



EMPLOYMENT TRIBUNALS

Claimant: Mr J Linwood

Respondent: British Broadcasting Corporation

Heard at: London Central **On:** 1-20 May 2014 and
2-6 and 25-27 June 2014 (In Chambers)

Before: Employment Judge Ms A Stewart

Members: Mr D Buckley
Mr S Ferns

Representation

For the Claimant: Mr S Ritchie, of Her Majesty's Counsel

For the Respondent: Mr D Stilitz, of Her Majesty's Counsel

JUDGMENT


The unanimous Judgment of the Tribunal is as follows:

1 The Claimant's complaint that he was unfairly dismissed, contrary to section 94 of the Employment Rights Act 1996, is well-founded and succeeds.

2 The Claimant contributed by his own conduct to the extent of 15% to his own dismissal.

3 The Claimant's complaint that he was subjected to unlawful detriment on the ground that he had made protected disclosures, contrary to section 47B of the Employment Rights Act 1996, is not well-founded and fails.

4 The Claimant's complaint that he was subjected to unlawful detriment on the ground that he had asserted his statutory right to be accompanied at disciplinary hearings, contrary to section 12 of the Employment Relations Act 1999, is not well-founded and fails.



Employment Judge

Date 6 August 2014

JUDGMENT SENT TO THE PARTIES ON

6th August 2014

Mubarak

FOR THE TRIBUNAL OFFICE



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REASONS

Introduction

1 The Claimant, Mr John Linwood, brings the following complaints before the Tribunal:

1.1 That he was unfairly dismissed from his post as Chief Technology Officer; and

1.2 That he was subjected to detriment, namely suspension, the failure to lift such suspension and the publicising of his suspension, on the grounds of; (i) having made protected disclosures within the meaning of **section 43B and 43C of the Employment Rights Act 1996** and/or (ii) on the ground that he exercised his right, or sought to exercise his right, to be accompanied at a disciplinary hearing under **section 10 of the Employment Relations Act 1999**.

2 The Respondent denies that the Claimant was subjected to any unlawful detriment and contends that he was fairly dismissed for gross misconduct or, alternatively, for some other substantial reason, namely a breakdown of trust and confidence.

3.1 The Tribunal had before it an agreed bundle of documents running to over 6,000 pages and heard evidence from the following witnesses: the Claimant himself and the following witnesses called by the Respondent; Mrs Alice Webb, Chief Operating Officer for BBC North; Mr Charles Villar, Divisional Finance Director for BBC Finance and Business and BBC People Divisions; Mr Dominic Coles, Director of Operations for the BBC; Mr Richard Burdon, Human Resources Director for Finance and Operations; Mrs Clare Dyer, HR Director for Television, North and Nations and the dismissing officer; Mr Nick Pascazio, Head of HR, Finance and Business; Mr Philip Almond, Director of Marketing and Audiences at the BBC and hearer of the Claimant's appeal against dismissal and Mrs Sarah Hayes, Controller for Information and Archives.

3.2 The Tribunal also had before it, and had read, prior to evidence being led,

all of the witness statements, including one for Ms Caroline Thomson, former Chief Operating Officer of the Respondent, whom the Claimant in the event chose not to call to give evidence and whose evidence was therefore not tested by cross-examination. The Tribunal did not accept the Respondent's submission that the statement should be ruled inadmissible and noted that, on its face, it appeared to contain points potentially favourable to both parties but, in the circumstances, was unable to place any real substantive weight upon it.

Conduct of the Hearing

4 On day 4 of the Hearing Mr Ritchie, the Claimant's Counsel, was unwell and unable to attend until 2pm. This occurred again on day 9 and on both occasions the Hearing was paused during his absence.

5 On the morning of day 8 of the Hearing Mrs Dyer, who was in the middle of her cross-examination, attended in order to continue. However, she had been unwell and had therefore not slept during the previous night and it was decided to interpose the Claimant's evidence, so as to allow her time to recover before resuming her cross-examination. This was then resumed at midday on day 11 of the Hearing.

The Issues

6 The issues which this Tribunal has had to determine were as follows:

6.1 What was the reason, or the principal reason, for the Claimant's dismissal and, in particular, was it for a reason relating to his conduct and/or a breakdown of trust and confidence, as the Respondent contends, or because he was made a 'scapegoat' for the Respondent's decision to abandon the DMI project and write down nearly £100 million, as the Claimant contends?

6.2 If the Respondent has satisfied the Tribunal, on a balance of probabilities, that the reason or the principal reason for dismissal was one of the potentially fair reasons contained in **section 98(2) of the Employment Rights Act 1996**, then did the Respondent act reasonably or unreasonably in treating that reason as sufficient reason for dismissing the Claimant in all the circumstances, having regard to equity and the substantial merits of the case, within the meaning of **section 98(4) of the Act**?

6.3 Did the Claimant make protected disclosures within the meaning of **sections 43B and 43C of the Employment Rights Act 1996**? He asserts the following: (a) His statement to Alice Webb on or about 21 March 2013 (Reasons paragraph 45 below); (b) His statement at a Finance Committee meeting on 29 April 2013 (Reasons paragraph 49 below); both about the proposed write down being too high; (c) His statement about his unfair treatment in a letter dated 14 May 2013 to Mr Coles (Reasons paragraph 66 below); (d) His complaints in his own letters of 14 and 15 May 2013 and his solicitor's letter of 15 May, about the abandonment of DMI, the write down and his own treatment (Reasons paragraphs 73, 74 and 76 below); (e) His letter to Mr M Ford, Director of Risk and Assurance, dated 24 June 2013 about allegedly inaccurate statements made by the Respondent to the Public Accounts Committee and as to the extent of the DMI write down (Reasons paragraph 101 below).

6.4 It not being disputed that the Claimant's suspension, continued suspension and its publication constituted detriments for these purposes, did the Respondent subject the Claimant to these detriments, or any of them, on the ground that he had made protected disclosures?

6.5 Further or alternatively, did the Respondent subject the Claimant to these detriments, or any of them, on the ground that he had exercised or sought to exercise his statutory right under **section 10 of the Employment Relations Act 1999** to be accompanied by his chosen companion at a disciplinary Hearing, contrary to **section 12 of that Act**?

6.6 In relation to the complaints set out in paragraphs 6.3 to 6.5 above, has the Claimant presented his complaints to the Tribunal within 3 months of the acts complained of, or the last of them, or within such further period as the Tribunal considers reasonable, where it is satisfied that it was not reasonably practicable for him to have presented them within that three month period, within the meaning of **section 48(3) of the Employment Rights Act 1996**, so as to give the Tribunal jurisdiction to consider them?

6.7 **Case Management Orders** made on 23 January 2014 provided that this Hearing would determine liability only and that a Remedy Hearing, if appropriate, would be listed separately.

The Facts

7 The Respondent is a global public broadcaster established by Royal Charter and funded largely by public money through the levy of the annual licence fee. It is accountable to the BBC Trust and to the United Kingdom Government. The constitution of the Respondent is established under Royal Charter which establishes the BBC Trust as the final sovereign body and guardian and steward of the licence fee and its other resources, and of the public interest. The Trust is responsible for securing the effective promotion of those public purposes set out in the Charter, including "sustaining citizenship and civil society; promoting education and learning; stimulating creativity and cultural excellence; representing the UK to its nations, regions and communities; bringing the UK to the world and the world to the UK; and helping to deliver to the public the benefit of emerging communications technologies and services" and, in addition, taking a leading role in the switchover to digital television. The Charter also establishes an Executive Board to be the executive body of the Respondent, responsible for delivering the Respondent's services, in accordance with the priorities set by the Trust, and for operational management. The Charter provides that the Executive Board and the Trust must act independently of each other and the Executive Board must include at least four non-executive directors, being one third of the Executive Board's membership.

8 The Director General is the Chief Executive Officer of the Respondent and a member of the Executive Board and, if so approved by the BBC Trust, is Chairman of that Executive Board. Mark Thompson was Director General during the period material to this case up to September 2012, George Entwistle was Director General from September to November 2012, Tim Davie was acting Director General from November 2012 to April 2013 when Tony Hall took over as Director General.

9 Erik Huggers, then Director of Future Media & Technology (FMT), in October 2008 approached the Claimant and attempted to persuade him that the Respondent organisation was a great place to work. The Claimant's impressive CV included being a partner and General Manager at Microsoft and subsequently in a very senior position at Yahoo. He joined the Respondent as Chief Technology Officer (CTO) on 6 April 2009 at grade SM1, the most senior executive management grade, at a salary of £240,000 per annum with a sign on bonus of £140,000, payable as to half after six months' service and the remainder after 18 months' service. He reported directly to Mr Huggers, who was himself a member of the Executive Board. The Claimant's contract provided for a notice period of six months on either side, save in the event of 'gross or serious misconduct or negligent or incompetent performance, failing to comply with any reasonable instruction and/or doing anything, whether within or outside the BBC, which might adversely affect the business interests or reputation of the BBC or any member of the BBC Group'.

10 The Claimant's role meant that he was responsible for the Technology, Distribution and Archive Division within FMT, with an annual budget in excess of £500 million and a total annual spend on technology in excess of £700 million. The DMI project budget was in the region of £133 million, over a period of approximately six years, which meant that the project accounted for approximately 5% of the Claimant's annual budget and, as he told the Tribunal, approximately 5% of his working time as CTO.

11 The Claimant's job description as CTO stated that FMT "must responsibly deploy finite, shared resources and successfully deliver technology projects and programmes to the maximum benefit of the BBC and provide innovative leadership in the fields of IT and broadcasting technology, media management, research and development and interactive services across all platforms". Among the 'aims' of his job were to provide strategic leadership across these fields, ensuring appropriate technology platforms for each of the divisions and content groups (vision, journalism, audio and music), ensuring a balance between transforming ways of working and delivering efficiency savings across the BBC. Also to assist the internal client groups to implement transformational change programmes. Among 'key responsibilities' were; ensuring that content group needs were effectively addressed. (The Claimant told the Tribunal that effectively it was his responsibility to keep the BBC 'on the air' in technological terms). Also, to be an effective communicator of technology strategy and establish business benefits; to lead and monitor the implementation of systems and technology projects through appropriate reporting processes/project boards, ensuring the effective resolution of business issues; to act as a sponsor for key technology programmes and future media and technology group projects, responsible for scoping life cycle and risk management, on time on budget delivery and business benefit realisation, in line with both individual programme/project objectives and the overarching BBC technology plan. A further key responsibility was to identify trends and opportunities for the development and application of emerging technology and innovation, and provide professional leadership to colleagues across the BBC. Amongst the 'required knowledge and experience' section of the job specification were; substantial experience and proven track record in both operational and strategic senior technology management roles; excellent understanding of project management; political astuteness; the ability to build strong relationships with disparate business and technology groups, building a structure of trust and professionalism; interpersonal skills at a level sufficient to

ensure credibility and effective working relationships; sound appreciation of the essential balance between technology excellence and effective investment; sound judgment; demonstrable ability to work with both business and technical staff and strong interpersonal leadership and communication skills.

12 The Technology, Distribution and Archive Division, which the Claimant headed, comprised 1,200 employees and the Claimant had 13 direct reports, mainly controllers and directors of different departments. From March 2011 until September 2012, the Claimant was also a member of the Business Direction Group (BDG), a group created by the Director General and made up of the Respondent's 25 most senior managers. He also attended the Finance Committee in an advisory capacity from mid 2011 onwards.

13 On the Claimant's first day of work, the 6 April 2009, he found an email from Mr Huggers, sent two days before, saying "one of the key things we need to focus on is DMI. I believe that the project is in trouble and that Siemens are not capable of delivering it... It would be good if you could take a look at your contacts and think about a super strong software engineer/project manager who can take on the actual delivery of the project." On 7 April Mr Huggers sent the Claimant another email regarding DMI and Next Steps.

14 The Digital Media Initiative project (DMI) had been created by the Respondent in November 2005 in order to "fully prepare the BBC for the on-demand digital world." By December 2007 the final phase 1 business case was submitted in order to release funds for its implementation. It was then put out to contract with Siemens in February 2008, although it had become apparent by early 2009 that Siemens were in trouble in terms of delivering the project.

15 The DMI project was ambitious and complex and was intended to enable the BBC to produce, work on, store and retrieve all of its programmes digitally from start to finish. This entailed the standardisation of production, storage, access and use of all content across TV, radio and online and was intended to enable easy manipulation of content, effective sharing across location, desk top editing and access to archive of not only finished content but also production stages i.e. end to end digital production and access across the organisation. This represented very considerable changes from the way in which production had previously worked and the existing methods of archive storage. There were three major pillars of the project, namely; (i) the Meta-data archive/physical stock and loan searchable archive, to enable searching of, and access to, all of the BBC's previous tape and other content; (ii) Production Tools, which would allow producers and editors to work on PCs instead of using editing suites and tape editing equipment and (iii) the DMI digital archive, an online warehouse designed to digitise the content produced by Production Tools, once these came into operation. Underlying these three main components was the Media Infrastructure, which was a technology platform underlying and connecting all the various parts of the system and allowing Meta-data and content to move through the entire system. There was a further small component called music reporting, which went live in early 2012 as a discrete aspect of the project.

16 The contract with Siemens was terminated by mutual agreement in July 2009, the decision to bring the project in-house was thereafter made and a revised and very detailed Business Case for the project was submitted to the Finance Committee on 1 April 2010. It was some 40 pages long and it envisaged

that the project would be completed and delivered by January 2011. The project sponsor was named as the Claimant and the Programme Director of DMI was Raymond Le Gue. The governance structure of the DMI project, as set out in the 2010 revised Business Plan, stated that “the DMI Programme Director is responsible for delivering DMI and the Claimant as chair of the Steering Group is accountable”. Five levels of governance were set up; the Delivery Group, comprising the day to day delivery team; the Deployment and Change Group; the Leadership Group; the DMI Steering Group “which maintains strategic alignment with the wider BBC and monitors overall progress against plan and manages risk contingency as well as accountability for delivering the benefits ... In addition, the accountability for delivering the benefit will, along with the content groups, be the responsibility of the DMI steering group”; and the Executive Board and its sub committees (most notably the Finance Committee). As to reporting structure; the Delivery Group meetings took place weekly; the Development and Change group met every fortnight; the Steering Group met monthly and reported to the Finance Committee which met quarterly. The BDG also met quarterly. The Finance Committee reported to the Executive Board and the Executive Board reported eventually to the BBC Trust. There was also independent assurance and additional oversight provided by the BBC Project Management Office (PMO) which also reported to the Finance Committee and the Executive Board.

17 On 12 April 2010, the Executive Board had approved the final Revised Business Case for DMI and on 24 June 2010 the revised business case for the DMI was approved by the BBC Trust Finance Committee. In September 2010, the Claimant succeeded in negotiating a return from Siemens of £27.5 million under a “no fault settlement agreement.” In late 2010 the licence fee settlement from the Government was frozen at £145, which gave rise to the need for £700 million savings per annum by the year 2016/2017; that is 20% over five years. This included ongoing operating costs including IT, although the capital allocation to the DMI project was not affected. This cost saving initiative was called the ‘Delivering Quality First’ initiative and Mr Villar told the Tribunal that the cost-cutting target for his division was £165 million and that the DQF initiative gave rise to heightened scrutiny across the board, including conditioning the Executive Board and Trust thinking on DMI. He also said that people were being very rigorous and conscious about external presentation and that there was a strong consciousness that ‘value for money’, in terms of licence fee payers, was of great importance, as was the Respondent’s credibility for being well run. He said that it was not a pleasant environment in which to work at that time and made reference to various scandals, for example those regarding Jimmy Savile and also severance payments.

18 In January 2011, the National Audit Office reported on DMI’s progress as at December 2010 and there was a Public Accounts Committee hearing on DMI in February 2011, which reported in March 2011.

19 The envisaged delivery date of January 2011 was revised in February 2011 at the most senior level at the Respondent, including the Director General, the COO and the Chairman of the BBC Trust Finance Committee, although without reference to the Claimant; the envisaged delivery date was then set as at the end of 2011.

20 At the end of February 2011, Mr Huggers left the Respondent, having been head-hunted by a technology company, and the Claimant began reporting

directly to Caroline Thomson, Chief Operating Officer and a member of the Executive Board. She became the Executive Sponsor of DMI in March 2011.

21 In May 2011, the DMI Steering Group noted that £7 million worth of the benefits initially forecast for the project were at risk and in June 2011 they increased this to £11.3 million. The BBC PMO quarterly portfolio update for the third quarter of 2011 stated that the DMI project had made significant steps forward “and the ambition continues to be attractive” however, due to delays and other issues, was expected to under-deliver against the original benefits case by £19 million. “This slump in benefit realisation and increase in costs calls into question the economics on which we decided to proceed with the DMI programme and could well lead to a negative return on investment.” The PMO raised the possibility of radical options being considered at this stage, including re-scoping the programme to only focus on the most beneficial elements, or fully stopping the project in order to re-plan the delivery of all products. The risk profile of the DMI project was moved from red/amber to red, resulting from delays to roll out and the further and potential permanent erosion of financial benefits. The radical options were expressed to be put forward primarily to provoke debate and in order to establish whether any of them were worth taking forward. The recommendation was that the Finance Committee challenge DMI on potential reversal of benefits/loss; rethink strategy on radical solutions and consider “how congruent are the views of DMI/technology and the business and does this relationship need to be addressed.” At the end of 2011, the NAO report noted “serious deterioration in the risk rating of the DMI”.

22 It was part of the Respondent’s case that the Claimant had consistently given an over-optimistic message in relation to DMI and had essentially presented it as always being on the point of delivering. The Claimant contended that he had always reported factually and accurately on the state of DMI at any given moment and had hidden nothing. The Tribunal analysed the evidence of the Claimant’s updates to Caroline Thomson, his email exchange with his own team and senior stakeholders, his meetings with the Director General and his other communications over approximately the first eight months of 2012 and concluded that the Claimant was portraying and presenting the project in its best light, as enthusiastically and positively as he could, that being his job as “champion” of the project, particularly following the lowered morale consequent upon the Siemens failure and general delays and, further, that he did not tolerate his own technology team ‘bad mouthing’ the project. The Tribunal also noted that he was encouraged to ‘get on with it’ and to press on in the face of whatever delays and technology hitches there were by his line manager Ms Thomson in 2011 and 2012 and also by Mark Thompson who pushed him to keep going on 30 March 2012, having received both positive and negative reporting from him on the Archive database and also production tools. The Tribunal concluded unanimously that the Claimant was not hiding whatever problems there were and was factually reporting those matters through the appropriate reporting channels and that it was a matter of common knowledge that there were project delays. For example, in his presentation to Mr Thompson at the end of March 2012 it was clear from his slides that the project status was at red flag, although here were no other particular negativities in this slide show.

23 It was also very clear that the Claimant was not standing in the way of the accurate direct reporting of ups and downs from the DMI team to Corporate Finance and the PMO, for example on 24 April 2012, Corporate Finance

informed Ms Patel, Mr Villar and others of a DMI update received from the DMI team which summarised that the project “is still experiencing severe difficulties in delivering its objectives and the timetable for completion has now moved back from February to June/July. This will further erode the financial benefits and we are likely to see costs escalate beyond the original funding envelope. In addition, the delivery of projects with a critical dependency on DMI, most notably project North, are being financially hit by the delayed rollout.” There followed a detailed list of defects, problems and cost increases and the email summarised that this all “presented a significant risk to the reputation of the BBC with the BBC Trust, as the case presented to them over the past year is one of gradual decline. We are also concerned that without a radical change in approach, the project will significantly overspend and will need to stand up to scrutiny”. A meeting was then requested. Further, the Claimant facilitated during April 2012, by way of Dan Webb, a Consultant working on his team, the obtaining of a detailed list of outstanding DMI issues for presentation to Ms Thomson, which was then forwarded by the Claimant to Caroline Thomson, COO, Ms Zarin Patel, then Chief Finance Officer for the Respondent, Charlie Villar, Finance Director for BBC Finance and Operations, Alice Webb, COO for BBC North, and members of his project team, as well as to Simon Higdon, Head of BBC Project Portfolio at the PMO. These were outstanding issues and were unadorned, practical and detailed in their setting out. The delays were clearly flagged up. During May the Claimant’s updates to Ms Thomson, the DMI team and senior stakeholders gave positive messages about the ongoing fixing of bugs and technical issues and also responded to a fall back plan request from BBC North. On 15 May the Director General’s Finance Committee was informed that delayed implementation was affecting BBC North and that business engagement was crucial to delivery. Overall, it was clear to the Tribunal that the entire executive was well aware of the problems of DMI throughout.

24 On 23 May 2012, the Claimant informed Ms Thomson that there was a “desperate need for a senior ‘owner’ from Vision on the Steering Group to be responsible for the successful deployment of DMI into production” and that that person needed to be very senior in Vision and reporting directly to George Entwistle, then Director of Vision. Ms Thomson forwarded this email to Mr Entwistle who asked Pat Younge, Chief Creative Officer for Vision, and on 29 May Mr Entwistle proposed that Mr Younge Chair the Steering Group. Mr Younge accepted the role of Vision ‘owner’ on the Steering Group but declined the Chairmanship of the Steering Group because he was too busy. However, the Steering Group attendance record sheet showed that he did not attend a single Steering Group meeting over the months of his appointment as Vision ‘owner’ until he attended three meetings in a row, on 4, 19 and 31 October 2012 – ie from the first meeting at which the decision was taken to pause all work on DMI, onwards (referred to in paragraph 34 below), when he also became Chair and Business Sponsor.

25 On 24 May 2012, Mr Entwistle emailed the Claimant setting out the key issues which the DMI project raised from a Vision perspective, showing in this detailed email a clear and nuanced understanding of the realities of the different aspects of DMI and its problems and ending by assuring the Claimant that everyone was enthusiastically awaiting full deployment and was ready to deal with the inevitable concern and noise around the change of processes in the business. He affirmed that Vision was a major supporter of digital production technology, however, also raising various concerns about meeting user criteria

and delays, but at the same time stating his view that Vision 'is well represented on the Steering Group' by two of his direct reports. Mr Entwistle also on the same date confirmed that Mr Younge would take responsibility for deployment of DMI into production.

