EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105471/2020

Held in Glasgow by CVP on 7, 8, 9, 10 and 11 June 2021

Employment Judge L Doherty

Ms Stephanie Asgill	**Claimant** **Represented by:** **Mr Milson, Counsel** **instructed by:** **Ms E McGlone,** **Solicitor**
Royal Dutch Shell UK	**First Respondent** **Represented by:** **Mr Brown, Counsel** **Instructed by:** **Burness Paull LLP**
Shell UK Ltd	**Second Respondent** **Represented by:** **Mr Brown, Counsel** **Instructed by:** **Burness Paull LLP**
Shell EP International Ltd (SEPIL)	**Third Respondent** **Represented by:** **Mr Brown, Counsel** **Instructed by:** **Burness Paull LLP**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that;

(1) the Tribunal does not have jurisdiction to hear a claim against the third respondent.

(2) the claim against the first respondent is dismissed on the grounds that it has no reasonable prospects of success under Rule 37(1) (a) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the Rules);

(3) the claim against the second respondent in respect of acts of discrimination said to have taken place prior to 1 October 2020 is dismissed on the grounds that it has no reasonable prospects of success under Rule 37(1) (a) of the Rules.

(4) the claim against the second respondent in respect of acts of discrimination said to have taken place after 1 October 2020 will proceed, and a Preliminary Hearing (PH) to consider any relevant case management issues and to determine further procedure will be fixed.

REASONS

Background

1. The claimant presented a claim on 20 October 2020 in which she complains of discrimination under the Equality Act 2010 the (EQA), and unfair dismissal.

2. The claim was initially presented against seven respondents. Issue was taken as to the tribunal's jurisdiction to consider claims against four of those respondents, and at a Preliminary Hearing (PH) in January for case management purposes it was decided that a PH should be fixed to consider whether the tribunal had jurisdiction to consider the complaint against the then second, fifth, sixth and seventh respondents, and to consider the question of applicable law in the period prior to October 2020. After 1 October 2020 it is accepted that the claimant was employed by the now second respondent and that she was subject to UK law from that date.

3. At the PH in January it was agreed that the claimant would provide additional specification as to the basis upon which it is said that the then first and third (now first and second) respondents are liable for all or any of the acts complained of, by 10 February 2021.

4. This PH was fixed for 5 days to take place by way of CVP.

5. The claim was subsequently withdrawn against four respondents (Shell International BV; Shell UK International and Production Ltd; Shell Offshore (Personnel) Services BV; and Shell Iraq Petroleum Developments BV).

6. The claim continues to be pursued against the now first, second and third respondents. It is accepted that the first and second respondent are subject to the territorial jurisdiction of the Tribunal. It is not accepted that the third respondent is subject to that jurisdiction. The third respondent's ET3 sets out the basis on which it is said the Tribunal lacks jurisdiction to hear a claim against it, and that it has entered appearance in these proceedings only for the purpose of contesting jurisdiction.

The Preliminary Hearing

7. The claimant was represented by Mr Milsom, and all three respondents by Mr Brown, both Counsel.

8. A list of issues has been prepared, (but not agreed) in advance of the preliminary hearing in the following terms;

FIRST RESPONDENT

Are there any reasonable prospects of the Claimant establishing that the First Respondent has liability for any of the acts complained of under the terms of the Equality Act 2010? In particular:

1.1.1 *With regard to any claims made pursuant to sections 109 and 110 of the Equality Act 2010:*

Did the First Respondent at any time act as a principal (as defined in the Equality Act 2010) in respect of the Claimant?

Did any or all of the Second or Third Respondents act as agents of the First Respondent in respect of the Claimant?

1.1.2 *With regard to any claims made pursuant to sections 111 and 112 of the Equality Act 2010:*

Did any person within the First Respondent have any knowledge of the Claimant, or her circumstances, such that the First Respondent could have instructed, caused, induced or knowingly aided any discrimination in respect of the Claimant?

If they did not, can the First Respondent have any liability in respect of any alleged omissions in respect of the Claimant?

SECOND RESPONDENT

The parties agree that the Claimant's complaint of indirect discrimination related to pregnancy or maternity should be dismissed.

Are there any reasonable prospects of the Claimant showing that the Second Respondent could have any liability in fact or law for any of the alleged acts or omissions which pre-date the employment of the Claimant by the Second Respondent on 1 October 2020? In particular:

2.2.1 *Is it the case that the Second Respondent "delegated responsibility to the Third Respondent for conducting [a] restructure", as is alleged?*

2.2.2 *Did the Second Respondent at any time act as an agent for the First Respondent in respect of the Claimant's employment, as is alleged?*

2.2.3 *Has the Claimant set out any basis in fact and/or in law upon which, if proved, the Second Respondent could be liable for causing, inducing or knowingly aiding any contraventions of the Equality Act 2010 in the period prior to 1 October 2020? Namely:*

With regard to any claims made pursuant to sections 111 and 112 of the Equality Act 2010:

Did any person within the Second Respondent have any knowledge of the Claimant, or her circumstances such that the Second Respondent could have instructed, caused, induced or knowingly aided any discrimination in respect of the Claimant?

If they did not, can the Second Respondent have any liability in respect of any alleged acts or omissions in respect of the Claimant?

2.2.4 *Does clause 23 of the contract of employment between the Claimant and the Third Respondent, which commenced on 1 August 2017, provide any legal basis upon which the Second Respondent could have any legal liability for the termination of the Claimant's employment with the Third Respondent? In particular:*

Did clause 23 of the LNN contract dated 1 August 2017 delegate liability to the Second Respondent for matters arising from repatriation by the Third Respondent? If so, what is the legal effect of this clause under the scheme of the Equality Act 2010?

Applicable law in the period of the Claim prior to 1 October 2020, when it is accepted that the Claimant commenced her employment with the Second Respondent. To the extent that any of the alleged acts or omissions of the Second Respondent are alleged to have taken place prior to 1 October 2020, at a time when the Claimant was living and working outwith the United Kingdom, has the Claimant demonstrated that she had, during that period, the especially strong connection with Great Britain and British employment law which is required in order for

the relevant statutory rights, including rights under the Equality Act 2010, to be applicable in respect of her employment during that period?

THIRD RESPONDENT

Without prejudice to the Third Respondent's position on jurisdiction, the parties agree that the correct name of the Third Respondent is Shell EP International Ltd.

Does the Employment Tribunal have jurisdiction to hear a Claim against the Third Respondent, having regard to the Third Respondent's domicile in Bermuda outside the EU? For the avoidance of doubt, the Third Respondent's position is that it does not submit to, or agree to submit to, the jurisdiction of the Employment Tribunal, nor has it submitted to the jurisdiction.

9. Mr Milsom's position at the outset of the PH was that because of the nature of the complaints of discrimination it was not appropriate to conduct a PH at all, and that all matters should be reserved to the final Merits Hearing.

10. Given the fundamental nature of the jurisdictional points taken by the third respondents, the Tribunal was not satisfied that this was an appropriate course to adopt. It was satisfied that PH should proceed. The Tribunal conducted the PH under the reservation that if it emerged that it did not consider it safe to deal with any of the issues placed before it, then it would decline to do so.

11. The Tribunal heard from a number of witnesses, and had a jointly agreed bundle of documents.

Claimant's witnesses;

1. The claimant.
2. Ms Kelly Ripley, employee of Shell Expatriate Employment US Inc from 2018 to March 2020, seconded to the third respondent.

Respondents' Witnesses

Some of the witness were called for all three respondents and others for the first and second respondent only. On the first day of the hearing, Mr Brown identified which witnesses were called on behalf of which respondents. Where a witness was called for the third respondent Mr Brown indicated, prior to asking the Tribunal to read the witness statements, that his/her evidence was given subject to the caveat that it was given only for the purpose of contesting jurisdiction, and the witness was not giving evidence on the merits of the claim on behalf of the third respondent. He also applied

the caveat to evidence of witnesses called for the first and second respondents, that to the extent they gave evidence as to the merits of the claim, it was not given on behalf of the third respondents.

1. Mr Anthony Clark - Deputy Company Sectary for the first respondent (RDS); called on behalf of all three respondents.

2. Andrew Dempster - Conventional Oil and Gas (GOG) Safety Manager Middle East and Africa (MEA) - currently employee of Shell UK Ltd.; called on behalf of the first and second respondent.

3. Margaret Powell - Finance Controller-Employed by Shell Oman Trading Limited; called on behalf of the all three respondents.

4. Noorah Mezaina - HR Manager UER and Iraq – employee of the third respondents (SEPIL); called on behalf of the first and second respondent.

5. Ali Al- Janabi – Director of SEPIL. Vice President and Country Chair UAR, Iraq and Syria; called on behalf of the first and second respondent.

For ease, each of the respondents is referred to by name in these Reasons.

Findings in Fact

12. The Shell group of companies (the Shell group) is a large group of companies engaged, in very broad terms, in the oil and gas business. As of April 2021 there were over 1,800 entities within the Shell group, comprising over 1000 companies, 400 incorporated Joint Ventures, and over 300 unincorporated Joint Ventures (JVs).

The Shell Group/The RDS Control Framework

13. There are standards and policies which apply across the Shell group of companies. These include the RDS Control Framework (the Control Framework), the Shell Business principles and Code of Conduct, and the Shell Health, Safety, Security, Environment and Social Performance (HSSE&SP) Control Framework.

14. The introduction to the Control Framework a copy of which is contained at Document 45 in the Joint Bundle (at pages 444 to 467) provides as follows;

> *The Shell Group consists of Royal Dutch Shell plc and all companies in which Royal Dutch Shell plc either directly or indirectly has a controlling interest ('Shell companies'). Royal Dutch Shell plc has adopted this Control Framework for providing reasonable assurance that it will achieve its objectives, including fulfilling its external obligations and commitments. It establishes the structure within which Shell companies operate to achieve overall Shell Group objectives. Where a Shell company is the operator of a joint venture, it applies the control framework to the*

operation of the joint venture. Shell takes a risk-based approach to influencing how non-Shell operated joint ventures are run, particularly where necessary to protect Shell's reputation. Every joint venture is expected to apply a set of business principles, a Health, Security, Safety, Environment and Social Performance (HSSE & SP) policy and an approach to risk and internal control that are materially equivalent to those of Shell. The Joint Venture Governance Standards provide more instructions on Shell's expectations on the governance of joint ventures.

The key components of the Shell Control Framework are illustrated in the diagram below and this document describes each of these. The overall framework and its key components remain largely constant over time. Elements of the framework adapt to reflect changes in the internal environment and external factors including stakeholders' expectations and laws and regulations.

Each Shell company has its own properly constituted board of directors, its own management, its own business purpose, its own assets and its own employees appropriate for that purpose. Its board and management take the operational decisions necessary to run its business. Each Shell company is responsible for its operational performance and its compliance with the Foundations (see below), whereby Royal Dutch Shell plc expects Shell companies to assist it in achieving the Shell Group objectives. An outline of the various types of Shell companies can be found in Section 5.

The Shell Control Framework establishes boundaries for the activities of the Businesses and Functions and must be reflected in business management systems, processes and working procedures applied by staff. Senior leadership of Businesses and Functions are expected to act as its ambassador demonstrated through their commitment, messages, behaviours and disciplined application.

The Shell Control Framework is the single overall control framework that applies to all Shell companies. A controlling interest allows Shell to require the implementation of the Shell Control Framework by the company.

15. Section 1.2 of the Control Framework describes the corporate structure. It sets out the role of RDS as the ultimate holding company of the Shell group. It states that RDS does not involve itself or otherwise intervene in the operational activities of its many hundreds of subsidiaries, and that as a holding company it does not have the expertise or capacity to do so.

16. The Shell group operates on Business and Function lines. Functions operate across Finance, Corporate, HR, and Legal.

17. Section 1.3 describes the organisational structure. It provides as follows;

> *The Businesses and Functions assist Royal Dutch Shell plc in delivering the overall objectives of the Shell Group, each within its respective organisational authority. The Manual of Authorities describes, among other things, the distribution of such organisational authority among the individuals in the Businesses and Functions.*
>
> *A description of the various Businesses and Functions and the role of Country Chair can be found in Section 4.5. Businesses and Functions report to the Chief Executive Officer through their representatives in the Executive Committee (see Section 4.4 for more detail). Within the Businesses and Functions, there are units that provide independent assurance and report out to Board Committees. They are described in Section 3.3.*
>
> *Within the boundaries of this Control Framework, Businesses and Functions determine their own internal organisational structures as they deem fit for achieving the overall objectives of the Shell Group. This may include creation of cross-entity reporting lines (provided that both entities have a Group service agreement). Note that all staff with a legal and/or compliance advisory role in Shell companies ultimately report to the Legal Director and that the Finance staff in the various Businesses report to the Chief Financial Officer (CFO)5.*
>
> *To assist Shell companies in achieving the overall objectives of the Shell Group, Businesses and Functions develop policies, processes and systems (for example Finance or HR IT systems) for adoption by Shell companies. Each Shell company remains responsible for its policies, processes and systems, and the operation thereof.*

18. There are four Business lines; Upstream, which is concerned with extraction, now referred to as GOG (Conventional Oil and Gas); Downstream, which is concerned with manufacture and supply; Projects and Technology; and Integrated Gas and New Energies.

19. The Businesses are Upstream, Integrated Gas & New Energies, Downstream, and Projects & Technology.

20. The Control Framework provides;

> *Each Business is led by a Business Head who appoints a leadership team. The Business Leadership team supports the Business Head with the development of the Business strategies to give substance to the Shell strategy at Business level. Business leadership teams also include report directly to the CFO, the Chief HR and Corporate Officer and the Legal Director respectively.*

The Functions are Finance, Human Resources and Corporate, and Legal. Each Function is led by a Function Head. The term 'Function Head' refers therefore to the CFO, the Chief HR and Corporate Officer and the Legal Director. The Functions have delegated authorities and accountabilities for an area of functional responsibility. They assist the CEO by providing functional direction, support and leadership to Shell and they develop the Functional strategies to support the Shell and Business strategies. All staff in Legal and Finance report ultimately to the Function Head concerned. The Function Heads are accountable to the CEO for the performance of their Function across Shell and are members of the Executive Committee.

Country Chairs are appointed by the Country Portfolio Director and provide country level coordination and guard Shell's reputation in countries where Shell has business interests. Externally, they are the senior Shell representative in the country.

21. Shell has an integrated process to delegate organisational authority from RDS's board to organisations, individuals and committees.

22. The Control Framework provides that;

Shell has an integrated, consistent process to delegate organisational authority from the Royal Dutch Shell plc Board to organisations, individuals and committees.

Organisational authorities are delegated to individual staff as members of a Business or Function. These authorities are aligned with the requirements of the job or position and may only be exercised within the authority holder's area of responsibility (including existence of budget cover, if applicable). The principal organisational authorities are defined in the Shell Manual of Authorities

The Group Controller is the custodian of the Delegation of Authority process.

Corporate authority is the power to legally bind a Shell company and is held by individuals either because they are a Board member of the relevant company or because authorities have been delegated to them by the Board of such company.

The objective of delegating authorities is to ensure that decisions are made at the appropriate level in the organisation.

The Business and Function provide advice to legal entities so that those with corporate authority can take informed decisions and actions in line with the overall business objectives of Shell. Where Standards, Manuals or other policies in the Control Framework or requests for exceptions to these, require organisational approval this is achieved through

organisation authorities. Business and Functions maintain a record of any required exception. Organisational approval, as a general rule, proceeds corporate approval.

23. The legal entities within the Shell group comprise RDS holding companies, service companies, and operating companies.

24. Service companies within the Shell group provide services and advice to other Shell companies. Agreements entered into by each of the service companies allows them to obtain services from each other. Service Companies provide services to Shell Companies across the Business and Functions; others provide Business and Function specific services. Services under the service agreements are provided at arms' length. The entity receiving the service remains responsible for its operations, and no service provider assumes responsibility for the operations of the receiving entity.

25. Operating companies have business activities in one or more countries. Some operating companies carry out operations that form part of a single Business, while others operate within several Businesses.

26. Section 2 of the Control Framework explains the "Foundations" which are in place. These include the Shell General Business Principles and the Code of Conduct. Both of these are intended to be group wide.

27. The Shell Business Principles provide for a systematic approach to Health Safety Security and Environment (HSSE) to achieve compliance.

28. HSSE within Upstream worked across country lines.

29. The Shell Principles provide that a core responsibility is owed to employees to create an inclusive and equal opportunity to develop their skills and talents.

30. The Code of Conduct (the Code) applies to all Shell employees and sets out core values and principles. It contains a section *inter alia* on Equal Opportunities.

31. Individual corporate entities do not issue separate Codes of Conduct to their employees.

32. Any breaches of the Shell General Business Principles or the Code of Conduct can be reported to the Shell Global Helpline.

33. Section 3 deals with *Management Processes.* It provides under 'Strategy' that;

Business and Function strategies may be cascaded into lower level Business Unit strategies for approval by their Business or Function head.

34. Shell Companies are legal entities each with its own Directors, who are required to know the corporate governance which applies to them in that role and to comply with it.

35. Each operating company within the Shell group is responsible and accountable for its own performance and have to manage risk with regard to their own professional and legal requirements. Legal requirements on a corporate entity may vary from country to country and each corporate entity has to comply with the relevant legal and tax obligations which apply to it. Each legal entity controls its own assets, operations and personnel. Corporate authority, held by a Board member of the relevant company, has the power to bind that Shell company.

