THE EMPLOYMENT TRIBUNALS

Claimant **Mr K Morris**

Respondent **Wipro Limited**

HELD AT: **London Central**

ON: **9 – 20 October 2017**

Employment Judge: Mr J Tayler **Members: Ms T Breslin**
Mr J Carroll

Appearances

For Claimant: **Mr T Kibling, Counsel**
For Respondent: **Mr W Ho, Solicitor**

JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The Claimant was unfairly dismissed

2. The claims of detriment done on the ground that the Claimant made protected disclosures and of dismissal for the reason, or principal reason, that the Claimant made public interest disclosures, fail and are dismissed.

3. The claim of race discrimination fails and is dismissed.

REASONS

Introduction

1. By a Claim Form submitted to the Employment Tribunal on 16 December 2016 the Claimant brought complaints of unfair dismissal, including that the dismissal was automatically unfair being for the reason, or principal reason, that the Claimant had made protected disclosures. The Claimant also alleged that he was subject to detriment done on the ground that he had made protected disclosures and race discrimination.

2. The matter was considered at a Preliminary Hearing for Case Management before Employment Judge Pearl on 8 March 2017 when the issues were identified as set out in Annex.

Evidence

3. The Claimant gave evidence on his own behalf.

4. The Claimant called:

   4.1 Gary Madders, Contractor, brought in to provide expertise on structural areas on the Carillion contract, including contract mobilisation

5. We were provided with a statement from Geoff Wilkins, Former Data Centre Services Manager. He could not be contacted by the Claimant's representatives so could not attend to give evidence. We took into account the fact that he had not been available for cross examination in deciding the weight to attach to his evidence.

6. The Respondents called:

   6.1 Deepak Parija, Vice President and Global Head of HR for the Energy, Natural Resources and Utilities Business Unit

   6.2 Kedar Deokule, Business Development Manager. Now Programme Manager on Project Rio

   6.3 Nalini Naidu, Senior Manager HR

   6.4 Arjun Ramaraju, Now Vice President and Global Head of Oil & Gas. Previously, Vice President and Global Head of Engineering & Construction

   6.5 Sarah Watkins, Former Senior HR Manager

   6.6 Brenda Pound, Former Associate Vice President/Global Infrastructure Services (GIS) Delivery Head

6.7 Ravinder Dhamija, Account Delivery Head for Carillion at time of Project Rio/Claimant's redundancy consultation. Now Account Director/Regional Director for E&C UK & Europe

6.8 Stuart Deignan, Vice President and Global Head of Cross Industry Consulting

7. We were provided with a witness statement from Jayanth Janak, Previously, Delivery Manager on the Carillion account up to July 2016. Counsel for the Claimant indicated he had no questions for Mr Janak.

8. The witnesses who gave evidence before us did so from written witness statements. They were subject to cross-examination, questioning by the Tribunal and, where appropriate, re-examination.

9. We were provided with an agreed bundle of documents. References to page numbers are to the page number in the agreed bundle of documents.

Findings of fact

10. The Respondent is a company specialising in providing outsourced IT services. It employs approximately 170,000 employees in over 35 countries. It has an annual turnover of $8 billion. It is described by the Claimant as a Tier 1 IT Services Provider.

11. The Respondent's headquarters are in Bangalore. The majority of senior managers in India are, perhaps not very surprisingly, Indian.

12. The Respondent has a Code of Business Conduct ("the Code") [91]. It refers to the Spirit of Wipro, which includes a commitment to "respect for the individual" and "honesty and fairness in action". Under the heading "Asking Questions and Raising Concerns" it suggests that employees when faced with an ethical decision should ask themselves whether it is right, legal and consistent with the Spirit of Wipro. In the first-place staff should speak to their managers but it is stated:

> "If this seems inappropriate, or if you don't believe the person to whom you've reported your concern has taken appropriate action, you have several additional options:
>
> - Speak with your manager's manager or any member of Senior Management
> - Contact the Legal & Compliance Department or your HR manager
> - Use the Company's Ombudsprocess, which is a whistleblower process"

13. Email contact details are given together with a hotline. Staff are informed that they can make anonymous calls, although they are not encouraged. It is stated that the Respondent will take any allegations of retaliation seriously.

14. The Code includes a section on Diversity and Non-Discrimination. It is stated that the Respondent "does not engage in or support discrimination in hiring, compensation, access to training, promotion, termination or retirement based on ethnic and national origin, race, caste, religion, disability, age, gender or sexual or political orientation". The code also makes provision for a "harassment free workplace" and sets out a definition of harassment that is compatible to that in the Equality Act 2010.

15. The Respondent also has a Global Diversity Policy [141B] which is stated to have aims including attracting, recruiting and retaining diverse talent. It makes provision for training including "diversity awareness training for employees – category specific training for managers and team". Provision is made for diversity audits and diversity tracking. It is suggested that there should be inclusive advertising and production of job specifications. A Vice President, Sunita Cherian, has specific responsibility for diversity.

16. In the UK the Respondent has in the region of 3,500 employees. The Respondent employs human resources professionals in the UK and has access to specialist employment law advice.

17. Staff in the UK are required to read the Code and complete an annual questionnaire with questions that they must answer correctly to continue to access to their computers. In the last questionnaire, there was one question about equality and diversity. There is no "category specific training for managers and teams" as provided for in the Global Diversity Policy.

18. We were provided with no evidence of diversity audits in the UK. In response to a questionnaire served in these proceedings the Respondent gave the names of senior management in the UK but failed to answer the question as to their nationality and/or national origin. It was stated that that "the Respondent does not routinely request its employees or associates to confirm details of their nationality, nor does it retain such records". However, staff entering employment in the UK are asked to complete a Personal Information Form [supplementary 33] which requires non-EU staff to state whether they require a work permit. The employee database permits staff to state their country of birth. As we were provided with no monitoring data, but only a list of names, we have no reason to doubt the Claimant's evidence that most senior managers in the UK are Indian nationals; or of Indian national origin.

19. The Respondent is split into Business Units. One of the Business Units is Energy, Natural Resources and Utilities ("ENU"). Within each Business Unit there are a number of "Verticals". Engineering & Construction ("E&C") is one of the Verticals in ENU.

20. Prior to joining the Respondent, the Claimant worked for Capgemini, for 6 years from 2005 until 2011. He was UK Vice President for Outsourcing, with 50 Sales and Account Managers reporting to him and had a client base of over 100 accounts. Prior to this, he was a Business Unit Director for 11 years from 1994 until 2005 at Fujitsu Services, with a team of over 30 Sales and Account Managers reporting to him. The Claimant had significant experience.

21. The Claimant describes himself as Northern Irish and contrasts his treatment as non-Indian with that of Indian nationals and those of Indian national origin.

22. The Claimant commenced employment with the Respondent on 11 June 2012 as a Business Development Manager. The Claimant initially worked in the Manufacturing Vertical. Business Development Managers are described by the Respondent as "hunters". Their job is primarily to seek new business opportunities and accounts.

23. During his time in the Manufacturing Vertical the Claimant started dealing with a potential major new client; the construction facilities management company, Carillion.

24. In early 2013 the E&C Vertical was established. The Claimant moved to the E&C Vertical and was tagged on the Respondent's sales system "Trace" as the lead hunter on the Carillion account.

25. Carillion was one of the largest sales opportunities for the Respondent globally. The Claimant worked with a team that put together a bid for the Carillion IT outsourcing contract. The Claimant reported to Arjun Ramaraju, who was the Head of the E&C business unit. Mr Ramaraju reported to Anand Pandmanabhan, the Respondent's President and Head and Chief Executive of ENU, based in London.

26. The bid process was lengthy; taking the better part of a year. A team worked on the bid. The Claimant stated that a deal of this nature costs in the region of £2M to prepare.

