcome of the grievance process. Mr Brothers said that he failed to see how the concerns raised in relation to risk and submission count at the

meeting on 20 November could have been interpreted by the Claimant as anything other than concern with his performance, and that his lack of bonus or pay rise in 2021 further supported that position. It was, therefore, his view that there had been longstanding performance issues prior to the Claimant being invited to the PIP meeting and that he had been aware or, at the very least, ought to have been aware of it. He found that the Claimant had made no allegations of fraud on the Ken Bau loss until 27 April 2021 and prior to that he had simply disputed coverage. There was in any event no link between the alleged protected disclosures and the instigation of the PIP on 24 April 2021. He concluded that the objectives set were reasonable and fair for a senior underwriter and should have been achievable, and indeed had previously been achieved by Mr Burton, the other senior underwriter in the team. Further, he had been given multiple opportunities to propose suitable alternative objectives and had failed to do so.

77 On 18 June 2021 the Claimant's solicitors appealed the grievance outcome. One of the grounds of appeal was that Mr Brothers had failed to make any findings about the involvement of Mr Burton and Mr Dawson in the ENI fraud. This ground was advanced as follows,

> "*To clarify, there are two main parts to the fraud alleged by our client.*
>
> 1. *The fraud committed by ENI in submitting a false claim;*
> 2. *The fraud committed by Matthews Daniel in the report into ENI's claim.*
>
> *… In both cases our client believes that employees of Ark, in particular, EB and PD, have deliberately ignored the ENI claim fraud and/or been complicit in it. Together these two types of fraud and Ark's responses are referred to as the "ENI claim fraud".*
>
> *Our client has clearly stated that he believes that EB and PD set unreasonable objectives and created unjustified concerns about our client's performance because of his protected disclosures about the ENI claim fraud.*
>
> *In the circumstances, it is unreasonable that you have decided that you can effectively investigate our client's complaints about his unreasonable objectives and subsequent performance management in isolation. Findings that EB and PD were complicit in the ENI claim fraud would have (or should have) affected the grievance outcome and the nature of any investigation."*

78 Mr Beaton heard the Claimant's grievance appeal on 29 June 21. The meeting seemed to go round in circles because the Claimant kept saying that there was a fraud and no one had investigated it. Mr Beaton said that it had been investigated and the conclusion of the investigation was that that there was no evidence of a fraud. The Claimant maintained that he was right and Mr Beaton asked him what he expected him to do when everyone who had looked at it disagreed with the Claimant. The Claimant said that prior to November 2020 they had had team objectives but not individual objectives and Mr Beaton appeared to be surprised by that. Mr Beaton asked the Claimant whether he had had any quarterly or half yearly appraisal and the Claimant said that he had only had an annual meeting to tell him about his bonus and whether he had received a salary increase or not. The Claimant said that he had been told in March 2021 that he was not receiving any bonus or a salary increase because he needed to improve his performance and produce more business. Mr Beaton told the Claimant that he would investigate what he had said and would

speak to other people, and then get back to him. There was no evidence that Mr Beaton conducted any further investigation.

79 Mr Beaton sent the Claimant the outcome on 9 July 2021. He did not uphold the appeal. He said that the Claimant's allegation around the Ken Bau loss had been investigated in accordance with the company's fraud policy and the investigation had concluded that there was insufficient evidence of the fraud to pursue the matter any further. The allegations that Messrs Burton and Dawson had been complicit in the fraud were serious allegations and had been made with no supporting evidence. He reiterated that they had found no evidence of fraud from any party involved in the matter. He continued that the PIP had not been linked to the Claimant's concerns over the Ken Bau loss. The PIP was formally instigated on 6 May 2022 following an informal process that had commenced in November 2020. During the informal process measures had been set by the company to improve his performance which, based on objective measures, had been below what had been expected. It was clear from that that there had been concerns with his performance for a substantial period of time before 6 May 2020 and it was clear to him that it was those concerns, rather than the allegations raised by him in connection with the Ken Bau loss, which prompted the PIP. He said that the PIP, which had been put on hold pending the outcome of the grievance, would now recommence. He said that he would ask Mr Burton to arrange the next meeting and discuss any agree actions.

80 On 12 July 2021 Mr Burton wrote to the Claimant and asked him to re-confirm his agreement to the original objectives or to propose alternative SMART objectives that were acceptable for performance measurement. If he did not propose agreeable alternative objectives by the end of that week, they would continue the PIP using the objectives that they had agreed at the end of the previous year. The Claimant did not respond by 16 July 2021 (the end of the week). Mr Burton wrote to him on 16 July expressing his disappointment that the Claimant had not responded, and extended the deadline to 21 July. He said that if the Claimant failed to respond constructively, he would need to consider what steps were necessary with regard to the PIP.