36. The *Appendix to the Control Framework* sets out the position with regard to Corporate Separateness in the Shell Group and provides as follows;

> *Shell companies are legal entities, each with its own director(s). Shell staff appointed as directors of Shell companies are required to know the laws and corporate governance requirements that apply to them in their roles as directors and to ensure that these are complied with.*
>
> *The Legal Director, via a network of legal advisers in the countries where Shell companies operate, provides directors of Shell companies with legal advice, including country-specific guidance on their duties.*
>
> *Corporate and tax laws view corporations as separate entities, with parent companies, subsidiaries and affiliates all distinct from each other. Thus, Royal Dutch Shell plc is distinct from Group holding companies, operating companies and service companies, as each of these companies is distinct from the others. Accordingly, any legal or fiscal liability of a subsidiary can be satisfied only out of the assets of that subsidiary without recourse to the assets of the parent or affiliates. In order to demonstrate its separate existence, each subsidiary must have its own properly constituted management, its own business purpose, its own assets appropriate to that purpose and its management must take the operational decisions necessary to run its business.*
>
> *Maintaining corporate separateness does not mean that all Group holding, operating and service companies must be treated as if they were wholly detached from Royal Dutch Shell plc or its requests. A parent company has the right to pursue its overall business objectives by coordinating the activities of its wholly-owned subsidiaries. Accordingly, Royal Dutch Shell plc can appropriately establish certain mandates, strategy and tactical decisions for Shell without unduly impairing the separate legal or fiscal status of the subsidiaries.*

Mandates or decisions made by the Royal Dutch Shell plc Board or its management are not acts of the subsidiaries' boards or management. Neither the Royal Dutch Shell plc Board nor the Royal Dutch Shell plc management can act in place or on behalf of the boards or management of the subsidiaries But Royal Dutch Shell plc can request that the subsidiaries implement mandates or decisions on matters of Group-wide importance, including organisational change. Specific examples are included in the organisational authorities from the 'Manual of Authorities'. The boards and management of subsidiaries continue to hold fiduciary duties to control and manage the assets, and to govern and manage the operations, of their respective subsidiaries. The board and management of a subsidiary thus are not required to implement a Royal Dutch Shell plc request if implementation conflicts with those fiduciary duties. This might be the case if, for example, a Royal Dutch Shell plc request was in conflict with local law, with a subsidiary's articles of association or by-laws, or with the solvency of the subsidiary or the commercial rights of its creditors. If, however, the Royal Dutch Shell plc request is both a legitimate request for a shareholder to make (for example, a request dealing with consolidated account matters, compliance matters, internal control matters or overall Shell strategy) and the request does not conflict with the fiduciary duties of a subsidiary's management or board, then the subsidiary does have an obligation to implement the request of the shareholder.

37. RDS sets objectives and group wide strategy and this is implemented across the Business's and Functions. Corporate entities have to align with the group strategy but can take autonomous decisions in order to implement group wide strategy and are responsible for their own day to day management.

38. Significant compliance issues are reported to RDS board of directors or the RDS Audit committee, but they do not enforce compliance. This is done at the appropriate level with the relevant company corporate structure. There is a Business Integrity Department (BID) which has responsibility for conducting investigations into alleged breaches of the Code of conduct, including those which are reported via the Shell Global Helpline.

39. The Shell group take the management of risk seriously. This is at least in part to avoid reputational damage. Iraq was regarded as a high risk country, and was the subject of high level strategic and HSSE focus. On one occasion the CEO visited Iraq.

40. Mr Al-Janabi met with the CEO of RDS once a year to discuss risk.

Royal Dutch Sell PLC

E.T. Z4 (WR)

41. RDS Plc (RDS) is the ultimate holding company of the Shell group. It is registered in the UK. It carries out activities commensurate with that role, including holding shares in its subsidiaries and investments, and setting the overall strategy and business principles of the Shell group. RDS also reports on the consolidated performance of the Shell group, makes appropriate disclosures to the markets, and maintains relationships with investors.

42. The RDS the Control Framework provides in relation to RDS;

> *The Board is collectively responsible for the management of Royal Dutch Shell plc. Its role is, to consider strategy and approve strategic aims and business principles, to review performance of the Shell Group against those aims, to set values and standards and to ensure that Royal Dutch Shell plc meets external requirements and its obligations to shareholders and other stakeholders. The Board assesses the risk management and internal control system of the Shell Group and annually reviews the effectiveness of the Shell Control Framework and the level of risk exposure across the Shell Group. The Board is supported by certain units within the organisation that provide independent assurance to a Board Committee as described in Section 3.3.*
>
> *While reserving a formal schedule of matters for its decision, the Board delegates the executive management of Royal Dutch Shell plc to the CEO. The Chair, who is appointed by the Board, is responsible, among other duties, for the leadership of the Board and for ensuring that the Board and its committees function effectively.*
>
> *The Company Secretary of Royal Dutch Shell plc is the custodian of documents describing its corporate governance arrangements and advises the Board on governance matters. These documents are designed to comply with the regulations and codes of good practice that apply to Royal Dutch Shell plc, like the UK Corporate Governance Code. They include a fuller description of the role, composition and responsibilities of the Board, the Chair, and the CEO; a schedule of those matters on which the Board has reserved the right to make decisions itself; and terms of reference for the Board Committees.*

43. RDS is not an operating company. It does not have any employees. A limited range of corporate services are provided to RDS by individuals employed elsewhere in the Shell group, who are seconded to RDS.

44. RDS is primarily constituted of its Board of Directors. There are occasional secondees providing support services to RDS, but they are no employees. The RDS board of directors is comprised of non-executive directors and executive directors. Of the 13 appointees to the board, only two have an executive function. Ben van Beurden is the chief Executive Officer and

Jessica Uhl is the Chief Financial officer (CFO). The remaining directors are non-executive directors. Ben Van Beurden is employed by Shell Petroleum NV and Jessica Uhl employed by Shell Expatriate Employment US Inc.

45. The Control Framework provides that the CEO –

> '*is appointed by the Board to implement Board resolutions, to manage Royal Dutch Shell plc and the business enterprise connected with it and to supervise and hold accountable Businesses and Functions. The CEO has final authority in all matters of management that are not reserved for the Board or the shareholders of Royal Dutch Shell plc and is accountable to the Chair and to the Board for the performance of Royal Dutch Shell plc, including the Executive Committee and its individual members'*

46. There are 11 are matters reserved for the Board of Directors of RDS (page 566/569 of the joint bundle) These are under the headings of; Strategy and Management; Structure and capital; Financial reporting and controls; Risk Management and Internal Controls; Contracts; Communication; Board membership and other appointments; Remuneration; Delegation of Authority; Corporate governance matters; Other.

47. An Executive Committee operates under the chairmanship of the RDS CEO. Members of the Executive Committee are the CEO, the CFO, Business Heads, Chief HR and Corporate Officers, and the Legal Director.

48. The Executive Committee is supported by a number of committees that provide oversight and guidance on specific matters. The committees comprise Audit; Remuneration; Nomination and Succession; and Corporate and Social responsibility.

49. On a quarterly basis the CEO holds appraisals with the Business Heads.

Shell UK Ltd

50. Shell UK Ltd is a company registered in the UK. It is part of the Shell Group of companies. It was the claimant's 'Base Company' in terms of the LNN (Local Non National) contract of employment she entered into with Shell Exploration and Production International Ltd (SEPIL) in August 2017.

51. The claimant was repatriated to Shell UK Ltd on paper, when her assignment with SEPIL came to an end. It became the claimant's employer as of 1 October 2020 and remained her employer until the termination of her employment in March 2021.

Shell Exploration and Production International Ltd (SEPIL)

52. SEPIL is a limited company which is part of the Shell Group of companies. As such it is subject to the Control Framework and the Shell group wide policies and standards including the HSSE standards. SEPIL was incorporated in Bermuda in 2003; its head office is in Bermuda.

53. SEPIL holds a Trade License to operate in Dubai (Document 59). SEPIL operates in Dubai through a branch, referred to as “Shell EP International Limited – Dubai Branch” (“the Dubai Branch”). The registered office of the Dubai Branch is PO Box 11677, Dubai, United Arab Emirates.

54. The Dubai Branch functions as the regional office of SEPIL and provides support services to applicable Shell group companies operating in the Middle East region. The audited Financial Statements of the Dubai Branch for the year to 31 December 2019 (Document 60) are the Financial Statements are for the whole of SEPIL, as there are no other branches.

55. SEPIL has a Service Agreement with Shell International Exploration and Production B.V. (“SIEP”), a company registered in the Netherlands. Under the terms of that Service Agreement, SEPIL provides services to affiliates within the Shell Group. SIEP bills individual companies for the services which are provided to those companies by SEPIL, and SEPIL in turn recovers all costs from SIEP.

56. The Financial Statements for the Dubai Branch for the year to 31 December 2019, states that SEPIL is a wholly owned subsidiary of Shell Petroleum N.V., a company registered in the Netherlands. In January 2021, Shell Petroleum N.V. sold its shareholding in SEPIL to one of Shell Petroleum N.V.’s subsidiaries, Shell Overseas Investments B.V, a company registered in the Netherlands.

57. The only places that SEPIL has been present, besides Bermuda, are Dubai and, previously, Singapore.

58. There are five Directors of SEPIL, including Ms Powell who is based in Bermuda and who carries out Company Secretarial work, and Mr Ali Al Janabi who is based in Dubai. The other Directors are also based either in Dubai or Bermuda.

59. Mr Al Janabi’s employment with the Shell group of companies commenced in September 2009. In April 2016, Mr Al Janabi became the Vice President and Country Chair for the UAE and Syria, employed by Shell Abu Dhabi B.V. In March 2020 he also took over responsibility for Iraq from a Mr Marcus Antonini, and he has been employed by SEPIL since March 2020.

60. In his role as Vice President Mr Al Janabi is responsible for upstream operations in the UAE, Iraq and Syria, although Syria is a dormant business at the moment .

61. SEPIL Board meetings of the company take place in Bermuda, however these are not attended by Mr Al Janabi.

62. SEPIL has granted Mr Al Janabi a Power of Attorney to enable him to exercise his functions as a Director including authority to sign, execute and perform agreements, contracts and undertakings which are entered into by the Dubai Branch, and to decide upon the management, financial and technical services which may be required in order to fulfil the Dubai Branch's obligations under its contracts.

63. In that capacity Mr Al - Janabi takes management decisions which effect the management and operation of SEPIL.

64. SEPIL has HR and pay role based in the UAE. The HR manager of the UAE and Iraq is an employee of SEPIL . UAE HR support SEPIL employees, along with the Shell Business Operations Centre in Malaysia.

65. There are local HR policies which apply to SEPIL employees. HR in the UAE would manage grievances lodged by an Employees of SEPIL, including employees on LNN (Local Non National contracts) relating to their employment.

International Mobility Policy

66. The Shell group have a 'Shell International Mobility Policy (the Mobility Policy) (page 750).

67. 'Base Country' is a Shell Group policy concept.

68. The Mobility Policy provides that the Base Country is the country with which certain elements of an employee's remuneration and benefits are linked. It provides that the Base Country is a fundamental building block for both career and terms and conditions of any Shell employee, and that it determines the appropriate market for basic pay and the structure and delivery of any core long- term benefits such as pay and retirement benefits. It also effects the provision of tax management support, calculation if travel entitlement, and career opportunities.

69. The policy provides that the decision on Base Country is made on hiring. The expectation is that it remains unchanged throughout an individual's career at Shell. The policy provides that Base Country is typically the country of the

first Shell employment and this tends to be country of nationality, however it does not have to be.

70. The policy contains a table setting out examples of how Base Country should be established, and sets out a number of different scenarios as examples. Scenario 2 is that an employee is recruited to work in a number of different countries, though there is one country that is clearly identified as the country in which the majority of his/her Shell Career will be based. In those circumstances the base country should be the country in which it is intended that the employee should spend the majority of his career irrespective of nationality, and this may not be the country of the first Shell employment.

71. Scenario 4 is the employment is recruited for a truly international career and there is no clearly established country in which the employee will spend the majority of their career. The base country should be established in those circumstances as the country of nationality provided Shell has a business in that country.

72. The policy provides that for employees on a LTIA (a long term International assignment) certain elements of remuneration are linked to Base Country pay. It provides that employees on LTIAs, where possible, will join and remain members of their Base Country retirement benefit arrangements. There are provisions for tax support and travel allowance.

73. The policy provides that at the end of an international assignment it is expected the individual will return to their Base County to resume local employment. It also provides that on termination of employment employees are normally repatriated to their Base Country prior to termination of employment and Base Country termination policies are applied.

The Claimant's Employment

74. The claimant is a British national living in Dubai with her family. She had lived there since 2014.

75. In 2005 the claimant successfully attended a Shell graduate recruitment assessment in Aberdeen, and was recruited from the UK . As was the standard process at the time of graduate recruitment, Shell had one year to find a suitable placement for the claimant within the Shell Group.

March 2006

76. In March 2006 the claimant was offered, and accepted a contract of employment with Shell Gas and Power International BV, a company based in the Netherlands. The place of employment was the Hague and the claimant lived and worked in the Netherlands.

77. The claimant's letter of engagement provided;

> *Base Country /Location*
> *United Kingdom is considered as your base country and will be the basis on which terms and conditions of employment, such as, remuneration, travel arrangements and pension are set.*
> '*International staff*'
> *You will be considered as an employee recruited for international service. It is a condition of employment you're prepared to relocate and to work at locations in your base country and abroad in the future, should you be required to do so.'*

78. The contract provided that it was governed solely by Netherlands law.

79. The contract provided that Shell Gas and Power International BV was the Base Company and the Parent was Gas and Power.

October 2008

80. The claimant was offered and accepted a contract of employment with Qatar Shell GTL Ltd on with effect from 1 October 2008. The place of employment was Doha the claimant lived and worked in Qatar.

81. The letter of engagement provided;

> '*Base Country/Location*
> *United Kingdom is considered as your base country and it will be the basis on which terms and conditions of employment, such as remuneration, travel arrangements and pension are set. The base country location is London.*

82. The letter of engagement provided for Base Country Retirement Benefit plans.

83. The contract provided that Shell Gas and Power International BV, which was a company based in the Netherlands, was the Base Company, and the Parent was Gas and Power

84. The contract provided that was to be construed and governed in accordance with the laws of Qatar.

2010/11

85. In 2010, the claimant returned to the UK on a sabbatical year, to undertake an MSc at the University of Edinburgh, which she personally funded. During the period of her sabbatical she was under a contract with a Shell company based in the UK, but was unpaid.

August 2011

86. On 1 August the claimant was offered a contract of employment and commenced employment with Shell International Petroleum Co Ltd, based in London, as a Policy Adviser. Her contract provided the claimant would initially be employed in the London, but it was a condition of the contract that she was prepared to work at other locations in the UK and overseas at a future date if required to do so. The claimant lived and worked in the UK, until February 2013, when she moved to Turkey on a Short term international Assignment (STIA) from Shell International Oil Products (London, United Kingdom) to the Shell Company of Turkey Ltd.

87. The contract provided;

> 4. *Employment Outside the UK*
> *14.1 Should employment outside of the United Kingdom for a period of more than one consecutive month arise, the following information will be provided:*
> *- The period of work outside the UK*
> *- The currency in which remuneration \would be paid during that period*
> *- Details of any additional remuneration or benefits provided for that period*
> *- Terms and conditions relating to your termination/return to the UK*
> *14.2 For the purposes of remuneration, leave entitlements, pension etc, your base country will be the United Kingdom.*

No Base Company was identified in the contract.

February 2014

88. On 3 February 2014 the claimant was offered and accepted a Long – Term international Assignment (LTIA) contract of employment with SEPIL based in the UAE. She was employed as a Social Performance Lead. The contract provided that it was not fixed term, however the employing company expected the claimant to carry out the role for 3 years.

89. Her contract provided the Employing Company was SEPIL. The place of work was Dubai.

90. The contract provided that Shell's International Mobility Policies for LTIA's applied during the LTIA. It provided that the Employing Company, the Base company, or any Affiliate reserves the right to amend these policies from time to time at their discretion. It also provided that if there was any discrepancy between the wording of the contract and the wording of the International

Mobility Policies, then the wording of the International Mobility Policy would prevail.

91. The contract provided under the heading '*Base Country and Host Country;*

> *6.1 Scotland is considered as your 'Base Country' and is the basis on which your terms and conditions of employment, such as remuneration, travel arrangements and, only if applicable, retirement benefit arrangements are set.*
>
> *a. Your base country location will be Edinburgh.*
>
> *b. United Arab Emirates is the country in which you carry out you LTIA. and is known as your 'Host country.'*

92. Clause 15 of the contract provided for *Base Country Retirement benefit Arrangements,* and provided and that the claimant become a member of the Shell overseas contributory Pension fund (SOCPF).

93. Under sickness Absence the contract provided that the provisions of the relevant International mobility Policy relating to pay and absence would apply.

94. Clause 22 of the contract dealt with *Termination of Employment.*

95. Clause 22.2 provided that the Employing company could terminate the contract at any time by giving a minimum of three months' notice, unless the applicable law determined that a longer period was required.

96. Cause 23 provided for *Repatriation upon Termination of Employment (*similar to clause 23 set out below*) .*

97. It provided; '*You Base company will be Shell UK Ltd (EXPRO). Your Parent will be Upstream*.'

98. The contract provided that the applicable law was that of the UAE, and that each parties submitted to the jurisdiction of the civil courts in Dubai.

November 2016

99. In November 2016 the claimant was offered and accepted a LTIA contract of employment with Shell Offshore (Personnel) Services BV, a company based in the Netherlands, in terms of which she was seconded to Shell Iraq Petroleum Developments BV (SIPD). The contract was ongoing and not fixed term, however it was expected that the secondment would last one year.

100. The contract provided that the claimants 'Base Country' was the UK and her base location was Edinburgh. It provided that her Host Country was Iraq and that that was where she would carry out her LTIA.

101. The contract provided that Shell UK Exploration and Production Ltd was her Base Company and that her Parent was Upstream.

102. The Contract contained clauses very similar to that set out below regarding termination of employment and repatriation (clause 22 and 23).

103. The contract provided that the applicable law was the law of Iraq and that each parties submitted to the exclusive jurisdiction of the courts of Iraq.

104. The claimant lived and worked in Dubai with some work performed in Iraq.

August 2017

105. In August 2017 the claimant was offered and accepted a contract of employment with SEPIL. She was employed as an Iraq HSSE Assurance and Systems lead, which was the same role as she had held under her previous contract.

106. The claimant's location of work remained Dubai. By virtue of this contract, the claimant became engaged on what were referred to as Local Non National terms (LNN) which the claimant considered to be inferior in terms of the benefits which they conferred. The claimant considers that her engagement on these terms amounted to an act of discrimination on the grounds of her pregnancy or maternity leave.

107. Previously some elements of the claimants remuneration had been paid in sterling as well as other currencies, however under this contract the claimant's salary and living allowance was paid in UAE currency into her bank account in the UAE.

108. The contract contained the following terms.

> 5 *International Mobility Policies*
>
> 5.1. *During your LNN Assignment Shell's International Mobility Policies for LNN Assignments, as amended from time to time, will apply to you and you are expected to abide by them. These International Mobility Policies can be found on the International Mobility web pages of HR Online.*
>
> *5.2. The International Mobility Policies contain information about benefits which you may or may not be eligible for depending on your assignment type, including but not limited to those relating to personal effects, housing, utilities and relocation. The Employing Company, the Base Company or any Affiliate reserves the right to amend these policies from time to time at its or their discretion. If there is any discrepancy between the wording of this contract and the wording of*

the International Mobility Policies the wording of the International Mobility Policies will prevail.

6. Base Country and Host Country

6.1. United Kingdom is considered as your 'Base Country'.

6.2. Your Base Country location will be London.

6.3. United Arab Emirates is the country in which you will carry out your LNN Assignment and is known as your 'Host Country'.