26 In June 2012, the deterioration in the DMI's risk rating to red was reported to the Executive Committee. Also in June 2012, the Claimant, in his appraisal by Ms Thomson, was rated as "exceeds expectations". Also in June 2012, the Meta data archive went live, regarding which Ms Hayes, Controller for Information and Archive, stated in evidence that there were bugs at the outset and that certain problems continued and were continuing up to the date of this Tribunal Hearing. On 24 June, the Claimant updated Ms Thomson on the going live of the archive including what was going very well and also where problems and concerns had arisen. The Tribunal had before it the minutes of the Steering Group meeting held on 27 June 2012 which showed a robust, detailed and in depth discussion between the business users and the DMI technology team across the range of DMI issues, including a request by the Claimant and Mr Webb for a cost benefit analysis on Cottonwood vs Roughcutter, BBC owned vs off the shelf desktop tools, from both a technical and business perspective.

27 In July 2012, the deterioration in the DMI's risk rating to red was reported to the Trust Board. On 13 July, Ms Thomson hosted a meeting with Mark Thompson, the Director General, George Entwistle, Pat Younge, the Claimant and Peter O'Kane in order to discuss the DMI project. This presented a rather mixed picture of functionality and problems with both the Meta data archive and production tools, some of which were being trialled in Bristol and in Salford, and noted that the digital archive would not be populated because out of scope for the DMI programme. On 13 July 2012, Fiona Clarke, Alice Webb and other members of the production or business side provided a DMI briefing note for Mr Entwistle, Bal Samra, Commercial Director, and Peter Salmon, Commercial Director of BBC North, strongly indicating a desire to dramatically reprioritise the archive over and above production tools, logically leading to the stopping of the current development of production tools. As to governance, the briefing stated that "to date we have not created a governance structure for DMI that promotes objective honest conversation. It has become a technology project sponsored by technology and run by technology rather than business input. Despite high business engagement throughout, business ownership drifted away some time ago as delivery issues started to mount". The briefing expressed the need to reset the project dynamic, that it should be business led, with technology as a key supplier/partner. It noted that "it is easy to get into a situation where DMI is always 'just around the corner' after one or two more technical steps and then the meeting of a significant milestone, whereas it seems that each technical step seems to be fraught with risk and that delivery milestones continuously slip". Also in around mid July it was confirmed that Mr Entwistle's appointment as DG would take effect in early September. On 20 July an interim edit solution was agreed for project BBC North after which, it was agreed, that all efforts would revert to testing and deploying production tools in the North.

28 On 24 July an Internal Audit Report on DMI was produced which was distributed to Ms Patel, Ms Thomson, Ms Samra, Ms Webb and other administrative and financial officers and members of the DMI Steering Group, the external auditors and the Director and Head of Risk Management. The objective of the audit was to assess the effectiveness of governance and delivery planning

for the implementation phase of the DMI project. Its findings included that the project had had a troubled history with key delivery dates missed and deployed systems not operating as expected by users, which had eroded confidence. There was a finding of significant weaknesses in the governance processes and delivery planning and “we recognise that the programme sponsor identified the need to address various weaknesses in programme management early in 2012 and is already taking steps in this respect”. “While the programme has changed significantly in terms of delivery timetable and benefits realisation, the business case approved in April 2010 has not been maintained to allow an assessment of the ongoing viability and achievability for the full programme. This means that the full impact of the changes and delays, including overall value for money of the programme, is not known. The Finance Committee have requested an updated benefits case in June 2011 but this was not produced, due to other programme priorities, and internal audit will be reporting to the Finance Committee on weaknesses in its follow up process. Had this been stronger, it may have resulted in the business case being updated”. It also found that a single business sponsor tasked with representing the user community and driving forward implementation was not appointed to the Steering Group and that this had reduced the effectiveness of the decision making process. There were also findings of flaws in the quality approach and plan, the absence of a formal strategy for stake-holder engagement communication, that reporting to the Steering Group had focused on the most optimistic view of delivery, with insufficient commentary on potential other or worst case scenarios, thus preventing the Steering Group from taking corrective actions on a timely basis and that a risk and issue log had not been maintained by programme management since January 2012. The ‘actions recommended’; following the programme sponsor’s identification of the need to address governance weakness earlier in 2012, some of which were in train, including weekly meetings with members of the Executive Board for status updates and decision making; recruitment of a business sponsor to sit on the Steering Group and appointment of a new programme director and programme team to strengthen delivery. The conclusion was that “continued senior management involvement, particularly from the user community, was essential for successful completion of the programme and that the programme sponsor and the new programme director needed to address the findings of this report and also ensure that lessons identified from past BBC projects of a similar nature were taken on board”.

29 On 25 July Mr Entwistle confirmed that Mr Younge would be the DMI project sponsor and the Claimant was very pleased about his deeper involvement, but was not happy with this being characterised as ‘Vision coming to the rescue of technology’, since he stated that this simply was not the case. In the event, Mr Younge did not attend any Steering Group meeting until 4 October 2012, when a decision was taken to pause work on DMI, save for the meta data archive, and the Pasadena review was instigated.

30 On 23 August 2012, there was a DMI project review produced by Daniel Danker, Head of BBC iPlayer, who had spent an in-depth two days reviewing the project, at the Claimant’s personal request. The Tribunal found this report to be a balanced overview, including the good (as with the individuals of the core leadership team), the problems (as with “quality and predictability of the archive functionality although it was clear that the business was aligned with the archive proposition”) and the problems with the production tools as to whether or not there was business buy-in to the concept of these tools and whether its

functionality was a match for alternative products on the market and recommending that this core issue in relation to production tools should be revisited at the most senior levels before proceeding with them. The Danker Report noted that, without fail, every member of the DMI core leadership team pointed to lack of clear requirements as the top issue on the project. Mr Daniel Webb sent the Danker report to Ms Hayes, Ms Fiona Clarke and the communications person for the project team and it was distributed amongst the project team for actioning.

31 On 31 August 2012, the Claimant attended the BDG and gave an update on the progress of DMI which constituted an accurate factual report of the current state of affairs. In September 2012, Mr Thompson stepped down as Director General and Mr Entwistle was appointed in his place. On 11 September the Claimant attended sponsorship training, along with other BBC Executives. In September 2012, upon her return from holiday Ms Thomson was dismissed for redundancy, Dominic Coles was appointed Director of Operations, Ms Patel was appointed Chief Finance Officer and Executive Board Member and took over as DMI Executive Sponsor and Lucy Adams, as Director of HR, was elevated to the Executive Board. These decisions and the restructuring of senior management were the work of Mr Entwistle and in this restructuring Mr Coles, who was not on the Executive Board, became the Claimant's line manager.

32 On 12 and 14 September 2012, the Claimant had meetings first with Lucy Adams alone and then with Ms Adams and Mr Entwistle together, during which the changes and new structure were explained to him and he was informed that Mr Entwistle intended a review of technology across the BBC because he considered that the relationship between technology and creative was not right. It was common ground that the Claimant was not happy about the proposed changes although he was firmly assured that it had nothing to do with him personally, nor his performance in role. Nevertheless, it was clear from the conversations that both Mr Entwistle and Ms Adams envisaged that the Claimant may decide to leave as a result of these changes and Mr Entwistle said that, if the Claimant so decided, he would give as much support as he could in securing a disengagement that was as generous and elegant as it could be, explaining that he meant by that that this was 'not about throwing him to the wolves, it was about ensuring it works in as decent a way as possible'. The Claimant undertook to consider the matter during his two week holiday. He also raised with Ms Adams and Mr Entwistle the fact that an ex-colleague in the US had emailed him saying that he had been approached by an Executive Recruiter for the position of CTO at the BBC. Mr Entwistle said that this was a complete mystery to him as he had not spoken to anyone about the CTO role and Ms Adams sought to know the identity of the Recruiter. In answer to the Claimant's inquiry about the possibility of applying for the Director of Operations role, Mr Entwistle stated that he there was someone specific whom he intended to put into that role. The Claimant was also assured separately, on 12 September, by Ms Thomson and by Mr Mike Lynch, non-executive director, and by Ms Patel on 13 September, that the changes were not in any way a reflection on his performance in role and that his reputation across the BBC was excellent.

33 The Claimant, on 3 October, wrote to Mr Entwistle and Ms Adams, stating that he was very surprised and disappointed that his status was being reduced in the reorganisation and stating that the change represented a demotion in

reporting level and standing for him and was therefore potentially detrimental to his future career prospects. These concerns he wished to be placed on record. However, he confirmed his strong sense of commitment to the organisation and that he felt he had much to offer the BBC going forward. Mr Coles stated in evidence that he 'would not have been surprised' had the Claimant left the BBC at this stage, in the light of his disappointment at reporting in to the lower position of Mr Coles, who was not on the Executive Board. Mr Entwistle wrote a reply to the Claimant on 10 October explaining his intended smaller more focused management board but assuring the Claimant that his responsibilities remained exactly the same. He also addressed the Claimant's disappointment at being unable to apply for the Director of Operations role because, as Mr Entwistle said, he had made a direct appointment of his preferred candidate, namely Mr Coles. Mr Coles told the Tribunal in evidence that Mr Entwistle had been eager not to lose him from the BBC and feared he might be head-hunted away in the wake of his role in the successful delivery of the Olympic games. He had therefore offered him the role of Director of Operations.

34 Mr Coles had serious concerns about the viability of the DMI project and therefore, immediately upon his appointment, in consultation with Ms Patel, implemented a special measures group consisting of Peter O'Kane, Mr Coles himself, Mr Younge, the Claimant and Alice Webb. At the same time, sponsorship of the DMI project transferred away from technology and to the business, Patrick Younge becoming sponsor of the project and chair of the Steering Group. Ms Webb was also asked to lead the internal review instigated by Mr Coles, which was referred to as 'Pasadena' and which lasted from approximately October 2012 to March 2013. Pasadena was a root and branch review of exactly what the BBC needed in order to make, deliver, store and retrieve content in a fully digital production environment. It was to include a technical review of DMI which was commissioned from Accenture, an external organisation. The DMI Steering Group at its meeting on 4 October 2012 decided to pause all work on DMI except that relating to the Meta data archive and, in particular, requested that work on production tools cease at the end of the next release, when it was safe to pause the development of them. As usual, prior to each Steering Group meeting a Steering Pack was prepared and distributed to group members, updating them on latest developments and status. In this Steering Pack it was reported that production tools "has sufficient functionality for a viable production workflow and to derive some efficiency benefits for Vision". Also, that "production has identified candidate productions to start using production tools within the next two months". In the recommendations of the Steering Group meeting to be taken forward to the Finance Committee the request was to suspend use and development of production tools "due to unclear business direction". This recommended a "complete stop, no use in WIP".

35 On 5 October production tools Release 12 completed its first day of testing with no "show stoppers", ie major problems. The Executive Board Finance Committee endorsed the 'stop' recommendation and work on most parts of the DMI project was halted, other than on the Meta data archive data base. On 12 October, the Claimant sent an email to Mr Coles stating that one of the key reasons DMI was struggling was the same as with previous failed or delayed projects, namely "the BBC constantly changes its requirements". He continued; "first off, production wanted a custom editor so we built one, then they wanted to use Adobe Cottonwood, so we dropped the custom editor and integrated Adobe Cottonwood, then Premier Pro 6 came out and they decided they wanted that

instead of Cottonwood. We pointed out that it would be very expensive to change so they said they wanted a custom rough cutter instead, so we started building that. They then said they did not want production tools at all so we said we would stop building them at which point they said they wanted us to complete them but that they do not know if they would use them or not. The business does not speak with one voice and it changes its requirements all the time. We have to implement the new governance immediately where one person (Pat Younge,) becomes the single voice for the business.” Mr Coles sent the following reply: “Clarity. And convincing (although we also know there is another side to the story) ...“I am beginning to warm to the idea. We need a sponsor who will genuinely galvanise the business and I think Pat simply sees this as a poison chalice and will treat it as such. Alice could well be the person, but would she have the credibility and authority to bring the business with her?”

36 Ms Patel, who was copied into this chain of emails, then wrote: “I am with John on this one, as is Alice. I think getting together in our little group is going to be vital and I am wondering if I should chair the DMI Steering Group.” Mr Coles then replied; “Yes. Very good idea, but we should crack the question of sponsorship”.

37 On 8 November 2012 a DMI programme mid-term status report was produced, written by Catherine Smadja, Head of Special Projects, Policy and Strategy and Peter O’Kane, Director, Supplier Management and Service Assurance. It was produced for discussion and noting at the Finance Committee, updating it on the status of DMI as at 30 September 2012, and included the following:

(i) That the DMI programme is ‘not going according to plans and the business context has much changed since 2011 as a result of DQF, relocation decisions and external developments’.

(ii) That the DMI programme ‘has delivered key hardware infrastructure and developed software solutions which can support the future realisation of financial and non-financial benefits, for example the archive database being in live operation with 2,500 users’.

(iii) It noted that despite the fact that the programme was currently running ahead of itself on costs, with benefits lower than they should have been, “the rationale for pursuing the objectives of the programme remains very strong although subject to the Pasadena Internal Business Lead Review to ensure that what is delivered matches the changed requirements.” It envisaged that a new business case would be prepared following Pasadena.

(iv) The report stated that production tools had been deployed with some live production use but acknowledged that, ‘in general, the size of the technical challenge was greater than anticipated, project wide, and that the project had suffered from a lack of clear and consistent direction with respect to business requirements and priorities, that the business representatives were not empowered to make decisions on behalf of the whole production community and did not find it possible to impose standardised solutions on them, necessitating frequent reprioritisation of the requirements, added to which, delays in delivery had compounded the issue, as business needs had evolved over time and without a pan-BBC solution in place’.

The Claimant, as CTO, sponsored and approved this report to the Trust Finance Committee.

38 On 10 November, Mr Entwistle resigned as Director General and Tim Davie was appointed as Acting Director General.

39 On 19 November Mr Anthony Fry, a member of the BBC Trust and Chairman of the Trust Finance Committee, sent a letter to the Rt Hon Mrs Margaret Hodge MP, Chairman of the Public Accounts Committee at the House of Commons, updating her on the halted work on the DMI, because he had undertaken to do so when he had given evidence before the Public Accounts Committee the previous year. This previous hearing had followed a report by the National Audit Office following the bringing of the project back in-house. Mr Fry's letter stated that the project's future was being determined by a current review following a 'commitment' which had been given by the former Director General, who had planned to conduct his own technology review (the scope of which would have extended beyond DMI) and confirming that this timetable would continue under the acting director general. The letter set out that the benefits delivered to the project to 12 September were some £11 million lower than forecast and that the Trust had become increasingly concerned about some aspects of the project being behind schedule in terms of time, budget and anticipated benefits to the BBC. He continued; "once the future of the project has been determined we feel it is important in the interests of licence fee payers for the Trust to commission a value for money review focusing on the lessons learnt since the project was brought back in-house" and that the NAO would be the best place to undertake this follow up review. He ended by saying that he had previously told the committee that he was not content with the BBC's performance in delivering DMI and that he regretted to say that this was still the case.

40 On 18 November the Claimant sent a briefing email to Mr Davie, clearly having seen Mr Fry's letter to Mrs. Hodge MP, since he refers to it in the first line. He stated: "I feel there is a general assumption that the current situation is that technology has not delivered. The reality is very different." The Claimant then went on to set out in considerable detail his perspective on the history of the project, including achievements and the reasons for the current difficulties, notably that business requirements were unidentified and the lack of senior ownership from production/vision. He continued; "with Pasadena, there is finally senior ownership from Vision and until that single voice is there, the DMI will never be able to deliver". He ended by saying "the good news is that the production team still want DMI, in fact some would have gone live already with production tools as they stand'. This email to Mr Davie was up-beat in tone and appeared intent on counteracting the negativity which the Claimant clearly perceived to be the tone of Mr Fry's letter to Mrs Hodge MP. In evidence before this Tribunal, Mr Coles expressed his great surprise that he, as the Claimant's line manager, had not been aware of this letter before it was sent to Mr Davie.

41 On 23 November 2012 there was a final meeting of the DMI Steering Group which was then subsumed into the 'End to End Digital' project (E2E), chaired by Dominic Coles. The discussion notes that decisions made at that meeting were that the sponsorship of DMI passed from the Claimant to Pat Younge (although the Claimant disputes that Mr Younge ever took on that role) and that Alice Webb became Programme Director for DMI and E2E digital.

42 On 1 February 2013 the Respondent entered into a contract with Accenture to review DMI. The consultancy framework agreement stated that 'it is

intended to perform an independent review of the technology platform underpinning the DMI solution and provide an assessment of three key areas', although production tools were stated to be out of scope. The objective was 'to provide a research hypothesis outcome for the future of the DMI solution by assessing the current progress and alignment of the delivery versus the original requirements and industry best practice'. It also stated that interviews would be conducted with key personnel from the DMI team as well as stakeholders for the BBC Pasadena review and the review Steering Group, although it was envisaged that further deeper research may be required into certain of the potential hypotheses. The review was intended to take one month.

43 The Accenture research and investigation took place over the next few weeks. The Claimant was briefed by Accenture on its review during February and an interim report was produced on 1 March 2013, with the final report, running to 64 pages, being produced on 8 March. The executive summary of the final report stated: "The focus of this paper is on what assets exist today that have value or potential value to the BBC as it moves forward with its vision for end to end digital capability". It stated that; 'the technical solution has not moved in lockstep with the changing priorities, as between production and archiving priorities; that governance of the solution, including its scope requirements, ongoing design and delivery has lacked robustness, with the result that at present the solution is being used in a manner it was not originally designed for. For example, an over complexity in software for current use as compared with the intended, more complex and wide ranging, use originally envisaged'. The report did not directly address one of the original questions posed in its remit, namely, what is the current state of DMI compared with what the original vision intended, but instead expressly subsumed the response to this question into the responses to the other two original questions set as part of its terms of reference. The Claimant was not interviewed as part of the Accenture review, although Dan Webb the DMI Technical Director and Alice Webb were extensively interviewed, as was the DMI Lead Architect, a Lead Test person and also the Respondent's Head of Enterprise Systems, amongst many other people consulted and/or interviewed.

44 On 14 March the E2E Steering Group, attended by the Claimant and others, discussed the findings of the Accenture review. However no minutes from this meeting were before the Tribunal.

45 On 21 March 2013, during a conference telephone call between the Claimant, Ms Webb and Mr Villar about the proposed DMI write down of £24m, the Claimant states that he said that the write down was too high because the technology was working and could be used and therefore it was not appropriate to write off working technology. He contends that this was a protected disclosure in the statutory sense. The evidence of both Ms Webb and Mr Villar was that the Claimant had stated his opinion that he felt that the write down was too high on various occasions, but that there was nothing particularly notable or striking about this particular conversation and that it was merely the expression of one point of view amongst others.

46 On 3 April 2013 Tony Hall was appointed as Director General of the Respondent. On 23 April the E2E Digital Review Report came out, intended for

presentation to the Finance Committee and making the following recommendations for acceptance and approval:

- (1) that the original vision of DMI for a single integrated digital production tool set is no longer valid and, as such, that DMI production tools should be permanently stopped.
- (2) the principles of E2E digital, and specifically the need for a pan BBC digital archive remains compelling and should be the initial focus of the E2E digital programme.
- (3) the closure of the DMI programme, following completion of the archive stabilisation work in September 2013, and the transition of the archive database to 'business as usual'.
- (4) that it be noted that the forecast financial and non financial benefits will not be delivered by DMI prior to its close down.
- (5) that it be noted that the revised direction for E2E digital production, together with the findings of the independent technical review by Accenture, will necessitate a write down of assets held by the BBC of between £24.4m and £40.2m.

The Executive summary of this report was circulated, late on 23 April 2013, to a variety of people, including Mr Villar, Mr Coles, the Claimant and Mr Younge.

47 On the morning of 24 April, the Claimant replied to an e-mail circulated on the previous afternoon from James Purnell, Director of Strategy and Digital, who had written that the new Director General "wants to make a speech in June/July on how he wants to change the BBC and it occurred to him that he has a short window in which he could clear out any existing problems. This wasn't specifically about technology but if there are any technology projects that we are worried about, this would be a good opportunity to abandon and move on. Let me know if you have any candidates". The Claimant's reply, on the morning of 24 April was: "DMI is the one we have that is going to generate a write down of around 25% of the overall project cost. Alice Webb is driving the way forward and working with Finance on the write down. I expect Tony (Hall) will want to get this behind us asap".

48 Mr Coles on the following day sent an e-mail saying: "I find this e-mail most irresponsible". He told the Tribunal that he had felt it was irresponsible because the Claimant had not referred the question to himself, as his line manager, that the closure had not been signed off and that the Claimant was not an expert in finance and that it was a matter for the accountants at the highest level.

49 On 29 April 2013 the E2E Report and recommendations were duly presented at the Director General's Finance Committee Meeting and the future of DMI was discussed. The recommendations of the E2E were accepted, and the decision was taken to close DMI, in principle. Mr Coles told the Tribunal that, as

at all of the various briefing and discussion meetings which he attended at this period regarding DMI, he had spoken in support of the recommendations of the E2E review report, namely the closure of the project. The Claimant alleges that he made a protected disclosure at this meeting, in that he objected to the levels of the proposed write down.

50 On 8 May there was a Trust Finance Committee meeting, Chaired by Mr Fry. Lord Patten, Chairman of the BBC Trust, attended the meeting only for the Agenda Item concerning the DMI, item 43. Ms Patel was present as Chief Financial Officer. The notes of Agenda item 43 state that the Trustees discussed a briefing they had received the previous day on DMI, including a progress report on the Accenture review of the project and expressed their "profound concern at the planned write off of DMI assets prompted by the Accenture report. Following detailed discussion of possible courses of action, it was agreed that Mr Fry would write to the Director General to request confirmation that expenditure on all other technology-based (or technology-related) projects was being properly reported, scrutinised and controlled ... and to request that – when appropriate – he should advise the Trust as to who from the Executive he considers should be held responsible for the outcome of DMI. It was also agreed that Mr Fry should write to the Chair of the PAC to update her on the current position in relation to DMI and ... that Mr Fry would discuss the matter offline with the non-executive Chair of the Executive Audit Committee.... and that the Trustees would appoint an external consultant to review DMI and establish what went wrong in terms of project control and reporting, what lessons could be learned for other projects."

