



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Motiur Rahman

v Cubic Transportation Systems Ltd

Heard at: Watford

On: 10-21 February 2019

Before: Employment Judge Bedeau
Mrs S Goldthorpe
Mrs I Sood

Appearances

For the Claimant: Ms R Barrett, Counsel

For the Respondent: Mr M Islam-Choudhury, Counsel

RESERVED JUDGMENT

1. The claim of direct discrimination because of race is not well-founded and is dismissed.
2. The claim of direct discrimination because of religion or belief is not well-founded and is dismissed.
3. The breach of contract claim has been proved.
4. The case is listed for a remedy hearing on Friday 2 August 2019, if not settled earlier.

REASONS

1. By a claim form presented to the tribunal on 19 December 2017, the claimant made claims of unfair dismissal; direct race discrimination; and direct discrimination because of religion or belief.
2. In a further claim form presented to the tribunal on 20 December 2017, he claimed unfair dismissal; direct discrimination because of age and race;

wrongful dismissal; accrued unpaid holiday; unauthorised deductions from wages as well as other unspecified payments.

3. In the response presented to the tribunal on 31 January 2018, all claims are denied.
4. At the preliminary hearing held on 30 May 2018, before Employment Judge Heal, the claimant withdrew his claims of age discrimination; unfair dismissal; unpaid holiday; unauthorised deduction from wages and other payments. Accordingly, EJ Heal dismissed those claims and clarified the claims and issues for this tribunal to hear and determine which we set out below.

The issues

5. Section 13: Direct discrimination on grounds of race/or religion or belief.

- 5.1 The claimant is a British citizen of Bangladeshi origin and is also Muslim.
- 5.2 Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act, namely?
 - 5.2.1 dismissing him with effect from 30 September 2017;
 - 5.2.2 failing to renew the claimant's contract so that it terminated on 30 September 2017; and
 - 5.2.3 on 24 August 2017, the manager Peter Creelman told the claimant, '*your face does not fit in my organisation*' and this led to the failure to renew/dismissal on 30 September 2017.
- 5.3 Has the respondent treated the claimant as alleged less favorably than it treated or would have treated the comparators? The claimant relies on the following comparators:
 - 5.3.1 John Packham and/or Luke Boswell Lewis, Steve Conn, Dragon (whose surname the claimant does not know), Andy McHugh, Andy Saunders, Ray Cork, Steve Milner and/or hypothetical comparators.
 - 5.3.2 The claimant contends that those comparators obtained permanent positions and were given permanent employment from subcontractor positions, working for other agencies. The comparators seemed to have a fast-tracked into the company and some of them did not even have an interview. They were all doing similar jobs to the claimant. All are white British (except Dragon who is white non-British/European) and all are non-Muslim and who are doing the same job that the claimant would be doing in the respondent company.
- 5.4 If so, has the claimant proved primary facts from which the Tribunal could properly conclude that the difference in treatment was because of the protected characteristic?
- 5.5 If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment? The respondent says that the claimant was not put onto a permanent contract in the same way as the others, on the ground that when it

was offered to him, he refused it. He was placed on a fixed-term contract and the reason his employment was terminated was because that fixed-term contract came to an end. As far as the respondent was concerned, even if it was wrong in contract law, the claimant was on a fixed-term contract.

6. Is the claim in time?

6.1 The claim forms were presented on 19 and 20 December 2017. ACAS received notification on 6 November 2017 (day A) and an Early Conciliation Certificate was sent on 21 November 2017 (day B). Accordingly, any act or omission which took place before 7 August 2017, is potentially out of time. Therefore, the claims as set out above are all presented in time.

7. Breach of contract

7.1 The claimant contends that he was dismissed without notice. The respondent asserts that the fixed-term contract contained its own notice, so notice was not needed. Alternatively, the claimant was effectively served notice on or around 24 August 2017 and in any event by the end of August, therefore, served out his contractual 4 weeks' notice.

7.2 It is not in dispute that the notice period was 4 weeks.

8. Remedies

8.1 If the claimant succeeds either in whole or part, the Tribunal will be concerned with issues of remedy.

8.2 There may fall to be considered a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, breach of contract and/or the award of interest.

The evidence

9. The tribunal heard evidence from the claimant who called Mr Alan Charles Mundy, London Underground, Integration and Performance Manager; and Mr Darren Lewis, Electrician.

10. On behalf of the respondent evidence was given by Mr Peter Creelman, Head of Installations; and by Ms Leanne Gravatt, Human Resources Director.

11. In addition to the oral evidence, the parties adduced two joint bundles of documents comprising, in total, of 915 pages. References will be made to the documents as numbered in the joint bundles.

Findings of fact

12. The respondent is a leading integrator of payment and information technology services for intelligent travel solutions worldwide. It also provides combat training and secure communication systems for the United States and allied nations' military.

13. The nature of its business is such that contracts are won and lost in what is a very competitive industry. When it takes on projects, in order to give it flexibility, it engages a workforce comprising of agency workers, contractors and fixed-term employees, alongside permanent employees.
14. London Underground is a subsidiary of Transport for London and regularly contracts with the respondent to carry out several projects.
15. The claimant worked for the respondent in 2002 as an Installation Engineer Contractor within its Installation Department. He worked on a series of contracts, the last of which ended on 30 June 2016 and was among a group of contractors who worked for the respondent. He describes his race as a British citizen of Bangladeshi national origins. He was referred to in the workplace as 'Shaun'.
16. He contracted with the respondent via an agency called Short Term Group. In cross-examination he agreed that he worked on average 43 hours a week and was paid £35 per hour before VAT. Over a period of 70 weeks he earned £104,570 gross before VAT. This averaged at £78,000 per year. (page 113 in the bundle).
17. The respondent wanted to reduce its reliance on long-term contractors and increase its directly employed workforce in order to save costs.
18. On or around 31 May 2016, prior to the end of his contract with the respondent which was due to take place on 30 June 2016, the claimant had a meeting with Mr Adrian Randall, Site Implementation Manager, during which he was offered a permanent position as an Installation Team Leader – Rollouts, £40,000 gross annual salary, £2,500 disturbance payment, and a car allowance of £4,982 yearly, to be paid monthly. (207- 208)
19. On 30 June 2016, he wrote to Mr Matt Beadle, Head of Installation, in which he put forward a counter-proposal of £45,000 gross salary per annum, £5,000 car allowance and £2,500 night disturbance allowance. (217)
20. The claimant and the respondent were unable to agree a permanent employment contract by the end of his contract on 30 June 2016. After that date he was not in a contractual relationship with the respondent, but he continued to work as a contractor.
21. He met with Mr Randall and Mr Guy Gibson, Recruiter, working in the Human Resources Department when another offer was discussed which the claimant accepted, namely a salary of £43,000 gross per year plus the car allowance and annual night allowance of £2,500. He was told that as his contract had expired, he had to undergo a job application process and be interviewed.
22. He emailed Mr Beadle and Mr Randall on 3 July 2016, accepting the offer and acknowledged that he had to go through the respondent's job selection process. He stated: "I would like to continue working for Cubic as a permanent member of staff if I am still offered this opportunity." He then sent a copy of his curriculum vitae. (216)

23. A similar email was sent to Mr Gibson on 4 July 2016, who replied on 8 July inviting the claimant to an interview for the position of Installation Team Leader – Rollouts on 13 July. (220)
24. The interview, by all accounts, went well but after week, the claimant did not receive any information regarding the outcome and WhatsApp messaged Mr Bob Grevett, Senior Principal Engineer, asking for an update. Mr Grevett's reply was "No news is good news. We will be discussing all candidates on Friday" and "Hold tight". (224-229)
25. At the time of the claimant's interview there was an approved position of Installation Team Leader – Rollouts, no. 1818, created on 20 June 2016. The respondent received eight applications but not from the claimant. However, recruitment and selection for it was cancelled on 27 July 2016. (234-236)
26. On the same day a fixed-term position was requisitioned, no. 2393, with the same job title. It was full-time and was offered to the claimant, who was the only applicant. (231)
27. The respondent's case is that although there was an agreement to continue to engage the claimant, it had to follow its selection procedure.
28. In 2016 it implemented a new human resources computer software called Workday which integrated human resources systems for employees and candidates into recruitment process. Workday is a global system covering employees not only in this country but all over the world. Following its implementation, the respondent began experiencing difficulties in operating it as it did not function as expected. This problem is relevant to what happened later.
29. The claimant was unaware that he was the only one who applied for the fixed-term position. He told the tribunal that as far as he was concerned, he only applied for the full-time post and was not informed that the respondent had changed it to a fixed-term appointment.
30. On 27 July 2016, Mr Gibson called the claimant to inform him that he had been successful in his application for the position of Installation Team Leader – Rollouts "ITL". The claimant then replied on 4 August as, by then, he had not received his written employment contract and wrote:

"Hi Guy,

Thank you for your call last Wednesday regarding my job offer. I hope you are well?

I haven't received any paperwork from you and wanted to know if you have my correct address? My current address is ...

Please let me know if and when you send it.

Kind regards." (237)

31. We find that at this point in the process, the claimant had not been made aware that what he was enquiring about was a fixed-term employment contract.
32. On 8 August 2016, Mr Gibson emailed inviting the claimant to apply for an Engineering Commissioning role in Redhill. The purpose being to enable Mr Gibson, who was experiencing problems with Workday, to publish the ITL – Rollout position by this ruse. The engineering position was not a vacancy that would be offered to the claimant in any event. He gave the claimant the link for the post and stated:

“Please ignore this job title, I can’t publish the Rollout position as there is a problem with Workday)!!! But once applied I can transfer you over...

Thanks for your patience – we’ll get there.” (240)
33. On the same day Mr Gibson was able to access Workday to amend the claimant’s application and link it to the fixed-term ITL – Rollouts position, no. 2393. (241)
34. As a result of requisition 2393, a letter was sent to the claimant dated 9 August 2016, stating that he had been offered the position of ITL – Rollouts at a salary of £43,000 gross per annum and was entitled to a car user allowance of £4,982 p.a. together with a disturbance allowance of £2,500. He would be based at the respondent’s Greenford/Baker Street offices reporting to Mr Grevett. The contract was for a fixed-term commencing on 16 August 2016 and ending on 16 May 2017. It was subject to receipt of satisfactory references and proof of qualifications. It also had a probationary period of six months which, if satisfactorily completed, his employment would be made permanent. In addition to the offer letter, attached were the terms and conditions of employment. (119-120)
35. The claimant told the tribunal in evidence that upon receiving the letter of 9 August 2016, he met with Mr Beadle, Mr Grevett and with Mr Gibson sometime in August 2016, as he was concerned that the letter referred to the employment being for a fixed-term and he did not apply for such a position. He asserted that the agreement was that he would be offered a permanent position. It was explained to him that the temporary contract was just a measure adopted by the respondent to see whether he would be willing to work on a substantially lower income and that at the end of the period he would transition to a permanent contract automatically. He stated that Mr Gibson, who had knowledge of the respondent’s recruitment and selection procedures, as he worked in the human resources department, said that it was the correct procedure for the respondent to follow in the claimant’s circumstances. His explanation was accepted by the claimant and was confident, based on his work record, that he would be made a permanent employee at the end of the term.
36. Following on from the meeting, on 10 August 2016, Ms Cate Wilson, Human Resources Manager, sent the claimant another offer of employment superseding the offer letter sent the previous day. The start date was the

same, but the end date was amended to 12 May 2017. The provision in relation to a probationary period was removed as well as the disturbance allowance. (121-122)

37. We are satisfied that he did not lose the disturbance allowance of £2,500. He normally worked nights. (125-127)
38. In his statement of terms and conditions of employment which he signed on 18 August 2016, his salary was confirmed. He had the car allowance. His standard weekly hours were 37.5. His fixed-term contract was from 16 August 2016 to 12 May 2017. The purpose of the role was to “undertake a sequence of rollouts”. His job title was ITL reporting to the Installation Project Manager. His place of work was Lion Way Trading Estate, Greenford.
39. Although in the terms and conditions reference was made to a probationary period, which was confusing, it was understood by both the claimant and the respondent that that provision did not apply to him. It was unclear to the tribunal why it was included as Ms Wilson’s 10 August letter had removed it.
40. As regards the notice period, it stated the following:

“17. Notice period

During the probationary period, your employment may be terminated on one week’s written notice by either party. Once you have successfully completed your probationary period and have been confirmed permanent you will be required to give the company four weeks’ written notice of your intention to leave. During the first four years of your employment you will be entitled to receive four weeks’ written notice of termination from the company. The notice period will then increase by one week for every completed year of service up to a maximum of 12 weeks.

We reserve the right to terminate your fixed-term contract early, without liability for the balance of the fixed-term, by giving four weeks’ notice. We reserve the right to make a payment to you in lieu of notice. Any acts of gross misconduct will lead to dismissal without notice or payment in lieu of notice. Notice must be given in writing to your manager or in the case of absence, their deputy.” (128-132)

41. He commenced work as an employee on 16 August 2016 and two days later signed the terms and conditions of employment. He was aware that his employment was for a fixed-term to end on 12 May 2017 but if successfully completed, would transition to permanent employment status. We find that that assurance was given to him specifically by Mr Gibson on 10 August 2016 during the meeting.
42. We heard evidence from Mr Alan Charles Mundy, who works for London Underground as Integration and Performance Manager within the ticketing and revenue team. He worked with the claimant on several projects since 2002. These included the implementation of chip and pin technology which ended in August 2017; queue busting machine installations/removals/relocations which was completed in or around November 2017.

43. They also worked on the Advance Fare Machine – pin entry device project. Two pin entry devices would be completed each night and there were, Mr Mundy told us, 58 devices left, the equivalent of two months' worth of work by the time the claimant was no longer involved in that project. Mr Mundy said that the last device was implemented in or around November 2017.
44. A further project included ticket vending machine which is still ongoing as some aspects of it had been delayed.
45. In relation to two more recent projects, we are satisfied that the ticket office machine/station accounting facility project, the upgrade work for this started in December 2017 and finished around October 2018. As regards the station control unit, which is a computer terminal allowing machines to be switched on and off, this work commenced in February 2019, well after the claimant left the respondent. Both projects the claimant was not involved in as his employment had terminated when they started.
46. Mr Mundy worked very well with the claimant over a number of years and found him to be a very efficient, professional and trustworthy person. He appreciated the fact that when there was an issue with the projects, he could count on the claimant's support and help to sort it out.
47. The claimant was appraised on 10 May 2017, by Mr Grevett, his line manager. In his evaluation of the claimant, he wrote:

“Shaun understand well the One London structure and finds problems when others do not uphold his high standards. Shaun understands more than most the importance of the customer and their interface in projecting the corporate image.”
48. In relation to the respondent's core competencies, in respect of innovation, Mr Grevett wrote that the claimant:

“applies information, imagination and initiative to identify efficiencies, implement improvements and drive growth.”
49. In respect of communication as a core competency:

“Shaun is very good in this area especially within his team.”
50. In the summary section:

“Shaun has worked very well in his new permanent position and is continuing to give a very good service in all aspects of the job. Well done.” and

“Shaun has primarily subcontract staff working for him and he is able to give the more experienced staff greater autonomy.”
51. As regards Mr Grevett's overall evaluation of the claimant, he stated:

“Shaun this last six months has worked very well and requires little or no supervision and he understands fully Cubic's and customer demands and goals. With Shaun if you do not hear from him you know all is going well. The level of supervision by me of him

is low as I know that the job he has been set will be progressing on course. Communication is very good.”

52. The claimant was given an overall rating of 3, meaning he exceeded job requirements. (357-360)
53. In the respondent's Workday system, Mr Grevett entered on 8 May 2017, a request to Ms Laura Slade, human resources assistant, to extend the claimant's contract. He wrote:

“Shaun's current project run to the end of September in addition Shaun was originally forced on to permanent position from contract after 15 years with us but it was decided late on that he may not suit permanent so we were seeing him for a period of the fixed-term to allow both a get out if it did not work. With me retiring in January he will report in to someone else and his job may change. We have not yet sorted this out so it is felt that by extending his contract by the time it expires the way forward in his position will be firmed up and who he reports to better defined...” (473)

8 May 2017 letter

54. It is the respondent's case that a letter was sent to the claimant on 8 May 2017, by Ms Wilson stating:

“Dear Shaun

Further to recent discussions, I am writing to confirm that we would like to extend your fixed-term contract until 30 September 2017. All other terms and conditions of your employment will remain the same.

Your revised annual leave allowance for 2017 will be 19 days.

Please find enclosed two copies of this letter, please could you complete and sign one copy to show your acceptance of the extension of contract and return it to me by 19 May 2017. Please retain the other copy for your records.

We look forward to working with you for a further period of time.” (142)

55. There was a provision in the letter for the claimant to acknowledge his acceptance of the variation to his contract of employment, but this was not filled in by him.
56. The claimant's case is that he did not receive the letter. The respondent's case is that it was sent to him by human resources. Having listened to the evidence, we find that the letter was generated by human resources but not received by the claimant, hence there was no acknowledgement from him to the respondent.
57. Just to put the respondent's position in relation to the letter in context. As will become apparent later in this judgment, the claimant lodged a grievance regarding his treatment on 20 August 2017, which was investigated, and a report produced. He appealed against the outcome and a further investigation was conducted by Ms Wilson as part of the grievance appeal

process. She presented a report dated 25 October 2017, in which the letter of 8 May was investigated and considered by her. She wrote the following:

“An extension to his fixed-term contract was approved in Workday and issued by HR. Matt Beadle advises that it was his expectation that Bob Grevett would discuss the offer of a further fixed-term contract with Shaun. Bob thought this was with Matt and Peter as he no longer had responsibility for this area. The conclusion being that no-one discussed this with Shaun as those involved thought others were or had done this. HR did not follow up on Shaun returning a signed contract so it is impossible to confirm whether Shaun received the fixed-term contract posted or not. However, that said, Shaun had access to Workday so would have been able to see the information/details of his employment on there.

Shaun commented that HR policy was to email and post all HR communications. This is not HR policy as often employees working in the “field” do not have access to company email and therefore post is a more effective form of communication.

By continuing to work Shaun was accepting of his terms and without a break in service he was covered by the liability insurance...” (307)

58. There was, therefore, no evidence that the claimant received the letter.

The claimant future in the company

59. Mr Peter Creelman, Installation Design and Machining Manager, made a file note of an impromptu meeting he had on 24 July 2017 with the claimant’s line manager, Mr Grevett; Mr Lars Torgren, Team Leader; and Mr Jon Packham, Machining Engineer. In his note, Mr Creelman wrote in relation to a dispute he had with Mr Grevett during the meeting:

“During the meeting it was suggested that we were manoeuvring to remove Shaun Rahman out of the business and he would be going to personnel. This accusation was directed at me (P Creelman) due to changing circumstances. We were then again accused of not providing the site files as a reason for getting Shaun out of the business.”

60. Mr Creelman then continued:

“It would seem that due to change of staff it has been missed (site files) from being produced and handed out – rectified 24 July 2017.”

61. As part of the respondent’s procedure in relation to work records, Mr Creelman noted that there was no evidence that the claimant was being signed in on Task Briefs. However, whatever concerns he had at the time about the claimant were resolved at that point in time. This was his evidence before us. (255-256)

62. In Mr Creelman’s note he referred to it not being sensible to have an additional Team Leader. This potentially affected the claimant who was advised by Mr Grevett, on 27 July 2017, to have a discussion with Mr Beadle about plans going forward due to his, Mr Grevett’s, retirement. A meeting was arranged for him to speak to Mr Beadle at 9pm that evening.

63. Mr Grevett was due to retire January 2018. Prior to his retirement there was a long handover period with Mr Creelman who acquired some of his responsibilities and duties. Mr Grevett also informed the claimant that, as a consequence, he would be working under Mr Creelman.
64. On 27 July 2017, the claimant was called in to a meeting with Mr Grevett and Mr Beadle during which he was informed that following Mr Grevett's decision to retire, the respondent would be making some changes in the Installation Department and he would be transferred to work under Mr Creelman. He would become the Night Manager, a role that he was already fulfilling de facto.
65. During the investigation into the claimant's grievance which was conducted by Ms Tracey Ottley, Human Resources Business Partner, Mr Beadle was interviewed and questioned about whether the claimant had been told that his role was due to come to an end. He said that he met the claimant at Greenford and told him that his role would come to an end. He advised that he, the claimant, should meet with Mr Creelman who would be taking over the department. Mr Beadle stated that at that point in the discussion the claimant's persona changed and he became quite aggressive in his demeanour. The specific date of this discussion was not given to Ms Ottley but we find that it was with reference to the meeting in July. (342)
66. The claimant denied in evidence that Mr Beadle had told him in the meeting that his contract was coming to an end. We accept the claimant's evidence that he was unaware of this at that time.
67. An Installation Team meeting was held on 28 July 2017, chaired by Mr Beadle, who informed those present that there were going to be changes in the structure; that from 29 July, Mr Grevett would move to a consulting role within Installation; Mr Randall, Manager Site Implementation, who managed the Site Implementation team, would report to Mr Creelman, who, in turn, would be responsible for bringing together all the installation functions, namely design support, installation design, site implementation and commissioning; Mr Loges Elavalagan, senior Project Engineer – Installation, would deputise in place of Mr Randall, who was absent due to sickness; and the claimant would be reporting to Mr Creelman. An email was sent by Mr Beadle to the Installation Team on 28 July 2017 at 12:45pm, setting out the changes. (260)
68. Of note, there was no reference to the claimant's employment due to terminate on 30 September 2017.
69. In the organisational chart detailing the new structure from 28 July 2017, it distinguished permanent from contract staff. The claimant was down as a permanent member of staff who would be reporting directly to Mr Creelman and did not have any direct reports. (265)
70. The claimant said in evidence, and we do find as fact, that he was advised by Mr Beadle during the meeting on 27 July, to have a word with Mr Creelman in order to discuss how they would be working together, going

forward. Mr Creelman in his file note made for the purposes of the grievance investigation following instructions by Kate Wilson on 24 October 2017, wrote that the meeting was not only to discuss the claimant's workload but his contract. He headed his file note "End of Fixed-term Contract". (269, 325)

71. In a letter dated 9 August 2017, sent by Ms Leanne Gravette, Human Resources Director, to all staff including the claimant, she set out the respondent's proposal to change the salary review effective date from 1 October to 28 October each year. In the letter she also wrote the following:

"I am therefore writing to confirm that your terms and conditions will be permanently changed to state that "your salary will be reviewed on 28 October every year. We do not guarantee to increase your salary." (267)

72. The claimant argued that this letter was a further illustration that the respondent considered him to be a permanent member of staff. We, however, take a different view in that this letter was a standard document sent to all employees at the time.

Claimant's meeting with Mr Creelman on 24 August 2017

73. The claimant and Mr Creelman were on annual leave at different times in August 2017 but met on 24 August 2017. It was due to start at 2 o'clock but the claimant was delayed on the motorway. He arrived at 2.25pm. The meeting lasted about half an hour.
74. It is the claimant's case that Mr Creelman asked him for details of his work which he provided. He then asked Mr Creelman how he would fit in his hierarchy. At that point, the claimant alleged that Mr Creelman replied that he was not Mr Grevett and did not know where to put him as "my face did not fit in his team". The claimant said that he was shocked by the comment and did not reply. At no point, he said, was he told that his contract was about to expire and would not be renewed. He went on to say that their meeting terminated immediately afterwards. He contacted Mr Grevett to discuss what had happened.
75. In evidence he denied that Mr Creelman had said to him that because of the workload his contract would not be renewed after September 2017, as stated in Mr Creelman's file note. He contended that there was enough work left for his contract to continue.
76. Mr Creelman recalled the meeting. He said that he advised the claimant that his fixed-term contract was not going to be renewed and referred to the limited amount of work the respondent had at the time and explained that he did not have any work coming up in the department. He denied saying that his "face did not fit". He maintained that his explanation was purely around operational requirements as outlined in his file note. He did say to the claimant that he should look at other jobs being advertised internally because there were over 100 advertised vacancies. Further, he commented that with the claimant's skillset he was bound to find something

that would fit. He alleged that the claimant was seeking to re-frame the conversation. He further stated that the conversation ended on a positive note with the claimant commenting that he was disappointed but had enjoyed “a good run at it” with the respondent over the years. There was no animosity or challenge from him about the workload during the meeting. As a manager of the department, he was entitled to make the decision about staffing levels to meet the workload. He asserted that he acted in a professional and friendly manner throughout.

77. In the claimant’s claim form, he wrote in section 8.2:

“I was called into a meeting with my new manager (my old manager was retiring) and in that meeting I was told that my face doesn’t fit into his department and he doesn’t know where to place me. I was off sick for the first time during my work with Cubic due to my disgust and stress this brought upon me.” (7-8)

78. In his grievance he made no reference to the meeting with Mr Creelman on 24 August 2017. (350-351)

79. In his grievance meeting with Ms Ottley, held on 27 September 2017, with reference to the meeting with Mr Creelman, he is recorded to have said:

“After Peter returned from holiday he called me to meet up and go through things face to face at AFC House. All he said to me was that he didn’t know where to place me in the department and that he would get back to me.”

80. Ms Ottley asked:

“He didn’t say that your contract was coming to an end and that it was not going to be extended any further due to the work not being there?”

81. The claimant’s response was:

“No he just said that he did not know where to place me. As you know I am off with stress and kidney stones, I have been told that stress has made this worse.”

82. The claimant’s union representative at the meeting, asked Ms Ottley whether the claimant should return to work the following Monday 2 October, to which Ms Ottley replied that the claimant’s contract had come to an end and that the respondent was not going to employ anyone in his position. (352-354)

83. In the claimant’s grounds of appeal against Ms Ottley’s grievance outcome dated 15 October 2017, under the sub-heading “Racism Today”, he wrote:

“Peter Creelman told me at the meeting (August 24th 2017) I had with him at AFC House that he was trying to find a place for me but it’s proving difficult for him as the existing team leaders are Andy Saunders, Ray Cork, Steve Milner, John Packham and there’s me. He told me to my face that I did not fit in. Can you please explain what’s the difference between Saunders, Ray Cork, Steve Milner, John Packham and I apart from my race? Peter told me that the current members of his teams don’t want to work for a person with my background. Therefore, he is having a hard time finding a place

for me within his department. Peter also told me that due to John Packham's lack of experience running jobs/projects, he doesn't want to work for me and hence he isn't happy working for me/with me and he doesn't feel that I'm his equal and that I'm not even British. To my amazement, Peter told me "quite frankly, he agrees with John and the others, he will do his best to hide me in some corner of the department." (369-372)

84. During the claimant's grievance appeal meeting with Mr Richard Rowlands, Engineering Director, held on 2 November 2017, he said:

"Peter said he didn't know where to place me and basically my face didn't fit in and I was shocked as I've been with the company since I was 23/24 years old and the fact that we have had little dealings with each other and the first time I met Peter was with the LCP 31 Gates and he gave me some parts in bits in system tests that's the first time I met Peter. I had some dealings with Peter when I was doing the MFN project and Vanguard with my teams and they took the project away from me to Peter and they said they'd achieve more with their guys and they couldn't do what they promised and they gave the project back to me and Lars. These are mainly dealings and his comment highlights his prejudice and others who have spoken badly about me and its department knowledge that John Packham is worried that he doesn't have enough experience and that he will have to work for me one day and he has conveyed that to Peter, Matt and so forth..." (428)

85. The account that is closer in time to the 24 August 2017, is the account the claimant gave to Ms Ottley on 27 September 2017, a month after the meeting, at which he said, that Mr Creelman said: "All he said to me was that he didn't know where to place me in the department and that he would get back to me."
86. The claimant said that at the time all he wanted was to be kept on by the respondent. When the union representative asked whether he would be working on Monday 2 October, the response was that the termination still stood because his fixed-term contract had come to an end and he would not be replaced. After this was said by Ms Ottley, he said that he decided to raise the issue of race.
87. In his email to Mr Roger Crow, Managing Director, sent on 28 September 2017, he wrote that he wanted to bring to Mr Crow's attention that he was aggrieved because he had been unfairly treated and "due to an ongoing racial discrimination case within the installation department's managerial structure. Unfortunately, the installation department managers have always had a code of silence and always swept serious matters such as racial discrimination, bullying, unfair treatment etc. "under the carpet" and did not deal with the grievances and deliberately hid these matters from senior Cubic management such as HR and directors."
88. He asserted that he had been unfairly dismissed, constructively dismissed and was the victim of a racially motivated dismissal. (300-301)
89. The expansion given in his grounds of appeal as to Mr Creelman's conduct being influenced by the alleged racist attitude of others, is not in his witness statement or in his claim form.
90. The tribunal took some time considering the evidence in relation to the conversation that took place between the claimant and Mr Creelman on 24 August 2017. We find that Mr Creelman did not say to the claimant that his

face did not fit in his team or organisation, or department. What Mr Creelman said to him was reflected in his, the claimant's, account to Ms Ottley on 27 September 2017. Mr Creelman did not know where to place him in the department and said that he would get back to him.

91. The claimant took the statement, incorrectly, to mean that it was a reference to his face not fitting in as he was the only non-white Team Leader and, consequently, was a reference to his race.
92. We further find that Mr Creelman did not tell him that his contract would expire on 30 September 2017 because he said in evidence that he did not give a date to the claimant. He also told us that he was aware from Mr Beadle that Mr Bob Jamieson, Relation Manager, and Mr Adrian Randall, Site Implementation Manager, did not want to work with the claimant.
93. Mr Creelman did not, in the tribunal's view, proactively engage in assisting the claimant in trying to retain him in some capacity as an employee of the respondent. He stated in his witness statement, paragraph 16, that he did say to the claimant that he should look at other jobs being advertised internally because there were over 100 vacancies generally. We find that he did not signpost the claimant to where he could be assisted by others in being retained by the respondent. His first meeting with the claimant resulted in telling the claimant that his employment had come to an end.
94. Shortly after the meeting on 24 August, the claimant went on sick leave. He said that he was suffering from kidney stones and stress brought on by the decision about his contract coming to an end.
95. On 6 September 2017, Ms Laura Slade, of human resources, wrote to him regarding the expiration of his fixed-term contract. In the first paragraph she stated:

“I am writing to confirm the end of your fixed-term contract and to confirm that your last day of service with Cubic will be 30 September 2017. We are sorry to hear that you wish to leave our service.”
96. She then informed the claimant that he had 14 days accrued holiday entitlement outstanding, that he had to ensure the return of all company property in his possession and that an enclosed memorandum was a reminder of his post-employment obligations to the respondent. He was also sent an exit questionnaire. (144)
97. It was not the case that the claimant decided to resign as Ms Slade had stated in the first paragraph of the letter and this was drawn to her attention by the claimant in his email to her dated 21 September 2017, in which stated that she was incorrect and he wanted to remain with the respondent. He also wrote that he had received her letter earlier in the week of his email response. Ms Slade's error was acknowledged by the respondent. It confirmed in evidence that the reason for the termination was the decision taken by Mr Creelman that the claimant's contract would end on 30 September 2017. (144A)

The claimant's grievance dated 20 September 2017

98. As already referred to, on 20 September 2017, the claimant submitted a grievance to Ms Grevett and to Ms Ottley. He referred to being off work due to stress caused by the treatment he had received from the respondent after the previous one and a half years. He stated that he had been treated unfairly and inconsistently and asked for a subject access request under the Data Protection Act. He challenged the wording of the letter from Ms Slade sent to him and wanted to make it "abundantly clear" that he did not resign and asked where Ms Slade got that information from. He also questioned the whole process following the ending of his contractor's contract on 30 June 2016 and being given a fixed-term contract. (350-351)
99. We have already referred to the investigation into his grievance being carried out by Ms Ottley who spoke to the claimant on 27 September 2017. The salient parts of that interview we have detailed above.
100. She interviewed Mr Grevett on 4 October 2017, who said that the respondent changed the permanent contract to fixed-term in order to see if the claimant would accept the lower income. He did not know that it was a fixed-term contract until the claimant told him. His only involvement was to approve the claimant's timesheets and expenses. Since the restructure in the department, he had nothing to do with the claimant in terms of managing him. (340)
101. Mr Creelman was interviewed on 28 September 2017. He said that he informed the claimant that the respondent was not able to allow him to continue in his role due to the restructure and the fact that the work was not there any more to warrant the position being permanent. There was a discussion about the claimant looking at other roles which were available in the company and whether he wanted to make an application. He added that should there be an opportunity in the future then he would be happy for the claimant to apply to the department. (341)
102. Mr Beadle was interviewed on 28 September 2017. He said that he held a meeting with his managers to discuss rollouts, which was a position the claimant occupied. It was discussed whether the team leader role should be permanent or fixed-term as the work may not be continuing. Also, due to the changes in the department, Mr Grevett retiring in January 2018, and the change in structure and reporting lines, it was felt that the role the claimant filled could not be made permanent and that the work would be absorbed by the department restructure. Initially, it was intended that the role would run for nine months but because of over-running on the project, there was the need to extend for a further three months. He said that the claimant was interviewed for the role. He later met him at Greenford and told him that his role would come to an end and that he should meet with Mr Creelman who would be taking over the department. He said that, at that point, the claimant became quite aggressive in his demeanour. He confirmed that other contractors/sub-contractors had gone through an interview process for the roles in which they were in. (342)

103. During Mr Bob Jamieson's interview on 28 September 2017, he was asked if he was aware of a job description specifically written for the claimant. He confirmed that he was aware, but it had been changed to a fixed-term contract. There were opinions, he said, raised in the meeting with Mr Beadle that due to the pending restructure of the department and Mr Grevett retiring, it was proposed that the position be on a nine months' contract. (343)
104. The claimant emailed Ms Ottley on 28 September 2017, expressing some concerns over the conduct of the investigation by her as he did not know her. He stated that the only person he had any dealings with was Ms Leanne Gravette and "I still believed that she was an honourable woman who would do the right thing." He said that some of the things he learned from watching Hollywood movies was that you should never show your hand until the end and that it was mentioned in his previous emails, to observe the code of silence because of fear of reprisals, if that be the case, then she would have more internal issues to fix. (346)
105. He wrote an earlier email on that day to Ms Ottley referring to racism and racist comments allegedly made by Mr Andy Saunders, Installation Team Leader – Mechanical Enabling, towards him. He complained about it to senior managers, Mr Jamieson and Mr Grevett but their response was "we all know what Andy Saunders is like." Having reported the matter of Andy Saunders' behaviour towards him to management, he, the claimant, had been singled out. He gave the names of the individuals involved in his unacceptable treatment and, by inference, suggested that Ms Ottley should speak to them. He alleged that Mr Randall had shared the information about his earnings when a contractor with the individuals which led to resentment towards him, that is, the claimant. He asserted that his earnings were confidential information and should not have been shared. He said that other team leaders were white, that he was the only non-white team leader and that he was raising race discrimination. He also brought a grievance against Mr Elavagan, a work colleague. (347-348)
106. On 10 October 2017, Ms Ottley wrote to the claimant setting out her findings. In relation to the fixed-term contract issue, she stated that the role he was recruited into was for nine months. It was determined that after that time the workload would diminish, and the role would no longer be a requirement. However, having regard to unforeseen circumstances, the work overran by three months. A letter was sent to his home dated 8 May 2017, confirming the extension to his fixed-term contract and she attached a copy of it for his reference. She concluded that the work had come to an end and there was no further requirement for the role of Installation Team Leader.
107. As regards his assertion that he had been treated differently compared with others, stated that as he did not name anyone as a comparator, it was difficult for her to respond specifically to the allegation. She surmised that it may well have been the case that other people who were formally contractors were offered permanent positions with the respondent. The

“logical” explanation for the difference was that they were recruited into different roles where the work was not for a fixed duration.

108. In relation to the recruitment process, as he asserted that he had to go through a selection and then an interview, Ms Ottley confirmed that that was the correct procedure and it was consistent with the respondent’s recruitment policy which states that all vacancies must be advertised on Workday. She concluded that the process and procedure which were followed in the claimant’s case, were correct and in line with the respondent’s standards.

109. As regards racism and/or racist comments, she wrote the following:

“You state in your email dated 28 September 2017 that you reported allegations of racism/racist comments and that you reported it to your manager. Your email also states that this was raised back in November/December 2015, almost two years ago. If you were not happy with how your manager dealt with your complaint at the time it would have been your responsibility to raise it with HR department or your HR representative, as you did not do this and continued to work for the company, the matter would have been closed by your manager.

Whilst the company has a very strong focus on ethics and we take all allegations of racism extremely seriously, you must also be pragmatic here. You have not given me any detail or specifics to investigate and you have also chosen to withhold any evidence you claim to have in relation to your allegation, which I find very odd. In any event, the matter is now too historical as memories will have faded, making a fair investigation all but impossible.

I also note that you said you were really happy working for Cubic and wanted to retire working for the company, which also seems odd in light of this very serious allegation.

My findings on this issue are that you are now out of time to raise a grievance relating to unparticularised matters some two years ago.”

110. There were also findings in relation to an achievement award, outstanding holiday, and access to emails, which are not pertinent to the issues in this case. (336-338)

111. In our view the investigation was perfunctory. Ms Ottley focused on the claimant’s original grievance and not the concerns he raised in his two emails on 28 September 2017. She did not go back to the managers and put to them the alleged racism/racist comments allegations made by him. She stated in her outcome letter that the claimant had not given her any details or specifics to investigate, which he clearly had. He was not solely referring to historical matters. He clearly compared his treatment of being targeted with his fellow white team leaders.

112. Ms Ottley’s interviews with the managers seemed to have focused purely on the fixed-term contract and the claimant’s claim that he worked during his annual leave in December 2016.

Grievance appeal

113. On 15 October 2017, the claimant appealed against her grievance outcome. He challenged her findings in respect of the fixed-term contract. In relation to the allegation of “racism today”, he stated, as we have already noted, for the first time, that Mr Creelman said to him that his face did not fit. He alleged that Mr Creelman had said that the current members of his team did not want to work for a person of his background; he was having a hard time finding a place for him within his department; and that John Packham did not want to work for him. The claimant alleged that Mr Creelman said that he agreed with Mr Packham and with the other team leaders and “he will do his best to hide me in some corner of the department”. The claimant further alleged that Mr Creelman said that Mr Packham did not feel that the claimant was his equal as he was not even British.
114. In relation to “racism from the past year”, the claimant invited the respondent to listen to an attached recording he made stating that he had four recordings. He invited Ms Gravette, Human Resources Director, who was to conduct the grievance appeal investigation, to speak to five named individuals. He stated that when some members of staff complained about Mr Saunders that they were all threatened with disciplinary action. He asserted that Mr Saunders was the only one in the company who claimed that he was untouchable, would beat anyone up and that he was the “only non-working supervisor/team leader”. He further claimed that when he made a complaint to Bob Grevett and Bob Jamieson about Mr Saunders’ behaviour, Mr Jamieson called Mr Saunders and pre-warned him about the complaint. When the claimant informed Mr Jamieson that he was not happy with his behaviour, that he wanted it escalated to human resources, Mr Jamieson threatened to terminate his contract as a contractor and said that he should “keep my mouth shut”.
115. The claimant wrote that he was left in a situation in which it would have been his word against Mr Saunders’ as Mr Jamieson and Mr Randall had helped Mr Saunders to cover his tracks and warned others not to back up his, that is, the claimant’s claims. The claimant stated that he went to the ethics committee, which is a hotline, instead of contacting human resources with reference to another employment tribunal case involving Mr Paul Medcraft. He stated that after he complained about Mr Saunders’ behaviour, he was sidelined and was no longer given any work on any particular projects or any work with the normal installation team. He further claimed that had his grievance been properly handled, he would not have been victimised for so many years by Mr Saunders, Mr Steve Milner, Steve Conn and John Packham.
116. He also alleged that Mr Saunders made comments and expressed his racist views about him. He would always joke that he was not a racist because he had a coloured television. The claimant went on to allege that Mr Saunders went as far as to tell him that it made his stomach turn because he learned, that he, the claimant, had an English girlfriend at one point in time and said that there was no place for a white woman with a “Paki” and that if his own daughter came home with a “Paki” he would kill them both. Although his

complaint was an old one, he claimed it had not been properly dealt with by the managers. He wrote that “Cubic is in not better place in respect to racism and it is still rife within management...” Although Ms Ottley’s comments were that his complaint was too historical, the claimant stated that he had a photographic memory and with the aid of recording technologies, the events still played his mind as though it happened “yesterday” and had more evidence which he was prepared to disclose at the right time.

117. He further claimed that he raised a grievance with Mr Jamieson and Mr Randall, about Mr Elavalagan, whom he accused of bullying and inappropriate behaviour towards him, but the matter was not escalated to human resources. Mr Jamieson told him that Mr Elavalagan was not to contact him any further. The claimant stated that Mr Elavalagan did not comply with the instruction, so he wrote to Mr Jamieson but had yet to receive a reply from him. He questioned whether Mr Jamieson’s conduct was correct.
118. He then referred to outstanding holidays, access to emails, outstanding achievement awards and his contract.
119. In respect of Ms Gravette, he stated that after dealing with her in the Medcraft case, an earlier Employment Tribunal case, he found her to be “an honourable woman” as she told him that her door was always open if he needed anything on or off the record but when he later wrote to her seeking advice, she turned him away and advised him to speak to someone else. He claimed that Ms Ottley made up false information regarding what he said during the investigation meeting with her. He again repeated that he had a photographic memory and could prove what was said. (369-372)
120. Ms Cate Wilson, Human Resources Manager, wrote to the claimant by letter dated 26 October 2017, inviting him to a grievance appeal hearing on 2 November 2017 to be chaired by Mr Richard Rowlands, Engineering Director, with her being present. She then set out the claimant’s points to be discussed at the hearing and advised him of his right to be accompanied by a work colleague or trade union representative. She enclosed copies of documents which covered the documents obtained during the grievance investigation, as well as timesheets. She stated that the information and documents provided, which were over 12 months old, were not included as they were out of time. (363-364)
121. In the claimant’s email to her dated 31 October 2017, he objected to her summary of his grounds of appeal and requested further documents. He also objected to restricting his complaints to twelve months and questioned why he was not supplied with a copy of the respondent’s equal opportunities policy. He raised issues about the interviews with Mr Grevett, Mr Beadle and Mr Creelman and that there were many points he would like to discuss.
122. In relation to Mr Creelman’s statement, the claimant wrote:

“Peter Creelman’s statement is a complete fabrication of the truth. Peter asked me how things were going with the project I was running and I gave him my input. The cut to

the chase, Peter's comments towards me was to the tone that he doesn't know where to place me and my face doesn't fit into his organisation. Please note that the truth will come out and his racist prejudice will become common knowledge today or tomorrow."

123. He again repeated his request for documents to be disclosed and for time to be afforded to him as he wanted to liaise with his union representative and prepare for his appeal. He stated that he was suffering from kidney stones and it was not ideal or safe for him to drive long distances. He requested that the meeting be held locally, close to his home and suggested the ideal location would be Greenford. (373-374)
124. Ms Wilson's responded the same day stating that the claimant had been supplied with all the documents he had requested falling within the scope of his subject access request. In relation to the twelve months restriction, she wrote that it was to keep the process "relevant and proportionate" and that "your repeated threats to produce more evidence at a later date do not advance your case". She stated that if the evidence was relevant and the claimant intended to rely on it, then the respondent would need to see it in the appeal. If it was not presented, it would have no impact on the decision and was only allowed one companion at the meeting. (375)
125. The claimant again emailed her on 1 November 2017, in which he made further challenges to her assertion that all relevant documents had been supplied to him under his subject access request as well as the twelve months restriction.
126. Ms Wilson replied on the same day attaching to her email a copy of the respondent's Equality and Diversity Policy and stated that she was not going to answer the claimant's detailed questions and "demands" point by point. (414-415)
127. In Ms Wilson's conduct of the grievance investigation appeal, she interviewed Mr Beadle, Mr Creelman, Mr Grevett, Mr Jamieson and Ms Bea Wirbs, Paralegal and Administrator. In so doing, she considered the grounds of the claimant's appeal.
128. In her report she stated, in relation to the claimant's contract, the following:

"It is confirmed by all parties that the original resource need was considered to be of an ongoing nature and therefore a permanent need existed. The resourcing need was reviewed and considered to be fixed-term in nature as it was to work on a rollout project and it wasn't known if the resource need would exist longer term. Cubic's work is project based which means the requirement for resources across all areas of the business fluctuates. This has been, and when required does get, managed by using contingent workers whether temporary agency or contractors.

The advert that Shaun applied for does not display that the role was fixed-term but the contract of employment did clearly state this.

There is no evidence to show that the need for Shaun's services beyond May 17 took place.

In the absence of specific information from Shaun on times, dates, locations of events that occurred within the last 12 months there is no evidence to support his belief that he was subject to racist treatment either from his colleagues or from the management team.”

129. Ms Wilson then recommended that recruitment should ensure that fixed-term contract advertisements should clearly state the role is for a fixed-term and the period. Human resources should put a process in place to chase contracts which are not returned signed in order to have confirmation from the employee that the terms have been accepted. Installation management were to review how communication of employment was being handled and ensure that all communication must be recorded as having taken place. As an example, she noted that the extension to the claimant’s contract was not discussed with him. (302-355)
130. We find that Ms Wilson’s in her report made positive findings and conclusions regarding the claimant’s grievance appeal. In addition, she made several recommendations. Her report was sent to Mr Rowlands.
131. We were unclear what part her grievance appeal investigation played in the grievance procedure as the grievance policy makes no reference to a grievance appeal investigation but states that the respondent would hold an appeal meeting normally two weeks from receipt of the grounds of appeal.

The grievance appeal hearing

132. The appeal was heard on 2 November 2017, chaired by Mr Rowlands. Also, in attendance were: Ms Wilson; the claimant; his union representative; and Ms Jo Sale, Human Resources Assistant, who took the minutes. It started at 1.34pm and concluded at 3.40pm. There was an adjournment of seven minutes from 3.32pm to 3.39pm.
133. The claimant gave an account consistent with his grounds of appeal and again claimed that Mr Creelman had said to him at the meeting on 24 August 2017, that his face did not fit. Thereafter he felt physically sick because Mr Creelman did not speak to Mr Grevett or to the Project Manager, Mr Lars Torngren, before the decision about his contract. In respect of historic cover-ups, he had complained to his managers. Towards the end of the hearing he was asked by Ms Wilson to provide dates or further information for her to investigate. This principally was a reference to Mr Saunders’ alleged racist behaviour. The claimant promised to provide the information and dates. (417-437)
134. In Mr Rowlands’ outcome letter dated 10 November 2017, sent to the claimant, he considered in respect of the fixed-term contract, that the recruitment procedure had been followed. He stated that over the previous two years the respondent had been building a workforce for the future and he was seeking to reduce the number of contingent workers it engaged both to reduce costs and to build knowledge/experience within the workforce. He stated that not all contingent workers were offered the opportunity to join the respondent either permanently or on a fixed-term contract, “especially where the need for certain skillsets no longer existed and/or the individuals concerned wanted to

continue contracting elsewhere.” He dealt with the history regarding how the respondent treated the claimant from May 2016.

135. He stated that the Workday records showed that the claimant had applied for two roles, commissioning engineer by requisition 2049, on 12 August 2016, which was not offered, and he was not offered an interview as he did not meet the requirements. The second role was the one he had secured which was the fixed-term contract, requisition 2393, for which he had screenshots showing his application. There was no record on the respondent’s Workday system of him, the claimant, having applied for the permanent role that was advertised. However, Mr Rowlands acknowledged that the claimant was originally approached about becoming a permanent employee outside of the usual business process. He further stated that he had made every effort to investigate the claimant’s interview for the role of Team Leader – Rollouts but he was unable to find a record confirming a date when he was interviewed. Relevant individuals, such as. Mr Guy Gibson had left the respondent and Mr Randall was on long-term sick leave.
136. He wrote that he looked at the other contractors who were the comparators named by the claimant and out of the seven names given only Mr Steve Conn and Terry Haynes, joined the respondent as employees in 2016. The others joined between 2008 to 2013. He stated that the comparators were of different ethnicities and as such did not support the claimant’s assertion that he had been treated differently on grounds of race. Therefore, if he felt that he had been racially discriminated against he had the opportunity of raising the matter earlier or should have declined the offer of a fixed-term contract.
137. Mr Rowlands acknowledged that the respondent’s human resources department did not chase the claimant up for his signature to the May 2017 letter and the extension was not discussed with him by either his line manager or by the other managers within the Installation Department. Mr Rowlands wrote that this was disappointing and an oversight for which he apologised and that steps had been taken to ensure that it was not repeated.
138. In summary, he stated that the process was not well managed but the decision to offer the claimant a fixed-term contract was appropriate given the expected duration of the volume of work within the business area. The decision not to offer him a further fixed-term contract or a permanent contract was a commercial one and not personal.
139. In relation to “racism today and from the past year”, Mr Rowlands found that the claimant had “drip fed” information, rather than provide full transparency and evidence upon which the respondent could undertake an investigation. He went on:

“At the appeal hearing held on Tuesday 2 November 2017 in response to your claim that you had additional information it was specifically requested that you provided any additional information/evidence that you wished to rely on no later than Tuesday 7 November 2017 so that we might consider it in our response. For whatever reason you have decided not to and therefore I would like to confirm that I base my response to

your grievance on the evidence available. Furthermore, I uphold the feedback from the original grievance. It has been impossible to be able to carry out any further investigation into those events that occurred two plus years ago in the absence of the particulars of those events.”

140. Further, with reference to an incident that occurred during a meeting with Mr Beadle at Greenford on 27 July which was followed by a meeting with the Installation Team when the claimant alleged that someone said “Paki” when coughing and muttering under their breath, Mr Rowlands stated that he conducted an investigation and Mr Beadle and five other witnesses who attended the meeting, advised that the claimant did not stay for the meeting but left before the meeting took place. These witnesses also did not recall hearing any inappropriate comments being made. He also spoke to all the witnesses independently and concluded that this allegation was unsubstantiated.
141. In the course of the hearing before us, we were not referred to any notes of Mr Rowlands’ discussions with the individuals he questioned.
142. In relation to the alleged comments made by Mr Creelman of a racist nature on 24 August 2017, Mr Rowlands stated that he had spoken to Mr Creelman who strongly refuted the allegation. Having listened to both him and the claimant, he was satisfied that Mr Creelman acted entirely professionally in the delivery of what Mr Rowlands recognised was disappointing news to the claimant. He referred to the respondent’s practice of organising globally, equality, diversity and inclusion training.
143. With regard to the claimant’s concern that he was worried about losing his job as he had been threatened with termination, Mr Rowlands found that this did not accord with the records the claimant brought to the appeal hearing which revealed that the respondent tried to make him a permanent employee a number of times and entered into discussions with him.
144. In relation to the Medcraft case, Mr Rowlands concluded that if the claimant was able to contact the ethics hotline to report any inappropriate treatment, he could have raised with them issues of alleged racist treatment. He concluded that there was no evidence to support the claimant’s allegations of racism in either 2016 or earlier, nor in 2017. He stated that it was “curious” that the claimant had only chosen to escalate his concerns at a point when the company was no longer able to offer him further employment. He was unable to uphold the claimant’s grievance in relation to that part of his appeal.
145. There were other aspects of the claimant’s appeal in relation to the achievement award, outstanding holiday, access to emails and company property which do not form part of his case before us. (452-461)

Background evidence

146. The claimant in his further information, referred to alleged historical racist treatment which he invited the tribunal to accept as background evidence. They go back in time to 2005. He alleged that the principal perpetrator was

Mr Saunders and that Mr Saunders would say in front of others “I am going to the Paki shop, does anybody want something”. This was allegedly said in May 2005. In August 2005, he used the word “Paki” in front of the claimant and expressions like “I am going to the Paki shop” and “How the fuck [has this] happened Paki?”. In November 2005, in front of the claimant, Mr Saunders is alleged to have said “I’m not racist, I’ve got a coloured TV”. Further, “If you were not in my country, I would probably do your job.” The words “Paki” and “stinky Paki” were allegedly said in front of the claimant at least once during the time they were together and would go from a minimum of three times a month to a maximum of six days per week when they worked together.

147. The comments were also allegedly made about the claimant’s family in connection with the film called East is East. Mr Saunders would ask the claimant whether his two daughters looked like their mother, making a clear reference to the characters in the film. The claimant confronted him on more than one occasion by asking him to stop but Mr Saunders alleged response was “What’s the matter? Those girls were Paki and so are you, so what’s the issue?” or something similar.
148. The claimant also alleged that in 2010 Mr Saunders saw him speaking to a white female colleague or friend and asked, “Why can’t you leave our women alone and talk to your kind?” Or “You speak to white girls because all Asian women look like the girls from East is East.”
149. The claimant further alleged that, in relation to Ramadan, between 2005 and 2016, when fasting, he was the subject of discriminatory comments by Mr Saunders and by other work colleagues, Mr Del Lucas and Mr Steve Conn. When he informed his colleagues that he would take a short fast, Mr Saunders, Mr Lucas or Mr Conn replied saying, “This isn’t Paki land, this is England and we have homes to go to. You can break or start your fast when we have completed our work.”
150. There were also alleged references to terrorists which persisted until 2013, following the London 7 July 2005 bombing. Mr Saunders is alleged to have said to the claimant that all Muslims, in general, are terrorists and would say things like, “What is that ticking I hear? Aren’t you Muslim Shaun? Well that could be a time bomb. I’d be careful when working with those... terrorists.”
151. In relation to the claimant’s name, the claimant said he had to change it for the respondent because of his work colleague by the name of Dannis, it is alleged, used to say “Why the fuck don’t you Paki niggers have real English names like us? You’re not in the desert so start to fit in.” When Dannis complained to the claimant’s former line manager, Mr Matt Gaunt, Mr Gaunt advised the claimant that he should use a more modern name and suggested he call himself Shaun, the same name as Mr Gaunt’s brother. The claimant accepted this advice. From that point onwards he had been referred to as Shaun.
152. The claimant stated that he complained to Mr Grevett and to Mr Jamieson verbally and lodged informal complaints about the alleged racist behaviours but as he was not an employee of the respondent, he felt he could not

invoke its policies. However, in 2012, he made a formal complaint as his informal complaints, he alleged, were ignored. He complained formally to Mr Grevett and Mr Jamieson who told him that they had referred it to human resources. He stated that he had never been contacted by human resources in respect of his complaint. Instead, his complaint was referred to Mr Saunders and, as a consequence, their working relationship worsened. When he enquired of Mr Jamieson as to the status of his complaint, he was allegedly threatened by him who advised that he should remain silent or his contract would be terminated.

153. The claimant said that a black employee called Steve Edwards, was also subjected to Mr Saunders' racism who would refer to him as "smelly nigger" or "coon". He would say to him "hurry the fuck up you black cunt". This would happen on site every day. The discriminatory comments made to him and to Mr Edwards by Mr Saunders were so serious that it led to Mr Darren Lewis raising a grievance with Mr Grevett and Mr Jamieson about Mr Edwards' treatment.
154. Between 2012 and 2013, the claimant stated that he raised with Mr Grevett and Mr Jamieson the issue of another work colleague, Mr Paul North, being heavily bullied by Mr Andy Saunders and gave evidence in a statement following a complaint raised by Mr North against Mr Saunders. The claimant said he was interviewed by Mr Mike Goodman whose attitude was that the allegations were "not true". The claimant was not made aware of the outcome of the grievance, but Mr North stopped talking to him for fear of retaliation from Mr Saunders. (65-72)
155. Mr Lewis, who gave evidence on behalf of the claimant before us, confirmed that he had witnessed some of the alleged racist comments by Mr Saunders, in particular, his treatment of Mr Edwards. He was so moved that he lodged a grievance in early 2013. The outcome was there was no finding of racist behaviour, only of inappropriate conduct. Mr Saunders was required to undergo training.
156. The respondent understood that the historical allegations of racist behaviour was background evidence and did not produce any oral evidence in rebuttal. In any event, the incidents complained of occurred between 2005 and 2012. The perpetrator, Mr Saunders, played no part in the claimant's management but was at the same level of seniority as the claimant. Mr Creelman was not involved in these earlier historical matters. Mr Grevett was in a management role at the time and there was no evidence that he had witnessed the alleged comments made by Mr Saunders or Mr Saunders' treatment of the claimant.
157. From the information in the respondent's possession, Mr Beadle, Mr Randall, Mr Jamieson did not recall any issues being raised by the claimant in relation to his alleged earlier treatment. There was no record of Dannis working for the respondent and that Mr Gaunt had left the respondent many years previously. Mr Saunders denied making any personal or inappropriate comments about the claimant's wife, her race, the appearance of the claimant's children, nor did he make any comments or raise any

objections to the claimant speaking to white women. Mr Saunders was himself married to a lady of Indian origin and has a mixed-race child with her.

158. In relation to Mr Saunders allegedly coughing at the team meeting, this was a meeting at which the claimant was not present.
159. In relation to Mr Lewis' grievance in 2013, it was largely replicated by the claimant in his further and better particulars of claim which was highly unusual given the passage of time and the fact that the claimant was not named in any of the grievance documents or investigation notes from that time.
160. Mr Grevett had retired in January 2018 and had not been contacted for comment.
161. Another aspect of the claimant's case is that, in 2017, the respondent hired new employees. One of them was a Muslim who was subjected during Ramadan to the same alleged racist comments as experienced by the claimant, by another work colleague, Mr Del Lucas. The Muslim employee complained to management about Mr Lucas' behaviour and, according to the claimant, the employee was dismissed during his probationary period.
162. The respondent identified the employee concerned referred to as AC, who was dismissed during his probationary period for failing to observe health and safety regulations. In any event, he was not employed by the respondent during the period of Ramadan in 2017 but was employed from October 2016 to January 2017. (73-77)
163. The claimant said in evidence that he was advised by his legal representatives to put down information about his treatment going back several years and wrote what he could recall. We were not given details of the contexts in which these alleged statements were made nor of the incidents. We, therefore, are unable to make findings in respect of the background evidence.

Comparators

164. The claimant provided names of actual comparators. In turn they are, Mr John Packham who was Commissioning Team leader. He became a permanent employee in 2002 and was promoted to team leader in April 2016.
165. Mr Luke Boswell-Lewis was Commissioning Engineer who became a permanent employee in the System Test Team in 2014. He was successful in his application for Commissioning Engineer in April 2017. He is not a team leader.
166. Mr Dragan Zezelj was Installation Team Technician who became a permanent employee in March 2013 having previously worked as a sub-

contractor before applying for the permanent position. He is not a team leader.

167. Mr Andy McHugh is an electrician and he became a permanent employee in 2012. He had previously been a contractor. He is not a team leader.
168. Mr Andy Saunders, Installation Team Leader, became a permanent employee in 1990. He was promoted to team leader in 2016.
169. Mr Ray Cork, Installation Team Leader/Electrical, became a permanent employee in 2007.
170. Mr Steve Milner, Installation Team Leader/Communications, became a permanent employee in 2001.
171. Mr Steve Conn, Senior Commissioning Engineer, became a permanent employee on 13 March 2016. He left the respondent in January 2018. He previously worked as a contractor.
172. We find that the alleged comparators had been employees for some time prior to September 2017. However, Mr Conn became a permanent employee in March 2016 having been a contractor and accepted an offer of permanent employment immediately when it was offered to him. The claimant, on the other hand, had been verbally offered permanent employment but declined the offer and engaged in negotiations with the respondent. The discussions continued beyond 30 June 2016 regarding his status.
173. Mr Conn is white and in the tribunal's view, is not an appropriate comparator as he accepted the offer of permanent employment when first offered. Further, he was not on a fixed-term contract nor was he a team leader.
174. None of the individuals named, we are satisfied, are appropriate comparators.
175. The appropriate comparator is a hypothetical, team leader on a fixed-term contract with the claimant's level of skill, knowledge and experience working for the respondent. That person would have been offered a fixed-term contract for the respondent to assess whether they were content in their role on lower earnings than their previous contractor's earnings. As the work is project based, an assessment would have been conducted close to the expiration of the contract to determine whether it could be extended or changed to permanent status. As work would not have been available to occupy the comparator full-time, the employment would terminate on the expiration of the contract.
176. We further find that the respondent made several unsuccessful attempts at getting the claimant to change his status from contractor to a permanent employee, but he refused to engage in the process as he was earning much more money as a contractor. He eventually agreed to a fixed-term engagement on the basis that it may become permanent.