81 The Claimant responded that they had never agreed any objectives for a PIP and the objectives that Mr Burton wanted to use in the PIP were those that had been set for him as his annual objectives. He had already said that some of those objectives were unreasonable and had proposed alternative objectives which he had felt were SMART. He had no other objectives to propose. He maintained that the PIP was a punishment for his disclosure of the fraud on the Ken Bau loss.

82 On 19 July 2021 an HR Director from the company that provides the Respondent with HR services wrote to the Claimant inviting him to a disciplinary hearing with Mr Beaton and herself on 30 July via Microsoft Teams. She said that the hearing would consider whether he should be disciplined for failing to engage with and take the PIP process seriously. She warned him that termination of his employment was a possible outcome. He was advised of his right to be accompanied. The Respondent's Disciplinary Procedure provides,

> "*The employee should be:*
>
> - *advised in writing of any complaint, when a disciplinary hearing will take place and provided with any supporting documents, if appropriate;*
> - *given adequate time to prepare for the meeting;*
> - *…*
> - *given an opportunity to state their case,"*

87 On 26 July Mr Burton sent the Claimant an email in which he said that the Respondent was under no obligation to agree the PIP with him. In any event , he understood that the Claimant had received an invitation to a disciplinary hearing.

88 On 29 July Mr Burton sent information about the performance of his team to the HR Director and Mr Brothers. He referred in that to there having been a large increase in the premium written by the Claimant in April 2021 compared to April 2020 and provided an explanation for that. That increase was not shown in Mr Burton's letter inviting the Claimant to a formal PIP meeting. He also provided details of performance from 6 May to the end of July 2021.

89 The disciplinary hearing took place on 30 July 2021. It took place via Microsoft Teams and was recorded. Mr Beaton was accompanied by an HR professional. The Claimant was not accompanied. Mr Beaton said that he would set out the background and the allegations made against the Claimant. He said that the official PIP process had started on 6 May 2022 and that recent communication from the Claimant had shown that he was not going to engage with the PIP. He said that the question that arose from that was why the Respondent should spend time and resources on the PIP process if the Claimant was not going to engage with it and why it should not in those circumstances terminate his employment. He said that the Claimant's failure to comply with the Respondent's reasonable instruction to engage with the PIP had led to a breakdown in the relationship between him and Mr Burton. He then continued,

> "*Irrespective of that, there's clearly been a breakdown of trust between your line manager, and your line manager's … manager."*

Ms Beamish from HR then told the Claimant about evidence that they had received about his performance since 6 May 2021. She said that he had written less than 2% of the team's income and had written 5 risks whereas Mr Burton had written 88 and Simon had written 35.

90 The Claimant said that if the question was whether he wanted to enter into a PIP and was committed to the Respondent, the answer was that he was. He was not saying that all the objectives were unachievable, he was saying that three out of the nine were not. He also said that his risk count was artificially low because of the way it was entered on the system. He also said that he contributed to the team in lots of other ways, such as policy workings and pricing modelling, but these were not being taken into account. The objectives, with which he did not agree, were "*not consistent"* with what he had done since he joined the company. Mr Beaton said that although the Claimant said that he wanted to engage with the PIP, it was not going to happen if his managers thought that the objectives set were appropriate and he did not agree that they were. There was then a discussion about the three objectives which were the subject of dispute. Towards the end of the hearing there was the following exchange:

> "***Ian:*** *… So, coming to the broader, then, question, perhaps – because I think I've got a sense of your view of you um performance against those objectives and what's not disputed – is it sounds like there's been a fundamental breakdown of trust in the working relationship between you and Elliot.*

> ***Olivier:*** *Why, why do you say that? Me, I don't understand these objectives and I say they are there because of Ken Bau, but, um, what do you mean by a fundamental break of trust?*
>
> ***Ian:*** *Well, you've written. Or your lawyer's written that you believe that Paul and Elliot are complicit in the fraud of Ken Bau. Which are fairly sort of strong statements. Number one. Number two, you say that three of the objectives that your line manager's set, you refuse to sign up to. Um, and so I think those would be reasonable indications of a lack of good working relationship and trust in your line manager.*
>
> ***Olivier:*** *Okay, yeah, so yes, so I can, uh, I agree with what you said. I think that there is a fraud on Ken Bau. I think I proved it. And I should be praised for that because it should save money to the company and it should save money to the market. Uh… and then uh – ".*