51 The Tribunal had before it a chain of email correspondence between Mr Coles and Mr Younge after 10pm that same evening discussing what a 'rough day' it had been. Mr Coles wrote that the Trust had given Zarin (Patel) a 'horrid time' and were "threatening to go public early next week, so press office now want me and Tony (Hall) to front TV outlets early next week to pre-empt. Sounds like a potentially George (Entwistle) moment for me – what do you think?" Mr Younge replied: "Honest view – harsh maybe, but realpolitik. Zarin is history. It maybe harsh if it falls at her door, but Anne Bulford (Managing Director, Finance and Operations) is already the clean broom. Linwood can be in her sights. You position yourself as the man who took it over, reviewed it and called time. For others to explain how it got off track, but you are clean broom." Mr Coles replied: "I agree with most of that. Linwood reports to me. It should be my decision on him." He also referred to "the risk I become very much the messenger who is shot" and in a later email "I do all Anne's dirty work. And take the shit." Mr Younge's replies included: "Linwood can just spin in the wind for now. The rest, depends how the comms (communications) work." And "Hall is fireproof. Trust, esp Diane (Coyle) and Richard Eyre very impressed by your non-accounting approach to real cost. You're fireproof on this, just need to ensure you're set up properly (clean broom) and you have a succinct narrative for the period that preceeds u" (sic) Mr Coles had sent an email earlier that afternoon to Ms Patel, Mr Villar, Robin Holmes, head of Finance and Business and Beverley Tew, Group Finance Director, regarding what Ms Patel described as "another nasty meeting with TFC today", saying "On the comms, we are pulling a crack team together, which will coordinate messaging with all stakeholders."

52 On the 9 May, Mr Villar sent a draft of the Executive Board paper to Ms Patel for approval, proposing a write down of between £24.4m and £40m in

respect of DMI. On 10 May Simon Burke, a Non Executive Director and Chair of the Audit Committee, e-mailed to Ms Patel stating that the Executive Board paper would not satisfy either the Audit Committee or the Trust Finance Committee in that, in particular, the language of the paper did not acknowledge the gravity of what had happened and was out of step with the thinking of external parties; that it was still not clear how exactly, after everyone was on notice from 2010 onwards that this project was at risk, they had managed to get to the position of a near total write off without clearer early warning; that there was a hint that more expenditure may be required to get the salvageable bits working properly and that this needed to be quantified; that himself and Anthony were currently of the view that everything should be written off; and that the description of the E2E project now proposed was opaque and that there was little chance that they would support any new initiative unless they can really grasp what is proposed, what the benefits will be and the risks; and ending: "I certainly will struggle to support what is set out in the paper".

53 On 13 May 2013 the Executive Board discussed the E2E paper on the future of DMI which presented a 'fundamentally different' and much less ambitious, a more industry-standardised and less bespoke vision as the way forward. Mr Coles stated that it was he, as chair of the special measures group, who had presented to the meeting this final E2E digital review report, written by himself and Ms Webb, with its recommendations of closure and write down. Those present included Tony Hall, the Director General, Lucy Adams, Director of HR, Ms Patel, James Purnell, Simon Burke and three other Non Executive Directors together with the directors of Radio, Television and News as well as the Director of Future Media. The Executive Board expressed some surprise that there hadn't appeared to be an early warning system to alert it to the scale of the issue or, if there had been, that it had failed. The Board also highlighted its own collective failure in recognising the severity of the issues in reports it had received and acknowledged the large size and complexity of the project. It was acknowledged that the conclusions of the independent review of the project did not make comfortable reading and that the project had been on the watch list since 2011.

54 In the 5 and a half pages of manuscript notes of the DMI discussion which were before the Tribunal, inter alia; Mr Davie appeared to say that the BBC "has not been the best customer as well as technologists on the other side etc." "BBC engrained in asking for bespoke solutions, cultural, part of the strategy, need to move away from bespoke solutions". One of the Executive Directors said: "Need to be clear if Trust actually discovered this. Be clear what we found, what we are doing and money etc, collective responsibility". Mr Purnell set out the Trust's position and its desire to announce a full inquiry. There was discussion of 'who feels responsible, too many Boards', governance and lack of engagement with technology. The Senior non-executive director expressed worry as 'it had happened on our watch' and what needed to change.

55 The Tribunal also had before it a one page typed-up summary of the discussion on DMI which took place at the Executive Board, provided by the Respondent. There was no reference whatever to the Claimant, whether by name or role, in either the manuscript notes or the typed summary of the DMI discussion.

56 Mr Coles told the Tribunal in evidence that it had been a very long meeting and that the DMI discussion had lasted about 2 hours. He said that there had been 'a little discussion' about the Claimant; that lack of collaboration was key and the Claimant was primarily responsible; that loss of confidence in the Claimant was because of the Executive Board's shock that 'we had got into this position'. Mr Coles, in his witness statement, stated that the consistent view from the members of the board was that lack of collaboration on DMI had been one of its key failings and Board members considered that "Mr Linwood was likely to have been primarily responsible for this". Mr Coles' witness statement also stated that the Claimant's involvement was discussed briefly as part of the wider discussions, particularly in relation to lessons which must be learned from the failure of the project, in particular the need for collaborative leadership at the top of the technology division. He acknowledged in cross examination that there was no mention whatever of the Claimant in either the manuscript or the typed up notes of the meeting which were before the Tribunal and was unable to explain why none of the content contained in his own evidence was present in the notes of the meeting, whether in manuscript or typed up form.

57 Mr Coles' statement of evidence also asserted that he was not directed at any time to commence disciplinary action against Mr Linwood. However he also stated that "following this meeting Ms Patel and I took stock of the discussion that had taken place and the fact that it appeared to us that the Executive Board had lost confidence in Mr Linwood's ability to act as the BBC CTO and continue to run the BBC's technology division". Mr Coles view was that the Claimant had 'a case to answer' in relation to DMI. After the meeting Mr Coles said that he and Ms Patel agreed that he would talk to Richard Burdon, HR Director, about the next appropriate course of action, given his view that Mr Linwood had a case to answer in relation to DMI, and he got in touch with Mr Burdon on 13 May and agreed that they would have an initial meeting with the Claimant at which they would explain the concerns of the Executive Board, following the conclusion that DMI would close, and let the Claimant know that a disciplinary process would be started. He also discussed the potential need to suspend Mr Linwood at about the same time but stated in his witness statement that it was his hope that Mr Linwood could continue working and reporting to him after the process had started.

58 At 10.41pm on 13 May, Mr Coles e-mailed to Mr Burdon 'regarding today': "Have you that script for me yet? Need to rehearse! Our big risk is it leaks, so we need to be ready as early as possible tomorrow". At 7.30am on 14 May Mr Burdon replied by e-mail: "Dominic, less is best, I recommend, assuming we have next week available we follow this": There then followed a proposed script for Mr Coles' opening of the intended meeting with the Claimant on the same day including: "It is clear that you as CTO have a case to answer on why we have spent £Xm with no discernable technology benefit ... I have been asked to start formal disciplinary procedures to ensure any accountability is identified and appropriate disciplinary action is taken. For both you and I, I want to ensure this process is completed quickly and provides you with a fair opportunity to put your case". Then Mr Burdon proposed his own script as follows: "John, what this means is that we will be holding a formal disciplinary meeting early next week. This will be your opportunity to put forward your case. We will provide you with the DMI review report and a written summary of the reasons for the interview. I should point out that there could be a range of outcomes depending on the

interview and this ranges from no action to take, to formal disciplinary action, and this could mean summary dismissal". Mr Burdon's script then proposed that Mr Coles conclude the meeting by saying: "You can see this is being taken extremely seriously and I am determined to ensure the process and any outcome are fair. However, it is clear that the project has failed and where that failure is the responsibility of an individual, appropriate action is taken".

59 On the morning of 14 May, Mr Coles asked to see the Claimant and the Claimant found him and Mr Burdon together and, as Mr Burdon put it in evidence before this Tribunal: "We hit him cold", in the sense that the Claimant had no prior idea what the subject matter of the meeting was. There was some dispute between the parties as to the content of this meeting. However, it was agreed that the Claimant was told by Mr Coles that they wanted to talk to him about DMI; that there had been an Executive Board meeting the day before and that it was 'very clear that the Executive Board have lost confidence in you as CTO'. The Claimant states that he was then told that he could resign or go through a disciplinary process and face dismissal. Both Mr Coles and Mr Burdon deny that they put this stark ultimatum to the Claimant or that they ever used the words 'dismissal' or 'disciplinary'. Both sides agree that the Claimant said that it was not his fault and that "this is a stitch-up. I was demoted by George (Entwistle), I've not had access to management board or the Exec Board and now they are trying to pin this on me." Mr Coles replied "no-one is trying to stitch you up, this is a massive failure and as your line manager I expect you to take responsibility for this." The Claimant contends that it was quite clear to him from everything that was said at the meeting that the decision had already been taken that he would be leaving the Respondent.

60 The Tribunal had before it the Respondent's notes of the meeting, which the Claimant disputes in some measure. These notes show that the Claimant was told by Mr Coles at the outset, before he had said anything, that he had had 'a difficult couple of days; that both BBC Trust and Exec have gone through the review of DMI. Huge impact, terrible project and waste of licence fee payers' money; that both the Trust and Exec would be instigating a review into what went wrong, how this could have happened. The whole governance process and decision making will be reviewed. Also very clear that the Executive Board have lost confidence in you as CTO'. The Claimant replied that that was not fair, that he hadn't done anything wrong. After the third time that the Claimant was told that the Executive Board had lost confidence in him, he asked "well what other options are there", to which Mr Burdon replied: "you could resign," adding later that the Claimant should "reflect on this overnight and let us know which option you wish to take". However, the Respondent's notes show that Mr Burdon was the first to use the word 'option'.

61 After careful consideration of the evidence before it, the Tribunal concluded that it found the Claimant's version of what was said during this meeting more credible, for the following reasons;

- (i) the 'proposed script' e-mail from Mr Burdon to Mr Coles at 7.30am on the 14 May (referred to in paragraph 58 of these Reasons) clearly stated that Mr Coles would be saying to the Claimant that he had 'been asked to start formal disciplinary procedures', that both of them would mention

'disciplinary action' and that Mr Burdon would warn of the possibility of 'summary dismissal'. There was no evidence that this intended 'script' had been altered between 7.30 in the morning and the start time of the meeting, something around 10.00 o'clock.

- (ii) the Claimant wrote to Mr Coles, later that day, objecting to his treatment at that meeting, including an assertion that he was offered the ultimatum of resigning or facing a disciplinary process and dismissal. Mr Coles' letter of reply the following day, addressing the issue of disciplinary proceedings, simply assured the Claimant that no decision had been taken as regards the allegations being put to him, but did not deny the Claimant's assertion that the ultimatum of resign or face disciplinary action had been put to him. The Tribunal did not find credible Mr Coles' attempts to explain this failure of denial, in his cross examination. He firstly said that it was 'impliedly denied' in his reply letter because it stated that the dismissal was not prejudged and, when pressed, stated that he could not explain why we did not go further in denying the Claimant's assertion.
- (iii) It was clear that the Respondent's notes of the meeting were, at the very least, not a full note and had omissions. Even on the basis of the Respondent's own note: "We'll write to you outlining *the case* and give you *the chance to respond*. If this is the option you wish to take. However, it is clear the Executive have lost confidence in you". The wording of this passage alone indicates at the very least a disciplinary route. (Italics supplied).

62 It was common ground that both Mr Coles and Mr Burdon were very surprised at the Claimant's rejection of his responsibility for the failure of the project and that they both clearly expected him to offer his resignation, in accordance with what appeared to the Tribunal to be the Respondent's common cultural expectation, gleaned from the meeting notes themselves and from phrases regularly used by the Respondent's witnesses, relating to catastrophic failures or crisis happenings "on your watch" and also "ministerial responsibility". Mr Burdon stated that he thought that the Claimant might think better of it and change his mind overnight.

63 Later that day there was some discussion between Mr Burdon and Mr Coles, initiated by Mr Coles, about the possibility of suspending the Claimant during the process and also regarding whether certain meetings or events which the Claimant was supposed to be hosting ought to be cancelled and whether he should be offered HR support, should he need it.

64 Later on the same day, 14 May, the Claimant and Mr Coles wrote to each other, but the letters were independent of each other and crossed. Mr Coles' letter invited the Claimant to a formal disciplinary meeting either on Thursday 16 or Friday 17 May; that is before the end of the same week, informing him that he had the right to be accompanied and setting out the following allegations:

- (1) as CTO, and project sponsor of DMI, you have failed to deliver the requirements of the project;

- (2) you have been responsible for £94m of expenditure which has delivered little value to the BBC;
- (3) you have consistently failed to put in place actions to stop the continued spending of the project budget even though you were aware the project would not deliver; and
- (4) you continue to fail to take any responsibility for this failure, in full or in part.

65 The letter continued; that “these actions or lack of appropriate action amount to serious negligence and/or gross dereliction of duty. These are serious allegations which, if upheld, could amount to gross misconduct. Further and/or in the alternative, there may be a finding that there is a serious breach of confidence and/or a break down of trust and confidence in your continuing as CTO and/or as a senior manager at the BBC”. The letter continued: “If any of the above are upheld, an outcome of the disciplinary meeting would be disciplinary action and may result in dismissal, including summary dismissal, if I judge the above to constitute gross misconduct”.

66 The Claimant's letter, crossing with the above, stated that it had been indicated at the meeting that “a decision has been taken to ditch the digital media initiative project and that I could, as a result, choose to resign or face a disciplinary process and dismissal”. He objected that this was plainly procedurally unfair, to take a decision to dismiss without giving any warning or opportunity to comment, and substantively unfair where he had done nothing which could amount to misconduct or give rise to the loss of confidence. He continued that Accenture had recommended that the project should continue, that there had been no failure, simply a strategic change of direction which could not be laid at his door. He expressed a real fear that “you want to find a fall guy” and that my name will be publicly linked to the decision to abandon the project and that my reputation will be seriously damaged as a result, causing serious damage and real distress. He then asserted that the Respondent owed him a duty of confidentiality and trust and requested that under **Section 10 of the Data Protection Act 1998**, the BBC ensure that no data about himself was processed which linked him in any way to the DMI project or the decision to abandon it or the related write off or which referred to his proposed dismissal or any disciplinary proceedings, because of the potential, substantial damage and distress which this would cause. He denied having been the cause of any failure or done anything to justify the accusations against him and “in the meantime I await the threatened disciplinary letter and the unrolling of the sham and pre-determined disciplinary process”. The Claimant contends that this is a protected disclosure for statutory purposes.

67 It appeared to the Tribunal that there were three parallel processes going on in the Respondent organisation on 14 May in relation to the events involving the Claimant. Firstly, the gathering of potentially negative material about the Claimant from 2011 and 2012, for example on “various bits of temper losing by Linwood” and in relation to the readiness or otherwise of various phases of DMI; this being gathered by Mr Younge and forwarded to Mr Coles who replied with such words as “indeed” and in another e-mail; “telling” and in another; “more”,

when he forwarded them to Ms Webb. It was clear on the evidence that this search for old material had been discussed and co-ordinated by those involved and that about half a dozen pieces of e-mail evidence had been gathered thereby and that Mr Younge was conducting the trawl through material whilst Mr Coles appeared to be the orchestrator and co-ordinator of the process, which appeared to the Tribunal to be intended to unearth as much dirt on the Claimant as could be found, although in the event surprisingly little was found, and nothing of any real substance, considering that the Claimant had been in a senior management position across many projects across the organisation for a period of over 4 years.

68 The second parallel activity was on-going discussions about how the latest events should be handled in terms of publicity involving both internal and external communications ("comms"), including as to timing, given the perceived delicacy of the situation and the constant fear of "leaks". The Tribunal was told by various witnesses that the BBC is a 'very leaky' organisation.

69 The third ongoing activity was discussion about the Claimant's interim replacement and whether this should be an internal candidate. Mr Coles' email to Mr Burdon on the afternoon of 14 May included "shall we take a view later today as to whether he's likely to come in at all, in which case we may need to formally suspend him?" Mr Coles' view was that an external interim appointment should be avoided. The Tribunal noted in this regard an e-mail to Mr Coles from an old friend who was a recruitment consultant, on 13 May saying that it was 'very good to see him on Saturday night', i.e. 10 May, and 'further to our conversation' he set out examples of persons who had been placed by his recruitment organisation including a list of nine specific interim CTO appointments. Mr Coles told the Tribunal that the meeting had been entirely unexpected at a party on the Saturday night.

70 At 8.43am on 15 May, as part of an e-mail chain about the intended technical away day the following day, Ms Lucy Adams, Director of HR stated: "It has been cancelled because of JL" (i.e. the Claimant). The other person replied that the Claimant's office knew nothing about the cancellation, to which Ms Adam's e-mail replied: "Ah, that's because they don't know he's been fired yet. Richard (Burdon) was going to speak to his office today".

71 On the morning of the 15 May, the Claimant attended work as usual and requested the Respondent's disciplinary and dismissal policies and procedures, which were duly sent to him. So far as material, these policies contain the following provisions:

- (1) "Our aim during an investigation or dismissal or disciplinary procedure is to deal with matters sensitively and with due respect for the privacy of any individuals involved. ...
- (2) An investigation will take place in order to establish the facts and a disciplinary meeting will follow if the investigation finds that there is a case to answer. Investigative interviews are solely for the purpose of fact finding and no decision on disciplinary action will be taken until after a disciplinary meeting has been held. The amount of investigation required

will depend on the nature of the allegations and will vary from case to case. ...

- (3) The BBC reserves the right to suspend you on full pay and contractual benefits for such time as it deems necessary to carry out an investigation and where appropriate to hold a disciplinary hearing.”

72 Later that day, the Claimant sent an e-mail to Mr Coles and Mr Burdon saying: “Further to the letter sent the previous evening, would you please confirm that the BBC will not link my name in the public domain to any announcement regarding the DMI write down. There does not appear to have been a reply to this”.

73 Later on the same day, 15 May, the Claimant e-mailed a letter to Mr Coles and Mr Burdon responding to the disciplinary letter received the previous day, requesting an adjournment because ‘one day is insufficient time to prepare for a hearing to take place tomorrow’ and, in particular, as he had a half day holiday booked for Friday. The Claimant also sought a variety of documents detailing any investigation into his alleged serious gross misconduct and any findings or recommendations arising from such investigation; all documentation upon which the BBC was relying in relation to the allegations against him and stating that the allegations were so broad and so wide ranging that he needed more detail about the specifics of the allegations, and then setting out a list of the detailed specific material which he required. He also requested copies of his appraisals, the requirements of the project, the minutes of all Steering Group meetings, submissions to the Finance Committee regarding DMI, reports to the PMO, the Accenture report and Minutes of the Finance Committee relating to the project and seeking assurances that he would be given adequate time to consider all of the material and prepare himself for a disciplinary hearing “bearing in mind the gravity of the allegations made against me and the ruinous, financial and reputational consequences of a decision to dismiss me on these grounds”.

74 He ended the letter by saying “I fully understand that the BBC has decided not to proceed with this project because its needs have changed, but that does not mean that we have not, and could not, deliver on the project as it was originally conceived. The real scandal here is that the BBC is writing off large amounts of delivered and working technology such as the production tools that could be used. ... The BBC is throwing out value that could have been used in writing off all of the technology, including the archive media store, much of which had been developed”. He stated that suggesting that he had been derelict in his duty or grossly negligent or that his actions amounted to gross misconduct was wholly misconceived. The Claimant asserts that this letter constitutes a protected disclosure for statutory purposes. Mr Coles forwarded this letter, later that afternoon, to Ms Patel and Ms Lucy Adams.

75 Later that day Mr Coles replied to the Claimant’s letter stating that he “recognised the gravity of the allegations and the importance of giving you time to respond to them. However, in your role as CTO and sponsor of the DMI project, much of the subject matter is not new to you”. “In the light of the seriousness, I believe that it is imperative that we meet this week to commence this process. We have scheduled a meeting at either 5.30 tomorrow or on Friday. The 12.00

noon meeting can be rescheduled to 10.00am to accommodate your half day's leave". He stated that he did not envisage completing the disciplinary meeting this week and added: "As regards documents you have collated so far, and to which you wish to refer at our meeting, please either send these to me before or bring them to the meeting". Mr Coles did not appear to address the Claimant's requests for documents in this letter.

76 At 6.29pm on 15 May, the Claimant's solicitor sent an e-mailed letter to Mr Coles. This letter refuted in the strongest terms the allegations made against the Claimant and warned, also in the strongest terms, against the BBC making any public suggestion or implied criticism of the Claimant in relation to the project which, it was asserted, would be libellous/defamatory and a breach of all of the Claimant's rights. An undertaking was sought in that regard.

77 On 16 May the Claimant wrote to Mr Coles citing the Respondent's disciplinary policy and saying that he had had insufficient time to prepare and was not able to attend at all on Friday. He stated that the person who would be his chosen companion would be Mr Peter O'Kane, who was out of the office until the following Tuesday morning. He therefore sought a rescheduling of the meeting to Wednesday 22 May. He also reiterated his need for the clarification which he had already requested and any documents upon which the Respondent was relying, by the end of the week, 'so that I can prepare properly'.

78 The Tribunal had before it an e-mail of the morning of the 16 May from Mr Coles to a variety of people including, primarily, James Purnell, regarding who should be the 'front man' for any public announcements relating to DMI and saying that it should not be himself because "putting up a Mr Nobody and moreover a Mr Nobody who was never involved in DMI so can't even act as the fall guy, will not in my opinion be effective. However, I am of course happy to do the background briefings with the press as they follow up". "On JL (the Claimant) the process is ongoing and is constrained by lawyers on both sides. We are trying to fast track the process but all permutations remain possible for Tuesday, including suspension pending formal disciplinary action but, to be clear, hopeful to avoid that".