27. The Claimant found his relationship with Ramaraju difficult. Mr Ramaraju can be demanding and is prone to losing his temper. The Claimant and Mr Madders contested that Mr Ramaraju was more inclined to lose his temper when dealing with non-Indian employees. Mr Madders stated at paragraph 20:

> "I have never witnessed such bad behavior from a senior manager in my life. Arjun Ramaraju was rude, he shouted constantly, he insulted the team (predominantly the non-Indian team members)."

28. In his oral evidence, he stated:

> "Arjun shouted at everyone – seemed to give special attention to non-Indian".

29. Mr Madders described himself as a friend of the Claimant for 18 years. We did not fnd his evidence convincing. For example, he was extremely disparaging of Ravinder Dhamija in his witness statement, yet we were shown text messages from Mr Madders to Mr Dhamija after Mr Madders had left the Respondent's employment that are inconsistent with the evidence he gave to the tribunal.

30. Mr Deokule stated at paragraph 22:

> "I have a lot of respect for Arjun. He is one of toughest people I have met, but I can understand why some people may not find him very easy to get along with. He has high expectations and demands very high standards on content and details. He gets really hands on and goes into the details of every bid, pulls them apart and investigates everything very thoroughly. He forces you to do better than you would ever have imagined possible. Yes, he is very, very demanding, but he really knows his stuff and in my view this is what you want from an executive who is running the business and pushing people to do their best. Arjun is a very busy guy, so when you speak to him he expects you to know the facts, and he expects this of everyone, irrespective of role or nationality."

31. We accept his evidence.

32. Mr Dhamija stated at paragraphs 12 and 13 of his witness statement, in respect of similar allegation made against Mr Ramaraju, in an unsigned statement by Gordon Olvera, a former Senior Program Manager, and colleague of the Claimant on the Carillion contract:

> "A statement Gordon has made is at pages 146A to 146D of the bundle. Whilst Gordon does not refer to Arjun Ramaraju ("Arjun") specifically by name, Arjun is known for being a very demanding executive. As E&C was Arjun's Vertical, I can only assume that some of the comments are probably attributable to him.
>
> It was tough at the time and the timelines of work were tight. Arjun probably was being too demanding because of that. Anyone else would have said the same thing. Arjun is the same with each and everyone he interacts with though. He doesn't care who is on the end of the 'phone, that is just how he operates. He may ask tough questions, but then he asks that of everyone. Gordon himself was tough and from an ex-Defence background, and that was his personality also."

33. While we accept that Mr Ramaraju is demanding, and has a short temper, he was not more prone to lose his temper with non-Indian employees.

34. The Claimant alleges that in the bidding process "Indian" staff, particularly Mr Ramaraju would exclude him by speaking in Indian languages. He stated at paragraph 25 of his witness statement:

> "On many occasions during these negotiations my Indian colleagues would start talking in Indian and when I complained they would go next door to use another meeting room to continue these conversations and would not update me on the discussions, despite my role as the Sales Hunter, responsible for this opportunity."

35. On questioning the Claimant stated that when he referred to "Indian" this was generally a reference to Hindi; although other Indian "dialects" were spoken. Mr Ramaraju stated that although he does speak Hindi it is not his mother tongue.

He stated that the common language for the Respondent's staff, in India and elsewhere, is English, which is the language that he generally uses when discussing issues with his colleagues. We note that the Claimant did not raise any form of grievance or official complaint, or indeed put anything in writing about his concerns that he was being excluded from meetings at the time. We consider that had this been a significant issue the Claimant would have raised it at the time as the negotiations were for a contract with the potential for him to earn substantial commission and so were very important to him. On balance, we do not accept that the Claimant was excluded from meetings during the bidding process. While there may have been occasions on which Indian colleagues spoke in common languages, we do not accept that this was done to exclude the Claimant.

36. In December 2013, the Respondent signed a 10-year IT Outsourcing contract with Carillion. The winning of the bid was hailed by the Respondent as one of its best global deals of that year.

37. Mr Deokule was initially approached by a head-hunter who spoke to him about a Business Development Management role with the Respondent, in the Construction sector, in about July 2014. He had an initial discussion by telephone, and subsequently in the Respondent's Reading office, with Pawan Ganugapati.

38. In about January 2015 Mr Ramaraju rekindled discussions about the role, and met with Mr Deokule at the Penta Hotel in Reading. Mr Deokule also met with the Claimant at the Union Bar in Sheldon Square, London on 26 February 2015. Mr Dhamija subsequently met with Mr Deokule in Starbucks. The Claimant stated of his meeting with Mr Deokule in an email of 27 February 2017:

> "He ticks pretty much all the boxes and he is keen to take the process forward.
>
> I explained to him that we would make it a formal process through HR going forward and that he would need to meet Ravi as Ravi and I would hand in glove together.
>
> So, I explained there were a number of things I would like him to do inside Carillion (all sales related) and also to work on strategy with me to penetrate new accounts…
>
> Nalini, Can you call Kedar and tell him that he scored well with me yesterday"

39. While there was not open competition in the sense of an advertisement being placed for this potential Business Development Manager role, a head Hunter was use to source appropriate candidates and there was an informal interview process. At the time, the Claimant wished to obtain more assistance with sales in the Carillion contract and was pleased with the proposal to recruit Mr Deokule. Mr Deokule is from a delivery background that would be of assistance in "mining" the Carillion Account for new deals. Such deals were likely to be relatively small. Mr Deokule would also be able to work directly with the delivery team. We do not consider it is accurate to describe this as a "backdoor hire".

40. The Claimant stated in his email of 27 February 2015 [149B]:

> "Can the bonus scheme cater for any bonus earned by selling inside Carillion without impacting mine?"

41. We consider that this demonstrates that the intention was that Mr Deokule would mine further deals within the Carillion contract which almost certainly would be considerably smaller than the very large deal that the Claimant had obtained as Lead Hunter.

42. The Claimant also sought approval to recruit Paul Gallagher to work on a proposed joint venture with Carillion to seek UK Government contracts. An "indent" was produced to allow funding for his recruitment; but the Respondent decided not to put further resource into the proposed joint venture at the time. Instead Mr Ramaraju decided to progress with the recruitment of Mr Deokule in May 2013 and used the indent to do so. The annoyance the Claimant expressed in an email of 13 May 2013 was because the recruitment of Gallagher was not to be progressed [236]:

> "Arjun,
>
> What is this? I need Paul Gallagher who is an experienced Government Sales guy to manage a pipeline of identified bids.
>
> Can you call me please as I am uncomfortable with the situation"

43. In the email exchange, the Claimant was very direct with Mr Ramaraju which is inconsistent with the Claimant's contention that he was consistently bullied by Mr Ramaraju

44. Mr Deokule commenced employment with the Respondent on 6 July 2015 [149D]. Mr Deokule states at paragraph 6 of his witness statement:

> "The role was to focus on a number of client accounts within E&C, albeit that Carillion was the largest of these accounts, and therefore had potentially more opportunities within it. I reported to Kenny as he was the lead Hunter in the E&C sector, and was tagged to the Carillion account. I had the impression that even though Kenny had interviewed me as part of the hiring process, he was not initially told that I had actually been appointed to the role."

45. We accept this evidence and that the Claimant was understandably annoyed that Mr Deokule had been appointed without him being informed. While the job description and contract do not refer to a focus on small deals, and we do not consider that Mr Deokule was told that he should limit himself only to small deals, the role was essentially to mine for additional deals that would, in all likelihood, be much smaller than the very large deal the Claimant had negotiated with Carillion.

46. The Respondent's system only allows one hunter to be assigned to an account. Accordingly, it was decided that the Claimant's job title would be changed to Hunter Manager. The Claimant was not consulted about this and was initially extremely angry as he believed that his commission on the Carillion account would decrease from 2.5% to 1%. The was not the case. Initially, the Claimant refused to accept the change with the consequence that his bonus was not released. Eventually, the Claimant accepted the role on 31 July 2016 and a bonus of $200,000 was released. The Claimant protested about the role change again on 1 August 2017; once he had received his bonus. We do not accept that the Claimant can realistically suggest that he was "blackmailed" into accepting the change of title and do not consider that it significantly affected his job duties.