7. Duration of Employment

Your employment is intended to be ongoing and is not for a fixed term. However your LNN Assignment with the Employing Company to carry out the role of Iraq HSSE Assurance and Systems Lead is expected to last for up to 1 years. It can be terminated earlier in line with the Termination of Employment clause below.

Clause 9 dealt with renumeration, which was paid the currency of the UAE.

…….

15. Base Country Retirement Benefit Arrangements

You will remain a member of the Shell Overseas Contributory Pension Fund (SOCPF) subject to its eligibility requirements and Trust Deed and Regulations and to overriding legislation. Contributions to the pension fund will be in accordance with the Trust Deed and Regulations and based on your (pensionable) base salary of GBP 67,664.00 per annum. Further details of the fund will be provided to you separately. Your (pensionable) base salary will be reviewed on the basis of developments in your Base Country.

17. Sickness Absence

The provisions of the Employing Company's policy on sickness absence applicable to its employees will apply to you. Details of the policy can be obtained from your Employing Company HR contact. If you become unable to work due to ill health, you must inform your supervisor of your absence without delay and record your absence in accordance with the Employing Company's policy. As far as possible you must also speak to your Employing Companies HR contact to ensure that they are aware of any absence and likely duration.

18. Medical Cover

Your medical cover will be provided through the Shell Global Expatriate Medical Scheme (GEMS). GEMS is a global medical plan designed specifically for internationally mobile employees of Shell Group companies and their Eligible Family Members wherever they are in the world. Medical costs will be paid/reimbursed according to the GEMS policy, which can be amended from time to time.

22. Termination

22.1 You have the right to terminate this contract at any time by giving the Employing Company three months' written notice.

22.2. The Employing Company reserves the right to terminate this contract at any time by giving you a minimum of three months' written notice, unless applicable law determines that a longer notice period is required.

22.3. The Employing Company reserves the right to terminate this contract immediately and without notice, upon you reaching the Employing Company's normal retirement age, in the case of serious misconduct on your part, or if the Employing Company is not satisfied that it has evidence of your right to work in the Host Country, in which case you will have no right under this contract to receive notice or other compensation for such immediate dismissal.

22.4. Upon the termination of this contract and the settlement of all outstanding matters, the Employing Company and you will execute a mutual release of all claims against the other.

22.5. When this contract terminates you will return to the Employing Company all documents and other materials belonging to it, your Base Company or to an Affiliate containing Confidential Information, as well as all property belonging to the Employing Company, Base Company or Affiliate. For the avoidance of doubt, at all times during any notice period you shall continue to be bound by the same obligations to the Employing Company as arising prior to the commencement of the notice period.

22.6. If you enter into employment with your Base Company or an Affiliate for the purpose of an alternative local or expatriate role in each case before this contract terminates for whatever reason, then the Employing Company will treat this as a termination of your employment under this contract by mutual agreement, effective at the date on which the employment contract between you and the Base Company or Affiliate takes effect.

22.7. If you terminate this employment relationship, other than by reason of you accepting an offer of employment for a subsequent alternative local or expatriate role with the Employing Company, Base Company or Affiliate, you agree that the effect of you terminating this employment relationship is that you also and at the same time terminate any employment relationship or contract which may be in place between you and either the Employing Company, Base Company or affiliate

23. Repatriation upon Termination of Employment

23.1. Your Base Company will be Shell U.K. Exploration and Production Limited. Your Parent will be Upstream.

23.2. You may retain links with your Base Company during your LNN Assignment, for example for the purposes of retaining you in the Base Country retirement benefit arrangements. The Base Company is the legal entity which will represent the Parent in any issue arising from the end of an LNN Assignment.

23.3. Your Parent will provide a consistent point of reference throughout your career, particularly in relation to career development, regardless of the locations/businesses in which you work.

23.4. If your LNN Assignment is brought to an end by the termination of this contract through no fault of yours, for example by reason of the anticipated end of your LNN Assignment, redundancy or medical grounds, your Parent will use reasonable endeavours to assist you in finding employment with your Base Company or an Affiliate for the purpose of a suitable alternative expatriate assignment, or employment with your Base Company to carry out a suitable alternative role on local terms.

23.5. In the circumstances described above in this clause you are required to use reasonable endeavours in assisting and cooperating with your Parent in identifying and applying for suitable alternative employment (in accordance with the principles of the Open Resourcing system). However if you have not accepted employment with your Base Company or an Affiliate by the time this LNN Assignment ends you will repatriate to your Base Country at the end of your LNN Assignment. On repatriating, relevant International Mobility Policy will apply and you will be offered an employment contract with the Base finding alternative employment, or if none is available, about potentially terminating your employment with it by reason of redundancy. If suitable alternative employment is offered to you by your Base Company after repatriating but you do not accept it, the Base Company may exercise its discretion not to award you any redundancy pay.

23.6. After repatriating to your Base Country you may enter into the employment of your Base Company for the purpose described above in this clause, and if it is necessary for your Base Company to terminate that employment with it, then you will be subject to any Base Company severance arrangements which may exist and may be applicable to you at the time at which your employment with the Base Company terminates.

23.7. If you terminate this contract, or if the Employing Company terminates this contract for cause (for example on grounds of misconduct or performance), and you choose to repatriate to your Base Country afterwards, you may be offered only limited assistance with the cost of travel and movement of personal goods in line with

applicable International Mobility Policy, and normally no other repatriation assistance will be available to you. For more details please see here…

27. Applicable Law

This contract will be governed by and construed in accordance with the laws of the United Arab Emirates. Each party submits to the exclusive jurisdiction of the courts of the Federal Civil Courts in Dubai.

28. Definitions

…

28.2. "Base Company" bears the definition at the Repatriation on Termination of clause above.

28.3. "Base Country" bears the definition at the Base Country and Host Country clause above.

….

28.5. "Host Country" bears the definition at the Base Country and Host Country clause above.

28.6. "Parent" means the Shell entity which provides a consistent point of reference throughout your career, particularly in relation to career development, which is maintained regardless of the locations/businesses in which you work from time to time.

109. The claimant's international contracts were all stated to be of an anticipated length of time.

110. The claimant had continuity of employment from when she commenced working for until the termination of her employment.

111. There is an independent appraisal system in place across the Shell group entities.

Employment with SEPIL

112. The claimant was initially employed by SEPIL as Iraq HSE Assurance Systems and Lead. She was based in the Dubai office.

113. Shell Iraq Petroleum Development B.V. ("SIPD") was previously the operator of the Majnoon oilfield in Iraq. Majnoon was a Shell Operated Venture ("SOV"), meaning that Shell managed and operated the site. SIPD held an interest in Majnoon, and was appointed as the operator of Majnoon under the terms of a Joint Operating Agreement with the other shareholders. There were over 1,000 employees and contract staff from entities in the Shell Group working in Majnoon in 2016. In June 2018, SIPD divested its interest in the Majnoon field and handed over operations to the Iraqi government.

114. There was a transition period until the end of 2018. Following the divestment of Majnoon, Shell's main work in Iraq was the Basrah Gas Company (BGC).

115. In September 2018 the claimant obtained the role of Iraq Health and Safety Environment (HSE) and Operations Manager. Her previous role of Iraq HSE Assurance Systems and Lead having essentially disappeared as a result of the Majnoon oil field being diverted. There was no change to her terms and conditions of employment with this appointment.

116. The claimant remained based in the Dubai office, with a minimal amount of travel required between Dubai and Iraq.

117. The team in which the claimant sat provided support to Shell group's operations in Iraq, as part of the services which Shell Gas Iraq BV(SGI) provided under their Service Agreement with SEPIL.

118. BGC is an incorporated joint venture between the Iraqi state partner (South Gas Company), (51%), SGI (44%) and Mitsubishi Corporation (5%). BGC is what is referred to as a Non-Operated Venture ("NOV"). This means that BGC, not SGI, is the operator.

119. BGC was responsible for creating its own procedures, management framework and control framework. SGI is a minority shareholder. The decision-making, accountabilities lay with BGC.

120. SGI provide services to BGC under a Service Agreement. This includes the services which were provided by the Shell Iraq Governance Team in which the client sat, and which oversaw both the Iraq and UAE businesses. The claimant's main work was providing support to BGC; she had a very small amount of responsibility for HSE reporting in the UAE. The majority of the Governance Team were employees of SEPIL, but the employing companies of the Team varied.

121. In her role the claimant worked alongside an international workforce. She maintained contact with the Safety and Environment Function in the Upstream Operated (UOP) line of business through various Upstream general managers, including two Shell UK Ltd employees. She also had weekly interactions with Mr Dempster, who in his capacity as Upstream Safety Manager, covered all Upstream Operated countries which included Iraq and the UK. The claimant attended monthly meetings with HSE managers, were a number of country HSE Managers attended, including one from the UK. Part of the purpose of these meetings was to share/learn best practice, and on one occasion the claimant worked with the UK HSE team. Her HSSE role involved the claimant in assessing risk, and compliance in line with the RDS standards.

122. From a Business perspective Shell Iraq sat within Upstream Operated (UOP). The Claimant reported directly to Marcus Antonini the Iraqi Vice President (VP) until he left at the end of February 2020. While he was the Claimant's line manager, Mr Antonini was employed by SEPIL. Mr Al Janabi became the Claimant's line manager when he took over on 1 March 2020.

123. The claimant also had an unofficial line of reporting to the Safety and Environment Function, reporting to a Ms Neil, a Shell UK employee. Ms Chapman was replaced by Chee Tsong Chock prior to the claimant's return from maternity leave in 2020.

124. By the end of 2019/ beginning of 2020 BGC faced a number of difficulties. It was affected by the Coronavirus Pandemic and the very sharp drop in the price of oil. The business was overstaffed and there was a need to reduce the staff. The BGC Higher management Committee (HMC) decided to reduce the amount of the Projects Capital Expenditure Budget. There were also internal tensions in Iraq, and a security risk occurred which resulted in the evacuation of all expatriate staff from Iraq in May 2020. The Iraq business was in what was described as survival mode by May 2020.

125. Prior to Mr Al Janabi taking over in March there had been in discussions in January 2020 about the Iraqi organisation, which involved individuals across a number of Functions, including HR. Thereafter it was for Mr Al -Janabi to map out the scope of the organisation. His considered he needed to simplify the organisation. He wished to make it more akin to the structure which was in place in the business in Abu Dhabi. The Iraqi government's team structure had been put in place before Majnoon had been divested, and there been a significant reduction in staff. The need to save cash was also a driver.

126. Mr Al -Janabi carried out a review of SEPIL on a role by role basis, and decided to reduce staff and remove a number of roles from SEPIL's workforce, including the claimants role.

127. The claimant was on maternity leave from late November 2019. While she was on maternity leave her work was covered by Mr Dempster. He was unable to cover all of her work, due to his own significant workload, and he passed some of it to a Mr Hisham Abbassy.

128. Mr Al Janabi spoke to, Mr Chock, General Manager Safety and Environment, COG, and an employee of Shell Exploration and Production BV, prior to making the decision to terminate the claimant's role.

129. Mr Al Janabi emailed the claimant on the 5 of July advising her that she would be issued with an 'at risk 'letter, and his reasons for this. He stated that

changes in the Iraq governance team had been in discussion since before his arrival.

130. The claimant was subsequently issued with a letter by SEPIL terminating her contract with them.

131. The 2020 UAE HR policy provided that; *an employee returning from Maternity leave will be entitled to return to the position they held prior to the leave, or to a comparable position in terms of Management level (i.e. job group) and remuneration if the original position no longer exists"* (page 358). On the termination of her role the claimant did not have a job in SEPIL.

132. The Shell group had a planned restructure exercise by the name of Re Shape.

133. Cash Preservation measures was issued to the group in 2020 with a view to saving cash.

134. During claimant's first period of maternity leave in 2018 she made a submission to the Shell Global Helpline which raised concerns about addressing the Gender gap, and barriers to mid-level career women and in Shell. Mr Dempster, who worked with the claimant in Dubai, was aware of this and that there were concerns on the part of some women working in Dubai.

135. During her employment with SEPIL she did not work at all in the UK.

136. The claimant owns a flat in Scotland which is rented out. She has looked at other properties in Scotland in order to consider buying them, but has not yet purchased any other property.

137. The claimant applied for a job in the UK with a Shell entity in around July 2020 which she described as a 'long shot', but was unsuccessful. The claimant had no current plans to return to the UK, but she anticipates that she and her family will return at some point in the future.

138. The claimant was not obliged to physically repatriate when her assignment came to an end with SEPIL, and did not do so.

139. The claimant has made no attempt to or enquiry about pursuing a claim in the UAE against SEPIL.

The Claimant's claims

140. In paragraph 92 of her ET1 the claimant alleges she was subjected to the following treatment, which it is said amounted to acts of discrimination under the EQA. Noted alongside each of these is the claim's evidence in cross

examination as to who she said was responsible for the discrimination of which she complains. For the purposes of this PH the Tribunal has made findings in fact on the basis of the acts complained of, and who the claimant says was responsible for these, but these findings will not bind any subsequent Tribunal.

i. The refusal to permit the Claimant from performing the HSSE Assurance and Systems Lead role whilst based in Dubai.- This complaint relates to matters in 2017 when the claimant was employed by Shell Exploration and Production Services BV.

ii. The engagement of the Claimant on Local Non-National Terms (rather than Long Term International Assignment or Expatriate terms).- The claimant assumes the decision to offer these terms was made by a combination Iraqi HR , the Manpower Committee, Shell Iraqi Petroleum BV and SIPD, and that it was likely to be a general management decision, likely to have been taken at Functional level. The claimant considers further disclosure would be necessary to identify how the decision was made

iii. Threatening the Claimant with the issue of a repatriation letter during the course of her maternity leave.- The claimant did not receive a repatriation letter. She was told by HR in the UAE that a Mr Hussain of UAE HR had discovered that the claimant had not been issued a repatriation letter as she absent on maternity leave, and was furious about this. The claimant was not actually threatened with the issue of a repatriation letter but she understood this to have been narrowly avoided. This relates to matters in 2017 prior to the claimant's employment with SEPIL

iv. The timing, manner and/or fact of terminating the Claimant's assignment as Iraq HSE and Operations Manager. - The decision to terminate was made by Mr Al Janabi with the approval of the Function, Mr Chock; Mr Dempster aided the decision in the claimant's opinion by failing to fully disclose that he had given some of the claimant's work which he covered while she was on maternity leave to another employee, Hisham Abbassy. Further, there had been a direction as to Cash Conversion given by RDS which was used to justify the removal of her role.

v. Circulating the organisational chart on 23 June 2020 which removed the Claimant's role in general and/or without prior consultation. – This was done by Mr Al Janabi. The claimant does not know if he was helped in this.

vi. Issuing the Claimant with a letter of repatriation on 29 June 2020. – This was done by Mr Al Janabi. The claimant does not know who if anyone

helped, but two people were copied into the email (Mr Chok and Mr Dempster).

vii. Failing to offer suitable alternative employment and/or widening the pool of selection for removal. This was a failure of SEPIL's.

viii. The timing, manner and/or fact of the Claimant's notice of dismissal. This complaint is directed against Shell UK Ltd.

The Claimant avers that the above matters whether individually or cumulatively constitute direct discrimination on the grounds of sex, pregnancy and/or maternity leave.

94. Alternatively, the Claimant avers that she was subject to the following PCPs which would have applied to others by the Third Respondent for whom the First and/or Second Respondent are liable:

i. Initiating a restructure during the absence of an affected individual whether in general and/or in the absence of consultation with that individual. The claimant accepts this is a complaint about what was done by SEPIL.

ii. Failing to offer suitable alternative employment to an affected individual on absence; The claimant accepts this complaint about what was done by SEPIL.

iii. Selecting a role for removal from the organisation and/or repatriation in the absence of the individual. The claimant accepts this is a complaint about what was done by SEPIL.

95. Further and alternatively, the Claimant avers that she was treated detrimentally as a consequence of prior protected acts in the following respects:

i. The failure to investigate whether adequately or at all the Claimant's grievances / reported concerns as to the lack of protection for those returning from maternity leave;

ii. The continuation of the Claimant's termination from role, repatriation and/or dismissal.

Note on Evidence

141. The Tribunal heard a good deal of evidence in this case, not all of it directly relevant to the points which it had to determine. The Tribunal has made no determination of the merits of the claim. As indicated below it has made findings of fact solely for the purposes of this PH, on the basis of the claimant's case as to the acts of discrimination of which she complains, and who she says was responsible for these, taken at its highest.

142. The Tribunal generally found all the witnesses to be impressive, and did not form the impression that any of the witnesses sought to deliberately mislead it. There was clearly a divergence of views as to interpretation of matters, but that generally did not impact on the tribunal's assessment of the evidence on the relevant conflicts in evidence which it had to resolve.

143. Nor, for reasons which are dealt with below did the Tribunal have to deal with every matter about which evidence was given. For example, the claimant's witness statement contained what is some instances was stated to be opinion, or it simply expressed opinion; it also contained a good deal of detailed evidence about the work which she performed. It appeared to the tribunal that given the respondent's acceptance of cross Function, and cross country working it was unnecessary to analyse evidence of this type in detail. The Tribunal accepted that while the claimant lived and worked in the UAE some of the work involved cross-country work, and her HSSE role would involve assessing risk and compliance in line with the RDS standards. It also accepted that the management HSSE of risk in Iraq was importance to RDS and the Shell group. It concluded that her role was to provide HSSE services to BSG (a self-operating company) as part of the Shell Iraq governance team; that, it appeared to the Tribunal, was the purpose for the role, even if that involved working on compliance issues in line with RDS standards.

144. The claimant also give evidence as to the nationality of individuals who she worked with or reported to, or their base country by company, on occasions when these were the UK. Equally she give evidence about the base country/nationality of other individuals with whom she worked, and the Tribunal had no difficulty in concluding that she worked with an international workforce, which included a UK based workforce.

145. Albeit the Tribunal accepted that the claimant worked with international workforce, and from time to time performed work which was for benefit to other entities within the Shell group, it accepted Mr Dempster's evidence to the effect that the majority of the claimant's work was conducted in the UAE and Iraq, and that she was never required to work in the UK.

146. The Tribunal did not understand the claimant to suggest that during the currency of her employment with SEPIL she physically worked in the UK. In any event Mr Brown took the claimant in cross examination to her tax returns for the relevant period, from which it was apparent that there was no declaration work by the claimant in the UK for that period, the tribunal was satisfied this accurately represented the position.

147. There was one conflict the evidence which the tribunal had to resolve, and that was only the extent to which Mr Al-Janabi was in a position to make

autonomous decisions about the running of SEPIL, which goes to matters which the Tribunal has to consider.

148. This arises not just from Mr Milsom's submissions on the relationship of the principal and agent as between RDS and SEPIL, but also from consideration of where the third respondents were domiciled.