79 On 17 May, a paper was circulated to the Executive Board seeking approval to close DMI. Also on 17 May Mr Burdon called the Claimant at about 12.30 and asked him to come to a meeting at 1.15 where he would just "outline the process", adding that he could have a witness present. However, Mr O'Kane was not available and the Claimant attended the meeting alone. Mr Burdon told the Claimant that, given the seniority and sensitivity of his position, the Respondent had decided it was appropriate to suspend him with immediate effect pending completion of the disciplinary process and that this was a precautionary and not a disciplinary measure. He gave the Claimant a letter confirming his suspension and rescheduling the disciplinary meeting until 23 May. This letter was signed by Mr Coles. The Claimant was informed by Mr Burdon that he was to be taken off the e-mail system and that he would have to make document requests through himself. The Claimant said that Mr Burdon told him that he was being suspended because his mind would be on the disciplinary process and he would not be able to fully discharge his duties as CTO. The Claimant wanted to remain at work and made it clear that he was unhappy at his suspension and that

being blocked from the system would make it harder for him to prepare his rebuttal.

80 Also on 17 May, Mr Burke, Non Executive Director, e-mailed the Executive Board reiterating that he favoured a 100% write down of the value of DMI. Mr Burdon liaised with the Claimant regarding the provision of documents requested by him between 18 and 26 May and on 22 May the Claimant requested more documents. The Claimant regularly re-requested documents which he had not received and which he required, some of which were provided and some of which were not provided, in accordance with explanations supplied by Mr Burdon.

81 On 19 May, in the context of public communications, Mr Purnell sent an internal e-mail including the following: "I suggest a much more forthright blog without excuses and which goes straight to the mistakes, costs, action and apology. We need a clear line on JL (the Claimant) whether he is resigning or being fired, and why. We need to understand the £7.5m ... we need a clear line or a holding line on whether the Trust have been misled. ... What media are you anticipating me doing on this?"

82 The discussions regarding write down continued and on 21 May the Executive Board met by telephone and confirmed an increase of the anticipated write down to £51.8m. On 22 May, Price Waterhouse Cooper was appointed by the BBC Trust to undertake a review of DMI, with a focus on governance, reporting and controls. On the same day, the Claimant received an e-mail from a colleague working for Siemens in Australia saying: "Oh dear, have you been sacked! Well there is so much more to come out about your handling of DMI, let's wait and see, shall we".

83 The Claimant's solicitor, by letter of 20 May, had objected in considerable detail to the Claimant's suspension and the disciplinary process thus far and stated that Mr Coles was an inappropriate person to hear the disciplinary since the decision not to continue with DMI had been taken following a recommendation by himself and Alice Webb and Mr Coles therefore was instrumental in the case being levelled against the Claimant and, given that Mr Coles had already told the Claimant that he had a choice between resigning and facing a disciplinary process and dismissal, it was clear that his mind was already made up and the outcome pre-determined and that the Claimant was the scapegoat. Mr Coles however, maintained his position that he, as the Claimant's line manager, was the most appropriate person to be chairing the disciplinary.

84 On 23 May, therefore, Mr Coles proceeded to conduct an investigatory interview with Alice Webb because, as Mr Burdon stated, they had wanted to speak to her because she had led a review of DMI in late 2012/early 2013 and wanted to learn more about DMI and the Claimant's role, in advance of the disciplinary hearing. Inter alia her evidence to Mr Coles was that the project was cumulatively flawed in various ways; set-up, little collaboration, no alignment of Executive engagement, business engagement and technology delivery. "John (the Claimant) did loads of good things. He values the BBC and what we do and drives delivery. He's passionate about the BBC and sorting out problems, eg Project Dolby. He's very solutions focussed and champions things. He doesn't disrespect people and has delivered but he either didn't spot the problem with

DMI or didn't do enough about it". ... "I don't think he listened to the issues ... he'd say 'we just need to get people using the technology and everything will be ok'. With North, the Olympics, W1 – the business and technology were completely aligned, with DMI they weren't. There was always an assurance that 'It'll come tomorrow'. I don't believe John knew the detail of what was being built – it was too big, but all roads led to John." On the question of accountability: "The business did not hold up their side of the partnership but that doesn't mean you carry on...you hold up the red flag ...I don't believe the project was set up well and that wasn't John's responsibility at the outset, but fundamental things were missed, delays in delivery, not meeting the requirements and concerns raised not taken seriously enough ...I did not see John raise fundamental issues with DMI ...he carried on spending money when conditions were not right ..."

85 On 24 May, the Respondent publicly announced the termination of DMI and internally announced the Claimant's suspension and the closure of the project. Mr Fry wrote to the Rt Hon Mrs Margaret Hodge MP, informing her of the decision to close DMI and that "an individual has been suspended." In the predictable media frenzy of enquiry which ensued, the Respondent on BBC Radio 4 Lunchtime News, News at 10 and other communications to the press, stated that the person who had been suspended was the Claimant. On the BBC News Online website at 11.05 on 25 May, a news item was put out headlined 'BBC Abandoned £100 Million Digital Project'. This contained quotes from Tony Hall, the DG, that the DMI project "has wasted a huge amount of licence fee payer's money ... I have serious concerns about how we managed this project ... ambitious technology projects like this always carry a risk of failure. It does not mean that we should not attempt them but we have a responsibility to keep them under much greater control than we did here". The news item continued that Anthony Fry had written to Mrs Margaret Hodge MP, revealing that the project had generated little or no assets and continuing; "it is of utmost concern to us that a project which had already failed to deliver value for money in its early stages has now spent so much more of licence fee payer's money. We intend to act quickly to ensure that there can be no repeat of a failure on this scale"; the news item continued "...the Corporation said the initiative had been badly managed and outpaced by the change in technology and that to carry on would simply be throwing good money after bad. ... John Linwood the BBC's CTO has been suspended."

86 Predictably, there was seismic fall out and widespread press coverage of all of these matters with extremely negative press comment and hostile comment on social media about the Claimant and the BBC. The Claimant sought permission to make a reactive press statement, since the terms of his contract precluded him from speaking to the press without his line manager's permission, but he received no answer. Instead Mr Burdon offered him the services of a press officer in making any press announcements. The Claimant stated that his suspension and its publication caused him enormous personal distress and reputational damage and was very traumatic for himself and his whole family.

87 On 24 May the Director General sent an internal email to staff about DMI, including his serious concerns about how the project had been managed ... what lessons can be learned ... and "we will be taking appropriate action, disciplinary or otherwise". The Claimant's suspension was announced internally and Mr Peter Coles was appointed as acting CTO, in the light of the Claimant's suspension. On 28 May the offer of a senior technology post, for which the

Claimant had been lined up at another organisation, was withdrawn, in the light of the adverse publicity. Also on 28 May Mr Burdon sought the assistance of Mr Pascazio and Ms Helen Rees, Chief of Staff to Mr Coles, in gathering together the documents requested by the Claimant, including documentation supporting any allegation 'that the completed technology does not work'. Ms Rees' reply to Mr Burdon on the same day, attaching a variety of documents, included the following: "Note to RB (for deletion): Chris Dolder has provided me with some pointers here, but requires further discussion due to the terminology of 'does not work' – it's not black and white unfortunately." It was clear on all of the evidence that Mr Burdon sent only selected documents to the Claimant, amongst those available at that time and requested by him. The Tribunal found Mr Burdon's evidence on this issue both evasive and less than credible, given his 20 year career in HR. When pressed, he told the Tribunal "I didn't think it was necessary or appropriate to send them to him." He did not suggest that they were not relevant and they were apparently all, in fact, sent at a later stage. Further, the use of the word "unfortunately", off the record, tended to suggest to the Tribunal a mindset behind the scenes betraying, at the very least, a lack of impartiality as to outcome.

88 On 29 May, the Claimant wrote to Mr Burdon thanking him for certain documents which he had received but still seeking the clarification of the allegations which he needed in order to respond properly. He listed further documents which he needed and again requested that Mr Coles should not hear the disciplinary proceedings since, given Mr Coles' implication in events so far, he did not believe that the hearing would be a fair one. On 31 May, the Claimant was informed that Clare Dyer as a senior manager outside the division had been appointed as disciplinary chair person. She was given express authority by the Executive Board to act with full independence in her role. The Claimant had considerable reservations about Mrs Dyer because she was not a technologist, had no experience of large technology projects and little knowledge of DMI and was not senior enough, since she reported to Lucy Adams who was on the Executive Board, and was, as he believed, of a junior grade to himself. Mrs Dyer was supported throughout the disciplinary process by Mr Nick Pascazio from HR. Mr Burdon told the Tribunal that he was Mr Pascazio's line manager and that there had been hand over discussions and that Mr Pascazio was privy to his thinking.

89 On 3 June, the Claimant, accompanied by Mr O'Kane, attended an initial disciplinary meeting with Mrs Dyer. Mrs Dyer opened the meeting by stating that she wanted an understanding of the situation before any further investigation. She stated that she would not be making reference to any documents but confirmed that the four areas of her focus were governance, management, leadership and delivery and that they would not be going into the details of the project itself. The Claimant began by objecting to his suspension and that Mrs Dyer rather than someone more senior from the Executive Board was hearing the matter, whereupon Mrs Dyer explained that she had the full authority of the Executive Board. Mr Pascazio confirmed the four allegations as set out in the original disciplinary letter and the Claimant submitted a detailed response to the allegations against him in the form of a 27 page statement, a copy of which he handed over at the meeting. He also read from this document at various times throughout the meeting. Mrs Dyer acknowledged that the other projects which the Claimant had delivered had done well, but stated that she would be focusing on his role and decisions in relation to the DMI project. The Claimant's essential

contentions were: that accountability lay with the Executive Board sponsor; that there had been robust governance for the project; that he personally did not have authority to stop the project at any time; that he was not responsible for the 'requirements', because as each phase was delivered the requirements team were gathering the next phase of requirements; that the Steering Group had been the forum for very open and robust discussions; that there had been a fundamental change in direction by the business in the last six months; that the project had built a solution based on one premise which had now changed to a different vision. The Claimant also explained that since October 2012 he had not been responsible for the project work. The Claimant also stated that progress had continued to be made at all times, despite the major issues with the business and that he had told Caroline Thomson in May 2012 that it was imperative that Vision engage. The meeting ended with Mrs Dyer saying that she wanted to look into everything in a fair and diligent way and would not be discounting the fact that the Claimant had had good performance reviews, and he asserted that he had never received any negative feedback during his career at the BBC on any matter, including DMI.

90 The Claimant stated in evidence that as he left the building, he met John Tate, Head of Strategy (who reported to James Purnell, Director of Strategy) who asked how things were. When the Claimant said 'pretty rough', Mr Tate said "Of course it's a stitch up, but you must have seen this coming". The Claimant said that he had not, to which Mr Tate replied "I hope you've got a good lawyer, you've got them frightened".

91 On 4 June, the Claimant sent a letter to Mrs Dyer in which he wrote "At the meeting yesterday you confirmed that the BBC made the allegations against me without having conducted any prior investigation and that I am the only person who has been spoken to in connection with the DMI project. This goes to highlight the lack of justification for the BBC's actions against me. I have already expressed my view that the suspension was a contrivance and I have given you extensive evidence which shows that the allegations are without any substantive foundation and that a disciplinary process is misconceived." He therefore went on to request an explanation for his continued suspension, where there had been no prior investigation, and asked the length of time for which he would continue to be suspended, because he wish to resume his duties. Mrs Dyer replied on 7 June stating that suspension was a 'standard precautionary measure' as part of the disciplinary procedure and that, given the seriousness of the allegations, it was appropriate that the suspension continue pending its outcome.

92 On 5 June, Mrs Dyer interviewed Simon Higdon, Head of BBC Project Portfolio (BBC PMO). The Tribunal had before it notes of all of the meetings conducted by Ms Dyer at this time. Mr Higdon's evidence was broadly negative in relation to the DMI project, with particular emphasis on the relationship between the Claimant and the PMO team and their often frequent disagreements as to the red, amber, green status of various projects, including the DMI. Mrs Dyer questioned Mr Higdon by reference to certain paragraphs in the Claimant's Response statement and asked for his views on several of the Claimant's assertions. Whilst on occasion saying that the Claimant's view was not without foundation, his broad response was to disagree with the large majority of those points which were put to him by Mrs Dyer from the Claimant's statement.

93 On 6 June 2013, Mrs Dyer interviewed Mr Coles. At the outset she asked

Mr Coles if he could provide her with a brief summary of the Accenture report which 'makes it easy to understand and which will show the ways in which DMI is considered to have failed', since she had found it very complex and quite technical, and also if he could provide her with an 'outline of the key areas where he considered the Claimant to have failed'. Mr Coles duly sent about 10 pages of material in response, after the meeting, of which the Accenture report summary was one page. During their meeting, Mr Coles stated that "the Accenture report showed that the project was potentially flawed from top to bottom." He also said that the project had "morphed into an engine of its own destruction and had lost focus, direction and lost its purpose of delivering to the business needs and requirements." Mr Coles also stated that he did not believe that the business had changed its direction and that it was the role of the CTO to bridge the gap between technical expertise and business need. Mr Coles also opined that he thought that the Claimant asserting change of strategic direction was 'all that he could say, since he was refusing to accept responsibility'. This later supplementary information was in the form of answers to questions provided by Mrs Dyer, including a section which involved him giving responses to particular quotes and paragraph numbers from the Claimant's own Response statement, handed over at the 3 June meeting. At one point Mr Coles said that he did not recall the Claimant ever raising DMI at any meeting with him after he took over his new responsibilities. He went on to say "given John's apparent lack of concern regarding the health of the DMI project, I felt I could no longer rely on his judgment on the future delivery of DMI". At the end of the meeting Mrs Dyer thanked Mr Coles for his time and ended by saying that "a critical part of the investigation was obtaining the statements from Mr Coles himself, giving clear reasons why he considered John has failed and that the DMI project has failed." Mr Coles later forwarded to Mrs Dyer, with his supplementary information pack, a copy of Mr Entwistle's email to the Claimant dated 24 May 2012 referred to in paragraph 25 of these reasons. The Tribunal found that the evidence of Mr Coles, both orally at the meeting and in the supplementary information which he later supplied to Mrs Dyer, to be unrelentingly negatively biased and extremely damning in relation to the Claimant.

94 On 8 June, the Claimant was interviewed by Price Waterhouse Cooper in connection with their investigation. The Claimant stated that Yann Bonduelle, his interviewer, said that the DMI issues could not be down to one person and that BBC projects had a history of slipping behind schedule but that, given time, they usually delivered. On 10 June the Claimant and Mr Anthony Fry appeared before the Public Accounts Committee of the House of Commons.

95 On 11 June, Mrs Dyer interviewed Ms Patel and explained that she would be focusing on leadership, governance and delivery and specifically the role of the Claimant as CTO in relation to the DMI project. On 12 July, Mrs Dyer interviewed Alice Webb within the same parameters and in both interviews adopted a similar process of putting her questions to these witnesses by reference to specific paragraphs of the Claimant's Response statement and asking for their comments. The evidence of Ms Patel was largely negative in relation to the Claimant's points, as was that of Ms Webb who, however, gave a more nuanced view in certain respects. For example, in relation to the Claimant's leadership style, she said that he had delivered some really successful projects and his style had much to do with that, since he had real presence in a room but that this could make it difficult to put a point across to him. She accepted the Claimant's assessment that he spent only 5% of his time

on the project as being probably factually true, although rather surprising, given the large flagship nature of the DMI. She acknowledged that the business did drift off and she laid the responsibility for the project at the feet of the Claimant.

96 On 14 June 2013, the Claimant sent to Mrs Dyer, further to their meeting and a paragraph of his statement, the slide pack which he had emailed to Mark Thompson on 28 March 2012 (referred to in paragraph 22 of these Reasons) in which the project was clearly flagged as red, and also reiterated that Mr Thompson had already been aware, as early as February 2011, that the DMI was delayed and he attached other information in relation to that delayed timetable. The Claimant told the Tribunal that on 18 June Mr O'Kane called him and said that he had been coming under pressure from Mr Coles, who realised his position was exposed, and had told the Director General that it was all the Claimant's fault and that people at the BBC were trying to protect their own positions.

97 On 18 June 2013, Mrs Dyer interviewed Sarah Hayes, the Controller of Information and Archive, using the same terms of reference and process as she had used with previous witnesses. Ms Hayes' evidence was in general pretty damning about the project and the Claimant's handling of it, whilst acknowledging that there was an element of truth in the Claimant's point that, once people start using a system and overcome their resistance to change, that it could work. However, she said that in this case it was not just about people being difficult, it was about fundamental problems with the system, that in its current state the digital archive was not fit for purpose and that although she herself got on well with the Claimant, the culture in the department was such that it was impossible to say anything negative about the archive, as the Claimant would not allow it.

98 On 19 June, Mr Pascazio sent the Claimant a disk containing approximately 3,000 of his emails, spanning a four year period, in order to enable him to search his archived emails whilst suspended, and also the DMI Steering Group packs. On the same day, the Claimant's solicitors raised further concerns about his suspension. On 20 June, Mr Coles forwarded to Mrs Dyer the evidence requested by her following their meeting on 7 June, together with a summary of information provided by the DMI team and presented to the E2E review "demonstrating that about 50% of DMI was not delivered and of the areas that were delivered they did not deliver any completed functionality." On 20 June, the Claimant was invited by Mrs Dyer to attend the reconvened formal disciplinary meeting on Wednesday 26 June, stating that he would be supplied at that meeting with the documents to which she proposed to refer and asking that if there were any other relevant documents to which he would like to refer, that he would please send a copy in advance of the meeting or, if unable to do so, to bring them with him.

99 The Claimant replied immediately, stating that this was the third time that he had been asked to attend a meeting when he had pre-booked annual leave, this time in order to attend his son's graduation, and that the BBC "is aware that I would not be available from 26-28 June". He requested a postponement to the following week and further requested the Steering Group meeting minutes, which he had still not received, and the full minutes of the Executive Board meeting of 13 May, rather than a summary. He stated that he had asked for these materials over a month before. Mr Pascazio replied on 21 June stating that he 'sympathised with the fact that the meeting had clashed with another commitment but that diarising appointments that worked for everybody was difficult' and, being

aware that the Claimant wished to resolve his continued suspension as quickly as possible', therefore reconvening, on that basis, an alternative meeting on 25 June at 2pm, in other words, bringing the proposed meeting forward by one day. He agreed to forward the Steering Group minutes and stated that the Executive Board minutes had not yet been approved and had not been released. "I will shortly forward to you a full set of the documents and interview notes that we are relying on in the hearing, however, I do not propose to highlight how each document relates to each specific allegation. I therefore recommend that you familiarise yourself with the documents as a whole. The documents in the pack will form the basis of any decision we reach as part of this process." Late on the same evening of Friday 21 June, the Claimant received the promised pack of documents including Steering Group minutes dating back to 2009. The Claimant noted that in the BBC pack there were only very few documents upon which the Respondent was relying, which pre-dated 13 May 2013. The pack sent to him included notes of the interviews which Ms Dyer had conducted with various people and also his appraisals. He noted that many of these documents were ones which he had requested at the outset and that at least some of the witnesses had been interviewed weeks earlier, but that he had only just been sent all of that material. The Claimant also noted that Ms Dyer had not spoken to any producers who had actually used production tools nor to any technologists from the DMI team and that she had asked 'incredibly leading questions and had not challenged their responses at all'.

100 On 22 June, the Claimant wrote a letter to Mrs Dyer and Mr Pascazio in which he asked for clarification of the case, the allegations, the BBC's use of various documents, a request for certain other documents which had not been supplied and further documents which he now requested. He also stated that it seemed wrong that the first time he was confronted with witness statements from other people was after he had given his own Response statement to the case put against him and that it looked very much as if the BBC had started the process with an interview of himself and was now attempting to build the case against him as it went along. He stated that the continuing failure to clarify what process is being followed only appeared to him to confirm this. He also stated that; he now only had one working day to prepare for the hearing, which was insufficient; that he had not had time to properly review the documents, had read the statements once and wished to prepare evidence on the inaccuracies contained in them and required an adjournment; that his chosen companion had not yet been able to confirm his availability and that his lawyers were still waiting for a response to their letter of 19 June relating to his suspension.

101 On 24 June, the Claimant wrote to Mr Mike Ford, Director of Risk and Assurance, raising serious concerns in that firstly, he believed that the BBC Trust had been allowed to make statements about the Accenture findings to the PAC on 10 June which were not backed up in the copy of the Accenture report which had been provided to him and that these statements had not been rectified. Secondly, that he believed 'that the BBC Executive has, in breach of its obligations under the BBC Charter to ensure value for money, inappropriately maximised a write down on the DMI project in circumstances where Accenture has indicated that the technology it reviewed has value and (a) could be built upon and remains in use and (b) we could have delivered and still could deliver the rest of the project if the business wanted us to do so'. He stated that Accenture had not yet completed its detailed review and testing but that the DG in the Finance Committee on 29 April had stated that he wanted to maximise the

write down and that this was following the Claimant having informed the Director General at that Finance Committee meeting that the DMI completed technology worked and was being, or could be, used and that the proposed write down was therefore too high (then £24.4 million) and that at the time the Chief Finance Officer, Ms Patel, had shared his view that the proposed write down was too high. The Claimant also stated in this letter that the consequences for him of the position he had taken on DMI were that "I have been asked to resign, subjected to disciplinary action when I refused to do so, suspended, and subjected to distressing publicity about my suspension and related hostile commentary in the media." The letter ended by the Claimant summarising that (1) Accenture did not conclude that the technology was worth nothing. (2) Accenture did not conclude that the kit does not even work and (3) the primary reason for abandoning the DMI project was that the original vision of a standardised solution of production tools and processes and an ability to associate all business and archive systems with production assets is "no longer seen as appropriate, either from a creative or a business point of view" (extract from papers before the Finance Committee on 29 April 2013). The Claimant went on to express his concern that the statements to the PAC "do not properly reflect that position. I accept that it is difficult to explain to the licence fee payer that the BBC may have wasted licence fee payer's money because it has changed its strategic direction and no longer wants the solution it originally commissioned, but to present this as a technology failure is inaccurate." The Claimant requested investigation of the disclosures made in his letter, which for statutory purposes before this Tribunal he contends are protected disclosures.

