EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Ross Murray	**v**	WIPRO Limited

Heard at: Watford by CVP **On**: 12/13 May 2021

Before: Employment Judge Alliott
Mrs G Bhatt
Mr C Surrey

Appearances

For the Claimant: Ms Clare Thomas (Solicitor)
For the Respondent: Ms Sarah Reynolds (Solicitor)

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

"**This has been a remote hearing not objected to by the parties. The form of remote hearing was CVP. A face to face hearing was not held because it was not practicable and no-one requested the same."**

JUDGMENT

The judgment of the tribunal is that:

1. The claimant's claim for unfair dismissal is well founded.

2. The claimant's claim for race discrimination is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent on 4 July 2016 as a Transformation Director. His employment was terminated with effect on 19 February 2020 when he was paid in lieu of notice and given a redundancy payment.

2. By a claim form presented on 8 July 2020, the claimant brings complaints of unfair dismissal and race discrimination.

The Issues

3. At a preliminary hearing heard on 18 January 2021 in front of Employment Judge Chudleigh, the issues were set out as follows:

> "The issues between the parties which fall to be determined by the tribunal are as follows:
>
> Unfair dismissal;
>
> (i) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (ERA)? The respondent asserts that it was some other substantial reason, namely because no alternative billable assignment could be found for the claimant after his previous billable assignment ended on 7 October 2019.
> (ii) If so, was the dismissal fair or unfair in accordance with ERA Section 98 (4), and, in particular, did the respondent in all respects act within the "band of reasonable responses"?
> (iii) If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed/had been dismissed in time anyway?
>
> Equality Act Sections 13 and 19; direct or alternatively discrimination because of race;
>
> (iv) The claimant describes his race as white British. His concern is that he was not receiving work as it was being allocated to workers on the Indian sub-continent. The nature of the discrimination claims are to be clarified as set out below."

4. The claimant was ordered to clarify his race discrimination claim. In accordance with the Order, the claimant provided the following particulars:

> "The claimant is a British national. In terms of Section 9 of the Equality Act (EA) 2010, the definition of race includes nationality. The claimant suffered indirect discrimination in terms of Section 19 of the 2010 Act in that he was prevented from obtaining billable roles on client accounts as these were being taking by employees of the firm based in India. From the period 7 October 2019 until 19 February 2020 the claimant was advised that assignments had been allocated to an individual from India who required to remain working in the UK in order to meet visa requirements. The respondent's practice of assigning billable roles for which the claimant would have been eligible or offering such roles to a foreign national amounted to indirect discrimination. Nationality is a protected characteristic. The respondent's practice has put UK nationals at a disadvantage in obtaining billable roles compared to non-UK nationals based in India."

5. In its amended response, the respondent sought clarification as to the identity of the Indian national based in the UK, the grounds upon which it was said to be discrimination and what assignments were allegedly given to that Indian national.

6. On the basis of the further information provided at that stage, the agreed list of issues set out the indirect discrimination because of the race claim as follows:

> "4.1 Did the respondent apply a provision, criterion or practice ("PCP") of allocating new work to workers on the Indian sub-continent who required to remain working in the UK in order to meet visa requirements?
>
> 4.2 Did the PCP put persons with whom the claimant shares the characteristic of being white British at a particular disadvantage when compared with persons with whom the claimant does not share that characteristic?
>
> 4.3 Did the PCP put the claimant at that disadvantage?
>
> 4.4 The respondent asserts that the allocation of assignments to staff is done with the legitimate aim of ensuring that work carried out meets clients' needs and expectations in the most cost effective and efficient means possible. In this regard, was the PCP relied on a proportionate means of achieving a legitimate aim?"

7. On 23 March 2021, Employment Judge Hawksworth directed that the claimant send to the tribunal and the respondent more information about the claim, in particular relating to the disadvantage alleged and providing a response to the respondent's request for further information contained in the amended grounds of resistance.

8. The further information was provided in an e-mail dated 4 April 2021. This states as follows:

> "The respondent's practice of replacing local UK employees on client accounts with Indian nationals who were a cheaper resource led to the claimant being removed from billable roles and put his employment with the respondent at risk of termination. As a UK/British national, this placed him at a disadvantage compared to an Indian national working in the UK. Indian nationals were placed in the UK in order to obtain visas to work in the UK."

