EMPLOYMENT TRIBUNALS

Claimant: Mr O Alimi

Respondent: ENI International Resources Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Southampton and by Video (CVP) **On:** 21 to 29 March 2022
(Parties last attended on the 28 March 2022)

Before: Employment Judge Gray
And Members: Mr Knight and Mr Shah MBE

Appearances
For the Claimant: In person
For the Respondent: Mr Singer (Counsel)

The Tribunal was assisted by Court provided interpreter Mrs Hogg until close of day 3

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

- **The complaint for breach of contract for 3,000 Euros is dismissed on withdrawal.**

- **The complaints of unfair dismissal, direct race discrimination, disability discrimination (discrimination arising and failure in the duty to make adjustments), victimisation and breach of contract (for 8,000 Euros), all fail and are dismissed.**

- **The complaint of unauthorised deductions of wage (claim number 2207122/2021) continues albeit subject to a stay until the 5 May 2022.**

REASONS

1. BACKGROUND TO THIS CLAIM AND THIS HEARING

2. This matter is made up of three claims, two issued in the South West Region and one in the London Central Region the latter of which was then transferred to this Region for determination.

3. There have been four case management preliminary hearings concerning this matter as follows, before;

   3.1 Employment Judge O'Rourke on the 12 May 2021;

   3.2 Regional Employment Judge Pirani on the 28 September 2021;

   3.3 Tribunal Judge Peer (acting as an Employment Judge) on the 25 January 2022; and

   3.4 Employment Judge Rayner on the 22 February 2022.

Hearing format and timetable

4. At the case management hearing before Employment Judge Rayner arrangements had been made for the claim to be heard in person and by video (a hybrid), with the Respondent organising permission for three of its witnesses to give evidence remotely from Italy.

5. At the commencement of this hearing it was agreed that the time at this final hearing would be used as follows, determining liability only:

Day 1	Tribunal reading and preliminary matters
Day 2 & 3	Respondent's evidence
Day 4	Claimant's evidence
Day 5	Any overflow of evidence
	At least 2 hours of Submissions
	Deliberations
Day 6	Deliberations
Day 7	Delivery of judgment (liability questions first - disability, time limits and liability)
	Then Remedy, including causation for loss and injury, to be case managed for determination if required.

6. Unfortunately, it was not possible to meet this timetable due to a variety of reasons:

    6.1 The parties requiring use of their own hearing bundles to present their case, counter to the case management orders of Employment Judge Rayner. Also, producing hard copies and electronic copies that did not have a page search system that corresponded (see further details below).

    6.2 The hearing being in a hybrid format with a requirement for Italian interpretation for three of the Respondent's witnesses who were all remote.

    6.3 The Claimant wanting to ask a large number of open questions about the Respondent's evidence during cross examination.

7. Ultimately a slightly revised timetable was met as follows:

    7.1 Evidence concluded at 16:45 on Friday (day five).

    7.2 Submissions concluded at 13:45 on Monday (day six).

    7.3 The difference between oral and written Judgment was explained to the parties. The parties both indicated a requirement for written reasons so it was agreed we would reserve Judgment and the parties were released on day six.

Documents for the hearing

8. We were presented with:

    8.1 The Claimant's hard copy bundle broken into a number of coloured sections with each section subject to separate numerical pagination. We were in the main referred to the orange section of the Claimant's bundle so page references to the Claimant's bundle as referred to below are to the orange section.

    8.2 An electronic version of the Claimant's bundle consisting of 527 pages which did not correspond to the hard copy (not being broken into separate paginated sections and missing the last sections).

    8.3 A company policies bundle from the Claimant both hard copy and electronic, which appeared to be further copies of those provided in the Respondent's bundle.

    8.4 The Respondent's hard copy bundle consisting of six lever arch files with numerical pagination from bundle 1 through to 6.

    8.5 Electronic copies of the Respondent's bundle which were broken into the six files, but each file had its own electronic numerical pagination.

    8.6 A witness statement of the Claimant.

8.7 A supplemental witness statement of the Claimant which was contained separately in his bundle.

8.8 Ten witness statements on behalf of the Respondent, two for one witness.

9. It was identified in the preliminary issues phase of this hearing that what the parties had presented us was not what had been directed.

10. Conscious though of the Claimant being a litigant in person it was explored whether a pragmatic approach could be adopted provided the parties and the panel had sight of the relevant documents at the relevant time.

11. It was noted that the burden of proof was split as this claim included a complaint of unfair dismissal as well as discrimination. It was agreed with the parties that the Respondent would give its evidence first so that the Claimant could then put his documents to those witnesses during cross examination and the parties and the Tribunal would then have clarity on which documents were relevant to his case so far as he was concerned. It was agreed that the Respondent would give submissions first to enable the Claimant to respond to what Respondent's Counsel submitted as well as make his own submissions. In any event the parties agreed to produce written submissions and exchange those in advance, so both parties had opportunity to consider the others written submissions before making their own oral submissions.

12. The Tribunal adopted this pragmatic approach with the agreement of the parties so that all relevant evidence was presented by the parties during the hearing and so that the hearing could proceed as listed.

Witness statements

13. The following witness statements were provided:

13.1 The Claimant's.

13.2 On behalf of the Respondent:

13.2.1 Mr Olie Tigh (OT) who gave his evidence remotely due to being positive with COVID.

13.2.2 Mr Emanuele Matteucci (EM) who was remote from Italy before he moved to a ship.

13.2.3 Mr Giuseppe Muller (Mr GM) who was remote in Italy.

13.2.4 Mr Antonio Pastorello (AP) who was remote in Italy.

13.2.5 Mrs Gaukhar Mukazhanova (Mrs GM) (who has provided two statements).

13.2.6 Ms Joanne Barnes (JB).

13.2.7 Mr Oscar Hopkinson (OH).

13.2.8 Mr Donald Cockburn (DC)

13.2.9 Mr Ben Urmston (BU) (who was not attending so his statement was given less weight than those who attended).

The Complaints

14. By a claim form presented on 15 September 2020, the Claimant brought the following complaints;

14.1 Unfair dismissal and breach of contract (at the case management preliminary hearing before Employment Judge O'Rourke the Claimant agreed that these claims were no longer pursued within those proceedings but were the subject of the second claim).

14.2 Discrimination on the grounds of disability and race, consisting of:

14.2.1 direct race discrimination

14.2.2 discrimination arising from disability: section 15

14.2.3 failure to make reasonable adjustments

14.2.4 victimisation

15. The dates on the ACAS early conciliation certificate are 15 August 2020 until 15 September 2020.

16. By a second claim form presented on 9 April 2021 the Claimant brought a complaint of unfair dismissal (the effective date of termination is 7 July 2021, notice having been given on the 8 April 2021), which also asserts it was an act of direct race discrimination and victimisation. It also included a complaint of breach of contract.

17. By a further claim form presented on 15 November 2021 at London Central, the Claimant brought a complaint of unauthorised deductions from wage.

The Issues

18. The issues in this claim were confirmed at the start of the hearing and were in accordance with those agreed at the various case management preliminary hearings.

19. The liability matters between the parties which were therefore to be determined by this Tribunal for the purposes of this Judgment are as follows (with the additional clarification provided by the parties at this hearing being shown in ***bold italics***);

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the tribunal may not have jurisdiction. ***The first claim was issued 15 September 2020, the ACAS conciliation period is the 15 August 2020 to 15 September 2020, so acts on or after the 16 May 2020 within the first claim are in time, and this puts the allegation at paragraph 3.2.2 potentially out of time.***

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Disability

2.1 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Respondent disputes that the Claimant was disabled, both on grounds of lack of substantial adverse effect and whether such effect was long-term. The Tribunal will decide:

2.1.1 Whether the Claimant had a physical impairment. He asserts that he has an orthopaedic condition in both knees.

2.1.2 Did it have a substantial adverse effect on the Claimant's ability to carry out day-to-day activities?

2.1.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

2.1.4 Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?

2.1.5 Were the effects of the impairment long-term? ***This is where the Respondent disputes disability (see page 1689 of the Respondent's bundle), where it states … "The Claimant relies on an orthopedic condition in both knees and identifies the material time as 4 June 2020 until 7 July 2021. The medical evidence disclosed by the Claimant indicates that he suffered an***

anterior cruciate ligament rupture in May 2020 and underwent surgery that month. The Claimant's complaints of discrimination arising from disability (s15) relate to the periods between 4 June 2020 and January 2021. The claim of failure to make reasonable adjustments relates to a PCP of requiring the Claimant to work on site (in particular in the period 16 to 26 May 2020). The Respondent does not accept that the Claimant was disabled at the material time on the basis that the long term and substantial adverse impact elements of the test were not satisfied on the dates of the acts complained of.". The Tribunal will decide:

2.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

2.1.5.2 if not, were they likely to recur?

3. Direct race discrimination (Equality Act 2010 section 13)

3.1 The Claimant describes himself as a black African.

3.2 Did the Respondent do the following things:

3.2.1 It is not disputed that the Claimant was rendered 'unassigned' ***[this was in May 2020]***;

3.2.2 Mr Luca Faccenda requiring the Claimant, on 7 September 2019, to take on the additional role of site HSE officer, which entailed significant additional workload and responsibility, without additional salary?

3.2.3 Mr Ben Urmston, refusing, on 19 June 2020, to grant the Claimant an entitlement for return air travel for his child?

3.2.4 Mr Ben Urmston, refusing, on 4 June 2020, to permit the Claimant to work from home during COVID quarantine, unless he did so by taking annual leave?

3.3 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. The Claimant says he was treated worse than others, as follows:

3.3.1 As to being 'unassigned', in comparison to other white Italian and American employees, who remained assigned;

3.3.2 As to the HSE role, in comparison to Ms Sonia Berti, a white Italian safety engineer;

3.3.3 In respect of both travel for his child and working from home, in comparison to Messrs Paolo Barissielo and Francesco Acatoli, white Italians.

3.4 If so, was it because of race?

3.5 Is the Respondent able to prove a reason for the treatment that occurred for a non -discriminatory reason not connected to race?

4. Discrimination arising from disability (Equality Act 2010 section 15)

4.1 Did the Respondent treat the Claimant unfavourably by:

4.1.1 In the period 26 July 2020, to 1 January 2021, paying him a reduced salary and pension contribution, due to being placed on long-term disability pay; ***the Claimant explained that his disability means he is unable to work which leads to him being placed on long-term disability pay which means he gets less pay (it is 75% of his normal salary)***

4.1.2 In the period 30 August 2020, to 27 January 2021, fail to organise, or facilitate the issue to him of a work visa, or medical health visa; ***the Claimant explained that his disability means he us unable to work and needs medical treatment and because he cannot work the Respondent failed to organise or facilitate the issue to him of a work visa / medical health visa. The Respondent disputes it failed to do this as the Claimant had organised his own visa***

4.1.3 In the period 4 to 11 June 2020, failing to respond to emails from the Claimant, leading to the Claimant suffering internal bleeding***; the Claimant explained that his disability leads to stress, he emails the Respondent for support, the Respondent does not respond which then aggravates his stress***.

4.2 Did such unfavourable treatment arise in consequence of the Claimant's disability?

4.3 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent may seek to plead this defence in its amended Response. ***The Respondent has done so which can be seen at paragraph 17 of the amended ET 3 Response (page 59 of the Respondent's bundle) … "... such treatment was a proportionate means of achieving a legitimate aim, namely to protect the health and well being of the employee by allowing him to remain in South Korea until such time as it was safe for him to return to the UK after the closure of his assignment.".***

4.4 The Tribunal will decide in particular:

4.4.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;

4.4.2 Could something less discriminatory have been done instead;

4.4.3 How should the needs of the Claimant and the Respondent be balanced?

4.5 Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? From what date? The Claimant states that he informed Mr Emanuele Matteucci, the HSE manager, of his medical condition on 21 or 22 May 2020.

5. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

5.1 Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? From what date? Again, the Claimant states that he informed Mr Emanuele Matteucci, on 21 or 22 May 2020.

5.2 A "PCP" is a provision, criterion or practice. Did the Respondent have the PCP of requiring the Claimant to work on site (in particular in the period 16 to 26 May 2020). ***The Respondent denies it had such a PCP***.

5.3 Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that it aggravated his knee condition?