102 On 24 June Mr Pascazio replied to the Claimant's letter of 22 June, as follows: "I think the simplest way to categorise the case against you is in terms of the four allegations in the letter sent to you on 14 May; in terms of further clarification I do not consider this to be necessary. In terms of your request for further information, I will provide you with copies of documents which were not clear in your original bundle, however we do not agree to the remainder of your requests. To be clear, this is not a quasi-judicial process and as outlined above we believe the allegations against you are clear and do not require, and would not be informed by, the very wide ranging and onerous document requests you have made. We understand that you do not agree with this approach but we believe that the documents already provided are sufficient to ensure a fair and manageable process is followed. The process we are currently involved in is disciplinary in nature. We have now undertaken initial interviews of all those we wish to speak to. We want to meet you on Tuesday to run through some of the different perspectives that have been thrown up by the witness evidence, following which we hope to be in a position to reach a final decision without a further meeting. I realise that you find the timing of the disciplinary hearing challenging, however, I am confident that, given the limited amount of material included in the bundle, you have not been prejudiced by the suggested timescale. I understand that Peter O'Kane is available to accompany you on Tuesday and on that basis I confirm the reconvened hearing will go ahead and look forward to seeing you then."

103 Some two hours later the Claimant replied to Mr Pascazio stating; "I received the substantial Steering Group minutes and packs and thousands of emails late last week (which I asked for weeks ago). You also sent me lengthy witness statements. I have not had time to review the documents, to find additional documents which rebut the allegations or to prepare my detailed

commentary on the statements you sent me. The statements contained serious inaccuracies as well as fundamental misunderstandings about the DMI project and the Accenture review and findings. I put it on record now that the suggestion that I can deal with what you have sent me, or respond to the statements in a sensible way, in the short time scales you have allowed, is wholly unreasonable and unfair. I have not had sufficient time to prepare a full rebuttal of the allegations in the statements. I will attend provided you understand that this cannot fairly be the end of the line. I do have witnesses who I wish you to interview and/or who I would like to attend the hearing to be questioned. I will give you their names tomorrow."

104 The meeting, which lasted two hours, took place on 25 June and the Claimant stated that Mrs Dyer was working from scripted questions, which he told her at the time were 'very leading'. He felt that she had taken at face value what the witnesses had told her and did not seem to accept anything which he had told her on 3 June. He gave the following as examples of such leading questions; "Why was the project not governed properly?" and "Why was the documentation maintained in relation to DMI poor?" and "Why did you not ensure the requirements were clear?" "Did you fail to deliver the project because you did not devote enough time to it?" and "DMI failed to deliver anything, didn't it?" Virtually the whole of the meeting was spent on the first of the four allegations and just the very beginning of the second, before the meeting ended. The Claimant stated in evidence that when he told Mrs Dyer that they had fundamentally misunderstood the basis of the Accenture report, she looked visibly shocked, and he asserts that, thereafter, no further reference was made to the Accenture report at any stage of the disciplinary process or the decision itself and that Mrs Dyer did not discuss the technology with him in any detail. Mrs Dyer told the Tribunal that she was aware that the Claimant was very keen to focus on detail and that she realised that the process may therefore take considerably longer than she had expected. She said that she tried to move the discussion towards the 'bigger picture' rather than the detail, but that the Claimant would then become quite agitated and insistent and so she had tried to be as accommodating as possible, whilst making sure that she still asked her key questions.

105 During the meeting, the Claimant raised the issue of having been told in the emailed letter of 24 June that this was the final meeting, upon which Mr Pascazio said that his letter "should not have contained the words about it being a final meeting". The Claimant expressed surprise at this, since Mr Pascazio had himself written the letter. The Claimant gave the names of seven people whom he wished the Respondent to interview, including three technologists, two people from Accenture and someone who had trialled production tools. Further, during the meeting the Claimant again objected to his suspension.

106 The Tribunal had before it a one and a third page typed document headed 'Points to note from John's pack of documents' which (although the evidence was not entirely clear) it appeared that Mr Pascazio had drafted. Mrs Dyer stated in evidence that she did not know if she had typed it or if Mr Pascazio had 'captured our discussion', but she acknowledged that the manuscript note on it which stated "still has skin in game?" was her note. When asked what she meant by this, against a typed note which says "benefits to be assigned to divisional owners to ensure realisation" she said she meant still shaping things/spending money. In any event, the notes appear to be numbered to correlate with the Claimant's list of documents for the disciplinary process. Mrs Dyer told the

Tribunal that she did continue to question, throughout the process, the Respondent's contention that the project was a failure. However, on the second page of Mr Pascazio's memo, the final point under a heading 'Other Points' was as follows "Have to maintain position that project has been stopped and considered not to have delivered so is for John to present evidence to the contrary. You can then consider what John puts forward and take a view."

107 Mrs Dyer proceeded to interview three of the people on the Claimant's list of seven requested witnesses, namely; Peter O'Kane, Alistair Ford and Dan Webb, but not the other four persons. She had a list of questions to be put to Alistair Ford which appeared to the Tribunal to be more open and rather less leading than those which she had used in her previous interviews of persons during the disciplinary process. She interviewed Alistair Ford on 27 June, Mr Ford having been an Operations Project Delivery Consultant who had worked on the DMI project.

108 The Tribunal conducted a detailed forensic analysis of Mrs Dyer's interview technique, in the context of the Claimant's contentions that the interviews were not conducted fairly, using the particular example of Mr Ford, and found as follows; that the interview started with neutral and open questions which tended to elicit a nuanced, balanced analysis of the project, its problems and what it had and had not delivered, as well as wide ranging views on where responsibility lay. This included a critique of technology delivery, as well as engagement at high level in the business, and that oversight for ensuring right delivery lay with the Steering Group, at which point Mrs Dyer asked what Mr Ford would expect to see from the CTO, which the Tribunal found to be a leading question in the context. Mrs Dyer then increasingly, during the interview, began to employ a technique of reflecting back what the interviewee had said, as in "If I understand correctly then ..." which, in the Tribunal's analysis, invariably appeared to involve a negative rather than a balanced or impartial reflective synopsis of what the interviewee had just said. This then tended to elicit a confirmation of negativity from Mr Ford, for example, in relation to the project's delays, Mr Ford said that there were other extenuating circumstances around time, as a number of delays were due to Olympics coverage which impacted testing etc. Mrs Dyer then said that 'if she understands the situation correctly, the solution was not ready in entirety', to which Mr Ford assented. The Tribunal noted that the responses given by the interviewee in response to the 'open' questions appeared to be more balanced, neither for nor against the Claimant, whereas in response to the more loaded summaries and negatively directional questions the answers were more negative in relation to the Claimant and the project. Mr Ford said during the interview that he expected the Steering Group to be identifying problems, and especially the business sponsor Bal Samra, Commercial Director. The Tribunal noted that in her interview with Ms Patel, Mrs Dyer's negative 'summarising question' technique was used on occasion, but not very often, perhaps because Ms Patel's original evidence was far more negative in relation to the project in any event.

109 Over the period 24-28 June, the Tribunal had before it a chain of email correspondence passing between Mr Pascazio and Helen Rees, Chief of Staff to Mr Coles, which clearly demonstrate that Mr Coles and Ms Webb were gathering and co-ordinating the presentation of documents for the purposes of the disciplinary hearing, both those requested by the Claimant and also against the Claimant in response to various points raised by his Statement of rebuttal. This

included one entry from Mr Pascazio to Ms Rees saying "If Dominic has other documents he considers relevant, then please pass them to me and I can take a view as to whether or not to include them" ... and Ms Rees replying "I'll ask Dominic if there is anything else he wants to provide. Can I also check with you though that the other queries for Dominic in the letter have been actioned" ... Various documentary attachments were passing between these correspondents and Ms Rees said "Sorry for the barrage of emails".... "I know Dominic and Alice were concerned last week when pulling together the interview scripts/responses to Q&A that we were not presenting the full picture and wanted to ... bring all the evidence in one place to present as a set of full documentation to John ... Alice was still doing this on Friday ...when I spoke to Richard B last week I'm concerned not all the evidence has been presented against John as yet."

110 On 1 July, Mr Pascazio wrote to the Claimant requiring him to attend a reconvened disciplinary meeting on 10 July, sent him the notes of the meeting of 25 June and asked for any amendments or changes. The Claimant replied the following day stating that he had not had time to review any emails or documents prior to 2012, from the 16,000 plus which had been sent to him from that period. He sought confirmation that none of the allegations against him related to the period prior to 2012 so that he did not have to go through all of these emails. He also asked for confirmation about whether his witnesses had been spoken to and, if so, requesting their statements. He reiterated that he wished to rebut all the allegations in one go rather than dealing with the matter piece meal and therefore asked for at least four working days between receiving any further documents and statements from the Respondent and any rescheduled hearing, in order to allow proper preparation time. On 4 July Mr Pascazio replied that the allegations of misconduct related to the Claimant's role in DMI from when DMI came back in-house to the point where the decision was taken to pull the project and his suspension, and was not therefore limited to the Claimant's role in 2012. He informed the Claimant that Mr Ford and Mr Webb had been spoken to and that Pat Younge would shortly be interviewed and that they also proposed to interview Mr O'Kane and that the Claimant would be sent all of these interview notes. He proposed that the next meeting should take place on 17 July, which would give the Claimant plenty of time to prepare. The Claimant replied asking whether they have spoken to Gavin Mann of Accenture, as he had requested, so that they could understand the scope and findings of the Accenture review.

111 On 3 July Mrs Dyer interviewed Mr Webb, whose answers revealed mixed positive and negative evidence in relation to the Claimant and tended to lay responsibility on others as well as the Claimant, perhaps on balance revealing itself as negative but identifying positive things regarding him as well. Again, Mrs Dyer on occasion used the negative reflecting-back formulation of, "if I understand correctly, you are saying that the business representatives on the Steering Group would not necessarily understand what was being discussed from a technical perspective?", which was not a fair and balanced summary of what Mr Webb had actually said and to which Mr Webb replied that 'that was an interesting point and that technology have a responsibility to assist the business to understand'. Overall, Mr Webb's evidence was nuanced and reasonably balanced.

112 On 3 July Mrs Dyer also interviewed Mr Younge, whose evidence to her was also very nuanced regarding the failure of the project and where responsibility lay, including accepting his own responsibility in that regard. Mr

Younge said that Mr Huggers was a big fan of the 'Meta tag idea' and that this was a noble ambition which was technically beyond the BBC. He also stated that much of the technology just never worked in the proper enterprise setting and that the system had been so long delayed that producer confidence was lost, as the producers were then using commodity tools which were available elsewhere. He considered the project to be a failure overall and stated that the whole aspiration turned out to be "trying to boil the ocean." He accepted his own responsibility as a member of the Steering Group and that he should maybe have raised a flag outside of the risk register.

113 On 8 July, the Claimant wrote to Mrs Dyer and Mr Pascazio expressing his real concern that they had told him that they would speak to Gavin Mann from Accenture but had now decided not to do so and stating that he had no faith that 'you want to look at this objectively'. He also raised concerns about the scope of the allegations and set out some points which he wished to make in that regard.

114 On 9 July, Mrs Dyer interviewed Mr O'Kane who, on one occasion during the interview, stated that she was asking a leading question, which Mrs Dyer denied, saying that she was 'simply trying to understand'. His evidence was very balanced about the project and who was responsible and overall was marginally less favourable to the Respondent as responsible person than to the Claimant. When asked whether he could summarise the Accenture report, Mr O'Kane said that it did not give a view on production tools as this was not in scope; that with regard to the media infrastructure there was a need for testing to prove its viability and even though coding was completed, it could not be proved to work without testing; and summarised by saying that the archive would be given 5-6 out of 10 by the Accenture report and that, as to the media interface, there was nothing to report on since the production tools were not in scope. Mr O'Kane stated that the other members of the Steering Group were equally accountable, as was the Claimant, and that, arguably, the Claimant had called out, during 2012, the gap between the benefits given, the delays and time to deliver and that he was involved in deep dives in order to assess the situation. Mr O'Kane also stated that, in reading the business case of the Respondent in 2010, each of the major components could have been bought from the market but "it was because the BBC wanted to put their own wrapper around the solution that we are here today". Mrs Dyer asked "if that was so, at what point should the business case have been challenged". Mr O'Kane replied "it could have been challenged at any point." Mr O'Kane stated that the project was a failure judged by delivery against requirements, the time to deliver and the overall cost and stated that as a member of the Steering Group the Claimant 'is responsible for calling it out but that he is not solely responsible'. He added that a raft of people could have made the call for a pause earlier on, including the Claimant from a technology perspective, based on the technology challenges, the changing requirements and the ability to deliver within the time scale and budget which was not possible to do when balanced against the benefits. He added that there was "a big organisational piece in here also." He stated that he did not think that there was a single person accountable for the project, as it was set up as a business change programme with technology at the heart of it, and that any one person could have put their hand up and that at a meeting where the Claimant was asked if he should stop the project, he said no and had received support to carry on from those present, namely; Pat Younge, George Entwistle and Mark Thompson. However, this meeting had not been minuted. He ended by saying that he felt that this process is "trying to lay the blame on a single person ... John

does have significant responsibility but he is not the sole person responsible”.

115 On 10 July, the Claimant was provided with the witness statements of those already interviewed, together with further documents and was invited to a resumed disciplinary meeting on 17 July. In answer to his question about whether the case against him was now complete, Mr Pascazio answered; “I don’t envisage changing any of the allegations beyond those set out in the letter of 14 May”.

116 On 17 July, a further disciplinary hearing was held and, on this occasion, the Claimant was accompanied by Sally Rees, his PA. The meeting lasted for some three hours and the Claimant brought with him an enlarged Statement of response to the allegations, running to some 71 pages, plus schedules, expanded in order to deal with the new allegations which had arisen from the witness statements which he had received, together with four bundles of supporting documents which he also brought to the hearing. During this meeting the Claimant wanted to read out his statement and to show supporting documents from his bundles in support of the content. For example, he showed Mrs Dyer the explicit instruction from Mr Younge to stop developing production tools, which Mr Younge had not himself given to her, and the Claimant said she suddenly sat up and seemed finally to grasp the point he had been making throughout, namely that production could have used the technology but chose not to. She appeared very surprised and asked a question about it. The Claimant told the Tribunal in evidence that he sensed that in general, from the outset of the meeting, neither Mrs Dyer nor Mr Pascazio were fully engaged, that they were not really listening and that Mrs Dyer looked ‘like thunder’ and/or bored at times and that he felt that she was just going through the motions. He stated that she did not take him to a single document in the BBC pack of documents nor did she discuss the technology with him in any detail and had said, at the outset, that there was limited time. In the event, the meeting was adjourned until the following day when the reconvened hearing lasted for six hours. During this meeting the Claimant continued going through his rebuttal evidence and at the end gave Mrs Dyer a copy of his full statement. At the end of the meeting Mr Pascazio said that they would need to go back and speak to certain people but they would like to be in a position to let the Claimant know the outcome the following week. After the meeting the Claimant was sent a copy of the notes of the meeting, which he amended and returned to the Respondent, and the Tribunal noted that there were very considerable amendments and additions which at times entirely altered the sense of the original notes. The Respondent apparently made no objection to the Claimant’s amendments.

117 On 25 July, Mrs Dyer wrote to the Claimant summarily dismissing him. Her letter stated that his opinion of the DMI project differed in important respects from that of other witnesses and that she had had to consider those differences and decide which version of events she found more credible. “Having carefully considered the matter and balanced the evidence, I have found that there is a case to answer and I set out below my findings based on the original allegations set out in Dominic’s letter”. She then proceeded to deal with the first allegation; that he had failed to deliver the requirements of the project, and her findings were that, whilst accepting that he was not solely responsible for the outcomes and that others (both senior and junior to you) also had elements of management responsibility - “I find that as CTO you were (as you recognise) primarily responsible for the technology delivery on the DMI project and from the evidence

I have reviewed there was a failure to deliver that technology as a whole in a form useable by the business. On that basis this allegation is upheld". Moving to the second allegation ie responsibility for £94 million of expenditure, her reasoning for upholding the allegation was as follows: "Whilst recognising that some elements of the project had been delivered, it is clear to me that the original project vision is far from complete (or ever likely to have been completed) and accordingly significant sums of money have been wasted as a result. Your responsibility for this failure is clearly linked to the first disciplinary charge and on that basis I find this allegation upheld". As to the third allegation, to which Mrs Dyer devoted considerably more reasoning than she did to the other three allegations, namely about half a page, she found that she did not uphold this allegation, which was that he had "failed to put in place actions to stop the continued spending of the project budget even though you were aware that the project would not deliver", because she found that he had not identified this fact but had continued to believe that the business was at fault instead of challenging whether the technology was fit for purpose. "Therefore, I find this allegation is not upheld but only because you failed to identify that the project would not deliver because of your misguided belief that it was still viable." As to the forth allegation; that he had failed to take any responsibility for this failure in full or in part, she upheld the allegation 'because the Claimant had denied that anything was wrong, holding that any failure was due to the business and not the technology and maintaining that the technology was fully useable if only the business would live up to their original promises, and therefore, he had been unable to accept that any element of the project for which he was responsible had substantively failed to deliver and therefore the allegation was upheld".

118 There then followed a section of the dismissal letter headed 'Breach of Trust and Confidence' in which Mrs Dyer stated: "The allegations which I have upheld, in my view, constitute very serious disciplinary charges against a person of your seniority within the BBC. I have little doubt that by themselves they would amount to misconduct or a lack of capability which are so serious as to entitle the BBC to summarily dismiss you. However, even if this were not the case, one of the most troubling elements of this process for me was that, in circumstances where the management of the BBC and almost all of the witnesses to whom I have spoken hold that the DMI project has failed and should cease, you do not agree with this interpretation. Therefore you have proven unable to recognise that this project is no longer viable and has delivered little in value to the BBC, or to support the decision not to continue with the project (or at the very least acknowledge that such a decision is a justifiable outcome). This in turn means that trust and confidence in your abilities as the CTO have entirely broken down - put simply I cannot see how the BBC can have confidence in working with you again in circumstances where (rightly or wrongly) your belief in the project remains largely undimmed whilst (almost) everyone else is of the view it should be shelved."

119 The "Outcome" paragraph then stated: "For the reasons set out above, I confirm that the decision has been taken to terminate your employment with immediate effect "on the following grounds:

- (a) due to the serious breakdown in trust and confidence referred to above; and/or
- (b) that the first, second and fourth disciplinary charges (and the

circumstances underpinning the third charge) constitute a serious default in the performance of your duties and/or neglect or incompetence in the performance of your duties - in each case entitling the BBC to dismiss you summarily under the terms of your service agreement dated 11 February 2009”.

Mrs Dyer then offered the right of appeal and reminded the Claimant of his duties of confidentiality in relation to the Respondent’s business material.

120 On 7 August 2013, the Claimant appealed the dismissal decision in a four page letter, giving detailed grounds of appeal addressing each of the four allegations as well as the overall process, amongst which were the following: “By not pinning its colours to the mast and by keeping its options as broad as possible the BBC has been able to use any negative internal comment to support the remarkably broad allegations made”; that he had been suspended before any investigation had been carried out into his role in respect of DMI; that his own witness statement had been used as the basis to erect a case against him in conversations with witnesses; that he accepted that he, along with others, were responsible for the project, particularly in respect of the technology; that he accepted that the BBC could cease the project, although he contested the justifications put forward for that decision and refuted as misconceived proceeding against him on the basis of gross misconduct or negligence; that the entire process, including his suspension (“when it became clear that the disciplinary could not start when the BBC wanted it to”) had been a ‘charade’ instigated and timed so that the BBC could announce ‘action’ against him “simultaneously with the pulling of the DMI project” at a time when “the current political climate appears to have led the BBC to consider itself bound to identify an individual on whom the organisation can pin the blame for a decision of this nature” and when “the storm of adverse publicity in the media about BBC severance payments” led to its refusal to “countenance even payments in lieu of notice under contractual terms.”

121 On 12 August 2013, the Claimant was sent a reply by Mike Ford to his letter dated 24 June in which Mr Ford set out justifications for the Respondent’s decision to make a total write down on the DMI project by reference to the external auditors’ report and their agreement with the management assessment that assets were not going to be used as a result of the decision to terminate the DMI project, noting that assets of approximately £3-£5 million acquired during the project had been retained for alternative use in the BBC.

122 On 2 September, Mr Philip Almond, Director of Marketing and Audiences, was appointed to chair the Claimant’s appeal and this appointment was confirmed to the Claimant on the same day. It was the first appeal which Mr Almond had ever conducted. The Claimant, on 4 September, objected to Mr Almond’s appointment as appeal hearer on the grounds that he was not sufficiently senior, was not on the Executive Board and reported to Mr Purnell, whose views on the Claimant’s accountability were known, and therefore a fair and objective hearing would not be possible. Further, he objected that Mr Almond had no experience of technology projects and that no-one below Executive Board level could go against them on the trust and confidence issue. The Tribunal had before it a note created on 10 October 2013 by Natasha Adams of HR for the benefit of Mr Almond, which was a single page document summarising what she considered to be the Claimant’s grounds of appeal under the headings; ‘The process was flawed; Evidence does not justify the decision

and; The decision was unfair’.

