THE EMPLOYMENT TRIBUNALS

BETWEEN

Mr Omar Farag ***Claimant***

AND

ENI International Resources Ltd ***Respondent***

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central **ON**: 6, 7 and 8 June 2017 and, in chambers, 29 September 2017

EMPLOYMENT JUDGE: Mr Paul Stewart **MEMBERS: sitting alone**

Appearances:

For Claimant: Mr I Wheaton of Counsel
For Respondent: Ms R Thomas of Counsel

JUDGMENT

The Tribunal does not have jurisdiction to hear the claims of unfair dismissal or unlawful deduction of wages and / or breach of contract. If, contrary to that view, the Tribunal does have jurisdiction, the claims are all dismissed.

REASONS

Introduction

1. From 7 October 2008 until 29 October 2015, the Claimant was employed by the Respondent. The employment was terminated by summary dismissal. He claims the dismissal was unfair and that the summary nature of his dismissal was wrongful. Further, he claims unlawful deduction of wages, alternatively breach of contract.

2. The dismissal was admitted and thus I heard first from the witnesses for the Respondent, Mr Mariano Bonfitto and Ms Elena Cucco. I then heard the evidence

of the Claimant.

Facts

3. Eni SpA is an Italian integrated energy company working in exploration, production, transport, transformation and marketing of oil and natural gas. The ENI Group of companies is split into four divisions: Corporate; Upstream; Midstream; and Refining and Marketing. The Respondent is a London based wholly owned subsidiary of Eni SpA sitting within the Corporate Division. It is the specialist recruitment and global career management company of the Group. It is responsible for identifying, recruiting and developing technical and management personnel to fill positions within the Eni Group – predominately in the Upstream Division. Some 60 staff in London deal with the global workforce. As Mr Bonfitto, the head of Human Resources for the Respondent put it, the "hiring and firing is done in London".

4. The Respondent typically employs staff on an international employment contract (permanent or fixed term) – sometimes referred to as the standard international, or over-arching, contract - with separate assignment contracts then used for individual international assignments, where the employee works with companies or joint venture projects within the Group in different countries.

5. During assignments, under the standard international employment contract arrangement, the employee will receive an assignment salary, benefits and accommodation. If an employee is without an assignment, they will be classed as "unassigned" and receive a "notional" salary whilst the Respondent searches for a new assignment. The employee's salary is taxed in accordance with the country where the employee is working during an assignment or where they are residing when unassigned.

6. As an alternative to the standard international employment contract arrangement, referred to above, individuals can sometimes enter into a "TCN" (Third Country National) arrangement – now referred to as "Expat.com" (Expat from other Companies). This arrangement involves a single (assignment) fixed term contract of employment between the individual and the Respondent, as well as a separate (local) contract of employment between the individual and the operational group company which manages the local work location. The TCN arrangement involves payment of a single salary from commencement of the work through to completion of the work. There can be no period of "unassigned" status and therefore there is no concept of "notional" salary under the TCN arrangement. When the TCN arrangement ceases, the individual returns back under the umbrella of the local employment contract with the local group company.

7. The Claimant is a Libyan national who was a production engineer. He commenced a standard international contract of employment with the Respondent on 7 October 2008. Within that over-arching arrangement, he entered into separate international assignment contacts with the Respondent. He has never worked or resided in the UK. The Claimant had not visited the UK ahead of his dismissal, nor had he any assets, family or other connection with the UK other than the fact that his employer, the Respondent, was based in London.

8. His first assignment contract was with a project company in Egypt. This lasted until November 2010 when he accepted a new international assignment contract working in Italy with ENI Exploration and Production (E & P) Division. He was to be

based in Milan for 5 years.

9. In 2011, the Respondent issued a new international employee handbook which it notified to staff and made available through the business intranet. Contained within the handbook was the Respondent's disciplinary procedure wherein was cited various examples of gross misconduct, one of which stated that gross misconduct will occur "where an employee competes with the Respondent, whether during or outside working hours, in any capacity whatsoever and whether directly or indirectly, including taking any steps towards the establishment of a business which once operational will so complete."