149. Mr Milsom's submissions are set out in some detail below, but effectively his position, as the Tribunal understands that, is that any authority which Mr Al -Janabi had and came from the Netherlands, and he was delegated authority to reduce headcount and required to do so in accordance with Shell's policies and Cash Preservation Criteria and the imminent expectation of Re Shape.

150. The Tribunal accepted Ms Powel's evidence to the effect that SEPIL had granted Mr Al Janabi a power of attorney to act. While Ms Powel did not evidence a great deal of knowledge about the substance of SEPIL's accounts and what lay behind those in terms of business decisions, that did not impact on her credibility as to the corporate nature of SEPIL and its obligations and responsibilities.

151. Mr Milsom submitted that something was to be taken from the fact that there was no activity of SEPIL in Bermuda, and that Mr Al -Janabi did not dial into directors' meetings. The Tribunal however did not consider that much was be taken from that in circumstances where it was not suggested that SEPIL had an operational trading arm in Bermuda, and its only operational activities were in Dubai.

152. The Tribunal also considered whether Mr Al-Janabi was required to act in a particular way, as suggested by Mr Milsom, or if he had autonomy in making decisions about SEPIL.

153. Mr Al Janabi struck the tribunal as an impressive witness. He was asked by Mr Milsom in cross examination if authority was delegated to him to conduct his work. Mr Al -Janabi responded to the effect that he had authority as a director of SEPIL, and he also had obligations to look for business opportunities. He accepted that his obligation were also to Business and Country.

154. Mr Al Janabi was asked in cross examination about who told him to Re-shape the Iraq governance team. He responded that he did it himself. He said that it is an internal review, and that he looked at all the roles, role by role, and decided to simplify the organisation. He said that in doing so, he did this from his own perspective and on his own initiative. It was put to him that this was not simply a matter for his initiative, but was because there was a need to reduce headcount, which came from RDS/the upstream lead/and the cash

conservation direction. Mr Al Janabi responded that there was a need to reduce costs, but that did not become a factor until after he had started his review.

155. The fact that Mr Al – Janabi emailed the claimant stating that changes in the Iraq governance team had been in discussion since before his arrival, relied upon by Mr Milsom, was not inconsistent with his evidence that he carried out a review himself on a role by role basis. He accepted that the cash conservation policy was a driver, although he said not the main driver, citing the fact that because of external circumstances staff numbers had reduced from around 700 to 280. He gave evidence to the effect that he was trying to make the structure more like the organisation he had been involved with in Abu Dhabi, and he focused on the Iraq governance team which was 'way too large. '

156. The credibility of Mr Al- Janabi's position was also enhanced in that he accepted that there were external pressures, and he accepted that he had obligations not just SEPIL but also to Business, and Country. When it was put to him by Mr Milsom that he required the consent of Function and Mr Chok before he could terminate the claimant's role, he gave a credible explanation to the effect that he required to discuss matters with Mr Chok, and obtain his support for the decision to the extent that he required Mr Chok to make available a resource equivalent to 0.3 of the claimants of role. It was credible in the tribunal's view that Mr Al Janabi wanted to obtain practical support for the decision to terminate the claimant's role, but that did not support the conclusion that he was not in a position to make autonomous decisions about the operation of SEPIL.

157. The Tribunal, makes no findings in fact as to reasons for Mr Al Janabi's decisions, but it was satisfied in light of his evidence that he was able to make decisions about the operation and management of SEPIL, and that he did so

158. For the purposes however of assessing the questions which it is asked, the tribunal has accepted the claimant's evidence to the extent that Mr Chok was involved in the decision to end her assignment.

159. The tribunal made no findings in fact, beyond those stated in support of the claimant's own case, as to the involvement of Mr Dempster in the decision-making process.

Submissions

160. Both parties very helpfully produced written submissions, which they supplemented with oral submissions. For the sake of brevity the Tribunal has not reproduced these, but has dealt with them below it it's this consideration of each of the matters which it has had to determine.

Consideration

Basis of conducting the PH

161. One of the questions which the Tribunal is asked to consider is whether the claims against the first respondents, the against the second respondents for acts of discrimination alleged to have occurred prior to 1 October 2020, should be struck out under Rule 37 (1) (a) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the Rules) on the grounds that they have no reasonable prospects of success.

162. Rule 37 (1) (a) provides that at any stage in the proceedings a Tribunal may strike out a claim on the grounds that it is scandalous, vexatious or has no reasonable prospects of success.

163. The Tribunal approached this question by firstly considering Mr Milsom's submissions to the effect that it was not appropriate to conduct this PH at all on strike of discrimination claims on the grounds that they has no reasonable prospects of success. He referred to *Anyanwu anor v South Bank Student Union and anor [2001] 1 WLR 63*8 and the judgment of Lord Steyn, which underline the importance of not striking out claims of discrimination as an abuse of the process except in the most obvious and plainest cases. He observed that; *discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest.*

164. Mr Milsom also referred to the judgment of Lady Smith at in *Balls v Downham Market High School and College [2011] IRLR* in which she stated;

> *The tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the words "no" because it shows the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in the submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects …*

165. In its consideration of the question of strike out on the grounds of prospects of success at this PH the Tribunal is mindful of this guidance. However, the questions which the Tribunal is asked to consider, in deciding whether to strike out of claims against the first respondent, and second respondent for claims in the period prior to 1 October 2020, go to the nature of the legal relationship between the respondents, and between the respondents and the claimant. The question the Tribunal is asked with regard to the third respondent is a fundamental question of jurisdiction. The determination of these matters is unlikely to turn on evidence as to the merits of the complaints made.

166. The Tribunal did however hear a considerable amount of evidence, and to the extent it was necessary, resolved disputes in that evidence where it had to do so in order to determine issues of potential liability for the claims made, and jurisdiction.

167. In order not to fall foul of the guidance in *Anyanwu* and *Balls* , the approach which the Tribunal adopted was for the purpose of this PH, was to make findings in fact on the basis of the treatment which the claimant complained of as amounting to acts of discrimination as it is pled in her ET1.

168. The treatment which the claimant complains of in her ET1 is as set out above in the findings in fact. The claimant was asked in cross-examination to identify who she said was responsible for this treatment. The claimant's evidence about this is necessary in order to understand the basis of her claims under Section 111 and 112 of the Equality Act 2010. On a number of occasions the claimant identified particular individuals, but on some other occasions she said she could not identify who was responsible until such times as there had been Disclosure. The claimant's responses to the question of who she said was responsible, are noted above in the findings in fact, and the Tribunal has made findings in fact on that basis, albeit these findings are for the purpose of this PH only, and are not binding on any subsequent Tribunal.

169. Part of Mr Milsom's submission as to the inappropriateness of conducting this PH, is based on the fact that there has not been full Disclosure. He submitted that in accordance with retained EU law the Tribunal must take such steps as are necessary to ensure that material non-disclosure does not impede the effective implementation of the non-discrimination principle: *Meister v Speech Design Carrier Systems GmbH [2012] ICR 1006; Kelly v National University of Ireland (University College, Dublin) [2012] 1 WLR 789*. He submitted it was clear that the Respondents have failed to disclose critical documentation in order to ascertain the nature of the relationships between the corporate entities despite requests to do so.

170. These include the following:

i. The cash and/or service agreements in respect of SEPIL pursuant to which Mr Dempster was engaged to provide HSSE services;

ii. Iraq-related RDS risk matrices and registers from 2018-2021;

iii. The internal grievance investigation report;

iv. All communications relating to cash preservation between January and June 2020 as between members of the Upstream Leadership Team (ULT) or any central team and Mr Al Janabi;

v. All communications between Mr Al-Janabi and Mr Verbraeken relating to people changes and/or restructure between January and June 2020;

vi. The notes of the handover meetings in January 2020 to which Mr Al Janabi refers in his statement.

171. Mr Milsom submitted non-disclosure is a running theme. He directed the Tribunal to Lord Hamblin's judgment in *Okpabi and ors v Royal Dutch Shell plc and anor (International Commission of Jurists and Others Intervening) [2021] 1 WLR 1294 (paragraphs 134 to 138).*

> 134. The majority (of the CA) appear to have assumed that because they considered that the high level documentation so far obtained by the appellants did not provide evidence of the exercise by RDS of control over the operations of SPDC (the Nigerian subsidiary), it followed that further documentation provided on disclosure would be unlikely to do so. Indeed, the Chancellor so stated at para 198. This, however, does not follow. *Operational control is most likely to be revealed by documentation relating to operational matters. The appellants had no such documents and there had been no disclosure relating to such matters.*
>
> 135. The only disclosure provided by RDS was the Joint Operating Agreement for the SPDC joint venture and a five-page extract from the RDS HSSE Control Framework. *The RDS Control Framework was provided by Miss Sedgwick and the RDS HSSE Control Framework was produced following an order from the court*. The RDS witnesses would have known of these documents but they did not address them in any meaningful way in their statements. No mention is made by them of the RDS Control Framework, even though this is *effectively the RDS organisational constitution. Nor was any mention made of the RDS ExCo. As Sales LJ observed at para 168:*
>
> > *"the witnesses deployed by RDS to explain the operational workings of the Shell group and SPDC did not deal with these documents and did not explain clearly and with precision how the management structures described in those document were in practice implemented by ExCo and*

were in practice taken into account by SPDC."

136. The production of the RDS Control Framework and the RDS HSSE Control Framework for the appeal hearing illustrate the danger of seeking summarily to determine issues which arise in parent/subsidiary cases such as this without disclosure. Both are clearly material documents. Had there been no appeal, the appellants' claim would have been dismissed without consideration of either of them.

137. The appellants were and are able to identify specific internal documentation which is likely to be material to the claims made. The most obvious example is the documentation which the Dutch Court of Appeal ordered RDS and SPDC to produce in related proceedings. *These include the annual Assurance Letters submitted to the CEO confirming the level of compliance with the RDS Control Framework; internal Asset Integrity Audits evaluating the technical integrity and the operational integrity of the pipelines*; HSE audits evaluating SPDC's Emergency and Oil Spill response procedures applying to the pipelines; and the audit results and remedial action plans (findings, recommendations and approval and closeout of actions) documented on the basis of those audits. These were considered by the court to be "material" to its assessment of "how supervision was implemented" and how "relevant information was shared with [RDS]".

138. Many other examples of specific documents which it is reasonably contended both exist and will be material are set out in paras 123 and 124 of the appellants' written case. *Such examples include minutes of the meetings of the RDS ExCo relating to the health, safety, security and environmental risks and impact of SPDC's operations; the RDS ExCo's annual Country Reports for Nigeria; Nigeria- specific technical directions and guidance concerning HSSE matters; and correspondence passing between SPDC management and RDS concerning relevant aspects of SPDC's operations.*

172. Mr Milsom submitted that the issues before the tribunal were characterised by an imbalance of knowledge and documentation, and the claimant was not in a position to know the full extent to which the Iraq and UAE HSSE, cash preservation and staffing were discussed between Mr Al Janabi and the Dutch/London-based 'centre' , although clearly discussions took place. He submitted that many of these matters pertaining to period time when the claimant was absent on maternity leave, this imbalance should lead to a windfall for the respondents and the striking out of a *prima facie* meritorious claim.

173. Mr Brown referred the Tribunal to *Tesco Stores Ltd v Element (UKEAT/0228/20)* paragraph 33-36 in support of his position that it is not a

proper use of the Tribunal's process to assert a complaint but say it is not possible to articulate it without disclosure.

174. The Tribunal is satisfied that that the position advanced by Mr Brown is correct as a general principle. Further, one of the difficulties with Mr Milsom's argument is that the claimant has not made any application for Disclosure prior this PH. There is no general duty on a party to Tribunal proceedings to allow inspection of documents, and until the Tribunal makes an order, a party does come under that duty.

175. The Tribunal is told that a request for voluntary disclosure was made to the respondents, however no copy of a request to the respondents for voluntary disclosure of documentation is before the Tribunal and therefore the Tribunal is unaware of what was asked for. To the extent however that such a request was not complied with, or did not produce the documents to which Mr Milsom now refers to in his submissions, this was not pursued with an application for an Order for disclosure.

176. There is nothing in the Tribunal Rules of procedure which would have prevented an application for an Order for the disclosure of documents having being applied for, or granted, in advance of this PH. It is not necessary that a Final Merits Hearing is fixed before such an application in competent

177. Furthermore the claim was lodged on 4 October 2020. Further to the case management PH in January (paragraph 14 of the Note) it was agreed that the additional specification should be provided by the claimant by February as to the basis upon which it is said that the first respondents, and the third respondents are liable for all or any the acts complained of.

178. The claimant provided that specification with an Amended Ryder to the ET1 of 22 February in which she sets out her position at some length, including the acts complained of, as recorded in the findings in fact.

179. The claimant could have been under no doubt by January 2021 that she was required to identify the basis on which it is said RDS and Shell UK Ltd were responsible for the acts complained of, and had she considered disclosure of documents was necessary for this purpose, then a relevant application could have been made.

180. Not only has the claimant not sought disclosure, but also it was not clear what impact the disclosure which Mr Milsom referred to in his submissions would have had on her state of knowledge. It was not explained how any of the documents referred to in submission would have provided answer to Mr Brown's questions.

181. The Tribunal did not consider that the claimant's inability to articulate her claim to this extent at this stage of the proceedings, because no order for disclosure had been applied for or made, was a reason for it not to consider the fundamental questions which it is asked to address in this PH.

Submissions on Principal and Agency-Identity of Employer

182. One of Mr Milsom's overarching positions, as the tribunal to understand it, is that RDS acts as the principals for the second and third respondents and that those respondents are their agents, all in terms of the EQA.

183. Mr Milsom took the Tribunal to terms of Sections 109 -112 and 110(5) of the EQA and the Explanatory Notes setting out the explanatory purpose of the legislation, submitting that control of an Agent by a Principal was the litmus test.

184. He made submissions on the nature of the agency and principle relationship. Mr Milsom referred to *Ministry of Defence v Kemeh (2014) ICR 625* in which the CA held that the "*ordinary legal parlance"* of that relationship should apply to the provisions then found in section 32(2) RRA. It is not necessary in the modern law of agency that an agent must have power to affect the principal's legal relations with third parties. The fundamental question is whether a person is acting on behalf of another and with that other's authority. The notion of authority is a broad one: it can be express or implied and granted prior or subsequent to any contravention: *Remploy Ltd v Campbell and anor EAT 0550/12.*

185. Mr Milsom also referred to *Unite the Union v Nailard [2019] ICR 28* the CA in which he submitted it was suggested by Underhill LJ that the concept of agency under EQA was wider than that found in the common law, in particular:

    1. The test regarding the scope of authority granted to a putative agent is akin in its broad scope to that of "in the course of employment" in respect of vicarious liability. The scope of any such authority may be exercised towards an employee in the principal's business or via a third party;

    2. The test of authority under S.109(2) is whether the discriminator was exercising authority conferred by the principal and not whether the principal had in fact authorised the discriminator to discriminate (*Bungay and nor v Saini and ors EAT 0331/10*). The authority envisaged by section 109 is of a general rather than specific nature. A principal will be liable wherever the agent discriminates in the course of carrying out the functions he is authorised to do(*Nailard* at paragraphs 16 and 18).

186. Mr Milsom then followed this with fairly lengthy submissions on the operations of the Shell Group, and the rival positions between control and authority, and the impact of case of *Okpabi supra.*

187. He referred to the evidence in chief of Ms Powell to the effect that normally SEPILs interests are aligned with the Shell group, submitting she accepted this represented an overstatement as 'normal' meant there was never any divergence.

188. Mr Milsom referred the Tribunal to the judgment of Lord Hamblin in *Okpabi* summarising the respondents position in that case (paragraphs 71/72) which was to the effect that RDS did not exercise direction, control and oversight of its Nigerian subsidiary, and that all relevant decisions were made by that subsidiary.

189. Mr Milsom sought to adopt the appellant's printed case in *Okpabi*. He rejected the respondents' submission that *Okpabi* was of no relevance since is concerned the question of whether a duty of care was owed in negligence. He submitted that the reason why there was an arguable duty in *Okpabi* was that the nature of the control exercised by RDS established a tribal issue as the proximity between the parent company and those third parties injured by the conduct of its subsidiary Mr Milsom quoted from Lord Hamblin's observations on the Appellants case (paragraphs 43. 58 and 67), submitting that the expert witness in that case Professor Siegal had concluded that the Subsidiary company was unambiguously an agent.

190. Mr Milsom submitted that the analysis of control, direction and authority of the Supreme Court in Okpabi is at a piece with that of other courts. He referred to *Re Dutch Bitumen Capital [2007] 5 CMLR 9,* the European Commission held that the CMD (the predecessor to the RDS ex Co) "*was at the centre of the decision making process in the Shell Group and ultimately steered the conduct of the subsidiaries of* the *group*" (126). He also referred to *Shell Petroleum NV v European Commission [2012] 5 CMLR 22 at [73]* the CJEU concluded that the CMD was "*responsible for co-ordinating the operational activity and the governance of all the group companies*" and "*played a decisive role" within the group*. In a "*hierarchical organisation*" the CMD "*in fact exercised decisive influence over (the subsidiary's) conduct."*

191. Mr Milsom submitted that in *Dooh and ors v RDS plc C/09/365482* the Hague Court of Appeal went one stage further than *Okpabi*. On application of English common law principles it concluded that there was as a matter of law a duty of care owed by the First Respondent for the actions of its subsidiaries and that there had been a breach of the same.

192. Mr Milsom made submissions as to the hierarchy in Shell and the vertical structure in place. The RDS Board is collectively responsible for the management of Shell and reserves broad powers to that effect. The Board "delegates the executive management of Royal Dutch Shell plc to the CEO" The CEO has final authority in all matters of management that are not reserved to the Board or the shareholders of Royal Dutch Shell plc and is accountable to the Chair and to the Board for the performance of Royal Dutch Shell plc including the Executive Committee and its individual members. "Members of the Executive Committee are the CEO, the CFO, the Business Heads, the Chief HR and Corporate Officer and the Legal Director"

193. Shell is partitioned into Businesses and Functions. One such Business is Upstream. The Functions "have delegated authorities and accountabilities for an area of functional responsibility…The Functional Head are accountable to the CEO for the performance of their Function across Shell and are members of the Executive Committee…Outside of the three Functions (Legal, Finance, HR) there are other functional areas which also address matters which present Group wide risks through the establishment and maintenance of appropriate standards, practices, support and oversight…(including) Safety and Environment"

194. The development of Functions and Businesses is subject to the approval of the CEO 3. From there, strategies are "cascaded into lower-level Business Unit strategies to be approved by their Business or Function head". Country chairs "guard Shell's reputation in countries where Shell has business interests. Externally, they are the senior Shell representative in the country" They are appointed by and receive delegated responsibility from the Country Director (who serves on ExCo) Country chairs are appointed from the Netherlands and not by country;

195. Whilst there are country chairs the division between businesses and functions is a central means of maintaining "effective controls" to "help ensure that each Shell company will achieve its objectives and fulfil its external obligations and commitments" "Controls are continuous structured activities" set out in "designated control registers". Confirmation that a proposed course by any subsidiary is consistent with the requirements of overall business objectives "is achieved through organisational authorities…Organisational approval as a general rule precedes corporate approval." In short, the wider organisation precedes strict corporate lines.