91 On 9 August 2021 Mr Beaton sent the Claimant his decision. He summarised what both he and the Claimant had said at the hearing. He responded to some of the points made by the Claimant. He said that even if the Claimant's risk count was understated because of the way it was recorded, it did not alter the position that premium written by him was well below the expectations of a senior underwriter. He said that he believed that there was *"a fundamental and unsolvable disagreement*" between the Claimant and his line managers about what his role and objectives should be. He concluded,

> "*I have considered the matter carefully and taking all the facts into account, I have concluded that there is a complete breakdown of trust and confidence between you, EB and PD, but also with Ark in general. You continue to maintain that both EB and PD have been complicit in an alleged fraud, and that Ark has supported this notwithstanding that the Company's investigation does not agree with your view that fraud occurred.*
>
> *I see no way that the PIP can realistically proceed since you and EB have failed to reach an agreement on measurable objectives since November 2022. Furthermore, you continue to deny that there are any issues with your performance and maintain that the process is 'a punishment for Ken Bau'. The fact that you failed to engage with the re-commencement of the PIP process until you were chased supports my view that you are not, and will never be, fully engaged with the process notwithstanding your suggestion in our meeting to the contrary which I found to be unconvincing. Accordingly, there is no reasonable prospects of you ever meeting the appropriate performance standards."*

His decision was that the Claimant's employment was to be terminated with immediate effect and that he would be paid for three months in lieu of notice. The Claimant was advised of his right of appeal. He was advised that any appeal should be addressed to Rupert Atkin, Chairman of the Respondent.

92 On 16 August 2021 the Claimant appealed. He said that he considered he considered his dismissal to be unfair and that it had come about because of his protected disclosures. He summarised what had occurred since November 2019. He said that before he had raised accusations of fraud his conduct or capability had never been questioned. He said,

> "*Throughout this process, I have always simply attempted to promote the best interest of the company. This is entirely consistent with my obligation to promote trust and confidence. It cannot be valid that I am being dismissed for a breach of trust and confidence when all I have done is attempted to highlight genuine concerns about fraud."*

93 Prior to hearing the appeal Mr Atkin sought further information from Mr Burton and Mr Dawson about the ENI claim, concerns about the Claimant's performance and to comment on what the Claimant had said. They both provided information and documents on all these points. One of the points Mr Atkin raised with Mr Burton was when the Claimant had suggested fraudulent behaviour. In his response Mr Burton said,

> "*Re the timeline:*
> - *I agree that Olivier raised major concerns over coverage for this loss in November 2019.*
> - *Olivier did not label his concerns as "fraudulent" directly to me. Whilst he raised issues in November 2019 he did not explicitly suggest fraud, it was implicit, hence why I allocated so much resource to investigating the matter properly (100 hours with Mat dan + LWI peer review etc as you are aware)*
> - *The majority of correspondence in team was verbal until mid-2020 when Olivier was querying with the loss adjustor."*

94 The appeal hearing took place on 23 August 2021. Mr Atkin sent his decision to the Claimant on 27 August 2021. He dismissed the appeal. In the letter he dealt in detail with the points made by the Claimant in his appeal. In respect of the Claimant's allegation that the Ken Bau loss had been a fraud, he concluded,

> "*In my view, this is a complex claim and not at all simple, that was adjusted and reviewed by not just insurers but a series of experts and to suggest that a fraud has been committed is not credible."*

In respect of the appropriateness of the three objectives, about which the Claimant complained, he accepted that they were "*stretching"* and "*challenging"* but considered them to be appropriate for a senior underwriter. He upheld the decision to dismiss the Claimant and added,

> "*I also agree with IB's view that there has been a fundamental breach of trust and confidence between you and the Company's management. Furthermore, I can see no way of you ever agreeing objectives with your manager as you fail to accept there are any issues with your performance and cannot accept that the PIP process* has *nothing to do with the Ken Bau loss."*