10. The Claimant signed a new set of contract documents for this assignment in 2012. The new set comprised both an International Employment Contract and an International Assignment Contract.

11. The standard International Employment Contract at section 19.4 states that the Respondent is entitled to the Claimant's "undivided loyalty". It puts an obligation on the employee to "refrain from any conduct whatsoever which may create either a conflict of interest or the appearance of a conflict of interest'. The contracts stated that they are governed by UK law and provided that disputes thereon be litigated in the High Court.

12. In addition to the contracts which the Claimant signed, the Respondent supplied staff with a Code of Ethics which repeated the prohibition on staff being seen to create conflicts of interest with the Eni Group.

13. For staff who are assigned to Italy but who are not Italian, there are various immigration and visa requirements which need to be fulfilled so that the employee can enter, live and work in Italy. The employer must first secure a "nulla osta" before the employee can enter Italy. This requires a written application supported by various documents such as birth and marriage certificates and degrees for the employee and his family.

14. Upon receipt of the nulla osta, the employee is able to apply for a work permit and the permit application process allows the employee to enter Italy. Within 8 days of arrival, the employee needs to request an appointment with the Questura (Immigration Authorities) in order to sign a "contratto di soggiorno" (work visa / permit) which allows the employee to work in Italy. Securing the work permit allows the employee to obtain a "permesso di soggiorno" which is the "permit of stay" that allows the employee and his or her family to stay and live in London.

15. The Group has a company called ENI Servizi which assists employees obtain such permits in Italy and elsewhere. The Claimant obtained his initial permits for Italy with assistance from ENI Servizi.

16. The Claimant was provided with an apartment to accommodate himself and his family in Milan.

17. After 4 August 2012 when the Claimant's wife gave birth to a child, the Claimant informed the Respondent and ENI Servizi so that the relevant immigration and benefit details could be updated.

18. He was advised by emails on 5 August 2014 and 9 September 2014 (the latter giving him the three months' notice required under his assignment contract) that his

current assignment in Italy would not be extended any further and would come to a close at the end of November 2014.

19. There followed email correspondence between the Respondent and the Claimant about the possibility of the Claimant obtaining a new assignment once his assignment in Italy finished. The Claimant also corresponded with a Ms Irena Obracaj who worked in the Exploration & Production Division of Eni SpA based in Milan. He reminded her on 8 October 2014 that his Nulla Osta (his permission to stay in Italy) expired in the middle of February 2015.

20. The Claimant was offered and accepted an assignment in Angola but that assignment was cancelled on 13 January 2015 before it started. The period of time between 28 November 2014 and 13 January 2015 saw the Claimant being kept in Italy with Eni SpA but without a specific assignment.

21. On 19 January 2015, Ms Elena Cucco for the Respondent emailed the Claimant from London informing him that, following the cancellation of the assignment in Angola, no alternative roles for him had become available. In consequence, she officially served notice on him that, as of 13 January 2015, the Respondent's notice period had started. The Claimant was told that the Respondent would continue to be in touch to explore future assignments – one regarded as potential was mentioned in Malta with Eni North Africa – but, if no new assignment had been identified at the end of the three-month period [13 March 2015], then both the assignment contract and the international employment contract would terminate.

22. The Claimant was concerned about the fact that his permission, and that of his wife and children, to stay in Italy would expire on 17 February 2015. Historically, the Respondent had always managed the obtaining and extending of such permissions. He decided he had no other option but to renew his work permit and those permissions with the Italian Immigration Authority. Neither he or his family wanted to be deported to Libya, his home country, where there was a civil war raging.