196. Shell benefits from Independent Assurance through, inter alia, an HSSE & SP Controls Assurance Team and Shell Internal Audit. It is the latter unit which investigated the Claimant's grievance.

197. The respondents' position becomes all the more unsustainable in the face of the documentation before the ET. This begins with the Control Framework which "must be reflected in business management systems, processes and working procedures applied by staff…The Shell Control Framework is the single overall framework that applies to all Shell companies. A controlling interest allows Shell to require the implementation of the Shell Control Framework by the company:"

198. The Control Framework confirms that Shell operates via a series of Businesses and Functions "each within its respective organisational authority" operating via "cross-entity reporting lines. All staff with a legal and/or compliance role in Shell ultimately report to the Legal Director and the Finance staff report to the CFO. Both Ms Mezaina and Mr Al-Janabi report to either functional (Ms Mezaina) or operational / business personnel (Mr Al-Janabi) based in the Netherlands.

199. At the heart of the Framework is Shell's approach to delegated authority, as set out in that document. On this basis Mr Milsom submitted that all authority emanates from RDS plc.

200. It is, he submitted doubtless for this reason that Shell requires a detailed and consistent appraisal and individual review process for all staff. An individual thread throughout an individual's employment with Shell across geographic and corporate lines.

201. Mr Milsom also relied on the Code of Conduct; it applied across the group and there were no exceptions. The Claimant only received one Code of Conduct across her fifteen-year career. Amongst the Code's requirements is the obligation to ensure that "employment decisions" are not "in any way based upon" protected characteristics including gender.

202. He also referred to the Shell General Business Principles. One of the five core responsibilities is owed to employees, "to create an inclusive work environment where every employee has an equal opportunity to develop his or her skills and talents. Amongst the General Principles is the requirement for a "systematic approach to (HSSE)…(which) manage(s) these matters as critical business activities

203. Mr Milsom made submissions about Upstream/COG to the effect that Co-ordination of Upstream is in keeping with the integrated and vertical structure throughout Shell. Conventional Oil and Gas (COG), part of the Upstream Business, was designed to ensure "one team, one plan, one portfolio" p.639. To that end a clear hierarchy was established ensuring "only one senior leader who is providing leadership steer and support to a Country (leader)" p.641. Within that structure the Upstream Director and ExCo Member Mr

Wael Swan was able to issue instructions to all staff within the Business. HSE within Upstream frequently worked across country lines, and it was telling that Mr Dempster was able to perform his COG Safety Manager MEA role remotely in the UK. Ms Mezaina's observation that "HSE roles in country are via lines of business" p.974 rather than country or employing entity is significant.

204. Contrary to the evidence of Mr Dempster it is clear that his direct reporting line was not to any country chair but along Business and Function lines p.1015. This was revealed in the evidence of Mr Al-Janabi: whilst Mr Nabet was employed by SEPIL and in scope of the Iraq Governance Team reorganisation, to which this claim pertains, he nonetheless received his repatriation later and from the Netherlands.

205. In addition to enjoying the capacity to intervene in matters based in Iraq the CEO in fact did so. HSSE and Iraq were of particular significance in view of the HSSE risks and the sensitivities surrounding Iraq. Likewise emissions within Iraq were viewed as a "top risk" by RDS plc. To that end the Shell Iraq governance team was closely connected to work in the UK and Netherlands.

206. Mr Milsom submitted that the only prism from which the relationship between the First and Third Respondent can sensibly be viewed is that of principal and agent. The integration between the two was complete. Reporting lines traverse country and company and are ultimately partitioned by reference to Business.

207. This is reinforced by some striking features of SEPIL itself: it was "above-asset" entity providing a means of providing specialist support service across company lines. It generates no profit p.958 and has only one Netherlands-based Shell shareholder Shell International Exploration and Production BV; The only operational directors (Mr Al-Janabi and Ms Longley) have never dialled into Board Meetings and do not perform any work in Bermuda; no activity which takes place in Bermuda at all. Mr Al-Janabi was unaware as to the reasons for registration in Bermuda in the first instance;

208. Whilst Power of Attorney was ostensibly conferred upon Mr Al-Janabi by SEPIL it played no role in his appointment or appraisals. The better view is that the conferral of power of attorney followed a direction from SIEP BV (i.e. the Netherlands "centre");

209. Ms Powell illustrated little understanding of the role or activity of SEPIL. which illustrates the lack of operational activity in the seat of registration. The influx of funds from the Shell Treasury Centre Ltd and the provision of services by Mr Dempster via an undisclosed cost charging arrangement only serve to illustrate the fluidity of the corporate structure.

210. Mr Milsom submitted that the notion that the directing minds in practice of activity undertaken by SEPIL are based in Bermuda is fanciful. Instead, the activities of SEPIL are undertaken in accordance with the integrated and vertical structure of RDS plc and in accordance with authority which delegates from the First Respondent. It is in all activities an agent of the First Respondent. On any view, and to adopt the words of Lord Briggs in Vedanta, the "boundaries of legal personality and ownership within the group" have become close to irrelevant.

211. The genesis of the Claimant's repatriation is clear, submitted Mr Milsom. Mr Al-Janabi was "tasked with reducing the size of the governance team' Not for the first time there was pressure to undertake cost-cutting SEPIL faced "significant pressures on above asset costs" particularly in view of "organisational reviews being done at upstream and RDS level It was also in the context of "additional challenge from the centre to the expat levels"

212. Changes to Iraq governance organisation were in discussion prior to Mr Al Janabi's arrival. This was expedited by introduction of "the group focus on cash conversation" and the instruction to reduce ex pat contracts.

213. Mr Al Janabi sought support for his proposal to repatriate the Claimant given the requirement for alignment between Business and corporate entity (as the evidence of Ms Mezaina confirmed). That approval was forthcoming both from Mr Chok and Mr Dempster. As a consequence the decision was made to repatriate the Claimant and an organisational chart which reflected Mr Chok's desire that there be imminent recover in place should the Claimant be repatriated via by Mr Dempster "The exercise was driven by business decisions on scope, deferrals and scenarios that we are currently working on as an Iraq/UAE team" Mr Al Janabi presented it to the Claimant as a joint decision ,and it was just that.

214. In short, Mr Al Janabi was delegated the authority to reduce headcount. He was required to do so in accordance with the Code of Conduct, the General Business Principles, the Control Framework and associated Standards but also the Cash Preservation Criteria and with the imminent expectation of Reshape. He acted in Respondent was a principal.

215. Mr Brown on the other hand submitted that the approach advocated by Mr Milsom disregarded the fundamental principles of company law. Such an approach which disregards separate corporate personality risks a range of acute problems which an orthodox approach avoids, including the imposition of criminal and civil personal liabilities under the EPQ, the provisions of which may conflict with local labour law including different approaches to discrimination. Equality Law is not the only issue in play, and there could be

broader issues with taxation and regulation as well as international judicial comity, if employees of overseas companies working abroad are held have been employed in the UK where the contractual provision is to the contrary.

216. Mr Brown referred the Tribunal to *Prest v Petrodel Resources Ltd (2013) 2 AC 415,* and the judgment of Lord Sumption.

217. He also referred to *Lohnro Ltd v Shell Petroleum Co Ltd (1980) 1 WLR 627* where the House of Lords held that documents of a subsidiary were not in the power of the Parent company for the purposes of disclosure in litigation, simply by virtue of their ownership and control of the group. The fiction of separate corporate personality is the whole foundation of English company and insolvency law. Their separate personality and property is the basis on which third parties are entitled to deal with them and commonly do deal with them.

218. This principle, Mr Brown submitted has been reaffirmed repeatedly in the Scottish law, and he referred to *Symphony Equity Investments Limited [2013] CSOH 102 (Lord Hodge) at para11; The Tartan Army Limited v Sett GmBH and others [2015] CSOH 141 (Lord Glennie) at Paragraph 26.*

Identity of Employer

219. The Tribunal began by reminding itself that its power is to determine claims under the legislative scheme of the EQA, as opposed to labilities which might arise at common law.

220. While *Okpabi* was concerned with issues of control within the Shell group, it was a case which dealt with the common law of negligence. Whether the Parent Company might be liable at common law for the acts of its subsidiaries, did not appear to the Tribunal to be directly relevant to the questions it has to consider.

221. All of the matters complained of in this claim are rendered unlawful by section 39 of the EQA which provides that ;

> ***An employer*** *(A) must not discriminate against and a person (B) …… (emphasis added).*

222. The fundamental question therefore which the Tribunal has to ask itself in considering the types of claim which are before it is, who was the claimant's employer?

223. For reasons that are gone into more fully below, that question precedes any issue of liability as between agents and principals.

224. The Tribunal was persuaded by Mr Brown's arguments as to corporate personality, and its significance in determining the identity of the claimant's employer. In reaching its conclusion on this point, it takes into account Mr Milsom's submission at very considerable length, as to the degree of control and authority exercised by RDS and the structural hierarchy in place, delegated authority , the Control Framework and the Shell General Principles, the Code of Conduct, COG, the HSSE framework, SPEIL and the Upstream restructure and the effect of all that.

225. There did not appear to the Tribunal that on a number of points there was a great deal between the parties on much of what Mr Milsom relied upon. A good deal of what he relied upon in the submissions was taken directly from the Control Framework and other Shell documents. It is accepted that the Control Framework, the Shell General Principles, and the Code of Conduct are in place, and are group wide policies. It is also accepted that the operating companies have to implement RDS objectives. It is accepted, as it is stated in the Control Framework that there is a system of delegated authority. Mr Al Janabi accepted in cross exanimation that there a was a Control Framework for HSSE, and also that he met the CEO once a year to discuss risk. It is also accepted that Shell group operate on Business and Function lines and that work is performed by across these lines, and across country lines. There was no issue as to the reporting structure, which is contained in the Control framework. It was not in dispute that Iraq was a high risk country, and that strategy and HSSE were focus of attention at a high level. These were all matters which Mr Milsom made much of in his submissions.

226. It appeared to the tribunal that the conflict arose between the parties positions in that it was suggested by Mr Milson that because of the these factor, delegated authority, the hierarchical structure, reporting structure, groupwide policies, and the need to align with RDS objectives, the operating companies had no autonomy in their own decision-making. On that basis RDS (or the Shell group) was to be held responsible as the claimant's employer.

227. The Tribunal was however satisfied that notwithstanding a system of delegated organisational authority, the need to align groupwide objectives, and to adhere to groupwide policies and procedures, that there was a corporate separateness within the RDS group. Regardless of the fact that strategy was determined at Board level, and that the overall business operated on Business and Function lines, with employees working across different functions on occasion as a result of Service Agreements between one entity and another, the business was organised by way of separate corporate entities, each of which required to comply with the relevant legal and taxation regimes, and comply with legal obligations and reporting duties

imposed on them. This was plainly stated to be the case in the RDS control framework, and that position was supported by the evidence of Mr Clark, and Ms Powell and Mr Al-Janabi, which the tribunal accepted.

228. It is not relevant for this tribunal to consider whether RDS could be held responsible for actions of its subsidiaries on common law grounds of negligence, which is what *Okbapi* was concerned with. Some of the factors which Mr Milson places considerable reliance may be relevant to that question, but it was not apparent to the tribunal how liability in delict at common law could impact on the questions which the Tribunal had to answer for the purposes of determining this claim.

229. The Tribunal considered that Mr Brown's submission as to corporate personality was entirely in point. It obtained guidance from the judgement of Lord Sumption in *Prest v Petrodel Resources Ltd [2013] 2 AC 415,* referred to by Mr Brown;

> 8. *Subject to very limited exceptions, most of which are statutory, a company is a legal entity distinct from its shareholders. It has rights and liabilities of its own which are distinct from those of its shareholders. Its property is its own, and not that of its shareholders. In Salomon v A Salomon & Co Ltd [1897] AC 22, the House of Lords held that these principles applied as much to a company that was wholly owned and controlled by one man as to any other company. In Macaura v Northern Assurance Co Ltd [1925] AC 619, the House of Lords held that the sole owner and controller of a company did not even have an insurable interest in property of the company, although economically he was liable to suffer by its destruction. Lord Buckmaster said, at pp 626–627: no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up."*

230. That it appeared to the Tribunal was the case here. Notwithstanding the factors relied upon by Mr Milsom, each corporate entity within the Shell group had its own separate legal personality, and was entitled to be treated on that basis.

231. That then brings the Tribunal back to the question of who was the claimant's employer for the period of her claim prior to October 2020, after which it accepted she was employed by Shell UK and subject to UK law?

232. It is trite law that an employer must be a legal entity with the power to contract. At the point of submission Mr Milsom submitted that the claimant's employer was the Shell group. There is a fundamental difficulty with such a proposition

however, in that firstly this claim was not brought against the Shell Group, and secondly the Tribunal does not understand there to be such a legal entity with the power to contract. As Mr Brown submitted, the claimant was not employed by a Brand.

233. The claimant's employment history, and the relevant terms of her contracts of employment are set out above in the findings in fact. It is apparent from that that the claimant entered into a series of contracts, with different contracting entities within the Shell group, over an extended period.

234. Mr Milsom submits that in reality the claimant's employment within the Shell Group is to be regarded as a single whole. That, he submits is how matters were treated in respect of remuneration, continuity, performance appraisals and notice entitlements. He submitted, that further, in view of the decision in *Uber BV v Aslam (2021)ICR 675* the question of contractually identified employer should not become a basis on which access to fundamental workplace rights is denied and the employment was to be regarded as a single whole. The claimant was recruited in the UK, she worked in the UK between 2011 /13, June July 2017, she was dismissed by a UK company.

235. The Tribunal however did not consider that the *Uber* case to be directly in point. The passages of the judgment of Lord Leggat at paragraphs 69, 76, 80, referred to by Mr Milsom, were made in the context that the tribunal at first instance in *Uber* had made the finding that the carefully crafted documents did not reflect the reality of the situation.

236. While it is submitted by the claimant that second and third respondents are acting as agents of the first respondent, the Tribunal did not understand it to be suggested that the written contacts which she entered into did not set out accurately what was agreed between the parties at the time when they were entered into or did not reflect the reality of that situation. It is not suggested, as the Tribunal understands it, that it should consider, if it is alleged that those terms are not accurate, what has been proved to be the actual agreements at the time. The contracts which the claimant entered into were clear as to the identity of the employing body, and about the fact that there was a succession of different contracts.

237. Mr Milsom did suggest that the ratio in *Uber* was applied not just to whether Uber drivers were workers, but also who they were working for. However, the Shell Group whom he suggests was the employer, are not a party to these proceedings, and the tribunal did not understand it to be a separate legal entity.

238. The Tribunal considered whether it could be concluded that the claimant entered into a series of different contracts of employment, as submitted by Mr Brown, her penultimate contract being with SEPIL.

239. In considering this it took into account a number of factors. It took into account that the claimant was recruited for international service, and the UK was her base country. It also takes into account that Shell UK Ltd was the claimant's base company under the terms of her contract with SEPIL.

240. The Tribunal was satisfied that the 'base country' was a Shell Group policy concept which affected how certain of the claimant's terms and conditions were fixed, but the contract of employment was between the claimant and the employing entity. 'Base country' affected how remuneration for employees on long-term international assignments was calculated, the tax support provided, how retirement benefits were assessed, and how travel allowance were calculated, however regardless of how these benefits were assessed, the contractual obligations created in the contract of employment were between the claimant and the employing entity.

241. Clause 23 of the claimant's contract with SEPIL provided for repatriation to Shell UK Ltd, her base company, upon termination of the assignment with SEPIL. However it remained in SEPIL's gift to terminate the claimant's employment with them for other reasons or in the event of misconduct. Repatriation to the base company only became relevant in circumstances where the assignment was terminated through no fault of the employee, and even if an employee was repatriated, the Base Company was not involved in the decision to terminate or end the assignment with the employing entity.

242. Mr Milsom submits that it was significant that SEPIL could not terminate the claimant's employment relationship with the Shell Group overall. That however, was only the case in certain defined circumstances. Arguably the fact that SEPIL could not bind other entities in the Shell group, but it could take actions on its own behalf to end the employee's relationship with them, was a factor which supported its separateness.

243. The Tribunal also took into account that the claimant had continuity of employment. Continuity of employment is however a statutory construction in relation to particular employment rights, and did not on its own give rise to the conclusion that the claimant was employed under a single contract of employment.

244. The Tribunal also took into account the terms of the contracts which the claimant entered into. The claimant accepted in cross examination she had entered into these contracts, and she accepted that SEPIL where her employers in the period from 1 August 2017 until October 2020.

245. That, the Tribunal was satisfied represented the reality of the situation, and it concluded that the claimant was employed under a series of contracts of employment with the different employing entities as specified in the written contracts of employment she entered into and as described in the findings in fact.

RDS as Principal of SEPIL/ Shell UK Ltd

246. Having reached that conclusion the Tribunal then went on to consider whether the claim against RDS, on the basis that they were acting as a principal to SEPIL, should be struck out on the grounds it had no reasonable prospects of success.

247. Mr Brown took the Tribunal to the relevant statutory provisions. He argued that statutory scheme was based on the claimant's employment. The claimant was never employed by RDS, and therefore RDS was never a principal in that relationship. Complaints that RDS is liable as a principal in respect of a relationship in which it was not the principal, but another identifiable party was, (SEPIL and Shell UK Ltd), where bound to fail.

248. He submitted that the focus is on the claimant's employment relationships and referred to *Yearwood v Commissioners of Police of the Metropolis (2004) ICR 1660 at 38*- an agent may be appointed to any act on behalf of the principal which the principal do him or herself.

249. Mr Brown also submitted that the necessary ingredient of the principal/agent relationship is that the agent acts on behalf of the principal at the relevant time (*Ministry of Defence v Kemeth (2014) ICR 625 at 39*). If the claimant is seeking to argue for some more expansive definition of agency in which RDS is the ultimate parent company everything is done for, that is not possible before the tribunal which is bound by *Yearwood.* Mr Brown also referred to *Unite the union v Nailard (2019) ICR 28* and *Remploy Ltd v Campbell EAT 0550/12.*

250. In considering this matter the Tribunal has to focus on the relevant legislative scheme. While the common law of principles of principal and agent are helpful and relevant in determining whether there is a relationship of principal and agent for the purposes of section 109 and 110, the Tribunal cannot simply apply those principles out with that statutory framework. Much of Mr Milsom's extensive submission as to the organisational controls of Shell and delegated authority were therefore, in the Tribunal's view, not in point. The focus of the Tribunal's consideration has to be Section 39, 109 and 110 of the EQA.

