EMPLOYMENT TRIBUNALS

Claimant: Mr A Stockan

Respondent: ENI International Resources Limited

Heard at: London Central (by Cloud Video Platform)
On: 11, 12, 13, 16, 17, 18 and 19 September 2024

Before: Employment Judge Joffe
Ms J Jerram
Ms F Tankard

Appearances
For the claimant: Ms G Churchouse, counsel
For the respondent: Mr K Ali, counsel

JUDGMENT

1. The complaint of direct race discrimination is dismissed on withdrawal by the claimant.
2. The complaints of being subjected to detriments for making protected disclosures are not well-founded and are dismissed.
3. The complaint of automatic unfair dismissal for making a protected disclosure is not well-founded and is dismissed.
4. The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed.
5. There is a 0% chance that the claimant would have been fairly dismissed in any event.
6. The claimant did not cause or contribute to his dismissal by blameworthy conduct.
7. The complaint of unauthorised deductions from wages in respect of the 289 extra days the claimant worked on the Iraq assignment is well-founded.
8. The complaint of unauthorised deductions from wages in respect of the hypothetical tax deducted from the claimant's salary is not well-founded and is dismissed.

9. The complaint of unauthorised deductions from wages in respect of salary for the Angola business mission was presented out of time and it was reasonably practicable for the claim to have been presented in time. That complaint is dismissed.

REASONS

Claims and issues

1. We were provided with an agreed list of issues which is reproduced below. The direct race discrimination claim was withdrawn by the claimant before the conclusion of the hearing and is therefore represented in struck out text in the list. The respondent indicated it was no longer relying on an argument of lack of good faith in respect of the claims for protected disclosure detriment.

2. We agreed with the parties that the remedy issues of contribution, Polkey reduction and Acas uplift might be suitable for determination at the same time as liability.

3. It became apparent as the hearing unfolded that the contractual arguments underlying the unlawful deductions claims had not been articulated properly in the agreed list and we discuss this further below.

~~Claim(s) under Equality Act 2010 s120~~

~~Direct discrimination: Equality Act 2010 s13~~

~~The Claimant alleges that the Respondent did the following, which constituted direct race discrimination: unilaterally instructed the Claimant to cease his assignment in Iraq.~~
~~1. Whether Claimant subjected to a relevant detriment~~

~~1.1 Did the Respondent unilaterally instruct the Claimant to cease his assignment in Iraq? The~~
~~Respondent denies that it unilaterally ceased his assignment and submits that the assignment ceased by mutual agreement and in accordance with the contract.~~

~~2. Whether treatment was less favourable~~

~~2.1 By the Respondent unilaterally ceasing his assignment, did the Respondent treat the~~
~~Claimant less favourably than it treated Isabella Sciacovelli?~~

~~2.1.1 If so, was there any material difference between the circumstances relating to the Claimant and Isabella Sciacovelli?~~

~~3. Reason for less favourable treatment~~

~~3.1 If the Respondent treated the Claimant less favourably, was this because of the Claimant's nationality which is British?~~

~~4. Remedy~~

~~4.1 Is it just and equitable to award compensation?~~

~~4.2 What amount of compensation would put the Claimant in the position they would have been in but for the contravention of the Equality Act 2010~~

~~5. Whether claim is in time~~

~~5.1 Has the Claimant brought their claim within the time limit set by Section 123(1) of the~~
~~Equality Act 2010 bearing in mind that the assignment came to an end on 24 March 2023 and that is the act complained about.~~

~~5.2 If not, is it just and equitable for the Employment Tribunal to extend time for the presentation of the complaint pursuant to section 123(1)(b) of the Equality Act 2010?~~

Detriment: protected disclosure

The Claimant alleges that the Respondent subjected them to a detriment, in contravention of section 47B of the Employment Rights Act 1996.

6. Whether detrimental acts occurred
6.1 Did the Respondent do the following:
6.1.1 Withhold salary due to the Claimant;

6.1.2 Not give the Claimant a new assignment; and/or

6.1.3 Reserve its right to consider instituting disciplinary action against the Claimant.

6.2 Was the Claimant subjected to a detriment by the acts complained of?

7. Whether Claimant made a qualifying disclosure

7.1 Did the Claimant disclose information? The Claimant relies on the following:

7.1.1 an email of 4 October 2022 at 11:49AM to Patricia Abidakun;

7.1.1.1 Did the Claimant disclose to Patricia Abidakun that he would not agree to the business mission as to do so would be illegal? The Claimant stated "As stated I will not be signing the BM letter in its current form";

7.1.2 a phone call of 4 October 2022 between the Claimant and Nicola Ghedi;

7.1.2.1 During this call, did the Claimant disclose to Nicola Ghedi that he would be unwilling to work in Angola on the visa provided as to do so would be illegal? In particular, did he state, “I [the Claimant] will not sign the business mission side-letter and will not travel work and live in illegally in Angola”?

7.1.3 an email of 4 October 2022 to Nicola Ghedi;

7.1.3.1 Did the Claimant disclose to Nicola Ghedi that he would not sign an ‘erroneous document’, the business mission letter prepared by the Respondent, as to undertake the business mission with an incorrect visa would be illegal? The Claimant stated “the letter does not reflect previous discussions and arrangements” and “it is not possible to sign erroneous documents”.

7.1.4 an email of 5 October 2022 to Patricia Abidakun;

7.1.4.1 Did the Claimant disclose to Patricia Abidakun that there was no prospect of him signing the business mission letter for his proposed assignment to Angola on the grounds that to undertake this assignment would be illegal? The Claimant stated “As intimated to you on more than one occasion, there is no prospect of my signing the BM letter in this form as it does not reflect the tenant of discussions conducted even today. It is simply not possible to present such an inaccurate document, let alone request it be signed”.

7.1.5 a meeting on or around 5 February 2023 with the Respondent’s HR team;

7.1.5.1 During this meeting, did the Claimant disclose concerns about having been instructed to work in Angola illegally? In particular, did the Claimant state that he “was concerned to travel to Angola on a business mission on an e-visa while working, and the potential penalty may be imprisonment if in breach of the rules of the e-visa, which may lead to being revoked from the law society”?

7.1.6 a meeting on or around 13 April 2023 with Gaukhar Mukazhanova.

7.1.6.1 Did the Claimant disclose concerns that the instruction to work in Angola on the visa he had been provided would be illegal? In particular, did he state he “was concerned about [his] business mission to Angola in October 2022 which he took travelling with a tourist visa stating [he] was not permitted to be remunerated for work purposes”?

7.2 Did the Claimant reasonably believe the information disclosed tended to show that a criminal offence was likely to be committed?

7.3 Did the Claimant reasonably believe it was in the public interest to make the disclosure?

8. Whether qualifying disclosure was protected

8.1 Was the disclosure made in accordance with section 43C of the Employment Rights Act 1996? In particular:

8.1.1 Was the qualifying disclosure made to the Respondent or to any person falling within section 43C(1)(a), (1)(b) or (2).

9. Reason for treatment

9.1 If the Claimant made a protected disclosure, was this the reason for the treatment complained of?

10. Whether claim is in time

10.1 Has the Claimant brought their claim within the time limit set by Section 48 of the Employment Rights Act 1996.

11. Remedy

11.1 Is it just and equitable to award compensation?

11.2 What loss has the Claimant sustained in consequence of the treatment complained of?

11.3 Has the Claimant taken reasonable steps to mitigate their loss?

11.4 Was any qualifying disclosure made by the Claimant in good faith? If not, is it just and
equitable to reduce any compensatory award and to what extent?

11.5 Did either party unreasonably fail to follow the Acas Code of Practice? If so, is it just and equitable to increase or reduce the award and, if so, by how much?

11.6 Did the Claimant cause or contribute to the treatment to which the complaint relates? If so, to what extent should any compensation be reduced?

Automatically unfair dismissal: protected disclosure

12. Whether Claimant made a qualifying disclosure

12.1 Did the Claimant disclose information? The Claimant relies on the disclosures at paragraph 7.1 above.

13. Reason for dismissal

13.1 If the Claimant made a protected disclosure, was that the principal reason for dismissal?

13.2 Did the Claimant reasonably believe the information disclosed tended to show that a criminal offence was likely to be committed?

13.3 Did the Claimant reasonably believe it was in the public interest to make the disclosure?

14. Whether qualifying disclosure was protected

14.1 Was the disclosure made in accordance with section 43C of the Employment Rights Act 1996? In particular:

14.1.1 Was the qualifying disclosure made to the Respondent or to any person falling within section 43C(1)(a), (1)(b) or (2).

Ordinary unfair dismissal

14.2 Was there a redundancy situation? ie

14.2.1 Had the requirements of the business for employees to carry out work of a particular kind in the place where the Claimant was employed ceased or diminished?

14.3 If so, was the Claimant's dismissal wholly or mainly attributable to that fact?

14.4 If not, was the reason for the Claimant's dismissal a business reorganisation and, if so, was this a substantial reason of a kind such as to justify the dismissal of an employee holding the position which the Claimant held?

14.5 In the circumstances, did the Respondent act reasonably in treating this reason as a sufficient reason for dismissing the Claimant, taking into account its size and administrative resources and having regard to equity and the substantial merits of the case? This gives rise to the following sub-issues:

14.5.1 Was a fair procedure followed by the Respondent during the alleged redundancy process?

14.5.2 How was the pool of potentially affected employees selected?

14.5.3 Was this an appropriate pool?

14.5.4 Was there adequate consultation with the Claimant?

14.5.5 What selection criteria were considered in selecting the Claimant for redundancy?

14.5.5.1 Were the selection criteria reasonable?

14.5.6 Was suitable alternative employment considered by the Respondent and offered to the Claimant?

14.5.7 Was the decision to dismiss within the band of reasonable responses which a reasonable employer might have adopted?

Remedy

14.6 Basic award

14.6.1 When was the effective date of termination?

14.6.2 What was the length of the Claimant’s period of continuous service at the effective date of termination?

14.6.3 What was a week’s pay for the Claimant?

14.6.4 Was the conduct of the Claimant before dismissal such that it would be just and equitable to reduce the amount of the basic award and, if so, to what extent?

14.7 Compensatory award

14.8 What loss has the Claimant sustained in consequence of the dismissal, so far as that loss is attributable to the Respondent? This gives rise to the following sub-issues:

14.8.1 Has the Claimant taken reasonable steps to mitigate his loss?

14.8.2 What is the chance that the Claimant would have been fairly dismissed in any event had a different procedure been followed?

14.8.3 What is the chance that the Claimant’s employment would have ended shortly in any event by reason of conduct and/or some other substantial reason?

14.9 Did the Claimant cause or contribute to the dismissal by unreasonably refusing suitable alternative employment and/or his misconduct. If so, should the Tribunal reduce any compensatory award under section 123(6) of the Employment Rights Act 1996 and make an equivalent reduction to any basic award under section 122(2)?

14.10 Was any qualifying disclosure made by the Claimant in good faith? If not, is it just and equitable to reduce any compensatory award and to what extent?

14.11 Did the Claimant cause or contribute to his dismissal? If so, to what extent should the compensatory award be reduced?

14.12 What was 52 weeks’ pay for the Claimant?

Unlawful deduction from wages

The Claimant alleges that the Respondent made unauthorised deductions from wages, in contravention of s13 of the Employment Rights Act 1996.

Whether deduction(s) made from wages

14.13 What was the total amount of wages properly payable to the Claimant on the following occasions:

14.13.1 For the period until 30 August 2022 289 days’ salary;

14.13.2 For the period 6 October 2022 – 9 November 2022 in respect of the business mission to Angola; and/or

14.13.3 For the period 2015 – 2023 in respect of 'hypothetical tax'.

14.14 Was the sum of £404,440.00 payable as wages within the definition in section 27 of the Employment Rights Act 1996?

14.15 What was the total amount of wages actually paid to the Claimant on the occasions in question?

15. Whether deduction(s) authorised

15.1 Did the Claimant signify in writing their agreement or consent to the making of the deduction (or part of it) before the event on account of which the deduction was made?

15.2 Was the deduction (or part of it) required or authorised to be made by virtue of a term of the Claimant's contract?

15.2.1 Was it a written term of which the Respondent give a copy to the Claimant before the deduction was made?

15.2.2 Did the Respondent notify the Claimant of the existence and effect of that term before the deduction was made?

16. Remedy

16.1 What is the amount of the deduction made

Findings of fact

<u>The hearing</u>

4. We were provided with a bundle running to 1045 pages. The claimant provided a witness statement and gave oral evidence on his own behalf. For the respondent we received witness statements and heard oral evidence form the following:
    a. Ms R Tran, head of HR operations - North and West Africa;
    b. Mr N Ghedi, head of legal assistance, upstream Africa, Levant and reserves;
    c. Ms G Mukazhanova, at the relevant time head of global people management;
    d. Mr D Cockburn, head of tax and payroll.

<u>Facts in claim</u>

5. The respondent is part of a group of companies which operate internationally in the energy market. The respondent is a London-based company which

recruits and employs personnel to fill positions within the group. We were told that there were over 770 employees holding internationally mobile roles. These employees are mostly employed on international employment contracts and are offered assignments with group companies or in joint ventures in different countries. The respondent is the employer and responsible for HR issues but does not manage those employees on a day to day basis or directly receive the benefit of their services.

6. Employees on an assignment will have an assignment contract. The respondent has an international employee handbook, which it accepted is non-contractual. Assignments are typically for an initial period of twelve months, but we were told that they are often extended.

7. The group of companies has different professional departments known as 'professional families', which we were told, operate across the group. There is a legal professional family. Mr Ghedi as head of legal assistance, upstream Africa, Levant and reserves, coordinated legal resources across that area and provided legal assistance himself when necessary. He told us that there were others at his level coordinating legal resources for the Americas, Middle East, Asia and the far East.

8. Mr Ghedi was asked about the number of subsidiaries in the group; he thought there were approximately 50. Usually a subsidiary operates in one country. He said that some subsidiaries had no legal support and some had local support, for example there was no one on the ground in Libya. He could not estimate how many subsidiaries did have in-house legal support.