23. The Claimant set out in his witness statement what he did next:

> 14. As I had no valid employment assignment in order to fulfil Italian immigration requirements I registered a business with the Milan Chamber of Commerce on 19 January 2015 called Talent Training & Consultancy Da Farag Omar. This confirmed a business starting date of 13 January 2015. The day I found out I would not be going to Angola. This enabled me to renew my Permesso di Soggiorno which was now due to expire on 28 January 2017. I must stress that at no point was this an operational business – it was simply a formality to enable me and my family to remain in Italy until a new assignment could be secured. This is supported by the fact that I actively continued to seek a new assignment with the Respondent. I was prepared to go anywhere in the world, other than Libya.
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> 15. The Respondent knew that I had taken steps to renew my visa. I had a catch-up meeting with Maglio Antonio and Jason Cammaert in February 2015 and I advised them then. They appreciated that it was because my visa was due to expire and expressed absolutely no concerns. I was not asked to provide a copy but have willing done so – I had nothing to hide. In fact, I think they may have even contracted the Immigration Team themselves to advise them of the steps I had taken.
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> 16. The Respondent appreciated my predicament. It knew that my visa was due to expire on 17 February 2015 but it had confirmed that it would continue to employ me until 13 March 2015. I maintain that my immigration status remained the Respondent's responsibility as I remained an employee but clearly nothing was done about it and I knew

> that the Respondent did not have another assignment in Italy to offer me. To protect my family, I registered a "phantom" company to satisfy the Italian immigration authorities and allow me to stay for the intervening weeks. The company reflected the job that I was currently performing – I didn't know how to do anything else.
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> 17. On 17 March 2015 I received an email from Elena Cucco confirming that she would be in touch shortly to coordinate my departure from Italy and my flights. Nothing was said to me about my immigration status even through the Respondent would have been aware that my visa expired on 17 February 2015. If I had not renewed it I would have been staying in the country illegally.
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> 18. I received information about the Malta assignment but it was not ideal. The contract term was short (only 12 months) and the salary was relatively low. I accordingly asked the Respondent to keep looking for me unless Malta was prepared to renegotiate its terms.

24. There was the possibility of work in Kazakhstan. The Claimant expressed interest in this role which stopped his notice period running but the possibility disappeared when HR informed him that the role was withdrawn on 14 May 2015. Jason Cammaert wrote on 18 May 2015 informing him that the only option was the Malta assignment which would be managed by ENI NA (ENI North Africa).

25. This was confirmed by Ms Cucco by email the same day. She informed him that ENI NA would be in touch to discuss terms but, as Kazakhstan was not happening, his notice would begin to run again and would expire on 18 August 2015. The Claimant received notice of another role in Egypt on 18 May which he accepted on 19 May only to find it was withdrawn for operational reasons on 20 May.

26. On 22 May, Ms Cucco emailed the Respondent's immigration team advising that the Claimant and his family would no longer be required to stay in Italy for work as of 1st July 2015 and asking the team to arrange the closure of his permit to stay.

27. Ms Cucco was in further email contact with the Claimant on 27 May explaining that there were no international assignments other than Malta which to date he had refused. She pointed out that:

> … if you decide to refuse to leave Italy and remain in this country beyond 30/6/2015, it would be at your own and direct responsibility to manage your immigration status with the necessary authorities.

28. On 8 June, Ms Cucco advised by the Claimant that, from that date, he would be considered to be on garden leave until the end of his contract on 18 August 2015 in the event that no other assignment could be found. A letter sent to the Claimant also advised him that, during his notice period, he should not undertake any business or profession or become an employee, officer or agent of any other firm, company or person without the prior written consent of the Respondent. This merely repeated a prohibition that appeared in the Claimant's contracts.

29. During July and August, the Claimant attempted to negotiate a higher salary for the available Malta position but his attempt was rebuffed on 3 August and he was told the offer of the Malta job was not negotiable. On 10 August, Ms Cucco emailed the Claimant confirming that 18 August was to be his last day and pointing out that the Respondent would not be responsible for the rent on the Milan apartment after that date.

30. On 10 August, the Claimant signed the Respondent's offer letter and new contract to cover a 12-month assignment in Malta and the following day he signed

the local contract from ENI NA. He was informed that the assignment could not commence until the pre-employment conditions had been satisfied.

31. On 12 August, there was email correspondence between Kemala Rachmawati from ENI International HR in Italy and ENI Servizi regarding the Claimant's immigration status and his permit situation. ENI International HR were trying to make the requisite arrangements for the Claimant and his family to leave Italy and enter Malta for the new assignment. The records of ENI Servizi revealed that the Claimant's permit to stay in Italy had expired on 17 February 2015. As he had been under notice of termination at the start of 2015 and not had a new assignment within the notice period, there had been no triggering within ENI Servizi of the process required to extend the Claimant's permits. Furthermore, because seemingly permits had not been extended, there could be no guarantee that the Claimant, on leaving Italy, would have a smooth exit: "It depends on the customs officer that he will meet at the airport".