Submissions

177. We have taken into account the written and oral submissions by Ms Barrett, counsel on behalf of the claimant, and by Mr Islam-Choudhury, counsel on behalf of the respondent. We do not propose to repeat their submissions herein having regard to Rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended. In addition, we have considered the authorities referred they have referred to.

The law

178. Under section 13, Equality Act 2010, “EqA”, direct discrimination is defined:

“(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.”

178. Section 23, provides for a comparison by reference to circumstances in a direct discrimination complaint:

“There must be no material difference between the circumstances relating to each case.”

179. Section 136 EqA is the burden of proof provision. It provides:

- “(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 provisions 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.”

180. In the Supreme Court case of Hewage v Grampian Health Board [2012] ICR 1054, it was held that the tribunal is entitled, under the shifting burden of proof, to draw an inference of prima facie race and sex discrimination and then go on to uphold the claims on the basis that the employer had failed to provide a non-discriminatory explanation. When considering whether a prima facie case of discrimination has been established, a tribunal must assume there is no adequate explanation for the treatment in question. While the statutory burden of proof provisions has an important role to play where there is room for doubt as to the facts, they do not apply where the tribunal is in a position to make positive findings on the evidence one way or the other.

181. In Madarassy v Nomura International plc [2007] IRLR 246, CA, the Court of Appeal approved the dicta in Igen Ltd v Wong [2005] IRLR 258. In Madarassy, the claimant alleged sex discrimination, victimisation and unfair dismissal. She was employed as a senior banker. Two months after passing her probationary period she informed the respondent that she was pregnant. During the redundancy exercise in the following year, she did not score highly in the selection process and was dismissed. She made 33

separate allegations. The employment tribunal dismissed all except one on the failure to carry out a pregnancy risk assessment. The EAT allowed her appeal but only in relation to two grounds. The issue before the Court of Appeal was the burden of proof applied by the employment tribunal.

182. The Court held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, sex and a difference in treatment. Those bare facts only indicated a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.
183. The Court then went on to give a helpful guide, “Could conclude” [now “could decide”] must mean that any reasonable tribunal could properly conclude from all the evidence before it. This will include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the acts complained of occurred at all; evidence as to the actual comparators relied on by the claimant to prove less favourable treatment; evidence as to whether the comparisons being made by the claimant is like with like, and available evidence of the reasons for the differential treatment.
184. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the tribunal at the first stage from the hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual orientation or pregnancy. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the claimant’s allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.
185. Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities, that its treatment of the claimant was not because of the protected characteristic, for example, either race, sex, religion or belief, sexual orientation, pregnancy or gender reassignment.

186. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable in order to be non-discriminatory. In the case of B-v-A [2007] IRLR 576, the EAT held that a solicitor who dismissed his assistant with whom he was having a relationship upon discovering her apparent infidelity, did not discriminate on the ground of sex. The tribunal's finding that the reason for dismissal was his jealous reaction to the claimant's apparent infidelity could not lead to the legal conclusion that the dismissal occurred because she was a woman.
187. The tribunal could pass the first stage of the burden of proof and go straight to the reason for the treatment. If, from the evidence, it is patently clear that the reason for the treatment is non-discriminatory, it may not be necessary to consider whether the claimant has established a prima facie case, particularly where he or she relies on a hypothetical comparator. This approach may apply in a case where the employer had repeatedly warned the claimant about drinking and dismissed him for doing so. It would be difficult for the claimant to assert that his dismissal was because of his protected characteristic, such as race, age or sex. This was approved by Lord Nicholls in Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, judgment of the House of Lords.
188. The claimant has to prove that the act occurred and, if so, did it amount to less favourable treatment because of the protected characteristic?, Ayodele v Citilink Ltd [2017] EWCA Civ 1913.
189. Unreasonable conduct does not amount to discrimination, Bahl v Law Society [2004] IRLR 799
190. The employer's explanation must be proven on the balance of probabilities, EB v BA [2006] IRLR 471.
191. Discrimination can be overt, covert or unconscious, Anya v University of Oxford [2001] EWCA Civ 405, Sedley LJ paragraphs 11 and 28.
192. As regards notice of dismissal, it is only effective if it is unequivocal, Rai v Somerfield Stores Ltd [2004] ICR 656, paragraphs 30-32.
193. The courts and tribunals are reluctant to find that employees have consented to contractual changes in the absence of an express agreement to that effect, Jones v Associated Tunnelling Co Ltd [1981] IRLR 477, a judgment of the Employment Appeal Tribunal.

Conclusions

Direct discrimination because of race, religion or belief

194. In our findings of fact, we found that Mr Creelman did not make the statement to the claimant on 24 August 2017, "Your face does not fit in my organisation" as the claimant's evidence as to what was allegedly said was not consistent. It, therefore, follows that the matter relied on in the list of issues is not supported by the evidence.

195. Further, we have not made findings of fact from which we could decide that there was less favourable treatment because of religion.
196. These claims of less favourable treatment on grounds of race and/or religion or belief have not been made out.
197. It is clear that by not renewing the claimant's contract from 30 September 2017, the claimant's employment with the respondent was terminated and he was dismissed. The question here is whether the non-renewal was less favourable treatment because of either race or religion or belief?
198. We have come to the conclusion that the respondent, for reasons to do with the work prevailing in rollouts at the time in 2016, made the decision to engage the claimant on a fixed-term contract to expire on 12 May 2017. It was Mr Rowlands' finding at the grievance appeal that the respondent had been trying for the previous two years to build a workforce for the future and was seeking to reduce the number of contract workers. This was to reduce costs and build knowledge and experience within the workforce. Not all of the contractors were offered the opportunity to join the respondent, either permanently or on a fixed-term basis.
199. Even Mr Grevett stated that the project the claimant was on was going to run to the end of September 2017. (473)
200. The claimant signed a fixed-term contract to expire on 12 May 2017. (132)
201. By 24 August 2017, Mr Creelman was of the view that in relation to the projects the claimant was working on, they were due to come to an end and that some were due to start after 30 September 2017. He made the business and managerial decision that there was not enough work for the claimant to be fully engaged in or substantially engaged in after September 2017. This was agreed to by Mr Beadle who stated that managers discussed rollouts and decided that the Installation Team Leader – Rollout position should not be permanent or fixed-term as the work would be absorbed by the department restructure. (342)
202. Mr Beadle also approved the termination of the claimant's contract on 29 August.
203. We are satisfied that compared with a hypothetical white Installation Team Leader–Rollouts, in similar circumstances, who was on a fixed-term contract, the decision would have been taken, for business reasons due with the reduction in projects, that the contract would not be renewed.
204. Accordingly, applying Madarrassy, the claimant had not been treated less favourably on grounds of either race, religion or belief in relation to the non-renewal/dismissal. These claims, therefore, are not well-founded and are dismissed.

Breach of contract/Wrongful dismissal

205. As regards wrongful dismissal, we have found that the claimant did not receive the letter sent by Ms Wilson dated 8 May 2017 extending his fixed-term contract to 30 September 2017. (142)
206. Although he was aware from his conversation with Mr Creelman that his contract was coming to an end, he was not aware of the actual date until he received the letter from Ms Slade dated 6 September 2017, which inaccurately referred to him deciding to leave the respondent.
207. In his email of 21 September, to Ms Slade, he stated that he had only received her letter earlier that week. (144A)
208. We conclude that it is probable that the claimant received the letter on Monday 18 September 2017. Given the fact that he did not receive the 8 May 2017 letter extending his fixed-term contract to 20 September 2017, in accordance with paragraph 17 of his contract of employment, he was entitled to receive four weeks' written notice of termination from the respondent. In reality, he received 12 days' notice. We, therefore, find that his wrongful dismissal claim/breach of contract on the balance of probabilities, has been proved.
209. The case is listed for a remedy hearing on 2 August 2019 for one day, if not settled earlier.
210. We must express our concerns about the way in which the claimant had been dealt with by the respondent's managers and by human resources. He was not spoken to prior to the decision being taken by his managers that they were considering offering him a fixed-term contract. The human resources department did not chase him up following the 8 May 2017 letter sent to which he did not receive offering an extension to his fixed-term contract up to 30 September 2017. Indeed, there were no discussions with his line managers, Mr Beadle, Mr Grevett or Mr Creelman, about when the contract would come to an end. The investigation conducted by Ms Ottley was perfunctory, as we have found, and have given our reasons. It was also unclear to the tribunal what part Ms Wilson's role as investigator played in the grievance appeal process having regard to the grievance policy.
211. Although some of these concerns have already been taken on board by Mr Rowlands, it seems to the tribunal that the respondent should endeavour to train its managers on its procedures as well as human resources and that their knowledge should be regularly updated.
212. The Judge apologises for the delay in promulgating this judgment. This was because of his judicial commitments.

Employment Judge Bedeau

Date: ...04.06.19.....

Sent to the parties on:04.06.19.....

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For the Tribunal Office