9. The further information went on to cite three examples, where the claimant alleged he had been replaced by Indian nationals in the UK; in January 2019 (Highland Council Client account) in May 2019 (Liverpool Victoria Insurance account); and in October 2019 (National Grid account).

10. The respondent has complained that the 4 April 2021 allegation is a new claim and needs amendment. In our judgment, there is a material change in the PCP alleged. Originally, it was put that it was the allocation of new work to workers on the Indian sub-continent that disadvantaged the claimant. The second PCP is that the claimant was replaced by individuals from the Indian sub-continent in the UK. In discussion, it was confirmed that the only act of discrimination relied upon related to October 2019, which we are already dealing with. The two previous ones were not acts of discrimination complained about but were tendered as evidence. Although made late, the respondent has not been prejudiced as has been able to deal with the new way the PCP and evidence is put.

Consequently, we have approached the issue on the basis that the claimant is given permission to amend the claim to include the new PCP.

The Law

Unfair dismissal

11. Section 98 ERA 1996 provides as follows:

"98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this sub-section if it -

(a) relates to the capability or qualifications of the employer for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention of a duty or restriction imposed by or under any enactment.

…

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

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case."

12. When considering the decision to dismiss, it is well established that it is not for the tribunal to substitute its view for the views of the employer. It is only if the decision to dismiss falls outside the band of reasonable responses of a reasonable employer that a dismissal will be unfair.

Redundancy

13. Section 139 ERA 1996 provides as follows:

"139 Redundancy

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

(b) the fact that the requirements of that business:
(i) for employees to carry out work of a particular kind; or
…..
have ceased or diminished or are expected to cease or diminish"

Indirect discrimination

14. Section 19 of the Equality Act 2010 provides as follows:

"19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of these.

(2) For the purposes of sub-section (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if:

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim"

The evidence

15. We have been provided with a main hearing bundle which runs to 162 pages. We have a supplemental bundle of documents, pages 163 – 169. We have been provided with a cast list, chronology and agreed list of issues.

16. We had witness statements and heard evidence from the following:

16.1 The claimant;
16.2 Mr William Dougan, the claimant's line manager at the relevant time who still works for the respondent;
16.3 Ms Sheekha Shah, HR Manager Business Unit, Cloud Infra structure Services for UK and Ireland as from 1 September 2019.
16.4 Mr Bahagwandas Jakotiah, employed by the respondent, currently on the National Grid account.

The facts

17. The respondent is a leading global IT company with a total global workforce of approximately 180,000. Approximately 5,000 employees work in the UK and Ireland.

18. The claimant was employed by the respondent on 4 July 2016. His salary was £109,800 and he had a target bonus plan of £24,000 per annum. The claimant's job title was Transformation Director, and he was in Band D1. We have been provided with a copy of the claimant's contract of employment. There are four annexes to that contract containing the respondent's confidentiality policy, the conflict of interest policy, the internal code for regulation and prevention of insider trading and details of the respondent's personal pension plan.

19. In this case, the respondent has relied very significantly on what it has referred to as the "bench process". It would appear that the respondent's business is conducted as follows. The respondent employs individuals with certain skillsets. Clients approach the respondent with projects and some of the respondent's employees, with job titles such as Portfolio Manager and Account Delivery Head, were responsible for the delivery of the client's projects. These are the hiring managers within the respondent's organisation. Roles available to be filled are published on a weekly basis and change all the time. Employee's such as the claimant are expected to apply for suitable roles. The hiring manager, in conjunction with the client, will decide if the employee such as the claimant is to be utilised on a project. If he has the requisite skillset and is acceptable to the client, then he will work on the project and the client will be billed for his time. When working on a project the employee is therefore billable. When the project comes to the end, unless they have secured another billable project, they are termed to be "on the bench".

20. None of the claimant's contractual documentation that has been provided to us contains details of the "bench process".