<u>Policies etc</u>

9. We were taken to a number of policy documents and the following were relevant to the issues we had to determine.

10. We saw a professional operating instruction which contained the following provisions as to the duration of assignments:

6.1.1 Duration
In general, the company foresees the Eni person to be assigned to the destination site/yard for a period between 12 and 24 months.
At the end of this period and in line with business needs, the company reserves the right to extend the long-term international assignment for the Eni person taking into account the legislations applicable in the home and host Countries as well as logistics and environmental conditions in the host Country.
Subject to the provisions of the following paragraph, any extensions, of a maximum duration of 12 months each, may take place on condition that the total maximum period of assignment does not exceed 3 years, including top management positions.

The overall period of the assignment refers to the stay in the host Country and not in the specific location or position.
In addition, the Eni person may not be assigned to a destination in order to cover the same position he/she already held there, before 24 months have elapsed since the end of the previous assignment.

Derogation from duration: contract extension process
Within the termination of the assignment, the evaluation of possible extension period may occur without specific approval procedures in compliance with the standard times defined above (3 years).
The exceptions beyond these time limits - always taking into account the legislations applicable in the home and host countries - can instead take place only in exceptional and justified cases, with a maximum limit of other 3 years (6 years total), through a formal authorization process and the filling of related form1: this form must contain the detailed description of the reasons for which the extension is requested, as well as the authorization signatures of the competent line functions and the human resources' function.
The form must be completed, archived and transmitted to the competent Eni function responsible for monitoring.
In order to ensure that the process runs smoothly and effectively, an even more precise and timely joint scheduling between the line and human resources functions involved is recommended.

11. The following parts of the International employee handbook were relevant:

5.3.3 Tax Policy
A hypothetical tax amount is calculated with reference to your Notional Base Salary and is deducted from your gross salary, or such other elements of your salary as specified above and within your contract. EIRL, or your Assignment Company, will then be responsible for paying any Assignment Country taxes that relate to your EIRL employment income.
…

5.3.6 Pay in lieu of extra working days
If you are on a Rotational Assignment and have worked extra days in excess of your specified work periods, you may be entitled to pay in lieu of such additional days worked at the end of your assignment, subject to the terms of your contract. If you have worked additional days, you should discuss this with your Assignment Company HR contact as soon as is reasonably practicable and in any case before the expiry of any deadlines set by local assignment policy.
…

5.3.8.2:Hypothetical tax deductions are non-refundable in all circumstances.
…

5.3.8.4 Hypothetical Tax
A hypothetical tax amount is calculated with reference to your Notional Base Salary and is deducted from your salary. The hypothetical tax to be deducted

will be indicated in your International Assignment Contract. The hypothetical tax is non-refundable and independent from actual home or host country liability. Hypothetical tax deductions are applied as an internal tax equalisation tool, and is not eligible for foreign tax credit.
…

5.12.1.2 Unused Leave

Upon the closure of the assignment contract, any remaining balance of days (positive or negative - due to additional days worked on top of the rotation set out by the contract, or additional rest days taken) will be calculated and paid out (or recovered) based on the rotation schedule outlined in your contract. For this purpose, a day's pay is usually calculated as 1/365th of the current annual net or notional salary as applicable.

12. On 25 September 2015, the claimant commenced employment with the respondent as a legal & corporate affairs manager. He started an assignment with Eni Iraq B.V. From that time until 24 March 2023 when the assignment in Iraq ended, deductions of hypothetical tax were made from the claimant's salary.

13. The claimant's assignment was extended a number of times. His international assignment contract dated 18 September 2019 included the following provisions:
Your international assignment start date is set out in the enclosed terms and conditions of assignment. In the event of any conflict between your contract of employment with EIRL and your terms of assignment during your period of assignment, the terms of the assignment shall take priority. At all other times both prior to commencement and following termination of your assignment, the terms of your contract of employment shall take precedence. For the avoidance of doubt, any entitlements set out in the enclosed terms and conditions of assignment (such as salary) shall be inclusive of any such entitlements under your contract of employment and shall only apply during the period of your assignment.

14. The contract described the work pattern as 'Rotational 28/28' which meant 28 days on an assignment followed by 28 days of leave. There was a notice period of one month. The section on remuneration specified a gross and net salary and a sum for hypothetical tax. As to tax the contract specified:
During your assignment, EIRL will be liable for employment related taxes incurred by you on your EIRL income according to the fiscal laws of the Assignment Country, where such taxes are incurred pursuant to your assignment.

Throughout your assignment, EIRL will reduce your Gross Salary by the Hypothetical Tax (as defined in the International Assignment Contract).

Hypothetical Tax is a deduction used for tax equalization purposes only. A hypothetical tax amount is calculated with reference to your Notional Base Salary and is deducted from your salary. EIRL will then be responsible for paying any Assignment Country taxes that relate to your employment income with EIRL. You will be responsible for paying any Point of Origin taxes or any Assignment Country taxes that arise on non-EIRL income.

15. Some relevant definitions were:

"Hypothetical Tax" - means the hypothetical tax which shall be made from your Gross Salary in accordance with the terms of this Contract and
"International Employee Handbook" - the policies and procedures governing your Employment and Assignment. This document will not form part of the contractual terms and conditions of Employment.

16. We also had regard to the following provisions:
5.3. Assignments are identified and prioritised based on the Group's global operations and project activity. As you are performing an internationally mobile role, you hereby agree that you will be accommodating when presented with options for future assignments. In the event that you unreasonably (in the opinion of the Company) refuse new assignments, or if the Company is unable to identify a suitable new assignment for you, you hereby accept that it may be necessary for the Company to terminate your Employment in party during the probationary period by giving the accordance with section 15.

5.6 If you return to your Point of Origin:
i. during a period when you are unassigned;
ii. following notice of termination of your Assignment being given; or
iii. if you are otherwise required to be in your visa/work permission to enable you to lawfully Point of Origin (e.g. for visa reasons); then your salary will revert to your Notional Base Salary. For the avoidance of doubt, this does not apply to periods when you return to your Point of Origin for the purpose of annual leave.

7.6. If you are on Rotational Assignment and have worked any additional days in excess of those specified in your Assignment Offer, you may request a reconciliation of days worked. This reconciliation will be carried out at the completion of a full Contract Year. You will be reimbursed for any extra days worked and paid through the payroll at the end of the Assignment.

8.1. For the purposes of the Employment Rights Act 1996, you hereby authorise the Company and/or the Assignment Company, if applicable in accordance with section 7.5 above, to deduct from your remuneration hereunder, at any time during the Assignment or following termination thereof, any monies owed by you to the Company or any Group Company is otherwise permitted by law to deduct, including but not limited to deduct including but not limited to:
a) Hypothetical Tax;

…
16. OTHER CONTRACTS
This Contract (together with any applicable terms set out in your International Employment Contract) constitutes the entire agreement between the parties in respect of your Assignment, and applies in respect of your current Assignment only.

17. As to annual leave, any statutory entitlement was deemed to have been taken during an employee's specified leave period, which we understood in the claimant's case to be the 28 days off assignment in his rotation pattern.

18. Between 14 November 2021 and 30 August 2022, the claimant worked 289 days in excess of the days required under his international assignment contract. On 6 March 2022, the claimant signed a contract extension to continue to act as head of legal and corporate affairs. There was another legal professional also assigned to the Iraqi entity, Ms I Sciacovelli.

19. On 16 May 2022 Mr P Marques was proposed as a replacement for Ms Sciacovelli, whose international assignment contract in Iraq was due to expire in November 2022. Internal correspondence said:

As just anticipated, we hereby inform you that colleague Pedro Marques, who is currently on duty in Mozambique, is planned to exit to Iraq as a replacement of colleague Isabella Sciacovelli. This latter is planned to exit to Angola as of the expiry date of the current contract (end of November 2022).
From the side of Legal Professional Area the replacement of Marques has been already identified in the person of Romina Giordani, whose candidature will be formalised shortly.
I kindly ask you to let us have the number of the accrued days of leave of Marques in order to allow us to timely set up ourselves for the moving. It must be considered that it would be desirable to succeed to have the colleague arriving in Iraq for a period of handover with colleague Sciacovelli before she leaves Iraq.

20. 16 May 2022 was the date the new professional operating instructions with the limitations on assignment length we have set out above came into effect. Ms Mukazhanova said that at the time the instruction came into force, there were about a hundred employees who had exceeded the new three year rule. Ms Mukazhanova said the business had imposed a deadline of 1 October 2022 for the employees to be reassigned. Reassignment typically takes about four months so there was some urgency to starting to explore reassignment. Ms Tran told the Tribunal that new policy had to be rolled out and applied immediately.

21. On 7 June 2022, there was further internal correspondence about the situation with respect to legal personnel in Iraq:

I have arranged in a video conference with the corporate hr department to put things on hold, by drawing their attention on the fact that on March 23 Stockan expires and it is a 6+. Furthermore , a double change of Legal Manager cannot be sustained over a 4 months' period. They will be giving us fb.

22. On 8 June 2022, the claimant was substituted for Ms Sciacovelli in the proposals for Iraq:

The candidature has been examined by MD. As for each of MD's first line reporting positions, MD would like to arrange a get-to-know interview. Before conducting the interview we suggest to check/confirm from your side that the candidate will be replacing Mr Stockan (not Sciacovelli). This relates to the fact that Stockan has been under Iraqi contract for almost 8 years and based on the OPI at the next expiry date of his contract (March 2023) it cannot be renewed anymore. The above aims at avoiding to replace the 2 legal managers nearly at the same time, thus completely losing any historical memory on the past. This may entail severe consequences on the legal activities in progress.

23. The claimant accepted that this email supported the proposition that he was being moved from his role due to the amount of time he had spent in Iraq compared with Ms Sciacovelli and ultimately withdrew his claim that the decision had been influenced by race.

24. On 8 June 2022, there was a phone call between the claimant, Mr J Hart,)head of legal) and Ms V Ferri (head of international upstream and procurement legal assistance) about possible reassignment of the claimant to London, Jakarta or Angola at the expiry of his current assignment in March 2023. The claimant told us that the discussions were about how his contract was ending in March 2023 and would not be extended. The respondent would start looking for a new role. Three possibilities were identified. He did not require further information about the Jakarta possibility as that had been mooted in 2019 and he knew about it. The claimant said that he was told that there was no pressure of time. This was an initial discussion and other things would come up.

25. On 10 June 2022: the claimant sent an email to Mr Hart

Thank you again for both you and Valentina's time during the call on Wednesday. I had planned to e-mail you yesterday, however, the laptop would not connect to the internet in the hotel we stayed in last night, saying "unsecure network".
Thus, I apologise for the slight delay in reverting.

As promised, I have given the matters discussed further consideration. I had some additional questions on the prospective roles discussed, however, these were more H.R. related matters (i.e. if there was a Job Description for both/either role, what the tax regime was in Angola, if accommodation was *included with the London role etc). Is there anyone I would be able to discuss such HR matters with, or should I direct them to my HR contact within EIRL?*

As discussed, I would wish to fulfill the commitment I made to Isabella in regard to July/August coverage in Basra.

26. We saw an internal email dated 1 July 2022, which said that the claimant was being nominated for the Angola position. The claimant told the Tribunal that he did not know that was happening and had not consented to it. That same day the managing director of the Angolan entity consented to the proposal. The claimant told the Tribunal that he had had no offer and was proposed and accepted without his own knowledge.

27. The claimant's evidence was that the usual process was for a candidate to accept before the managing director was asked to approve a candidate; otherwise it would be a waste of the MD's time.

28. On 4 July 2022, it was confirmed that Mr Marques would be replacing the claimant and on 5 July 2022 the claimant was informed by the managing director of the Iraq entity that his assignment in Iraq would not be renewed beyond 24 March 2023. He was told that he should cease performance of his duties in Iraq on 30 August 2022. The claimant said that he was not told that this was because he was needed in Angola either at the time or subsequently. He said that was not the reason ultimately given for shortening his time in Iraq. He said that he and the respondent had had a high level discussion about possible roles. Angola was simply one of several roles under discussion.

29. On 14 July 2022, the claimant emailed HR about the balance of days worked by him in the Iraq assignment:

In advance of my calls next week with the professional family and EIRL, I had been advised to check my balance at EIBV.

From my timesheets, and assuming contract at EIBV is closed on 31 August 2022, my balance would be 319.4 days. This is obviously a very different figure from that quoted in my office when we spoke last week. So I just wished to ensure we were aligned.

30. On 6 August 2022, Ms J Mathew emailed the claimant

Have reviewed the presence balance and accordingly please refer attached the balance statement as of last work day at the camp on 29/8, total 289 days are accrued with tentative last contractual day 14.06.2023.

Balance days signifies in the system aren't accurate due to the remote work/mission ratio calculation, hence please refer the manual calculation in line with the standard approach.

Please note as soon as the next assignment start date is confirmed, we will close the balance a day prior to the next assignment and that time the remaining balance will be included in the EIBV payroll.

Please do let us know for any clarifications you may require in this regard, alternatively if it's alright then please send us the signed copy to proceed ahead the closure process.

31. The claimant told the Tribunal that he did not understand what the wording about 'tentative last contractual day' meant as the contract ended in March 2023. He denied he understood it as saying that he would be using up the 289 excess days he had worked as leave until he started a new assignment.

32. The balance statement we saw had columns for work and rest days. It showed a total balance of additional days of 289. It specified the last work day as 29 August 2022. It specified the 'theoretical last contractual day' as 14 June 2023. It said that 'days to be paid in lieu at the end of last contractual day' was '0'. The respondent argued that this was to be understood as showing that the employee would be using up excess days worked as leave and the 'theoretical last contractual day' was the date when all of the excess days would have been used as leave.

33. The claimant told the Tribunal that he did not know what the theoretical contractual date was and he was just signing that he agreed that 289 days was the correct figure for the excess days he had worked. He said that the document did not say he would instead be taking the days in lieu or having them imposed as holidays. He said that he did not understand that the payment would go to zero by 14 June 2023. This was not the tenor of the discussions he had had.

34. On 8 August 2022, the claimant signed the accrued additional days worked record / balance statement. He said that in doing so he was confirming 289 additional days had been worked.