123 The Tribunal had before it an index of some 65 documents constituting the appeal bundle. This index had about 20 of the document numbers written in manuscript at the top following the word “READ:” in Mr Pascazio’s writing. Mr Almond told the Tribunal that he had asked HR to mark for him documents which he should read ‘for an initial grasp’. The Claimant contends that Mr Almond did not read either his full extended Response Statement nor his documents. Mr Pascazio’s evidence on this matter was evasive. When pressed, he accepted that “possibly, yes” he had been directing Mr Almond and Paz Patel, his initial HR support, to read certain things – ‘key process documents’ - and he accepted that the Claimant’s extended Response Statement of 17 July, together with his support documents, were not part of the bundle. Mr Pascazio stated that he had given Mr Patel a briefing, a brief overview of the process and the decision. Mr Almond’s evidence was that he had not read every single document since his role was to conduct a review and not a rehearing and that he had looked at what he considered relevant. Mr Almond also told the Tribunal that he had read all of the documents on the list before making his decision. However, he also accepted that his habitual modus operandi was to mark with ticks and to make notes to himself on and about documents which he read and that there were no such notes on the Claimant’s Statement or materials. He stated that he had access to all of the investigatory documents and the Claimant’s longer Response statement and 4 files of materials “on the legal department floor”, should he wish to refer to them. The Tribunal found Mr Almond’s evidence on this issue to be evasive, hesitant, inconsistent and not credible and concluded that he had not read the Claimant’s extended Response Statement, nor any of his materials, but had confined himself largely to those documents flagged up for his attention by HR and which therefore supported the dismissal decision.

124 By 16 September 2013, it had become clear that mediation between the Claimant and the Respondent did not lead to a resolution.

125 The appeal meeting between the Claimant and Mr Almond was held on 22 October and lasted for 32 minutes, ending with Mr Almond stating that they would meet again when he returned from his holiday. The Tribunal was very much struck by the difference between the notes of this meeting produced by the Respondent’s notetaker (which was 3 and one third pages long) and the amended version returned to the Respondent by the Claimant, showing his track-changes, deletions/amplifications and additions, amounting in all to seven and a half pages of notes (and this in a smaller type-face than the Respondent’s notes). The Respondent did not appear to dispute any of the Claimant’s amendments. One notable addition in the Claimant’s notes, which does not appear in the Respondent’s version, was near the beginning of the meeting when the Claimant asked Mr Almond if he has read his statement and Mr Almond replied Yes ...”and some of the other important documents, not the entire caseload yet but enough to get myself acquainted with some of the key issues.” The Claimant at the end of the meeting reiterated that his statement ‘covers it all’, apologised for it being 75 pages long and stated “The supporting documentation that goes with it substantiates all of the points that I make. All the documents are there that prove that what I say is the truth”. This quoted passage is also omitted from the Respondent’s notes of the meeting.

126 Common to both versions of the meeting notes was the Claimant stating that Tim Davie had told him that he was 'the best CTO the BBC had ever had' and that he had had no negative feedback from Mr Coles nor anyone else in management above him. The Claimant's notes also succinctly put his position: "There are two ways you can look at this. You could say this is primarily a technology led project and therefore if it had failed you take ministerial responsibility, which is; 'you didn't do anything personally wrong but because you are head of technology you have got to take the fall for this'. The way this whole thing has been characterised is actually to try to make out that I did do something wrong, but nobody has been specific about anything that I did wrong. ... Nobody can tell me you didn't do this or you did this which was wrong. I have been charged with gross misconduct but not for any specific conduct. There is no justification for gross misconduct or for dismissal without notice."

127 The Claimant presented his complaints to the Tribunal on 23 October 2013, the final day of the 3 month limitation period starting with the date of his dismissal.

128 Mr Almond interviewed Mr Coles on 5 November 2013, who strongly defended the Respondent's position in relation to the Claimant, (whom he stated had refused to take the 'more protected route' of resignation), including his suspension, the write-down of "absolutely worthless...obsolete before it was delivered" ... technology, and made an 'off the record' reference to the Claimant's "ambulance chasing lawyers". The notes of this interview ran to two and a half pages. The Tribunal also had before it an email from Mr Almond to Mr Coles the following day, on 6 November, Subject Line: "Thanks". "Hi Dominic, thanks for your time today. It was really useful and shed a lot of light on the appeal. Apologies if the questions were more than a little irritating at times – but as you know there's a process that has to be gone through. And in case you are on (sic) any doubt your integrity shone through all you had to say. Best, Philip."

129 On 7 November Mr Almond interviewed Ms Webb who said that she had not been under any pressure to stick to the accepted BBC view of the project and that she had been given a copy of the Claimant's statement and then asked a series of questions about her take on the issues raised. When asked whether the Claimant had been unfairly singled out, she said that that was a difficult question to answer, that as overall sponsor and CTO "all roads led to him, but that it was clear that there were others who shared responsibility for the project and that the PWC report may shed more light on this".

130 On 8 November Mr Almond interviewed Mrs Dyer who stated that her instructions had been: "I was to hear the appeal in the normal way with the normal procedures"; that there had been a huge amount of scrutiny from the organisation and pressure for a decision to be made quickly but not about the outcome, which had made her more rigorous and that she did not believe that her career would have been adversely affected if she had come to a different conclusion. She stated that she did not feel that the Claimant had been unfairly singled out since he was responsible for delivering the technology, although there could have been more engagement from the business. She also stated that the Claimant had a 'fantastic track record and he has delivered great things for the BBC' but that a whole range of different voices had told her that the technology of the DMI had failed ... that the balance of opinion was that it was not delivered and the Claimant was leading the delivery of the technology. In relation to having

used the word “appeal” in relation to her own role during her interview with Mr Almond, Mrs Dyer told the Tribunal that despite having scrutinised the two and a half pages of notes when they were sent to her after the meeting and making a variety of track changed amendments, she had not noticed this word. She stated that she was, however, ‘under no illusion that she was not conducting a disciplinary’.

131 Mr Almond interviewed Mr Pascazio on 8 November and Mr Burdon on 14 November. Mr Pascazio stated that he had perceived that there had been some background pressure to get through the disciplinary before a Public Accounts Committee meeting on 10 July, so that the BBC would be in a position to say more about the DMI project and outline any action taken as a result of the completion of the disciplinary process. However, when he had ‘pushed back a little re the timescales’, he was told to take as long as was necessary, and also stated that there had been no pressure as to the outcome. He stated that he and Mrs Dyer had worked on it together; that they “did not want to get bogged down in the complexity of the actual technology involved in the project but to focus their questioning of interviewees on whether it worked or not, given that the BBC considered it to be a failed project”; that based on the Accenture report, Mr Coles considered the project to have failed and that he had explained this to himself and Mrs Dyer; that given this evidence from Mr Coles and the evidence of other interviewees who also considered that the project had failed, they had not considered it necessary to speak with the Accenture witnesses whom the Claimant had requested be interviewed. He also stated that the interviewees were questioned by reference to the Claimant’s Response statement, whether or not they actually saw it, as such. As to those responsible for DMI, Mr Pascazio said that he felt that ultimately it was the Claimant, who had had a blind spot in pushing on with it, whatever the cost, and now accepted no responsibility at all. Mr Burdon told Mr Almond that they had considered that Mrs Dyer fitted the bill of someone who had had no involvement with DMI but who knew the technology because, as well as having been HR director for technology, she had also previously worked for Microsoft. Mr Burdon told Mr Almond that he felt that the matters potentially amounted to gross misconduct and professional incompetence because of “the scale of the loss. If he carried out duties wilfully and so if he wilfully didn’t do it or if there was evidence that he wilfully covered things up. If it’s a technology project which a peer review shows is never going to work. I’d regard that as the CTO failing.” ... “there may well be other people to answer to the failings of DMI” but that it was not within his gift to go fishing and see if other people have a case to answer. “That would be up to their line managers in due course.”

132 Also on 14 November, Mr Almond interviewed Gavin Mann, Account Lead at Accenture, Youssef Tuma, the specialist who had also worked for Accenture on its DMI report and Gavin Dawson, Head of Communications for the Respondent at the material time. The notes of Mr Mann’s interview show him to have been very guarded and cautious about committing himself, carefully reiterated what had and had not been reviewed and tested and referring to Mr Tuma as ‘the nuts and bolts specialist’. On the basis of “hypothesis spot checks ... they had found that there was not a lot of useable stuff, but that some was still in use, but not much, and the users don’t love it”. He stated that DMI started off as being “massively overambitious” and ... “the biggest bit of it being unwise was the belief that you could create something for the whole creative community. It’s hard enough to get finance to adopt a new system, let alone a creative

community. ... some of the decisions were made prior to John (the Claimant).” Mr Almond’s response to this was “I don’t think anyone is saying John was wholly responsible ... others may need to answer for the failings of DMI too. Mr Tuma’s evidence, set out in just over a page of interview notes, was, on the basis of the confinements of his brief, nuanced and not definitive.

133 Mr Dawson was questioned about the public announcement about the Claimant’s suspension at the same time as the Director General announced the failure of DMI and the very large waste of money. As a general and off the record aside about media handling, Mr Dawson said “It was meant to be a punch in the face before anyone else can punch you. No one knew how to react on Fleet Street.” He stated that an internal announcement had been made the same day about the Claimant’s suspension and that the newspapers had picked it up and had put questions to Mr Dawson. As to the connection to the Claimant’s suspension, he added “The newspapers joined the dots because that’s what they do.” As to whether or not the Claimant had been made into a scapegoat, Mr Dawson said; “A scapegoat, yes, arguably, but then again, arguably not, he was after all the project sponsor. The newspapers are always going to be after someone. Scapegoat is not the way I would characterise it” He added that that was his opinion of how the coverage had played out in the press but, for the record, that had not been his intention and that it had all been very carefully structured with the legal team.

134 On 18 and 20 November Mr Almond conducted short interviews with Colette Camden, Producer, and Emma Couling, Requirements Lead, Production Systems. Both gave nuanced and modulated responses from their own perspectives.

135 On 4 December 2013, Mr Almond wrote to the Claimant apologising for the delay and informing him that he would issue his appeal decision shortly. On 18 December Mr Almond contacted the Claimant to ask for his comments on the PWC Report by 7 January 2014, which invitation the Claimant refused.

136 On 23 December the Claimant wrote to Mr Almond complaining about the delay and stating that he had lodged his appeal on 7 August, had been told on 2 September that Mr Almond was hearing his appeal, that a half hour meeting had taken place on 22 October where he was told that there would be a further meeting after Mr Almond returned from holiday, however, nothing was rescheduled and on 4 December Mr Almond had said that he was nearing the end of his investigations and that an outcome would be issued shortly. He was then told on 18 December that Mr Almond had been waiting to consider the PWC report, but that it had been made clear to himself, in letters of 30 May and 4 June, that the PWC report was unrelated to his disciplinary and that the timing and outcome would not be impacted by PWC. The Claimant attached copies of these two letters. He also noted that the PWC Report appeared to have been edited, since a draft (and fuller) copy, apparently leaked to the Guardian newspaper on the eve of publication (which he also attached to his letter) included concerns regarding “the impact of the swift closure of the project on the assets created by DMI”, which was supportive of his own position regarding the write down being unjustified since the technology worked and could be used. He asked for a copy of the full and/or draft version of the report.

137 On 8 January Mr Almond replied that the PWC report had not been taken into account in the dismissal process and that he would not rely on it in the appeal, but was happy to take into account any observations which the Claimant may wish to make on its findings in support of his appeal. This appeared to the Tribunal to contradict an email from Mr Almond to Mr Pascazio on 17 September 2013 expressing his concern as to the timetable for the appeal on various grounds including; “the fact that we have not yet seen the PWC report which could be fundamental.” Mr Almond further stated in his letter of 8 January to the Claimant that he could not comment on any earlier drafts or press comments since that was a matter for the BBC Trust. The Claimant declined the opportunity to comment on the PWC report.

138 On 22 January 2014 Mr Almond emailed Mrs Dyer and Mr Pascazio asking whether the Claimant's appraisals had been considered as part of their investigation. He stated that he had considered them himself but they had not proved material to the outcome either way. Mr Pascazio replied stating that they were considered and “like you, were not considered material”. Mrs Dyer agreed.

139 On 23 January the Claimant submitted evidence on DMI to the Public Accounts Committee of the House of Commons. On 24 January Mr Almond produced his outcome of appeal letter, rejecting the Claimant's appeal. His letter ran to over six pages and dealt in some detail with the numerous issues raised in the appeal, upholding the dismissal and preferring to accept the evidence of the disciplinary/dismissing and HR managers. He further wrote that the evidence of those witnesses whom the Claimant had asked him to interview did not undermine the original disciplinary outcome. As to the breakdown in trust and confidence; Mr Almond clarified that “given your role, if you and the BBC no longer share the same view as to the future of this major technology project, there is clearly a significant breakdown in trust and confidence.” He continued that he agreed that the Claimant was responsible “since the success of DMI rested primarily with you, its delivery was a key part of your job description and you chaired the Steering Group.” As to the delay in taking action against the Claimant from the suspension of DMI until the following May; “It was only after the Accenture report had been issued and considered that it was appropriate to instigate a disciplinary process.”

140 On 24 January the Respondent published the Claimant's dismissal to the press. This resulted in widespread and appalling press coverage.

141 In late January 2014 the National Audit Office reported on DMI and a benefits review report to the BBC Technology Board concluded that there were no benefits. On 10 April the Public Accounts Committee published its report into DMI.

The Law

142 As to the law, the Tribunal directed itself as follows:

142.1 It is for the employer to show the reason (or, if more than one, the principal reason) for dismissal and that it is either a reason falling within **section 98(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 (**section 98(1)(a) and (b) of the Employment Rights Act 1996**).

142.2 The reason shown by the employer for the dismissal of an employee is potentially fair if it 'relates to the conduct of the employee' (**section 98(2)(b)**)

142.3 In conduct dismissals, the employer is required to show that at the time of dismissal it held a genuine belief in the employee's misconduct, based on reasonable grounds, after a reasonable investigation (**British Home Stores v Burchell 1980 ICR 303**).

142.4 The dismissal is then actually fair if the employer acted reasonably in treating the reason shown as a sufficient reason for dismissing the employee in all the circumstances (**section 98(4)(a)**), and this question shall be determined in accordance with equity and the substantial merits of the case (**section 98(4)(b) of the Act**).

142.5 The test is whether the employer's action in dismissing the employee fell within the range of reasonable responses of a reasonable employer, in all the circumstances, and it is not for the Tribunal to substitute its own view for that of the reasonable employer (**Iceland Frozen Foods v Jones [1982] IRLR 439**).

142.6 Procedural fairness is an integral part of the question of whether or not the employer acted reasonably within the meaning of **section 98(4)**, but any failure to comply with procedures will not automatically render a dismissal unfair, (**Polkey v AE Dayton Services Limited [1988] ICR 142**), since the question is whether the procedural flaws impeded the employee in demonstrating that the reason for his dismissal was not sufficient (**Westminster City Council v Cabaj [1996] IRLR 399**).

142.7 If the dismissal is found to be procedurally unfair, the employee's compensation will be reduced to the extent that the Tribunal finds that correcting the procedural irregularities would have made no difference to the dismissal outcome, (**section 123(1) of the Employment Rights Act and the Polkey case**).

142.8 Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding (**section 123(6) of the Employment Rights Act 1996**). A similar provision relating to the basic award, in respect of conduct before the dismissal, is contained in **section 122(2) of the Act**.

142.9 The material 'whistleblowing' provisions may be summarised as follows: **Section 47B of the Employment Rights Act 1996** provides that a worker has the right not to be subjected to any detriment (other than dismissal) on the ground that he has made a protected disclosure: **Section 43B and 43C taken together** provide that a protected disclosure is a disclosure of any information which, in the reasonable belief of the worker, tends to show the commission of a crime or a failure to comply with any legal obligation; and which is made in good faith to their employer.

142.10 **Section 12 of the Employment Relations Act 1999** provides that a worker has the right not to be subjected to any detriment by his employer on the

ground that he has exercised, or sought to exercise, his right to be accompanied at a disciplinary hearing by his chosen companion.

142.11 **Section 48 of the Employment Rights Act 1996**, which applies to both **section 47B** rights and (by virtue of **section 12(2)**) to **section 12 of the 1999 Act** rights, provides: **(2)** on the employee's complaint to an Employment Tribunal, it is for the employer to show the ground on which any act, or deliberate failure to act, was done; **(3)** A Tribunal shall not consider a complaint unless presented (a) before the end of the period of 3 months beginning with the date of the complained of act, or, if part of a series of such acts, 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 3 months; **(4)** For these purposes, where an act extends over a period, the 'date of the act' means the last day of that period.

142.12 The Tribunal was additionally referred to the following principal cases during submissions: **Sainsbury's Supermarket Ltd v Hitt [2003] ICR 111; Salford Royal NHS Foundation Trust v Roldan [2010] ICR 1457; Stuart v London City Airport Ltd [2013] EWCA Civ 973; Stoker v Lancashire County Council [1992] IRLR 75; Sandwell v West Birmingham Hospitals NHS Trust v Westwood [2009] UKEAT 0032/09/LA; Robert Bates Wrekin Landscapes Ltd v Knight (UKEAT/0164/13/GE); McFarlane v Relate Avon Ltd [2010] IRLR 196; Leach v Office of Communications [2012] IRLR 839; Software 2000 v Andrews [2007] IRLR 568; Blackbay Ventures Ltd t/a Chemistree v Gahir UKEAT/0449/12/JOJ; NHS Manchester v Fecitt and others [2012] IRLR 64; Orr v Milton Keynes Council [2001] ICR 704; Alidair Ltd v Taylor [1978] ICR 445; Perkin v St George's Healthcare NHS Trust [2005] IRLR 934; Hadjioannous v Coral Casinos Ltd [1981] IRLR 352; Paul v East Surrey District Health Authority [1995] IRLR 305; West Midlands Co-operative v Tipton [1986] ICR 192; Taylor v OCS Group Ltd [2006] ICR 1602.**

Conclusions:

Applying the law to the facts as found by the Tribunal, the Tribunal concluded as follows:

143 The Reason, or the Principal Reason, for Dismissal: The Claimant's case is that the Respondent closed ranks, singled him out, suspended and summarily dismissed him, making him into the public scapegoat for the decision to close the DMI project, thereby diverting the heat of potential responsibility away from everyone else who may have been implicated; that he was "stitched up", that the gross misconduct allegations against him were misconceived and that his dismissal was profoundly substantively and procedurally unfair.

144 The Respondent contends that the Claimant was dismissed fairly after a full and even-handed disciplinary procedure; that even if the Tribunal were to find malicious intent on the part of others, this cannot assist the Claimant's allegations of a "stitch up" unless an illicit motive can be attributed to Mrs Dyer as the dismissing officer and Mr Almond, the hearer of the appeal, and that what was remarkable in this case was the Claimant's shameful abnegation of responsibility for the disastrous failure of the DMI project, in relation to which he had had a pivotal role.

145 It appeared to the Tribunal that there were, on the face of the evidence, potentially three discernible reasons for dismissal; (i) that the Executive Board had lost confidence in the Claimant as CTO (which Mr Coles repeated to the Claimant three times during their initial meeting on 14 May 2013) as a result of the failure of DMI, with its attendant substantial financial write-down; (ii) gross misconduct, as found by Mrs Dyer and stated in her dismissal letter; (iii) complete breakdown in trust and confidence in the Claimant as CTO because, again as set out in her dismissal letter, he alone continued to believe in the project, whereas the Respondent management and almost all of the other witnesses to whom Mrs Dyer had spoken held that it had failed and should be ceased.

146 As to the first of these; the Tribunal concluded unanimously on the evidence before it that a decision was made at Executive Board level on 13 May 2013 that, one way or another, the Claimant must go. This was either at the meeting proper, in respect of which the meeting notes have been 'sanitised', or in 'off the record' discussions, since the summary notes of that meeting are very short and clearly do not reflect the two hour discussion about DMI which Mr Coles told the Tribunal had taken place. Neither the handwritten nor the typed up summary notes make any mention at all of the Claimant or the CTO role, which is again at odds with Mr Coles' evidence on the matter. For example, Mr Coles' witness statement made clear that various individual members of the Board expressed their views and "Board members considered that Mr Linwood was likely to have been primarily responsible" for the lack of collaboration which had been one of DMI's "key failings". Whatever the limitations of the meeting notes, that such a decision was indeed made can readily be discerned from the events which immediately followed:

- Mr Coles told the Claimant at the very outset of the meeting on the following morning, before the Claimant had said anything at all, that 'it was very clear that the Executive Board had lost confidence in him as CTO';
- the Claimant was offered the choice of resigning or going through a disciplinary process and facing dismissal, as the Tribunal found, at this same meeting;
- Mr Burdon's proposed script for this meeting had Mr Coles saying "I have been asked to start formal disciplinary procedures to ensure any accountability is identified and appropriate disciplinary action is taken" which indicated that he had clearly taken instructions, or at least a very clear steer, from those senior to himself, although he denied having been so instructed.
- The Tribunal found Mr Coles' evidence on the details of events and meetings on and around 13 and 14 May 2013 evasive, at times inconsistent as between his written and oral evidence and the documents before the Tribunal, and unconvincing.
- Ms Lucy Adams, HR director and a member of the Executive Board who had been present at the crucial Executive Board meeting on 13 May, wrote in an internal email on 15 May, relating to the Claimant; "they don't know he's been fired yet";
- on 19 May Mr Purnell, an Executive Board member who had also been present at its meeting on 13 May, in the context of public communications about the closure of DMI, wrote: "We need a clear line on JL, whether he

is resigning or being fired, and why". It was notable that there was no third option in Mr Purnell's mind, such as a different disciplinary outcome.

147 Further, this decision flowed from its context. It was very clear that the Trust Finance Committee had reacted extremely adversely, at its meeting on 8 May 2013, to the prospect of DMI shut down and the write off of assets and had given those present a very hard time. The DMI agenda item was the only one attended by Lord Patten, Chairman of the BBC Trust, a mark of its gravity and importance. It was agreed at that meeting that Mr Fry, as chairman, would write to the Director General to request, inter alia, that – 'when appropriate – he should advise the Trust as to who from the Executive he considers should be held responsible for the outcome of DMI'. This, in the Tribunal's view, was tantamount, in the context of what was clearly a very torrid and difficult meeting, to a very vivid instruction to the executive to 'find the culprit'. It may well have been that, as early as this meeting of 8 May, Mr Coles sensed which way the wind was blowing in relation to the Claimant, since the nature of his conversation on the evening of 10 May with his old friend the recruitment consultant at a party, whether or not their meeting was pure coincidence, clearly (from the nature of his friend's subsequent email) had focussed largely on the placement of interim CTOs. The Tribunal did not find it credible that the contents of this email was pure coincidence. Mr Coles told the Tribunal that his job was to ensure 'continuity' across the board although not only in relation to technology appointments.