21. We have in the bundle a six page document titled "Global Company Policy" – Allocation & Deployment Policy. We were told that this document was not specifically provided to employees but was available on the company portal. This states as follows:

> "Introduction
> Our employees are the most valuable assets of our organisation. We believe it is important to ensure continuous engagement of employee skills and to provide employees with opportunities to build a successful career path for them. In a service industry like ours, it is also imperative that most of our employees are billed to clients. At the same time it is also important that healthy bench strength is maintained.
>
> This policy explains our process for allocation and deployment of employees into billable roles."

And

> "Allocation norms for employees in the free-pool for a long period.
> Despite our best efforts, and the best efforts of the employees, there may be situations in which some employees are not able to obtain any billable opportunities

> for an extended period of time. Different norms are applicable for such employees as detailed in the below section"

22. For those outside India and tagged as "free" (ie on the bench), they are defined as being in the free pool for a long time if they are in the system for 30 continuous days or more. We were not told that the claimant had niche skills, so it is assumed that the 30 day threshold is applicable.

23. The allocation process is defined as follows:

> "Allocation process
>
> (1) Employees falling under the above category, will no longer show up in the People Availability Report (PAR) and their allocation will be handled manually by WMG.
>
> (2) The BU workforce management group (WMG) and the WMG team will do an assessment of the employee's profile to identify gaps and decide on the next steps. In case a billable opportunity is available after 60 days, the BU WMG SPOC will do the allocation manually.
>
> (3) At this stage, the WMG team may work with the employee, to identify the closest possible opportunity in line with the employee's knowledge, skills and abilities. The WMG team may suggest additional training and/or certification program to reskill the employee for a billable opportunity.
>
> (4) In case, even after two weeks there is no allocation to a suitable opportunity, the employee may be asked to go through HR counselling and assessment of capability."

24. We note that the Allocation & Deployment Policy provides that if an individual has not been placed on a billable project, then the process ends with HR counselling and an assessment of capability. Nowhere in the policy are time limits for achieving a billable role prior to termination of the employment set out. Termination of employment is not dealt with within the policy in any way.

25. Nevertheless, the respondent seeks to rely on what it has termed, the "bench process". In essence, this is as set out in paragraph 4 of the respondent's particulars of response.

> "When an assignment ends, if there is no immediately available billable opportunity on another client account for that employee, the employee will move to "the bench". Employees will be given some time to find another billable opportunity, failing which a formal bench process will be commenced with them, at the end of which, if no billable role has materialised, the employee's employment will be terminated. Throughout the period when the employee is on the bench, they continue to receive full pay and benefits albeit that there is no billable work for them to do."

26. With the exception of two documents in the bundle, which we will deal with in due course, there is no document setting out what this "bench process" is. Ms Shah told us that there was nothing in the portal and consequently no way for employees to be able to discover what it was. We accept that

employees were aware of the term of going on the bench, and the fact that they had to apply for billable projects. However, we find that employees were unaware of the time limits and possibility of the termination of employment in the event that they did not find a billable project.

27. We find that it is extraordinary that, in an organisation of the respondent's size, if there was a "bench policy", then it is not set out in a document available to employees who are directly affected by it.

28. One document in the bundle we have is headed "Guidance notes on consultation process for local employees on bench". Ms Shah said this was forwarded to her by a predecessor. She was somewhat unsure on this point. This document suggests that the consultation period begins the day after an employee's role has ended, lasts 30 calendar days and that if an employee has not found an alternative billable role by the end of that period, then their employment will be ended.

29. Ms Shah told us that that guidance was incorrect and the consultation period only started after 30 days on the bench. During the course of the claimant's time on the bench after 7 October 2019, Ms Shah sent him a document that she had written entitled "redundancy process note". This suggests that after an employee has completed 30 days in the free pool, then a consultation process would start for 30 days and that if at the end of the consultation period the employee had been unable to find an alternative role their employment would be terminated. Given that the guidance note is inaccurate, according to Ms Shah, Ms Shah was asked where she got her understanding of the "bench process" from. Her answer was unconvincing and vague in that she said that she was just aware of it from her employment.