32. These concerns led to Mr Mario Albenese of ENI NA contacting the Claimant by telephone on 14 August 2015 on a conference call. The Claimant admits he was anxious about the call and attributes that anxiety to the fact that, by that stage, the Respondent had let him down over three potential assignments and, if the Malta assignment were to disappear, there was the underlying threat, as he saw it, of himself and his family being returned to Libya.

33. However, Mr Albenese perceived the Claimant to be somewhat "hectic and confused" during the call. The Claimant confirmed to Mr Albenese that the previous permit arrangement obtained for him by ENI had expired but that he had put in its place an alternative permit arrangement. Mr Albenese wanted to see the alternative permit but the Claimant refused to provide a copy. The Claimant also disclosed that he had set up his own consultancy business.

34. After the conference call, Mr Albenese circulated an email but, it being August, its contents were not immediately discussed by management at the Respondent's London office.

35. Meanwhile, on 17 August, Mr Albenese made further contact with the Claimant in order to clear the way for the Claimant to start his Malta contract. There was some negotiation concerning the Claimant's family remaining in the Milan apartment as opposed to them moving to a hotel while the Claimant made a familiarization visit to Malta. There was a need for the Claimant to renew his Libyan passport ahead of obtaining a work permit for Malta.

36. In September 2015 after the summer break, the Respondent reviewed the situation and, in particular, the email of Mr Albenese concerning the conference call. The disclosure of the Claimant recorded therein of having set up a consultancy business caused an investigation. This entailed contacting the Italian immigration authorities who confirmed that the Claimant did have a valid permit to stay in Italy and that this had been obtained on the basis that the Claimant was self-employed and had set up his own business in Italy.

37. Mr Bonfitto asserted that this information came as a complete surprise to the Respondent. He saw it as potentially a disciplinary issue. A search of the Italian Business Register was carried out for businesses registered with the Milan

Chamber of Commerce. This revealed full details of the Claimant having registered a business called "Talent Training & Consultancy of Omar Farag" with his (the Respondent's) Milan apartment being the business' registered address.

38. As a result, a pack of documents was prepared as an enclosure to a letter addressed to the Claimant inviting him to a disciplinary meeting with Mr Bonfitto to be held on 19 October 2015 at the ENI offices in Milan. This was both sent by post and by email on 9 October 2015.

39. The Claimant sent an email later on 9 October to Mr Nasar Ramadan of ENI NA referring to the emailed letter he had received, admitting having registered a business but denying that he had carried out any business activity.

40. On 14 October 2015, the Claimant contacted Jason Cammaert by email. He stated that he had taken legal advice and made various representations about the situation. Also on the same day, he contacted Mr Antonio Vella of ENI asserting that he had been forced to register the business for reasons relating to his Italian immigration status.

41. On 16 October 2015, the Claimant sent a further email to Messrs Ramadan, Cammaert, Bonfitto and other contacts from both ENI and the Respondent. In it, he asserted he was no longer employed by the Respondent but now was employed by ENI NA. A later email that day announced he would not be attending the disciplinary meeting with Mr Bonfitto arranged for 19 October. Despite being warned on 17 October that the meeting would still go ahead if he failed to turn up, the Claimant did not attend the meeting for which Mr Bonfitto had travelled from London to attend.

42. In his evidence, the Claimant asserted that there were three reasons for his decision not to attend: first he considered he had suffered at the hands of HR who had offered and then withdrawn three assignments. Second, he perceived Mr Bonfitto to be both judge and prosecutor – and therefore not impartial. And, third, he was not permitted to bring as his representative someone from outside the group.