148 This, then, was the context in which the Executive Board met on 13 May, devoted some two hours to discussing DMI and which gave rise to the events relating to the Claimant which began the following day. It was also clear to the Tribunal that there existed a deeply ingrained cultural expectation within the organisation of sacrificial accountability when something large and/or public went wrong 'on your watch'. This appeared to approximate to something akin to ministerial responsibility. Externally, the very high profile of the BBC together with its public and governmental accountability for its use of public funds invariably gave rise to very high levels of scrutiny by the media, in which field it is itself regarded as a world leader, and (under the terms of its Charter) by Parliament. Enormous attention was therefore paid to how potentially damaging events, issues and decisions were to be publicly presented. There had been the recent Savile scandal and very adverse press coverage about high executive pay-offs, including Mr Entwistle's. The combination of these factors appeared to the Tribunal to have generated particular sensitivities, fears and anxieties on the part of senior individuals, from Mr Fry on the BBC Trust down through the executive and senior management, about being 'the fall guy', left 'carrying the can', being grilled by the Public Accounts Committee of the House of Commons, or by the media, and potentially suffering what Mr Coles described in an email as 'an Entwistle moment'. DMI was a longstanding, very high-profile and very expensive project, to which the BBC had publicly committed and recommitted itself over the years. The thinking engendered by this culture and climate was exemplified in the quite extraordinarily unattractive tone and content of the email exchange between Mr Coles and Mr Younge on the evening of 8 May (summarised in paragraph 51 of these Reasons) which included a reference to leaving the Claimant 'spinning in the wind for now'. This culture and climate also gave rise to avoidance strategies, no doubt including, on occasion, the steering of the spotlight of blame in other directions, on the part of those who felt themselves to be in danger of association with a sinking ship, for example; the

rather self-justificatory tone of Mr Fry's letter of 19 November 2013 to Mrs Margaret Hodge, MP, Chairman of the Public Accounts Committee; Mr Younge's avoidance of the 'poisoned chalice' of the Steering Group until the decision had been made to halt the project; Mr Coles' self-characterisation as a 'Mr Nobody' in his email to Mr Purnell on 16 May 2013. There appeared to be a cultural expectation that, where one was unfortunate enough to be the one left holding the ticking parcel when the music stopped, one resigned, thereby taking the 'more protected route'. Mr Coles and Mr Burdon were genuinely very surprised at the Claimant's refusal to resign on 14 May 2013 and the Tribunal noted that by the time Mr Almond was dealing with the Claimant's appeal against dismissal, virtually all of the other senior figures associated with the DMI project had left the Respondent; Caroline Thomson, Zarin Patel, Patrick Younge, as indeed has Lucy Adams, although the precise timings and details of these departures, other than Ms Thomson's, were not before the Tribunal.

149 At times, the Claimant himself was not entirely immune to this cultural climate in the organisation. His briefing note regarding DMI to the new Acting Director General, referring to Mr Fry's letter of 19 November to Mrs Hodge MP, was clearly intended to defend technology's corner and redress the balance against what he quite clearly viewed as a directional deflection of blame. No doubt, for this reason, he did not consult his line manager before sending his email to Mr Davie. Further, the Claimant was not, per se, contrary to the characterisation of DMI as a "technology project we are worried about", since his reply to Mr Purnell's email, on 24 April 2013, was sanguine in stating that "DMI is the one we have that is going to generate a write down of around 25% and ...I expect Tony (Hall) will want to get this behind us ASAP." Nor, indeed did he in this email pose any objection to the recommendation of the project's closure, of which he had been apprised the previous day. Nevertheless, the Claimant was not prepared to take the rap for the closure of DMI, to be 'stitched up', as he saw it, when faced with the ultimatum of 'resign or go through a disciplinary process and face dismissal' at the meeting on 14 May 2013.

150 Mr Coles stated that, as the Claimant's line manager, he regarded himself as the appropriate person to conduct the disciplinary and therefore immediately began this process by sending the initial disciplinary letter later the same day, setting out the allegations and convening a meeting 2 or three days later. Given the seriousness and breadth of the allegations of gross misconduct with which the Claimant was faced, the Tribunal found this to be remarkably short notice and quite clearly determined by the demands of the Trust's, Director-General's and/or Executive's proposed public announcement timetable regarding the closure of DMI, rather than any considerations of what might constitute fair process in a disciplinary of this gravity. Mr Coles on 16 May, in that context, stated in an email; "we are trying to fast track the process" ...

151 Mr Coles was also, at this time, exploring an interim replacement for the Claimant, co-ordinating the gathering of whatever negative material regarding the Claimant could be trawled from historical email records, discussing who should, or should not, be fronting any public announcements regarding DMI, which the Trust wished to happen without delay, and on 23 May he interviewed Ms Webb in advance of the disciplinary process. Although Mr Coles paid lip service to the necessity of "process" in his internal emails regarding the Claimant's disciplinary – a word which, in one email, he tellingly placed in inverted commas – the Tribunal formed the view, on the basis of all the evidence before it, that Mr Coles

was the designated, or self-designated, continuity 'fixer' charged with getting rid of the Claimant, one way or another, timed to coincide with the announcement of the closure of DMI and the substantial write-down, and that Mr Burdon was complicit in this intention.

152 Eventually, it was decided, following consistent objections by The Claimant and his solicitors, that Mr Coles was not the appropriate person to conduct the disciplinary, and Mrs Dyer and Mr Pascazio were appointed to replace Mr Coles and Mr Burdon, of which the Claimant was informed on 31 May. Mrs Dyer was a senior manager from outside the division and was given explicit full authority by the Executive Board to conduct an independent process. Both she and Mr Pascazio told the Tribunal that there was pressure from above as to time, but not as to outcome, and that when Mr Pascazio 'pushed back' a little on time, he was told to take as long as necessary.

153 It is the Respondent's contention that this handover to Mrs Dyer, supported by Mr Pascazio, marked a clean break from anything which may have gone before and that Mrs Dyer only spoke to Mr Coles twice thereafter, when taking evidence from him, and that therefore he was not 'pouring poison into her ear' throughout the disciplinary process, as the Claimant suggests. The Claimant told the Tribunal that he believes that the dismissal was a sham and the outcome predetermined, although he does not aver that there was an explicit or widespread conspiracy after Mrs Dyer took over, nor does he characterise her as having acted in bad faith, but simply that the process was flawed in many ways, that he does not know what was going on behind the scenes, that her conclusions were not borne out by the evidence which he had provided to her and that therefore something else was, perhaps, driving her decision.

154 The Tribunal, on a balance of probabilities, on all the evidence before it, accepted that the disciplinary process, as re-launched under Mrs Dyer, was an attempt, very probably on the part of those in the Respondent organisation having some grasp of employment law and the norms of fair process, to meet the reasoned objections of the Claimant and his solicitors to Mr Coles' conduct of the process, by appointing someone more independent and impartial to the matter in hand and that this succeeded, to the qualified extent set out below. The personal integrity and good faith of Mrs Dyer are not directly impugned by the Tribunal. However, she was in a very difficult position, was very much in the hot-seat and in the spotlight in what was a very high-profile case, with lawyers involved on both sides, as she well knew. She had only ever conducted 10 dismissals in her HR career and needed to rely very heavily upon those around her, advising and supporting her, and was at times naïve in this reliance. The Tribunal formed the view that she was out of her depth in the situation as it unfolded and was at times overwhelmed, as when Mr Pascazio advised her to go home, clear her head and turn off the phone and email in order to make her decision in peace.

155 As to the two other potential reasons for dismissal, referred to at paragraph 145 of these Reasons, being those in the mind of Mrs Dyer as dismissing officer, as set out in her letter of dismissal: the Tribunal concluded unanimously that the principal reason for dismissal, within the meaning of **section 98(2) of the Employment Rights Act 1996**, was a reason related to the Claimant's conduct because; (i) the dismissal letter (even if the reasons are listed in reverse order and stated to be 'and/or' in the final 'Outcome' section) begins with, and majors on, the disciplinary allegations which are stated to be 'by

themselves' 'so serious as to entitle the BBC summarily to dismiss you. However, even if this were not the case' ...'trust and confidence in your abilities as CTO have entirely broken down'. This denotes gross misconduct as the principal reason operating on the mind of Mrs Dyer at the material time. (ii) the entire process leading to the dismissal had proceeded on the basis of gross misconduct from the outset on 14 May.

156 The Tribunal was, nevertheless, surprised that Mrs Dyer had also mentioned "lack of capability" in her dismissal letter as an alternative to misconduct as entitling the Respondent to summarily dismiss him, since this appeared to be the first time during the process that capability had been formally raised against the Claimant. Also surprisingly, at one point during cross-examination, Mrs Dyer hesitated in characterising the Claimant's culpable conduct as between 'misconduct' and 'negligence', plumping finally for negligence because there was 'no mal-intent' and 'he was trying so hard'. This also was inconsistent with her dismissal letter. The Tribunal was struck by this apparent lack of clarity in the mind of the dismissing officer as to the precise nature of the Claimant's failures. It is perhaps indicative of how far Mrs Dyer was floundering in her attempt to marry gross misconduct allegations with notions of accountability and may, in some measure, explain the paucity of reasoning in her dismissal letter, further referred to below. On balance, the Tribunal accepted that Mrs Dyer's belief in the Claimant's broad culpability, as set out in her letter of dismissal, was genuine. She there stated that she found three of the four allegations of gross misconduct to be proven. Pursuing the Burchell test therefore, Tribunal asked itself whether Mrs Dyer's genuine belief was based upon reasonable grounds following a reasonable investigation.

156.1 The first difficulty here is the conflicting evidence before the Tribunal as to what precisely constituted the 'investigation' in this case. Mrs Dyer, in her witness statement said that her role was 'to investigate the matter thoroughly' and her dismissal letter used the phrase 'I have found that there is a case to answer', which appeared to the Tribunal to be a phrase pertaining to the investigatory, rather than the disciplinary, phase of the process, and indeed is used as such in the Respondent's own disciplinary policy. However, Mrs Dyer stated in cross-examination that she had understood that there had already been a 5 month "extensive review"; that Mr Coles and Mr Burdon had 'carried out a preliminary investigation by considering the Accenture Report and the 4 allegations in the initial disciplinary letter', that 'the Respondent had determined that the project had failed and was to close, lots of money had been wasted and that she was handed a case to answer'. She appeared hesitant and unclear at one stage during cross-examination as to whether she herself was conducting the investigation or whether one had already been carried out. Mr Pascazio, who was her HR support, told the Tribunal that he believed that the investigation had already been done and "was handed to us to do the disciplinary". Mr Coles on the other hand, told the Tribunal that Mrs Dyer 'took over and did the investigation', adding a little later that "the disciplinary process is the investigation". The Tribunal noted, in passing, that in her evidence subsequently to Mr Almond Mrs Dyer stated that she had conducted 'the appeal in the normal way', a 'slip' not spotted and corrected despite her apparently extensive scrutiny of, and amendment to other parts of, the notes of this meeting.

156.2 Treating the Pasadena and Accenture reviews into the DMI project as constituting an investigation into alleged misconduct on the part of any given

individual appeared to the Tribunal to be highly problematic in terms of satisfying the **Burchell** test of a 'reasonable investigation' because neither Pasadena nor Accenture addressed any individual's personal conduct in relation to the project. Mrs Dyer accepted at one point during cross-examination that accountability is not the same as misconduct in the disciplinary sense. Fundamental principles of fairness in relation to allegations of gross misconduct, require that they are sufficiently particularised to allow the accused to know the precise nature of the allegations against him/her, in order to be able to prepare a response. However, crucially, time and again in her evidence Mrs Dyer appeared to equate the project's failure and wasted money with the Claimant's personal culpability for gross misconduct. The Tribunal did not accept the Respondent's contention that this case was broadly analogous to the cases of the dismissal of a headmaster of a failed school or the manager of a relegated football team or the CEO of a failed business, each of whom, it was contended, could not expect minute particulars of each specific thing which they had done wrong because each had taken on a higher salary and senior responsibility and had led their employer's operation into failure. The Claimant's role as CTO was very much broader in remit than the DMI project alone. It included daily keeping the BBC 'on the air' and many other projects, both major and minor, including the Olympics, North, New Broadcasting House, all of which he had carried out with great success, and for whom DMI represented some 5% in terms of his time and budget, however high-profile and historically troubled the DMI project was from the perspective of the Trust and the executive of the BBC. DMI was not co-extensive with the whole school or football team or company. Its failure was not equivalent to the failure of the employer's entire operation. In this important respect this case is distinguishable from those other cases.

156.3 The Tribunal noted that the Respondent's disciplinary procedure provides that: "An investigation will take place in order to establish the facts and a disciplinary meeting will follow if the investigation finds that there is a case to answer," in other words that the investigation should take place before the disciplinary. In as much, therefore, as Mrs Dyer conducted the investigation after the commencement of the disciplinary process, this renders the Respondent in breach of its own disciplinary policies.

156.4 It is trite law that where an employee faces dismissal for extremely serious and/or potentially ruinously damaging disciplinary allegations, whether personally or professionally, it is incumbent upon an employer to conduct a commensurately careful and thorough investigation before coming to a conclusion. The Claimant's professional reputation, built up over some three decades, was here at risk, given the very high level of publicity which issues surrounding the DMI project inevitably attracted, as the Respondent very well knew. In the Tribunal's view, it was even more incumbent upon the Respondent to thoroughly investigate the Claimant's alleged misconduct as compared with other potential causal factors in the failure of the DMI project, since neither his successful record in carrying through other major projects over a period of four years nor his good general appraisals were in dispute.

156.5 In Mrs Dyer's investigations, she proceeded by using the details set out in the Claimant's Response statement, rather than any specific factual allegations of misconduct generated by the Respondent, as the terms of reference with which to question her witnesses, in itself a reversal of the normal order of things. This may well have been because the breadth and generality of the 4 allegations,

as put to the Claimant, offered no specifics in themselves: "You have failed to deliver the requirements of the project". "You have been responsible for £94 million of expenditure which has delivered little value to the BBC". "You have consistently failed to put in place actions to stop the continued spending of the project budget". ... "You continue to fail to take any responsibility for this failure, in full or in part". These appeared to the Tribunal to be entirely general, vague, broad in nature and non-specific and therefore virtually impossible to address in any practical way. The Claimant, understandably, condescended to detailed specifics in his Rebuttal statement and supporting evidence, in order to cover all eventualities potentially falling within the broad allegations with which he was faced, when his entirely reasonable request for specific details of the allegations against him was regularly refused. Further, Mr Pascazio's memo to Mrs Dyer (referred to in paragraph 106 of these Reasons); "Have to maintain position that project has been stopped and considered not to have delivered so is for John to present evidence to the contrary. You can then consider what John puts forward and take a view" tended to suggest a mindset requiring that the Claimant prove his innocence, rather than that the Respondent establish his culpability.

156.6 Further, as found by the Tribunal, Mrs Dyer tended to use leading questions and negatively-skewed reflection-back techniques during her questioning of witnesses. In this, she was perhaps badly advised, since Mr Pascazio told the Tribunal, in defence of leading questions, that 'they are easy to rebut', a remark which the Tribunal found very surprising in the mouth of an HR professional of some 21 years' experience. Indeed Mrs Dyer was herself HR Director for Television, North and Nations, at a very senior management level in HR, at the material time. She must therefore be taken to understand, in her own capacity, the incompatibility between leading questions and the conduct of an impartial disciplinary investigation.

157 The above matters, in the Tribunal's unanimous conclusion, are not the characteristics of a reasonable investigation. Further, and whether Mrs Dyer was conducting an initial investigation, a disciplinary investigation or a combination of both, in relation to the entirety of the process which she conducted, the Tribunal unanimously concluded that it was further fundamentally flawed in the following respects:

157.1 Mrs Dyer was disproportionately reliant upon the evidence, opinion and interpretation of Mr Coles in relation to the Accenture Report, the technology and context, which she did not understand, and she specifically solicited his opinion on where he considered the Claimant to have failed in relation to the DMI project. She stated in evidence that she understood the Accenture Report to have been the 'key basis for commencing the disciplinary process, together with the 4 allegations in the initial disciplinary letter', and had asked Mr Coles for a 'brief summary' of the Accenture Report, which she had found 'quite technical'. She ended her interview with him on 6 June 2013 by thanking him for his time and saying "a critical part of the investigation was obtaining the statements from Dominic giving clear reasons why he considers John has failed and that the DMI project has failed." The Tribunal found that the Accenture Report did not in fact show what Mr Coles contended for it, summarised by him as 'that DMI was potentially flawed from top to bottom', but was in fact far more nuanced. Mr Coles' opinions, throughout his evidence to her, were unrelentingly and exclusively negatively biased and damaging to the Claimant. Mr Coles' stance, as he later stated to Mr Almond during the appeal interview, was that the

Claimant's position was 'untenable' and that he had been offered 'the chance to resign, of going down a more protected route'. Although she knew that he had been replaced by herself as disciplining officer because of his previous involvement, not least as proponent of the closure of DMI, Mrs Dyer appeared to take his evidence at face value, without specifically testing his assertions. It appeared to the Tribunal that Mr Coles was held in inappropriately uncritical awe by both Mrs Dyer and Mr Almond, as witness Mr Almond's rather fawning and apologetic email to Mr Coles on 6 November 2013, after his interview as part of the appeal. This attitude towards the main protagonist of an employer's case against an employee undergoing a disciplinary process does not assist either a dismissing officer or an appeal hearer in discharging their duties with the necessary impartiality, fairness and rigour.

157.2 Mrs Dyer apparently wished, throughout the process, to remain focussed on 'the bigger picture', telling the Tribunal that she felt she "needed to establish accountability" and "didn't feel the need to understand the detail of DMI because the project had failed and the BBC had agreed that". She attributed most weight to the witnesses whom she heard, which did not include the technology or Accenture review team "because I was not confident about what the documents were telling me". She clearly considered it unnecessary to engage with the Claimant's detailed case and at least once during the disciplinary meetings her irritation about the time which the Claimant wished to devote to the detailed evidence for his defence was patent to those present. Whilst accepting in oral evidence that DMI was a very heavily documented project, Mr Pascazio admitted that he did not read the Claimant's documents and stated that he did not know if Mrs Dyer had read them either. The Tribunal concluded, on the basis of her rather hesitant and contradictory evidence on the issue, that Mrs Dyer herself did not read very many of them either. Further, there was no evidence that she followed up on any of the Claimant's documentary evidence with any of her witnesses. Her failure to engage was further confirmed by her letter of dismissal, which lacked any substantive evidence-based reasoning for her findings of misconduct, offering merely a three line statement of conclusion under each of the three allegations which she upheld. The Tribunal considered this to be wholly inadequate in a case of such gravity, where the Claimant had gone to considerable efforts to rebut the case against him, by evidence and a wide range of contemporaneous documentation, and where Mrs Dyer had the opportunity to consider a substantial volume of evidence on both sides.

157.3 Even with the best will in the world, neither Mrs Dyer nor Mr Pascazio were operating in a vacuum. Mr Coles' chief of staff, Ms Rees, was feeding her 'barrage of emails' through to Mr Pascazio as late as 24 June. Mrs Dyer also told the Tribunal that she had reverted to Mr Coles to check something after her interview with him, but accepted that there were no notes of this transaction. In particular, the Tribunal did not find it credible that Mrs Dyer somehow remained unaffected by the ingrained culture of the organisation described above as 'akin to ministerial responsibility', nor could she have been unaware of how acutely this must have been felt to apply by those above her throughout the Trust and executive in relation to the hugely important, high profile and potentially publicly disastrous DMI closure. Mr Pascazio, who was assisting her, stated that he had 'pushed back' against pressures as to time and otherwise, although he admitted in relation to the later appeal process that 'he was aware without being explicitly told' that the Director General wanted to be able to say to the Public Accounts Committee that the initial process 'had been concluded'. As to substance, he

wrote in his note to Mrs Dyer (referred to in paragraph 106 of these Reasons); "Have to maintain position that the project has been stopped and considered not to have delivered ..." He sought to explain this in cross-examination by saying that it had been "an unfortunate choice of words". Everyone was well aware that lawyers were engaged in the process on both sides and Mr Pascasio stated that he was updating the legal team. The Tribunal concluded that Ms Adams, as director of HR must also have been regularly briefed, whether directly or indirectly. Mr Burdon told the Tribunal that he had spoken to Ms Adams on 14 May, when he and Mr Coles had conduct of the Claimant's case, and also stated that in his view 'it was not necessary to examine details; the question was whether something catastrophic had gone wrong on the Claimant's watch' and that this 'could be gross misconduct'. He added that the investigation leading to the Executive Board's decision to close DMI "were the facts" and that 'it was not about a forensic analysis about whether or not the technology worked, it was about closing the project' and "I would expect some come-back on that". Mr Burdon appeared to the Tribunal to be giving voice here to the establishment position and culture which permeated everyone's thinking. He was Mr Pascasio's line manager and had briefed him at handover of the process from Mr Coles and himself. Mrs Dyer herself was fundamentally looking at the big picture of accountability and responsibility for the given failure/closure of the project (as indeed was Mr Almond at a later stage) and struggling, within the confines of the organisational culture, to equate this with the requirements of the gross misconduct disciplinary process which she had been given to conduct. She inevitably failed, since they are not the same thing. Her lasting confusion, even at the date of this Tribunal Hearing, as to the precise reason for dismissal as between misconduct/negligence/incapability (referred to in paragraph 156 above) and her impatience with the Claimant's insistence on detail, as disclosed in the documentation, no doubt sprang from this mismatch.