35. His email said:

As requested, please find attached the signed balance sheet, as it matches the submitted timesheets.

36. The claimant disputed in cross examination that in signing this document he was agreeing that those days would be deducted until he started new assignment, He said that Ms Mathew was calculating the days; that was her role. That was all he was responding to. He said that he did not understand from the email and attachment that the respondent was proposing to deduct the days as leave rather than pay him for them. He did not ask what the June date meant.

37. 10 August 2022, there was an email from Ms Abidakun in HR to the claimant about his last day in Iraq and the additional days worked record:

In reference to your contract with Eni Iraq, as anticipated I received confirmation from your focal point for Ranine Jaber in cc. She confirmed confirm indeed your last day in camp will be on the 30th August 2022, however you will remain in contract under EIBV while using his annual leave balance. Eni Iraq have confirmed, you have enough annual leave balance to take you up until next year 2023.

Iraq have also agreed that once you will be ready to mobilise to Angola, they will liquidate the remaining balance.

Iraq have advised they are working on the final balance, which will be shared with us in due course.

As mentioned during the call the process for Angola can take up to 6 months but we will aim to expedite the process as quick as we can – also dependant on the WP approval which we hope the authorities will approve in time once the legalised documents have been sent to Angola form the UK.

I hope this clarifies. Our immigration providers will be in touch to kick-start the process.

In the meantime, should you have any questions please do not hesitate to contact me. Any queries concerning your Iraq contract please contact Ranine directly for an update.

38. The claimant told the Tribunal that he did not remember reading this email at the time. Ms Abidakun was an administrator with no power to amend his contract and he would not have put any weight on the email as a result. He said that he would not have challenged Ms Abidakun as an HR administrator; he would have raised any problems with his contract at the appropriate level.

39. An internal email to Ms Abidakun at the time said:

I confirm that Anthony Stockan's last day in camp will be on the 30th August 2022, however he will remain in contract under EIBV while using his annual leave balance. From my conversation with Iraq, Anthony has enough annual leave balance to take him into next year 2023. Iraq have agreed that once he is ready to mobilise to Angola, they can close his assignment and liquidate the remaining balance. Iraq have advised they are working on the final balance, which will be shared with us in due course.

40. The Tribunal also saw some emails from this period about vaccines required for the claimant to go to Angola. The claimant said that he needed the vaccines to do an orientation visit. He had no offer and no job description for the Angola assignment.

41. On 10 August 2022, the claimant sent an email to Ms Abidakun stating:
As discussed, my biggest concern remains regarding the timing of matters. I conclude with Eni Iraq on 30 August (my replacement arrives on 19th), and would hope to start with Angola as soon as possible (hopefully within October) even remotely in the first instance. I have signed for my balance of days and EIBV will pay this at the commencement of the new assignment.

42. The claimant said that this referred to getting on with the orientation visit. He had not had an offer for the Angola role. The orientation visit was necessary to see if he would want to take the role.

43. On about 23 August 2023, Mr Ghedi had a telephone conversation with the claimant about the Angola role in which he said that the business could not wait until the end of November to mobilise the claimant to Angola and that the claimant might be able to start earlier under a business trip arrangement pending finalisation of the work permit. It appeared from Mr Ghedi's statement that this was his first conversation with the claimant about the Angola role. He suggested in cross examination that there were earlier conversations but ultimately seemed to accept that those may have been with other people.

44. Mr Ghedi said that his impression from discussions with the claimant was that, subject to financial arrangements, the claimant was willing to accept the Angola assignment; he had worked in Angola before and seemed enthusiastic. Mr Ghedi did not detect any strong reluctance or pushback. It was the financial element the claimant wanted to know more about, and Mr Ghedi was comfortable that the package was likely to be in line with his expectations.

45. 29 August 2022 was the claimant's last day on shift in Iraq. Technically he remained "assigned" to Iraq under his existing international employment contract as the assignment was not formally terminated.

46. On 6 September 2022, there was a telephone call between the claimant and Mr Simao of Azule Energy, the Angolan entity, about the Angola assignment.

47. On 28 September 2022, an Angolan tourist / business visa was issued for the claimant.

48. The visa stipulated

IMPORTANT INFORMATION ABOUT THE TOURIST/BUSINESS VISA:
1. It does not allow the exercise of any remunerated activity;
2. The tourist / business visa is valid for 120 days, for multiple entries, and allows a stay of up to 30 days, and can be extended twice for the same period;
3. The filing of false statements constitutes a crime;

49. One of the requirements on the visa was that the claimant have a round trip ticket.

50. On 3 October 2022, the claimant was issued with what was described as a Side Letter for the Pre-Assignment Business Mission to Angola commencing on 5 October 2022. This said inter alia:

Immigration compliance must not be abused as host country authorities can remove, fine or imprison employees who do not comply with all immigration/work permit requirements. Activities that can be legally performed during a business strip and the duration limit for the location must be respected and adhered to."
The side letter contemplated that the business mission would potentially carry on until the start date of an assignment contact5 in Angola.

51. The claimant said that he understood from the visa that he could not do any remunerated activity in Angola. He was not at this time provided with a round trip ticket. He told the Tribunal that he therefore considered that the business mission was not in accordance with the visa.

52. The claimant gave evidence about his beliefs as to the situation if he did go to Angola on this visa. He said that he believed that if his situation came to the attention of authorities, they would look more closely at the respondent's activities and there would be a knock on effect on other employees on these visas. This could expose them to repercussions such as deportation and imprisonment. The belief about the wider implications of the claimant going on the business mission on the visa provided was first mentioned by the claimant in response to supplementary questions in chief.

53. On 3 October 2022, the claimant received the visa and side letter and wrote to Ms Abidakun:

Can you please confirm the proposed duration of the mission to Angola, with exact dates? This does not appear to be contained in any of the documentation which has been provided. Also, what are the proposed arrangements for remote working to year-end? This also does not appear to be contained in any of the documentation.

54. On 4 October 2022, Ms Abidakun wrote to the claimant

As stated in the BM letter the date to commence on the 5/10 and will continue until the start of your EIRL contract with Angola. The initial timeframe for your visa is 1 month, however Angola has confirmed they will apply for a renewal when you are onsite.

In addition as previously discussed during our call the remote working is not required hence the issuance of the BM visa. You will be travelling Angola to commence your activities.

Please kindly confirm your acceptance and sign the BM letter sent to you, so we can send your flight ticket to you.

55. The claimant told the Tribunal that it was this email which caused him alarm because of the instruction to 'commence activities' which he says he perceived to be in contravention of the visa.

56. The claimant replied to Ms Abidakun:

I am sorry, your e-mail is unclear and is not consistent with previous information.
No such discussion on remote working was had, I was previously informed I would undertake a mission to site, followed by a period of remote working prior to mobilization in Q1 2023.
I can not sign a BM letter without knowing the return date, I have to make arrangements prior to departure and can not do so on an open-ended basis.

57. Ms Abidakun then wrote to the claimant:
The plan is always for you to go to Angola for the mission.

The approx. date for you to start EIRL contract with Angola you contract is December with hope the mobilisation process will be completed by then, hence we foresee the mission to end around this December.
If you wish for us to have a call please confirm. However we need this finalised today.

58. The claimant responded with the email which was said to contain his first protected disclosure: *As stated, I will not be signing the BM letter in its current form.*

59. Ms Abidakun responded to that email:

Please kindly reconfirm your concern? As we have confirmed the dates of the mission and the requirement for you to be in the assignment country for the duration of the mission.

60. The claimant suggested in evidence that he was having telephone conversations with Ms Abidakun as well and made her well aware of his concern about illegality. He accepted that concern was not expressed in writing. These telephone conversations were not relied on a protected disclosures. They are not referred to in the contemporaneous documents, which instead raised issues about the duration of the assignment and the possibility of some of it being conducted remotely.

61. A further protected disclosure was said to have been made on 4 October 2022 in an email to Mr Ghedi. The email said:

I have not been provided travel instruction and flight information from EIRL HR, nor a mission itinerary. I have received a Business Mission Letter from EIRL HR, unfortunately, however, the letter does not reflect previous discussions and arrangements, and as such I am unable to sign it. HR said the travel instructions would only follow after my signature of the Business Mission Letter.

For your information, I have always previously agreed to everything proposed by Eni (early returns, delayed departures, covering positions etc.) and this can be confirmed by John, Valentina and Seger, and as such this is not something I would do lightly. However, as lawyers it is not possible to sign erroneous documents.

62. Mr Ghedi told the Tribunal that he did not understand the reference to 'erroneous documents' to be a reference to illegality. Given how complex HR and immigration processes connected with mobilising an employee to a new country were, he said that he was not surprised that there were mistakes in documents. He said that he was frustrated if delays were being created by mistakes in documents. He therefore followed it up. The concern the claimant had was to have an end date, Mr Ghedi understood, because he had family matters to attend to. Mr Ghedi said that he was concerned to facilitate that.

63. On 4 October 2022 there was also an alleged protected disclosure in a phone call between the claimant and Mr Ghedi. The claimant said he told Mr Ghedi that he would be unwilling to work in Angola on the visa provided as to do so would be illegal. In particular, he said that he stated, "I will not sign the business mission side-letter and will not travel work and live illegally in Angola".

64. Mr Ghedi's evidence was that he did not recall the claimant raising these concerns. It was put to Mr Ghedi that the discussion must have been about what the claimant had said about the documents being erroneous. Mr Ghedi agreed that that the discussion was about erroneous aspects of the side letter but not that the concerns related to the visa. He said that he contacted HR to see that the side letter was rectified. He later messaged the claimant to see if the documents had been received and the claimant replied that they were in order so he presumed anything erroneous had been resolved to the claimant's satisfaction.

65. The claimant in turn was cross examined about why none of his concerns about illegality / the visa issue was explicitly raised in any document. The claimant said that he was raising the concerns in telephone calls.

66. The claimant said that he was given comfort in the phone call with Mr Ghedi because the instruction to start work was withdrawn and he was told he would leave after thirty days. He was told it would just be a visit and not commencing activities. In fact he did not receive the return ticket and had to pursue it whilst

in Angola. He did not accept in evidence that the issue was fully resolved but said that he was given comfort to travel.

67. On 5 October 2022, Ms Abidakun wrote to the claimant:

Hope you are well.

We have sent to you in attached the amended BM letter to be signed electronically, which will now commence on the 6/10 and also in attached your flight and hotel ticket for your stay in London. Please kindly sign the letter before COB today.

I am happy to have a call today at 4pm today if necessary.

68. The claimant replied with another alleged protected disclosure:
As intimated to you on more than one occasion, there is no prospect of my signing the BM letter in this form as it does not reflect the tenant [sic] of discussions conducted even today. It is simply not possible to present such an inaccurate document, let alone request it be signed!

69. Ms Tran said that HR staff tried to call the claimant to understand what his concerns were but could not get through. In any event the claimant signed the side letter on 6 October 2022. Ms Tran said that they did not know what he was concerned about or why he signed the side letter in the end. At that point she believed he was satisfied with the business mission and that there were no outstanding concerns. She said that she was not aware of any concerns about the visa.

70. Between 6 October and 9 November 2022, the claimant was on the business mission to Angola. The claimant told the Tribunal that during this period, he performed the usual duties of an in house lawyer: correspondence, advice, mentoring junior colleagues and attending business meetings.

71. The claimant's evidence was that in some ways this activity did breach his visa but he said that he felt more comfortable once he had a return ticket as, if someone came from the immigration authorities, he could point to his return ticket.

72. On 9 November 2022, Ms Abidakun wrote to the claimant:

Please note that your BM with Angola will end today given the update we received regarding your WP [work permit] approval.

We are just waiting for the LOI once received our provider Fragomen will finalise the process for your STV application. In the meantime you will continue to enjoy your vacation balance with Iraq until the mobilisation process for Angola is complete.

73. The claimant was asked in cross examination about the fact that he did not challenge with Ms Abidakun the suggestion that he would be using his 'vacation balance'. The claimant said that by this point he had raised the dispute with more senior people. We did not hear anything about those discussions.

74. On 10 November 2022, the claimant wrote to Ms Abidakun and stated: 'I look forward to the well overdue salary and expense payments (of which you are both fully aware) being paid in the interim' and on 16 November 2022, the claimant wrote to Ms Abidakun:

I have yet to receive any of the following
- *Proposed payment of overdue and outstanding salary from Iraq*
- *Proposed payment of BM salary from October/November*.

75. On 21 November 2022, the claimant received a formal offer for the Angola assignment:
Attached to this email are the revised Contractual Terms and Conditions that will apply to this new role.[1]

We are proposed to update the terms of your employment and assignment to bring them in line with our revised contracts. We hope that you will find these new terms clearer and more consistent.
The key changes to the employment and assignment contracts are summarized below:
The Company has widened the scope of permitted deductions it may make from your salary payments
Wording has been included to confirm the waiver of employment notice in the event that you are "localized" to another ENI entity
Further provisions have been include to clarify the manner in which your payments are calculated and administered.

76. The claimant rejected the formal assignment offer. The respondent's account of events thereafter was that there were further discussions, that the claimant still seemed keen to do the role and that the claimant was primarily concerned about the job title. The claimant accepted that there were ongoing discussions about the move but not the respondent's account of his attitude during those discussions. He said that he was not primarily discussing the title, as suggested by the respondent. His concern was that the role constituted a demotion. He said that if he took the role, it would be difficult to explain this role to a subsequent employer.

[1] The contract for the Angola role included the following term:
10.4. If you are under notice of termination of your Employment and/or Assignment, or if you are due to be placed on "unassigned" status, and have any unused holiday entitlement (or accrued rotational leave balance), the Company or Assignment Company may require you to take such unused holiday (or accrued rotational leave balance) during any notice period or during any "unassigned" status period.

Evidence about the Angola role

77. We heard some evidence from both parties about how the role in Angola compared with the claimant's previous role in Iraq. The role in Angola had a somewhat higher salary but was a residential assignment not a rotational one, which meant that there were more working days in the year. The respondent's witnesses told us that the roles were at the same Hay grade but we did not see any documentary evidence of the grades.