43. Mr Bonfitto waited 2 hours in the company of Mr Zuljay Manzo, a local HR representative of ENI in Milan, for the Claimant to appear before accepting he would not be attending. He therefore decided to adjourn the meeting to give the Claimant another chance to attend. On 22 October, he wrote to the Claimant informing him that the meeting had gone ahead on 19 October and that he had adjourned it when the Claimant failed to appear. The reconvened meeting would be held on 29 October.

44. On 26 October, the Claimant sent an email to Mr Marco Volpati of ENI attaching thereto a letter which he described as a letter of grievance. Because the letter of grievance related to the overall ongoing disciplinary process, Mr Bonfitto decided he should take the grievance letter into account. He informed the Claimant accordingly ahead of making the trip to Milan on 29 October. Again, Mr Bonfitto and Mr Manzo waited two hours but the Claimant failed to appear.

45. After reviewing the letter of grievance and the letter calling the Claimant to the disciplinary hearing plus the enclosed documents, Mr Bonfitto came to the conclusion that the Claimant had registered his business in Italy in breach of the

contractual obligations he owed to the Respondent. Such action destroyed the loyalty and trust between the Claimant and the Respondent. Mr Bonfitto accordingly made a finding that the Claimant was guilty of gross misconduct and decided to terminate the Claimant's contract with immediate effect.

46. A letter was sent by email to the Claimant on 29 October confirming Mr Bonfitto's decision and informing the Claimant of his right to appeal. The letter was signed not only by Mr Bonfitto but also by the managing director of the Respondent to whom the Claimant was advised he might appeal against the decision to dismiss. The Claimant did not appeal. Subsequently on 24 November 2015, ENI NA wrote to the Claimant pointing out that their contract with the Claimant had not come into effect as the Claimant had not started working in Malta, which was a condition of the contract. Therefore, ENI NA treated the contract as cancelled.

The issues

47. At the start of the hearing, I was provided with a list of issues which I understood to be agreed. I propose to work through that list.

Jurisdiction

48. The issue which arises in this case and in the seminal case of Lawson v Serco Ltd [2006] ICR 250 and the subsequent cases of Duncombe v Secretary of State for Children Schools and Families [2011] ICR 1312 and Ravat v Halliburton Manufacturing and Services Ltd [2012] ICR 389 was set out in the opening paragraph of Lord Hoffman's speech in Lawson:

> 1. The question common to these three appeals is the territorial scope of section 94(1) of the Employment Rights Act 1996 , which gives employees the right not to be unfairly dismissed. Section 230(1) defines an "employee" as an individual "who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment." But the Act contains no geographic limitation. Read literally, it applies to any individual who works under a contract of employment anywhere in the world. It is true that section 244(1) says that the Act "extends" to England and Wales and Scotland ("Great Britain"). But that means only that it forms part of the law of Great Britain and does not form part of the law of any other territory (like Northern Ireland or the Channel Islands) for which Parliament could have legislated. It tells us nothing about the connection, if any, which an employee or his employment must have with Great Britain. Nevertheless, all parties to these appeals are agreed that some territorial limitations must be implied. It is inconceivable that Parliament was intending to confer rights upon employees working in foreign countries and having no connection with Great Britain. The argument has been over what those limitations should be. Putting the question in the traditional terms of the conflict of laws, what connection between Great Britain and the employment relationship is required to make section 94(1) the appropriate choice of law in deciding whether and in what circumstances an employee can complain that his dismissal was unfair? The answer to this question will also determine the question of jurisdiction, since the Employment Tribunal will have jurisdiction to decide upon the unfairness of the dismissal if (but only if) section 94(1) is the appropriate choice of law.

49. While all three of these cases were of assistance, Lord Hope's judgment in Ravat – with which the other Supreme Court Judges were in agreement – was particularly helpful.

50. Lord Hope reviewed the earlier cases and said:

> 26. As I have already indicated (see para 14, above), it is possible on a careful reading of Lord Hoffmann's speech in the Lawson case to find what he saw as the guiding principles.