251. Section 109 provides;

(1) *Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.*

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—

(a) from doing that thing, or

(b) from doing anything of that description.

Section 110 providers;

(1) A person (A) contravenes this section if

(a) A is an employee or agent,

(b) A does something which , by virtue of section 109(1)or (2)is to be treated as having been done by A's employer principal (as the case may be), and

(c) the doing of that thing by A amounts to a contravention of this Act by the employer or the principal (as the case may be).

252. As indicated above the alleged acts of which the claimant complains are rendered unlawful under Section 39 of the EQA which provides that it is unlawful for an *employer* to discriminate. Under that provision it is the employer who is liable. Sections 39 and 110 do not create a free standing right to pursue a claim on the basis of principal and agent.

253. The Tribunal concluded that from August 2017 the claimant's employer was SEPIL and from October 2020 she was employed by Shell UK Ltd. In that capacity SEPIL or Shell UK Ltd could potentially have a liability to the claimant as a principal for an act of their agent, in breach of the EQA, but there is no relevant relationship between RDS and SEPIL or RDS and Shell UK Ltd or RDS and the claimant, which could render RDS liable for the claimant's claim under Section 39 as an employer.

254. The Tribunal reminded itself the terms of Rule 37 (1) (a) of the Rules and the guidance given in *Balls v Downham Market supra.*

255. Applying that guidance, the consequence of the Tribunal's conclusion is that the claimants claims, insofar as they are presented against the first respondent on the basis that they acted as principal and are thus liable for the acts of the second and/or third respondent as their agents in terms of the EQA, are struck out on the grounds that they have no reasonable prospect of success.

Instructing , Causing or Inducing Discrimination/Aiding Contraventions

256. Sections 111 of the EQA provide as follows;

(1) *A person (A) must not instruct another (B) to do in relation to a third person (C) anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 112(1)(a basic contravention).*

(2) A person (A) must not cause another (B) to do in relation to a third person (C) anything which is a basic contravention.

(3) A person (A) must not induce another (B) to do in relation to a third person (C) anything which is a basic contravention.

(4) For the purposes of subsection (3), inducement may be direct or indirect.

(5) Proceedings for a contravention of this section may be brought up

…..

(7) This section does not apply unless the relationship between A and B is such that A is in a position to commit a basic contravention in relation to B.

…….

Section 112- Aiding contraventions

(1) A person (A) must not knowingly help another (B) to do anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 111 (a basic contravention).

….

(5) For the purposes of Part 9 (enforcement) a contravention of this section is to be treated as relating to a provision of this Act to which the basic contravention relates.

257. The claim under these provisions is framed as follows in the Amended ET1;

97.*The Claimant avers that the First Respondent is liable as principal for the acts of the Second and Third Respondents pursuant to s109 EqA 2010. Further and alternatively the Claimant avers that the First and/or Second Respondents are liable for causing, inducing or knowingly aiding EqA contraventions by failing to have a consistent and robust means of redressing discrimination during assignment in place and failing to take any or any adequate action to prevent the Claimant's removal from the Third Respondent*

99.Further and alternatively the First Respondent instructed the Third Respondent and/or Mr Al Janabi whether directly or via its vertical company structure to make costs savings without undertaking any or any adequate oversight as to the discriminatory impact of any restructure. This ultimately led to the Claimant's repatriation. As such the First

Respondent (whether directly or via subsidiary companies) instructed, caused and/or induced the discrimination of which she complaints pursuant to s111 EqA 2010.

258. Mr Milsom referred the Tribunal to the England and Wales Code of Employment at paragraphs 9.18 to 9.28. 'Inducement may be no more than the persuasion and does not need to involve a benefit or a loss. It may be indirect, and it is enough if it is applied in such a way that the other person is likely to come to know about the inducement.'

259. 'Knowingly aid' is the help given to someone to discriminate, and it will be unlawful even if it is not substantial or productive so long as it is not negligible. The knowing helper must know the discrimination is a probable outcome but does not have to intend that this outcome could result from the help.

260. Mr Wilson again referred to *Anyanwu*, in support of the position that the claim should not be struck out at a PH. He submitted it was clear there was a challenge to the size of the Iraq governance team from the point with Mr Al Janabi took over. The circumstances of the claimant's maternity leave were known to Mr Chok and Mr Dempster. The decision to terminate the assignment was approved in the knowledge of the fact that it would be a breach of the requirement to enable the claimant to return to the same or a suitable alternative job. Lastly the claim had to be viewed in the context that it was known, at least to Mr Dempster, that was a common concern as to the management of pregnancy and maternity leave within SEPIL, by those involved, but that this had not been dealt with.

261. Mr Brown made extensive submissions as to why these claims had no prospect of succeeding. His first position was that the claims under section 111 could not succeed because to be liable for causing or inducing discrimination, the alleged causer on inducer, here RDS, must be in a position to commit a basic contravention in relation to the passion caused or induced (Section 111(7)).

262. Mr Brown submitted that RDS could not commit a basic contravention in relation to SEPIL is it is a corporation, and the relationship between two companies is not regulated by the EQA.

263. With regard to this point the Tribunal obtained guidance from the case of *EAD and others v Abrams UKEAT/54/15* and the judgment of the EAT President Langstaff, referred to by Mr Milsom. In that case it was held that since '*person*' could include a body corporate in the absence of a contrary intention, under section 13(1) of the Equality Act 2010 the LLP could be held to discriminate against 'another' person who might be a natural or a legal person; that it was clear from the use of the term '*because of the protected characteristic'* in

section 13(1) that the protected characteristic did have to be enjoyed by the person who was the subject of the detrimental treatment, and it was entirely possible for the protected characteristic to be that of an individual who was not the claimant; and that, since there was nothing in the Equality Act 2010 to indicate a contrary intention, and since it would be consistent with EU law, the tribunal had jurisdiction to consider the claim of associative discrimination by the claimant company.

264. In light of this it did not appear to the Tribunal that the application of section 111 could be excluded on the basis suggested by Mr Brown.

265. Mr Brown's next point was that as SEPIL is out with the territorial scope of the EQA, there was no action RDS could take in relation to SEPIL could amount to a basic contravention of the EQA as the territorial scope of the EQA does not run to decisions taken by a foreign company (Section 111 (7)). He submitted the same principles apply to the complaint as between RDS and Mr Al Janabi , as an employee and Director of a foreign company.

266. The Tribunal was satisfied that on a proper construction, in order for section 111 to apply, the relationship between the person giving the instruction and the person receiving instruction, is such that it is a relationship in respect of which discrimination, harassment or victimisation is itself prohibited.

267. For reasons which are dealt with more fully below the Tribunal concluded that SEPIL was a foreign domiciled company, and was therefore out with the territorial reach of the EQA. RDS could not commit a basic contravention as regards SEPIL in those circumstances. Nor could it commit a basic contravention in respect of Mr Al Janabi who was working in Dubai and the UAE, as an employee and director of foreign-based company which was out with the jurisdictional reach of the EQA.

268. On that basis the claims against the RDS under Section 111 as regards any allegations of instructing, causing or inducing discrimination on the part of SEPIL or Mr Al Janabi have no reasonable prospect of succeeding.

269. In connection with the allegation against RDS and Shell UK Ltd that they knowingly aided SEPIL, the same consideration applies. SEPIL and Mr Al Janabi are not subject to the EQA, and therefore could not commit a basic contravention of it which is enforceable (Section 112 (5)).

270. Furthermore, in his submissions Mr Milsom relied on Mr Dempster's knowledge of the circumstances of the claimant's maternity leave, and submitted that the decision to terminate her assignment was approved in the knowledge of the fact that there would be a breach of the requirement to enable the claimant to return to the same or suitable equivalent job.

271. This however did not reflect the case pled before the tribunal which is set out above. That case is that the first and or second respondent knowingly aiding EQA contraventions by failing to have a consistent and robust means of redressing discrimination during assignment in place and failing to take any or any adequate action to prevent the Claimant's removal from the Third Respondent.

272. 'Aiding' in the context of section 112, as submitted by Mr Milsom means the help given to someone to discriminate. Help is to be given its ordinary meaning. The tribunal did not consider that a failure to have a robust means of addressing discrimination could be properly regarded as 'knowingly aiding 'or helping to discriminate for the purposes of section 112. Nor is there any pleaded case of knowledge; section 112 (1) requires the person aiding the contravention to knowingly aid the contravention.

273. The claimant's own evidence did not identify a basis on which it could be concluded that Shell UK Ltd or RDS caused, instructed, induced or knowingly aided discrimination. In considering this the Tribunal took into account the treatment which the claimant complained of, as specified in her ET one, and set out above the findings of fact, alongside her answers in cross examination to Mr Brown's questions as to who did she said discriminated against her in respect of each of these acts. The majority of the treatment which the claimant complains about said to be at the hands of her then employer, SEPIL, (albeit subject to the qualification that the first and/or second respondents were liable on the principal/agency basis,).

274. The Tribunal understand the claimant to rely on a direction issued by RDS to save costs, without adequate oversight as to the discriminatory impact of the restructure. Taken at its highest, an RDS direction to save costs, which SEPIL or Mr Al Janabi acted upon in deciding the restructure of SEPIL, could not sensibly be considered as an instruction or inducement to discriminate, or to have knowingly aided discrimination. As Mr Brown submitted, saving costs is not inherently discriminatory. 'Causing' or 'Inducing 'cannot be mean purely factual causation, otherwise strict lability could ensue. An instruction to save costs could not be regarded as being caught by the provisions of section 111 and 112 in these circumstances.

275. The Tribunal also understands the claimant to rely on the fact that Mr Al Janabi discussed matters with Mr Chok, and obtained his approval for the termination of her assignment. This is denied by Mr Al Janabi, however even if it were correct, it does not advance the claimant's case under section 111 or 112 as Mr Chok was not an employee of RDS or Shell UK, but was an employee of Shell International Exploration and Production BV.

276. The Tribunal also understands the claimant to allege that Mr Dempster knowingly aided discrimination in that he failed to disclose the extent to which he did not deal with the claimant's work load while she was on maternity leave, and that it was passed on to another employee. Again there is an issue as to the merits of this point, with Mr Dempster and Mr Al Janabi giving evidence that the requirement for the work which the claimant performed had significantly diminished as a result of operations in Iraq reducing significantly. However, even taking that at its highest , and leaving aside the fundamental point that Mr Dempster could not commit a basic contravention of the EQA in relation to Mr Al Janabi, the tribunal did not consider that the failure which the claimant relies upon on the part of Mr Dempster could be construed as an act which caused, instructed, induced or knowingly aided discrimination. The alleged failure could not be said to amount to a persuasion to discriminate, or be a failure which it could be said that Mr Dempster knew was likely to result in discrimination. Indeed such a case is not pled by the claimant, and in her evidence she said that she didn't like to think he intended it (discrimination) but that he was involved.

277. Some of the treatment which the claimant complains occurred while she was employed by Shell Offshore (Personnel) Services BV who are not a party to these proceedings. There is therefore no basis in terms of the case before the Tribunal, on which it could be concluded that complaints that that the first or second respondents had a liability under of section 111 or 112 of the EQA for acts done while the claimant was an employee of Shell Offshore (Personnel) Services BV had any reasonable prospects of success.

278. Again taking into account the terms of Rile 37 (1)(a) of the Rules, and the test in *Balls v Downham*, the Tribunal was satisfied that the claimant's complaints taken at their highest, as set out in paragraph 92 (i) to (vii) of the ET1, and narrated in the Findings in Fact, on the basis of sections 111 and 112 of the EQA against RDS , and against Shell UK Ltd for the period prior to the commencement of her employment with them on 1 October 2020, had no reasonable prospects of success.

Deemed liability of Shell UK Ltd

279. The Tribunal also dealt with the claimant's case to the effect that there was a deemed liability on the part of the second respondents. Mr Milsom did not make specific submissions on this but the tribunal understand the position to be that deemed liability arose as a result of the principal /agency relationship between the Shell UK Ltd and SEPIL. The Tribunal's consideration of this point is set out above.

280. The Tribunal also considered the terms of clause 23 of the contract, and whether this gave rise to a deemed liability on the part of Shell UK Ltd. This was touched upon in the list of issues which the parties attempt to agree.

281. Mr Brown made submissions on this and on the effect of clause 23 of the claimant's contract of employment with SEPIL. His position was that in terms of that clause Shell UK Ltd does not assume liability for unlawful discrimination by SEPIL. Clause 23 did no more than describe what would happen when the claimant's assignment came to an end with SEPIL without her having secured alternative employment. Furthermore the difference in territorial jurisdiction between the two companies and the consequent jurisdictional bar to a claim against SEPIL, weighed against such an approach to clause 23 as a means by which a dispute under a contract subject to UAE law and the jurisdiction of the Dubai Courts would become a dispute within the exclusive jurisdiction of the Scottish courts, subject to Scottish law, especially where the claimant's contract with Shell UK Ltd did not mirror the transfer of liability which the claimant argues for, or made any provision for how this is to be achieved or which law was to be applied. Additionally the parties by agreement cannot confer jurisdiction of the Employment Tribunals, whose sole jurisdiction comes from the Equality Act.

282. The Tribunal concluded that parties to the contract of employment are the claimant and SEPIL. On the face of the contract in the event Shell UK Ltd had not complied with the provisions of clause 23 with regard to repatriation, or any other provisions which sought to place obligations upon them, then neither the claimant nor SEPIL would have had a right of redress against them. The Tribunal was satisfied, that as suggested by Mr Brown clause 23 did no more than describe what was going to happen if the claimant's assignment came to an end through no fault of hers, and she was not redeployed. That did not appear to the Tribunal to be a sufficient basis to deem Shell UK Ltd liable for acts of discrimination alleged to have been committed by SEPIL.

283. Nor did the fact that the contract provided that Shell UK Ltd was the 'Base Company' which would represent the Parent in any issue arising from the end of the Assignment (clause 23.2) provide a basis upon which it could be deemed liable for acts of discrimination at the hands of SEPIL. Notwithstanding that the contract could not bind Shell UK Ltd, the obligations which that clause sought to impose were concerned specifically with representation, and the Tribunal did not consider this could be a sufficient basis for deeming Shell UK Ltd liable for acts of SEPIL during the claimant's employment with them. Nor did the Tribunal considered that the reference to retaining links to this company, for example for the purposes of remaining in

the base company retirement scheme could give rise to a deemed liability on the part of Shell UK Ltd, for acts said to be committed by the SEPIL.

284. The Tribunal was satisfied that the claims against the second respondents, Shell UK Ltd, on the basis that they have deemed liability for the acts of the third respondents SEPIL, has no reasonable prospect of succeeding, and therefore applying the relevant test as set out above, the claims against the second respondent for the period prior to 1 October 2020 are struck out on that basis.

285. The claimant's claims of indirect discrimination (paragraph 94 of the paper part to the ET1), on the grounds of maternity leave, are no longer insisted upon.

The Tribunal's Jurisdiction

286. A distinction has to be made between the forum where the case is determined; the applicable law; and the territorial scope of a domestic statute.

287. There is a fundamental issue as to the Tribunal's jurisdiction to consider claims brought against SEPIL. It is said by the respondents that SEPIL is incorporated in Bermuda, and trades only in the UAE. There is no basis upon which the Tribunal in Scotland has jurisdiction to consider a claim against it.

288. It is argued by the claimant that the Tribunal has jurisdiction to consider a claim against SEPIL on a number of basis, which are dealt with below.

SEPIL's Submission to the Jurisdiction of the Tribunal

289. The first point which the Tribunal considered was the claimant's argument to the effect that SEPIL had submitted to the jurisdiction of the Tribunal. The basis of Mr Milsom's submission was that the three respondents had been jointly represented throughout the proceedings. He submitted that on 17 May the respondents provided a copy of all the witness statements to the claimant; these statements were placed before the tribunal on Monday 7 June without any caveat as to which statement related to which respondent, and no such caveat could be detected in the face of the statements .

290. Mr Milson submitted that Mr Al Janabi's statement addresses the substance of the complaints on their merits, stressing the legitimacy of his decision, the level of consultation he underwent, and effort to find alternative work, and he accreted in evidence that the claimant's pregnancy had no impact on his decision, which he would have reached regardless of claimant.

291. Mr Milsom submitted that SEPIL consented to an order by the Tribunal to provide statements on the merits. He listed the following cases; *Brearley v*

Board of Management of Royal Perth Hospital (1999) 21 WAR 79 ; Global Media International Ltd v ARA Media Services [2007] 1 All ER (Comm) 1160; Esal (Commodities) Ltd v Mahendra Pujara [1989] 2 Lloyds Rep 479; Solvalub Ltd v March Investments Ltd [1998] IL Pr 419.

292. Mr Brown disputed that the third respondents had submitted to the tribunal's jurisdiction. He submitted that the claimant must show that the respondent had taken a step which is only necessary or useful if it had waved its objection to jurisdiction; the exchange of witness statements on behalf of the respondents collectively rather than individually is not a step which is only necessary or useful if SEPIL had waived its objection to the jurisdiction. This is especially so in the context of SEPIL's consistently-stated position in these proceedings, including in its response and amended response to the claim, its case management agenda for the 13 January 2021 preliminary hearing, its lack of response to a request for further information, the 25 March 2021 list of issues and the position stated from the first day of this hearing that evidence as to the merits of the claim would not be led on behalf of SEPIL. Mr Al Janabi , Mr Dempster and Ms Mezaina were not called as witnesses for SEPIL, which has not sought to argue any part of the merits at this hearing. Their evidence is readily explicable as evidence relevant (and only relevant) to the claims against RDS and Shell UK Ltd.

293. Mr Brown referred the Tribunal to Lord Denning LJ's opinion in In re *Dulles' Settlement (No. 2) [1951] Ch. 842 at 8 I cannot see how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court, when he has all the time been vigorously protesting that it has no jurisdiction. If he does nothing and lets judgment go against him in default of appearance, he clearly does not submit to the jurisdiction. What difference in principle does it make, if he does not merely do nothing, but actually goes to the court and protests that it has no jurisdiction? I can see no distinction at all.*

294. The issue of jurisdiction in relation to SEPIL must be decided before any hearing on the merits, since SEPIL could not both contest jurisdiction and defend the claim on the merits. SEPIL is registered in Bermuda and has a trade license to operate in the UAE. Its position is that it is in no way present in the United Kingdom.