47. From early 2015 the Respondent had been working on a bid to Carillion for a Computer Aided Facilities Management IT system referred to as "Project Rio. We accept Mr Deokule's evidence at paragraphs 7 and 8:

> "On joining Wipro I understood that the Wipro team assigned to the Carillion account had been working since around the January of that year (2015) on what was known as "Project Rio". At the time I joined Wipro was to submit two bids, one partnering with IFS and based on IFS technologies, and the other partnering with IBM and based on IBM technologies.
>
> It was initially thought that this was not a competitive bid, and that the only choice Carillion was making was on the technology to be used, and which technology was more suited to deliver their programme. Once Carillion had chosen either IBM or IFS as the technology, it would then be handed over to Wipro to implement. Around July/August 2015 however, I heard from an external source that it was not an exclusive Wipro bid as we had originally thought and been led to believe. It was actually going to be a competitive bid, as IBM were also submitting a bid for the project."

48. The consequence was that there would be three bids. The first was a bid from the Respondent using IFS technology; the second from the Respondent using IBM technology; and the third a stand-alone bid by IBM.

49. The Respondent had separate bid teams for their bids. Chinese walls were in place and nondisclosure agreements were signed to protect information from Carillion and to avoid cross fertilisation of information about the IFS and IBM technologies; "the product". While the bid teams were separate the Respondent operates a matrix system under which information about implementation and delivery; "the ownership experience"; came from the same team; with the consequence that certain elements of the two bids from the Respondent might be the same.

50. The Claimant was the compliance lead for Project Rio, but was not substantially involved in producing either of the Respondent's bids.

51. On 6 October 2015 Paul Huggan of Carillion sent an email to the Claimant stating that IBM had raised a concern because they had noticed that Nagesvararao Manrellapudi had been involved in all three bids. The Claimant investigated the matter and sent an email, with organograms attached, to Mr Huggan. He stated [278]:

> "The slide attached IBM-Wipro solution clearly shows the work share for Wipro is generic and not within the core solution, so bringing Nagy to the table was to bring knowledge of the generic."

52. Carillion were satisfied with the explanation and did not pursue the matter further. It is also notable that the Claimant draws a distinction between generic information and information about the core solution which fits with the distinction that Mr Deokule draws between the product and the ownership experience.

53. The Claimant states that he attended a conference call with Mr Ramaraju in mid-October 2015. He states that Mr Deokule was on the call. The Claimant alleges that he made his first Public Interest Disclosure during this telephone conversation. He states at paragraph 44 of his witness statement:

> "During a call with my manager, also attended by Kedar Deokule, in or about mid October 2015, I and Kedar Deokule were very concerned by our manager's statement he would use IFS's bid and confidential information to support the "Wipro only" bid. I reminded my manager of the Chinese Walls obligations and the terms of the non-disclosure agreements. I repeated these concerns a number of times. However, as I did not have any actual evidence that my manager would or had authorised such conduct, I believed that raising the flag with IFS on the matter, with no evidence, would be wrong and could amount to an act of gross misconduct should it turn out that my manager did not authorise such conduct. I strongly opposed my manager's views and I repeatedly told my manager that it was illegal to do what he was suggesting as it would breach the non-disclosure agreements, and confidentiality and intellectual property obligations and was simply wrong and unethical."

54. In the Claim Form the alleged disclosures are pleaded cumulatively and in much less detail. This first alleged disclosure in the Claimant's witness statement is to the effect that Mr Ramaraju "would" use IFS intellectual property in the "Wipro only" bid. That appears to be a reference to the bid in which the Respondent would use IBM technology. Mr Ramaraju denies making such comments. Mr Deokule states at paragraph 10 of his witness statement:

> "At no point did I hear Arjun say that he would use intellectual property from one bid into the other as I understand Kenny has since alleged. Aside from this being plain ethically wrong, I don't really see how that would have worked, or what advantage that would have given us, as both bids were based on radically different sets of technologies. It would have been practically impossible to use information from one bid in the other as there were significant engineering differences in both. We never ended up doing that; both proposals were just so separate."

55. We accept the evidence of Mr Deokule. We do not believe that had Mr Ramaraju expressly stated that he intended to use IFS intellectual property to support the Wipro IBM bid that the Claimant would have raised the issue only with Mr Ramaraju himself. The Claimant was unclear in his evidence as to whether he had read the Code; but stated that he knew one would exist as "you don't need to go to the North Pole to know there is snow". We consider that the Claimant was well aware that if there was a serious compliance issue he must escalate it. He could do this by going to Mr Ramaraju's manager, HR, the Legal & Compliance Department or by using the ombudsprocess. If, as alleged at paragraph 10, Mr Ramaraju had said explicitly that he would use intellectual property from one bid in the other the Claimant would have been duty-bound to take the matter further. We do not accept that the comment about using intellectual property from one bid in the other was made or that the Claimant contended that to do so would be illegal. We do not accept that the alleged disclosure was made.

56. The Claimant alleges that his second Public Interest Disclosure was made in November 2015. He states at paragraphs 45 and 46 of his witness statement:

> "After the three Project Rio bids were submitted in late November 2015, I was subsequently invited to attend an informal call in early December 2015 with Dave Moore, who was the Carillion CIO running the project, and the head of Carillion procurement, Paul Huggan. They told me that, sadly, neither of the Wipro bids (the Wipro/IFS bid and the Wipro only bid) would be chosen as the preferred bid. Also, they informed me that the Chinese walls of information had been breached as the "Wipro only" bid clearly included elements of "cut and paste" from the IFS & Wipro partnership bid. They told me that it was evident in the both the solution description and also in the pricing schedules. David Moore told me that the Wipro pricing schedule was so clearly cut and paste that it still had IFS' name in it.
>
> I called my manager, Arjun Ramaraju, the same day to discuss the information that I had been provided with on the telephone call, as described above, and I explained what I had been told. I confirmed that it was outrageous that this had occurred and that this type of malpractice had unfairly tarnished my integrity and totally compromised my position as the Governance Director for Project Rio. I also told my manager that breaching the non-disclosure agreements and the information barriers would expose Wipro's dishonesty to the wider market. This malpractice would also impact Wipro's reputation. Using other companies' intellectual property rights and confidential information, pricing model, or copying unique aspects in this environment also contravenes clear business ethics and is contrary to the public interest. This disclosure by Carillion confirming malpractice by Wipro could be devastating for Wipro's integrity and consequently devastating for its employees and shareholders, even business partners, and I believe that it was in the public interest that I disclosed it. I felt that exposure might force Wipro to behave appropriately in similar situations in the future. No action to my knowledge was taken by Arjun Ramaraju. My manager seemed unconcerned when I reported this to him."

57. Mr Huggan gave evidence. At paragraph 6 of his witness statement he stated:

> "During an evaluation of the bidders proposals, Carillion discovered that there were some similarities between Wipro's independent bid and Wipro's joint bid with IFS. Carillion were concerned by this and these were raised on a call during December 2015 with Kenny Morris by Dave Moore."

58. In his oral evidence Mr Huggan stated that it was noted that some information in the pricing schedule, rate cards and answers to supplier questionnaire appeared to be word for word the same in both of the bids for the Respondent. In cross-examination, it was put to Mr Huggan that there could be such similarities without there being anything untoward; to which he replied:

> "Take, for example, pricing the section where it was exactly the same was for support - entirely possible Wipro performing the role in exactly the same way and costed it the same - and the same person could have costed it the same"

59. He stated that if that was the case there would not be a breach of the Chinese Wall. He said that he raised the concern orally with the Claimant but did not put it in writing. The Claimant did not reply and Mr Huggan did not chase for a response.

60. Mr Ramaraju stated that he had a recollection of there being some reference to Chinese walls. He and Mr Deokule contended that there was not necessarily any problem if some of the wording about the common delivery solution was the same.

