EMPLOYMENT TRIBUNALS

JUDGMENT

BETWEEN

CLAIMANT		RESPONDENT
MR C COSTE	**V**	**EMERGEN (UK) LIMITED**

HELD AT: LONDON CENTRAL **ON: 23 - 27 AUGUST 2021**

EMPLOYMENT JUDGE: **MR M EMERY**
NON-LEGAL MEMBERS: **MR R BABER**
MR P LEWIS

REPRESENTATION:
For the claimant: Ms R White (Counsel)
For the respondent: Ms D Masters (Counsel)

JUDGMENT

1. All claims of direct race discrimination fail and are dismissed.

2. All claims of direct age discrimination and sexual orientation discrimination were withdrawn at the outset of the hearing and are dismissed on withdrawal.

REASONS

The Issues

1. The claimant was employed on 10 June 2019 as a Principal Consultant based in the UK. The respondent asserts he was dismissed on grounds of redundancy. He has less than 2 years' service. The claimant contends he was subject to direct discrimination on grounds of his race by being placed on furlough when there was work he could have undertaken, and by being selected for redundancy. He argues his dismissal amounts to direct discrimination on grounds of his race. The respondent denies all allegations of discrimination.

2. *Direct Race Discrimination claim*

    a. The Claimant is mixed race (Asian / Caucasian):

        i. Did the Respondent's decision-makers know that the Claimant was mixed race (Asian / Caucasian)?

        ii. Was the Respondent informed for the first time on 3 March 2021 that the Claimant was Asian / Caucasian as part of the process of finalising the List of Issues?

        iii. Did the Respondent's decision-makers perceive that the Claimant was white?

    b. Has the Respondent subjected the Claimant to the following treatment and was it detrimental? The Claimant advances the following incidents of alleged less favourable treatment/detriment:

        i. Placing him on and keeping him on furlough between 8 April and 22 June 2020 despite alternatives being available.

        ii. The Claimant contends that he should have been deployed on to billable projects with BP Germany and Colt and/or non-billable activities regarding 'Building Better Products' and 'I3W' and / or pre-sales activities regarding a project for the Department of Education and / or Emergn Marketing and Training (13 April 2020 to 31 May 2020).
            1. The Claimant relies on employee G1 (White) as a comparator who was not enrolled in the furlough scheme and was instead given non-billable work with minimal internal billable work (about 35 hours) for the following period 13 April - 31 May 2020

            2. The Claimant also relies on employee D1 (White) who was taken off furlough on 4 May 2020 when the Claimant was not.

iii. Not enrolling the Claimant for the second furlough scheme on 12 June 2020 starting 1 July 2020.

1. The Claimant relies on employee L1, Consultant, as a comparator who he states was enrolled in several furlough schemes from 8 April 2020 until November 2020.

iv. The Claimant's selection for redundancy leading to his dismissal on 26 June 2020. The Claimant takes issue with the selection process in comparison with employees D1 and G1 and the failure to consider alternative employment for him.

v. Not being offered the role of Client Partner.

1. The Claimant relies on the following comparator: employee K1, Senior Consultant, (White/Caucasian) who was given this role in June / July 2020.

c. Was that treatment "less favourable treatment", i.e. did the respondent treat the Claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?

d. If so, was this because of the Claimant's race (Caucasian/Asian)?

e. The Respondent does not rely on the defence set out in section 109(4) Equality Act 2010.

3. *Time*

a. Were the claims presented within a period of three months starting with the date to which the complaint relates?

b. Did the alleged conduct extend over a period so that it should be treated as being done at the end of that period?

4. If no to (a) and (b) the claim is out of time. Is it then just and equitable for the tribunal to extend time?

5. *Withdrawal of claims*

a. The claimant withdraws his claims of direct age and direct sexual orientation discrimination, these claims are dismissed on withdrawal.

The Law

6. Equality Act 2010

s.13 Direct discrimination

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

s.23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case.

(2) The circumstances relating to a case include a person's abilities if—

a. on a comparison for the purposes of section 13, the protected characteristic is disability;

s.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.

Relevant legal cases

7. We considered the legal cases put forward by the parties. We also considered the following 'direct discrimination' general principles:

a. Has the claimant been treated less favourably than a hypothetical comparator would have been treated on the ground of his race? This can be considered in two parts: (a) less favourable treatment; and (b) on grounds of race. Importantly, it is not possible to infer discrimination merely because the employer has acted unreasonably (*Glasgow City Council v Zafar [1998] IRLR 36)*

b. The requirement is that all *relevant* circumstances between complainant and comparator are the same, or not materially different; the tribunal must ensure that it only compares 'like with like'; save that the comparator is not of the same race (*Shamoon v Chief Constable of the Royal Ulster Constabulary [2013] ICR 337*)

c. The tribunal has to determine the *"reason why"* the claimant was treated as he was (*Nagarajan v London Regional Transport* [1999] IRLR 572) and it is not necessary in every case for the tribunal to go through the two stage procedure; if the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial *(Igen v Wong [2005] EWCA Civ 142). "*Debating the correct characterisation

of the comparator is less helpful than focusing on the fundamental question of the reason why the claimant was treated in the manner complained of.*" (Chondol v Liverpool CC UKEAT/0298/08)*

d. *Law Society v Bhal[2003] IRLR 640* - the fundamental question is why the discriminator acted as he did. Was the claimant (in this case) treated the way he was because of his race? It is enough that a protected characteristic had a 'significant influence' on the outcome - discrimination will be made out. The crucial question is: 'why the complainant received less favourable treatment … Was it on grounds of [the protected characteristic]? Or was it for some other reason..?"

e. *Nagarajan v London Regional Transport [1999] IRLR 572, HL.* "What, out of the whole complex of facts … is the effective and predominant cause" or the "real and efficient cause" of the act complained of?" (*O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School [1996] IRLR 372*, *[1997] ICR 33)*

f. *London Borough of Islington v Ladele*: *[2009] EWCA Civ 1357* provides the following guidance:

1. In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in *Nagarajan v London Regional Transport [1999] IRLR 572, 575*—"this is the crucial question". In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator

2. If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in *Nagarajan* (p 576) as explained by Peter Gibson LJ in *Igen v Wong [2005] EWCA Civ 142*, *[2005] ICR 931*, *[2005] IRLR 258* paragraph 37

3. As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test, which reflects the requirements of the Burden of Proof Directive (97/80/EEC).