78. Mr Ghedi gave evidence about the nature of the Azule Energy role. He said that it was a business combination between Eni Angola and BP Angola. The legal director was from BP and the Eni group wanted to ensure there was someone from Eni for balance. They wanted someone experienced in Eni who could bring Eni culture to the collaboration. The arrangement had taken significant negotiation with BP; Eni had had to persuade BP of the need for an international lawyer. Mr Ghedi said that Azule was a complex organisation; it was the holding entity for 15 other legal entities. Mr Ghedi said that Azule was a more complex entity than the Iraq company in terms of legal and governance issues. It was a very important project for the Eni group and the claimant would have been dealing with very significant legal issues.

79. The claimant pointed to the reporting structures of the Iraq company and Azule. In Iraq he reported to the managing director; in Azule his reporting line would have been to a more senior lawyer.

80. Mr Ghedi said that the Iraq role reported to the managing director as the claimant was the only lawyer on the ground. Mr Ghedi said that the reporting line issue could not be seen in isolation; one had to look at other factors such as the overall composition of the organisation. The plan was for Azule to become a pan African player. It was a more international company and was in his view a promotion for the claimant.

81. Ms Tran gave evidence that the Hay grades were the same for both roles and said seniority could not be evaluated solely based on organisation charts; one had to look at authority and responsibility of the roles.

82. Mr Cockburn agreed that it was not appropriate just to look at organisation charts; he said there might be politics involved in how an organisation chart looks. He pointed to the fact that there was a £21,000 salary increase. The salary told him more than the organisation chart.

83. Picking up the chronology again, Mr Ghedi's evidence was that they remained keen to get the claimant to accept the Angola role and to see if there was anything they could do to change his mind.

84. On 1 December 2022, there was a telephone call between the claimant, Ms Tran and Ms Mukazhanova about the role. Ms Tran said that the claimant

was continuing to show interest in the job; they were trying to understand what he did not like about the role. His concerns were the job title and job description. Ms Mukazhanova said the claimant was concerned that the title was senior advisor. He said that they had discussed the title of gas and low carbon managing counsel. She said that she got the impression that the claimant was very much still interested in the assignment. There was a small issue to resolve about the title and level.

85. On 8 December 2022, Ms Tran sent an email to the claimant confirming that the job title was as in the job offer received on 21 November 2022 ie special senior legal counsel:

> *Further to our meeting last week, please see below our feedback on some of the points discussed:*
>
> - *Job title – we have verified the job title for your assignment in Angola and it has been confirmed that the job title shall remain the same as per the job offer you have received on 21 November 2022.*
> - *Job description - this is currently under finalisation and will be sent at the earliest possible. In case you would like further discussion on the matter, we can arrange a call with you and your Line Manager to discuss.*
> - *Immigration - as an exception and due to the immigration system with the authority not working, you have been granted an e-visa authorisation form for a visa on arrival to enter Angola, in order to finalise your work visa process. However, it is valid until 25 December 2022 as previously communicated.*
>
> *We kindly ask for your feedback regarding the job offer sent by my colleague Mari Bahchedzhiyan. If you are in agreement with the job offer, please kindly provide us with your earliest date of travel to Angola, which will be considered as your assignment start date.*

86. On 11 December 2022, the claimant responded:

the email does not address certain significant issues which we discussed i.e the non payment of outstanding salary for both ENI Iraq, the recent business mission to Luanda nor the outstanding incurred expenses, as well as the current signed contracts in place.

87. Between 20 December 2022 and 13 January 2023, there were exchanges between the parties' lawyers. Ms Mukazhanova said she was shocked lawyers had become involved as she thought the claimant was still interested in the Angola assignment and they were trying to resolve the issues.

88. On 24 January 2023, Ms Tran wrote to the claimant asking to set up a call which then took place on 1 February 2023 with Ms Mukazhanova, the claimant and Ms Tran. It was during this call that the claimant made a further alleged protected disclosure.

89. The claimant was asked in the meeting to confirm his final decision on the proposed assignment to Angola. Ms Tran summarised the content of the meeting in her subsequent email to the claimant which also summarised the alleged protected disclosure (in bold below):

> ***<u>"Angola business mission –</u> you have expressed your concern to travel to Angola on business mission in October on an e-visa, while working and the potential penalty may be imprisonment if in breach of the rules of the e-visa, which may lead to being revoked from the law society. We appreciate this and explained the different perception we may have on reliance on local practices confirmed by the subsidiary.***
> *<u>Azule new role –</u> …As the grade of the new role (Special Senior Legal Advisor against Legal Corporate Affairs Manager in ENI Iraq) has not decreased, from our perspective, we deemed the role is a step that may other assignees would take on their path to grow in the organization.*
>
> *<u>Angola new assignment –</u> you have advised that your preference is to go to*
>
> *Angola for a duration of 1-2 years…*
>
> *Actions for EIRL:*
> * Process reimbursement of expenses once you have provided us with the claim form and supporting document*
> * Revert back to you if possible to restart the process for the Angolan assignment and determine the way forward regarding the closure of Iraq assignment*
> * Process the difference of compensation for the business mission in Angola in the next available payroll*
> *Actions for You:*
> * Provide to EIRL the expense claim form and supporting documents*
> * Revert back with your final decision regarding the Angola assignment and dropping any pending legal claims and continue the employment relationship with EIRL*

90. Ms Tran said that although the claimant did raise the visa issue, it was not the focus of the meeting. She said that the respondent had had advice from the local entity about the suitability of the visa and had relied on that. The claimant in re-examination said that he had thought there was potential for a criminal offence to happen in October 2022 but by February 2023 knew that one had not occurred.

91. Ms Mukazhanova said that the tone changed significantly from that of the call in December 2022. The claimant said that his expectations had not been met in relation to the Angola assignment and he was not in a position to accept.

92. Around this time, the claimant made what the respondent accepted was a final decision not to proceed with the Angola role. The result we were told was that Azule Energy localised the role, ie resourced it themselves locally.

93. On 9 February 2023, the claimant was informed of a retrospective proposed amendment to the side letter for the Angola business mission. He refused to sign the new letter and on 21 February 2023 said that payment under the side letter remained outstanding. Also on 21 February 2023, there was the following passage we were shown in a without prejudice letter between the respondent's solicitors and the claimant's solicitors:

By unreasonably refusing to commence his Angola assignment and failing to promptly communicate his intentions to EIRL, EIRL considers that Mr Stockan has also refused a reasonable management instruction. EIRL therefore reserves its right to consider this a conduct issue, one that has caused delays and disruption to the overall project. As was emphasised to Mr Stockan, his proposed new role was of key importance to the Angola project and his assignment was due to commence at a critical stage in its progression. EIRL reserves the right to take appropriate action in this respect.

94. On 22 March 2023, Ms Mukazhanova wrote to the claimant to say that he would now be placed unassigned and would be paid for what were said to 121 outstanding extra days worked in Iraq. On 24 March 2023 it was confirmed to the claimant that the Iraq assignment had terminated and he was now unassigned. This meant he was now being paid his notional base salary rather than the higher rate of pay attached to Iraq assignment.

95. On 13 April 2023, there was a telephone meeting between the claimant, Ms Mukazhanova and Ms Tran at which the claimant was told that he was being placed at risk of redundancy. At this meeting the claimant made another alleged protected disclosure which was recorded in Ms Mukazhanova's email summarising the meeting of 14 April 2023: *you say you were concerned about your business mission to Angola in October 2022 which you took travelling with a tourist visa stating that you were not permitted to be remunerated for work purposes.*

96. When it was put to the claimant in cross examination that he would not have reasonably believed a criminal offence had been committed by this point, he said 'I take your point'. When it was put to him that this disclosure was just about his interests, he said that he agreed at this point.

97. At the meeting, the claimant was warned that he was being placed at risk of redundancy for what the email said were two reasons:

- *Mobilisation to Angola to the newly build Joint Venture Azule Energy Angola BV between Eni and BP for a critical role of Eni's representative for legal counselling activities in the country was refused by you after your business mission to the JV on the agreed terms – this has caused significant difficulties* *in the relationship between you and the Eni group;*

- *Your email refusal of the EIRL's formal job offer to reassign to Angola in November 2022 and your intention to discuss the contract closure in your letter from your legal counsel in December 2022 was completely at odds and inconsistent with the video conversations and email correspondence taken place with EIRL until January this year.*

98. The email commenced with a reference to the ending of the Iraq assignment.

99. On 18 April 2023, the claimant asked the respondent to recommence a grievance process he had initiated and on 25 April 2023, Ms Mukazhanova told the claimant that the redundancy process would be put on hold pending completion of the grievance investigation.

100. Mr Cockburn wrote to the claimant on 16 June 2023 to inform him that he had been appointed to investigate the grievance. He referred to six points of grievance. Mr Cockburn's evidence was that he was appointed some time earlier in June. We heard no explanation for the delay in commencing the grievance process before that. Mr Cockburn suggested in evidence that the delay was about clarifying the grievance but it was not until Mr Cockburn asked that anyone attempted to clarify grievance.

101. On 21 June 2023, the claimant added three additional points to his grievance and on 22 June 2022, Mr Cockburn wrote to the claimant to confirm there were nine points of grievance.

102. On 14 July 2023, an Early Conciliation certificate was issued.

103. On 10 August 2023, Mr Cockburn held a grievance investigation meeting with the claimant. Mr Cockburn told the Tribunal that the delay between June and August was because the claimant did not have access to work emails once his assignment in Iraq ended and there were technical issues to overcome to access his emails so he had documents he wished to rely on. They had to be restored to the server and Mr Cockburn had to get his MD involved to have the appropriate level of authorisation.

104. Notes of the meeting were taken by a Ms Serkova. The claimant disputed the accuracy of the minutes, which he was not asked to agree. The passage in which the vias for the business mission was discussed was recorded as follows:

DC: Angola Business Mission compliance – entering the country on a Tourist Visa
AS: well… the tourist visa.. it causes some concern because it was explained to me that the trip would be an orientation visit, but then they said that this tourist visa would be extended and extended until the WP and WV will be in place, so effectively I needed to work illegally for 3 months. So both my lawyer and I

suggested to work remotely, but instead I received various emails threatening to take a disciplinary if I don't follow the instruction.
I was in Angola from early Oct to early Nov 2022.

DC: so you thought the original visa would be temporarily but then it became clear that it would be longer than 30 days.

AS: well, they said that it was supposed to be an orientation, but not commencing my activities.
Plus, I didn't have a contract of employment to perform in Angola.

105. The claimant said that this note was not accurate and that he raised a concern about being expected to be there three months and work under a tourist visa. It was not simply a concern about the duration of the trip but about being asked to work under a tourist visa. It was put to the claimant that he could not have had a concern at that point that anything criminal had taken place; he said that he did but this sat uneasily with his evidence about his beliefs at the earlier discussion with Ms Tran and Ms Mukazhanova.

106. In correspondence with Ms Serkova, she only asked the claimant to provide comments on highlighted sections of the notes. He asked if it was possible to comment on other areas but did not receive a reply to that query and did not seek to make further comments. He was cross examined to the effect that as a senior lawyer he would have known to correct any glaring inaccuracies.

107. On 11 August 2023, the claimant provided further information about his grievance to Mr Cockburn. On 17 August 2023, Mr Cockburn conducted investigation meetings with a number of other people including Ms Tran and Ms Mukazhanova.

108. Part of the claimant's grievance was about not being paid for the full number of excess days he had worked on the Iraq assignment. On 25 August 2023, Mr Cockburn wrote to Iraq personnel to suggest a layout for a chart to reconcile the days paid. He said he was frustrated that they had not set out a clear reconciliation which showed how the days were calculated. He wrote:

Unfortunately, I am still confused by your reconciliation. Please understand that there is a real possibility of being in front of judge for ~300K GBP on this issue alone.

109. On 31 August 2023, Mr Cockburn's grievance outcome was delivered. He did not uphold the complaints. One of the claimant's complaints was that he had not been paid both his Iraq salary and the sums due for the business mission to Angola for the period when he was on the business mission in Angola.

110. As to that complaint, Mr Cockburn wrote:

Decision - not upheld

The investigation did not reveal any communication that would establish any realistic expectation that you were to receive both your Iraq Assignment Salary and Angolan Business Mission salary. Although the Business Mission side letter of 05th October 2022, does not make clear that Iraq Assignment salary would be suspended, it would be unrealistic to expect a payment for both contracts simultaneously. Moreover, you would be unable to fulfil the terms of both contracts simultaneously.

Additionally, it's important to point out that the annual salaries are the same: the final salary for the Iraq assignment and the salary indicated in the 05th October Business Mission letter was £159,176. Hence the side letter is essentially re-confirming your annual remuneration will remain unchanged during the Angolan business Mission.
For your reference, the final salary payment for the Business Mission was calculated as follows: The months of Oct & Nov 2022 were split between Iraq & Angolan business mission.
The Salary used was £180,000, based on the business mission side letter of 09th of February 2022, which was aligned with the salary offer of the Angolan assignment. Although, I acknowledge that you did not sign this letter, the remuneration was higher than the £159,176 proposed in the letter of 05th October 2022.

111. The claimant had raised a complaint the he was subject to various detriments for raising whistleblowing concerns about the Angola visa. Mr Cockburn concluded that the visa arrangements were not problematic and that the claimant had not been subjected to any detriments for raising his concerns but he did make some recommendations:

However, your broader concerns about the communication you received regarding your Angolan immigration status are valid. After you initially raised your concerns, EIRL should have arranged for advice from the company's immigration and/or Legal advisors qualified in Angola. Neither HR colleagues in London nor the company's UK legal advisors (Eversheds) are qualified on this issue. Your fair and proper question on your Angolan immigration status was not given the care and legal response that was required.

As such, I am recommending that the business take the following action: EIRL needs to ensure that assignees are comfortable with their immigration status. The use oftourist/e-Visas/business visa & work permits needs to be clearly explained to the assignee and if the assignee has any concerns that cannot be addressed internally (from either EIRL or the subsidiary), the assignee should be given access to qualified legal advice. Immigration is a very complex legal area, especially in developing countries, where the local practices may differ from a strict legal interpretation of the legislation. Any assignees finding themselves in a "grey" area and are uncomfortable with their immigration status should be given the appropriate level of assurance and even qualified legal advice if necessary.