61. While we accept that the Claimant disclosed information that he had been told that there were sections of the bids that were identical and that this could involve a breach of the Chinese walls, we do not accept that at the time of the conversation the Claimant believed that there was a breach of a legal obligation. He was raising a concern; but had it been the case that he believed that there had been a breach of a legal obligation we do not believe that the Claimant, as compliance lead, would merely have made a disclosure to the person who he contends was responsible for the breach. If he genuinely thought that there was a breach of a legal obligation he would have escalated the matter, probably under the obudsprocess which is stated in the Code to be the appropriate mechanism for whistleblowing. Indeed, had the Claimant believed there was a breach of a legal obligation he would have read the Code rather than merely assume that one must exist.

62. We do not accept that the disclosure of information was nearly as explicit as suggested in the Claimant's witness statement. For example, the Claimant stated in his oral evidence that he used the words "public interest" when describing his concerns. That did not fit with his general use of language. We consider that he was seeking to bring the matter within the statutory wording. We also accept Mr Ramaraju's contention that had the matter been nearly as serious as the Claimant suggested, Carillion would have put the matter in writing and/or followed up when the Claimant did not respond to their oral concern.

63. Mr Ramaraju also stated that he had been required to take part in a conference call during the Project Rio bidding process to give a personal assurance about the implementation of Chinese walls. He contended that had Carillion been concerned that there had been a breach of the Chinese walls it was inconceivable that they would not have raised the matter with him. We accept this point. If the matter had been of such concern to Carillion it is hard to see why they subsequently, on renegotiation, awarded the contract to the Respondent using IBM technology. We accept Mr Ramaraju's evidence that while there was a brief mention of Chinese walls and that he gave his opinion that there might well be some commonality between bids without there being any such breach, he did not understand that the Claimant was raising a matter of any particular importance and did not think about the matter again.

64. It was common ground that hunters "roll off" a contract after about two years. The Claimant was due to roll off the Carillion contract in early 2016. There was a cap of $300,000 per annum of commission that the Claimant could earn on the Carillion contract, which the Claimant had hit. The Claimant was ready and willing to roll off the contract as he wished to look for opportunities to earn further large commission payments. At paragraph 12 of his witness statement he described the position as follows:

> "Prior to commencing employment with Wipro, it was made very clear to me by Dean Terry that if I should win a large deal, I would stay on the account for 2 years and be paid commission during this 2 years, thereafter I would be rolled off the account and move on to identify, qualify and win the next deal. Winning Carillion "maxed out" my commission of $300,000 per annum for 2015 and 2014 (a total of $600,000 was paid in commission). At the start of 2016 my commission for the Carillion contract ended and it was time for me to move off the account and start activities to win another similar large contract."

65. In his grievance appeal the Claimant explained the position as follows [634]:

> "I've been selling into tier 1 companies the probably the larger part of my adult life and just to explain to you how a salesperson's head goes and how their lifestyle goes because a salesperson rarely, if ever, would base their lifestyle around their base salary, just doesn't happen. You sell, you're successful, you come to accept that your income is a mixture of basic and bonus, that that's the way it is… so the appetite for people to get out and sell is driven by their personal circumstances, their normal spend and the lifestyle that they become accustomed to living"

66. At the end of the two-year period, when the Claimant was due to roll off, the Carillion contract would convert from being a "hunting" to a "farming" contract. Mr Dhamija and the Claimant had a number of discussions in which they both accepted that Mr Dhamija would take responsibility for the contract once it became a farming contract. He had the delivery experience necessary in that new phase. The Claimant wanted opportunities to hunt new deals that could bring him further substantial commission payments. The Claimant accepted in evidence that Mr Dhamija had delivery experience that he lacked. The Claimant told Mr Dhamija that he was responsible for managing the account while the Claimant would start looking for potential new big deals.

67. In the latter part of 2015 the Respondent was considering how to develop the E&C Vertical. The Respondent create only limited documentation. PowerPoint slides for a financial review of Q2 2015/16 included an entry "UK – Slow progress in EPC Hunting. Stabilise and Grow Existing business with Carillion, Go slow on Hunting." Slides for a financial review of Q3 2015/15 included an entry under the heading "mining identified accounts & large opportunities" an entry "Stabilise and Grow business in Carillion" and under the heading "Hunting" include no entry for the UK in the E&C Vertical. We accept the evidence of Mr Ramaraju and Mr Parija, despite the paucity of documentation, that a decision was taken that it was unlikely that there would be opportunities for large deals in the E&C Vertical in the UK in the foreseeable future and that it was therefore not worth continuing any significant hunting activities for such large deals. Bids for such deals require a team, would take many months to develop and could cost in the region of £2 million.

68. On 12 January 2016, the Claimant sent an email to Mr Ramaraju [305]

> "Arjun
>
> Just a short update for you on my activities.
>
> As we agreed, in the early part of 2016 I would start to reverse out of Carillion.
>
> To this effect, I will meet with Ravi and his delivery team (+ Kedar) at the end of January to do an account plan for 2016, minimising any actions on me and handing across any/all activity/relationships.
>
> ..
>
> Outside of this I am back in hunting mode.
>
> Specifically researching the accounts below - starting with connecting to the green highlighted accounts …"

69. In the list attached the Claimant listed the most significant companies in the construction industry. There was nothing to suggest that any substantial progress had been made in identifying and starting to hunt for large deals. In part of his oral evidence, the Claimant suggested that he was one meeting away from a prospect with Amey that would be entered in the Respondents sales management software, Trace. We do not accept that the Claimant had made nearly as much progress as he alleges; or that he was anywhere near being able to obtain any major new deals. The Claimant had not met with the board of Amey and was not close to reaching a deal with them. Any hunting activities on the prospects he mentioned would have taken many months, required a team to support the Claimant and cost in the region of £2 million. On cross-examination, the Claimant accepted that the deals were "really not that close"

70. The Respondent does not have a Redundancy Policy. Ms Naidu told us that she relied on the ACAS guidance, although we were not given the specifics.

71. In an undated email, that the Claimant replied to on 21 January 2016, Ms Naidu stated:

> "I would like to set up a meeting with you on your role. I understand that Arjun has mentioned to you that your role would change, as it would no longer be tagged to Carillion account as a Hunter Manager.
>
> We would like to discuss this further with you and set up a formal individual consultation meeting, as this role change puts your current role at Risk."

72. On 26 January 2016, the Claimant made an application for travel authorisation to fly from Northern Ireland to visit Carillion for a handover meeting but received a notification stating that there was inadequate budget. We accept that the Respondent operated a system under which there is a fixed budget for travel by air. When the budget is exceeded this results in any further requests for travel by air being refused, unless specific approval is obtained from a senior manager. We were shown evidence that this had occurred when Mr Parija had requested travel, although we accept that he was in a different Vertical. We were informed that Ms Naidu and Mr Deokule had travelled by train to Wolverhampton in February 2016, but accept that rail travel did not fall within the scheme. We were not shown any specific evidence of others working the E&C Vertical being refused travel at this time. We consider there are two real possibilities; either the applications for travel was refused because the budget had been exhausted; or, because the Claimant was entering redundancy consultation.

73. We note that the first refusal for travel was in relation to a visit to Carillion to arrange the handover because it was becoming a "farming" account. It seems hard to see why the Respondent would wish to prevent the Claimant attending such a meeting as the handover was particularly important if his role was to become redundant. On balance of probabilities we accept that the refusal of flight payments was because of the budget being exhausted. In any event, we consider that the only other realistic alternative is that the refusal to authorize air travel was because the Claimant was entering into redundancy consultation. The Clamant did not, at any stage, seek special permission, for flights to attend any meetings with companies for meetings about new business.