Conclusions

Protected Disclosures

Disclosures 1 and 2

95 These relate to what the Claimant said to Mr Burton and his colleagues, and then to Mr Dawson, on 27 November 2019 after seeing the ENI presentation slides about

the incident at the Ken Bau well (see paragraphs 32 and 33 above). At that stage that was the only information that the Claimant had about the incident and the claim. We considered these two together because the substance of what the Claimant said in the two conversations, and his basis for it, is not very different. He told them that ENI had been vague in its presentation about what had happened. The clear implication of that was that it had been deliberately vague because it did not want to disclose the full picture. He also said that on the basis of what was in the presentation there was another possible explanation for the incident which would not be covered by the insurance policy. One the basis of what he had seen and what he knew (acknowledging he was not a drilling engineer) he believed that that the claim was probably not valid and ENI was not giving the full picture in order to conceal that. He did not use the word "fraudulent" but it was implicit in what he said that he was saying that he believed that it was probably a fraudulent claim. Messrs Burton and Dawson understood him to be saying that. The Claimant did not say that it was definitely a fraudulent claim that was not valid. He could not do so on the information available to him. He highlighted to his managers that the claim was probably not valid and fraudulent.

96 The Claimant believed that the information which he gave tended to show that that ENI was probably committing a criminal offence by making the claim and the Respondent would probably be in breach of its legal obligations by paying the claim without looking further into it. On the basis of what the Claimant had seen in the presentation and his knowledge of such issues, his belief was reasonable. The fact that his managers did not discard what he said as having no merit, but encouraged him to take it up with their own Claims Adjuster and later, the loss adjusters, also supports our conclusion that the Claimant's belief was reasonable. The Claimant believed that it was in the public interest to raise what he did; he personally had nothing to gain by it. We concluded that in those two conversation on 27 November 2019 the Claimant gave information which he reasonably believed was in the public interest and tended to show that a criminal offence was being committed or likely to be committed by ENI and that the Respondent was likely to fail to comply with its legal obligations if it paid on the claim without making further inquiries. They were protected disclosures.

Disclosure 3

97 The email of 4 May 2020 needs to be looked at in the context in which it was sent and not in isolation. The background to the sending of that email is as follows. The Claimant had by then seen the interim MD report of 11 November 2019 and the advice given by Clyde & Co which was based on the MD conclusion. He had dome his own research and it was clear to him that there were other possible explanations. It was not clear to him from MD's report whether they had considered the other possibilities and, if they had, why they had discounted them and concluded that on balance there had been an underground blowout. From 21 April 2020 onwards the Claimant had discussions with Ms Fenner and Mr Burton in which he raised questions about why MD was not challenging the insured's data and assumptions and not considering other possibilities. It was in that context that he sent the email of 4 May 2020. What he said in that email was that if MD were able to prove that other scenarios were not possible (i.e. other possibilities did not exist) that would be the end of the matter. Realistically, it was unlikely that MD would be able to do that. If, however, there were other possibilities then his view would be that they had deliberately (*willingly")* not challenged the facts which could be explained by "*corporate issues"* would have "*serious consequences".* He was saying that if there

were other possibilities (which there would always be in a complex claim of this kind), then his position would be that MD had been complicit in the fraud. They had deliberately not looked at the other possibilities.

98 We concluded that in this email the Claimant was giving information which he believed tend to show that the claim was probably fraudulent and that it was likely that MD was complicit in the fraudulent claim. On the basis of what he had seen and his knowledge and research, the Claimant believed that there were other serious possibilities. There was nothing in MD's first interim report that indicated to him that they had either challenged the data provided by the insured or considered and rejected other possibilities. In those circumstances, his belief was reasonable. Ms Fenner and Mr Burton must have thought that it was reasonable for them to arrange the meeting with MD and to afford the Claimant the opportunity to question MD. In the email of 4 May 2020, seen in the context in which it was sent, the Claimant was giving information which he reasonably believed tended to show that ENI was probably making a fraudulent claim and that it was likely that MD was complicit in that fraud and therefore it they were both probably committing a criminal offence. Furthermore, he reasonably believed that it tended to show that the Respondent was likely to be in breach of its legal obligations if it paid out on the claim without investigating it further. We concluded that that was a protected disclosure.