5.4 Did the Respondent know, or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

5.5 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests that he should have been permitted to work from home.

5.6 Was it reasonable for the Respondent to have to take those steps and when?

5.7 Did the Respondent fail to take those steps?

6. Victimisation (Equality Act 2010 s. 27)

6.1 Did the Claimant do a protected act as follows ***(reliant on section 27(2)(d) of the Equality Act). The Respondent accepts the Claimant did these protected acts)***:

6.1.1 On 23 June 2020, raise a written grievance against Mr Urmston, in which he referred to being discriminated against on grounds of race;

6.1.2 On 23 July 2020, his solicitor writing to the Respondent, to reiterate and expand on that complaint?

6.2 Did the Respondent do the following things:

6.2.1 Mr Urmston refusing to permit him to work from home, unless he took annual leave?

6.2.2 Mr Urmston refusing to respond to emails from the Claimant between the period 23 June to 1 August 2020?

6.2.3 Ms Joanne Barnes, on 7 August 2020, challenging the Claimant's decision to seek legal advice?

6.3 By doing so, did the Respondent subject the Claimant to detriment?

6.4 If so, was it because the Claimant had done the protected acts?

7. Unfair dismissal

7.1 it is not in dispute that the Claimant was dismissed with notice on the 8 April 2021 with an effective date of termination of the 7 July 2021.

7.2 The Respondent asserts that the Claimant was dismissed fairly for the reason of redundancy or some other substantial reason, being a business re-organisation.

7.3 The Claimant asserts that the real reason was his race (the Claimant relies on the same comparators from his first claim) or his protected acts, so an act of victimisation.

7.4 The Tribunal will need to determine if there was a genuine redundancy within the meaning of section 139 of the Employment Rights Act 1996.

7.5 The Claimant asserts that the dismissal was unfair procedurally with inadequate consultation, unfair selection and an inadequate search for suitable alternative employment.

7.6 the Respondent asserts that the dismissal was procedurally fair under the circumstances of this case.

8. Breach of contract claim

8.1 The Claimant says he was entitled to travel up to 5 times per year plus a return travel ticket for a family member. He says this was contained in his contract of employment. In breach of contract the Claimant says:

8.1.1 the Respondent refused to reimburse a travel ticket: €8000

8.1.2 the Respondent refused to pay for a return ticket for his son: €3000

8.2 The Respondent denies any breach of contract.

9. Unauthorised deduction from wage

9.1 Whether there is jurisdiction to hear this claim having regard to whether the claim is filed in time (section 23, Employment Rights Act 1996);

9.2 If the claim is out of time, whether there is jurisdiction to hear this claim having regard to whether it was not reasonably practicable to file the claim on time and, if it was not reasonably practicable to file the claim on time whether it has been filed within such further period as the Tribunal considers reasonable;

9.3 Whether there is jurisdiction to hear this claim having regard to whether the amounts claimed are 'wages' (section 27, Employment Rights Act 1996); and

9.4 If the Tribunal has jurisdiction, whether any deductions were authorised or excepted (section 14, Employment Rights Act 1996) or unlawful deductions.

20. FINDINGS OF FACT

21. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after considering the factual and legal submissions made by and on behalf of the respective parties.

22. At the outset of our fact found we can confirm that the complaint of unauthorised deductions from wages is stayed to **5 May 2022**, as the parties agreed factually that the amount of **£622.84** (which is net of tax from South Korea) had been paid into the Utmost Fund contrary to the Claimant's instructions. The parties wanted time to consider the tax implications on the Claimant with him seeking to collapse that fund and his residential tax status now having been confirmed to the Respondent as Germany. If the parties are not able to resolve this matter, they will request a hearing of up to a day by video for the matter to be determined. We have therefore not made any further findings of fact on this matter.

23. In respect of the breach of contract complaint for 3,000 Euros the Claimant confirmed he had not lost this money, so he withdrew that complaint which is therefore dismissed on withdrawal.

24. The Claimant describes himself as Black African (in the agreed list of issues) and Black British (in his witness statement (paragraph 39)). He confirmed that the protected characteristic he relies upon for the complaint of race discrimination is that he is Black, African born with a British passport.

25. About the Respondent OT provides a helpful explanation in his witness evidence (paragraphs 1 to 4) of what the Respondent does and its relationship with the other entities referred to in this claim:

> "1. Eni S.p.A ("Eni") is an Italian energy business, which has operations, projects and group companies all around the world. Eni International Resources Limited ("EIRL") is a London based company of the Eni group who employs and assigns international workers to other Eni group companies and projects.
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> 2. Eni has headquarters in Rome and Milan. EIRL has approximately 502 international employees including some permanent or fixed term contract Inter-Company Transfers from other Eni group companies who are assigned to work around the world, with around 60 local employees at its office in London. EIRL's international employees are from many different countries and nationalities.
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> 3. EIRL employees have an international employment contract with EIRL and then enter into separate international assignment contracts with EIRL for each assignment, which are initially always a minimum of 12 months in duration. Employees from other Eni group companies have a fixed term assignment contract with EIRL for the duration of the assignment.
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> 4. When an EIRL employee is not on an international assignment contract, with another group company, they typically return to their home country and are classed as unassigned under their employment contract with EIRL, until another assignment opportunity arises or their EIRL employment is closed. During unassigned periods the employee receives their notional base salary, as defined in their employment contract. Employees of other Eni group companies return to their home company when an assignment ends, or they can be reassigned."

26. Further at paragraphs 9 to 13, OT explains:

> "9. The Mozambique project came about after the discovery of gas off the coast of the country. The project is huge and involves lots of different energy and engineering companies and joint venture partners. After around 6 years of Eni's presence in Mozambique, the main project got underway with the design and construction of the project vessel, which is like a huge floating rig, which would extract the gas from under the seabed and then convert it at the location into liquid gas which ships would then transport away. [page 757 of the Bundle]
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> 10. Eni became involved, setting up different group companies for different functions and in different locations. Eni Mozambique Engineering ("EME") was set up for each stage of the project and included locations in Basingstoke for project management, a centre in Paris for design work in partnership with a French company plus locations in Singapore and Japan at applicable project phases. When Samsung Heavy Industries of South Korea won the tender to build the vessel, EME also established a location there to support the construction phase. In addition, at this stage, Eni Rovuma Basin B.V. ("ERB"), another Eni group company created a South Korea location in relation to owning and operating the vessel.
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> 11. The construction of the vessel was completed last year, and the vessel was dispatched and sailed to the coast of Mozambique for the commissioning phase before becoming operational. One of the key partners in the project is Exxon Mobil from the USA. A separate joint venture entity including Eni and Exxon, called Coral FLNG S.A., owns and will operate the vessel.
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> 12. EIRL assigned a total of 18 international employees/Inter-Company Transferees to EME in South Korea following receipt of formal activations from EME/Eni HQ. EIRL also assigned 32 international employees/Inter-Company Transferees to ERB in South Korea. As the vessel has now been constructed and moved to Mozambique, the South Korean part of the project has closed for EME, and EIRL no longer assigns any employees to EME in that location. The remaining EME assigned employees at the point of EME's closure were either returned to their home company, placed on unassigned status until a new assignment was identified or they were reassigned to ERB in Mozambique. ERB will remain in South Korea until April 2022 for training and there are currently 11 EIRL employees still located in South Korea. Other EIRL employees assigned to ERB have been repatriated to their home country or are on a business mission (trip) in Mozambique, in preparation for their reassignments to Mozambique.
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> 13. EIRL's records show that the Claimant began employment with EIRL in 2014 and was initially assigned to work with EME at its Basingstoke location. The Claimant was then assigned to EME's Paris location, then Basingstoke and Paris again, before being assigned for 12 months to EME at the vessel construction location in South Korea from 2nd September 2019."

27. The Claimant challenged OT in cross examination about the role of ERB and asserted that the vessel was operated by a different entity, although we note that this does not appear to be a factual dispute based on what OT then sets out in paragraph 11 of his statement. Other than that, the factual matters OT presents are not in dispute.

28. The Claimant began employment with the Respondent in 2014. He is assigned on a 12-month assignment to South Korea in September 2019. As the Claimant says in his witness statement at paragraph 1 this is as a Senior Technical Safety Engineer Hull.

29. It is not in dispute that the Claimant's employment is covered by an international employment contract when out of assignment and then a specific assignment contract when assigned (see from pages 1125 to 1144 for the international employment contract and pages 1111 to 1124 for the specific assignment contract, within the Respondent's bundle).

30. Chronologically we then arrive at the allegation of direct race discrimination where the Claimant alleges Mr Luca Faccenda is requiring the Claimant, on 7 September 2019, to take on the additional role of site HSE officer, which entailed significant additional workload and responsibility, without additional salary.

31. The Claimant compares himself to Ms Sonia Berti (SB), a white Italian safety engineer.

32. About SB it is not in dispute that she only does a Technical Safety role and was employed by a different entity (Italian Eni) and on a lower salary than the Claimant.

33. The Respondent disputes that the Claimant was required to perform two roles. It is the evidence of AP that the Claimant asked and was transferred to the HSE role only (see paragraph 7 of AP's witness statement).

34. We have a dispute of fact about this matter. As it is the Claimant's allegation, he has to prove on the balance of probability that he is undertaking both roles without additional salary.

35. The Claimant in his evidence relies upon page 90 of his evidence bundle which is a contact list referring to his Technical Safety role. Also, an email from September 2020 (page 188 of the Claimant's bundle) (which was when the Claimant was on sick leave) which he says shows him doing Technical Safety work. The Claimant did not assert it also showed him doing HSE work.

36. The Respondent in its evidence relies upon an organisation chart showing the Claimant as part of the HSE team (see page 1663) and an email dated 25 February 2020 (page 269 of the Respondent's bundle) where the Claimant is asking about the HSE team only… "I just want to check with you on management

decision for HSE team members working from home.". About this email the Claimant confirmed in cross examination that he was wanting to find out if other HSE employees would be allowed to return to site to assist, but his email does not say this and is in response to an email from BU about arrangements in place when working from home.

37. We note that the Claimant has not presented evidence of the work he was doing in both roles and when cross examined, AP did not accept the Claimant did do both roles.

38. We do not find that the Claimant has proven on the balance of probability that this less favourable treatment as he asserts happened.

39. We then have another factual dispute between the parties. The Claimant asserts that when COVID hit, he was an essential worker and always required on site (paragraph 12 of the Claimant's witness statement).

40. This is disputed by the Respondent, in the witness evidence of AP (see paragraph 12 of his statement) and EM (see paragraph 10 of his statement). EM explains that the Claimant requested to work on site, and he agreed, although he couldn't recall exactly when this was, believing it to be after the first main COVID wave.

41. The Claimant says in paragraphs 12 of his witness statement that all home working staff return to site on the 11 May 2020.

42. Therefore, it would appear that from the beginning of May 2020, there is no longer a factual dispute as to where the Claimant was working, he was on site.

43. What has not been proven on the balance of probability though is the Claimant requesting to change this status and to work from home.

44. Chronologically we then arrive at the allegation of direct race discrimination that on the 6 May 2020 the Claimant is informed he is to be unassigned. As to being 'unassigned', the Claimant confirmed that he compares himself to SB only. As this matter is connected to the Respondent's assertion the Claimant was fairly made redundant (which the Claimant also challenges as an act of direct race discrimination) we address this aspect in our fact found below.

45. It is then that the issue with the Claimant's knees occurs. The Claimant asserts that the first time the Respondent is aware of his knee condition is on the 21 May 2020 (as he sets out in paragraph 13 of his witness statement). He says that he visits a doctor and informs his line manager and supervisor.

46. EM denies this saying in paragraph 8 of his witness statement … "I was unaware of Mr Alimi having issues with his knees until he contacted me on 26 May 2020 to say that he was having a medical check-up and could not come into work. On the same day Mr Alimi notified me that he had an operation and could not return to work.".

47. What EM says is consistent with what the Claimant writes in his email dated 26 May 2020 (which the Claimant explained in oral evidence would have been 27 May 2020, South Korean time) … "I just had a surgery yesterday on my right knee and the second is scheduled for 2nd June 2020. My knees gave way all of a sudden and I am admitted in Baik hospital Geoje. The Doctor's assessment indicates I will need 6 weeks to recover with constant visits for rehabilitation. I have given BUPA the permission to provide my employer my health report. I am currently incapacitated and cannot walk (see page 248 of the Respondent's bundle). We note its states that the Claimant will need 6 weeks to recover.