112. The claimant subsequently appealed the grievance outcome and his appeal was rejected on 25 September 2023.

113. On 3 October 2023, Ms Mukazhanova confirmed that the respondent would recommence the redundancy process and on 10 October 2023 she held the first redundancy consultation meeting with the claimant.

114. The claimant's evidence was that in this meeting Ms Mukazhanova said that the respondent had lost all trust in him. Ms Mukazhanova denied that she said that.

115. On 12 October 2023, Ms Mukazhanova sent the claimant a record of the meeting. She recorded that they had searched in the legal professional area and not identified any roles. They had extended the search to commercial negotiations as the claimant had been involved in similar areas in Iraq. No suitable roles were identified.

116. Ms Mukazhanova's account continued:

Alternative opportunities

o As agreed, please kindly check for any suitable vacancies on eni.com, LinkedIn and Rigzone including international roles and local roles suitable for the locations where you have the right to work, UK as your point of origin. Please kindly search for all Eni business units as EIRL's remit is mainly limited to Upstream business unit.
o In case of suitable opportunity, please apply and notify EIRL once applied, in order for EIRL to liaise with the relevant stakeholders to facilitate the selection process.
o We confirmed that we will share the CV we have on file (as attached), updated in June 2022 to our Global Resourcing team and Local HR colleagues in the UK subsidiaries for them to confirm availability of any suitable roles.
o We should resume to update each other next week and will await any feedback of your progress in the meantime.
o As mentioned, should no opportunity be identified or interview be arranged during this time, unfortunately we will eventually have to discuss the process of closure of your employment.

117. On 15 October 2023, the claimant wrote to Ms Mukazhanova identifying that there were seven roles of interest to him; he sent a further email on 17 October 2023 with a list of the roles. On 16 October 2023, Ms Mukazhanova sent the claimant's CV to Ms S Bass, Mr A Thomas, Ms F D'ambrosio and Ms C Raimondi, whom we understood to be HR personnel in subsidiaries. It was pointed out on the claimant's behalf that some of these individuals responded saying that they had no available roles within minutes. Mr Ghedi said that individuals in HR in subsidiaries would be aware of any legal vacancies as legal roles were critical roles. The UK for example was not a large subsidiary.

118. It was suggested on the claimant's behalf that the claimant's CV was not in fact attached to the emails sent by Ms Mukazhanova but we were satisfied that the lack of appearance of an attachment on the copies of emails we had was because in all cases we had the copy emails as part of a chain.

119. The claimant said that the respondent did not make a genuine effort to look for vacancies. He was told to look on external websites for vacancies. He did not have access to the intranet for internal vacancies. He said only more junior vacancies were advertised externally. He himself could not access the professional family and he said that there was no evidence that the respondent did that for him. Ms Mukazhanova said that all internal vacancies were advertised externally.

120. Mr Ghedi was cross examined about the lack of documentation showing that anyone contacted other heads of legal assistance in different regions, ie others at his level in the group or, at the level above, Ms Ferri.

121. On 18 October 2023, the second redundancy consultation meeting was held. On 20 October 2023, Ms Mukazhanova sent the claimant an email containing feedback on the seven roles he had expressed interest in and two further roles she said had been identified by the global resourcing team. The claimant said that in fact he identified all of these vacancies.

122. On 25 October 2023, the third redundancy consultation meeting was held. The claimant sent a further email to Ms Mukazhanova about roles he was interested in. He was still interested in some roles on which he had not had feedback; feedback was expected by the end of the week. On 27 October 2023, Ms Mukazhanova wrote with more feedback. Some vacancies were for locals only; others required language or other skills and experience the claimant did not have.

123. On 31 October 2023, Ms Tran and Ms Mukazhanova held a further meeting with the claimant. They had a discussion about the remaining roles; the claimant had not been considered suitable for / to meet the requirements of these roles. Therefore his employment was going to be terminated.

124. Ms Tran wrote to Mr Ghedi before the meeting:

Considering the closure of Eni Iraq B.V. assignment on 24 March 2023 and we've yet to receive any confirmed new assignment opportunities for Anthony, both international and local roles, we had proceeded with the consultation process, as part of the redundancy process.
Please note, we are having a final consultation meeting with Anthony at 12.30pm today, the potential outcome may be that his employment may be made redundant if in case no new opportunity is identified. Can you please advise if there are any potential opportunities, both international and local roles within the Group that are available for his consideration? Please kindly let us know your feedback this morning.

Please find attached a copy of Anthony's CV and below is his performance rating for your review.

2018 – 2022

Far Exceeds

Should you require any other information, please let me know.

125. Mr Ghedi replied that to the best of his knowledge, he was not aware of any vacancies. It was put to him that he had not spent any time checking with subsidiaries. He said that he was aware of vacancies in his area; he would not need to phone around.

126. The claimant drew to our attention documents which showed that a Mr P Shein started in a role of business legal advisory Eni S.p.A on 5 February 2024, which he suggested was a suitable vacancy for him. We accepted the respondent's evidence that this was in fact a change of title and scope of a role Mr Shein already occupied.

127. On 14 February 2024 the claimant's further Acas conciliation certificate was issued and on 13 March 2024 his claim form was presented in case number 2216366/2024.

Evidence about other employees and extra days worked

128. We saw some evidence about other employees who had accrued large balances of additional days worked and the treatment of those days.

129. There was a Mr B O'Shea who resigned and received a payment for accrued days. The respondent's document leave balance document for Mr O'Shea was similar to the one showing the claimant's outstanding days. It was difficult to understand and not fully explained by any respondent witness but seemed to show that Mr O'Shea was paid for 34 extra days worked when he left employment on 15 December 2021.

130. Mr B Azbraitis had some 400 additional days worked on a particular assignment when he moved to a new assignment. In order to compensate him, he was paid for a period at double his monthly pay per month and then received the balance as a lump sum. Ms Tran said that he also used some accrued days as leave because his assignment ended in October and his new assignment commenced in November.

131. The respondent's case was that there was a practice of requiring employees to use extra days worked as leave rather than being reimbursed for them. Ms Tran said that she was aware this practice (using up extra days as leave) was

applied worldwide; it was a common and consistent approach. Mr Cockburn's evidence was that as tax and payroll manager, he was aware of the practice and he said that it was well known amongst internationally mobile employees. Ms Mukazhanova said that this had been the practice over the 20 years she has been in the company. No one had questioned it before.

132. The large numbers of extra days accrued by Mr Azbraitis and the claimant were unusual. It appeared that these situations had arisen because of the pandemic and the difficulties of travel. Usually when assignments come to an end there might be a balance of 20 – 30 days, something of that order.

Hypothetical tax evidence

133. The claimant said that he had never come across the concept of hypothetical tax on other international work. He said that he thought the 30% hypothetical tax deducted from his Iraq assignment salary was just the rate for Iraq. He did not know what the rate was for other colleagues. Until he saw statements from KPMG at a much later date, he said he thought the reductions were in accordance with tax regime in Iraq. He said that no one knew that the respondent was retaining the excess over what was owed in tax in the country of assignment. However, he said in answer to Tribunal questions that he had not actually discussed the matter with anyone. It was put to him in cross examination that he had not raised the matter for seven years whilst working in Iraq. He said that he had not been aware of the discrepancy and that he had trusted the respondent.

134. Mr Cockburn's evidence was that the respondent applied a hypothetical tax rate of 30% across the board. This was common in the industry. It was hard to recruit for international assignments if the respondent did not offer a net salary. The company paid a lot more than 30% in tax in jurisdictions with higher tax. There was tax also on benefits enjoyed by some international employees such as accommodation and schooling.

135. The claimant accepted in evidence that the deduction from his Iraq assignment salary of hypothetical tax did not relate to his alleged protected disclosures.

Evidence about payments for business missions

136. The claimant gave evidence that pre assignment missions were done when an employee was off rotation (ie on otherwise non working days) and always paid for as the employee would given up non working days to undertake the business mission.

Evidence about time issues

137. It was put to the claimant that he waited nine months to raise his claim about the ending of the Iraq placement. He said that his solicitors were involved form November 2022 and trying to find an internal remedy and only escalated it thereafter. This was not his area of law and he was sure his lawyers made claims within relevant time limits

Evidence about visas

138. We heard some evidence about what if any work could be undertaken under an Angolan tourist / business visa. Mr Ghedi said his understanding was that the claimant was going to Angola to familiarise himself and get to know people and that was permissible under the visa. He did not hear anything more about the claimant's activities whilst the claimant was in Angola. He said that the claimant was not under contract to or being remunerated by the Angolan entity. He did not recall the claimant ever raising any issue with him about the legality of the arrangements.

139. We noted this passage from the grievance appeal outcome:

DC's report stated AS continued to be paid by Eni Iraq during his business mission to Angola and that he was not paid by Eni's Angolan business. The evidence provided by the Eni Angola HR colleagues and reviewed by DC, shows remuneration paid by an Angola entity is not permitted during a business mission.
The evidence shows these colleagues confirmed the appropriateness of the visa AS had been granted to enter Angola. Their evidence, reviewed by DC as part of the investigation, indicates surprise at the perception of any illegality and that such concerns were never expressed by AS to the HR department in Angola. DC added that the colleagues in Angola had confirmed to him that all relevant documents and information had been shared with the Angola immigration authorities. DC said he reviewed the visa document itself, noting the words "tourism" and "business" were clearly stated.
The findings of the investigation report did not, therefore, rely solely on search results from Google relating to immigration rules for entry to Angola. Instead, DC consulted with the relevant stakeholders in situ to ascertain the appropriateness of the business mission visa and it is clear that immigration advisers were engaged to advise on the issue.

140. Mr Cockburn's evidence was that the effect of tourist / business visas is that the person should not be remunerated by a local entity. Mr Cockburn said that there was no charge back to Angola for what was being paid to the claimant on his Iraq contract. The claimant was not being remunerated by an Angolan entity. That was how visas of this type operated globally.

141. Ms Tran said in evidence that the claimant was being paid under his Iraq contract. The business mission letter should have said that he was continuing to be paid under his Iraq assignment as they had not started his Angolan assignment. This meant no remunerated activities were going on within the meaning of the visa.

Evidence about pool

142. The claimant was not pooled with any other internationally mobile employees for redundancy selection. The respondent said that the claimant was the only unassigned internationally mobile employee in the legal professional family. Ms Tran said that there was a requirement for continuity; the respondent could not just pull someone off an assignment.

143. We were not provided with evidence of all the internationally mobile employees in the legal professional family – their assignments and the duration of those and any factors which would have made it problematic to move them or details of their performance. There were some documents in the bundle which showed some details for four employees in this category.

144. Ms Mukazhanova said there were fewer than ten employees in this category but did not tell the Tribunal it was a much smaller number than that, such as four.

145. Mr Ghedi said it was not the respondent's practice to move employees to accommodate someone else whose assignment had come to an end.

Search for vacancies

146. Everyone agreed that new assignments could take several months to find and arrange. It was put to Mr Ghedi that he and others should have been looking for a new assignment for the claimant from November 2022. Mr Ghedi was not involved in looking for any roles and unable to say what was happening about roles for the claimant either during this period or during the period March to October 2023.

147. It was not clear whether anyone in the legal professional family was contacted during those periods. Ms Tran said even if there were no emails or other documents, there would be discussions over Teams or telephone. They would be liaising with the global resourcing team. She said that generally if the assignment of an employee under her remit was coming to an end she would advise other professionals to start identifying opportunities. She accepted that there was nothing on paper from 1 February 2023 to October 2023 to show that the respondent was looking for work for the claimant. She said that she

was only responsible for Africa. Other colleagues responsible for the Middle East would also have been looking for roles.

148. Ms Mukazhanova said that the respondent was not looking for a job for the claimant when he was still under assignment (ie up until the end of March 2023). They started looking in April, but then the process was put on hold because of the claimant's grievance. Ms Mukazhanova said that she had sight of vacancies during this period but there were none for the claimant. Ms Mukazhanova seemed to be saying that an active search for vacancies would commence when an assignment ended and the individual was put at risk of redundancy.

Submissions

149. Both parties provided helpful written and oral submissions and provided further written submissions in response to questions raised by the Tribunal during submissions and deliberations.

150. We agreed with the parties that we would consider whether the respondent required an amendment to pursue some of its contractual contentions and whether any such amendment should be allowed as part of our deliberations at the end of the hearing. The application to amend to include new ways of putting the defences to the unlawful deductions claims was made at the end of the claimant's evidence in response to enquiries from the Tribunal as to how the respondent was putting its case.

Law

<u>Amendment</u>

151. In considering an application to amend a claim, a Tribunal will have particular regard to the balance of hardship and injustice in refusing or allowing the amendment, together with any relevant factors. Those include the factors set out in <u>Selkent Bus Co Ltd v Moore</u> ICR 836, EAT:

The nature of the amendment: The Tribunal has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action.
Applicability of time limits: If a new claim or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that claim/cause of action is out of time and, if so, whether the time limit should be extended.

Timing and manner of the application: Delay in making the application is a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the identification of new facts or new information from documents disclosed on discovery.

152. The merits may be relevant to an amendment application; if a proposed claim is obviously hopeless, that consideration affects the assessment of the injustice caused to a claimant by not being able to pursue it. Nothing is lost in not being able to pursue a claim which cannot succeed: Herry v Dudley MBC and anor EAT 0170/17.

153. Time limits are simply a factor in the exercise of the discretion although they may be an important and potentially decisive one. The fact a time limit has expired will not prevent the tribunal exercising its discretion in favour of allowing an amendment, although it will be an important factor in the scales against allowing the amendment: Transport and General Workers' Union v Safeway Stores Ltd EAT 0092/07.

154. The core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application. The parties must therefore make submissions on the specific practical consequences of allowing or refusing the amendment. If the application to amend is refused, how severe will the consequences be, in terms of the prospects of success of the claim or defence? If permitted, what will be the practical problems in responding? Where the prejudice of allowing an amendment is additional expense, consideration should be given as to whether the prejudice can be ameliorated by an award of costs, provided that the other party can meet it: Vaughan v Modality Partnership [2021] ICR 535, EAT.