30. We find that the so-called "bench process" forms no part of the claimant's contract of employment and that he was unaware of the details relied upon by the respondent to timetable the termination of an employee's contract. Mr Dougan was similarly unaware.

31. We find that the respondent's business model was clearly to have a pool of available employee talent who were required to bid for projects. We find that it suited the respondent to have hiring managers who would decide who was taken on board for any particular project. This would often be in conjunction with the end user client. We find that it suited the respondent's business model to have a strong team of talent "on the bench". It is inevitable that if employees are placed "on the bench" they will be paid but without being on a billable account. We find that the respondent's process for those who are unable to obtain a billable project was to support them and after a period refer to HR and assess capability.

32. At no time was the claimant's capability brought into question.

33. When first employed, the claimant told us that his line manager allocated him projects to work on. However, by 2017 that appears to have no longer

been the process, and the claimant accepted that it was impressed upon him that he was required to find billable projects.

34. On 6 March 2019, the claimant began work on a billable project known as the Liverpool Victoria Insurance account. We have been shown evidence and accept that the program director of that account became unwell and the claimant was taken on board to cover his position. Mr Prashant Swama was already acting as Foundation Tech Separation in the organisation structure. The claimant became his line manager standing in for the program director. In due course, the program director recovered and returned to work. We have seen an e-mail dated 2 May 2019 indicating that the claimant had handed over existing work to the returning program manager. Thereafter, the claimant ceased work on that project. The claimant has complained that he was replaced by Mr Swama. We find that Mr Swama merely continued in his existing role, answering to the program director. We find that the claimant was not replaced by an Indian national and we find that suitable work for the claimant was not offered to an Indian national. The claimant was only ever a temporary stand in.

35. From May 2019 until 16 September 2019, the claimant was "on the bench". This is a period of 4 ½ months. The claimant was not subjected to the so called 'bench process' during this time.

36. In September 2019, an existing client, National Grid wanted a project managed at short notice and, given the claimant's skillset and immediate availability, the claimant was recommended for that project. A round-robin e-mail dated 6 September 2019 to everyone involved in the planning suggested that the claimant be taken on for a minimum of three months to set up and then have him handover to a Band C1 when ready, to save the account some money. The three month suggestion was never taken up and the portfolio manager, Mr Vishwa Kandarpa, asked that the claimant be tagged for 15-20 days only.

37. Mr Jakotiah told us , and we accept, that the respondent was looking for an appropriate C1 resource for this project. Dr Jayanthi Puthiyaveetil was a C1 band, based in Reading and her skillset matched the requirements for the role. She was interviewed and approved by the client to take on the project management role. We were provided with no evidence as to Dr Puthiyaveetil's visa status. We find that it was always envisaged that the role would be taken by a Band C1 employee. Consequently, we find that the claimant was not replaced by an Indian national and we find that the claimant did not fail to be offered the billable role in preference to an Indian national. It may be that Indian nationals obtained work visas for the UK based on jobs offered to them in the UK. Further, that such Indian nationals were graded at a salary level below that of Band D1. However, and the claimant accepted this, the rationale for placing Dr Puthiyaveetil's was on cost grounds and not on the grounds of nationality.

38. As regards the Highland Council project in January 2019, the evidence before us was that this was only temporarily within the UK and that it was always intended to be offshored. Again, we find no evidence that the

claimant was replaced on that account, or was not offered that account on the grounds of race.

39. Accordingly, the claimant's claims of indirect race discrimination are not made out and are dismissed.

40. After 10/15 days billable employment on the National Grid project the claimant returned to the "bench" on 7 October 2019.

41. Ms Shah had only moved to the UK to begin her HR Management role on 1 September 2019.

42. Ms Shah became aware of the claimant in October 2019 as he was "on the bench". Ms Shah had meetings with the claimant on 14 November, 26 November and 4 December 2019. The claimant readily accepted that these meetings were to support him in obtaining a billable role. The meetings were not minuted but there is a letter summarising the 4 December 2019 meeting. As the claimant wanted a period of leave over Christmas so Ms Shah indicated that she would not start a formal consultation process until he returned to work in January. The claimant was provided with a list of available, billable accounts, which indicates that 455 positions were available worldwide. The claimant told us that he was more than willing to relocate and retrain if necessary. Unfortunately, none of the 455 roles were for a Band D1.

43. On 20 January 2020, Ms Shah started a formal consultation period which was scheduled to last for 30 days.

44. In late January, early February 2020 two Band D1 positions apparently became available. One was in Montreal, Canada. The claimant submitted his CV which was not deemed to be suitable. The other was in the UAE and the claimant told us, which we accept, that he did not get that role as he was told the costs of relocating him would be too expensive.

45. Throughout this process, the claimant was told he was being dealt with under the redundancy program with an illustrative letter indicating what redundancy payment he would receive. His final meeting was scheduled for 19 February 2020 and we have a termination letter dated 18 February 2020 which indicates that his employment would terminate on 19 February 2020. The reason given was redundancy. Prior to the meeting on 19 February, solicitors on behalf of the claimant requested the company's redundancy procedure, raised issues concerning the absence of documentation, pool and selection criteria. A request was made for the meeting to be postponed. The meeting was not postponed and the claimant was dismissed.

46. On 27 April 2020 Ms Shah e-mailed the claimant's solicitors stating:

> "Whilst your client's role was not terminated for redundancy as we now concede, it was nonetheless for a fair reason, being for "some other substantial reason" (SOSR) at law. This was a fair reason, as at the time your client's employment ended, he had not been in a billable role for over 3.5 months.

> …..
>
> I appreciate that labelling this a "redundancy" situation has caused confusion and can only apologise for that. The bench consultation and redundancy processes are indeed very similar, both designed to try and place employees without roles into an alternative opportunity."

47. Ms Shah told us that the respondent did not have a formal written redundancy process. Again, we find this astonishing.

Conclusions

48. We find that the reason the claimant was dismissed was that he was not working on a billable project. Ms Reynolds, on behalf of the respondent, sought to distinguish this from redundancy. Her case was that there was no redundancy situation as the requirements of the business for employees to carry out work of a particular kind had not diminished and there had been no reduction in clients. We find that it is impossible to reconcile that proposition with dismissing the claimant because there was no work for him to do.

49. We find that in the absence of any roles for a Band D1 to undertake, the requirements of the respondent for employees to carryout work of a particular kind, namely Band D1 could be said to have diminished. As such, we find that the claimant's dismissal might have been characterised as dismissal by reason of redundancy. However, this is not the respondent's case.

50. Accordingly, we find that the principal reason for the claimant's dismissal was because he was not working on a billable project. If the respondent structures its business such that it does not take it upon itself to assign projects for an employee to work on and leaves it to the employee to bid for roles, then time spent in non billable roles is inevitable. The claimant's capability was never in issue. We find that that reason is not some other substantial reason justifying the dismissal. As set out in paragraph 52 below, no alternatives to dismissal were explored. Given the immense size and administrative resources of the respondent, we find that the respondent acted unreasonably in treating it as a sufficient reason for dismissing the claimant.

51. Given it is the respondent's case that there was no redundancy situation so dismissal on that ground must be unfair.

52. In any event, the dismissal was procedurally unfair. It is accepted the claimant was warned and consulted. However, we were told that there were ten other Band D1 Transformation Directors as well as the claimant. No evidence has been placed before us from which we can assess what the likely pool would have been and what the selection criteria would have been. It is clear that no effort was made by the respondent to see if there were any alternatives to the claimant losing his job. The respondent did

not apply its own procedure in referring the claimant to HR or assessing his capability, possibly with retraining. No investigation was made as to what other roles could have been undertaken by the claimant, possibly with him moving down a pay grade.

53. Accordingly, we have absolutely no evidence upon which we can assess the chances of the claimant losing his job in the event that there was a genuine redundancy situation and had a fair procedure been adopted. We find that there should be no adjustment to any compensatory award to reflect the possibility that he would have been dismissed had a fair and reasonable procedure been followed.

54. Accordingly, we find that the claimant was unfairly dismissed, both procedurally and substantively.

_____

Employment Judge Alliott 6/7/21

Date: ……..

Sent to the parties on: .....

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For the Tribunal Office