> The question in each case is whether section 94(1) applies to the particular case, notwithstanding its foreign elements. Parliament cannot be taken to have intended to confer rights on employees having no connection with Great Britain at all. The paradigm case for the application of the subsection is, of course, the employee who was working in Great Britain. But there is some scope for a wider interpretation, as the language of section 94(1) does not confine its application to employment in Great Britain. The constraints imposed by the previous legislation, by which it was declared that the right not to be unfairly dismissed did not apply to any employment where under his contract of employment the employee ordinarily worked outside Great Britain, have been removed. It is not for the courts to lay down a series of fixed rules where Parliament has decided, when consolidating with amendments the previous legislation, not to do so. They have a different task. It is to give effect to what Parliament may reasonably be taken to have intended by identifying, and applying, the relevant principles.
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> 27. Mr Cavanagh [*counsel for the Appellant employer*] drew attention to Lord Hoffmann's comment in Lawson, para 37, that the fact that the relationship was "rooted and forged" in Great Britain because the respondent happened to be British and he was recruited in Great Britain by a British company ought not to be sufficient in itself to take the case out of the general rule. Those factors will never be unimportant, but I agree that the starting point needs to be more precisely identified. It is that the employment relationship must have a stronger connection with Great Britain than with the foreign country where the employee works. The general rule is that the place of employment is decisive. But it is not an absolute rule. The open-ended language of section 94(1) leaves room for some exceptions where the connection with Great Britain is sufficiently strong to show that this can be justified. The case of the peripatetic employee who was based in Great Britain is one example. The expatriate employee, all of whose services were performed abroad but who had nevertheless very close connections with Great Britain because of the nature and circumstances of employment, is another.
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> 28. The reason why an exception can be made in those cases is that the connection between Great Britain and the employment relationship is sufficiently strong to enable it to be presumed that, although they were working abroad, Parliament must have intended that section 94(1) should apply to them. The expatriate cases that Lord Hoffmann identified as falling within its scope were referred to by him as exceptional cases: para 36. This was because, as he said in para 36, the circumstances would have to be unusual for an employee who works and is based abroad to come within the scope of British labour legislation. It will always be a question of fact and degree as to whether the connection is sufficiently strong to overcome the general rule that the place of employment is decisive. The case of those who are truly expatriate because they not only work but also live outside Great Britain requires an especially strong connection with Great Britain and British employment law before an exception can be made for them.

51. Lord Hope suggests that an especially strong connection with Great Britain and British employment law is required before an exception can be made for those who are truly expatriate in the sense that they live and work outside Great Britain. So, given that this Claimant both worked and lived outside Great Britain, can it be said that he and his employment had an especially strong connection with Great Britain and British employment law so as to bring his case with the scope of the exception?

52. The Claimant is of Libyan nationality. He had been working in Italy assigned to an Italian company, one of the group of companies to which the Respondent company, his British employer, belonged. The Respondent company may be a limited company registered in England but it is a wholly owned subsidiary of the Italian energy company Eni SpA. As such, it identifies and recruits personnel to fill positions within the Eni group world-wide. The Claimant was recruited by the Respondent and placed in two assignments, first in Egypt and then in Italy. A third assignment for work in Malta was thwarted by his dismissal. Ahead of his dismissal, the Claimant had never visited the UK.

53. The law of the contracts under which the Claimant was employed was stated to be UK law. Given that UK law encompasses three different jurisdictions, that is not very precise although the mention of the High Court suggests that the contracting parties had in mind the law of England and Wales. However, many contracts contain such a clause which is a reflection more of the confidence that contracting parties have in the courts of England and Wales rather than anything else. The Claimant was paid from London but not paid in sterling: at his option, he was paid in euros. He did not contribute to the UK state through paying to it income tax or national insurance.

54. Mr Wheaton for the Claimant argues that the Respondent company, by exercising a considerable amount of control over the staff it places on assignment with different companies in the Eni Group, thereby receives a benefit. If I understood him correctly, he was suggesting that the activities of the Respondent – its wages bill for its 60-odd staff and its running costs - were paid for by a precept levied from the Group companies to whom they provided staff in addition to the reimbursement of such salary as the Respondent paid to the staff on assignment.