157.4 As to procedure: It was clear on the evidence that the Respondent failed to provide important documents in a timely fashion to the Claimant, even where these were readily to hand and even where they were explicitly requested. Mr Pascasio told the Tribunal that he was fundamentally responsible for documents. He accepted that the Claimant had been sent thousands of his emails on 19 June and late on the evening of Friday 21 June was sent Steering Group documents back to 2009, his appraisals, interview notes from witnesses dating back over several weeks and the BBC documents, all for a meeting scheduled for 25 June, with the recommendation, in Mr Pascasio's letter of 23 June, that the Claimant 'familiarise yourself with the documents as a whole' since 'I do not propose to highlight how each document relates to each specific allegation' but that 'the documents in the pack will form the basis of any decision we reach as part of this process.' This applied the dual pressure on the Claimant to read all of the documents without allowing him sufficient time to do so and, in the event, was not entirely accurate in that neither Mr Pascasio nor Mrs Dyer read very widely beyond those documents which the Respondent regarded as core to its case, but instead relied on witness interviews.

157.5 The Tribunal was unanimously astonished by the terms of the letters sent by Mr Pascasio to the Claimant on 21 and 24 June 2013 in their apparently cavalier disregard for any of the accepted norms of a fair disciplinary process, particularly on the part of a large and well-resourced organisation, in the following respects:

(i) faced with a request on 19 June for postponement of the disciplinary meeting of 26 June because the Claimant was on family leave from 26 to 28 June, coupled with his repeated request for documents, and knowing that the Claimant had just been sent 3,000 emails on the day of the request itself, the meeting is instead *brought forward* by one day to 25 June, together with the promise to send yet more documents and a recommendation to 'familiarise yourself with the documents as a whole'. (Mr Pascazio's letter of 21 June as set out in paragraph 99 of these Reasons). A further large bundle of documents was sent late in the evening of 21 June.

(ii) faced with the Claimant's request, on 22 June, for clarification of the Respondent's case and the allegations against him, and a repeated request for documents, and seeking a postponement because he now only had one working day to go through the thousands of documents (some 16,000) which he had recently been sent and to prepare for the hearing, Mr Pascazio replied on 24 June (in the terms set out in paragraph 102 of these Reasons): that he did not consider further clarification necessary, over and above the existing 4 allegations which were "the simplest way to categorise the case against you"; promising more legible copies of certain documents already sent but refusing all other requests because "we believe that the documents provided are sufficient to ensure a fair and manageable process is followed"; "I realise that you find the timing of the disciplinary hearing challenging, however, I am confident that, given the limited amount of material included in the bundle, you have not been prejudiced by the suggested timescale" and "we hope to be in a position to reach a final decision without a further meeting". The Tribunal was at a loss to understand how Mr Pascazio came to assess the amount of material in the Claimant's possession as "limited", or what he might have considered a prejudicial timetable. He had also refused to time-limit the period under consideration as part of the disciplinary, which the Claimant had requested so as to reduce his preparatory workload given the timetable imposed by the Respondent and the huge volume of documents.

(iii) The Claimant only agreed to attend on the following day on the basis that this would not be the final meeting, since he had had insufficient time to prepare his rebuttal. At the meeting Mr Pascazio stated blithely, and apparently without apology, that his letter "should not have contained the words about it being a final meeting". He appeared to have no conception of the potentially vital difference, from the Claimant's point of view, between a final and a non-final meeting, nor of the unrealistic timescales, given the breadth and ill-definition of the allegations, the large volume of lately-supplied documents and the personal and professional significance of the outcome to the Claimant. He accepted in cross-examination in relation to the late supply of documents that he "didn't put himself in the Claimant's shoes".

157.6 That an experienced HR figure could have considered that this was an acceptable way in which to conduct a serious gross misconduct disciplinary process against a senior employee of some four years' service, can only be credibly explained, in the Tribunal's view, in one of three ways: (i) spectacular incompetence. The Tribunal did not accept as credible this degree of incompetence on Mr Pascazio's part, since it seemed highly unlikely that Mr Pascazio would have been handling a disciplinary of this notoriety and importance without senior oversight and support, particularly since lawyers were involved on both sides. (ii) explicit instruction by others, which in the absence of

specific evidence the Tribunal was unable, on a balance of probabilities, to find proven. (iii) by the HR department being so imbued with the general organisational culture regarding accountability for catastrophic events 'on your watch', together with 'comms' timing considerations regarding how such matters should best be presented both internally and externally, as to eclipse entirely the requirements of reasonable compliance with the fundamental principles of a fair hearing, namely; that a person facing serious allegations is entitled to know the specific allegations against him and to have sufficient time to consider all of the evidence and to prepare his defence. After careful consideration, the Tribunal concluded, on a balance of probabilities, that the third alternative was the most credible explanation for Mr Pascazio's letters.

158 The Tribunal concluded unanimously that, having regard to the entirety of the matters set out above, the Respondent has failed to satisfy it, on a balance of probabilities, that it conducted a reasonable investigation into the Claimant's alleged misconduct, so as to form a reasonable basis for Mrs Dyer's genuine belief, within the meaning of the principles set out in **the Burchell case**. The Tribunal accepted that the great preponderance of witness evidence before Mrs Dyer confirmed that the project was a failure, overall, (the BBC having made a decision to close it and cut its losses rather than continue to incur further expenditure, as it was entitled to do), and that there was a combination of reasons for this, business, technological and political. However, neither this failure/decision to close DMI nor the Pasadena and Accenture reviews in themselves, without more, established gross misconduct, in the disciplinary sense, on the Claimant's part. Mrs Dyer was seeking 'accountability' for the project's closure and failure and was conflating that closure and failure with the Claimant's personal liability for gross misconduct. She wanted to remain focussed on 'the big picture' rather than the detail, the witnesses rather than the documents. She appeared to regard the detail and the documents as a tiresome and unduly time-consuming distraction from the task in hand. However, the majority of her witnesses also stated that the Claimant was not the only one bearing responsibility for the project's failure. The Claimant's lone voice in defence of the project's continued viability and potential struck Mrs Dyer and led to her subsidiary reason for dismissal, namely; breakdown in trust and confidence in the Claimant's abilities as CTO due to the wide divergence in views regarding DMI.

159 The appeal, under Mr Almond, did not put matters right. Although he interviewed those witnesses whom the Claimant had requested and whom Mrs Dyer had decided not to interview, he told the Tribunal that "responsibility and accountability were absolutely at the forefront of my mind all the time." He was totally inexperienced in terms of both the conducting of appeals and the technology. He promised the Claimant a further meeting after the first one which lasted 32 minutes, which then never took place. He delayed his outcome decision for some months, apparently, in part, so as to ensure that his decision was not out of keeping with the outcome of the PWC report, not in order to allow the Claimant the opportunity to comment on it (the Claimant had already been told that PWC would have no effect on his process) but because, as he told the Tribunal "it would lack credibility if PWC and I contradicted each other." The time lapse from lodging the appeal to outcome letter was over 7 and a half months, a very long delay indeed, particularly when compared with the unseemly haste with which the disciplinary process had been pursued prior to dismissal. Further, as the Tribunal found on the facts, Mr Almond was at all times focussed

on accountability, did not read the Claimant's material and documents and was clearly far from impartial, as his email to Mr Coles on 6 November 2013 vividly demonstrated.

160 Even had the Tribunal found that there had been an investigation sufficient to satisfy the **Burchell** test, it would have concluded unanimously, on a neutral burden of proof, having regard to the entirety of the disciplinary process, that the dismissal was unfair within the meaning of **section 98(4) of the Employment Rights Act 1996**. It cannot be said that the Respondent acted reasonably in treating the misconduct reason as a sufficient reason for dismissing the Claimant, in all the circumstances and having regard to equity and the substantial merits of the case, because in all of the respects set out in paragraphs 156.1 to 156.6 and 157.1 to 157.6 inclusive and paragraph 159 above, the entire disciplinary process was profoundly substantively and procedurally flawed. These were not the actions of a reasonable employer and in these circumstances the dismissal fell out-with the range of reasonable responses of a reasonable employer. The Respondent contends that if the Claimant is found to have been unfairly dismissed, he would have been dismissed fairly 'even if a slightly different procedure had been followed'. However, the matters set out above cumulatively went well beyond what may reasonably be described as 'procedural flaws' and went to the root of the entire process and therefore the reasoning in the **Polkey** case cannot apply. Accordingly, the Claimant's complaint of unfair dismissal is well-founded and succeeds.

161 The Tribunal was of the view, on the evidence before it, that a reasonable employer in the Respondent's position, having decided at the highest level on 13 May 2013 that it had lost confidence in the Claimant as CTO, might reasonably have informed him of this fact in a transparent manner and given him six months' contractual notice, on gardening leave, rather than charging him with gross misconduct and proceeding down the disciplinary route in the fundamentally flawed and unfair manner set out above.

162 Contribution: The Respondent contends that if the Claimant was unfairly dismissed, he contributed 100% to his dismissal by his misconduct and neglect. The Claimant contends that the process was so flawed that it would be impossible to seek to reconstruct what might have been, so as to enable the Tribunal to embark upon either a **Polkey** or a contributory fault process. The Tribunal, however, on the basis of all the evidence before it, found itself in a position to assess the extent to which the Claimant may be said to have contributed, by some culpable or blameworthy conduct, to his own dismissal, and in particular, took the following factors into account:

(i) The DMI project predated the Claimant's employment by the Respondent. Indeed it had already demonstrated itself to be deeply problematic and undeliverable by Siemens before his arrival. It was he who negotiated a substantial return of money from Siemens (£27.5 million) when it was brought in-house. It may well have been 'mission impossible' from its inception, the consensus being that it had been a hugely ambitious project; an aspiration akin to "trying to boil the ocean" as Mr Younge put it to Mrs Dyer during his interview.

(ii) The Revised Business Case in support of its continuance, when it was brought in-house, was written in early 2010 by Raymond LeGue, DMI Programme Director, and Kerstin Mogull, COO of Future Media and Technology

Division, not by the Claimant, although the Claimant, as CTO, was named as Sponsor.

(iii) The consistent message to the Claimant, throughout his employment up to September 2012, from his direct line managers (Mr Huggers and Ms Thomson, who were both on the Executive Board) and from Mark Thompson, the Director General, in regard to what everyone knew was a highly problematic project, was that he should press on and keep going, in spite of the problems. The Claimant's Job Specification requires, *inter alia*, 'political astuteness'. He no doubt recognised that this was a political and commercial, as well as a technology, project in that the Respondent's aim was to "put their own wrapper on" the digital solution, perhaps with a view to future commercial exploitation as well as being seen as leading the field, rather than buy components off the shelf. Accordingly, he continued to champion the project, as was part of his role, in an up-beat and positive way, although without concealing the realities of its difficulties in his reporting to his line managers and briefings to the Steering Group. He had flagged up the "desperate" need for an engaged, senior business representative on this Group in May 2012, although Mr Younge only stepped into role from 4 October, once the decision to stop the project had been made. The Claimant did present rather too positive an overall picture of the project to Mr Davie, incoming acting Director General in November 2012, in rebuttal of Mr Fry's letter to the Chairman of the Public Accounts Committee.

(iv) The fundamental message to 'keep going' changed with Mr Entwistle becoming Director General and the departure of Mark Thompson and Caroline Thomson in September 2012 and in October 2012 the project was halted and the Claimant was no longer in charge of DMI, thence E2E Digital.

(v) In terms of general governance responsibility, the Tribunal accepted that the Claimant, among the other members of the Steering Group, both finance and business, could have called for an in-depth re-appraisal of DMI, at any stage, in spite of the messages from on high to 'keep pressing on', although whomever did so might well have felt themselves to be in the shoes of the young child who cried out that "the Emperor has no clothes on". The Claimant did instigate the Danker Review in August 2012. Further, in the Revised Business Case for the project coming in-house in 2010 the Claimant and the Steering Group are separately stated to be "accountable", as set out in paragraph 16 of these Reasons. However, the Business Case also provided for a broad structure of governance and oversight across the Respondent organisation. The continual runic reiteration of the Claimant's three roles in relation to the DMI project; CTO, Project Sponsor and Chair of the Steering Group, does not in itself establish substantive culpability on his part.

(vi) The Claimant's complete denial to Mrs Dyer of all responsibility for anything other than the technology aspect of the project was not realistic, in the Tribunal's view, in the light of the broader terms of his Job Description (as set out in paragraph 11 of these Reasons) and his accountability under the terms of the Revised Business Plan of April 2010 (paragraph 16 of these Reasons).

(vii) However, the Tribunal concluded that the extreme defensiveness of his position regarding his own personal liability was very probably prompted by being personally accused of gross misconduct and his belief that he was being 'stitched up' and publicly scapegoated for the abandonment of DMI. His strenuous

arguments for the potential continuing validity and ongoing residual value of the project may well have been prompted, at least in some measure, by what he saw as the extreme nature of the write-down. He well-knew that being disciplined, or indeed resigning, if associated with the closure of DMI, would be potentially ruinous to his reputation. The Tribunal noted that his earlier email of 24 April to Mr Purnell (paragraph 48 of these Reasons) appeared entirely sanguine regarding a 25% write-down on DMI, and indeed, by implication, its closure, as recommended in the E2E Digital Review report, circulated to him on the previous day. The difference here was that he was not being personally accused of gross misconduct in that regard.

(viii) Mrs Dyer vaguely intimated during oral evidence that things might possibly have been different had the Claimant accepted at least some responsibility for the failure of DMI. However, the Tribunal considered that this would only have had an approximately 5% chance of altering the dismissal outcome, in the context of Mrs Dyer's findings and thinking as a whole.

163 The Tribunal concluded, in the light of all of the above factors, that the appropriate level of the Claimant's contributory conduct to his own dismissal was 10% for (v) above and 5% for (vi) above; that is 15% in all.

164 Public interest disclosure: As to jurisdiction, the Tribunal concluded that the suspension constituted a continuing act from 17 May until the Claimant's dismissal, since the Respondent decided to sustain it until the completion of the disciplinary process, despite the Claimant's repeated requests for it to be lifted and that he be allowed to return to work. The continuing suspension and its publication are too closely interrelated to be realistically capable of severance. Accordingly, within the provisions of **section 48 of the Employment Rights Act 1996**, his whistle-blowing complaints are in time and the Tribunal has jurisdiction to consider them in their entirety.

165 The Tribunal concluded unanimously that the first two alleged protected disclosures (the statement to Ms Webb on 21 March 2013 and to the Finance Committee meeting on 29 April 2013, referred to in paragraphs 45 and 49 respectively of these Reasons) did not qualify for protection because neither of them disclosed information, within the meaning of **section 43B(1) of the Employment Rights Act 1996**, but were, rather, expressions of opinion, amongst other views, as to the proper level of write-down.

166 The Tribunal was satisfied that the remainder of the alleged protected disclosures, as set out in paragraph 6.3 of these Reasons, did so qualify as disclosing information tending to show failure to comply with legal obligations, within the meaning of **sections 43B and 43C of the Act**. The Claimant's good faith is not in dispute. In terms of chronology, the Tribunal noted that the Claimant was suspended on 17 May 2013 after his own and his solicitor's protected disclosures on 14 and 15 May 2013.

167 The suspension, continuing suspension and publicising of his suspension were manifestly detrimental to the Claimant. This is not in dispute.

168 The question is whether the acts/omissions of detriment to the Claimant were done 'on the ground' that he had made protected disclosures. **Section 48(2)** provides that it is for the employer to show the ground on which any act, or

deliberate failure to act, was done. It is common ground that the correct test is whether the protected disclosure “materially influences (in the sense of being more than a trivial influence) the employer’s treatment of the whistle-blower” (**NHS Manchester v Fecitt, CA**). It was further contended on behalf of the Claimant that the burden of proof shifts to the employer to show that the protected disclosure did not materially influence the detrimental treatment, by analogy with the discrimination case of **Igen v Wong [2005] IRLR 258 CA**. The Respondent refuted the contention that the burden shifts to the Respondent to prove an absence of material influence, because no such statutory provision was included by Parliament in the whistle-blowing legislation and because Elias LJ noted in the **Fecitt case** that **Igen v Wong** was ‘not strictly applicable, although the principle should be equally applicable to the objective of protecting whistle-blowers as where there are unlawful discrimination considerations’. The Tribunal noted that this part of the Court of Appeal’s discussion and reasoning was, strictly speaking, obiter and concluded that had Parliament intended to make provision for reversal of the normal burden of proof, it would have done so, if not in the original statute, then in subsequent amending legislation. It clearly addressed its mind to the matter to the extent of **section 48(2)** and has explicitly made statutory provision for reversal of the burden of proof in the anti-discrimination legislation up to and including **section 136 of the Equality Act 2010**. Parliament has not made like statutory provision in relation to the whistle-blowing legislation. It follows that the guidance in **Igen v Wong** is not applicable to this case.

169 The Tribunal therefore turned to consider the reasons advanced by the Respondent for the Claimant’s suspension, continued suspension and its publication. The Claimant was suspended at a meeting on 17 May by Mr Burdon, who handed him a suspension letter. (The Tribunal noted in passing that the Claimant had only been told that the meeting was to ‘outline the process’ and therefore that the suspension appeared to be an ambush in much the same way as the initial meeting of 14 May had been). The letter gave the reason as; “given the seniority and sensitivity of your position, we have decided it appropriate to suspend you pending the completion of the disciplinary process”. It was Mr Coles’ decision to suspend the Claimant. He first mooted the possibility at 11.23pm on 14 May and became increasingly convinced that suspension was appropriate as it became clear that the disciplinary would be a lengthy, time consuming and complex process, given the Claimant’s resistance to the allegations made against him. Mr Coles discussed the matter with Mr Burdon and they feared that the Claimant would be unable fully to discharge his duties as CTO, given his attention to the disciplinary process. Mr Coles considered that the Respondent’s output may be at risk due to the Claimant’s engagement with, and strength of feeling about, the disciplinary process and he needed to ensure continuity. Mr Burdon told the Tribunal that it was normal to suspend in cases of alleged gross misconduct and procedurally open to the Respondent to do so. Mr Pascasio told the Tribunal that in early June he and Mrs Dyer had some additional concerns that the witnesses to whom they would be speaking either worked with, or reported to, the Claimant.

170 The Tribunal found generally credible the Respondent’s witness’ evidence on this issue and concluded, on a balance of probabilities, that the principal reasons for the suspension and its continuance were genuinely held legitimate business protection reasons and the precautionary removal of the Claimant from the workplace for the duration of the disciplinary process. The Tribunal was also of the view that the decision may well have been influenced, at least in relation to

its timing, by considerations of the Respondent's desire to make prompt all-encompassing public announcements (as further dealt with in paragraph 170 below). In these circumstances, the Claimant's protected disclosures did not figure large within the Respondent's contemplation at the time and had no material influence on its thinking.

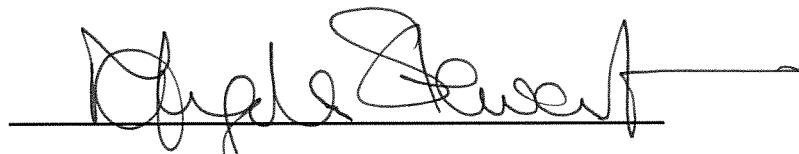
171 As to the publication of the Claimant's suspension: the Claimant's contention was that the Respondent had ensured that it had "all its ducks in a row" in order to publicly scapegoat the Claimant for the closure and associated losses of DMI. It was apparent to the Tribunal that the announcement of the Claimant's suspension in close association with the closure of DMI and the attendant write-down of almost £100 million would, in publicity terms, be the next best thing to the announcement of his resignation or dismissal, in terms of the attachment to him of public 'blame' for the failure of the project. It was clear, from the evidence of Mr Dawson, head of Communications at the material time, (paragraph 133 of these Reasons) that it was well anticipated by the Respondent how the newspapers 'joined the dots' and the likely media reaction, whether deliberately intended or not. The Tribunal also noted the lively concerns of the Trust and senior management regarding the desire to make coherent and all-encompassing public announcements about the closure of DMI as being the probable timing driver for the early timetabling of the disciplinary process, at least up to the point when Mr Pascazio 'pushed back a little' on timing. However, the Tribunal also accepted that the internal announcement of the Claimant's suspension, a necessity in business and management terms, was, with the best will in the world, very likely to leak, given the nature of the Respondent organisation. In any event, it was clear to the Tribunal that the Claimant's protected disclosures were not within the Respondent's purview at all when set against the wider considerations and importance of its publicity timing and "comms" decisions. Accordingly, the Claimant's complaints of public interest disclosure detriment are not well-founded and fail.

172 Detriment on the ground of asserting statutory rights, contrary to **section 12 of the Employment Relations Act 1999**: The Claimant's complaint appears to relate to the period between 15 and 21 May 2013, when he was pressing for an adjournment of the disciplinary hearing, inter alia, because of the non-availability of Mr O'Kane, his chosen companion. However, the detriment complained of is the same as in his public interest disclosure detriment complaint above and for the same reasons as set out in paragraph 164 above in relation to that complaint, is made in time and the Tribunal therefore has jurisdiction to consider it.

173 The Tribunal concluded that there was no evidence whatever that the Respondent was in any way resistant to the Claimant's right to be accompanied by Mr O'Kane, or at all. Indeed the evidence is to the contrary: the Respondent's policy expressly provides for it; there was a postponement to allow Mr O'Kane's presence; and Mr Coles' email to Ms Adams said "good, he has chosen Peter to accompany him". Further, the reasoning set out above in paragraphs 168 to 170 inclusive, regarding the grounds for the Respondent's detrimental treatment of the Claimant in the context of his complaint of public interest disclosure detriment, is equally applicable to his complaint under **section 12 of the Employment Relations Act 1999**. The Tribunal concluded that the Claimant's assertion of his statutory right to be accompanied by his chosen companion at a disciplinary hearing had no material influence on the

Respondent's treatment of him. Accordingly, his complaint under **section 12 of the Employment Relations Act 1999** is not well-founded and fails.

174 Remedy: The parties are requested to inform the Tribunal, within 21 days of the Promulgation date of this Judgment, of their dates to avoid up to the end of December 2014, so as to enable the listing of a Remedy Hearing for the Claimant's well-founded complaint of unfair dismissal. It is envisaged that one day will be sufficient. However, the parties are requested to liaise with each other and decide whether they consider that two days will be necessary and to inform the Tribunal accordingly at the same time as providing their dates to avoid.



Employment Judge

6 August 2014
Date

REASONS SENT TO THE PARTIES ON

6th August 2014

Mubarak

FOR THE TRIBUNAL OFFICE