Effect of list of issues

155. An agreed list of issues will generally limit the issues to be considered at the full merits hearing but a list may be departed from where to do so would be in the interests of justice. Relevant considerations include whether the amendment would delay or disrupt the hearing because a party is not in a position to deal immediately with the new issue or the length of the hearing would expand beyond the time allotted: Mervyn v B W Controls Ltd [2020] ICR 1364,CA.

Unlawful deductions from wages

156. Section 13 of the ERA 1996 provides that an employer shall not make unauthorised deductions from a worker's wages, except in prescribed circumstances.[2] Wages are defined in section 27 as 'any sums payable to a worker in connection with his employment', including 'any fee, bonus,

[2]Section 13 (1)An employer shall not make a deduction from wages of a worker employed by him unless—
(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.

commission, holiday pay or other emolument referable to [the worker's] employment, whether payable under his contract or otherwise' with a number of specific exclusions.

157. On a complaint of unauthorised deductions from wages, a tribunal must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion: Greg May (Carpet Fitters and Contractors) Ltd v Dring [1990] ICR 188, EAT.

158. Where there is ambiguity in a contract, a court or tribunal must consider the language used and ascertain what a reasonable person, who has the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant: Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2011] 1 W.L.R. 2900.

159. The task of a court or tribunal is to decide the objective meaning of the language in which the parties have chosen to record their agreement. If there are two possible constructions, the court or tribunal is entitled to prefer the construction which is consistent with business common sense: Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The "Ocean Neptune") [2018] EWHC 163 (Comm).

160. The court or tribunal must place itself in the same 'factual matrix' the parties were in when concluding the contract: Reardon Smith Line Ltd v Yngvar Hansen-Tangen [1976] 1 W.L.R. 989.

161. Where there is ambiguity, a contract is also construed more strongly against the party who has made the contract: Borradaile v Hunter (1843) 5 M. & G. 639.

Implied terms

162. There is a useful summary of the principles to be applied by a court or tribunal in deciding whether a terms should be implied in Ali v Petroleum Company of Trinidad and Tobago, [2017] ICR 531:

"It is enough to reiterate that the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, 'Oh, of course') and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract

would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement."
[Per Lord Hughes]

Uncertainty

163. An agreement may lack contractual force because it is so vague or uncertain that no definite meaning can be given to it without adding further terms.

Terms incorporated by custom and practice

164. For terms to be incorporated into a contract as a result of custom and practice, they must be 'reasonable, notorious and certain'.

165. A policy adopted by management unilaterally cannot become a term of the employees' contracts on the grounds that it is an established custom and practice unless it is at least shown that the policy has been drawn to the attention of the employees or has been followed without exception for a substantial period: <u>Duke v Reliance Systems Ltd</u> [1982] ICR 449.

Entire agreement clauses

166. An entire agreement clause may prevent a term based on custom and practice being incorporated into a contract: <u>Exxonmobil Sales and Supply Corp v Texaco Ltd</u> [2003] EWHC 1964(Comm).

Right to work

167. Not all employment contracts contain an implied right to work. The factors to consider in determining whether such a right exists include:

(i) whether the position was a specific and unique post, (ii) whether the skills necessary to perform the role need regular use (iii)whether the contract provided for the hours and days of work to fill the normal working week, and specifically imposed on the employee the obligation to work those hours necessary to carry out their duties in a full and professional manner. (iv) whether there was a right of suspension: <u>William Hill Organisation v Tucker</u> [1998] EWCA Civ 615.

Series of deductions

168. Section 23 of the Employment Rights Act 1996 provides that there is a three month time limit for presenting claims of unlawful deductions from wages. Section 23(3) provides:

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments, or

(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,
the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

Section 23(4) provides:
(4)Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

169. In <u>Chief Constable of the Police Service of Northern Ireland v Agnew</u> [2019] IRLR 792 the Court of Appeal considered what constituted a series of deductions for these purposes:

We agree that there has to be "a sufficient similarity of subject matter, such that each event is factually linked with the next (in the alleged series) in the same way as it is linked with its predecessor;" see paragraph [79] of Bear Scotland to which we have added the words "in the alleged series." We do so because factual consideration as to whether there is a sufficient similarity of subject matter requires identification of what is alleged to constitute the series of deductions. For instance in this case it is only when one identifies the alleged series as being a series of deductions in respect of holiday pay that one sees that each unlawful deduction is factually linked to its predecessor by the common fault or unifying or central vice that holiday pay was calculated by reference to basic pay rather than normal pay. That method of calculation factually linked all payments of holiday pay whether to police officers or to civilian employees and it did so consistently since 23 November 1998.

<u>Unfair Dismissal</u>

170. The test for unfair dismissal is set out in section 98 Employment Rights Act 1996.

Reason for Dismissal

171. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal and 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.’

Redundancy

172. Redundancy is one of the potentially fair reasons for dismissal: section 98(2)(c).

173. The definition of redundancy is found in section 139 of the Employment Rights Act 1996. It has a number of elements. The provisions which are relevant for the purposes of these claim are s 139(1)(b):

'*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 –*

……

(b) the fact that the requirements of [the employer's] business -

(i) for employees to carry out work of a particular kind …
(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.'

174. When considering redundancy dismissals, tribunals are not normally entitled to investigate the commercial reasons behind the redundancy situation. The reasonableness of the business decision which leads to a redundancy situation is not a matter on which the Tribunal can adjudicate: Moon and ors v Homeworthy Furniture (Northern) Ltd [1977] ICR 117, EAT. This does not mean, however, that we are obliged to take the employer's stated reasons for the dismissal at face value. In order to establish that the reason for the decision was genuinely redundancy, an employer will usually have to adduce evidence that the decision to make redundancies was based on proper information and consideration of the situation: Orr v Vaughan [1981] IRLR 63, EAT, and Ladbroke Courage Holidays Ltd v Asten [1981] IRLR 59, EAT.

Reasonableness

175. Once an employer has established a potentially fair reason for dismissal, the determination of the question whether the dismissal is fair or unfair, having regard to that reason '…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 that question shall be determined in accordance with equity and the substantial merits of the case.' (Section 98(4) of the ERA).

176. When considering reasonableness, a tribunal cannot substitute its own view. Instead it is required to consider whether the decisions and actions of the

employer were within the band of reasonable responses which a reasonable employer might have adopted. The test applies to the procedure followed by the employer and to the decision to dismiss.

Reasonableness in redundancy cases

177. In cases of redundancy, an employer will not normally be deemed to have acted reasonably unless it warns and consults any employees affected, adopts objective criteria on which to select for redundancy, which criteria are fairly applied, and takes such steps as may be reasonable to consider redeployment opportunities.

178. In R -v- British Coal Corporation and Secretary of State for Trade & Industry (ex parte Price) [1994] IRLR 72, Glidewell LJ approved the following test of what amount to fair consultation: ‘Fair consultation means (a) consultation when the proposals are still at a formative stage; (b) adequate information on which to respond; (c) adequate time in which to respond; and (d) conscientious consideration by an authority of the response to consultation.’

179. An employer will need to identify the group of employees from which those who are to be made redundant will be drawn. This is the ‘pool for selection' and the choice of the pool should be a reasonable one or one which falls within the range of reasonable responses available to a reasonable employer in the circumstances. The definition of the pool is primarily one for the employer and is likely to be difficult to challenge where the employer had genuinely applied his mind to the problem. (Capita Hartshead Ltd v Byard 2012 ICR 1256 (EAT)).

Polkey reduction

180. Section 123(1) ERA provides that

‘…the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in the all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.’

A tribunal will be expected to consider making a reduction of any compensatory award under section 123(1) ERA where there is evidence that the employee might have been dismissed if the employer had acted fairly (see Polkey v AE Dayton Services 1988 ICR 142; King and ors v Eaton (No.2) 1998 IRLR 686).

181. The authorities were summarised by Elias J in Software 2000 Ltd v Andrews and ors [2007] ICR 825, EAT. The principles include:

in assessing compensation for unfair dismissal, the employment tribunal must assess the loss flowing from that dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal;

if the employer contends that the employee would or might have ceased to have been employed in any event had fair procedures been adopted, the tribunal must have regard to all relevant evidence, including any evidence from the employee (for example, to the effect that he or she intended to retire in the near future);
there will be circumstances where the nature of the evidence for this purpose is so unreliable that the tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Whether that is the position is a matter of impression and judgement for the tribunal;
however, the tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence;
a finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e. that employment might have been terminated earlier) is so scant that it can effectively be ignored.

182. As Elias J said in Software 2000:

> ‘The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed. For example, there may be insufficient evidence, or it may be too unreliable, to enable a tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the tribunal to conclude that on any view there must have been some realistic chance that he would have been. Some assessment must be made of that risk when calculating the compensation even though it will be a difficult and to some extent speculative exercise.’

Protected disclosures

183. Section 43B(1) ERA 1996 defines a qualifying disclosure as a disclosure of information which in the reasonable belief of the worker making the disclosure is in the public interest and tends to show one of a number of types of wrongdoing. These include ‘(b)that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject’ and ‘(d) that the health and safety of any individual has been, is being or is likely to be endangered.’

184. To be a protected disclosure, a qualifying disclosure must be in circumstances prescribed by other sections of the ERA, including, under section 43C, to the worker's employer.

185. Guidelines as to the approach that employment tribunals should take in whistleblowing detriment cases were set out by the EAT in Blackbay Ventures (trading as Chemistree) v Gahir (UKEAT/0449/12/JOJ):

185.1 each disclosure should be identified by reference to date and content

185.2 the basis upon which the disclosure is said to be protected and qualifying should be addressed

185.3 if a breach of a legal obligation is asserted:

each alleged failure or likely failure to comply with that obligation should be separately identified; and

the source of each obligation should be identified and capable of verification by reference for example to statute or regulation

185.4 the detriment and the date of the act or deliberate failure to act resulting in that detriment relied upon by the claimant should be identified

185.5 it should then be determined whether or not the claimant reasonably believed that the disclosure tended to show the alleged wrongdoing and, if the disclosure was made on or after 25 June 2013, the claimant reasonably believed that it was made in the public interest.

186. There is a number of authorities on what a disclosure of 'information' is. It must be something more than an allegation; some facts must be conveyed: Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325. There is no rigid dichotomy between allegations and facts. A statement must have sufficient factual content and specificity such as is capable of showing one of the matters listed at s 43B(1): Kilraine v Wandsworth LBC [2018] ICR 1850. The context is also relevant in determining the meaning of what was said and what facts are conveyed: 'If, to adapt the example given in in the Cavendish Munro case … the worker brings his manager down to a particular ward in a hospital, gestures to sharps left lying around and says "You are not complying with health and safety requirements", the statement would derive force from the context in which it was made and taken in combination with that context would constitute a qualifying disclosure.'[3]

[3] And see Twix DX Ltd v Arnes UKEAT/0030/20/JOJ, per Linden J:

It also follows from these passages that the question whether a written communication discloses information which is capable of satisfying section 43B (1) will often require the determination of issues of fact as to context, and consideration of all of the relevant facts in the case. In such cases the issue will, therefore, be a mixed question of fact and law.

187. In Williams v Michelle Brown AM UKEAT/0044/19/OO, Auerbach HHJ identified five potential issues where a tribunal is required to decide whether an utterance by a worker amounted to a "qualifying disclosure" as defined:

It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.

188. The burden of proof is on the worker to show that he or she held the requisite reasonable belief. The tribunal must look at whether the claimant subjectively held the belief in question and objectively at whether that belief could reasonably be held. The allegation need not be true: Babula v Waltham Forest College [2007] IRLR.

189. The reasonableness of the worker's belief is determined on the basis of information known to the worker at the time the decision to disclose is made: Darnton v University of Surrey [2003] IRLR 133.

190. Factors relevant to the issue of whether a worker reasonably believed that a disclosure was in the public interest include:

190.1 the number in the group whose interests the disclosure served (the larger the number, the more likely the disclosure is to be in the public interest)

190.2 the nature of the interests affected (the more important they are, the more likely the disclosure is to be in the public interest)

190.3 the extent to which those interests are affected by the wrongdoing disclosed (the more serious the effect, the more likely the disclosure is to be in the public interest)

190.4 the nature of the wrongdoing disclosed (the disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing)

190.5 the identity of the alleged wrongdoer (the larger and more prominent the alleged wrongdoer, the more likely the disclosure is to be in the public interest).

The subjective belief that something is in the public interest must be objectively reasonable.

(1) Chesterton Global (2) Verman v Nurmohamed [2017] IRLR 837.

There may be clear cut cases, or cases where the factual context is not in dispute and the issue is therefore one of pure law.

191. A worker has a right not to be subjected to a detriment by any act or deliberate failure to act on the part of his or her employer done on the ground that the worker has made a protected disclosure under s 47B ERA 1996.

Causation of detriment / burden of proof

192. Where the employee complains of detriment under various provisions of the ERA 1996, including and s 47B, the tribunal will consider the complaint under s 48. S 48(2) provides that it is for the employer to show the ground on which any act or deliberate failure to act was done.

193. The worker must show:

193.1 that he or she made a protected disclosure and

193.2 that he or she suffered less favourable treatment amounting to a detriment caused by an act, or deliberate failure to act, of the employer

193.3 a prima facie case that the disclosure was the cause of the act or deliberate failure to act which led to the detriment.

(International Petroleum Ltd v Osipov & others 2017 WL 03049094, EAT and Serco Ltd v Dahou 2017 1RLR 81, CA)

194. Once the worker has done that, the employer must show:

194.1 the ground on which the act, or deliberate failure to act, which caused the detriment was done

194.2 that the protected disclosure played no more than a trivial part in the application of the detriment (Fecitt v NHS Manchester [2012] ICR 372, CA).