74. The first consultation meeting took place by telephone on 27 January 2016 [307]. The Claimant recorded the meeting. The Respondent did not keep notes of the meeting. The Respondent's witnesses accepted in evidence that they had already decided as a business strategy that there would be no large-scale hunting in the E&C Vertical in the UK in the foreseeable future; as a result of which the Claimant's role would cease to exist. Mr Ramaraju told the Claimant that he did not see much activity happening. The Claimant stated:

> "Yeah, well I've got to agree with you in terms of that. I don't see any on my plate but up until a few weeks ago I hadn't really started any significant action to get into the Boardrooms. Now that I've started that in

> terms of getting access to 2, they're certainly interested in Wipro but there's nothing to say that Wipro's going to get involved to bid for 100 million project, even if they were there at the moment. I don't believe with any of the companies of the sort of top 20 that I've been looking at that I've got any feeling that why would Wipro be included, even if there were any. So at the moment I think your comment is quite right, not that may be that the deals aren't there but I do agree with you that Wipro is not aligned to anything significant, I'm not seeing that at the moment. There's a bit of bits and pieces going on in places like Amey[1] and so on but nothing of huge significance across the other players."

75. We consider that this initial reaction sets out the Claimants true understanding of the position at the time. He knew that he had only made a very limited progress in looking for large deals and accepted that there did not appear to be large deals available in the UK engineering and construction sector. Later in the meeting the Claimant suggested that there might be more significant prospects with companies such as Cofely and Amey. However, any such prospects would have taken months to develop, required a dedicated team and been extremely expensive.

76. On 1 February 2016 Ms Naidu wrote to the Claimant and stated [347]:

> "You were advised that it is proposed that your role as Hunter Manager in the Carillion Account will no longer exist. The reason for that is that the account will convert from Hunting to Farming. This is also an outcome of the vertical strategic decision based on the fact that we don't foresee active large deal hunting opportunities in the E&C vertical in UK. You agreed that you were aware of the changes in the account and are happy with that and will liaise with Ravi on the transition.
>
> You questioned the strategic decision, to which Arjun clarified with the rationale.
>
> The reason we mentioned that your role is proposed at risk and that it is provisional is because in our further consultation meetings we may be able to find you suitable alternative employment within the company."

77. While the letter did not set out the detail of what had been discussed during the first consultation meeting, it did include a summary of the key points. First, the Carillion account was to change from being a hunting account to being a farming account. The Claimant accepted that was the case and that he would liaise with Mr Dhamija on the transition. Second, there had been a strategic decision to withdraw from hunting for large opportunities in the E&C vertical in the UK. It was noted that the Claimant questioned the strategic decision, although the notes show that he initially agreed that there did not appear to be any large opportunities. Finally, the letter made it clear that the strategic decision had been taken and that consultation would be limited to considering alternative roles for the Claimant.

[1] We assume Amec is a typo for Amey

78. Ms Naidu sought to explain why she had no notes of the consultation meetings by stating that the hard disc of her computer had crashed and that she had lost or her documentation. We were provided with late disclosure that included an email on 2 February 2016 that demonstrated that a significant proportion of the data from her hard disk had been recovered. We conclude that Ms Naidu sought to mislead the tribunal by suggesting that the reason for her lack of contemporaneous documentation was because of the hard disk failure. Not only was a significant proportion of the data recovered, the crash had clearly occurred before 2 February 2016 and, therefore, before the majority of the consultation process. Ms Naidu also suggested that she generally recorded important discussions or meetings by sending herself and email with a summary. She suggested that the system whereby her emails were uploaded to the cloud had also failed. This was suggested to be because of the hard disk crash. Again, the problem had been remedied by 2 February 2016. We consider the reality is that Ms Naidu, like many of the Respondent's staff, kept inadequate records of meetings. We consider that Ms Naidu was seeking to cover up this inadequacy, rather than covering a failure to disclose relevant documents that exist.

79. The Claimant contends that in February 2016 Mr Dhamija asked him to hand over his government sales pipeline. This is a reference to possible government contracts that might be sought should a joint-venture be established between Carillion and the Respondent. The Claimant accepted in his email of 12 January 2016 that he would be handing over all matters related to Carillion. This was one of the components of that handover.

80. There was a second telephone consultation meeting on or about 12 February 2016 [354]. The Claimant challenged the rationale behind the decision to cease large deal hunting in the E&C vertical and said that he would like to meet with Mr Parija. The Claimant agreed to send his CV to Ms Naidu so that she could look for alternative roles.

81. On 15 February 2016, Ms Naidu sent an email to Mr Deokule to fix a meeting with him in Wolverhampton. Mr Deokule was informed that he was at risk of redundancy. The reason that Mr Deokule entered consultation later than the Claimant was because Mr Ramaraju had not felt that his role should be placed at risk of redundancy because he saw it as separate to that of the Claimant, in that it was focused on mining the Carillion contract. His focus was on small sales and presales activities. Ms Naidu persuaded Mr Ramaraju that Mr Deokule should be included in the consultation process as his job role, according to the job description, was 90% the same as that of the Claimant. Ms Naidu therefore felt it would be hard to justify excluding him from consultation. Although both the Claimant and Mr Deokule entered the redundancy process they were not scored against objective criteria; or allowed to apply for the remaining sales role with Carillion.

82. On 17 February 2016 Mr Deokule attended a first consultation meeting by telephone [159].

83. There was a further discussion between the Claimant and Ms Naidu on 23 February after which Ms Naidu sent an email with a possible alternative role. During the consultation process the Claimant had discussions about two potential roles; one of which was too junior for him; the other required technical knowledge that he did not have [377, 380].

84. The Claimant attended a telephone consultation meeting with Mr Parija and Ms Naidu on 4 March 2016. Mr Parija sought to explain the business rationale which he did at great length, but with little clarity. In fact, the business rationale was straightforward: the Respondent had decided to stop hunting for large deals in E&C Vertical in the UK. The Claimant was well aware that this was the business rationale, although he disagreed with it. Towards the end of the meeting the Claimant stated [405]:

> "My preference is to stay in selling. I've had a wide range of senior management roles in terms of being an executive board director, vice president and so on, I've done all of that in my career, I've been a managing director in four different large companies within Fujitsu etc so I've a broad range of skills but I prefer to ply my trade in sales because that's what I enjoy most"

85. We accept that summarises the Claimant's position. His preference was to be in sales, particularly because of the large commissions that might be earned on large deals, but he said he had other skills so he might be suitable for alternative roles.

86. The Claimant made it clear that he wished to attend the meeting in person but had found that he could not obtain permission to purchase the flight ticket. Although Ms Naidu appreciated this was the case, she took no steps to seek a special release of budget to allow the Claimant to attend the meeting. The Claimant, although very highly paid, did not choose to purchase a ticket himself.

87. On 8 March 2016, the Claimant sent an email to Mr Prime. There was a possibility of the Respondent reviving their bid for Project Rio as the IBM alone deal had not closed. The Claimant stated:

> "I don't think it will be an easy task to turn the situation around because of the issues communicated to us ...
>
> 1. Integrity and Trust issue: We agreed to have "Chinese Walls" between our 2 Wipro bids (IFS based solution and IBM based solution) and we also agreed to treat any IBM GBS bid information in total confidence. I agreed to take up the role as requested by Carillion as Wipro Bid Governance Lead. However, IBM chose not to engage with us as they did not believe we would treat their bid details in confidence. When we submitted the "Alternative" IBM based bid, we clearly "cut and paste" sections from the IFS bid -the alternative bid submitted even made a number of references to IFS!! - this was pointed out to us by the CIO (Dave Moore) and Head of Procurement (Paul Huggan) during a de-brief.

> This of course flew in the face of the commitments we gave to honour the Chinese Walls. I had no idea whatsoever that the offshore teams were violating the confidentiality promises, but unfortunately because of these actions my own personal integrity (as Governance Lead) was under the spotlight and being questioned - something you can imagine I was (and still am) very unhappy about."

88. The Claimant relies upon this as his third Public Interest Disclosure. While there had been a concern that there were similarities between pricing schedule, rate cards and answers to supplier questionnaire, this was likely to be because the same team at the Respondent produce a common information in respect of the delivery aspect of the contract. If this was produced for the IFS's bid first that could also explain why any information that was cut and pasted into the Wipro IBM bid included reference to IFS. There was nothing to suggest that there had been any sharing of confidential information about the IFS and IBM technologies. We do not consider that the Claimant believed it was likely that that there had been a breach of a legal obligation by the Respondent. He was simply raising the fact that the concerns mentioned by Carillion might make reactivating the Respondent's bid difficult. If he had felt that there was likely to have been a breach of a legal obligation he would have taken the matter further to HR, legal and compliance, or used the ombudsprocess. In raising this issue with Mr Prime we do not consider that the Claimant believed he was acting in the Public Interest: all he was seeking to do was provide information as to the likelihood of the Respondent being able to re-enter the bidding process for Project Rio.

89. On 10 March 2016 Mr Deokule attended a second consultation meeting. It was agreed that whilst there was no longer a requirement for the hunter elements of his role, he would instead focus on internal and Pre-Sales and RFP activities. This included him also looking for opportunities outside of Carillion with other construction companies. It was expected that any such deals would be small. The Claimant was not given an opportunity to be considered for this role.

90. On 11 March 2016, the Claimant sent his grievance dated 8 March 2016 to the Respondent complaining about the initial appointment of Mr Deokule, his role being changed to Hunter Manager and the withholding of his bonus, the alleged compromise of his integrity as a result of the Chinese Walls issue in Project Rio and the way in which he had been selected for redundancy.

91. On 13 April 2016, the Claimant sent an email to Ms Naidu chasing progress with the grievance [448].

92. On 15 April 2016, a general email was sent under the heading "Engineering & Construction: Organization Announcement". It was stated that Mr Dhamija would "lead Europe sales including existing accounts". The reality was that the main part of Mr Dhamija's role would be delivery on the Carillion contract, including limited investigation of possible new sales. We were taken to some text message exchanges with Mr Madders that shows that Mr Dhamija was keen to gain an introduction to senior managers at Amey. Mr Dhamija was aware that Amey had a joint venture with Carillion which might provide opportunities for the Respondent. He was not aware of the large-scale data

centre outsourcing contracts that the Claimant suggested in evidence were available. We accept that that hunting for new deals was not a major component of his new role. This role was not openly advertised and the Claimant was not informed about it during the consultation process. He was not given an opportunity to be considered for it.

93. It also appears that there was a limited hunting component to Mr Deokule's role. In that in August 2016 he travelled to Scotland to meet with managers from Balfour Beatty. He told the tribunal that a previous colleague at Balfour Beatty had contacted him and asked for a meeting. He asked Mr Ramaraju for permission to fly to Scotland for the meeting. Permission was granted. It was no more than a general enquiry and does not evidence Mr Deokule being involved in hunting for large deals on a regular basis.

94. The Claimant attended a grievance hearing on 11 May 2016. The meeting was chaired by Brenda Pound with HR support from Sarah Watkins. During the grievance hearing the Claimant stated that he was focusing on hunting for big deals but questioned why Mr Deokule was still in a hunting role on the Carillion contract. On 7 June 2016, the Claimant issued a second grievance complaining about the delay in dealing with the first grievance and having been "placed in limbo" [485]. On 10 June 2016, the Claimant issued a third grievance contesting that his treatment had had a severe adverse effect on his health [495].

95. On 13 June 2016, a telephone meeting was conducted in which the Claimant was informed of the outcome of the grievance. That was confirmed by letter dated 13 June 2016. The Claimant was informed that his first grievance had been rejected [567].

96. The Claimant appealed the grievance decision. An appeal hearing took place on 27 June 2016 before Stuart Deignan.

97. On 30 June 2016, the Claimant was informed that his second and third grievances had been rejected [613]. On 3 July 2016, the Claimant appealed against the outcome of the second and third grievances [616].

98. There was a further grievance appeal meeting on 5 July 2016 [622].

99. On 6 July 2016, the Claimant's solicitor wrote alleging for the first time that the Claimant's treatment might be race or age discrimination.

100. On 14 July 2016, the Claimant was informed that his grievance appeals had been unsuccessful [681].

101. On 5 August 2016, the Respondent wrote to the Claimant noting that as the Claimant would not be attending any meetings during his period of ill health, and no alternative roles had been identified, if there was no change in the situation by 12 August 2016 it was likely that the Claimant's role as Hunter Manager would be terminated on grounds of redundancy.

102. On 26 August 2016, the Respondent wrote to the Claimant informing him that he was to be dismissed by reason of redundancy.

The Law

103. Provision is made in respect of protected disclosures in Part IVA of the Employment Rights Act 1996 ("ERA"). A protected disclosure is defined by Section 43A. A qualifying disclosure is defined by Section 43B ERA. A qualifying disclosure is rendered a protected disclosure provided it comes within, so far as is relevant to this case, Section 43C ERA.

104. The employee must make a disclosure of information; it must, in the belief of the worker, tend to show, so far as is relevant in this case, that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject. The tribunal has to consider whether that is the belief genuinely held by the Claimant, not whether it is correct: **Babula v Waltham Forest College** [2007] EWCA Civ 174. The term 'likely' requires that it is more probable than not that the employer will fail to comply with the relevant legal obligation: **Kraus v Penna plc** [2004] IRLR 260. The belief must also be reasonable. The disclosure must be must be made to one of a number of prescribed persons, including the worker's employer. In the reasonable belief of the person making the disclosure it must be in the public interest.

105. There is a distinction between a disclosure of information which is protected and the mere making of an allegation that is not. In **Kilraine v. London Borough of Wandsworth** UKEAT/0260/15 at paragraph 30 Mr Justice Langstaff noted:

> 'I would caution some care in the application of the principles arising out of Cavendish Munro. …The dichotomy between information and allegation is not one that is made by the statute itself. It would be a pity with Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined'.

106. The fact that a disclosure of information is combined with an allegation does not mean that the disclosure loses its protection.

107. The information does not have to be the product of investigation by the whistle-blower to test is accuracy, **Welsh Refuge Council v Brown** UKEAT/0032/02,

108. Pursuant to Section 47B(1) ERA:

> 'A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.'

109. In **Fecitt v NHS Manchester** [2012] ICR 372 at paragraph 43 Lord Justice Elias held that:

> '… liability arises if the protected disclosure is a material factor in the employer 's decision to subject the Claimant to a detrimental act. …'.

110. Section 48(2) ERA imposes the burden on the R to show the ground on which it acted, or deliberately failed to act.

111. While detriment is not defined in the ERA, we adopt the test applied in discrimination case law. In **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285 it was held that a worker suffers a detriment if a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work.

112. Pursuant to s.94 of the Employment Rights Act 1996 ("ERA") an employee has the right not to be unfairly dismissed. It is for the Respondent to establish one of a limited number of potentially fair reasons for dismissal. Pursuant to s.98(2)(c) ERA, redundancy is a potentially fair reason for dismissal.

113. There are a number of automatically unfair reasons for dismissal including dismissal for the reason, or principal reason, that the Claimant made protected disclosures.

114. S103A of the ERA 1996 provides:

> "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure"

115. The approach to the burden of proof in dismissal claims was considered by the Court of Appeal in **Kuzel v Roach Products Ltd** [2008] ICR 799. Where the Claimant sets out an evidential basis on which it could be concluded that the reason for the dismissal is the making of protected disclosures, the Tribunal will look to the Respondent for its explanation of the treatment of the Claimant. If it is unsatisfied with that explanation, it may conclude that the real reason for the Claimant's treatment was the making of the protected disclosure. As with discrimination claims the key issue will often be the "reason why" question; in this case why the Claimant's role was selected for deletion in the redundancy process, why was the Claimant dismissed.

116. While in a discrimination dismissal case one has to consider the conscious or unconscious decision made by the person who decided upon dismissal. However, in a protected disclosure dismissal claim where the dismissing manager was unaware of the protected disclosure but is manipulated by someone in a managerial or other influential position, who is in possession of the true facts, the reason and motivation of that other person must also be taken into account and attributed to the employer: see **Royal Mail Ltd v. Jhuti** UKEAT/0020/16 and **Co-op v Baddeley** [2014] EWCA Civ 658.

117. If the reason, or principal reason, for dismissal was not that the Claimant made protected disclosures the tribunal will go on to consider whether the Respondent has established a reason, or principal reason, for the dismissal that is potentially fair. Redundancy is a potentially fair reason for dismissal. A redundancy is defined in section 139 ERA. An employee who is dismissed shall be taken to be dismissed by reason of redundancy, so far as is relevant to the facts of this case, if the dismissal is wholly or mainly attributable to the fact that the requirements of the business for employees to carry out work of a particular kind has ceased, or is expected to cease or diminish. Cease mean cease either permanently or temporarily, and for whatever reason.

118. In **Safeway Stores plc v Burrell** [1997] ICR 523 his Honour Judge Peter Clark set out a three-stage test: was the employee dismissed?; if so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?; if so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution.

119. In **Polkey v AE Dayton Services Ltd** [1987] 3 All ER 974 Lord Bridge held at 984:

> "in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representatives, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation."

120. Race is a protected characteristic for the purposes of the Equality Act 2010 ("EQA"). Being non-Indian constitutes being a member of a protected racial group: **Orphanos v Queen Mary College** HL [1985] IRLR 349; **R v Rogers** HL [2007] a AC 62.

121. The Employment Appeal Tribunal in the **Law Society v Bahl** [2003] IRLR 640, made this simple point, at paragraph 91:

> "It is trite but true that the starting point of all tribunals is that they must remember that they are concerned with the rooting out certain forms of discriminatory treatment. If they forget that fundamental fact, then they are likely to slip into error".

122. The provisions that we are dealing are to combat discrimination. In that context, it is important to note that it is not possible to infer unlawful discrimination merely from the fact that an employer has acted unreasonably: see **Glasgow City Council v Zafar** [1998] ICR 120. Tribunals should not reach findings of discrimination as a form of punishment because they consider that the employer's procedures or practices are unsatisfactory; or that their commitment to equality is poor; see **Seldon v Clarkson, Wright & Jakes** [2009] IRLR 267.

123. Direct discrimination is defined by Section 13 EQA:

> **13 Direct discrimination**
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

124. Section 23 EQA provides that a comparison for the purposes of Section 13 must be such that there are no material differences between the circumstances in each case. In **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 Lord Scott noted that this means, in most cases, the Tribunal should consider how the Claimant would have been treated if he had not had the protected characteristic. This is often referred to as relying upon a hypothetical comparator.

125. Since exact comparators within the meaning of section 23 EQA are rare, it is may be appropriate for a Tribunal to draw inferences from the actual treatment of a near-comparator to decide how an employer would have treated a hypothetical comparator: see **CP Regents Park Two Ltd v Ilyas** [2015] All ER (D) 196 (Jul).

126. The Courts have long been aware of the difficulties that face Claimants in bringing discrimination claims and of the importance of drawing inferences: **King v The Great Britain-China Centre** [1992] ICR 516 para.36:

> "It is important to bear in mind that it is unusual to find direct evidence of racial discrimination. Few employers will be prepared to admit such discrimination even to themselves. In some cases the discrimination will not be ill-intentioned but merely based on an assumption "he or she would not have fitted in".

127. Section 136 EQA provides:

> 136 Burden of proof
>
> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

128. Guidance was given in **Igen v Wong** [2005] IRLR 258. It has repeatedly been approved thereafter: see **Madarassy v Nomura International Plc** [2007] ICR 867. However, the focus should be on the facts established at the conclusion of the hearing rather than on those "proved" by the Claimant. Taking that into account the guidance may be summarised in two stages: (a) there must be established from the totality of the evidence, on the balance of probabilities,

facts from which the Tribunal 'could conclude in the absence of an adequate explanation' that the Respondent had discriminated against him. This means that there must be a 'prima facie case' of discrimination including less favourable treatment than a comparator (actual or hypothetical) with circumstances materially the same as the Claimant's, and facts from which the Tribunal could infer that this less favourable treatment was because of the protected characteristic; (b) if this is established, the Respondent must prove that the less favourable treatment was in no sense whatever on the grounds of race.

129. To establish discrimination, the discriminatory reason for the conduct need not be the sole or even the principal reason for the discrimination; it is enough that it is a contributing cause in the sense of a significant influence: see Lord Nicholls in **Nagarajan v London Regional Transport** [1999] IRLR 572 at 576.

130. There may be circumstances in which it is possible to make clear determinations as to the reason for treatment so that there is no need to rely on section 136: see **Amnesty International v Ahmed** [2009] ICR 1450 and **Martin v Devonshires Solicitors** [2011] ICR 352 as approved in **Hewage v Grampian Health Board** [2012] ICR 1054. However, if this approach is adopted it is important that the Tribunal does not fall into the error of looking only for the principal reason for the treatment but properly analyses whether discrimination was to any extent an effective cause of the reason for the treatment.

131. In **Talbot v Costain Oil and Process Ltd** EAT 2017 ICR 11, having considered the relevant authorities, the EAT summarised the following principles to be considered when deciding on whether to draw inferences of discrimination:

131.1 It is unusual to find direct evidence of discrimination,

131.2 Normally an ET's decision will depend on what inference it is proper to draw from all the relevant surrounding circumstances, which will often include conduct by the alleged discriminator before or after the unfavourable treatment in question,

131.3 It is essential that the ET makes findings about any 'primary facts' that are in issue so that it can take them into account as part of the relevant circumstances,

131.4 The ET's assessment of the parties and their witnesses when they give evidence forms an important part of the process of inference,

131.5 Assessing the evidence of the alleged discriminator when giving an explanation for any treatment, involves not only of credibility but also of reliability, and involves testing the evidence by reference to objective facts and documents, possible motive and the overall probabilities,

131.6 Where there are a number of allegations of discrimination involving one person, conclusions about that person are obviously going to be relevant in relation to all the allegations,

131.7 The ET must have regard to the totality of the relevant circumstances and give proper consideration to factors that point towards discrimination in determining what inference to draw in relation to any particular unfavourable treatment, and

131.8 IF it is necessary to resort to the burden of proof in this context, section 136 EqA provides, in effect, that where it would be proper to draw an inference of discrimination in the absence of 'any other explanation', the burden lies on the alleged discriminator to prove there was no discrimination.

Analysis

132. We do not accept that the Claimant made protected disclosures. We have found that the first disclosure did not occur. We have found that in the second and third alleged disclosures the Claimant did not disclose information that in his reasonable belief tended to show that there had been a breach of a legal obligation. In the case of the third alleged disclosure we do not consider that the Claimant can reasonably have believed that making the disclosure was in the public interest.

133. The Claimant alleges that he was subject to a number of detriments. He alleges that he was excluded from meetings, suspended from work and lost the opportunity to earn commission. We do not accept that the detriments as pleaded are factually made out. The Claimant was not excluded from meetings: although many of the consultation meetings were conducted by telephone, he was able to take part. The Claimant was not suspended from work and we do not consider that he has established that there was any realistic opportunity of earning commission during the redundancy consultation period.

134. In reality, the first three detriments are different ways of complaining about what the Claimant described as the "travel ban". In our findings of fact, we accepted, on balance of probabilities, that this resulted from lack of budget. We concluded the only other realistic alternative was that a decision was taken that air travel would not be paid for because the Claimant was in redundancy consultation. To the extent that the Claimant could establish any detriment in respect of the refusal to authorise payment for flights (which is not how the detriments are pleaded), we do not consider that there is anything to suggest that this was a result of the issues he had raised about Project Rio. Mr Ramaraju did not think them to be of any significance.

135. Similarly, while we accept that the Claimant has genuine complaints about the delays in dealing with his grievance, we do not consider there is anything to suggest that the way in which the grievances were dealt with, including the outcomes, were influenced by the concerns he had raised about Project Rio.

136. As we find that the Claimants treatment did not result from the issues he raised about Project Rio, and we do not accept that those complaint amounted to public interest disclosures, no public interest disclosure detriment claim is made out.

137. As we do not accept that any public interest disclosures were made the automatic unfair dismissal claim must fail. We would add that we see nothing to suggest that the Claimant was dismissed for the reason, or principal reason, that he had raised issues about Project Rio.

138. We accept that there are a number of facts in this case that could be relevant to drawing an inference of race discrimination in appropriate circumstances. These are:

138.1 The Respondents' witnesses very limited understanding of equality and diversity

138.2 The failure of the Respondent to fully answer the questionnaire in respect of the national origin of senior managers in the UK

138.3 The apparent lack of diversity in senior management within the UK

138.4 Ms Naidu misleading evidence as to why she had no notes of important meetings

138.5 The failure of the Respondent to follow their own procedure, including, in particular, the Global Diversity Policy, and the ECHR Code in appointment processes

138.6 The failure to conduct diversity audits

139. However, such facts have to be considered in the context of the specific case to consider whether they could lead to the drawing of an inference. In this case we consider that the key is to consider why the decisions adverse to the Claimant were taken; and whether we could properly infer that they were because of his race; or are entirely satisfied that his race had nothing to do those decisions.

140. In respect of the detriment claims, as set out above, we do not accept that the first three detriments are factually made out. To the extent that he might be able to rely on the "travel ban", we conclude that there are only two realistic reasons for the Claimant's treatment, lack of budget, which we accepted on balance was the real reason, or the fact that the Claimant had entered into redundancy consultation. We see no evidence to suggest that the Claimant's treatment in respect of travel expenses had anything to do with his race. We note that it was not put to Brenda Pound, Stuart Deignan or Ms Naidu that the way in which they handled the Claimant's grievance was in any way related to the Claimant's race. We are entirely satisfied that the Claimant alleged detrimental treatment, short of dismissal, had nothing whatsoever to do with his race.

141. The Claimant contended that the initial decision to place him at risk of redundancy resulted from his disclosures about Project Rio; whereas the decisions to allow Mr Deokule to continue in a role on the Carillion contract and to appoint Mr Dhamija to the new role of Account Director/Regional Director for E&C UK & Europe were because they are of Indian origin.

142. We consider that the real reason for the treatment was a genuine view formed by Mr Ramaraju, Mr Parija and Ms Naidu about the roles that staff wished to undertake. They genuinely believed that the Claimant wanted to focus on large deal hunting as this could earn him very substantial commission. That view is entirely consistent with the documentation and the Claimant's evidence to the tribunal. Hunting for large new deals that could bring in substantial commission was his focus. In the redundancy consultation, the Claimant tried to challenge the business rationale that led to a decision to cease large deal hunting in the E&C Vertical. We consider that Mr Ramaraju, Mr Parija and Ms Naidu saw the role of Mr Deokule as one of mining the Carillion contract for further small deals with some pre-sales activities. We accept that they genuinely did not think that was a role that the Claimant would want to undertake. In respect of the role given to Mr Dhamija, they genuinely assumed that the role would not fit with the Claimant's aspirations, as it was focused on delivery rather than large deal hunting. We accept that their belief that the Claimant was only interested in large deal hunting is why they did not consider him for those roles. Their focus was to look at the skills of individuals and their preferences and then to slot them into an appropriate role. We find that was the real, and entire reason, for the difference in treatment, and it has nothing whatsoever to do with the Claimant's race

143. We accept that the reason for the Claimant's dismissal was redundancy, in that the Respondent's requirement for Business Development Managers had diminished. We consider that there is a significant difference, as a matter of fairness, in considering an individual's preferred for roles as opposed to considering whether there are alternative roles that the employee may have the skill to undertake; and would like to be considered for if the alternative is to be dismissed as redundant. Operating a fair procedure, the Claimant would have been given an opportunity to be considered for the roles that were provided to Mr Deokule and Mr Dhamija. In the case of Mr Deokule he and the Claimant were supposedly part of the same redundancy consultation at the end of which two Business Development Manager posts would be replaced by one, with an emphasis on small deal mining and pre-sales. A fair process would have involved selecting between the Claimant and Mr Deokule by the application of objective criteria or, more likely, allowing them both to apply for the new role. In the case of the Account Director/Regional Director for E&C UK & Europe to which Mr Dhamija was appointed, under fair process the Claimant would have had an opportunity to apply. These failings render the dismissal unfair.

144. Furthermore, the consultation process only started at the stage when it had been decided that the Claimant's role was to be deleted he was given no opportunity to make comments on that proposal at a formative stage. We find that is a further ground upon which the dismissal was unfair.

145. In the circumstances, the unfair dismissal claim succeeds but the claims of detriment done on the ground that the Claimant had made protected disclosure, of automatic unfair dismissal for making protected disclosure and race discrimination fail and are dismissed.

Employment Judge Tayler
20 October 2016

Annex

1. The issues for determination are these:

   1.1 What was the reason for the Claimant's dismissal? The Respondent relies on redundancy as the principle reason for dismissal. Alternatively, it was for SOSR (business reorganization)

   1.2 If there was a redundancy situation, was the reason for the Claimant's dismissal redundancy or for some other reason?

   1.3 Having regard to the size and administrative resources of the Respondent's undertaking was the Claimant's dismissal fair having regard to:

      1.3.1 The consultation undertaken including the timing of the consultation process?

      1.3.2 The selection process including any pool for selection as may have been applied?

      1.3.3 Whether such other steps were taken to avoid the Claimant's dismissal including redeployment?

2. If the reason for dismissal was not redundancy, is the Claimant entitled to an uplift in the award of compensation as a consequence of the Respondent's alleged failure to comply with the ACAS Code of Practice?

3. Is the Claimant entitled to an uplift in the award of compensation as a consequence of the Respondent's alleged failure to comply with the ACAS Code of Practice due to the Respondent's handling of the Claimant's grievances?

4. Has the Claimant contributed to his dismissal such that any compensation awarded should be the subject of a reduction?

5. If the dismissal was procedurally unfair, would the dismissal be inevitable such that any compensation awarded should be the subject of a reduction for *Polkey*?

6. Were the purported disclosures relied on by the Claimant dating from October 2015, late November / December 2015, March 2016 in respect of the NDAs for Project Rio including the misuse of the confidential and IP information belonging to third parties, qualifying protected disclosures?

6.1 In particular, in respect of each purported disclosure in turn:

6.1.1 was an actual disclosure of information made by the Claimant?

6.1.2 did the Claimant hold a reasonable belief that the purported disclosure of information by him evidenced that the Respondent had failed, was failing or was likely to fail to comply with any legal obligation to which it was subjected to?

6.1.3 did the Claimant make the disclosure in the public interest?

6.2 Was the Claimant subjected to any of the following detriments

6.2.1 Exclusion from meetings,

6.2.2 Suspension from work,

6.2.3 Loss of the opportunity to earn commission, and

6.2.4 The handling and conclusion reached in respect of the Claimant's grievance and appeal?

6.3 If so, and if the Claimant is found to have made a qualifying protected disclosure, did any such qualifying disclosure materially influence (being more than a trivial influence) the Respondent's treatment of the Claimant in relation to such detriment(s) ?

6.4 Whether the reason or if more than one reason, the principal reason for the Claimant's dismissal was that he made a protected disclosure?

7. Was the Claimant subjected to direct race discrimination on grounds of his race (being British and a non Indian) in respect of the matters identified in 6.2.1 to 6.2.4 and in the decision to dismiss him, having in mind:

7.1 the date(s) on which any alleged unlawful act has purportedly taken place; and

7.2 whether such unlawful act(s) relied on by the Claimant (with the exception of the dismissal itself) amounted to continuing acts such that the Tribunal might have jurisdiction to hear such claims.