Disclosures 4 and 5

99 These relate to statements that the Claimant made in an email on 14 September 2020 and verbally on 16 September in connection with an article in the Financial Times (see paragraphs 51 and 52 above). We considered these together because they are close in time and the circumstances in which they are made are the same. Things had moved on considerably since the Claimant made the first three protected disclosures. On 21 April Ms Fenner sent the questions posed by the Claimant to MD and they provided a response the following day. The Claimant then raised further questions with Ms Fenner and Mr Burton, and Mr Burton suggested that the Claimant should speak directly with MD. A meeting was set up for 5 May and prior to that the Claimant provided the ENI presentation to share with MD. The meeting on 5 May lasted two hours and the Claimant had the opportunity to ask MD whatever questions he had. The Claimant asked further questions after the meeting and MD responded to them. As the Claimant was still not satisfied there was a second meeting with MD on 18 June which also lasted two hours. Following the meeting the Claimant sent MD a presentation of why the loss was not covered. They responded on 14 July. On 15 July the Claimant asked further questions and on 17 July MD informed him that they had asked a colleague from Houston to look at it and would revert to him. On 23 July MD provided a detailed response to the questions asked by the Claimant and concluded that their view remained the same as that stated in their interim report of 11 November 2019, which was that on balance it seemed likely that a cross-flow had occurred.

100 The Claimant suggested that they should appoint an independent expert and, although Ms Fenner and Mr Burton were initially reluctant to do so, they agreed to do so and a second loss adjuster was instructed on 6 August to review the claim. The second loss adjuster was provided with all the information and material that the Claimant wanted to provide to it. The conclusion of the second loss adjuster was that on the balance of probabilities cross-flows had occurred. On 14 September Mr Burton sent the Claimant an email setting out their conclusions, and pointed out that

both adjusters and the leader had come to the same conclusion and there was nothing more that they could do.

101 The Claimant's response was that he was convinced that it was not a valid claim and that a particular point had not been clarified by MD and it appeared that LWI had not done so other. That is alleged by him to be a protected disclosure. Although the Claimant did not say that he was convinced that the claim was fraudulent, that remained his view as can be seen by what he said to Mr Burton on 16 September. We accept that the Claimant believed that what he was saying tended to show that the claim was fraudulent and not valid.

102 The real issue for us is whether the Claimant could reasonably have believed that it was fraudulent and that the Respondent would be in breach of its legal obligations if it did not challenge the claim and paid out on it. It was accepted by everyone that in such a situation it was not possible to be 100% certain that a particular scenario had occurred. Three drilling experts (MD, the MD engineer from Houston and the second loss adjuster) had all agreed that it was probable or likely that a cross-flow had occurred and there had been an underground blowout. Zurich, the lead insurer, and the Lloyd's lead were satisfied that they should pay out on that basis. It is difficult to see how, in those circumstances, the Claimant, who was not a drilling engineer or an expert in the area, could reasonably believe that the claim was definitely not valid and fraudulent and that the Respondent would be in breach of its legal obligations in paying out on the claim. The converse was true. In circumstances where two loss adjusters had concluded that it was likely that there had been an underground blowout, the Respondent would probably have been in breach of its legal obligations to the insured if it had not paid out on the claim. It could not have defended a claim in court on the basis that, regardless of what the loss adjusters said, its senior underwriter said that the claim was fraudulent and not valid. We concluded that the Claimant's belief at that stage that what he said tended to show that ENI was committing or was likely to commit a criminal offence and/or that the Respondent would be in breach of its legal obligations by not challenging the claim and paying it was not reasonable. Nor could he have reasonably believed that it tended to show that the commission of a criminal offence or breach of a legal obligation was being deliberately concealed. That communication was not a protected disclosure.

103 What has been said above also applies to the statements made by the Claimant on 16 September. In addition, the Claimant could not reasonably have believed that the information about ENI and other oil companies being prosecuted in Italy for bribing Nigerian oil ministers tended to show that the claim for the Ken Bau well was fraudulent or that the Respondent was in breach of its legal obligations or concealing the commission of a criminal offence. We concluded that that communication was not a protected disclosure.

Disclosures 6 and 7

104 These relate to the Claimant telling Mr Beaton on 27 April 2021 why he believed that the ENI claim was fraudulent and providing Mr Beaton on 4 May 2021 with a document setting out why he considered the ENI Ken Bau loss to be fraudulent (see paragraphs 65 and 70 above). The reasons we have given above for the Claimant's belief not being reasonable in September 2020 apply equally to these statements. For the same reasons, the Claimant's belief that this information tended to show the commission of a criminal offence by ENI, the breach of legal obligations by the

Respondent or the deliberate concealment of criminal offences could not be reasonable.