295. Mr Brown submitted that the claimant does not appear to rely on proper service of the claim form in the UAE, and in any event it was not properly served. The claim form was purportedly served on SEPIL in Dubai. Regulation (EC) 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (''the EU Service Regulation'') does not apply since Dubai is not subject to the EU Service Regulation (it is solely concerned with intra-EU service), Dubai is not a party

to the Hague Convention on the service abroad of judicial and extra-judicial documents in civil or commercial matters. The claimant has not led evidence that the claim form was properly served in accordance with the law of the UAE. The Treaty between the United Kingdom of Great Britain and Northern Ireland and the United Arab Emirates on Judicial Assistance in Civil and Commercial Matters applies. There is no evidence that the requirements of the Treaty were met. For example, there is no evidence that a request and supporting documents were accompanied by a translation into Arabic, the official language of the UAE, as required by article 6(2) of the Treaty. Nor is there any evidence that the request for judicial assistance was approved by the Senior Master of the Queen's Bench Division of the Senior Courts of Justice for England and Wales or the Scottish Executive Justice Department, being the Central Authorities provided by Article 5 of the Treaty.

296. The Tribunal considered that it was highly relevant that, as submitted by Mr Brown, SEPIL had consistently maintained its position that it was not subject to the jurisdiction of the tribunal. That was its position in the ET3 response, and the PH agenda. The response lodged providing answers to questions asked by the claimant was lodged on behalf of the first and second respondents only, and not on behalf of SEPIL. The draft list of issues which the parties sought to agree made clear that SEPIL was not submitting to the jurisdiction of the tribunal.

297. The Tribunal did not consider any weight could be attached to the fact that there was collective representation in considering if here had been submission to the Tribunal's jurisdiction.

298. The Tribunal did not consider, in the context where SEPIL had clearly stated their position on jurisdiction, that much could be taken from the fact that the witness statements did not state in terms on whose behalf the witnesses were giving evidence, or for that to be made clear at the point when statements were produced in compliance with the tribunal direction. That matter was addressed on the first day of the Tribunal hearing by Mr Brown, prior to the Tribunal being asked to read the witness statements. At that stage, he made clear that Mr Dempster, Mr Al Janabi and Ms Mezaina were all giving evidence on behalf of the first and second respondents only, and their evidence was given subject to the caveat that to the extent they gave evidence on the merits of the claim that evidence was not given a behalf of SEPIL. This was also stated to be the case for Mr Clark and Ms Powell's evidence , to the extent that it was given on behalf of the third respondents.

299. This caveat was repeated by Mr Brown in the course of the Hearing and the Tribunal considered that this was a legitimate position for the third respondents to take. The first and second respondents are accused of

discriminating against the claimant on the basis either of RDS acting as a principal to SEPIL, or by RDS and /or Shell UK Ltd causing inducing, or aiding discrimination. The defence of such a claim readily explains why evidence was given on behalf of RDS and Shell UK Ltd as to the decision-making process within SEPIL and the reasons why decisions were made. Given the position of RDS and Shell UK Ltd, that they were not responsible for the decisions of which the claimant complains , it was not surprising that evidence was led from the individuals who they say were the decision-makers, in order to defend the claims brought against them.

300. The collective production of witness statements, or Mr Al Janabi, Mr Dempster or Ms Mezaina giving evidence in these circumstances did not demonstrate that SEPIL had taken a step which was only necessary or useful to it if it had waived its objection to jurisdiction.

301. In light of these factors the tribunal was not satisfied that SEPIL had submitted to the jurisdiction of the tribunal.

The Recast Brussels Regulations

Domicile/ Article 20(1)

302. Mr Milsom relies on the Recast Brussels Regulations to confer jurisdiction on the Tribunal to consider claims against SEPIL. In this connection he referred the Tribunal to Articles 20 to 23 and Article 8(1).

303. Mr Milsom maintained that RDS, Shell Overseas Investments BV and/or Shell International Exploration and Production BV are both capable of constituting seats or other establishments of SEPIL. A parent company which acts as principal is capable of constituting another establishment; *Sar Scotte GmbH v Parfums Rothschild Sarl (1987) ECR 4905.*

304. Further Mr Milsom submitted that the courts have recognised that in view of the express purpose of Art 21 a broad approach should be taken to place of business; *Voogsgeerd v Navimeer SA (2011) ECRI-3275.*

305. Mr Brown rejected the notion that Article 20 (2) of the Recast Brussels Regulations could confer jurisdiction on the Tribunal to consider a claim against SEPIL. He referred to *Olsen v Gearbulk Service Ltd (2015) IRLR 818* in support of this position.

306. He submitted that significantly the claim must be that RDS is an extension (‘an agent’) of SEPIL (the ’parent body’) in terms of the guidance given in that case, and not the other way round since RDS must be said to be in the agency of SEPIL. Such a position was unsustainable. It could not be said that SEPIL was a presence in the UK with the appearance of permanency,

nor that SEPIL's management and control was in the UK or that RDS was an easily discernible extension of SEPIL or that RDS was subject to the direction and control of SEPIL.

307. Further Mr Brown submitted that it was no evidence of SEPIL having delivered a return to the register of companies which would have been required had it opened UK establishment under the Overseas Companies Regulations 2009/1801. Mr Brown also rejected the notion that it could be argued that SEPIL is domiciled in the UK on the basis of article 63 of the Recast Brussels Regulations. It was unarguable that SEPIL was domiciled in the UK as opposed to Bermuda or UAE.

308. In considering this point the Tribunal reminded itself that where the respondent to a claim is domiciled in any EU Member State, the Brussels Regulations apply to determine where the claimant may be heard. They do not affect the content of the substantive law applicable to the claim itself

309. The Brussels Regulations at Article 20/21 provide;

> *Article 20*
> *1. In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 6, point 5 of Article 7 and, in the case of proceedings brought against an employer, point 1 of Article 8.*
> *2. Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.*

310. Articles 20/23 of the Brussels Regulations are concerned with the relationship under individual contracts of employment.

311. The effect of the Tribunal's conclusion on identity of employer is that in considering the impact of the Regulations for the period of the claim prior to October 2020 SEPIL is the employer.

312. The Tribunal began by considering if it could be concluded that SEPIL was domiciled in a member state of the EU.

313. Article 63 (1) provides that a company is domiciled at the place where it has its statutory seat, central administration, or principal place of business.

314. The statutory seat of a company is its registered office, or if there is no registered office is place of incorporation, and if there is no place

incorporation, the place under the law of which it was formed. While Mr Milsom questioned the decision making authority of SEPIL and where that derived from, there was no effective challenge to Ms Powell's evidence that SEPIL was incorporated in Bermuda, and that the registered office of the Dubai branch was in Dubai.

315. Therefore as a matter of fact SEPIL that was incorporated in Bermuda with a licence to trade in Dubai. The Tribunal was also satisfied that although SEPIL provided staff under a Service Agreements to other companies operating in the Middle East, it operated out of Dubai. Such a conclusion is supported by the evidence of Ms Mezaina, who was employed by SEPIL to provide HR support, and who was based in Dubai. She also spoke to the fact that SEPIL had a local parole administrator in Dubai which processes for all staff, including LNN employees. This conclusion is also supported by the evidence of Mr Al Janabi a director of SEPIL based in Dubai, who gave evidence about the decisions he took to review the business operating in the UAE. It is also supported by the claimant's evidence, to the extent that she confirmed that while in the employment of SEPIL she worked in Dubai. Lastly Ms Powell gave unchallenged evidence to the effect that SEPIL operates in Dubai through a branch, which branch in the regional office of SEPIL, and that SEPIL provides a specialised support services to applicable Shell Group companies operating in the Middle East region. She also confirmed that SEPIL did not operate elsewhere.

316. The light of these conclusions as to the operations of SEPIL there was no basis on which the Tribunal could conclude that its principal place of business was in the UK or in an EU member state.

317. It is accepted by the respondents that SEPIL has a Service Agreement with Shell International Exploration and Production BV (SIEP), which is registered in the Netherlands, and under which they provide services to affiliates within the Shell Group, however this was not a sufficient basis upon which to conclude that SEPIL's principal place of business was in the Netherlands, in circumstances where its operational base is the UAE and it was registered in Bermuda.

318. Nor was the fact that SEPIL was a wholly owned subsidiary of a Netherlands-based company capable of giving rise to the conclusion that this principal place of business was in the Netherlands, in light of the factual position as to the operation of SEPIL in the UAE.

319. The Tribunal also considered if SEPIL's central administration was located in the UK or EU member state. Although it is not bound by decisions from the Court of Appeal, these are persuasive and in considering this question the

Tribunal derived assistance for the judgement of Aitkens LJ at paragraph 48 of *Young v Anglo American South Africa Ltd and others*

> *(No 2) [2014] Bus LR 1434*;
> *In this case the judge was correct to concentrate on the factual position relating to AASA itself and to search for the place where AASA itself, through its relevant organs according to its constitutional provisions, made the decisions that were essential for AASA's own business, or where AASA's own "entrepreneurial" decisions were taken. In that way he would arrive at a provisional view on where AASA had its "central administration" at the relevant date. The judge was correct not to be diverted by[counsel for V's] ingenious* attempt *to turn the issue around so as to ask the more impersonal question "where were the main entrepreneurial decisions taken which determined the activity of AASA". That is the wrong question. It removes the focus from where it should be, which is on the decisions of the company itself. It obfuscates matters by looking at other companies in the group or the group as a whole. It gets away from the essential question: where does AASA have its "central administration"?*

320. The Shell Group strategy was decided at the board level, which SEPIL's decision's making had to align with; the business operated across Business and Function lines; and there was reporting across those lines. The focus of the Tribunal is SEPIL, rather than other companies in the Group or Group wide, and it has to look at the place where according to its relevant organs SEPIL took decisions essential to its operational and management, and entrepreneurial decisions.

321. Mr Al Janabi as a director of the SEPIL was empowered to make day to day decisions on behalf of that company from SEPIL's base in the UAE. Those decisions, such as a reorganisation of the business to merge the Iraq and UAE business, where essential to its operation, and were management and entrepreneurial decisions.

322. The corporate reporting functions were carried out in Bermuda. Mr Milsom pointed to Ms Powell's inability to explain why a very significant sum was shown due the company accounts from the London Based Shell Treasury Centre Ltd or that significant sums were due to RDS, as an indication of the lack of operational activity in the seat of the companies registration. He submitted that whilst a Power of Attorney was ostensibly conferred on Mr Al Janabi by SEPIL, it played no role in this appointment or appraisals and the better view was that the conferral of this power of attorney was as a result of direction from SIEP BV in the Netherlands.

323. The Tribunal accepted Ms Powel's evidence to the effect that she carried out company secretarial work for SEPIL in Bermuda, and that SEPIL had granted the POA to Mr Al Janabi. She did not depart from this on cross examination, and the Tribunal did not consider her lack of familiarity with the substance of the accounts to be sufficient reason to doubt her credibility on this point.

324. The Tribunal also accepted Mr Al Janabi's evidence as to the extent to which he was empowered to make decisions autonomously on behalf of SEPIL, and the extent to which he did so. The Tribunal accepted that the decision to reorganise the business in Iraq, (even if done in response to cash preservation measures across the Shell Group and regardless of whether it was discriminatory) was driven by his experience in the Saudi business, and his desire to integrate both the Iraq and UAE businesses, and having carried out a review of SEPIL, a decision was made by him regarding the viability of roles across a number of functions. That, in the tribunal's view was compelling evidence about where decisions which effected the activity of the company itself were made.

325. In light of this, the Tribunal did not conclude that SEPIL's central administration' was based in the UK, or the Netherlands, or any other EU member state.

326. The Tribunal then went on to consider if RDS, Shell Overseas Investments BV and/or Shell International exploration and production BV are capable of constituting a 'branch, agency or other establishment' of SEPIL for the purposes of Article 20 (2) of the Brussels regulations.

327. In support of his submission that a Parent company which acts as a principal is capable of constituting another establishment, Mr Milsom relied in Sar *Scotte GmbH v Parfums Rothschild Sarl (1987) ECR 4905.*

328. The Tribunal understood that case to be concerned with jurisdiction where a legal entity established in a contracting state, maintains no dependent branch, agency or other establishment in another contracting state, but nevertheless pursues its activities there through an independent company with the same name and identical management, which negotiates and conducts business in its name and which it uses as an extension of itself.

329. The circumstances of that case did not appear to the Tribunal to be at one with the circumstances in this claim. SEPIL does not conduct business with the same name, or as extension of RDS or Shell Overseas Investments BV and/or Shell International Exploration and Production BV in an EU member state. While those companies are subject to the same Shell group policies and the Control Framework as a SEPIL, the Tribunal did not conclude that it could be said they had identical management to it. It was not suggested that

Mr Al Janabi, who the tribunal was satisfied had the power to make autonomous decisions on behalf of SEPIL, was a director of RDS, Shell Overseas Investments BV and/or Shell International exploration and production BV.

330. The Tribunal also found *Olsen v Gearbulk Services Ltd [2015] IRLR 818,* to be of assistance in this regard. There the EAT considered the concept of agency, holding that at paragraph 53, ;

> *In Mahamdia v Peoples Democratic Republic of Algeria Advocate General Mengozzi drew together the case law relating to the 'agency' to which the Brussels Regulation refers. In Somafer SA v Saar-Ferngas AG (case 33/78) [1978] ECR 2183, the court had stated this involved:*
> *'… the concept of branch, agency or other establishment which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such a parent body but may transact business at the place of business constituting the extension' In Blanckaert v Willems PVBA v Trost, C-139/80 [1981] ECR 819 at paragraph 12, and SAR Schotte GmbH v Parfums Rothschild Sarl, C-218/86 [1987] ECR 4905 paragraph 16 a branch agency or establishment 'must appear to third parties as an easily discernable extension of the parent body'. In Etablissements A de Bloos SPRL v Société en Comandite par Actions Bouyer, C-14/76 [1976] ECR 1497:*
> *'One of the essential characteristics of the concepts of branch or agency is the fact of being subject to the direction and control of the parent body.'*

331. As submitted by Mr Brown, to succeed on the basis of the 'other branch or agency' argument, the claimant would have to show that RDS, Shell Overseas Investments BV and/or Shell International Exploration and Production BV , as the 'branch or agency' where somehow an extension of SEPIL. That, as the Tribunal understands it is not what is argued here, the claimant's position being that any authority exercised by SEPIL derived from RDS or a centre in the Netherlands. The was nothing to support the conclusion that RDS or Shell Overseas Investments BV and/or Shell International Exploration and Production BV carry on business under the same name or as an extension of SEPIL.

332. Following the guidance in these cases, the Tribunal did not conclude that SEPIL, although undoubtedly part of a global group of companies, had a branch, agency or establishment in the UK or the Netherlands for the purposes of Article 20(2).

Habitually Carries on work/ Article8(5) claims so closely connected

333. *Article 21*

> *1. An employer domiciled in a Member State may be sued:*
> *(a) in the courts of the Member State in which he is domiciled; or*
> *(b) in another Member State:*
> *(i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or*
> *(ii) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.*
> *2. An employer not domiciled in a Member State may be sued in a court of a Member State in accordance with point (b) of paragraph 1.*

334. As an alternative argument Mr Milsom submitted that the claimant is to be regarded as not habitually working in any given location, given the effect of the Base Country and the recognition in RDS policy that she was pursuing a truly international career. Pursuant to Art.21(1)(b)(ii) the place which engaged the claimant was the UK was either the UK (by way of recruitment) or the Netherlands (by way of her first assignment).

335. He also submitted as a further alternative that in event the claim may be heard in Scotland in accordance with Art.8(5): the claims are so closely connected that it is expedient to hear them together.

336. Mr Milsom again relied on *Uber,* submitting that the corporate lines were not followed in practice, and were secondary to reporting lines.

337. Mr Brown submitted that in considering jurisdiction against SEPIL the claimant's employment with them must be considered in isolation from her subsequent employment by Shell UK ltd; there is no basis in law by which to amalgamate these periods of employment, since they were pursuant to separate contracts of employment, and there was no overarching contract of employment.

338. Mr Brown submitted that it was notable that the claimant's employment with Shell Offshore (Personnel) Services BV (and therefore one period of employment with the Shell Group) did recognise a distinction between successive contracts of employment and secondment under a contract of employment: from 16 December 2016—before her employment by SEPIL—the claimant was employed by Shell Offshore (Personnel) Services BV, and seconded therefrom to work for Shell Iraq Petroleum Development BV. The

claimant habitually carried out her work for SEPIL in the UAE, and not the United Kingdom.

339. In any event, even if the claimant's employment by SEPIL and Shell UK Ltd are treated as amalgamated, the claimant cannot sue SEPIL, who not her employer at dismissal, in the United Kingdom.

340. Mr Brown submitted the claimant habitually carried out her work for SEPIL in the UAE, and not the United Kingdom.

341. Material to its considerations on this point is the Tribunal's conclusion that the claimant was employed under a series of different contracts of employment. The effect of that conclusion is that the tribunal considered whether the claimant habitually worked in one country for duration of her contract with SEPIL, and if so where.

342. 'Habitually worked' in the case of *Weber v Universal Ogden Services [2002] ICR* 979, referred to by Mr Brown, is said to be the place where the employee performed the essential part of their duties vis-à-vis the employer, which is in is in principle the place where he/she worked the longest on the employer's business over the course of the employment.

343. The Tribunal was satisfied that after the commencement of employment with SEPIL on 1 August 2017 the claimant did not work at all in the UK. This is supported by her tax returns which were gone through in cross examination.

344. The Tribunal accepted the evidence of Mr Dempster, and Mr Al Janabi to the effect that the majority of the claimant's work was performed in the UAE and that she was based in the Dubai office with minimal requirements to travel to Iraq. The claimant's own evidence supported this, in that although she gave evidence to the effect that she worked with an international workforce, many of whom had understood to have a base company /country in the UK or other EU member states, and that she considered she was working for the benefit of RDS/ the Shell group, she did not suggest that she physically worked to any significant extent from August 2107 out with the UAE.

345. Mr Milsom did not direct tribunal to the exact provision on which he relied in the RDS policy which recognised the claimant was pursuing an international career, however such recognition as there was of this was not a sustainable basis on which to find that the claimant was not habitually working in any given location, in circumstances where as a matter of fact she worked while in the employment of SEPIL almost entirely in the UAE, albeit providing services to entities based elsewhere, in particular Iraq

346. Article 21 (1) (b) (ii) does not therefore apply, because the claimant habitually worked in the UAE.

347. Article 21(1) (i) does not apply as SEPIL is not domiciled in an EU member state; in any event the claimant last worked for SEPIL in the UAE.

Article 8 (1) of the Recast Brussel's Regulations

348. The Tribunal considered Mr Milsom's further alternative argument to the effect that jurisdiction was conferred by virtue of Article 8 of the Brussels Regulations.