55. I do not find that argument compelling. It seems to me that the fact that an Italian energy company finds it convenient to run its hiring and firing from London does not create a very strong connection with the UK. The Respondent company is providing a service to other companies within the Eni Group. It is true that it has a contractual connection with the staff it places with other companies in the group but that merely ensures continuity of employment of staff between assignments. An employee so placed has, to my mind, a much stronger connection with the company to whom he or she is assigned than to Great Britain. The over-arching contract with the Respondent really covers periods between assignments which, for business reasons, do not necessarily follow each other without a gap.

56. Mr Bonfitto gave evidence that the Claimant had commenced proceedings relating to his employment in Libya. This suggests that the Claimant considered his employment to have at least an equal if not stronger connection with a jurisdiction other than that of the UK.

57. It is always, as Lord Hope says, a question of fact and degree but all I have heard concerning the Claimant's overall contractual relationship with the Respondent and his assignments, in particular, the one in Italy, leads me to the conclusion that the place of employment is decisive in his case. He was assigned to work in Italy in November 2010 for a period of 5 years. When that assignment came to an end, he remained in Italy pending assignment elsewhere.

58. Therefore, I decline jurisdiction on the basis that, in the circumstances of this case, it cannot be implied that Parliament intended the Claimant to have the right to complain of unfair dismissal to the Employment Tribunal.

59. My decision on jurisdiction means that further consideration of the issues must be on the basis that it would be helpful to an appeal court to have my first instance views should it decide that I am wrong on jurisdiction.

Unfair Dismissal

60. I am satisfied that the Claimant was dismissed for a reason relating to his conduct, that being a potentially fair reason with the ERA 1996. I am satisfied that

the Respondent, in the form of Mr Bonfitto, did have a genuine belief that that the Claimant was guilty of the misconduct alleged.

61. I am further satisfied that there were reasonable grounds on which Mr Bonfitto could form that belief and that, at the time of him forming that belief, the Respondent had carried out as much investigation into the matter as was reasonable in all the circumstances. That investigation had intended the Claimant to have the opportunity of explaining why his actions should not be treated as gross misconduct but, for reasons of his own, the Claimant did not avail himself of that opportunity.

62. Further, in writing his letter in response to being called to a disciplinary meeting, the letter treated as a grievance letter, the Claimant did not assert, as he was to assert at this hearing, that certain of the personnel working in HR in Italy were aware of the actions he had taken to secure the continuation of his work and other permits beyond 17 February 2015 and had expressed no concerns. I find it singularly odd that the Claimant, faced with being called to a disciplinary meeting over an issue about which, on his account, he had advised Maglio Antonio and Jason Cammaert in February 2015, did not include in his grievance letter that very pertinent fact.

63. I have no doubt that, if the Claimant had claimed those individuals had knowledge of the steps he had taken, the Respondent would have taken steps to ascertain the truth of the claim. If the individuals had confirmed that they knew of the Claimant's actions and had done nothing either to alert Mr Bonfitto or to dissuade the Claimant from doing what he was doing, it would have been very difficult for Mr Bonfitto to have concluded that the Claimant was guilty of gross misconduct.

64. But the Claimant neither advanced that version of events either in his grievance letter or in the disciplinary meeting which, of course, he did not attend. In the circumstances, therefore, Mr Bonfitto had reasonable grounds to conclude that the Claimant had breached his contract of employment and was guilty of gross misconduct.

65. Two matters concerned me about the procedure adopted for the dismissal. First, there is the fact that Mr Bonfitto appeared to the Claimant to be both the investigator and also the person conducting the disciplinary hearing. And, second, the managing director of the Respondent signed the letter of dismissal along with Mr Bonfitto and the letter stated it was to the managing director that any appeal against dismissal should be made.

66. The first matter may have acted on the Claimant's mind and formed one of the three reasons advanced by him for not attending the disciplinary hearing. To that extent, it may have affected the Claimant's participation in the disciplinary process. However, I am not persuaded that it made any difference to the outcome. I am not satisfied on the balance of probabilities that, had Mr Bonfitto conceded the task of investigating the matter or the task of conducting the disciplinary hearing to another manager within the organisation so that the Claimant could not have cited his perception of Mr Bonfitto as both judge and prosecutor and therefore not impartial, it would have meant that the Claimant would have chosen to attend the hearing. There were, after all, two other reasons advanced by the Claimant for not attending

the hearing.