105 In addition, in order for these disclosures to be protected disclosures the Claimant would have to prove that he reasonably believed that he was making the disclosure in the public interest. It is noteworthy that between 16 September 2020 and 27 April 2021 the Claimant did not raise his concerns with anyone within the Respondent or anyone externally. If the Claimant had genuinely believed that it was in the public interest to make these disclosures, one would have expected him to have done so. For seven months he did not say anything to anyone about them. The obvious question is why did he suddenly think it was in the public interest to raise them again at the end of April 2021, and the only possible answer to that is that it was to derail the formal performance review that he was told on 22 March 2021 was about to commence. After a failure to agree the objectives against which his performance would be measured, on 9 April 2021 the Clamant contacted Mr Beaton to meet with him. In those circumstances, we do not accept that the Claimant genuinely believed, after seven months of inaction, that is was suddenly in the public interest, to give this information. He did so because he believed that it would benefit him to do so. He raised it because he believed that it was in his interest to do so. He did not make those disclosures because he reasonably believed that it was in the public interest to do so. For all the above reasons, we concluded that these were not protected disclosures.

Detriments

Jurisdiction

106 The Claimant's case is that he was subjected to two detriments on the grounds that he had made protected disclosures The first is that he was set certain objectives on 20 November 2020 and the second was that he was put on a performance improvement plan on 6 May 2021. Unless the Tribunal finds that the Claimant was subjected to both those detriments on the grounds that he had made protected disclosures and they are part of a series of similar acts, the first claim will not have been presented in time. In those circumstances, the Tribunal will only have jurisdiction to consider if it is satisfied that it was not reasonably practicable for the complaint to have been presented before 19 February 2021 and that it was presented within such further period as it considered reasonable. The Claimant has not put forward any basis to suggest that it was not reasonably practicable for him to have presented the complaint before 19 February 2021, or any explanation for not commencing Early Conciliation until 18 July 2021. In those circumstances, unless we concluded that it was part of a series of acts that continued until 4 May 2021, our conclusion would be that we do not have jurisdiction to consider it.

Detriment 1

107 The Claimant's complaint is not about all the objectives that were set on 20 November 2020 but about three specific objectives relating to risk count, submission count and premium written. The Respondent argued that the Claimant agreed to the objectives on 14 December 2020 and a reasonable worker could not consider treatment to which he had agreed to constitute a detriment. Hence, the Claimant had not been subjected to a detriment. In considering that argument it is important to look at what happened between 20 November and 14 December. The Claimant was given the objectives verbally, without any prior warning, at the meeting on 20 November

2020. He had not been given any personal objectives before. The whole process was new to him. He expressed reservations about those three objectives at the meeting. Having received them in writing, he responded in writing on 27 November, objecting to those three objectives. Mr Burton responded on 3 December that his view was that the objectives were appropriate, achievable and a fair reflection of the role. He said that if the Claimant was still in disagreement with them they would need to schedule another meeting with Mr Dawson and HR. The Claimant did not respond and Mr Burton chased him up on 14 December. As it appeared to the Claimant that Mr Burton was not going to change his mind, he reluctantly accepted them (*"Let's go with your choices."*).

108 In considering whether the Claimant was subjected to a detriment by the imposition of those three objectives and what the reason for it was, we considered the following factors to be relevant. We looked at the level at which the objectives were set. In 2020 the Claimant had a submission count of 16, the target set for 2021 was 120 (7.5 times what he had achieved the previous year). In 2020 the Claimant had a risk count of 22, the target set for 2021 was 120 (5.5 times what he had achieved the previous year). In 2020 the Claimant's premium income was 2.8 million, the target for 2021 was 5.6 million (double what he had written the previous year). It is not in dispute that Mr Burton was achieving considerably more than that. It was the Respondent's case that the targets set were appropriate for a senior underwriter. If that is correct, the Claimant must have been seriously underperforming ever since his employment transferred to the Respondent in April 2018. But in that period of two and a half years no one put him on a formal performance review or set targets for him so that he knew what was expected of him. Other than the very informal annual conversations when bonuses and salaries were reviewed, where very general comments were made about him needing to be more outcome focussed, no one raised any serious performance concerns with him. At the time when the objectives were set, the Claimant had been an underwriter for that business for a period of 17 years. He had not been set targets like that before and no one had told him that he was underperforming. As the Claimant said at the disciplinary hearing, the objectives were not consistent with the way he had worked since he had joined the company. The Claimant believed that he was being subjected to a detriment by the setting of those objectives, and we considered that a reasonable worker in those circumstances would consider it to be a detriment. We concluded that the Respondent subjected the Claimant to a detriment by setting those particular three objectives.