349. The tribunal did not consider that Article 8(1) was applicable to contracts of employment. The Recast Brussels Regulations are divided into Chapters, with Chapter II dealing with Jurisdiction. Chapter II is subdivided into 9 Sections, each one dealing with different aspects of Jurisdiction.

350. Chapter II, Section 2, Articles 7 to 9 deal with *Special Jurisdictions.* Article 7 makes provision for where jurisdiction can be founded in a number of types of claims. That list (Article 7 (2) to (7)) does not include contracts of employment.

351. Section 2, Article 8(1) following on Article 7 that provides;

> *A person domiciled in a Member State may **also** be sued: (emphasis added)*
> *(1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.*

Section 5 of Chapter II deals specifically with the rules relating to jurisdiction over individual contracts of employment. These are contained in Articles 20 to 23, relied upon by Mr Milsom, and where relevant considered above by the Tribunal.

352. It did not appear to the Tribunal that the Brussels Regulations properly construed operated so that Article 8 applied to jurisdiction over individual contracts of employment, which the Tribunal is concerned with here.

Rule 8 (3) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the Rules).

353. Mr Milsom made a further submission as to the basis upon which jurisdiction could be founded against the third respondents. He submitted that here is a question as to whether Rule (8) of the Rules which supplements the Brussels

Regulations, and which has been unanswered by authority. Mr Milsom submitted that the effect of Rule (8) is to replicate the ability to serve out of jurisdiction pursuant to CPR 6B on the ground that there is between the claimant and RDS a legitimate claim to which SEPIL is a necessary and proper party.

354. His position was that otherwise an alarming disconnect emerges between the ability to sue in the county court in tortious actions (as in *Okpabi* itself) and discrimination complaints. This becomes all the more stark given that discrimination complaints in the county court are subject to the CPR and as such pursuit of a foreign subsidiary in the UK is possible. This disconnect:

1. offends the principle of equivalence;
2. contravenes the general principle of non-discrimination and the retained provisions of the Recast Directive; and
3. contravenes the right to a fair trial pursuant to Art.6 ECHR such that a Convention compatible construction should be sought insofar as possible pursuant to Section 3 of the HRA 1998.

355. Mr Milsom's position was that such a construction is entirely possible: on an ordinary application of the plain words of Rule 8 (3) SEPIL may be pursued before this Tribunal.

356. Mr Brown's position was that this matter had effectively been considered in *Jackson v Ghost Ltd and another 2003 IRLR 824* which dealt with the equivalent provisions under the 2001 Tribunal Rules.

357. The Tribunal Rules of Procedure could not operate to effect the territorial jurisdiction of the Employment Tribunal.

358. Section (7) of Employment Tribunals Act 1996 (ETA) could not confer power on the Secretary of State to alter the territorial ambit of primary legislation.

359. Rule 8 (3)provides;

> *A claim may be presented in Scotland if—*
>
> *(a) the respondent, or one of the respondents, resides or carries on business in Scotland;*
>
> *(b) one or more of the acts or omissions complained of took place in Scotland;*
>
> *(c) the claim relates to a contract under which the work is or has been performed partly in Scotland; or*
>
> *(d) the Tribunal has jurisdiction to determine the claim by virtue of a connection with Great Britain and the connection in question is at least partly a connection with Scotland.*

360. The Tribunal reminded itself again that it is not concerned with claims in delict but with claims under the Equality Act. If there is an alarming disconnect between the procedural rules on bringing a claim based on delict in the County Court, and a claim under the EQA, then that is not necessarily a matter which this Tribunal is empowered to deal with.

361. The Tribunal considered that the purpose of Rule 8 (3) (a) is to indicate where Tribunals in the UK have jurisdiction to hear particular proceedings and whether these should be heard in Scotland or England and Wales, and that is a different issue to the territorial scope of an employment right.

362. The Tribunal derived considerable guidance from the case of *Jackson* in considering Mr Milsom's argument. The EAT in that case considered the equivalent provisions in the 2001 regulations.

363. As was explained in *Jackson* under section 7 of the ETA the Secretary of State did not make one set of procedural rules, but two sets of rules, one applying to England and Wales, and the other to Scotland. Regulation 11 (5) (the equivalent to Rule 8(3)) of the England and Wales Rules of Procedure scheduled in the regulations apply to the proceedings to which they relate where one or more of the respondents resides or carries on business in England or Wales. The equivalent Scottish regulations substitute Scotland in regulation 11(5)

364. The EAT considered the key lay in the transfer provisions, then rule 21, now (Rule 99), which allows for the transfer of proceeding between Scotland and England and Wales. Simply put if the respondent resides or carries on business in England or Wales, the claim should be heard in England or Wales, and if he resides or carries on business in Scotland, it should be heard Scotland. Regulation 11(5) did not confer jurisdiction on the tribunal, it merely determined where, if the Employment Tribunal has jurisdiction, the claim should be heard.

365. That, the Tribunal considered, provided the answer to Mr Milson's argument as to the effect of rule 8(3) (a) of the Rules, and it was not persuaded that jurisdiction was conferred on it by the operation of that rule to consider a claim against a respondent company which was domiciled out with the territorial jurisdiction of the Tribunal and where jurisdiction was not conferred to hear a claim against that respondent by the operation of the Recast Brussels Regulations.

366. The Tribunal also considered the effect of Rule 8 (3) (d) which was introduced with the 2013 Rules, and which seems to refer to the test for territorial reach of rights conferred by UK employment legislation. This appears to imply that where a Tribunal lacks jurisdiction to under any of the heads in Rule 8(3), but

the rights which a claimant evokes apply to him because of a '*sufficiently strong connection to Great Britain and the connection in question is at least partly to Scotland* ' then the Tribunal has jurisdiction to consider the claim.

367. That Rule however following the reasoning in *Jackson v Ghost*, does not operate to confer extraterritorial jurisdiction on the Tribunal, but determines where a claim should be heard by the Tribunal if has jurisdiction to consider it by virtue of a sufficiently strong connection to the UK, and in part Scotland.

Territorial Reach/ Connection to the UK.

368. Lastly the Tribunal considered territorial reach/connection to the UK. Mr Brown submitted territorial reach only became relevant if the Tribunal has jurisdiction to hear the claim against SEPIL.

369. That is correct, however the Tribunal considered that in the event it is wrong on its earlier conclusions on jurisdiction it was prudent to deal with this.

370. In support of his position that the claims were within the territorial reach of the Tribunal Mr Milsom sited *Ravat v Halliburton Manufacturing (2012) ICR 389* and the judgment of Lord Hope at paragraph 26 and 29.

371. He also relied on *Bates van Winkelhof v Clyde and Co LLP [2013] ICR* 883. Where an individual spends part of their working time in the UK, as Mr Milsom suggested was the case here, there is no need for an "overwhelming connection" to UK employment law (Elias LJ at paragraphs [96]-[99]).

372. Further, Mr Milsom submitted that when considering the scope of workplace rights a purposive approach must be taken. *Uber BV v Aslam [2021] ICR 657*. In *Uber* the Supreme Court recognised that the purpose of statutory workplace rights must be placed at the heart of any contractual construction.

373. Mr Brown submitted that the question as to whether there is a sufficiently close connection to Great Britain and British employment law is a question of fact *(Olsen v Gearbulk Services Ltd* at paragraph 36).

374. Taking into account the factors which he enumerated, there was no sufficiently close connection between the claimant's employment and Great Britain and British employment law.

375. The respondents' primary case is that the especially strong connection test applies since the claimant was a true expatriate: *Ravat supra*. However, even if the especially strong connection test does not apply, the Mr Brown submitted that the claimant still does not meet the lower bar.

376. The factors relied upon by Mr Milsom in support of his position that the claimant had a sufficiently strong connection to the UK are as follows.

377. The claimant's assignments, including the LNN assignment were always intended to be short term.

378. Shell made clear that international mobility was necessary and desirable.

379. The repatriation provisions to base country. It was immaterial the physical repatriation did not occur. Repatriation was not subject to UAE severance entitlements.

380. Having conceded that Shell UK Ltd are within territorial scope after 9 October the respondents position, the respondents position is incoherent. On LLN terms the Base company steps in before the end of the assignment as there is obligation on them to use reasonable endeavours. SEPIL cannot enforce that obligation on them, and therefore the pull of UK laws begins at some point prior to repatriation, and on a proper analysis it never fell away.

381. In reality, the Claimant's employment within the Shell Group is to be regarded as a single whole. This is how it was treated internally in respect of remuneration, continuity, performance appraisals and notice entitlements. The employment is to be regarded as a single whole during the course of which the Claimant:

a. Was recruited in the UK;

b. Worked in the UK between 2011-2013 and June-July 2017 in addition to shorter period of work;

c. Was dismissed by a UK company in circumstances accepted to be within the territorial scope of UK law.

382. As such *Bates van Winkelof is* directly applicable, and it is unnecessary for the Claimant to establish an overwhelmingly close connection to the UK.

383. Even on application of a higher test the claims are within the UK territorial scope. Shell recognise this in Mr Milsom's submission in a number of ways, as follows.

384. Shell invokes the concept of a Base Country as "*a fundamental building block for both career and terms and conditions*". It determines matters as fundamental as pay, pension and dismissal;

385. Base Country is set at the point of hire, typically corresponds to nationality and is difficult to change. The scenarios of Base Country envisage that, as here a "*the employee is recruited for a truly international career and there is no clearly established country in which the employee will spend a majority of his/her Shell career*." This was borne out by the claimant's career: over a 15 year period the Claimant worked in the Hague, Qatar, the UK, Turkey, Iraq and UAE prior to her UK dismissal;

386. It is necessary to "where practicable (have) regard to Host and Base Country laws to employees and their eligible families who go on international assignments regardless of…gender…" p.770. "Base Country commitments" must be similarly recognised p.744;

387. The Base Company represents the Shell Group in respect of "any issue arising from the end of the LNN assignment."

388. The contractual terms were also relied upon by Mr Milsom in that they provide:

Medical checks were conducted on a global level;

All contracts other than those which engaged the Claimant outside the UK were expressed with an expectation of fixed-term duration and by contrast no such expectation was addressed in the UK contracts;

Remuneration and entitlements were determined in accordance with UK baseline and typically expressed with some measure of sterling

The Claimant was expected to repatriate in the event of sickness

Whilst seconded to or working for SEPIL the Claimant was nonetheless subject to the International Mobility Policy which could override the contract in the face of conflict and could in turn be amended by base country.

Prior to moving to the LNN terms the Claimant's tax agreements were all subject to UK law.

The Claimant benefitted from GEMS health insurance and Leave arrangements included cost of travel back to Base Country

Termination and repatriation clauses reaffirmed the UK connection

The Base Company is "*a constant point of reference throughout your career"*

The address on all assignment contracts was the Claimant's Fife-based address

389. In addition Mr Milsom submitted that the Claimant's sustained periods of work in the UK she attended training in 2015 and 2019 and she also engaged in weekly interactions with Mr Dempster and Ms Neill in their upstream capacity.

390. Lastly the claimant did at some point intend to return to the UK and she had applied for a UK based job following receipt of her repatriation letter.

391. Mr Brown on the other hand listed the factors which he submitted pointed away from a connection to the UK. These were;

a. The claimant worked for a non-UK company not carrying out business in the UK;

b. She worked alongside an evidently international workforce;
c. The claimant was managed by a UAE-based manager;
d. AE HR policies applied to the claimant;
e. There is no evidence that the claimant was promised or assured that, for duration of her employment, by SEPIL she would have British statutory employment protection;
f. The claimant was a member of an overseas pension scheme.
g. The claimant did not undertake a day's work for SEPIL in the UK;
h The claimant was non-resident for tax purposes and sought to maintain that non-resident status; The claimant was paid a salary in United Arab Emirates dirham into a UAE bank account;
j. The claimant lived in Dubai with her family;
k. The claimant was neither commuted, nor was peripatetic, nor was she representing a British entity overseas or working in a British enclave;
l. She was not working for the British state;
m. She was not paid in pounds;
n. The claimant was employed under a contract subject to the law and the exclusive jurisdiction of the courts of the UAE (and no evidence has been adduced that she could not obtain in the UAE the rights she seeks to obtain in these proceedings).

392. In considering this matter the Tribunal began by considering the guidance in *Ravat.*

393. The guidance given that case was to the effect that the overarching question is whether Parliament intended Section 94 (1) of the ERA will apply to a person the claimants circumstances.

394. The general rule is that the place of employment is decisive, but where the employment has a much stronger connection with the UK and UK employment law than any other system of law, the claimant will fall within the scope of the unfair dismissal legislation if the connection is sufficiently strong.

395. A comparative exercise is appropriate with the claimant is employed wholly abroad. The comparisons is between the UK and jurisdiction and the country in which the claimant works.

396. The country in which claimed the lives is relevant. If he/ she lives as well as works abroad, an especially strong connection with Great Britain and British employment is required before an exception can be made.

397. Where the claimant lives and works at least for part time in Great Britain, a comparison of the connection between Great Britain and the country in which he/she works is not required; all that is required is a sufficiently strong

connection to enable it to be said that Parliament would have regarded as appropriate for a tribunal to deal with the claimant's unfair dismissal claim.

398. If an individual spends part of their working life in the UK there is no need for an overwhelming connection to UK employment law (*Bates van Winkelhof).*

399. The Tribunal was satisfied, for the reasons given above, that for the duration of her contract with SEIPL, the claimant lived and worked principally in the UAE. There was no evidence that she spent any time working in the UK during that period, and therefore the Tribunal concluded that the guidance in *Bates van Winkelhof* did not apply here.

400. The Tribunal therefore considered it necessary to carry out the comparative exercise, considering the factors which pointed towards the connection with Great Britain, compared to the factors pointing in favour of another jurisdiction, in this case, the UAE.

401. In carrying out this exercise the Tribunal had regard to the factors relied upon by both parties, which are set out above in their submissions. The tribunal considered that some factors identified by the parties were more significant than others. For example the claimant working with other UK nationals as part of a multinational workforce, or medical checks being carried out on a global level were not factors which pointed strongly, to a connection to the UK .In considering the factors relied upon by both sides, the Tribunal therefore attached more weight to some of these than others, and had identified these below.

402. In assessing the factors which pointed towards a connection to the UK, the tribunal attached considerable weight to the fact that the UK was the claimant's base country, and that while employed on LNN terms with SEPIL her Base Company was a UK company.

403. It also attached considerable weight to the impact base county had on the assessment of important benefits in in terms of the Mobility Policy, and the fact that it was intended to be regarded as a fundamental building block in terms of career. It also attached some weight to its representative function for the Parent on end of assignment disputes.

404. The Tribunal also considered the repatriation provisions to be of considerable significant. Mr Milsom's submission to the effect that Base Country determined dismissal was correct to the extent that it did so in circumstances where an assignment had come an end and no other assignment was identified.

405. The fact that the claimant was recruited for an international career where it was anticipated that she would move from location to location, and was recruited on contracts which were anticipated to be of a certain number of years duration, were also factors relied upon by Mr Milsom, however it appeared to the tribunal that these were factors which did not necessarily support a strong connection to the UK, in that they support the anticipation the claimant would work regularly out with UK, and was recruited on that basis.

406. Against the factors which support a connection to the UK, the Tribunal considered those which did not, but pointed towards another jurisdiction. Very powerful amongst them was the fact that the claimant lived (and continues to live with no immediate plans for return) and worked in the UAE from August 2017, (in fact from 2014 although not in the employment of SEPIL). The tribunal also attached weight to the fact that the claimant was working for a non-UK company, albeit part of a global group of companies, which was not conducting its business in the UK. She was not representing a British entity overseas or working in a British enclave, even if some of the work she performed had significance for entities based in other jurisdictions, including the UK. Significantly also, the claimant was non-resident for tax purposes, and did not pay tax in the UK. She was paid in the local currency, directly into a local bank account. Although not determinative of the point, the Tribunal also attach some weight to the fact that contract under which the claimant was employed provided that it was subject is the exclusive jurisdiction of the courts of the UAE.

407. The Tribunal considered that in the comparative exercise which it had to conduct, that the factors which supported a connection to the UK, while not insignificant, were not sufficiently strong so as not to be outweighed by those which supported a connection to the UAE, in circumstances where the claimant lived and worked there, in addition to the other factors which point towards a connection to the UAE. In the circumstances the Tribunal did not conclude that the claimant's employment had a sufficiently close connection to the UK in order to extend the territorial reach of the EQA.

Bleuse Principle

408. Lastly the Tribunal considered the tribunal considered the impact if any of the principles derived from the case of *Bleuse V MBT Transport Ltd 2008 ICR 488 EAT,* that courts and tribunals should interpret the provisions of domestic law so as to give effect to directly effective rights under EU law.

409. The Tribunal took into account the guidance *in Wittenberg v Sunset Personnel Services Ltd. (2017) ICR 1021* (paragraph 63; Lady Stacy);

By raising that question, Baroness Hale JSC raised essentially the same question as is raised in the line of cases starting with Lawson v Serco Ltd [2006] ICR 250 and dealing with the territorial scope of the 1996 Act. That is, did Parliament intend that the rights would extend to territories outside the EU? The cases in which people working outside Great Britain but who are found by the court to have rights under the 1996 Act are cases where that question is answered in the affirmative, because the employment has a strong connection with Great Britain and with Great Britain's employment law. In Bleuse v MBT Transport Ltd [2008] ICR 488 it was held that rights coming from EU Directives had to be protected by enabling the litigation to go ahead in England. That is because the principle of effectiveness is a part of English law, and it requires that those who have rights under EU law have an effective opportunity of enforcing those rights. There can be little dispute that EU Directives are enforceable within the EU. But I do not see the Bleuse case as authority for the proposition that rights asked to make a reference in this case.

410. Following this guidance, the Tribunal was not satisfied that the *Bleuse* principle applied to the claimant's claims under the EQA, as the acts complained of took place out with the EU and it could not extend beyond the territorial reach of the EU.

Conclusions - Further Procedure

411. The effect of these conclusions is that;

(1) the Tribunal does not have jurisdiction to hear a claim against the third respondent.

(2) the claim against the first respondent is dismissed on the grounds that it has no reasonable prospects of success under Rule 37(1) (a) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the Rules);

(3) the claim against the second respondent in respect of acts of discrimination said to have taken place prior to 1 October 2020 is dismissed on the grounds that it has no reasonable prospects of success under Rule 37(1) (a) of the Rules.

(4) the claim against the second respondent in respect of acts of discrimination said to have taken place after 1 October 2020 will proceed. The Tribunal considers that a PH to consider further case management in relation to these claims may be helpful. This will be listed in the usual way by the Tribunal Administration.

Employment Judge: L Doherty
Date of Judgment: 16 July 2021
Entered in register: 17 July 2021
and copied to parties