4. The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of protected characteristic of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one.

5. It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the *Igen* test: see the decision of the Court of Appeal in *Brown v Croydon LBC [2007] EWCA Civ 32*, *[2007] IRLR 259* paragraphs 28–39.

6. It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are.

7. As we have said, it is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The proper approach to the evidence of how comparators may be used was succinctly summarised by Lord Hoffmann in *Watt (formerly Carter) v Ahsan [2008] IRLR 243*, *[2008] 1 All ER 869* … paragraphs 36–37) …"

g. *Chondol v Liverpool CC UKEAT/0298/08*, *[2009] All ER (D) 155 (Feb), EAT*: 'Debating the correct characterisation of the comparator is less helpful than focusing on the fundamental question of the reason why the claimant was treated in the manner complained of'.

Witnesses & Hearing procedure

8. This hearing was held remotely on the 'cvp' platform because of a lack of availability of Tribunal hearing rooms during the Covid-19 pandemic, no objections having been raised by the parties in advance. Regular breaks were taken in evidence, and no issues were raised about access, difficulties with the process or technical issues. Witnesses were given appropriate warnings about use of 'clean' statements and documents, and the absolute requirement not to communicate about the case while under oath.

9. We heard first from the claimant, who also provided a statement from a former colleague, Mr C Cunningham. From the respondent we heard from:

    a. Ms A Mistry, Chief Financial & Operations Officer
    b. Ms A Hunt, HR Manager
    c. Mr L McHugh, Practice Lead, latterly the claimant's line manager
    d. Mr A Adamopoulos, Founder & CEO
    e. Mr P Dalins, VP Global Delivery

10. Corrections were made to some of the statements at the start of the witness' evidence. The Tribunal spent most of the first day of the hearing reading the witness statements and the documents referred to in the statements. Witnesses were cross-examined, and the Tribunal asked questions of the witnesses.

11. This judgment does not recite all of the evidence we heard, instead it deals with the evidence relevant to the issues. The '"quotes" below are a detailed summary of the answers given to questions, or are a quote from a document (with a document number).

12. Based on the evidence we heard and read, we unanimously reached a conclusion that the following occurred, our 'findings of fact'.

The Facts

13. The claimant was employed as a Principal Consultant, a senior role typically with 15+ years' experience. His role was (in brief) to focus on how companies work, to assist them to become more agile, to help companies develop products faster and with more efficient teams. The respondent uses the "Agile" model, onto which it has developed a training framework for businesses. This can involve coaching and mentoring, going into the client's business, often onsite, occasionally remotely.

14. Ms Mistry accepted in her evidence that the claimant was highly skilled and worked successfully for the respondent. By September 2019 the claimant successfully completed his probation period in the company. His manager Mr McHugh mentioned the *"ongoing contribution"* he was making and his success sharing his knowledge *"and doing it in a manner which is wholly aligned"* with the respondent. A letter from Mr McHugh said *"… I am … impressed with your significant contributions and spirit"* (163-164).

15. There was a significant dispute about the claimant's number of chargeable hours during his employment. On one project in December 2019 he was told that the work he was undertaking in December 2019 to use the non-billable code, as the *"billable work will start in January only.."* (195). The claimant accepted in his evidence that delays in setting up contracts and client codes, which then enabled chargeable time to be added, meant that time may not be billed, or may be regarded as non-chargeable. He accepted that this applied to all consultants.

16. For one client, the claimant's timesheets were rejected for the period 2-22 March 2020; he was told the reason was the time *"Should be 50% on Bench"* (251-3). The claimant challenged this for the period 2-8 March as he was full time at the client, one day of which was non-billable training, this explanation was accepted (254). The reason for the reduction was that the client was terminating the contract and it was agreed to reduce charges to the client. The claimant's case is that he was told this retrospectively, on 25 March, he also believes that the client was *"billed the same, it was never suggested they did not bill the same"*.

17. We accepted that the claimant had limited visibility of what proportion of his time was charged to clients. No time was recorded for this client after 31 March although he was undertaking some follow-up activity during the run-off. The claimant had no other chargeable project work planned after this date.

18. In March 2020 the claimant was also undertaking pipeline work. He was asked to develop a proposal to [C13] on 18 March 2020, and was added to the Teams site

for this opportunity. On 23 March 2020 he asked to delay a catch-up on a proposal, as he was *"swarmed"* with work (245)

19. On 24 March 2020 an announcement was made to the whole UK workforce that because of the pandemic and government guidelines, all staff were to work from home with immediate effect and the London office was closed (246).

20. By 2 April 2020 all staff were working remotely. An internal email references *"sharing the good news about our performance in Q1, the ongoing work with our clients and also some of the new wins…"* (259).

21. The claimant was placed on furlough 6 April 2020. The reason given in the letter the claimant signed and returned, the pandemic was *"starting to have a significant impact on our customers, consulting accounts in particular and some of our assignments have been postponed. The speed and certainty of our pipeline business is also impacted …"*. The claimant was informed that furlough was being used as an alternative to redundancies. He was told he would be furloughed for a minimum of 3 weeks (263).

22. Only 3 of 11 Principal Consultants were furloughed. Some remained working with clients, some remained on the Bench, the respondent asserts because they had upcoming assignments. Of the 3 furloughed, there was the claimant, a Black employee, and D1, a White employee who was moved off furlough onto a client project shortly after.

23. The claimant contends that as an alternative to furlough he should have been considered for other projects. He accepted in his evidence that the timing of projects is essentially in clients' hands, that it is difficult to start projects within, say, a 2-3 week timetable. He also accepted that he was not aware of when decisions were made on allocation of consultants to projects *"… I did not know what was in the pipeline or who was allocating which consultants to which projects."*

24. The claimant argues that one project he should have been allocated to was "Colt"; that he was at the workshop with this client and he demonstrated his experience. The respondent's evidence is that G1 was briefed at the beginning of the engagement, a PC was needed one day a week for 4 weeks commencing June 2020. Mr McHugh argues that the claimant had not done 'discoveries' before, and G1 had. The claimant disputes this, arguing in his evidence this was *"completely wrong"*, that he had done discoveries including with BP *"it is common to understand the scope and identify the right opportunities. So I ran plenty of discovery projects, with teams with different skill sets"*. He argued that he had been doing *"pre sales for IT and digital for 20 years. So I fit this…".* He argued he was *"never asked"* about his experience on discoveries or knowledge or presales, or of emerging solutions, *"so I do not know how he can assess [other candidates] as more suitable"* for this project.

25. Another project was a BP 'global' role. The claimant argues he was a suitable fit for this role, having recently worked with BP. The respondent argues that G1 had strong relationships within BP, who had asked for G1 to fill this role. Also, G1's

expertise was architecture implementation, a key requirement of the client. *"It would have been the same if the claimant had been asked for"*. Before this contract started to fill his time G1 was on the bench, doing mandatory but non-billable accreditation and training.

26. It is accepted that D1 was taken off furlough to start work on a project (BP ScrumMaster). The respondent argues that the client asked for a ScrumMaster but Mr McHugh and others believed it was a more technical rather than ScrumMaster role, and that they submitted the cvs of D1 and that of a qualified ScrumMaster, the client choosing D1 because of his technical skills. The respondent argues that D1 has *"back end process knowledge"* the claimant *"…he is front end".*

27. Another project was Covea; the respondent's argument is that that role did not need a Principal Consultant, the claimant argued that a Senior Consultant role can be undertaken by a Principal Consultant, *"it may be good for the client"* to do so. He argued that he had the experience and skill set for this, as was clear from his recruitment file; *"my expertise was identified".*

28. On other projects identified by the claimant, for example GSK, PayPal, Astra Zenica, the respondent's position was that lots of consultants were already signed onto these projects (657). The claimant argued there were opportunities to expand the work with these clients, he queried whether or not they had been developed. He argued that he could have been swapped with a consultant already on a project, he argued this had happened in the past on a Belgian project, he was moved to BP. The respondent's position was BP was not a swap, it was a move to an externally billable project. For PayPal, the respondent argued that the client had a requirement for a US based Principal Consultant, to which the claimant contended this role could be remotely based in UK. The claimant did not name comparators for the majority of these roles, nor provide any evidence that this conduct could amount to discrimination. We therefore considered these allegations as background evidence of the cumulative number of projects potentially available, which the claimant contends he could have undertaken.

29. Ms Mistry's evidence was that when the respondent started considering redundancies, they were *"looking forward, mapping";* the respondent's evidence was that consulting work was drying up, the revenue declining significantly from the outset of the pandemic, whereas software engineering was growing, the share of business was changing.

30. The claimant was emailed a letter on 27 May 2020 from the CFO A Mistry, stating there was a *"potential redundancy situation"* of Principal Consultant and Senior Consultant employees. The reason was the *"significant impact"* of the pandemic; the reasons were the same as the 6 April furlough letter. He was told alternatives would be considered including reducing the number of redundancies (275). This letter was sent to all Principal and Senior Consultants.

31. Mr Adamopoulos argued that furlough guidelines were followed; that there was no foreseeable work for the same number of Principal Consultants for the rest of

2020. He argued that there was "*no question of continuing on furlough, we started this process because no work was in sight."*

32. The respondent's evidence was that the claimant *"… was not on billable work for some time, we had a loss/pause for foreseeable future, and we had to make assessments on the team, and we made a decision to make the claimant redundant … it's about the pandemic. It's about his ranking as a consultant. The large point is there was no billable work for foreseeable future."*

33. By 29 May 2020 the selection process had concluded, and on this date the claimant and other employees were informed they were at risk of redundancy. The claimant was sent an appointment for a Teams meeting on 3 June, and was given the right to be accompanied by a colleague. Mr Brady and Ms Hunt conducted the meeting, and the transcript (which was heavily amended by the claimant) shows the claimant being told of cancelled and postponed projects, that decisions were not being made by clients *"we haven't got high levels of confidence in work starting.."*. He was told that consultants had been scored and ranked, this had been considered against potential work in the 2nd half of the year.

34. At the 3 June 2020 Teams meeting, the claimant queried why Consultants had been targeted, and why he had been furloughed and others had not; *"that says there is a kind of difference in treatment between employees: … it looks like this has been kind of engineered…"*. He questioned the scoring, and whether it was independent; he questioned why the Sales team was not at risk. In response the claimant was told that Marketing and Sales *"… are areas that we're still wanting to maintain …to increase the business pipeline…".* He said that all Principal Consultants were considered in the pool and were scored the same way, including these not on furlough.

35. The claimant questioned the 2 days between the general consultation letter received by all consultants, and the individual consultation letter received by those who were selected for redundancy. He asked when he was scored and by who, he asked why volunteers for redundancy had not been sought. He was told that employees on client contracts were retained with these clients, that this as a decision taken at the furlough stage.

36. The claimant argued that those considered for redundancy were those on furlough, that not everyone on the bench was furloughed, he queried why he was not being kept on furlough instead of being made redundant. He talked about his relevant prior work experience.

37. The claimant referred to *"unconscious bias"* on issues of diversity and training which he had highlighted the year before. He said, *"… you see who are the people considered for redundancy … are basically a mature woman, a black guy and half a black guy, no half-white EU citizen … there is potentially unconscious bias in place. I'm not saying that this is intentional … statistically it's an unlikely outcome…."* (279-90).

38. Ms Hunt did not believe the claimant was describing himself in this statement, *"… he had observations about others …. he is saying he is involved and was*

selected, but there was a lot of confusion regarding his race. My understanding was he is French." She accepted he was raising a concern about potential unconscious bias.

39. The redundancy criteria were scored 1-5: not a capability (1); not demonstrated (2); done with support/jointly delivered (3); demonstrated ability at 1 or more clients (4); considered to be an expert (5). The criteria included ability to coach teams, product managers, portfolio owners; ability to define a solution; ability to apply consulting methods; provide support to pre-sales.

40. Ms Mistry accepted that the respondent's redundancy policy states that employees are "*to be informed of [R]s proposed approach including selection criteria to be applied..."*; she accepted that this had not happened with the claimant.

41. The claimant was scored by Lee Brady (VP Consulting), Mr McHugh, Brian Hanly (Chief Customer Officer), and Della Brooker (Engagement Director). Their combined scores across the eight subject areas were: four 2s; one 3 and three scores between 1.7 - 2.7 , an overall average of 2.21/5 (307).

42. There was a wide range of marks for the claimant in each category, e.g. a range of 2 – 4 for Product Management, 1 – 3 for Solution Definition. The claimant argued that Mr McHugh had good visibility on his work. He argued that Mr Brady had *"visibility of my work, this is not reflected in my rating"*. He argued that he had little or no interaction with Ms Brooker and Mr Hanly, the latter's score *"I do not think it reflects my competence or performance…."*. He referred to another employee who had *"messed up",* that this was *"not shown in his score".* He said his score *"is no reason to keep me, it's undervalue, not acceptable, so this does not reflect my performance."* He argued that he was billing on client accounts, *"I was delivering the value expected…".*

43. Ms Hunt was unable to say why there was this discrepancy, she said that these skills were marked, and *"we can only look at what they have done … all employees were scored in the same way, and scoring is consistent with other individuals."*

44. In his detailed notes following the 3 June meeting, the claimant provided his feedback giving himself scores between 3 and 5 (315). He asked whether the scoring could be objective or fair given he had 4 line managers during his employment. In his scoring he argued he provided *"evidence based self-assessment … this is aligned to the reality of my work…"*. He referred to positive feedback at end of probation and other positive feedback. He referred to the lack of clarity on assessments, referring to positive client interactions which he argued had contributed financially. He provided several pages of detailed examples of work he said appeared not to have been considered in the assessments (311-19).

45. In his evidence, he argued that the selection criteria was an *"incomplete"* version of his role, that this has not been seen before, it was never explained *"so it's a surprise it has been used in this process"*. He argued the criteria had some relevance, but there was no link to measurable KPIs; what for example does team enablement' or 'ability to coach' mean, and how was this ability assessed?

46. It was put to the claimant that his scores were because he had not had time to demonstrate these abilities, rather than him being poor at his role. The claimant argued that he and others had been handpicked for one major project *"because of our capability … that I can demonstrate value in short time".* He referred to his confirmation in employment at the end of probation, how impressed his manager had been by his *"significant contribution and spirit",* his capability. He argued that his colleagues' positive knowledge of him was not reflected in the scoring.

47. The claimant also queried why only 7 of the 11 Principal Consultants were scored. He asked why was it that *"two non-white individuals"* were made redundant. Ms Mistry accepted that of 12 Principal Consultants, 3 were made redundant including the claimant and a Black employee.

48. The respondent does not record employees' ethnic origin; it does not have an Equal Opportunities policy. Ms Mistry accepted that at best the respondent had *"pockets of training"* on equality diversity/inclusion, she argued that the respondent selected for redundancy based on experience and who had billable work. "*The process that the team took had no bias in it, as it focussed on who had billable work and who did not; experience and how that experience ranked against the others."* Ms Hunt argued that there was no unconscious bias, that selection was based on what had been *"physically experienced of their work."*

49. During the process. the claimant was given the details of 3 roles in the business for which he could interview if he expressed an interest: B2B Marketing Manager, Automation Solution Architect, and Product Manager (which was based in Latvia). He was told on 11 June that interviews may be 12 or 15 June. He expressed concern about the lack of time to prepare. He was told that the Marketing role could not be held open past 15 June as two candidates were awaiting a decision following their final interviews (340-43). Of the roles, he said he would *"start the process"* with the Marketing role.

50. The claimant was unsuccessful at interview for the Marketing role *"… this is not the core of his experience … The two other candidates have more relevant and timely experience…".* (371). He was given feedback the next day, 16 June 2020. In his evidence he accepted that this was *"a fair process…".*

51. The Solution Architect role, his evidence was that they had decided at this stage to *"get rid of me because of my race, so they did not interview me".* The claimant was asked by email on 12 June at 14.30, *"Interviews are currently being held of the Solution Architect and Product Manager roles. Please can you advise if these positions are of interest to you?".* He did not respond. In his evidence the claimant said that *"it was not clear that I had to reconfirm the other two roles. For me it was clear that I will consider all 3 …".* The claimant said he could not recall responding to the 14.30 email.

52. There was dispute whether the Product Manager role could have been undertaken from the UK. The LinkedIn advert contains multiple roles available in various countries, the respondent says that this role needed to be undertaken from Latvia for operational reasons. The claimant argues he could have worked on any

worldwide project from home. The respondent argues that other jobs referred to at paragraph 78 of his statement were junior roles unsuitable for him.

53. The claimant's evidence was that another *"problematic"* role was Client Partner *"which was not advertised"*. He argued that *"clearly they did not want me to know"* of this role, that this was "*possibly"* because of his race. He argued that part of his role was *"engagement"* with clients, he argued that his experience in the company meant that he was of value, he was aware of emerging markets, he was suitable for this role. Mr McHugh's evidence was that the person in role resigned, that K1 was chosen as replacement because K1 knew the account and had a good relationship with the key client managers. Mr McHugh accepted that the claimant had spent time in this client, *"… but it's a huge organisation… we needed relationships in place who understood this business and K1 was on a fast track…"*. K1 was not furloughed because the delay to project start was less than 3 weeks.

54. The claimant said he was unable to attend the redundancy follow-up meeting scheduled for 17 June on grounds of ill health and he submitted a Med3 stating stress at work.

55. The claimant submitted a 4 page grievance on 17 June 2020 arguing he was discriminated against on grounds of age, sexual orientation, and race *"As a mixed race individual I feel that I have been targeted for furlough and now redundancy as I do not fit the white-British male characteristics of the consultants at my grade*…". He argues that 2 of the PCs targeted for redundancy are not Caucasian; he makes a detailed complaint about the fairness of his selection.

56. The claimant was informed on 18 June that his furlough was coming to an end on 22 June 2020. As he was signed off work he would go onto sick leave (383).

57. Attempts were made by Mr Dalins to set up a grievance meeting; the claimant refused to do so while on sick leave saying he would not be able to prepare. He was told a meeting would go ahead in his absence (385 -6).

58. A redundancy meeting was held in the claimant's absence – he had been invited but said he could not attend because of sickness. The reason stated for his redundancy at this meeting was there was a difference *"between supply and demand"*.

59. Some of the claimant's questions were addressed at this meeting: one was whether all PCs had been placed in the pool, or just those on the bench, also why temporary Consultants (Associates) had not been placed at risk. The respondent's point was that many associates are embedded with the client and could not be placed at risk (398). In his evidence the claimant argued that moving consultants around can bring fresh ideas, and it's not good to become embedded with a client. He also accepted that it's the client's decision how long to have any particular consultant.

60. The notes did not record a response to one of the claimant's questions – why could he not remain on furlough, which by this date had been extended to October 2020. In her evidence Ms Hunt argued that at this time the respondent's belief

was *"not hopeful"* there would be sufficient work *"and it would be a misuse to use the furlough scheme".*

61. The claimant's final redundancy meeting took place on 26 June; he did not attend this meeting because of ill health, saying again he would *"expressly reserve"* his rights if it went ahead in his absence (417).

62. The claimant was informed by email on 26 June 2020 that his employment was being terminated on grounds of redundancy, his employment ending that day. He received 4 weeks' pay in lieu of notice and outstanding holiday pay (421-3).

63. Mr Dalins was separately proceeding with the grievance. He emailed questions to staff concerned including Ms Mistry, Ms Hunt and Mr Brady. He considered 7 subject areas, including unfair treatment for selection for furlough and for redundancy, discrimination on grounds of race and/or age and/or sexual orientation.

64. Mr Dalins report considered each of the claimant's allegations and a summary of the responses he had received to each allegation. For example, the allegation that all consultants on the bench were not furloughed, the report concludes that those soon to start billable work were not furloughed, while those *"with no foreseeable work"*, including the claimant, were furloughed. On the fact that contractors (associates) currently on client contracts were not replaced by permanent staff, the response records that associates were being reduced in numbers, those remaining could not be substituted because of the nature/stage of work. It records that the redundancy scores were *"based on capabilities that have been demonstrated during work … on client activities…".* It concluded on the evidence provided that there is *"no basis"* for upholding any of the allegations (437-449).

65. The claimant appealed his dismissal on 1 July 2020 (email timed 10:12am), arguing his redundancy was on the basis of his sexuality, race and age, and the furlough process was carried out in a discriminatory manner. He argued there was no evidence to show redundancies were necessary; that the redundancy policy was not applied; volunteers were not sought; the selection criteria was not explained or justified; he was denied working opportunities; other consultants not selected were on the bench; his marking was not credible; the redundancy pool targeted staff on furlough alone (451-2).

66. The appeal decision was made by Mr Adamopoulos and emailed to the claimant within 4 hours (1 July at 1:54pm) in a short 4 paragraph decision. He said he was *"fully informed"* about the furlough consultation and redundancy process and the grievance outcome, he had read relevant documents. He did not uphold the appeal. (452-3). In his evidence he argued he had adequately reviewed all documents, that he was *"aware of the team and the responses I had and the conversations I had about what had happened"*, that 4 hours was a reasonable timescale to conclude the appeal.

67. There was significant evidence in what was meant by 'billable' time. It was agreed that being on the bench was non -billable time, for the claimant being on the bench

meant undertaking no activity at all. It was agreed that paid work undertaken at an hourly or fixed rate billed to clients was billable time.

68. One issue on billable time was contentious: preparatory pitch work, what the claimant described as *"building a product";* there would be a *"… time lag between expense and revenue… and investment of time with a proposal to sell a product to a client".* This was, he contended, internally billable time, and should not be considered non-billable work, as at this stage it was his role to *"onboard principles to discuss and refine proposals … I cannot think of a case where I was used for free…"* He accepted the proposition that this was *"productive work"* but that the client did not necessarily pay for that work. He said that there was an internal budget to build the proposal or pitch, and the consultant will bill against this.

69. The claimant argued that his hours recorded on the respondent's time recording 'Startrack' system of 464 billable hours was wrong (464). He argued that other items on this spreadsheet were also billable, for example the "Delivery E" of 353 hours *"my understanding these hours … were billed to the clients".* He argued he undertook billable work during furlough. He referred to being asked to record against a temporary code on this item – that *"this was supposed to be reverted to a billable code later"*. He referred to a dispute about billing the first two weeks of employment when he did not have a billing code. He argued that there was a cross-over between two assignments in September 2019, and time was recorded against the wrong code, there was no way to change this until *"my contract with the client is signed off and Finance authorises code…"*. The claimant accepted that the same issue would affect all staff starting a new project. He also said it was *"not my responsibility to bill against code".*

70. The claimant's case is that roles were advertised by the respondent during and immediately after his redundancy. The respondent's case is that none were at Principal Consultant level; the claimant accepted one role was Senior Consultant, in November 2020.

Closing Submissions

71. The parties gave written submissions and elaborated on them, and made comments on each other's submissions. The relevant arguments are dealt with in the conclusions section below.

Conclusions

Did the Respondent's decision-makers know that the Claimant was mixed race (Asian / Caucasian), if so when?

72. We concluded that by 3 June 2020, at the latest, the respondent was aware the claimant was of mixed-race descent, while not necessarily being aware he was of Asian / Caucasian descent. This is the natural meaning of the words the claimant used at the 3 June meeting. He referred to the *"people who are considered for redundancy"* being an older woman, a black man, and "*half a black guy, no, half white EU citizen".* He said this when making an allegation of unconscious bias.

73. The Tribunal thought that the language used was slightly unusual, but clear: the claimant considered himself to be of mixed-race EU origin who may be the subject of unconscious bias. We concluded that the lack of follow-up question or comment from those present to this remark meant that this statement was accepted at face value.

74. We considered whether the respondent was aware prior to 3 June 2020 the claimant was of Asian/Caucasian (or of mixed-race) descent. The claimant's accent can be described as quite possibly French. We concluded that the respondent's witnesses were incurious about his ethnic background at the start of and during his employment, including after meeting with him. At some point during his employment and before the start of his furlough it may have dawned on some of his colleagues that he was of mixed-race descent, but we could not say on the balance of probabilities that this was the case, or that his origins were in any way identified, before he made the 3 June 2020 statement.

75. Because we concluded the respondent was aware the claimant was of mixed-race origin on and after 3 June 2020, it follows that we did not accept that his managers perceived him to be white during the whole of his employment.

Has the Respondent subjected the Claimant to the following treatment, if so was it detrimental, and if so was it less favourable treatment?

Placing him on and keeping him on furlough between 8 April and 22 June 2020 despite available roles, or non-billable alternatives such as presales activities; training or marketing (13 April 2020 to 31 May 2020). His comparators are G1 and D1.

76. It is a fact that the claimant was on furlough throughout this period and he was not assigned to roles at BP Germany or Colt. We accepted that being placed on furlough, instead of engaging in billable work or being engaged in other work, amounts to detrimental treatment.

77. The respondent's position is that the claimant was placed on furlough because he had no billable work or any prospect of billable work in the next three weeks, that clients were postponing or halting engagements. We noted that the last billable work of the claimant was on a contract which was terminated early by the client, coming to an end early April 2020, and that he was classed as 50% on the bench from 9 March 2020, albeit retrospectively. We noted that Mr McHugh put the claimant forward for projects at this time (238, 241).

78. We concluded that had this contract not been terminated, or if any of the projects he was engaged with had become billable work, the respondent would have had no grounds to place the claimant on furlough, and it would not have done so when it did. We accepted the respondent's case, that the decision was made to furlough the employees who were on the bench and who had no likelihood of billable work for the next three weeks.

79. Was failing to place the claimant in the roles eventually undertaken by G1 and D1 (BP and Colt) detrimental treatment? We concluded that to be so, the roles

needed to be a good fit for the claimant, suitable roles, i.e. roles where the claimant would be the best placed consultant to fulfil the client's requirements. We concluded in the context of the respondent's business that this included both technical skills and experience, and ongoing relationships with key client stakeholders.

80. We accepted that a key manager at BP had asked for G1, and he was filling in on non-chargeable bench work while waiting for this project to commence. It is agreed that D1 was taken off furlough. We accepted that this was because he was chosen by the client after being put forward by the respondent, who considered D1 to be the best match for the role.

81. The claimant's evidence is that he had the same relevant skills for both roles – essentially that he should have been put forward for the BP role. We first assumed the claimant did have the key relevant skills for this role. However. we concluded that G1 did not fulfil a key requirement for a 'comparator', as he was not in the same or similar position as the claimant, the key difference being the client's personal knowledge of and request for G1, who the client considered to be the ideal fit for the role. The claimant was not in the same position as he had not been requested by the client.

82. While we took on board Ms White's argument that it is right to be sceptical – *"is this right?"* that *"in every instance"* there was no suitable work for him to do, we accepted Ms Masters argument that G1 is not in an analogous position for this role.

83. We concluded that the appropriate comparator would be a white employee with the same or similar skills, length of service, positive recognition of their value, and a similar profile within the organisation as the claimant. We concluded that the respondent would not have put forward this comparator's cv for this role, i.e. this comparator would have been treated the same as the claimant. The reason: G1 was the only realistic candidate for this role – G1 was available and was the client's choice.

84. D1: We accepted that the claimant has the relevant ScrumMaster skills that the client had requested. This was a client for whom the respondent was putting forward CVs, and we accepted that client wanted to see 2 CVs initially. The claimant's case is that putting D1 on furlough was a sham because he was always going to be put forward for this role. We accepted that D1 was always going to be put forward for this role.

85. We also accepted the basic argument that it was in the respondent's interests to put forward suitable consultants – i.e. those it believed were the best for the role. We accepted that the respondent genuinely believed that D1 was best placed for this role, for skills beyond those of ScrumMaster, and that the respondent genuinely believed that the claimant did not have the same relevant skills.

86. Again, we accepted Ms Masters argument that D1 is not an appropriate comparator. It follows that we again concluded that the appropriate comparator would be a white employee with the same characteristics set out above. We

concluded that this employee would have been treated the same as the claimant. The comparator's cv would not have been put forward because of the respondent's genuine view that D1 and another employee were the best suitable matches for the role.

87. We considered other roles which the claimant said were suitable, including those based abroad which the claimant said he could have done from home. We accepted that the respondent is entitled to base the role in the country which it considers most suitable. We concluded that a hypothetical white comparator based in the UK would have similarly not been put forward for such roles.

88. Another role the claimant considered suitable was the Client Partner role. We accepted the respondent's position, that it needed to replace an employee on an ongoing project, that K1 was the clearly most suitable candidate because of their relationship with the relevant client managers. Again, we considered that a hypothetical white comparator would not have been put forward for this role, because K1 had the key requirements for the role, and the comparator, like the claimant, did not.

89. We noted the undisputed evidence that the other furloughed employee without any prospect of a role was Black, with in the claimant's view all remaining Principal Consultants being White. We noted the lack of diversity training. We accepted the claimant's view throughout, that unconscious bias can very easily occur.

90. But, we accepted the explanation put forward by the respondent for each of the roles put forward by the claimant - that the Principal Consultant comparators had different client relationships and different technical skills which made them best placed to fulfil that contract.

91. We concluded that the reason why the claimant was put on furlough was that there was no foreseeable billable work for him; i.e. work on client accounts which could be invoiced to the client. We did not accept that training or pipeline activity was a substitute for the prospect of billable work. We concluded that the reason why the claimant was treated differently to his named comparators was because they had materially different skills or client relationships. We concluded that a comparator with the same skills and knowledge as the claimant would have been similarly treated.

The Claimant's selection for redundancy leading to his dismissal on 26 June 2020. The Claimant takes issue with the selection process in comparison with employees D1 and G1 and the failure to consider alternative employment for him.

Not enrolling the Claimant for the second furlough scheme on 12 June 2020 starting 1 July 2020, he relies on L1 as a comparator.

92. We took these issues together because the claimant was selected for redundancy on 29 May 2020, the extension to the furlough scheme was followed by his date of dismissal.

93. The respondent's position is that there is a difference between no work on a temporary basis and no foreseeable work until the end of the year. Ms Masters said that by the date the claimant was selected for redundancy it was unclear what the position was on furlough, there had been a series of Treasury directions but no extension to the scheme. She argued that furlough was *"never an alternative to redundancies".*

94. We also noted the claimant's position as argued by Ms White, that this was a *"messy changing situation",* but that the position remains *"there was an opportunity to avoid redundancy",* that it was *"not in dispute"* that by 25 June 2020 it was known the furlough scheme was to last to at least October 2020. She also argued that it was *"highly illogical"* for the respondent to make someone as skilled as the claimant redundant, that this needs close examination.

95. We accepted that the core aim of the furlough scheme was to avoid employers having to make redundancies where the Covid-19 pandemic had caused business difficulties. We accepted that by end-May 2020 this was generally known by affected business and their employees across the country. We accepted that the respondent's senior management would have been aware that this was the scheme's aim by this date. We accepted that while by end-May there was uncertainty about the furlough scheme's extension and its nature, it was generally understood that the scheme would be extended in some shape or form.

96. We accepted that were a Tribunal considering a claim of 'ordinary' unfair dismissal, the respondent may well find it hard to justify the fairness of the claimant's dismissal for redundancy, when furlough was adopted by the vast majority of employers in similar circumstances and where it was known by his dismissal date that the furlough scheme had been extended to October 2020.

97. To be clear, we did not accept the respondent's position that by end-May 2020 it believed it was required to make employees redundant in circumstances where it appeared furlough had led to contracts being curtailed or cancelled. We did not accept that the respondent genuinely believed it would be an abuse of furlough scheme to keep employees on furlough by the date it selected the claimant for redundancy.

98. The claim is one of direct race discrimination, and we therefore considered whether the claimant was less favourably treated than comparator(s).

99. We considered the respondent's view on the need for redundancies. We concluded that the respondent's SMT reached a settled view very early on in the pandemic that, because of the pandemic, which had led to what the respondent considered was a long-term decline in consultancy-based work and an increase in engineering work, the company would make structural changes.

100. We concluded that the rationale for redundancies can be seen in the respondent's own evidence, in particular Ms Mistry's statement paragraph 32 – the decision was taken to limit redundancies to Principal and Senior Consultants *"because they are our biggest population of consultants".* We concluded that the

respondent decided at the time of the pandemic to restructure and reduce the number of senior-level Consultants.

101. There was a two day gap between the first notification of redundancies and the claimant being selected for redundancy. We noted the failure to provide selection criteria to employees in advance, and we noted the claimant's significant concerns about the nature of the criteria. We accepted Ms White's contention that the criteria was designed to test gaps in knowledge and has been used for a different process, redundancy selection, also that it was a *"process which produces a raw average, a poor process, a sledgehammer".* We had serious doubts about the fairness of the redundancy process.

102. There are no dates on the scores of the claimant and others, we concluded that they were scored before all Principal and Senior Consultants were put at risk of redundancy. We noted the wide variance in scoring between scorers.

103. Ms White argued that the use of the selection criteria *"has produced a situation where unconsciously discrimination has occurred".* There is *"no logical defensible process … the claimant is being assessed by 4 individuals with no training on the process."* We noted that the lowest redundancy scores were those on furlough, also the respondent's contention that the disparity in marking was because of the scorers' knowledge of that employee.

104. We accepted the respondent's position that the claimant and other employees were assessed based on their work visible during their employment. We accepted that this would inevitably disadvantage the claimant who had less time to show his all-round skills. We also accepted that an employee on furlough is less visible. We also accepted that it was almost inevitable that furloughed employees would be made redundant. We concluded that it was likely that the employees on furlough were seen as more expendable, not on paid work, not undertaking any unpaid work or development in anticipation of paid work.

105. In saying this, we did not conclude that there was a deliberate decision to ensure the claimant was selected for redundancy. It was, instead, more of a 'self-fulfilling prophesy', the claimant was unavailable for work and no work was foreseeable, in contrast to other consultants who were or soon to be in paid work. The claimant fitted the profile – reducing the number of senior consultants.

106. Was a 'more than trivial' reason for the claimant's selection for redundancy his race? We concluded not: we concluded that a hypothetical comparator would have been treated the same: an experienced Principal Consultant with the same length of service and work as the claimant and the same profile amongst those scoring him. This employee would have the same skills/experience, on a fee-paying contract until early April and on furlough since, with no likelihood of any work for the foreseeable future.

107. As above, G2 and D1's relevant circumstances were different to that of the claimant, not on furlough, both undertaking some billable work. Being in paid work we found inevitably led to these employees being more favourably marked in the

redundancy score, and this was the principal reason why they were scored higher than the claimant.

108. Once furloughed, we concluded that the respondent's rationale – selecting senior consultants – would have inevitably had led to the comparator's redundancy. We concluded that the 'effective and predominant' reason why the claimant was selected for redundancy was because he was on furlough. Given the criteria adopted, a hypothetical comparator would have been similarly disadvantaged in being scored, and would, we concluded, have received the same scores as the claimant.

109. We also criticise the appeal process, which in our view was conducted in a high handed and unreasonable way, a 4 hour process from the email of appeal to decision. While we accepted that Mr Adamopoulos had a detailed knowledge of the issues and had reached a conclusion, his failure to give even a pretence of a fair process or detailed reasons for rejecting the appeal has not assisted the respondent's case.

110. We again concluded that a hypothetical white comparator who raised serious issues (not related to race) during a redundancy process would have been treated equally as unreasonably.

111. We considered whether the claimant was less favourably treated for alternative roles. The claimant accepted one process appeared to be fair. In the genuine opinion of Ms Hunt, he did not put himself forward for two other roles. We did not accept the claimant's explanation that he thought he had already said yes to interviews for these roles. We concluded that a hypothetical comparator who acted similarly, who did not confirm their interest in the two roles would also have not been put forward for interviews.

112. The failure to enrol the claimant on the 2nd furlough scheme. He relies on L1, who was furloughed several times.

113. The respondent knew before the claimant's dismissal date that it had the option of extending employees on furlough even if they had no work to undertake at that time; the scheme was extended prior to his dismissal. It was therefore an option to place the claimant back on furlough, and it was not a misuse of the furlough scheme to do so, and the respondent's senior management team knew this. The tribunal did not accept the respondent's explanation that it would be an abuse of the furlough scheme.

114. We noted the protected characteristics of the three employees taken off furlough and made redundant, two of whom were who the claimant considered to be the only BAME members of staff in this redundancy pool. A statistically highly unlikely outcome and potentially indicative of discrimination.

115. We also noted the two stage test - that something more is needed to establish discrimination. Not accepting the respondent's principal explanation does not mean that the failure to re-enrol the claimant was an act of discrimination.

116. We concluded that the failure to re-enrol the claimant on furlough was not an act in any way connected to the claimant's race. We found that the principal reason why the claimant's furlough was not continued was because the respondent's management team had reached a settled wish that they wished to restructure the consulting team, to reduce the number of senior level consultants. The claimant had been selected for redundancy when the furlough scheme was extended. For the respondent, the extension of the furlough scheme had no impact on this plan. We accepted that the respondent, at this stage, was not prepared to rescind its decision.

117. The respondent's position is that L1 was a trainee consultant, a junior graduate position. As a Finance graduate she was in line for a potential transfer to a position in finance, which in the end did not happen. We accepted this evidence. We concluded that L1 was not an appropriate comparator as she was not in the same or similar position as the claimant.

118. We also considered the position with a hypothetical comparator: i.e. a white employee with similar experience, length of service, knowledge, expertise, and similarly well regarded as the claimant by clients and line manager, who was on furlough for the reasons outlined above. We considered whether this employee would have been re-enrolled on furlough when the extension of the furlough scheme was announced in June 2020. Again, we concluded that the respondent would not be prepared to rescind its decision to make redundancies, that it would not have placed the comparator back on furlough.

Not being offered the role of Client Partner.

119. For the reasons set out above, we did not consider that K1 was an appropriate comparator because she was known to the key client and had in depth knowledge of this contract, and was well placed to take over smoothly from an employee who was leaving.

120. The appropriate comparator is a white Principal Consultant with the same work history and abilities, profile etc. as the claimant, outlined above. This comparator would not have had the same in-depth knowledge and client contact as K1.

121. We concluded that this comparator would have been treated in the same manner as the claimant, for the same reasons. The reason why the claimant was not selected for this role had nothing to do with his race, it had all to do with the personal connections and knowledge of K1.

<u>If so, was this because of the Claimant's race (Caucasian/Asian)?</u>

122. We concluded that the claimant did not suffer less favourable treatment in comparison to either his named comparators or a (more suitable) hypothetical comparator.

123. We considered some of the respondent's explanations to be unsatisfactory. But the reason why the claimant was furloughed was because he was not on a contract and had no realistic opportunities for billing work in the foreseeable future.

Critically, we concluded that had the BP contract not ended early he would not have been furloughed. When he was furloughed the respondent made the decision to restructure. It was inevitable he would be then selected for redundancy. We concluded that the claimant's race had no bearing on any of the decisions the respondent took.

Time

Were the claims presented within a period of three months starting with the date to which the complaint relates?

Did the alleged conduct extend over a period so that it should be treated as being done at the end of that period?

124. While the claims do not succeed, we considered it important to consider the issue of 'time'.

125. Ms White accepted in her closing that the decision to furlough the claimant in May is a claim outside of the primary time-limits. She accepted that there may be *"some issues"* with a continuing act argument because of the different decision makers involved. She argued that it would be just and equitable to extend time: the claimant did not pursue a claim when he was furloughed because he considered that his job would be safe. Also, there is no prejudice to the respondent.

126. The decision to furlough the claimant was made and communicated to him on 6 April. The decision to make redundancies was communicated to affected employees on 27 May 2020, and the redundancy process was a continuing act from this date to 26 June 2020, the date of dismissal. There was less than a three-month time period between the 6 April and 27 May, and accordingly no part of the claim is out of time.

127. Finally, I apologise for the length of time it has taken to produce this judgment. This is entirely due to an error and oversight on my part.

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EMPLOYMENT JUDGE EMERY

Dated: 20 April 2022

Judgment sent to the parties
On

26/04/2022
For the staff of the Tribunal office