109 We then considered whether the fact that the Claimant had made protected disclosures on 27 November 2019 and 4 May 2020 materially influenced the Respondent's decision to set those objectives for the Claimant in November 2020. We accept that the Respondent believed that the Claimant's risk and submission count and premium written were lower than they should be for someone in his position. That is borne out by comparing his figures with those of others in his team. We accept that there were some concerns about the level of his output and they were communicated in very general terms informally once a year. In those circumstances, the Respondent was entitled to set objectives in those three areas to improve his performance. However, the level at which they set they did was (for the reasons outlined in the preceding paragraph) unfair and unreasonable, and it was unlikely that the Claimant would be able to achieve them. They were also different from the objectives set for others in the team. They were not given specific targets in any of those three areas. The real question that we had to consider was why Messrs

Burton and Dawson set the targets at the level they did and whether the Claimant's protected disclosures materially influenced their decision to do so.

110 In determining that issue we looked at what their reaction had been to the Claimant making those protected disclosures in November 2019 and May 2020. Their reaction in November 2019 had not been to ignore his concerns or brush them under the carpet, but to encourage him to raise them with Ms Fenner and to provide him with further information by sending him the MD first interim report and sharing the Clyde & Co report with him (see paragraphs 32-34 and 36 above). In March 2020 he received a bonus which was considerably higher than what he had received in the previous year. In April 2020 when the Claimant started raising questions which he wished to ask MD, Mr Burton encouraged him to directly contact MD and facilitated it, his view being that it was worth asking those questions as it was a big claim (see paragraph 39 above). Between May and the end of July 2020 the Claimant had two two-hour meetings with MD and numerous lengthy communications with them. At the end of that lengthy process and having taken into account what the Claimant had said, MD's view remained unchanged. The Claimant's reaction to that was that they should instruct an independent expert. At that stage Mr Burton could have said to the Claimant that that was the end of the matter and he was not prepared to take it any further. That was his initial view, but he reluctantly agreed to instruct an independent expert. When that expert reached the same conclusion as MD, the Claimant refused to accept that and maintained that they were all wrong and he was right.

111 It is clear to us that Messrs Burton and Dawson had no issue with the Claimant making the protected disclosure that he did and that they took them seriously and investigated the issues that he had raised. There was, however, towards the end of the process a certain frustration with his unwillingness to accept that the experts who had looked at it disagreed with what he said, he was not the expert and that the Respondent could not take it any further. By the end of July 2020 the Claimant had spent three months pursuing the matter with MD. A considerable amount of time and expense had been spent on it. However, he was not prepared to accept what they concluded. When Mr Burton agreed to instruct an independent expert he made it clear to the Claimant that if the expert agreed with the MD hypothesis, he did not want to continue questioning the assessment (see paragraph 47 above). The Claimant ignored that and continued to question the assessment when the expert agreed with MD. The Claimant spent a lot of time and effort in challenging the experts instead of focusing on his job of writing risks and generating premium income. In the summer of 2020 he had not written or reviewed any risks. In one of the internal investigations, Mr Burton referred to his having "disappeared" over the summer.

112 We concluded that the fact that the Claimant made protected disclosures on November 2019 and on 4 May 2020 played no part in Messrs Burton and Dawson setting the targets at the level at which they did. Their frustration with the Claimant's conduct after he made the disclosures – his unwillingness to accept the conclusions of the experts after they had considered all the points made by him and his continuing to challenge the assessments despite a number of experts reaching the same conclusion – played a part in their setting the targets at the level which they did. We accept that the conduct follows on from the making of the protected disclosure, but it is quite distinct and separate from it. We, therefore, concluded that the Respondent did not subject the Claimant to that detriment because he had made protected disclosures.

Detriment 2

113 It is not in dispute that the Claimant attended the first formal performance review under the Respondent's Performance Improvement Process on 6 May 2021 and that a discussion about a settlement agreement, which would involve the Claimant leaving, took place at that meeting. We accept that putting the Claimant on a formal PIP review, which could lead to warnings or the termination of his employment amounted to subjecting the Claimant to a detriment. However, the decision to move to a formal review under the PIP procedure was not first made or communicated to the Claimant on 30 April 2020 as the Claimant alleges. That is the date when he was sent the formal invitation to the meeting on 6 May. The decision was first communicated to the Claimant at the review meeting on 22 March 2021 (see paragraph 55 above). The formal review meeting did not take place soon after 22 March 2021 because there was an ongoing dispute between the Claimant and Mr Burton about the objectives to be used in the PIP. Mr Burton wanted to use the objectives that had been sent on 20 November but the Claimant did not accept three of them. There was a further review meeting on 23 April, when the Claimant was given one further week to suggest alternative measurable objectives.

114 We have found that the Claimant's disclosures on 27 April and 4 May 2021 did not amount to protected disclosures. Even if they had, the decision to move to the formal PIP review could not have been on the ground of those disclosures because the decision to move to the formal review had been made before those disclosures. The issue for us, therefore, was whether the decision to move to the formal PIP review was on the grounds that the Claimant had made protected disclosures on 27 November 2019 and 4 May 2020.

115 We accept the Respondent's evidence that the decision to move to the formal PIP review was made because of the Claimant's performance in the first three months of 2021. The Claimant's performance against the three particular objectives was in most cases worse than it had been in the same three months in the preceding year. Even if the objectives had been set at a lower level, he would not be meeting them. There had simply been no significant improvement in those three areas. We concluded that the decision to move the Claimant to a formal performance review process on 22 March 2021 was not in any way influenced by the fact that he had made protected disclosures in November 2019 and May 2020. The Claimant was not subjected to this detriment on the grounds that he had made protected disclosures.

116 It follows from our conclusion on the second detriment (for the reasons set out at Paragraph 106 above), that the Tribunal does not have jurisdiction to consider the complaint about the first detriment.

Unfair Dismissal

117 There were two main reasons for the Claimant's dismissal on 9 August 2021 by Mr Beaton - the Claimant had failed to engage in the PIP and it was unlikely that he would ever do so and he had made allegations in his grievance appeal that his managers, Mr Burton and Mr Dawson, had been complicit in fraud and that the Respondent had supported them. Mr Beaton believed that the latter had led to a breakdown of trust and confidence between the Claimant and the Respondent. Mr Beaton alluded to both of them at the disciplinary hearing and gave them as his reasons for dismissal in the outcome letter. The former is a reason relating to

conduct, the latter could be either a reason relating to conduct or some other substantial reason of a kind such as to justify dismissal.

118 The Claimant was not dismissed because he made protected disclosures on 27 November 2019 and 4 May 2020. The reasons for which Mr Beaton dismissed the Claimant were not fabricated or invented by his managers because they wanted him dismissed because he had made protected disclosures. As we have made clear above, they supported and encouraged him in raising the concerns that he had and did not subject him to any detriments because he had made protected disclosures.

119 The Respondent having established potentially fair reasons for the dismissal, we then considered whether it acted reasonably in all the circumstances for dismissing him for those reasons. We looked first at the Claimant's failure to engage in the PIP process. The Claimant had made it clear from the outset that he was not prepared to engage with the PIP if the three objectives set in November 2020 with those specific targets were going to be used in the PIP process. The objectives had been looked at in the grievance and the grievance appeal in the context of the Claimant alleging that they had been imposed because he had made protected disclosures. Prior to the decision to dismiss the Claimant, there had been no investigation into whether it was appropriate or reasonable to set those objectives for the Claimant in a PIP process in all the circumstances. If the matter had been investigated it would have revealed the Claimant had been an underwriter for that kind of business for nearly 17 years, he had not been given personal objectives like that before and he had not been told that he was underperforming, he had been an employee of the Respondent for 2.5 years, he had not had regular appraisals, he had not been set personal objectives, it had not been made clear to him what targets he was expected to achieve, it had not been drawn to his attention that what he was achieving in terms of risk and submission count and premium income was significantly below what was expected, the targets set expected him immediately to double his premium income every month and to increase his submission and risk count to figures that were 7.5 and 5.5 times higher than what he had produced before. The Respondent failed to conduct such investigation as was reasonable and, had it done so, it might have come to a different conclusion.

120 When the Claimant was invited to the disciplinary hearing he was told that the purpose of the hearing was to consider whether he should be disciplined for failing to engage in the PIP process and to take it seriously. He was not told that it was going to consider whether there had been a breakdown of trust and confidence because his solicitors had said in the grievance appeal that his manager had been complicit in the fraud. That was raised for the first time by Mr Beaton towards the end of the hearing. The Claimant's response to it (see paragraph 90 above) does not indicate that he accepted that that was the case. The Claimant should have been given advance notice that that was going to be considered at the disciplinary hearing and that it might lead to his dismissal and he should have been given an opportunity to prepare his response to that allegation.

121 For the reasons given above, we concluded that the dismissal was unfair.

Employment Judge Grewal

02/12/2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

02/12/2022

FOR THE TRIBUNAL OFFICE