67. But if I am wrong about that and the correct conclusion to be drawn is that a renunciation by Mr Bonfitto of one of the two roles he was undertaking would have led to the Claimant attending the disciplinary hearing, I do not accept that the person conducting that hearing would have heard the account advanced by the Claimant to this tribunal of HR managers in Italy knowing of, and condoning, his actions. The Claimant did not put that account in his grievance letter and, therefore, on the balance of probabilities, he would not have advanced it in a disciplinary hearing. And, without such an account, it would have been open to the person conducting the disciplinary hearing to have reached the same conclusion as Mr Bonfitto.

68. The second matter of concern – that Mr Bonfitto's letter of dismissal was signed by both himself and the man the Claimant was directed to appeal to against the dismissal – does not, in my view, make unfair what is otherwise a fair dismissal. The Claimant chose not to appeal. Had he done so, he could have raised as a preliminary issue the fact that it was proposed that his appeal should be heard by one of the signatories to the dismissal letter. In any event, there was no evidence that the managing director had taken any part in the decision to dismiss: on the evidence, the decision was taken by Mr Bonfitto alone.

69. The decision to dismiss, once it was established that the Claimant was guilty of gross misconduct, was within the range of reasonable responses for this employer.

70. If I am wrong in concluding that the dismissal was fair, I consider that the Claimant contributed 100% to his dismissal. It was open to him to make a bigger noise within the Respondent company and within the Eni Group about the impending expiry of his, and his family's, permits on 17 February 2015. ENI Servizi was charged with the function of obtaining renewals of such permits in Italy. It may be that its procedure for obtaining extensions of the Claimant's permits was not triggered but, if the Claimant knew that to be the case, it seems to me that all he had to do was to contact ENI Servizi and point out that such extensions were needed. I cannot conceive that the effort for the Claimant of doing that would have been anything like as great as registering himself as self-employed and then applying for new permits based on that registration.

71. In addition, the Claimant had material in the form of the contracts he had signed and in the Code of Ethics to which he could – and should – have referred before embarking on registering a business in his own name. And to have avoided any misunderstanding, he could – and should – have informed the Respondent in London about the course of action ahead of registering a business in his own name.

72. If the position was that he was misled as to the correctness of his behaviour by HR staff in Italy, he could – and should – have made representations to that effect in his grievance letter and / or at the disciplinary hearing to which he was summoned but did not attend.

73. The next issue posed is the question of what loss, if any, that the Claimant suffered. I did not hear evidence concerning the Claimant's loss and therefore cannot answer that question.

74. I was asked whether any award of compensation should be reduced to reflect a

failure on the part of the Claimant to follow the ACAS code of practice on Disciplinary and Grievance Procedures. The failure of the Claimant to attend the disciplinary hearing and advance his case that HR managers in Italy knew of, and condoned, the behaviour for which he was dismissed strikes me as wholly unreasonable. I am entitled in such circumstances to reduce compensation by up to 25%. If, contrary to my views, the Claimant's dismissal was unfair, I would reduce such compensation to which he might be entitled by 25%.

Unlawful deduction of wages / Breach of contract

75. As regards the territorial jurisdiction for an unlawful deduction of wages claim, it seems to me that it replicates the arguments relating to jurisdiction in relation to unfair dismissal. I therefore decline jurisdiction.

76. If I am wrong about that, I do not consider the Claimant to be entitled to damages for wrongful dismissal. His dismissal flowed from his breach of contract in respect of which the Respondent was entitled to treat itself as discharged from its obligations under its over-arching standard international contract. I do not consider that the Claimant's International Assignment Contract with Eni NA had commenced given that the Claimant never travelled to Malta, a contractual requirement, before the contract was cancelled by the Respondent. I therefore find that he was not entitled to be paid wages alternatively damages for breach of contract for the period between 18 August and 29 October 2015.

77. Thus, for all the reasons set out above, I dismiss the claims made by the Claimant.

EMPLOYMENT JUDGE Stewart On: 16 October 2017