48. It is for the Claimant to show that the Respondent had actual or constructive knowledge of all the ingredients needed to meet the definition of disability, that is a physical or mental impairment, which has a substantial adverse impact on normal day to day activities and which has lasted or is likely to last for 12 months or more (If not lifelong). Even if we accept the Claimant's evidence on this matter, what he says he communicates on the 21 May 2020 it does not prove on the balance of probability that the Respondent knew the Claimant was a disabled person on the 21 May 2020 nor in what way he was substantially impaired.

49. It is not in dispute that the Claimant is signed unfit for work on the 26 May 2020 (see pages 242, 245 and 279 of the Respondent's bundle). It was also noted that within the the email from Claimant to the Respondent dated 5 June 2020 (at page 279) he says … "I want to inform you that I started my sick leave on the 26th May 2020 as I had a surgical procedure on my knees. I informed Emmanuele, Simona and Dr. Porbenl on the same day [***the Claimant suggested in oral evidence that there may be a word or words missing here in the copy provided to the Tribunal***] has activated medllink to monitor the process with my end and I have provided medilink my medical certificate from the hospital.". Also, the Claimant says in the email … "I initially applied to take some vacation days off starting 8th June, but as this unfortunate incidence has happened, I will cancel the vacation days applied for…".

50. It is not in dispute that the Claimant receives his 13 weeks of sick pay as per his contractual entitlement and then has an application approved for Long Term Disability Payment (the Claimant confirms this being on the 20 August 2020 (see paragraph 13.g. of his witness statement) giving him 75% of his salary until the 31 December 2020.

51. It is then the Claimant's evidence (at paragraph 13.h. of his witness statement) that on the 31 December 2020 it is the notional end of his 5-month post-surgery recovery period, by his doctor. The Claimant says that during this period, the medical evidence points to him being unable to undertake any strenuous exercise, to spend all time using crutches and to be incapable of either working on site or undertaking long-distance travel.

52. We were referred to the medical input dated 11 January 2021 which confirms the Claimant potentially being fit for desk work … "Drs Opinion … Desk job possible" (see page 222 of the Claimant's bundle).

53. Considering then the allegations of disability discrimination the Claimant makes, the Claimant needs to prove on the balance of probability that he satisfies the definition of disability at the points of complaint and that the Respondent had actual or constructive knowledge of that.

54. Chronologically the first complaint of disability discrimination is that the Respondent failed in its duty to make reasonable adjustments. The Claimant asserts that the Respondent had a provision, criterion or practice of requiring the Claimant to work on site (in particular in the period 16 to 26 May 2020).

55. We can see why this is the relevant period for this complaint because the Claimant is signed unfit for work from the 26 May 2020.

56. As at the 16 May 2020 the Claimant has not been to the doctor. He certainly does not convey to the Respondent, taking his evidence at its highest, all the ingredients of disability on the 21 May 2020, and it is not evident from the email of the 26 May 2020 that the Claimant would be considered disabled at that point, nor that the Respondent has actual or constructive knowledge at that point of the disability or of any substantial disadvantage.

57. Further, the Claimant has not proven on the balance of probability that he made a request to work from home in the period 16 May 2020 to 26 May 2020.

58. So, to consider the facts around the first complaint chronologically of discrimination arising from disability (section 15 Equality Act 2010). The Claimant claims that in the period 4 to 11 June 2020, the Respondent was failing to respond to emails from the Claimant, leading to the Claimant suffering internal bleeding.

59. When agreeing the issues to be determined in this claim the Claimant explained that his disability led to stress, he then emails the Respondent for support and the Respondent does not respond which then aggravates his stress.

60. It was not until his closing submissions that the Claimant clarified that there was only one email not being replied to that he complained about and that was his email dated 5 June 2020 sent to OT (which is at page 48 of the Claimant's bundle).

61. This was not put to OT when he was cross examined by the Claimant.

62. The Claimant also suggested in his oral closing submissions that the reference to emails instead of just an email in this allegation may have been a typographical error by Employment Judge O'Rourke. It was highlighted to the Claimant that he had not sought to correct this until closing submissions, despite a lengthy review and confirmation of the agreed issues at the start of this hearing.

63. We have looked carefully at what the Claimant's email to OT says. It refers to him feeling stressed but does not draw any link to that stress and his alleged disability, instead attributing it to the actions of BU over his expenses claim. The Claimant has not therefore proven on the balance of probability that the alleged unfavourable treatment (being OT not replying to that email) arose in consequence of the Claimant's alleged knee disability.

64. Chronologically we then get to the third allegation chronologically of direct race discrimination which is that Mr Ben Urmston, refused, on 4 June 2020, to permit the Claimant to work from home during COVID quarantine, unless he did so by taking annual leave.

65. The Claimant refers to an email dated 4 June 2020 at paragraph 19 of his witness statement as being an email from BU refusing to reimburse his ticket and approve his leave request form. We have looked at this email and it is not BU refusing to permit the Claimant to work from home (see pages 281 to 282 of the Respondent's bundle).

66. We have therefore not been taken to evidence of such a refusal as the Claimant alleges.

67. However, looking at the matter in a broader sense we understand that this issue is the Claimant wanting to work his 14-day quarantine period at home rather than take it as leave. This can be seen from the email correspondence which relates to the quarantine period sent by the Claimant to BU on the 9 June 2020 at page 288 of the Respondent's bundle.

68. We also note from the Claimant's grievance email dated 23 June 2020 (see pages 358 to 359 of the Respondent's bundle) where the Claimant says … "Ben Urmston wrote to me in an email on 04/06/2020 stating he did not approve the leave request form I submitted 3 weeks earlier after it was duly signed and submitted for HR information on 12/05/2020. This was after Simona Rutigliano in EIRL HR team advised I take my vacation days as much as possible. He stated his reason to be that I do not have 14 days of leave to use for quarantine if I get back from vacation. First thing is I am an engineer and my leave request is supposed to be approved by my line manager which was adequately done by Emanuele Matteucci on Instruction from Antonina Pastorello and not HR. Secondly, everyone who travelled to Europe or America or those who had family members visit them came back and worked from home in quarantine. Nobody used their vacation days in quarantine. Lastly Ben already agreed to process my travel and then changed his mind for some reason before falsely listing his reasons. (Please see email attached).".

69. From this though it is not clear a request has been made of BU and refused by BU.

70. This matter was considered by OH who investigated the Claimant's concerns. The Claimant confirmed in his cross examination of OH that he accepted the facts as presented by OH.

71. We have noted from the part of OH's report which is at page 209 of the Claimant's bundle, about working from home:

> "
>
> There is no evidence OA was refused permission to work from home, including during the quarantine period, following the planned annual leave in the USA. OA was not required to work at site, as this only applied to HSE employees who spoke fluent Korean. There is no evidence to suggest OA was under any obligation from his line manager to come to the office. The classification of "essential / non-essential staff" had been established by previous managers. BU stated he was aware OA was unhappy with his manager, who did not want him to attend the office, but that the list of "essential and non-essential" staff had not been updated.
>
> "

72. For this allegation the Claimant relies upon the comparators of Paolo Barissielo and Francesco Acatoli.

73. It is not in dispute that there are material differences between them and the Claimant, in that they were employed by ENI SPA not EME or EIRL. They were assigned to South Korea in very different roles namely Project Execution Team and Project Services. They also had a different Line Manager. We were presented evidence about this from Mr GM (see paragraph 28 of his witness statement) and from Mrs GM (see paragraph 21 of her witness statement). It was then re-iterated in the written submissions of Respondent's Counsel.

74. BU's own explanation for his actions is summarised by Respondent's Counsel's in his closing submissions (see paragraph 131 iii of his submissions):

> "iii. The Respondent relies on counter comparators. At paragraph 27 of his statement Mr Muller points out that Mr Urmston clearly explains how two ex pat workers – Paolo Prada and Andy Bensley had line manager approval to work from home during quarantine following visits from family and others including Antonio Festa, Amran Howlader and Ziad Alasadi were able to work from home during quarantine with line manager approval after overseas travel. The key point was that these individuals had obtained approval for these arrangements with their Line Manager and C had not [p.522, folder 2, paras 4 and 5]. When put to him in evidence, C was unable to comment on these paragraphs. Mr Urmston, however, puts the documents into evidence [via his signed statement] and therefore his evidence should be preferred."

75. BU was not present to be cross examined by the Claimant, so his evidence will carry less weight, however, as Respondent's Counsel submits we can still rely upon it where it has not been positively evidenced against, as in this case, that those that were permitted to work from home had pre-authorisation. The Claimant has not proven on the balance of probability that he had such pre-authorisation.

76. It is then on the 18 June 2020 that the Claimant makes a request for the travel of his son to visit him on the 23 to 30 June 2020 be sorted by the Respondent.

77. This chronologically is the fourth allegation of direct race discrimination that Mr Ben Urmston, refused, on 19 June 2020, to grant the Claimant an entitlement for return air travel for his child. The Claimant compares himself to Messrs Paolo Barissielo and Francesco Acatoli, who are white Italians.

78. It is not in dispute that BU refused the Claimant's request.

79. About this BU summarises in his email dated 23 June 2020 (see page 352 of Respondent's bundle) the following:

> "Visa
> • Currently, there is NO visa-free entry for German passport holders (see page 18 of the attached). There was previously but this has now been suspended due to COVID19. This means Alim i's son would need to apply for a short term tourist visa at the Korean embassy in Germany. From Alimi's correspondence, his son does not have a visa so travel would not be possible on 23rd June. It is not even clear whether it is possible for tourist visas for Korea to be issued at present.
> • There is still a visa waiver for UK passport holders, but it was not clear that his son holds a UK passport as Alimi only sent the German document.
>
> Flights
> • No airlines will permit a five year old child to travel independently, a chaperone would need to be provided
> • A tourist visa would be required (discussed previously) plus medical certificate issued 48 hours before the travel date which hasn't been done (as far as I know)
> • It would not be possible to arrange a return flight on 30th June because of the quarantine rules
> • All these factors would make it impossible to arrange the flights within a few days for the dates requested
>
> Quarantine
> • Anyone arriving from Europe into Korea, on a short term visa, must have a COVID test at the airport and then spend 14 days in iso lation at government facilities. It may somehow be possible to arrange for Alimi's son to spend the quarantine with Alimi but it would be very difficult to obtain permission (probably impossible) and arrange (how will the son travel from Seoul to Geoje?), especially within the timeframe given.
> • His son will need to spend 14 days in quarantine, regardless, which means he cannot leave Korea on 30th June as requested
> • As you mentioned in your email below -Alimi "is a patient who needs special medical attention for the next 8 weeks, which cannot be offered during quarantine" - how would he receive treatment here in Korea in the two week period that he has to self-isolate with his son in quarantine?"

80. OH, whose findings are not disputed by the Claimant, concludes about this matter (at pages 216 and 217 of the Claimant's bundle) …

"

OA's request was not supported for a number of reasons. Firstly, poor communication from BU, and to a lesser extent OA, in providing insufficient information (e.g. the fact OA's father in law was also due to travel, UK passport confirmed a day later). Secondly, the short notice provided, compared to similar requests from other employees. Finally, BU's assessment of the associated, and in his view, significant challenges; no evidence of OA's son's UK passport, the assumption the child was to travel alone, the need for a medical certificate to be provided 48 hours prior, clarity on quarantine arrangements and how OA's medial situation was to be managed during the visit. Given the travel request related to a young boy during the pandemic period, such concerns appear reasonable. These factors were compounded by OA's imminent assignment end date; BU's response to OT showed he thought it impossible for a return flight on the 30th June due to the prevailing quarantine rules.

Similar requests from other employees and individuals working in South Korea were shown to include more information about the planned trips, such as quarantine and/or travel plans, which appeared to be missing from OA's initial request. BU's feedback indicates such requests were submitted with more notice compared to OA.

No evidence was found to indicate other employees were refused the same benefit. BU's evidence shows that the circumstances of OA's request differed, however, to those of other employees. Although not communicated to OA, seemingly valid concerns relating to OA's travel arrangements accounted for BU's unwillingness to immediately process OA's request.

On the basis of the evidence the grievance claim that OA was subject to discrimination in relation to his request for family travel is not upheld.

"

81. The Claimant accepted in cross examination that he had not clarified that his son had a British passport as well as a German one, nor that his son's grandfather had exemption from quarantine as being part of the German government.

82. What is clear from this evidence is that there are unique particular factors to the Claimant's request, such as poor communication between BU and the Claimant and a lack of clarity over visas, quarantine and travel arrangements for a child.

83. For this allegation the Claimant also relies upon the comparators of Paolo Barissielo and Francesco Acatoli.

84. It is not in dispute that there are material differences between them and the Claimant, in that they were employed by ENI SPA not EME or EIRL. They were assigned to South Korea in very different roles namely Project Execution Team and Project Services. They also had a different Line Manager. We were presented evidence about this from Mr GM (see paragraph 28 of his witness statement) and from Mrs GM (see paragraph 21 of her witness statement), which we accept.

85. It is not in dispute that the Claimant does two protected acts.

86. The first is on the 23 June 2020 (see pages 358 to 359 of the Respondent's bundle), when he raises a written grievance against Mr Urmston, in which he referred to being discriminated against on grounds of race.

87. The second is on 23 July 2020 (see pages 447 to 454 of the Respondent's bundle) where the Claimant's solicitor writes to the Respondent, to reiterate and expand on that complaint.

88. The Claimant alleges that he is then victimised as a result of those protected acts.

89. The first allegation is that Mr Urmston refused to permit him to work from home, unless he took annual leave. This appears to overlap with the allegation of direct race discrimination about the alleged refusal on the 4 June 2020. In evidence the Claimant suggested that it was possibly the 19 June 2020. It is certainly not asserted by the Claimant as being a date after the first protected act, which makes sense if the Claimant was no longer at that point taking the leave that would have required him to quarantine. As we have noted above the Claimant emailed on the 5 June 2020 (as can be seen at page 279 of the Respondent's bundle) to say he would not be taking the leave.

90. As a result, this alleged detriment cannot as a matter of fact be significantly influenced by the protected acts as it pre-dates them.

91. The next alleged act of victimisation chronologically is that Mr Urmston refused to respond to emails from the Claimant between the period 23 June to 1 August 2020.

92. We have not been presented any evidence by the Claimant as to what emails he was expecting responses to in this period, so the Claimant has not proven on the balance of probability that he was subjected to such a detriment.

93. The third act of victimisation chronologically is that Ms Joanne Barnes, on 7 August 2020, challenged the Claimant's decision to seek legal advice.

94. We were referred to the emails between the Claimant and JB dated the 7 August 2020 which are a pages 461 and 462 of the Respondent's bundle.

95. The first is from the Claimant to JB and then JB's reply:

"Dear Joanna,

I trust my email finds you well. I am currently recovering from my knee surgery and for this reason I would not be attending this meeting. I note the reason you have called for the meeting is to obtain a feedback from me on the investigation carried out by the persons named in your email. Every information you require based on my feedback can be found in the letter from my Solicitors dated 23rd July to Gaukhar Mukazhanova with the investigation parties in copy.

Kindly contact them for a copy of the letter from my Solicitors if you have not already received the brief.

Best Regards,

Femi"

Then the reply…

"Dear Olufemi,
I hope that all is well.

Could you please kindly indicate when you would consider it convenient to reschedule the infomal meeting with you to discuss your feedback further to the recent grievance rasised against EME HR in South Korea.

As previously advised, we hoped to schedule this meeting with Osar Hopkinson further to receiving notification from EME that their investigation on the matter had concluded.

I can confirm that we are in receipt of all documented minutes of the meetings held with you and EME reresentatives. Given that you had acknowledged the outcome of these proceedings, EIRL as your employer, sought to gauge your satisfaction on the outcome to what we consider to be very serious allegations.

I can also advise that we are not aware of any correspondence between your instructed lawyer and Gaukhar Mukazhanova, International HR Operations Manager at EIRL, who is currently away on leave with limited access to emails.

I see no reason not to have an informal dicussion with you as intended. We hoped to gain first hand understanding from you, your feedback on the investigation to these allegations, and to ascertain the rationale behind your recent instruction of a lawyer during this challenging time and during your recovery.

Please do revert back to me on this matter and I look forward to hearing from you soon.

Kind Regards

Joanna"

96. The Claimant complains about the words … "to ascertain the rationale behind your recent instruction of a lawyer during this challenging time and during your recovery.". It is not obvious that what is written by JB that the Claimant complains about is a detriment to him. It could be viewed as the Respondent communicating to the Claimant that it is one of things it would like to hear from the Claimant about.

97. Considering carefully what is written by JB in the context of what she writes and it being in reply to the Claimant's email, it can clearly be seen that JB is writing what she does in response to the Claimant's email of the 7 August 2020.

98. JB denied she was significantly influenced by the first protected act (us accepting she was not aware of the second protected act by the time she wrote her email,

as there was no evidential basis presented by the Claimant to dispute what she says) and we accept her evidence.

99. Chronologically we then have the other complaints of discrimination arising from disability (section 15).

100. The Claimant alleges that in the period 26 July 2020 to 1 January 2021, he was treated unfavourably by the Respondent paying him a reduced salary and pension contribution, due to being placed on long-term disability pay. The Claimant explained that his disability leads to him being sick and then being placed on long-term disability pay, which is 75% of his normal pay. This is something that happens after the Claimant has exhausted his 13-week sick pay entitlement.

101. The Claimant agreed in oral evidence that he had asked for this as he was sick and unable to work and being provided with what he wanted was not unfavourable treatment.

102. We agree with him and do not find it to be either.

103. We also acknowledge that this was all done in the interests of the Claimant so he could complete his medical treatment in South Korea, which is consistent with what the Respondent says its justification for doing this is.

104. The Claimant then alleges that in the period 30 August 2020 to 27 January 2021, he was treated unfavourably as the Respondent failed to organise or facilitate the issue to him of a work visa, or medical health visa. The Claimant explained that disability leads to his inability to work and the need for medical treatment, and because of that the Respondent failed to issue a work / medical health visa.

105. The Respondent disputes it failed to do this because the Claimant had already organised his own visa.

106. It is not in dispute that the Claimant did not ask for the Respondent to sort the visa for him, him having applied for his own visa on the 18 August 2020.

107. The Claimant always had legal residency status in South Korea, so we do not find that the Claimant has proven on the balance of probability the unfavourable treatment he alleges.

108. It is then on the 27 January 2021 that the Claimant accepts a flight to return to the UK (see paragraph 15 of his witness statement).

109. There is then a continuation of the redundancy consultation process that had started originally when the Claimant was in South Korea.

110. The redundancy consultation process had started after the Respondent received the assignment termination form (see page 201 of the Respondent's bundle).

111. The Claimant is informed of the position on the 6 May 2020, and that the assignment would now terminate on the 30 June 2020.

112. There is a follow up letter dated 6 May 2020 confirming the termination of assignment and that the Claimant is a risk of redundancy (see pages 204 to 205 of the Respondent's Bundle).

113. The Claimant had his first individual consultation meeting on the 19 May 2020.

114. About this process the Claimant confirmed in cross examination that he was aware of the termination date of the assignment, was aware that he was at risk of redundancy and that he did not dispute the records of the meetings.

115. As OT confirms at paragraph 29 of his witness statement the redundancy process was then placed on hold whilst the Claimant was on sick leave.

116. The Claimant then receives long-term disability pay until the 31 December 2020.

117. From the 1 January 2020 the Claimant reverted to his notional base salary. As OT then describes at paragraphs 49 of his witness statement the Respondent contacted the Claimant to explain that the redundancy consultation process would continue and a second consultation meeting took place on 11 January 2021 and OT emailed a summary of the meeting to the Claimant on 11 January 2021.

118. OT and JB then meet with the Claimant on 8 March 2021.

119. Mrs GM details in paragraph 15 of her statement that she then … "attended the final meeting on 8th April 2021 as a senior manager with authority to make a decision on behalf of EIRL.".

120. By letter dated 8 April 2021 (see pages 700 to 701 of the Respondent's bundle) it is confirmed…

> "Further to our consultation discussions with you on 6th May 2020, 19th May 2020, 11th January 2021, 8th March 2021 and 8th April 2021, we are writing to confirm that your position with Eni International Resources (EIRL) will become redundant with effect from 7th July 2021.
>
> In line with our previous communication, the company has explored ways in which your redundancy could be avoided and we have been searching for alternate opportunities for redeployment within the Company. Unfortunately, we have not been able to identify any way in which your redundancy could be avoided, as there are no suitable alternative jobs available at present that would suit your skills and experience. Therefore we hereby confirm to you, that we are serving you with 3 months employment notice today.

… you are entitled to receive a statutory redundancy payment equivalent to £4,080. This will be paid with your July 2021 salary. Please note that in the scenario that your employment with EIRL does not end due to another assignment starting with the company, this payment will not be applicable.

… You have the right of appeal against this decision. If you wish to exercise this right, you should do so by writing to the Managing Director at EIRL, Marco Volpati, within 7 days from receipt, stating your reasons.".

121. The Claimant is given notice in time about which Mrs GM says at paragraph 19 of her witness statement … "I informed the Claimant of my decision but did explain that the company would be willing to change its normal process of dismissal with a payment in leu of notice and instead allow the Claimant to stay on as an employee for the notice period, as this would allow him to retain the benefit of medical cover for any ongoing treatment, plus he was more likely to pick up new assignment opportunities if he was still employed by the business. As per the EIRL's practice to update employees on the progress of further search of assignment opportunities during the three-month notice, I also guided the Claimant what he should expect as further steps. The Claimant conveyed the message that he tried to explore those opportunities by himself too and became aware of the lack of opportunity.".

122. The Claimant is paid a redundancy payment and provided a right of appeal which he does not exercise.

123. The agreed effective date of termination is the 7 July 2021.

124. So, to consider the facts about the reason for the unassigning and the dismissal.

125. We accept the uncontested evidence of AP at paragraphs 13 to 14 of his witness statement …

"13. In April 2020, it became clear that Eni's business had been badly impacted by the Covid-19 pandemic. As a result, I was asked to reduce the costs associated with the HSE team working on Project Coral. Unfortunately, those on assignment from EIRL cost far more than those individuals employed locally. Moreover, the pandemic had meant that the site had seen a reduction in activity which also meant that the HSE team could be reduced and still cope with its responsibilities.

14. As such, the decision was made to terminate the assignments of the EIRL employees working in the team in Geoje, all the EIRL within the HSE team were planned to be terminated, even some with much more HSE experience than Mr Alimi. This included the LQ HSE Co-ordinator Mr Gavin Herbert who was a HSE specialist from South Africa with wide experience with Eni and he was also the one who was tutoring Mr Alimi. At the same time, members of the HSE team from the other Project Partners outside Eni were also removed from the project,

specifically Scott Francis who was the HSE manager (US and employed by Exxon not Eni), a Chinese colleague and the two female members from Mozambique."

126. This position is evidenced in summary by the documents at pages 1663 and 1664 of the Respondent's bundle.

127. This then triggers the ending of the assignment on the 30 June 2020 and the consultation process.

128. As OT sets out in his uncontested evidence in paragraphs 16 to 18 of his witness statement …

"16. EME decided in May 2020 to close its operations in Basingstoke, UK and transfer the work to Italy. EIRL supplied 42 of its international employees to EME in Basingstoke and with the closure of the EME operations there, 39 were placed at risk of redundancy and 3 returned to their home company. Following group and individual consultations, EIRL made 23 of the employees who were placed at risk, redundant. In addition, prior to the group consultation requirement, EME also closed 2 other international assignments of EIRL employees in the UK who, after being placed at risk and following an individual consultation process, both were made redundant.

17. A similar pattern happened at the other EME locations where EIRL supplied international workers. EME closed assignments in Paris of 5 EIRL employees, leading to 1 redundancy case. EME also closed 2 international assignments in the US leading to 1 employee returning to their home company and 1 redundancy case. At the construction site in South Korea where the Claimant was located, EME decided to close the assignments of 9 EIRL employees who were assigned to the that location. These employees were the Claimant, Mihal Barbuta, Conrad Stancliffe, Mohan Balasundar, Rajkumar Aglave, Andrew Bensley, Sabahat Malik, Hasan Demir and Mohamed Elgably all mixed nationalities including Australian, British, Indian and Turkish passport holders. This led to 1 employee returning to his home company (Mohamed Elgably returning to Egypt) and 6 EIRL employment closures. 2 EIRL employees had the employment at risk retracted as they were either extended (Hasan Demir) or reassigned to another Eni group company (Sabahat Malik).

18. Data captured by EIRL on 08 September 2020 shows 14 assignments of EIRL expatriates on the EME project worldwide who were not under assignment notice, were of various nationalities, including Iranian, Salvadorian, Nigerian, British and Iraqi, Italian, Portuguese, Venezuelan, Israeli, Pakistani, Turkmen and Kazak. The data also showed that 7 EIRL employees assigned to HSEQ were under assignment termination closure or already had their assignment contract closed in 2020."

129. The Claimant agreed in cross examination that he was aware of 6 of the 9 EIRL employees OT refers to in paragraph 17 of his evidence.

130. Mrs GM sets out at paragraphs 4 to 9 of her witness statement, which is uncontested, and we accept …

> "4. The COVID pandemic has hit the energy sector very badly, especially during 2020 when it led to a crash in the price of oil. Many energy businesses had to quickly look at ways to reduce cost and sadly this was also the case for the Eni group which includes EIRL.
>
> 5. EIRL is an internal group supplier of international assignee employees to other companies in the Eni group. We are therefore dependent on those other companies as our clients. We provide specialist employees on a flexible basis to these companies. The assignments are often for a fixed term of 12 months but the assignments are often extended. The assignment company can also terminate early with limited notice.
>
> 6. It's a contractor style arrangement, which suits a lot of the international employees who work with us and they often secure generous remuneration packages because they are well compensated for their expertise and the fact they are often away from their home country for significant periods. The downside is that these international assignees are often the first to be removed if there is a need to save costs.
>
> 7. This is what happened when COVID-19 hit during 2020. All across the Eni group, our internal assignment companies began to review costs and make requests to us for our international assignees to be demobilized. This meant that we had to terminate many assignments early and the added difficulty was that there little if any alternative opportunities to consider for these employees.
>
> 8. During 2020 we had to close approximately 300 assignments and also make 160 of our international employees redundant, as there was no prospect of alternative work.
>
> 9. I was not involved in managing the Claimant's assignment in South Korea, but I was involved at various stages of his final period of employment as a result of some of the issues that were arising. I was also the manager who chaired his final redundancy consultation meeting in 2021, with authority to decide whether or not his employment should be ended."

131. Mrs GM confirms she dismissed for reason of redundancy as set out in paragraph 22 of her witness evidence.

132. As Mrs GM states in paragraph 18 … "I was mindful that the business had offered a lot of support to the Claimant both in South Korea and in the UK, including support for securing income protection and postponing the redundancy consultation process in South Korea, as well as extending the assignment and employment periods well beyond other employees, in the hope that this may

increase the Claimant's chances of securing new work. Sadly, the situation for alternative assignment opportunities was still very limited and there was nothing available for the Claimant.".

133. The process was complicated and protracted because of the Claimant's health circumstances.

134. Nothing appears to have changed between the start of the consultation process and its conclusion.

135. We have not been presented evidence to support that there was alternative employment available. The Claimant does not challenge evidentially that there was, by asserting there was or were a particular role or roles he could have done (although the Claimant asserted in cross examination that he did not agree Mrs GM did a professional job search nor that he said he had found there was a lack of opportunity at the time, that there was an inadequate search for alternative employment is just assertion by the Claimant). We accept the evidence of the Respondent about this.

136. We haven't been presented evidence to show the Respondent acted unreasonably under all the circumstances in this case. The Claimant does not appeal his dismissal.

137. The Claimant also complains of a breach of contract by the Respondent and seeks the payment of 8,000 Euros in re-imbursement of flights he pre-booked to Las Vegas.

138. It is on the 10 May 2020 that the Claimant buys his flight tickets for a trip to Las Vegas (see page 200 of the Claimant's bundle). The flight dates are the 5 June 2020 to 23 June 2020.

139. The Claimant has a signed holiday form dated the 11 May 2020 (see page 196) which he says he requested on the 12 May 2020 (see paragraph 24 b of his witness statement).

140. The Claimant submits his claim for re-imbursement of the flights on the 12 May 2020 (see page 199 of the Claimant's bundle).

141. As at 1 June 2020 it appears the Claimant is still intending to go on holiday (see his email dated 31 May 2020 at pages 265 and 266 of the Respondent's bundle). In cross examination, the Claimant said his knee was not fine and he intended to go to Las Vegas for treatment.

142. The Claimant's oral evidence is that after his second operation on the 2 June 2020, there were complications, which lead to swelling on the 6 June 2020 and subsequently he said he was unable to travel although he could not say on what day he decided not to travel. However, as we have noted above, his email dated 5 June 2020 (at page 279 of the Respondent's bundle) confirms he is cancelling his leave.

143. The Claimant did not use the flights but still wanted a refund of his already purchased ticket. When asked in oral evidence about cancellation of the tickets he said he had tried but was offered the opportunity by the airline to rebook rather than be given a refund. He said that he did not take out any travel insurance to cover the cost of the flights if he could not fly. He confirmed he took no other action to recover the cost of the untaken flights from the airline.

144. The Claimant submits in his written submissions … "It is not in dispute that the Claimant is entitled to travel budget ticket fare reimbursement. The Tribunal panel can see Respondent's information in Oscar Hopkinson's interview in Claimant's document bundle orange section 5 on page 198 for policy document, page 201 Mr Urmston was reviewing document for reimbursement and asked Claimant for number of leave days outstanding. On Page 208, paragraph 7 Mr Oscar Hopkinson of Respondent stated the Claimant followed the leave application process and submitted the required evidence of purchased ticket adequately.".

145. BU's position in relation to this holiday is summarised within his signed interview notes at pages 519 to 524 of the Respondent's bundle, which was submitted as evidence with his signed witness statement.

146. The review by OH, which the Claimant agreed when cross examining OH was a correct factual account that we could accept, acknowledged that the Claimant submitted the request for re-imbursement correctly (see page 208 of the Claimant's bundle).

147. It notes though that BU did have authority to challenge the application (see the top of page 209).

148. It is then noted at page 209:

"

The evidence indicates OA likely had an awareness of the need to inform HR about international travel plans during the pandemic period. OA's email to BU on 13th May, when confirming his correct annual leave balance, indicates his awareness of coronavirus related travel restrictions. The evidence shows OA was aware of quarantine requirements through the regular updates provided by IP. It is reasonable to assume OA knew when submitting the annual leave request, the quarantine period would extend beyond the revised assignment end date (30th June).

"

149. The email from the Claimant that is referred to is at page 274 of the bundle. It is dated the 13 May 2020 and is included by the Claimant in his email to BU dated 4 June 2020 in which he challenges the leave days he has outstanding. The email of the 13 May 2020 states … "Thanks for your email. I stated in that form I did not take the last set of holidays due to Corona virus restrictions. I am guessing you can check this from Jeremy or Emanuele attendance register for days in the office working.".

150. Then at page 210:

"

> BU stated the intent of the travel budget benefit was for reimbursement to be made following the planned travel. The EME Employee Handbook and EIRL International Handbook do not specify the steps to be taken when an employee does not make use of a purchased ticket bought in line with his/her contractual entitlement. This suggests that BU, JC and GM were justified in challenging OA's claim for the unused travel expense claim. OA's request was correctly completed and in line with his contractual entitlement, but the evidence appears his request was not consistent with general practice adhered to by other EME employees.
>
> "

151. We observe here that it is not in dispute that the Claimant's request was correctly completed and in line with his contractual entitlement, but the evidence appears his request was not consistent with general practice adhered to by other EME employees. OH goes on to note that the issues were enough to query the application, but not necessarily to deny the payment at all (see page 211).

152. Then at page 211:

> "
>
> OA's request was made following EIRL's prompting and was fully in line with his contractual entitlements. The request was not confirmed by BU, acting on behalf of GM in South Korea, due to a number of reservations related to the request. The evidence indicates BU took a decision, in alignment with his line manager, not to approve OA's expense claim, due to the direct link to his annual leave request and the fact he did not travel.
>
> "

153. What we can see here is confirmation that the Claimant's expenses claim was not approved, due to the direct link to the Claimant's annual leave request and the fact that the Claimant did not travel.

154. This position is clearly expressed by BU himself in his signed interviews notes at page 521 of the Respondent's Bundle… "the intent of the benefit was that it should be payable when the flights had been taken, unless there were exceptional circumstances that could be evaluated on a case-by-case basis. BU also mentioned that as per the details of the flight booking submitted with the expense claim, it would have been possible for OA to cancel the ticket with either no cancellation fee or a minimal charge. BU thought it was strange that since OA had undergone surgery on 26th May and actually submitted a cancellation of his leave request on June 5th, citing his surgery as a reason, that he would not simply cancel the flights and obtain the refund from the airline. BU said if there had been any difference between the refunded amount and original cost due to cancellation charges and/or credit card interest payments, OA would have been welcome to contact HR to discuss his situation and whether the company may have been able to reimburse these costs.".

155. In his oral closing submissions, we were referred by the Claimant to the paperwork concerning a claimed trip to Paris earlier in 2020 (see pages 13 and 13 of the Claimant's bundle (there are two with the same number)).

156. This is for a trip on the 2 January 2020 (see the second page 13). The expenses claim form is submitted on the 6 January 2020 (see first page 13). This is wholly consistent with the process the Respondent outlines.

157. As Respondent's Counsel submits at paragraph 56 … "Taken fairly, as a whole, the Respondent concedes that the Claimant did have a contractual right to flights

with a budget which required Line Management approval and submission of evidence of flights. However, the contract only gives the bare bones of the right. The mechanics and practicalities had to be overseen by HR which retained a discretion in that regard. A discretion which had to be exercised rationally. HR involvement is explicitly highlighted at 1208 [15.2.2], but in any event would have to be implied to make the contract work and as a matter of business sense especially in an ever-changing Covid world. This is reinforced by the fact that, despite there being no clear explicit contractual right for a trip to Vegas (the contract talks of point of origin trips), EME HR was content, in its discretion, to allow such a trip in principle subject to other factors.".

158. We see from page 1208 of the Respondent's bundle at paragraph 15.2.2 it is said that … "Your Assignment Country HR contact will explain the process for allocating, tracking, and managing your holiday entitlements.". The Claimant did not accept that he was aware or subject to this particular policy, but it is clear he is aware of the principle of getting HR approval for the expense, otherwise he would not have submitted the request to BU. The Claimant does not dispute OH's findings that the Claimant's expenses claim was not approved, due to the direct link to the Claimant's annual leave request and the fact that the Claimant did not travel (as detailed at page 211 of the Claimant's bundle).

159. Factually we find that an approval discretion existed in the contract for this type of expense and we do not find, for the reasons set out above, that the approval discretion was exercised unreasonably. We accept what Respondent's Counsel submits at paragraph 160 (f) of his submissions … "At p.521, at para 1, Mr Urmston states that the intent of the benefit was that it should be payable when the flights had been taken unless there were exceptional circumstances that could be evaluated on a case by case basis. C of course never took the flight. As part of the exercise of the discretion it was decided that this case was not so exceptional to pay C back even though he had not taken the flight. That too was rational.".

160. THE LAW

Unfair dismissal

161. Pursuant to section 94 Employment Rights Act 1996 ('ERA 1996') an employee has the right not to be unfairly dismissed by their employer. Whether or not an employee has been unfairly dismissed is determined in accordance with section 98 ERA 1996:

> ***(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—***
>
> ***(a) the reason (or, if more than one, the principal reason) for the dismissal, and***

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it…

…(c) is that the employee was redundant; …

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

162. It is for the Respondent to prove on the balance of probabilities, the sole or principal reason for dismissal. In considering fairness the burden is neutral.

163. Section 139 ERA 1996 states:

139 Redundancy.

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, **have ceased or diminished or are expected to cease or diminish.**

164. The Respondent submits there was a genuine redundancy, and this was the reason for the Claimant's dismissal. Alternatively, it submits the reason for

dismissal was SOSR – in short there was a business reorganisation to save cost. As per ***Scott and Co v Richardson EAT 0074/04***. it is not for the tribunal to make its own assessment of the advantages of the employer's business decision to reorganise or to change employees' working patterns [see paragraphs 14 onwards]. In fact, the employer need only show that there were 'clear advantages' in introducing a particular change to pass the low hurdle of showing SOSR for dismissal. The employer does not need to show any particular 'quantum of improvement' achieved — ***Kerry Foods Ltd v Lynch 2005 IRLR 680, EAT*** [see in particular paragraph 14].

Breach of contract

165. The Claimant's claim for breach of contract is permitted by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and the claim was outstanding on the termination of employment.

166. The Respondent concedes that the Claimant did have a contractual right to flights with a budget which required Line Management approval and submission of evidence of flights.

167. If, as the Respondent submits that contractual right was subject to a discretion, then that discretion has to be exercised rationally, see ***Clark v Nomura*** **[2000] 9 WLUK 43**.

168. As to implied terms we are referred by Respondent's Counsel to ***Reigate v Union Manufacturing Co (Ramsbottom) Ltd 1918 1 KB 592, CA*** the Court of Appeal stated that a term may only be implied on the basis of business efficacy if it is necessary to make the whole agreement workable. Also, in ***Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and anor 2016 AC 742, SC***, Lord Neuberger pointed out that the test is not one of 'absolute necessity', and suggested that it might be more helpful to say that a term can only be implied if, without the term, the contract would lack *'commercial or practical coherence'*.

Direct Race Discrimination

169. This is also a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The Claimant complains that the Respondent has contravened a provision of part 5 (work) of the EqA.

170. The protected characteristic relied upon is race as set out in sections 4 and 9 of the EqA.

171. The relevant statutory provisions (as confirmed by Respondent's Counsel in his written submissions) are:

S.13 of the Equality Act 2010 states:

13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others

S.23 of the Equality Act 2010 states:

On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

S.39 (2) of the Equality Act 2010 states:

An employer (A) must not discriminate against an employee of A's (B)—
as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

S.109 of the Equality Act 2010 states:

109 Liability of employers and principals

(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.

S.136 of the Equality Act 2010 states:

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision*.*

172. We were provided a helpful summary of relevant legal authorities on these statutory matters by Respondent's Counsel:

173. In ***Laing v Manchester City Council and anor 2006 ICR 1519, EAT***, Mr Justice Elias suggested that a claimant can establish a prima facie case of direct discrimination by showing that he or she has been less favourably treated than an appropriate comparator. He considered that at the first stage *'the onus lies on the employee to show potentially less favourable treatment from which an inference of discrimination could properly be drawn'.*

174. Lord Justice Mummery stated in ***Madarassy v Nomura International plc 2007 ICR 867, CA***, where he stated: *'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'*

175. In ***Deman v Commission for Equality and Human Rights and ors*** **2010 EWCA Civ 1279, CA**, Lord Justice Sedley accepted the ***Madarassy*** approach that something more than a mere finding of less favourable treatment is required before the burden of proof shifts onto the employer. Nevertheless, he made the point that 'the "more" which is needed to create a claim requiring an answer, need not be a great deal.

176. In ***Chief Constable of Kent Constabulary v Bowler EAT 0214/1***6, Simler P observed: *'Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic.'*

177. In ***Bahl v Law Society 2003 IRLR 640, EAT***, Mr Justice Elias (as he then was) stated: *'The significance of the fact that the treatment is unreasonable is that a tribunal will more readily in practice reject the explanation given than it would if the treatment were reasonable. In short, it goes to credibility. If the tribunal does not accept the reason given by the alleged discriminator, it may be open to it to*

infer discrimination. But it will depend upon why it has rejected the reason that he has given, and whether the primary facts it finds provide another and cogent explanation for the conduct. Persons who have not in fact discriminated on the proscribed grounds may nonetheless sometimes give a false reason for the behaviour. They may rightly consider, for example, that the true reason casts them in a less favourable light, perhaps because it discloses incompetence or insensitivity. If the findings of the tribunal suggest that there is such an explanation, then the fact that the alleged discriminator has been less than frank in the witness box when giving evidence will provide little, if any, evidence to support a finding of unlawful discrimination itself.'

178. In ***Ministry of Defence v Jeremiah 1980 ICR 13, CA***, the Court of Appeal took a broad view of the words 'any other detriment' under S.39 of the Equality Act. Lord Justice Brandon said it meant simply *'putting under a disadvantage',* while Lord Justice Brightman stated that a detriment *'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment'.*

179. This view was approved by the House of Lords in ***Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL***, where their Lordships emphasised that a sense of grievance which is not justified will not be sufficient to constitute a detriment. The House of Lords held that the Court of Appeal had erred in law in this respect, in that there is no requirement for the claimant to show that he or she has suffered some physical or economic consequence.

180. In short, it is not sufficient to merely assert a difference in status and a difference in treatment. In order for the Respondent to be required to show that it has not committed an act of discrimination it is necessary for there to be some material before the Employment Tribunal from which it 'could properly conclude' that on the balance of probabilities the Respondent had committed an act of unlawful discrimination.

181. About agency we were referred to the cases of ***Unite the Union v Nailard [2019] I.C.R. 28*** and ***Jones v Tower Boot Co. Ltd*** **[1997] I.C.R. 254** by Respondent's Counsel and for that latter authority it was highlighted where the Court of Appeal had considered the meaning of "in the course of employment":

The tribunals are free, and are indeed bound, to interpret the ordinary, and readily understandable, words "in the course of his employment" in the sense in which every layman would understand them. This is not to say that when it comes to applying them to the infinite variety of circumstances which is liable to occur in particular instances — within or without the workplace, in or out of uniform, in or out of rest-breaks — all laymen would necessarily agree as to the result. That is what makes their application so well suited to decision by an industrial jury. The application of the phrase will be a question of fact for each industrial tribunal to resolve, in the light of the circumstances presented to it, with a mind unclouded by any parallels sought to be drawn from the law of vicarious liability in tort.

Disability

182. As set out in section 6 and schedule 1 of the Equality Act 2010 a person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months or is likely to last the rest of the life of the person.

183. The burden of proving disability lies squarely on the Claimant.

184. From the definition from the Equality Act 2010, as referred to above, four essential questions need to be answered: (1) does a person have a physical or mental impairment? (2) does that have an adverse effect on their ability to carry out normal day to day activities? (3) is that effect substantial? (4) is that effect long-term? These questions may overlap to a certain degree; however, a tribunal considering the issue of disability should ensure that each step is considered separately and sequentially, ***Goodwin v The Patent Office [1999] IRLR 4***.

185. An impairment will only amount to a disability if it has a substantial adverse effect on the individual's ability to carry out day-to-day activities which are normal. Whether an effect is substantial requires a consideration whether it is more than minor or trivial: section 212 Equality Act 2010.

186. Paragraph. 2(1), Schedule. 1, Equality Act 2010 states that an impairment will have a long-term effect only if: (1) it has lasted at least 12 months; (2) the period for which it lasts is likely to be 12 months; or (3) it is likely to last for the rest of the life of the person affected.

187. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out day-to-day activities, it is to be treated as having that effect if it is likely to recur (paragraph 2(2), Schedule.1, Equality Act 2010).

188. In respect of the meaning of the word 'likely' as used in the above context, this means whether something "could well do" or "could well happen".

189. The focus should be on what a disabled person cannot do rather than what they can do. The effect of medical treatment should be disregarded.

190. In ***All Answers Ltd v W 2021 IRLR 612, CA*** the Court of Appeal held that, following ***McDougall v Richmond Adult Community College 2008 ICR 431, CA***, the key question is whether, as at the time of the alleged discrimination, the effect of an impairment has lasted or is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at that date and so the tribunal is not entitled to have regard to events occurring subsequently.

Discrimination arising from disability (S.15)

191. S.15 of the Equality Act states:

15 Discrimination arising from disability

(1)A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Reasonable adjustments

192. S.20 of the Equality Act states:

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

193. ***Paragraph 20(1) of Schedule 8 to the EqA*** provides that a person is not subject to the duty to make reasonable adjustments if he or she does not know, and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at a disadvantage by the employer's PCP, the physical features of the workplace, or a failure to provide an auxiliary aid — ***para 20(1)(b)***.

194. In ***Secretary of State for Work and Pensions v Alam*** **[2010] I.C.R. 665** the EAT stated:

17. Separately, however, it seems to us clear, as a matter of statutory interpretation and giving the language of those provisions their ordinary meaning, that to ascertain whether the exemption from the obligation to make reasonable adjustments provided for by section 4A(3)(b) of the 1995 Act applies, two questions arise. They are: (1) did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1) ? If the answer to that question is: "no" then there is a second question; namely (2) ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1) ?

18. If the answer to that second question is: "no", then the section does not impose any duty to make reasonable adjustments. Thus, the employer will qualify for the exemption from any duty to make reasonable adjustments if both those questions are answered in the negative. That interpretation takes proper account not only of the use, twice, of the word "and" but also of the comma after "know" in the second line of section 4A(3) .

195. For the avoidance of doubt, the reference to section 4A(1) refers to the disadvantage.

196. The case of ***Gallop v Newport City Council*** **[2013] EWCA Civ 1583** states at para 36:

I come to the central question, namely whether the ET misdirected itself in law in arriving at its conclusion that Newport had neither actual nor constructive knowledge of Mr Gallop's disability. As to that, Ms Monaghan and Ms Grennan were agreed as to the law, namely that (i) before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person; and (ii) that for that purpose the required knowledge, whether actual or constructive, is of the facts constituting the employee's disability as identified in section 1(1) of the DDA. Those facts can be regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties; and whether those elements are satisfied in any case depends also on the clarification as to their sense provided by Schedule 1 . Counsel were further agreed that, provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a 'disabled person' as defined in section 1(2) . I agree with counsel that this is the correct legal position.

Victimisation

197. s.27 EqA 2010:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

198. The Respondent concedes both protected acts.

199. As part of the submission process reference was made to the recent case of ***Mr D Warburton -v- The Chief Constable of Northamptonshire Police and The Chief Constable of Northamptonshire Police -v- Mr D Warburton 2022 EAT 42***. It was noted from that about a detriment that is not necessary to establish any physical or economic consequence. Although the test is framed by reference to a reasonable worker, it is not a wholly objective test. It is enough that a reasonable worker might take such a view. This means that the answer to the question cannot be found only in the view taken by the ET itself. The ET might be of one view, and be perfectly reasonable in that view, but if a reasonable worker (although not all reasonable workers) might take the view that, in all the circumstances, it was to his detriment, the test is satisfied. It should not, therefore, be particularly difficult to establish a detriment for these purposes.

200. It also reminds about the correct legal test to the causation or "reason why" question. The question is whether the protected act had a significant influence on the outcome. Chief Constable of West Yorkshire v Khan [2001] 1 WLR 1947 HL, Nagarajan v London Regional Transport [2000] 1 AC 502, Chief Constable of Greater Manchester v Bailey [2017] EWCA Civ 425 and Page v Lord Chancellor [2021] ICR 912 CA were considered and applied.

Time limits

201. Of relevance to the question of time limits are the provisions of s.123 EqA 2010.

202. Section 120 of the EqA 2010 confers jurisdiction on claims to employment tribunals, and section 123(1) provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.

203. Section 123(3)(a) EqA 2010 provides for conduct that extends over a period to be treated as being done at the end of that period.

204. We were referred by Respondent's Counsel to the helpful summary of the law on continuing acts in ***Aziz v FDA [2010] EWCA Civ 304***:

"Part 4. The law

30. I shall now review in chronological order the authorities which have been cited by counsel for the respondent and by Ms Aziz appearing as litigant in person and which are relevant to the interpretation of section 68 of the 1976 Act, insofar as those authorities impinge upon this appeal.

31. In Commissioner of Police of the Metropolis v Hendricks [2002] EWCA Civ 1686; [2003] ICR 530, a police officer alleged racial and sexual discrimination against herself over a period of 11 years. The ET, relying on section 68(7)(b) of the 1976 Act and a similar provision of the Sex Discrimination Act 1975, held that it had jurisdiction to hear the police officer's complaints. That decision was reversed by the EAT, but restored by the Court of Appeal.

32. Mummery LJ, with whom May LJ and Judge LJ agreed, gave guidance on the correct approach at paragraphs 48 to 52 of his judgment. I shall read out the relevant parts only of those paragraphs:

"48. On the evidential material before it, the tribunal was entitled to make a preliminary decision that it has jurisdiction to consider the allegations of discrimination made by Miss Hendricks. … She is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of an 'act extending over a period'. I regard this as a legally more precise way of characterising her case than the use of expressions such as 'institutionalised racism', 'a prevailing way of life', a 'generalised policy of discrimination' or 'climate' or 'culture' of unlawful discrimination"

49. At the end of the day Ms Hendricks may not succeed in proving that the alleged incidents actually occurred or that, if they did, they add up to more than isolated and unconnected acts of less favourable treatment by different people in different places over a long period and that there was no 'act extending over a period' for which the commissioner can be held legally responsible as a result of what he has done, or omitted to do, in the direction and control of the Service in matters of race and sex discrimination. It is, however, too soon to say that the complaints have been brought too late.
…

52.. the focus should be on the substance of the complaint made that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the service were treated less favourably. The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would be given to run from the date when each specific act was committed"

33. In considering whether separate incidents form part of "an act extending over a period" within section 68(7)(b) of the 1976 Act, one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents: see British Medical Association v Chaudhary, EAT, 24 March 2004 (unreported, UKEAT/1351/01/DA & UKEAT/0804/02DA) at paragraph 208."

205. THE DECISION

206. Unauthorised deductions of wage

207. The complaint of unauthorised deductions from wages is stayed to **5 May 2022**, as the parties agreed factually that the amount of **£622.84** (which is net of tax from South Korea) had been paid into the Utmost Fund contrary to the Claimant's instructions. The parties wanted time to consider the tax implications on the Claimant with him seeking to collapse that fund and his residential tax status now having been confirmed to the Respondent as Germany. If the parties are not able to resolve this matter, they will request a hearing of up to a day by video for the matter to be determined. We have therefore not made any further findings on this matter.

208. Disability discrimination

209. Whether the Claimant is a disabled person or not at the times material to this claim remains in dispute.

210. Whether the Respondent had actual or constructive knowledge of the Claimant's disability and the substantial disadvantage at the time also remains in dispute.

211. It is fair to say that with the Claimant being approved for Long Term Disability Pay on 20 August 2020 it suggests recognition of disability and knowledge by the Respondent.

212. The Claimant's complaints though need to be considered with more specificity than this broad view.

213. The Claimant asserts that the first time the Respondent is aware of his knee condition is on the 21 May 2020 (as he sets out in paragraph 13 of his witness statement). He says that he visits a doctor and informs his line manager and supervisor. This is denied by the Respondent, which asserts they became aware of an issue with the Claimant's knees on the 26 May 2020.

214. It is for the Claimant to show that the Respondent had actual or constructive knowledge of all the ingredients needed to meet the definition of disability, that is a physical or mental impairment, which has a substantial adverse impact on normal day to day activities and which has lasted or is likely to last for 12 months or more (if not lifelong). Even if we accept the Claimant's evidence on this matter about what he says he communicates on the 21 May 2020, it does not prove on

the balance of probability that the Respondent knew the Claimant was a disabled person on the 21 May 2020 nor in what way he was substantially impaired.

215. It is not in dispute that the Claimant is signed unfit for work on the 26 May 2020.

216. It is not in dispute that the Claimant receives 13 weeks of sick pay as per his contractual entitlement and then has an application approved for Long Term Disability Payment giving him 75% of his salary until the 31 December 2020.

217. It is then the Claimant's evidence (at paragraph 13 of his witness statement) that on the 31 December 2020 it is the notional end of his 5-month post-surgery recovery period, by his doctor. The Claimant says that during this period, the medical evidence points to him being unable to undertake any strenuous exercise, to spend all time using crutches and to be incapable of either working on site or undertaking long-distance travel.

218. We were referred to the medical input dated 11 January 2021 which confirms the Claimant potentially being fit for desk work … "Drs Opinion … Desk job possible" (see page 222 of the Claimant's bundle).

219. Considering then the allegations of disability discrimination the Claimant makes, the Claimant needs to prove on the balance of probability that he satisfies the definition of disability at the points of complaint and that the Respondent had actual or constructive knowledge of that.

220. Chronologically the first complaint of disability discrimination is that the Respondent failed in its duty to make reasonable adjustments. The Claimant asserts that the Respondent had a provision, criterion or practice of requiring the Claimant to work on site (in particular in the period 16 to 26 May 2020). The Respondent does not accept it had such a PCP. We note that the accepted evidence of OH does appear to support the Respondent's position.

221. We can see why the Claimant asserts that the relevant period for this complaint is the period 16 to 26 May 2020 because the Claimant is signed unfit for work from the 26 May 2020 and he is not signed fit for a desk job until the 11 January 2021.

222. As at the 16 May 2020 the Claimant has not been to the doctor. He certainly does not convey to the Respondent, taking his evidence at its highest, all the ingredients of disability on the 21 May 2020, and it is not evident from the email of the 26 May 2020 that the Claimant would be considered disabled at that point (it suggests a 6 week impairment), nor that the Respondent has actual or constructive knowledge at that point of the disability or of any substantial disadvantage.

223. Further, the Claimant has not proven on the balance of probability that he made a request to work from home in the period 16 May 2020 to 26 May 2020.

224. For these reasons the Claimant has not proven matters on the balance of probability for this complaint to succeed.

225. So, to consider the facts around the first complaint chronologically of discrimination arising from disability (section 15 Equality Act 2010). The Claimant claims that in the period 4 to 11 June 2020, the Respondent was failing to respond to emails from the Claimant, leading to the Claimant suffering internal bleeding.

226. When agreeing the issues to be determined in this claim the Claimant explained that his disability led to stress, he then emails the Respondent for support and the Respondent does not respond which then aggravates his stress.

227. It was not until his closing submissions that the Claimant clarified that there was only one email not being replied to that he complained about and that was his email dated 5 June 2020 sent to OT (which is at page 48 of the Claimant's bundle in the Orange section).

228. This was not put to OT when he was cross examined by the Claimant.

229. We have looked carefully at what the Claimant's email to OT says. It refers to him feeling stressed but does not draw any link to that stress and his alleged disability, instead attributing it to the actions of BU over his expenses claim. The Claimant has not therefore proven on the balance of probability that the alleged unfavourable treatment (being OT not replying to that email) arose in consequence of the Claimant's alleged knee disability, even if the Claimant had proven on the balance of probability he was a disabled person as at the 5 June 2020 and that the Respondent knew the Claimant was a disabled person at that point, which from the evidence presented we do not find that the Claimant has shown on the balance of probability.

230. The Claimant also alleges as a complaint of discrimination arising from disability that in the period 26 July 2020 to 1 January 2021, he was treated unfavourably by the Respondent paying him a reduced salary and pension contribution, due to being placed on long-term disability pay. The Claimant explained that his disability leads to him being sick and then being placed on long-term disability pay, which is 75% of his normal pay. This is something that happens after the Claimant has exhausted his 13-week sick pay entitlement.

231. The Claimant agreed in evidence that he had asked for this as he was sick and unable to work and being provided with what he wanted was not unfavourable treatment (particularly as at this point the Claimant had exhausted his sick pay and was signed unfit for work). We agree with him and do not find it to be unfavourable treatment either. We also acknowledge that this was all done in the interests of the Claimant so he could complete his medical treatment in South Korea, which is consistent with what the Respondent says its justification for doing this is.

232. The Claimant also alleges that in the period 30 August 2020 to 27 January 2021, he was treated unfavourably as the Respondent failed to organise or facilitate the issue to him of a work visa, or medical health visa. The Claimant explained that disability leads to his inability to work and the need for medical treatment, and because of that the Respondent failed to issue a work / medical health visa.

233. The Respondent disputes it failed to do this because the Claimant had already organised his own visa.

234. It is not in dispute that the Claimant did not ask for the Respondent to sort the visa for him, him having applied for his own visa on the 18 August 2020.

235. The Claimant always had legal residency status in South Korea, so we do not find that the Claimant has proven on the balance of probability the unfavourable treatment he alleges.

236. <u>Direct Race discrimination</u>

237. The protected characteristic the Claimant relies upon for the complaint of race discrimination is that he is Black, African born with a British passport.

238. Chronologically the first allegation of direct race discrimination, which is potentially out of time, is where the Claimant alleges Mr Luca Faccenda is requiring the Claimant, on 7 September 2019, to take on the additional role of site HSE officer, which entailed significant additional workload and responsibility, without additional salary.

239. The Respondent disputes that the Claimant was required to perform two roles. We have a dispute of fact about this matter. As it is the Claimant's allegation, he has to prove on the balance of probability that he is undertaking both roles without additional salary.

240. We note that the Claimant has not presented evidence of the work he was doing in both roles and when cross examined, AP did not accept the Claimant did do both roles.

241. We do not find that the Claimant has proven on the balance of probability that this less favourable treatment as he asserts happened. At best there may be a delay in the administrative recording processes of the Respondent catching up with the work the Claimant was doing on the ground, but that is not the complaint the Claimant makes. For these reasons we do not need to go on and consider the out of time point.

242. We would observe as well that the Claimant compares himself to Ms Sonia Berti (SB), a white Italian safety engineer. About SB it is not in dispute that she only does a Technical Safety role, was employed by a different entity (Italian Eni) and was on a lower salary than that of the Claimant. There are therefore material

differences between the Claimant and who he compares himself with that can explain a difference in treatment.

243. Chronologically we then arrive at the allegation of direct race discrimination that on the 6 May 2020 the Claimant is informed he is to be unassigned. As to being 'unassigned', the Claimant confirmed that he compares himself to SB only. As this matter is connected to the Respondent's assertion the Claimant was fairly made redundant (which the Claimant also challenges as an act of direct race discrimination, also comparing himself to SB) we address this aspect below when considering the dismissal.

244. The third allegation chronologically of direct race discrimination is that Mr Ben Urmston, refused, on 4 June 2020, to permit the Claimant to work from home during COVID quarantine, unless he did so by taking annual leave.

245. We were not taken in evidence to the express refusal by BU on the 4 June 2020. However, we have looked at the matter in the broader sense and find that the Claimant has not evidenced line management authorisation to work from home, and OH acknowledges in his accepted report that there is no evidence the Claimant was refused permission to do so.

246. Further, for this allegation the Claimant relies upon the comparators of Paolo Barissielo and Francesco Acatoli.

247. It is not in dispute that there are material differences between them and the Claimant, in that they were employed by ENI SPA not EME or EIRL. They were assigned to South Korea in very different roles namely Project Execution Team and Project Services. They also had a different Line Manager. We also do not have positive evidence to not accept the explanation of BU that two ex-pat workers, Paolo Prada and Andy Bensley had line manager approval to work from home during quarantine following visits from family and others including Antonio Festa, Amran Howlader and Ziad Alasadi were able to work from home during quarantine with line manager approval after overseas travel. These individuals had obtained approval for these arrangements with their Line Manager and the Claimant had not.

248. Although BU was not present to be cross examined by the Claimant, so his evidence will carry less weight, as Respondent's Counsel submits we can still rely upon it where it has not been positively evidenced against, as in this case, that those individuals permitted to work from home had pre-authorisation. The Claimant has not proven on the balance of probability that he had such pre-authorisation, to make it a non-issue for BU, that BU would then be challenging the Claimant without legitimate reason.

249. For all these reasons about this allegation we find that the Claimant has not proven on the balance of probability some material from which we can properly conclude there has been an act of direct race discrimination as alleged.

250. Chronologically there is then the fourth allegation of direct race discrimination that Mr Ben Urmston, refused, on 19 June 2020, to grant the Claimant an entitlement for return air travel for his child.

251. It is not in dispute that BU refused the Claimant's request.

252. What is clear from the evidence is that there are unique particular factors to the Claimant's request, such as poor communication between BU and the Claimant and a lack of clarity over visas, quarantine and travel arrangements for a child.

253. For this allegation the Claimant also relies upon the comparators of Paolo Barissielo and Francesco Acatoli.

254. It is not in dispute that there are material differences between them and the Claimant, in that they were employed by ENI SPA not EME or EIRL. They were assigned to South Korea in very different roles namely Project Execution Team and Project Services. They also had a different Line Manager.

255. There is clearly room for better communication on such matters between the Claimant and BU, but we do not find that the Claimant has proven on the balance of probability some material from which we can properly conclude there has been an act of direct race discrimination as alleged.

256. Based on the facts we have found we do not find that the Claimant has proven on the balance of probability some material from which we 'could properly conclude' that on the balance of probabilities the Respondent had committed in respect of these three allegations an act of unlawful discrimination.

257. <u>Victimisation</u>

258. It is not in dispute that the Claimant does two protected acts.

259. The first is on the 23 June 2020, when he raises a written grievance against Mr Urmston, in which he referred to being discriminated against on grounds of race.

260. The second is on 23 July 2020, where the Claimant's solicitor writes to the Respondent, to reiterate and expand on that complaint.

261. The Claimant alleges that he is then victimised as a result of those protected acts.

262. The first allegation is that Mr Urmston refused to permit him to work from home, unless he took annual leave. This appears to overlap with the allegation of direct race discrimination about the alleged refusal on the 4 June 2020. In evidence the Claimant suggested that it was possibly the 19 June 2020. It is certainly not asserted by the Claimant as being a date after the first protected act, which makes sense if the Claimant was no longer at that point taking the leave that would have

required him to quarantine. As we have noted above the Claimant emailed on the 5 June 2020 (as can be seen at page 279 of the Respondent's bundle) to say he would not be taking the leave.

263. As a result, this alleged detriment cannot be significantly influenced by the protected acts as it pre-dates them.

264. It is next alleged chronologically that Mr Urmston refused to respond to emails from the Claimant between the period 23 June to 1 August 2020.

265. We have not been presented any evidence by the Claimant as to what emails he was expecting responses to in his period, so the Claimant has not proven on the balance of probability that he was subjected to such a detriment.

266. The third act of victimisation chronologically is that Ms Joanne Barnes, on 7 August 2020, challenged the Claimant's decision to seek legal advice.

267. We were referred to the emails between the Claimant and Ms Barnes dated the 7 August 2020 which are a pages 461 and 462 of the Respondent's bundle.

268. The Claimant complains about the words … "to ascertain the rationale behind your recent instruction of a lawyer during this challenging time and during your recovery.". It is not obvious that what is written by JB that the Claimant complains about is a detriment to him. It could be viewed as the Respondent communicating to the Claimant that it is one of things it would like to hear from the Claimant about. We of course note though the subjective element to there being a detriment.

269. Considering carefully what is written by JB in the context of what she writes and it being in reply to the Claimant's email, it can clearly be seen that JB is writing what she does in response to the Claimant's email of the 7 August 2020.

270. JB denied she was significantly influenced by the first protected act (us accepting she was not aware of the second protected act by the time she wrote her email, as there was no evidential basis presented by the Claimant to dispute what she says) and we accept her evidence.

271. JB was not significantly influenced by the 23 June 2020 email of the Claimant in writing what she wrote on the 7 August 2020. The significant influence was the content of the Claimant's email of the 7 August 2020 that she replies to.

272. <u>Unassigning and the dismissal</u>

273. The Respondent is a London based company of the Eni group who employs and assigns international workers to other Eni group companies and projects around the world. Respondent employees have an international employment contract with the Respondent and then enter into separate international assignment contracts with the Respondent for each assignment, which are initially always a minimum of 12 months in duration.

274. When an employee of the Respondent is not on an international assignment contract, with another group company, they typically return to their home country and are classed as unassigned under their employment contract, until another assignment opportunity arises, or their employment is closed. During unassigned periods the employee receives their notional base salary, as defined in their employment contract.

275. The Claimant began employment with the Respondent in 2014. He is assigned on a 12-month assignment to South Korea in September 2019. As the Claimant says in his witness statement at paragraph 1 this is as a Senior Technical Safety Engineer Hull.

276. It is not in dispute that the Claimant's employment is covered by an international employment contract when out of assignment and then a specific assignment contract when assigned.

277. It is not in dispute that a redundancy consultation process was started after the Respondent received the assignment termination form from the company the Claimant is assigned to.

278. We accept the undisputed evidence of the circumstances that led AP to terminate the Claimant's assignment as set out in paragraphs 13 and 14 of his witness statement.

279. The Claimant is informed of the position on the 6 May 2020, and that the assignment would now terminate on the 30 June 2020.

280. There is a follow up letter dated 6 May 2020 confirming the termination of assignment and that the Claimant is a risk of redundancy.

281. The Claimant had his first individual consultation meeting on the 19 May 2020.

282. About this process the Claimant confirmed in cross examination that he was aware of the termination date of the assignment, was aware that he was at risk of redundancy and that he did not dispute the records of the meetings.

283. As OT confirms at paragraph 29 of his witness statement the redundancy process was then placed on hold whilst the Claimant was on sick leave.

284. The Claimant then receives long-term disability pay until the 31 December 2020.

285. From the 1 January 2020 the Claimant reverted to his notional base salary. As OT then describes at paragraphs 49 of his witness statement the Respondent contacted the Claimant to explain that the redundancy consultation process would continue and a second consultation meeting took place on 11 January 2021 and OT emailed a summary of the meeting to the Claimant on 11 January 2021.

286. OT and JB then meet with the Claimant on 8 March 2021.

287. Mrs GM details in paragraph 15 of her statement that she then … "attended the final meeting on 8th April 2021 as a senior manager with authority to make a decision on behalf of EIRL.".

288. By letter dated 8 April 2021 (see pages 700 to 701 of the Respondent's bundle) it is confirmed, the Claimant is dismissed for reason of redundancy, that he will receive a redundancy payment and of his right of appeal.

289. The Claimant did not appeal his dismissal.

290. The agreed effective date of termination is the 7 July 2021.

291. The uncontested evidence of the Respondent as set out in our findings of fact above in our view support a genuine redundancy situation when the consultation process was started, in that EME served notice that they no longer required the Claimant in accordance with the contractual arrangements agreed to by the parties. From the Respondent's perspective as the employer, the work the Claimant did had ceased. The Respondent no longer had a requirement for an employee to do the work of a particular kind, namely the work done by the Claimant, as described by AP.

292. Mrs GM confirms she dismissed the Claimant for reason of redundancy as set out in paragraph 22 of her witness evidence.

293. So, to consider whether the reason for the Claimant's dismissal was redundancy and was the process fair?

294. EME, is a separate legal entity and we accept from the evidence presented the submissions of Respondent's Counsel, that EME was under no obligation to go through a selection process. We accept that EME merely needed to serve notice in accordance with the contractual arrangements. We also accept that, as submitted in evidence by the Respondent that EME fairly and reasonably selected the Claimant due to cost and there was an overall need for fewer employees on site.

295. Under these circumstances we find that more consultation would not reasonably assist matters. The Claimant has not presented positive evidence to support that it would have, and he did not appeal his dismissal, challenging this.

296. We accept that in such circumstances all that the Respondent could do was try to redeploy the Claimant whilst in consultation with him. We find that the Respondent did act reasonably at all material times. We accept that there was a lengthy consultation (which was extended to accommodate the Claimant's health) and a thorough and professional job search, extended further by the Respondent's decision to allow the Claimant to remain employed during his notice period.

297. The process was complicated and protracted because of the Claimant's health circumstances, however when it is restarted and Mrs GM makes the decision to dismiss we accept that her reason was the redundancy situation that arose from COVID and in particular for the Claimant the impact on the project being undertaken in South Korea. As Mrs GM states and we accept … "This is what happened when COVID-19 hit during 2020. All across the Eni group, our internal assignment companies began to review costs and make requests to us for our international assignees to be demobilized. This meant that we had to terminate many assignments early and the added difficulty was that there little if any alternative opportunities to consider for these employees. … During 2020 we had to close approximately 300 assignments and also make 160 of our international employees redundant, as there was no prospect of alternative work.".

298. Nothing appears to have changed between the start of the consultation process and its conclusion. Without alternative employment available, which the Claimant does not challenge evidentially that there was, by asserting there was or were a particular role or roles he could have done, dismissal for the reason of redundancy is confirmed.

299. We accept that redundancy is the reason for the Claimant's dismissal.

300. We haven't been presented evidence to show the Respondent acted unreasonably under all the circumstances in this case. The Claimant does not appeal his dismissal.

301. We find it was procedurally fair under all the circumstances in this case.

302. We find that the Respondent acted reasonably in treating the redundancy as a sufficient reason for dismissing the Claimant as determined in accordance with equity and the substantial merits of this case.

303. The Claimant has not proven facts on the balance of probability from which discrimination can be inferred concerning his unassigning. As already noted, his comparator SB has material differences in her circumstances.

304. Similarly, about the decision to dismiss by Mrs GM, the Claimant has not proven on the balance of probability facts from which race discrimination could be inferred.

305. Further for all these reasons we do not find that Mrs GM was significantly influenced by the Claimant's protected acts to dismiss the Claimant.

306. Based on the facts we have found we do not find that the Claimant has proven on the balance of probability some material from which we 'could properly conclude' that on the balance of probabilities the Respondent had committed, by unassigning the Claimant and then dismissing him, an act of unlawful discrimination.

307. Breach of contract

308. In respect of the breach of contract complaint for 3,000 Euros the Claimant confirmed he had not lost this money, so he withdrew that complaint which is therefore dismissed on withdrawal.

309. About the complaint of a breach of contract by the Respondent where the Claimant seeks the payment of 8,000 Euros in re-imbursement of flights he had pre-booked to Las Vegas we find as follows:

310. That the Claimant books his flights (10 May 2020), then seeks and is given leave approval (11 May 2020) and then makes his request for re-imbursement of the flights (12 May 2020). By the 5 June 2020 the Claimant communicates to the Respondent that he is cancelling the leave.

311. The Claimant did not use the flights but still wanted a refund of his already purchased ticket. When asked in oral evidence about cancellation of the tickets he said he had tried but was offered the opportunity by the airline to rebook rather than be given a refund. He said that he did not take out any travel insurance to cover the cost of the flights if he could not fly. He confirmed he took no other action to recover the cost of the untaken flights from the airline.

312. It is not in dispute that the Claimant did have a contractual right to flights with a budget which required Line Management approval and submission of evidence of flights. The Claimant himself in his oral submissions referred to such a process concerning a claimed trip to Paris early in 2020.

313. We accept that this right requires HR involvement and that this right requires the expense to be approved. We find that the approval of the expenses is subject to a discretion. We find that the Respondent exercised that discretion reasonably in the Claimant's case. The way the discretion was applied in the Claimant's case is also consistent with the evidence presented by the Claimant about his Paris trip; in that he claims the expense after the trip has been taken.

314. As Respondent's Counsel submits in his written submissions (at paragraph 157) … "As to the Vegas ticket … the Respondent concedes that the Claimant did have a contractual right to flights with a budget which required Line Management approval and submission of evidence of flights. However, the contract only gives the bare bones of the right. The mechanics and practicalities had to be overseen by HR which retained a discretion in that regard. A discretion which had to be exercised rationally [Clark v Nomura [2000] 9 WLUK 43]. HR's role is explicitly highlighted at 1208 [15.2.2], but in any event would have to be implied to make the contract work and as a matter of business sense especially in an ever-changing Covid world. This is reinforced by the fact that, despite there being no clear explicit contractual right for a trip to Vegas (the contract talks of point of origin trips), EME HR was content, in its discretion, to allow such a trip in principle subject to other factors.".

315. We accept that there is an approval discretion applicable to the contractual term the Claimant relies upon and we do not find that the approval discretion was exercised unreasonably.

316. In short, without approval of the incurred expense there is no entitlement to the reimbursement of the money the Claimant has spent so there can be no breach of contract about which the Claimant can claim remedy for.

317. For these reasons it is our unanimous judgment that the Claimant's remaining complaints all fail and are dismissed.

318. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 19; the findings of fact made in relation to those issues are at paragraphs 21 to 159; a concise identification of the relevant law is at paragraphs 161 to 204; how that law has been applied to those findings in order to decide the issues is at paragraphs 206 to 317.

Employment Judge Gray
Dated 5 April 2022

Judgment sent to parties: 19 April 2022

FOR THE TRIBUNAL OFFICE