Conclusions

Which contractual defences were before the Tribunal

195. We noted that it was not unusual to see a list of issues like this one where the contractual underpinnings of unlawful deductions claims / defences to the unlawful deductions claims were not articulated. Whilst we accepted that the Tribunal's template list of issues did not require such articulation, we considered that in a case such as this, where the parties are represented throughout, and where there are contractual issues of some sophistication, we would expect the parties to have turned their mind to these issues at the case management stage.

196. In the absence of such articulation, we accepted that the list could be taken to include a variety of underlying contractual disputes. However, in order for those disputes to be fairly before the Tribunal, they would have to have been spelled

out in the pleadings. Alternatively the party seeking to rely on the claim or defence would need to make a successful application to amend.

197. The respondent was seeking to argue the following:

198. In respect of the claim for 289 days pay for extra days worked on the Iraq assignment:
- that there was an implied term that the claimant could be required to use the days as leave;
- that there was a collateral agreement on 8 August 2022 that the claimant would use days as leave;
- that there was a term derived from custom and practice that employees could be required to use extra days worked as leave.

199. In respect of the sum claimed for the Angola business assignment, the respondent was seeking to argue that the side letter was a collateral contract with an implied term that the claimant would only be paid the business mission pay specified in the side letter whilst on the business mission.

200. We considered which of these were fairly to be regarded as being in the response. We noted the following sections:

Para 10
Under the terms of the Assignment Contract, employees under notice of termination (of employment and/or termination of the Assignment) or employees who are due to be placed on "Unassigned" status (described below), are usually required by the Respondent and/or the assignment company, to take accrued but unused annual leave before the termination of the Assignment Contract. This is a standard practice which applies to all of the Respondent's employees. At the end of the Assignment Contract, any remaining balance of leave days is calculated and the employee is paid in lieu of those leave days (if the balance is positive).
In practice, an Assignment Contract will only be brought to an end with a positive leave balance (and, therefore a payment made in lieu of accrued but untaken leave), where there is a critical business need for an employee to commence a new Assignment Contract.

Para 16

It was confirmed to the Claimant that between 30 August 2022 and commencement of the new assignment in Angola, the Claimant would utilise his rotational leave balance (in accordance with the terms of the Assignment Contract). When the assignment to Iraq was formally terminated, any outstanding rotational leave balance would then be 'liquidated' i.e. the Claimant would be paid in lieu of any outstanding rotational leave balance at that time. The Respondent confirmed the arrangements, i.e. to use accrued leave, in a phone call between Patricia Abidakun (Senior HR Advisor) and the Claimant on 9 August 2022, in an email to the Claimant of 10 August 2022 and in a further email of 11 November 2022. The requirement to use unused leave following notice of the termination of an Assignment Contract is expressly provided for in *the terms of the Assignment Contract and is also standard practice across the Respondent's business, as noted above.*

Para 48.2:
Wages for the period 6 October 2022 – 9 November 2022 - the Respondent understands that the Claimant alleges that he is entitled, simultaneously, to remuneration in accordance with the terms of his Assignment Contract in respect of his assignment to Iraq and under the terms of the side letter relating to his Business Mission to Angola. The Respondent denies that the Claimant was entitled to pay under the Assignment Contract whilst in Angola, in addition to pay under the terms of the side letter relating to the Business Mission, and denies that it made an unlawful deduction from the Claimant's wages. The Claimant was paid according to the terms of the side letter relating to the Business Mission;

201. It seemed to us that the respondent had pleaded:
- that the requirement to take extra days worked as leave was an express term of the assignment contract;
- arguably, that such a term was incorporated as a result of custom and practice;
- that the claimant's entitlement to wages whilst on the business mission was the subject of express terms.
The other contractual arguments which the respondent raised after the claimant's evidence was complete are not in the pleadings and would require an amendment.

202. Looking at the nature of the amendments, we considered they were relatively substantial. They involved very different arguments from those pleaded and could potentially involve further lines of factual enquiry around the context in which the contract was formed and the alleged collateral agreement was made. The amendments went beyond a mere relabelling of matters already in the response.

203. So far as the timing and manner of the applications were concerned, these were very late applications not made until after the claimant's evidence had been completed and which, in order to ensure we could conclude the hearing in the available time, we did not determine until after closing submissions. There is no good reason why the respondent, who has been very thoroughly represented throughout, did not make its applications at a much earlier date.

204. We looked at the issue of prejudice to the claimant. He had been deprived of the opportunity to prepare his own witness statement on the basis of these issues and to consider whether there might be other relevant evidence he should call on these points. His counsel had prepared the case on the basis of the existing pleadings, although she obviously did her best to adapt to these potential issues once they were raised.

205. Against that we set the hardship and injustice to the respondent if these amendments were refused. In assessing that hardship and injustice we were significantly influenced by our assessment of the merits of the contractual

arguments sought to be added by the respondent, which we considered to be poor, for reasons which we elucidate more fully below when considering the merits of the unlawful deductions claims. In relation to the claim for additional salary for the period of the Angola business mission we also noted that the respondent had a strong argument on limitation which it was able to pursue in any event.

206. For all of those reasons, we concluded that the balance of hardship and injustice was against allowing these amendments.

Substantive claims

Detriment: protected disclosure

207. We considered that it was appropriate to consider first whether the claimant had made protected disclosures and then whether he had been subjected to detriments, although the list of issues had these issues in the reverse order.

Issue: 7. Whether Claimant made a qualifying disclosure

7.1 Did the Claimant disclose information?

7.2 Did the Claimant reasonably believe the information disclosed tended to show that a criminal offence was likely to be committed?
7.3 Did the Claimant reasonably believe it was in the public interest to make the disclosure?
The Claimant relies on the following:
7.1.1 an email of 4 October 2022 at 11:49AM to Patricia Abidakun;

7.1.1.1 Did the Claimant disclose to Patricia Abidakun that he would not agree to the business mission as to do so would be illegal? The Claimant stated "As stated I will not be signing the BM letter in its current form";

208. There was some information disclosed in this email, ie information that the claimant would not be signing the business mission letter in its current form.

209. On the face of it, however that was not information which had sufficient factual content and specificity such as is capable of showing one of the matters listed at s 43B(1). The claimant might have any number of reasons for not wanting to sign the letter. The one which emerged from the documents was the lack of return date. The claimant pointed to the context of the visa, which referred to not permitting the exercise of any remunerated activity and the business mission letter, which referred to payment of a salary, as the context which gave meaning to what was in the email. We could not see that it did have that effect, particularly since a conclusion that there was potential illegality was far from an inevitable conclusion when the two documents were read together.

210. Although the claimant suggested in evidence that these emails were sent in a context in which he had phone calls with Ms Abidakun more explicitly referring to concerns about the legality of the arrangements, we did not accept that there were any such phone calls. In circumstances where the claimant had been legally represented since prior to commencement of these proceedings, and these phone calls had not themselves been relied on as disclosures and where there was no hint in the documents that such phone calls had occurred or contained such disclosures, we rejected the claimant's evidence on that point.

211. In those circumstances, we were not satisfied either that the claimant subjectively believed the information in this email tended to show some kind of potential criminality in relation to the Angola business mission or that such a belief was objectively reasonable.

212. Given the fact that the claimant only referred to a potential wider interest in the disclosure in supplementary oral evidence in chief, we were not satisfied that he believed that his disclosure was in the public interest.

Issue: 7.1.2 a phone call of 4 October 2022 between the Claimant and Nicola Ghedi;

7.1.2.1 During this call, did the Claimant disclose to Nicola Ghedi that he would be unwilling to work in Angola on the visa provided as to do so would be illegal? In particular, did he state, "I [the Claimant] will not sign the business mission side-letter and will not travel work and live in illegally in Angola"?

213. We did not accept that the claimant had made these disclosures. Mr Ghedi did not recall the claimant making the disclosures but did recall the claimant's concerns over the duration of the business mission, which was elsewhere apparent. Again, the fact that the raising of this issue is nowhere apparent in the documentary record caused us to conclude that we could not be satisfied the matters had been raised.

Issue: 7.1.3 an email of 4 October 2022 to Nicola Ghedi;

7.1.3.1 Did the Claimant disclose to Nicola Ghedi that he would not sign an 'erroneous document', the business mission letter prepared by the Respondent, as to undertake the business mission with an incorrect visa would be illegal? The Claimant stated "the letter does not reflect previous discussions and arrangements" and "it is not possible to sign erroneous documents".

214. Our analysis of this alleged disclosure was similar to our analysis of the first alleged disclosure. The information disclosed gave no hint as to what was said to be wrong with the documents or why they were said to be erroneous. The natural reading in context was that the claimant remained concerned about the duration of the trip, which was the area where Mr Ghedi provided him with reassurance. The issue about duration expressed to Mr Ghedi, we accepted, related to the claimant's family obligations.

215. Our conclusions as to whether the claimant actually believed the information he disclosed tended to show potential criminality were much influenced by the fact

that he ultimately went on the business mission to Angola and seems, without further complaint or concern, to have then performed activities which went beyond familiarisation. If he had a genuine concern that such activities might be illegal, we could not see why he would have commenced them.

216. Our conclusions as to the reasonableness of any such belief and whether the claimant believed his disclosure was in the public interest are essentially the same as for the first disclosure.

Issue: 7.1.4 an email of 5 October 2022 to Patricia Abidakun;

7.1.4.1 Did the Claimant disclose to Patricia Abidakun that there was no prospect of him signing the business mission letter for his proposed assignment to Angola on the grounds that to undertake this assignment would be illegal? The Claimant stated "As intimated to you on more than one occasion, there is no prospect of my signing the BM letter in this form as it does not reflect the tenant of discussions conducted even today. It is simply not possible to present such an inaccurate document, let alone request it be signed".

217. We did not consider that this was a protected disclosure for the reasons we have set out in respect of the first and third alleged disclosures above.

Issues: 7.1.5 a meeting on or around 5 February 2023 with the Respondent's HR team;

7.1.5.1 During this meeting, did the Claimant disclose concerns about having been instructed to work in Angola illegally? In particular, did the Claimant state that he "was concerned to travel to Angola on a business mission on an e-visa while working, and the potential penalty may be imprisonment if in breach of the rules of the e-visa, which may lead to being revoked from the law society"?

7.1.6 a meeting on or around 13 April 2023 with Gaukhar Mukazhanova.

7.1.6.1 Did the Claimant disclose concerns that the instruction to work in Angola on the visa he had been provided would be illegal? In particular, did he state he "was concerned about [his] business mission to Angola in October 2022 which he took travelling with a tourist visa stating [he] was not permitted to be remunerated for work purposes"?

218. We considered these disclosures together. Both contained a clear allegation of the wrongdoing alleged and some information. Did the claimant believe that that information tended to show that there had been criminality in relation to the business mission?

219. We concluded that he did not. As we have discussed above, he had travelled out for the business mission and carried out activities. In relation to the later meeting he accepted that he did not believe that a criminal offence had been committed and that the disclosure was not in the public interest. In relation to the February meeting, he accepted that by this stage he knew no criminal offence had occurred. Given that the claimant had travelled to Angola without a return ticket and carried out the work activities he described, it was hard to

understand why he thought there might be criminality in October 2022, before he went to Angola, but was aware by February 2023, there was no criminality. His case was not coherent in this respect.

220. The claimant himself appeared to accept that there was no public interest in disclosures. We concluded he had no belief that there was such an interest at the time he made these disclosures.

221. For the reasons outlined above, we concluded that the claimant did not make any qualifying disclosures.

Issue: 8. Whether qualifying disclosure was protected

8.1 Was the disclosure made in accordance with section 43C of the Employment Rights Act 1996? In particular:

8.1.1 Was the qualifying disclosure made to the Respondent or to any person falling within section 43C(1)(a), (1)(b) or (2).

222. The claimant made his disclosures to people who were acting as employees or agents of the respondent. Had they been qualifying disclosures, we would have concluded that they were protected.

Issues: The Claimant alleges that the Respondent subjected them to a detriment, in contravention of section 47B of the Employment Rights Act 1996.

6. Whether detrimental acts occurred
6.1 Did the Respondent do the following:
6.1.1 Withhold salary due to the Claimant;
6.1.2 Not give the Claimant a new assignment; and/or

6.1.3 Reserve its right to consider instituting disciplinary action against the Claimant.

6.2 Was the Claimant subjected to a detriment by the acts complained of?

9. Reason for treatment

9.1 If the Claimant made a protected disclosure, was this the reason for the treatment complained of?

223. We did not need to go on to consider these issues since we did not find that there were any protected disclosures.

224. Had we had to consider these issues, we consider that the evidence of a connection between the alleged detriments and the disclosures was very thin. The withholding of salary appears to have taken place because of the respondent's belief it was operating the contract correctly and in the way most financially favourable to the respondent.

225. Even after the initial alleged disclosures, the respondent was very keen to get the claimant to agree to the Angola assignment. It was clear to us that what had eventually soured the relationship was the claimant declining the Angola assignment, in circumstances where the respondent clearly believed for a long period that he would accept it. That had also led to the 'threat of disciplinary action' in without prejudice correspondence.

226. For the above reasons we did not uphold the claims of protected disclosure detriment and they are dismissed.

Issue: Automatically unfair dismissal: protected disclosure
12. Whether Claimant made a qualifying disclosure
12.1 Did the Claimant disclose information? The Claimant relies on the disclosures at paragraph 7.1 above.

227. Because we did not conclude that the claimant had made any protected disclosures, we did not uphold his claim of automatically unfair dismissal for making protected disclosures.

<u>Ordinary unfair dismissal</u>

Issue: 14.2 Was there a redundancy situation? ie
14.2.1 Had the requirements of the business for employees to carry out work of a particular kind in the place where the Claimant was employed ceased or diminished?

228. The work of a particular kind we identified was providing legal services to other entities in the respondent group. It appeared that the respondent had a number of people doing this work. Prior to the Angola assignment being localised, there were enough roles for the internationally mobile legal staff available to fill those roles. After that role was no longer a role the respondent had to fill, it had less of a requirement for employees to fill international vacancies than it had previously had.

229. The claimant did not seek to argue that there was no redundancy situation but focussed on the procedure followed by the respondent.

14.3 If so, was the Claimant's dismissal wholly or mainly attributable to that fact?

230. Again, the claimant did not argue that this was not the principal reason for his dismissal and this analysis seemed to us to be correct. Whilst the respondent was clearly disgruntled with the claimant after he rejected the Angola assignment, the respondent was clearly willing to place him in that assignment throughout a prolonged period. The lack of a role once the Angola position had been localised was clearly the principal reason for the ultimate dismissal.

Issue 14.4 If not, was the reason for the Claimant's dismissal a business reorganisation and, if so, was this a substantial reason of a kind such as to justify the dismissal of an employee holding the position which the Claimant held?

231. We did not need to consider this alternative reason for dismissal. Had we found that technically the situation did not amount to a redundancy within the statutory definition, it would have seemed to us to be a substantial reason of a kind such as to justify dismissal.

Issue: 14.5 In the circumstances, did the Respondent act reasonably in treating this reason as a sufficient reason for dismissing the Claimant, taking into account its size and administrative resources and having regard to equity and the substantial merits of the case? This gives rise to the following sub-issues:

14.5.1 Was a fair procedure followed by the Respondent during the alleged redundancy process?

232. The points about procedure which the parties argued related to selection of the pool, consultation, and redeployment and we consider the parties' contentions under those heads below.

14.5.2 How was the pool of potentially affected employees selected?
14.5.3 Was this an appropriate pool?

233. The claimant said that he should have been placed in a pool of all those internationally mobile employees in the legal function at his level of seniority or lower. The respondent said that a pool of one was appropriate because the claimant was the only unassigned such employee at the relevant time.

234. We could see no evidence that the respondent had put its mind to the issue of the pool at the time. It appeared to be its practice to put at risk of redundancy any employee in the claimant's position. The evidence given by the respondent's witnesses was ex post facto justification for the selection of the pool of one. For the respondent not to give any consideration to the composition of the pool was outside the range of reasonable responses.

235. Had the respondent put its mind to the issue of pool, could it fairly have concluded that it should be a pool of one because of the inconvenience and disruption of potentially removing an employee from an assignment which had not come to an end?

236. We bore in mind that the respondent appears to have been willing to move a large number of employees who were still on assignment when it introduced its new policy about the length of assignments. We also considered that in any situation where one employee's assignment came to an end the positions of the 'fewer than ten' other employees in the legal professional family were likely to vary considerably. In the prolonged period when the claimant was facing redundancy, some assignments might well have expired or been near to expiry. There may have been employees approaching the three year limit on their

assignment to a particular country. It seemed to us that a reasonable employer would have reviewed the other internationally mobile employees in the same function and, bearing in mind issues such as disruption to the business, considered whether to include further employees in the pool. The failure to do so was, we considered, outwith the band of reasonable responses. We were not provided with sufficiently detailed information about the other employees in this function to determine what would have been the result of a fair assessment of the pool.

Issue: 14.5.4 Was there adequate consultation with the Claimant?

237. Whilst we accepted that Ms Mukazhanova said something about the respondent having lost trust and confidence in the claimant at the 10 October 2023 consultation meeting (a message that was consistent with the tenor of the emails sent to the claimant at this time), we did not consider that this of itself rendered the consultation unfair.

238. We however considered that a reasonable employer, having made the further enquiries about the potential pool which we have described above, would then have consulted with the claimant about the results of those enquiries. In this respect the consultation fell outside the band of reasonable consultations.

Issue: 14.5.5 What selection criteria were considered in selecting the Claimant for redundancy?
14.5.5.1 Were the selection criteria reasonable?

239. The issue of selection criteria did not arise because the respondent choose a pool of one.

Issue: 14.5.6 Was suitable alternative employment considered by the Respondent and offered to the Claimant?

240. There was of course evidence that some efforts were made to redeploy the claimant. We considered that these efforts were not within the band of reasonable responses.

241. We were not satisfied on the evidence we had that there was any search for alternative employment in the period 13 April 2023 to 18 October 2023 whilst the grievance was ongoing. Although Ms Mukazhanova suggested in cross examination that there had been a search, the lack of any contemporaneous documentation told a different story. The fact that the claimant had raised a grievance was no reason not to conduct a search during this period. It was a long period when there could have been emergent roles or other relevant internationally mobile employees might have been coming to the end of their assignments.

242. The lack of evidence that other heads of region at Mr Ghedi's level or indeed Ms Ferri had been consulted with also seemed to us to support a conclusion that the respondent had not made reasonable efforts to redeploy the claimant.

Issue: 14.5.7 Was the decision to dismiss within the band of reasonable responses which a reasonable employer might have adopted?

243. Because of the failures we found occurred in respect of the selection of the pool, consultation ad effort to redeploy the claimant, we concluded that the decision to dismiss him was not within the band of reasonable responses.

Remedy issues

244. We went on to consider the remedy issues we discussed at the outset of the hearing we could consider alongside liability

Issue: 14.8.2 What is the chance that the Claimant would have been fairly dismissed in any event had a different procedure been followed?

245. A difficulty for the Tribunal in assessing this question is that we had:
(a) no exact number of internationally mobile employees in the legal professional family at the relevant time;
(b) no evidence about the precise roles that all of those employees occupied, the length of their assignments, how much of the three year maximum assignment in a particular country was left, the remuneration and seniority of the roles, the length of service of the employees and their qualifications ad performance.

246. Whilst we bore in mind that we were required to do our best with the evidence we have and that there will inevitably be an element of speculation in assessing Polkey, we ultimately concluded that any reduction we made would simply be a guess. We could find no more reason to estimate that the claimant would have had a 50% chance of retaining his job as to assess he had a 75% chance of retaining his job or a 25% chance of retaining his job. The fault for this lay with the respondent, which was in a position to adduce evidence about the other internationally mobile roles at the relevant time and failed to do so. In circumstances where we were unable to make any reasoned reduction because of the respondent's failure to adduce relevant evidence, we concluded that there should be no Polkey reduction.

Issue: 14.8.3 What is the chance that the Claimant's employment would have ended shortly in any event by reason of conduct and/or some other substantial reason?

247. We heard no evidence or argument on this issue.

Issue: 14.9 Did the Claimant cause or contribute to the dismissal by unreasonably refusing suitable alternative employment and/or his misconduct. If so, should the Tribunal reduce any compensatory award under section 123(6) of the Employment Rights Act 1996 and make an equivalent reduction to any basic award under section 122(2)?

14.11 Did the Claimant cause or contribute to his dismissal? If so, to what extent should the compensatory award be reduced?

248. We bore mind that we had to look at culpable conduct. The respondent suggested that the claimant's refusal of the Angola role was unreasonable. We could see that there were arguments either way as to whether the role could properly be described as a demotion and considered that the respondent could reasonably conclude that the role was not a demotion. However, it did not follow that the claimant's view that it was a demotion was culpably *unreasonable* and we concluded it was not. The reporting line and job title were significantly different from the role he had been in and the claimant ultimately was not satisfied after his discussion with the respondent about the role. We bore in mind also that the respondent had proceeded as if the claimant was certainly going to accept the role throughout much of the period when they had not satisfied him as to its contents and terms and that this would itself have caused him significant concern.

249. We did not find that there was any contributory conduct by the claimant.

<u>Unlawful deduction from wages</u>

The Claimant alleges that the Respondent made unauthorised deductions from wages, in contravention of s13 of the Employment Rights Act 1996.

Whether deduction(s) made from wages

14.13 What was the total amount of wages properly payable to the Claimant on the following occasions:

Issue: 14.13.1 For the period until 30 August 2022 289 days' salary;

250. The claimant's case was that this entitlement arose under an express contractual term:

> *7.6. If you are on Rotational Assignment and have worked any additional days in excess of those specified in your Assignment Offer, you may request a reconciliation of days worked. This reconciliation will be carried out at the completion of a full Contract Year. You will be reimbursed for any extra days worked and paid through the payroll at the end of the Assignment.*

251. After the period when he was present in Iraq, the claimant remained assigned to the Iraq contract until it terminated under its terms (presumably because the respondent did not want to trigger the requirement to pay him for the extra days). His case was that he should have been paid for the 289 agreed extra days at the end of the Iraq assignment (24 March 2023). There was no provision in the contract for holiday leave or for extra days worked to be converted to leave.

252. Ultimately the respondent advanced no argument that the express terms of the contract entitled the respondent to direct that the claimant use the extra days worked as paid leave. We considered it was correct to take that position. There is no reading of the express terms of the contract which could lead to that interpretation. The respondent implicitly recognised that fact when it sought to add a term allowing extra days worked to be converted to leave in the Angola assignment contract.

253. We did not allow the respondent's amendment to argue that there was an implied term, in part because the merits of the argument seemed to us to be poor. The implied term described by the respondent in submissions was 'to the effect that: the parties must reasonably be able to utilise rotational leave built up with days off'. We note that a term expressed in those terms lacks clarity but also is not really what the respondent was arguing for in order to succeed on this point, The respondent was arguing that it should be able to unilaterally require an employee to take extra days accrued as leave. We could see no possible argument that the term was necessary to give efficacy to the contract as a whole or was one the parties would certainly have agreed. A contract where extra days worked are paid for as overtime at the end of an assignment is not a contract which does not work. What might be better arguable would be an implied term which allowed for the parties to agree that extra days be utilised as leave, but that term would not have availed the respondent in resisting this claim.

254. So far as the respondent's proposed amendment to add a defence that the parties reached a collateral agreement on or around 8 August 2024, we also concluded that that defence lacked merit. If the respondent wished the claimant to give up his accrued right to a payment for the 289 days, it needed to make that clear to him and ask for his agreement. The leave balance document was wholly opaque; any ambiguity as to its meaning must be resolved against the respondent. The claimant took the view he was signing to say that the number of days outstanding was correct. We cannot construe the leave balance document as containing an agreement to anything beyond that. It is also questionable whether there was any consideration for any such agreement in circumstances where the respondent did not say to the claimant that the alternative to the claimant agreeing to take his accrued extra days as leave was that he would have his Iraq assignment terminated early and be reduced to his base salary.

255. As to the argument that there was a term implied by conduct or incorporated by custom and practice, we had no good evidence that any such term was 'notorious' amongst employees. We had unevidenced assertions by a number of the respondent's witnesses that this was how things had been done but no evidence that this was made known to employees in general or how it was made known. The two examples of Mr Azbraitis and Mr O'Shea did not show that the alleged practice had been applied even in those cases. Mr Azbraitis appears to have been paid for all or most of his very large balance of accrued days and Mr O'Shea for at least part of his balance. If he was not paid for all of it, the circumstances in which that arose were not clear - whether he agreed to take some leave or was told by the respondent that he must take some leave.

256. The handbook did not assist the respondent in this argument since it makes no reference to any such practice.

257. Additional factors against the respondent's argument were the fact that the terms sought to be incorporated conflicted with the express term entitling the claimant to payment for the extra days worked and the fact that incorporation of such a term would defeat the entire agreement clause.

Issue 15.1 Did the Claimant signify in writing their agreement or consent to the making of the deduction (or part of it) before the event on account of which the deduction was made?

258. The respondent's final argument, which was contained in the list of issues and which we therefrom considered, was that the claimant consented to the deduction in writing within the meaning of secion1391)b) Employment Rights Act 1996. Just as we did not consider that the 8 August 2022 leave balance document constituted a collateral agreement, we considered it was very far from being an explicit consent to the deduction.

259. For all of those reasons, we upheld the claimant's claim for payment for 289 days extra worked during the Iraq assignment. Unless the parties can agree the sum owed, calculation will be a matter for the remedy hearing.

Issue 14.13.2 For the period 6 October 2022 – 9 November 2022 in respect of the business mission to Angola;

260. In respect of this claim, we considered the issue of whether the claim had been presented in time.

261. The monies owed would presumably have been due in the December 2022 payroll at the latest. The claimant first contacted Acas on 3 June 2023. Claims which arose before early March 2023 would have been out of time on their face at this point. It was suggested in submissions that it was not reasonably practicable for the claimant to bring this claim earlier because once the Iraq mission ended he was shut out of the respondent's IT system, which contains his payslips. Even if the claimant had given evidence to this effect, it did not seem to us that loss of access to the system in March 2023 would have been prevented him seeing his payslips prior to that and in any event it would have obvious from his own bank statements that he had not been paid twice for the period of the Angola business mission. We noted that he was raising the issue about the payment for the business mission in correspondence in the autumn of 2022 onwards and that he had lawyers involved by December 2022 at the latest. We concluded that it was reasonably practicable for the claimant to have presented this claim in time.

262. We could see no good argument that there was the sort of factual nexus which rendered this part of a series of deductions when considered with the claim in respect of accrued leave days. The payments were two different types of

payment arising from different contractual provisions. The claimant sought to suggest that the deduction formed a series when considered with the hypothetical tax deductions; even if we could have seen a sufficient factual and temporal link with that claim, that claim was unsuccessful.

263. For these reasons we did not uphold this claim

Issue: 14.13.3 For the period 2015 – 2023 in respect of 'hypothetical tax'.

264. The claimant sought to argue that he was contractually entitled to the difference between the 30% hypothetical tax deducted from his salary over the years he was assigned to Iraq and the actual tax paid by the respondent on that salary. The claimant's claim in respect of the hypothetical tax deductions foundered on the very clear terms of the contract which authorised the deduction of hypothetical tax at the rate of 30%. The contract also referred to the respondent's obligation to pay the actual taxes owed on the claimant's salary in accordance with the fiscal laws of the country of assignment. These were separate provisions and nowhere in the contract did it state that the respondent would reimburse the claimant for the difference between hypothetical tax deducted and the sums paid by the respondent. We did not consider that there was any ambiguity in the contract nor that the claimant genuinely believed that there was in circumstances where he had not challenged the position for a number of years.

265. We did not uphold this claim.

Conclusion

266. There will be a short case management preliminary hearing to give directions for the remedy hearing. We concluded that, although we heard some submissions on the issue of whether there should be any Acas uplift, the issue needed to be fully considered in the context of the conclusions we have reached and the size of the award we are otherwise making.

Employment Judge Joffe

28 October 2024

Sent to the parties on:

31 October 2024

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For the Tribunal Office: