



EMPLOYMENT TRIBUNALS

Claimant: Mr UM Nwakwu

Respondent: London Borough of Redbridge

Heard at: East London Hearing Centre

On: 11, 12, 13 and 14 February 2020

Before: Employment Judge Russell

Members: Mrs K Freeman
Mr ML Wood

Representation

Claimant: In person

Respondent: Mr A Ross (Counsel)

JUDGMENT

The judgment of the Tribunal is that:-

1. The claim of unfair dismissal fails and is dismissed.
2. The claim of wrongful dismissal fails and is dismissed.
3. The claim of race discrimination fails and is dismissed.
4. The claim of age discrimination fails and is dismissed.
5. The claim of less favourable treatment because of fixed-term employee status fails and is dismissed.

REASONS

1 By a claim form presented to the Tribunal on 21 December 2018, the Claimant brought claims of direct discrimination because of race and/or age and/or status as a fixed term employee, wrongful dismissal, automatically unfair dismissal and ordinary unfair dismissal. The Respondent resisted all claims.

2 The issues were identified by Employment Judge Gardiner at a Preliminary Hearing on 29 October 2019 as follows:

Automatically unfair dismissal

2.1 The Respondent contends that, pursuant to *Webley v Department for Work and Pensions* [2005] ICR 577, CA, a non-renewal of a fixed term contract does not give rise to a claim under the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002. The Claimant alleges that the Respondent is in breach of Regulation 6 of the 2002 Regulations, on the basis that :

- a. He was dismissed for complaining about the lack of written feedback to Carolyn Baulch; and/or
- b. He was dismissed for the written complaint made to the Chief Executive on 26 October 2018.

Wrongful dismissal

2.2 The Claimant claims he should be entitled to one week's notice pay as implied by statute. The Respondent says that no such implied term exists given that he was a fixed term employee and notice was given by reference to the end date of the fixed term arrangement.

Direct race discrimination

2.3 The Claimant relies on the fact that he is a Black African, born in Africa, and has an accent that differs from those who are born in Britain. The Claimant alleges that the following were acts of less favourable treatment on the grounds of race/national origins contrary to Section 13 of the Equality Act 2010:

- a. The Claimant's non-appointment to the Assistant Brokerage Officer role in Autumn 2016;
- b. Mr Anthony Pardoe-Matthews regularly speaking only to the white permanent employees when visiting the area where the team is based, and excluding the Claimant from discussions;
- c. From 1 July 2018 onwards, Mr Pardoe-Matthews excluding the Claimant from discussions about and work with children's services;
- d. The failure to appoint the Claimant to the permanent role of Brokerage Officer following an interview on 1 August 2018;
- e. Mr Pardoe-Matthews interfering in the outcome of the Claimant's job interview process in Summer 2018;
- f. Carolyn Baulch did not provide written feedback on the unsuccessful job application despite the Claimant requesting it on 10 September 2018;

- g. Mr Pardoe-Matthews excluding the Claimant from training given to other members of staff on 28 September 2018, 9 October 2018 and 16 October 2018;
- h. The failure to redeploy the Claimant under the Redeployment and Redundancy Policy;
- i. The Claimant being asked by Sally Bird on 24 October 2018 whether he had annual leave remaining, while she was in an open-plan office;
- j. Not extending the Claimant's fixed term contract in October 2018.

2.4 The Claimant alleges that the Respondent committed an act of direct age discrimination contrary to Section 13 of the Equality Act 2010 in not extending the Claimant's fixed-term contract in October 2016. The Claimant compares the decision taken in his case with the decision to employ a substantially younger agency worker to perform the same duties.

2.5 The Claimant alleges that the Respondent treated him less favourably compared to the way in which a comparable permanent employee would have been treated on the ground that he was a fixed-term employee, contrary to Regulation 3 of the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002. The Claimant compares himself with the permanent Brokerage Officer employees working at the same establishment in the same 10 respects set out at paragraph 2.3 above.

2.6 For any act of less favourable treatment than a comparable permanent employee on the ground that the Claimant was a fixed-term employee, was this a proportionate means of achieving a legitimate aim? The Respondent avers that the legitimate aims were:

- a. Ensuring the retention of skills and experience by its Brokerage Team;
- b. Equipping new, permanent members of staff with the skills necessary to undertake their jobs.

2.7 For each act of direct discrimination particularised above, which occurred before 23 August 2018:

- a. Was it conduct extending over a period/part of a series of similar acts, the end of which was on or after 23 August 2018?
- b. If not, would it be just and equitable to extend time?

3 The Tribunal heard evidence from the Claimant on his own behalf. For the Respondent, we heard evidence from Mr Anthony Pardoe-Matthews (Head of Contracts and Procurement); Ms Gladys Xavier (Interim Director of Public Health and Commissioning); Mr John Remfry (formerly Duty Placement Team and Corporate Parenting Manager) and Ms Sally Bird (Contract and Client Manager). Ms Baulch did not give evidence as she has left the Respondent's employment voluntarily for significant personal reasons.

4 We were provided with an agreed bundle of documents and read those pages to

which we were taken during the course of evidence. On the first day of the hearing, we permitted the Claimant to add supervision notes from February 2018 and March 2018. The Claimant sought disclosure of further emails relating to the extension of a younger agency worker (Richardo) his comparator in the age discrimination claim. The Respondent said that they had conducted a reasonable search and no further documents existed. The Respondent sought disclosure of documents relating to the Claimant's attempt to mitigate. The Claimant said that he had disclosed all documents which existed. The Tribunal cannot order disclosure of documents which do not exist. Instead, we directed that the parties could cross-examine on the absence of the documents and the Tribunal would draw such inferences as it felt appropriate in due course.

Findings of Fact

5 The Respondent is a public authority providing a range of services to the local community. Its People Directorate includes a Brokerage and Placement Team which works with key partners within the council and externally to source appropriate placements for adults and children and respond to daily demand generated for emergency and planned placements and care packages arising from changes in the required needs of the individual such as hospital discharges, safeguarding concerns and placement breakdown.

6 The Claimant initially worked for the Respondent as an agency worker between 19 September 2016 and 2 December 2016. The Claimant worked in the Adult Services Brokerage Team and enjoyed a good working relationship with Ms Baulch who was his Line Manager. Before the end of his agency assignment, the Claimant was unsuccessfully interviewed for the permanent role of Brokerage Assistant. The interview panel comprised Ms Baulch and Ms Rose. Contemporaneous interview notes show that he came fifth out of seven candidates and had performed particularly poorly in the written test. The Claimant's case is that this was a document fabricated for these proceedings. This was an assertion made several times in the Claimant's evidence when faced with documents which did not support his case. For reasons set out below, we rejected the Claimant's assertions on other documents having heard direct evidence from those involved, for example the interview notes and scores in August 2018. The content of the 2016 document is consistent with it being an accurate and contemporaneous record. The Tribunal rejects the Claimant's case that it was fabricated for these proceedings and find it to be an accurate record of his performance at interview in 2016.

7 The Claimant started working again for the Respondent as an agency worker on 21 August 2017. This was at the invitation of Ms Baulch who knew the Claimant's work to be of a high standard.

8 On 4 December 2017, the Claimant was employed as a Brokerage Officer under a fixed-term contract due to end on 4 May 2018 but which expressly provided that it could be terminated sooner by either party in accordance with the notice provision. The contract set out a four-week notice period for all permanent employees on the Claimant's grade not serving a probationary period with between one month and five years' service. It also provided that:

"Employees on a temporary or fixed-term contract or serving a probationary period will be subject to one week's notice on either side. However, should a contract extend beyond 26 weeks the notice period will be as above".

9 On 1 January 2018, Mr Pardoe-Matthews was appointed as Head of Contracts and Procurement. At the time, there were two separate brokerage teams, one for adults and one for children, but each faced significant challenges due to staff leaving, illness and high volume of work. The Claimant's evidence was that Mr Pardoe-Matthews had regular contact and discussions about the restructure and children's service with the three permanent, white Brokerage Officers (Clare, Angie and Fiona) but ignored him. Mr Pardoe-Matthews accepted that he had little interaction with the Claimant but this was because he had substantive line management responsibility for the children's service but not for the adult's service and needed to speak to Clare, Angie and Fiona about operational issues such as care home closures and transfers whereas he did not have the same operational need to speak with the Claimant, who was doing very important work on homecare at a time of great disruption. The Tribunal considered Mr Pardoe-Matthews to be a reliable witness about the prioritisation required to deal with a service with many pressing needs due to the restructure and staffing issues. On balance, we accept his evidence that his more frequent discussions with Clare, Angie and Fiona were for entirely work-related reasons and not in any way due to race and/or employment status.

10 The Respondent decided to merge the children and adult placement and brokerage services into a single integrated function. The business case for the proposal was issued in March 2018 and envisaged the creation of two additional Brokerage Officer posts. The intention was to implement the new structure in the summer of 2018.

11 On 9 May 2018, Ms Baulch proposed Protocol training for all members of the adult brokerage team, including the Claimant. The training required the completion of online training modules at a time most convenient to the member of staff.

12 On 16 May 2018, Ms Baulch asked Ms Clare Rose to work with the children's placement team for three days a week over the next four weeks (and probably until mid-July) to learn children's work and support the two children's team workers. Ms Rose was one of three full-time, permanent brokerage officers in the adults' team. Ms Baulch agreed to recruit an agency worker to cover Ms Rose's adult brokerage work. It is not in dispute that as part of the restructure, both of the children's duty team officers were due to leave. Longer term planning and the anticipated merged service meant that it was necessary that one of the adult's team brokerage officers be trained in children's placements from the outgoing experienced officers in that team. On balance, the Tribunal finds that none of the three permanent adult brokerage officers (Clare, Angie and Fiona) or the Claimant had recent experience working in children's placement at the Respondent, but each had the ability to gain that experience if given the opportunity. Ms Baulch discussed this with Mr Pardoe-Matthews but it was her sole decision as to who to send to work with the children's placement team or put forward for training.

13 On 4 June 2018 the Claimant's fixed term contract was extended to 31 July 2018. Internal emails at the end of April 2018, show that Ms Baulch had incorrectly believed that the original fixed-term contract terminated on 4 June 2018 rather than 4 May 2018, hence the delay. A contemporaneous document completed by Ms Baulch to justify the extension confirms that there were skills shortages being caused by the merger of the adult and children placement teams and the voluntary redundancy of the children's placement officer. The purpose of the extension of the Claimant's fixed-term contract was to cover the first part of the transition whilst the new brokerage officers were recruited. Under the heading "impact of not extending the arrangement", Ms Baulch stated that if the contract was not extended, they would struggle to release a brokerage officer to work with the

children's placement officer in order that work/skills could be learned and transferred to the team. Under the heading "additional comments" the following was included:

"During the transition phase the brokerage officers will need to be released to have training on Protocol and Care Place, business as usual will need to continue during the transition phase."

14 The Tribunal finds that the purpose of the extension of the Claimant's fixed-term contract was to enable him to remain in the adults' team to enable service provision to continue without disruption whilst permanent staff were released for training on children's services. This is consistent with Mr Pardoe-Matthew's evidence, which we accepted as reliable, about the value of the Claimant's work on homecare and the lack of capacity within the team to train everybody on the children's service. There needed to be prioritisation about the best use of limited resources. The Claimant was chosen to stay at the adult's services base because he could be relied upon for stability and service continuity. The Tribunal finds that this was the genuine rationale of the Respondent but there is no evidence that this was made clear to the Claimant at the time.

15 In June 2018, the Claimant had a conversation with Ms Baulch where she said that she wanted him to stay and apply for a permanent post with the Respondent. Ms Baulch told the Claimant that she would not want him to apply for a job at Tower Hamlets. This was not, we find, an attempt by Ms Baulch to prevent the Claimant from seeking employment elsewhere but was an expression of her high regard for his work and genuine hope that he would be recruited to a permanent Brokerage Officer post.

16 In June 2018, Richardo joined the adults' team as an agency member of staff. This is consistent with Ms Baulch's stated intention to use an agency worker to cover Ms Rose's work whilst she was training with the children's team. Ms Baulch expressed her gratitude in one-to-one supervision notes for July and September 2018 for the Claimant's work in training Richardo. Richardo is in his late 20's; he is British born and with no accent.

17 The children's and adults' services merged with effect from 1 July 2018. It is not in dispute that at no time between 1 July 2018 and the termination of his employment on 28 October 2018 did the Claimant work in children's services or receive the training offered to permanent employees. Nor did Richardo.

18 On 10 July 2018 the Claimant's fixed term contract was again extended until 14 August 2018. The contemporaneous document in support gives the same rationale as before but, again, it was not shared with the Claimant.

19 The permanent Brokerage Officer jobs were advertised on 10 July 2018. There were 34 applicants, of whom six were shortlisted including the Claimant and Richardo. The Claimant's interview was conducted on 1 August 2018 by Ms Baulch, Mr Remfry and Ms Bird. The Claimant was rated fourth out of the six shortlisted candidates interviewed. Neither he nor Richardo were appointed. Both successful candidates were BAME. In his subsequent grievance and in his evidence, the Claimant said that he should not have been required to attend an interview as it was his own job which was being advertised. The Tribunal do not agree. The Claimant was a fixed-term employee providing continuity in the adults' services team whilst the new structure was implemented; the interview was for a permanent job in the new merged structure. It was appropriate that he be required to

attend an interview (as indeed had been the case in 2016 when he had also applied for a permanent role).

20 Interview notes and score summaries were included in the bundle of documents. The Claimant's case is that these have been created for the Tribunal hearing to justify the decision not to appoint him. As he was already doing the job and knew the systems where external candidates did not, his case is that he could not have performed as poorly as the notes and scores suggest even though he accepts that he scored 2 out of 6 on the written test. The Respondent's case, confirmed in the evidence of Mr Remfry and Ms Bird, is that these were contemporaneous notes and accurately record the Claimant's performance at interview. Whilst the notes are not verbatim, they are consistent with contemporaneous records of an interview. On balance, the Tribunal accepted the evidence of Mr Remfry and Ms Bird and find that they are accurate. Whilst the Claimant was good at his job, we find that he did not perform well in the interview and that the decision not to offer him one of the permanent jobs was based entirely on that interview. The Tribunal accepted as credible and reliable the evidence of Mr Remfry that during the scoring process, there was no discussion about the Claimant's ethnicity or accent and that Mr Pardoe-Matthews was not involved in making the selection decisions.

21 On 3 August 2018, the Claimant was told that he had not been successful in his application. He was naturally disappointed and asked Ms Baulch for feedback. Ms Baulch gave some oral feedback, in particular that he had not completed all of the written questions, but it was not comprehensive. The Claimant asked for written feedback.

22 On 6 August 2018, the Claimant's fixed-term contract was extended to 28 September 2018, for the same reasons as before. At that stage, it was anticipated that the Claimant would work until expiry of his fixed term contract and that Richardo's agency assignment would end on 19 October 2018.

23 In an exchange of emails with colleagues on 30 August 2018, the Claimant complained that he had been excluded from children's placement work since it started. This was the first time that the Claimant had made a complaint in writing and he accepted in evidence that he had not previously complained to managers about his exclusion. The first time it was raised by the Claimant in supervision was on 10 September 2018, when he told Ms Baulch that he would like to have had an opportunity to learn about the children's services. Ms Baulch explained that the decision was that permanent staff would learn about children's services first and the Claimant was on a temporary contract. In the same supervision meeting, Ms Baulch asked the Claimant to consider staying on for a further four weeks after 28 September 2018. The notes record that the Claimant declined and advised Ms Baulch that it was time for him to move on. Ms Baulch thanked him for his consideration. The Claimant again requested written feedback from his interview and Ms Baulch said she would do this before his employment ended.

24 The Claimant's case is that the notes of the supervision are not accurate as they do not record all that was discussed. Whilst they are not verbatim, the Tribunal finds that they capture the essential topics discussed including his request for written feedback. We find it plausible that the Claimant did say that he did not want a further four-week extension as an initial expression of his disappointment in not getting the permanent position and his feeling of exclusion from children's placement team. However, we find that the contents of the supervision notes are consistent with each of the contract extension requests, namely the Claimant was not offered the opportunity to work in

children's services because of his status as a fixed-term worker whose contract was due to end and the decision to prioritise the permanent staff who would continue to work in the longer term.

25 Following the supervision meeting, the Claimant changed his mind and a further extension to his contract was agreed until 26 October 2018. In other words, whereas on 6 August 2018 it was anticipated that the Claimant's employment would end on 28 September, the contract was extended before it had in fact terminated.

26 In an email sent to the Claimant on 19 September 2018, Ms Baulch said:

"Further to our conversation yesterday I can confirm that we would love to have you stay until 26 October 2018.

I have had agreement from Anthony and Gladys and HR have confirmed that you will be paid until 28 October 2018.

As discussed you will have just under 4 days [annual leave] to take before you go, please let me know which dates you would like."

27 In an email sent Mr Pardoe-Matthews on 27 September 2018, Ms Baulch confirmed that she was putting in place measures to train three brokerage assistants to manage and support the children's duty team with Fiona, one of the three permanent Brokerage Officers, continuing to work on children's work in the afternoons. Ms Baulch said that this was a short-term fix until one of the new Brokerage Officers was in place, when the process would be reviewed. The Claimant and Richardo were not included in this training, or subsequent training on 9 October 2018 or 16 October 2018. We accepted as reliable Mr Pardoe-Matthews' evidence that each had been unsuccessful in getting a permanent role and that the priority was training those in the substantive structure moving forward rather than those in the throes of leaving the organisation as the Claimant and Richardo were.

28 On 3 October 2018, the Claimant was sent his P45 and his access to systems terminated. The Claimant's Protocol training ended as he had not completed the modules (he was not the only employee in that position) and the Respondent had now decided to limit access to Protocol to two of the permanent Brokerage Officers, a Brokerage Assistant and Ms Baulch.

29 On 15 October 2018, Ms Baulch emailed Ms Xavier suggesting a four-week extension of Richardo's agency assignment. The reason as set out in the email was a short-term staffing shortage: two members of staff were signed off sick (although one was due to return at the end of the month), Richardo was due to leave on 19 October 2018, the Claimant was leaving on 26 October 2018 and the two new permanent members of staff were very new in post. Ms Baulch said that Richardo had two weeks' annual leave booked from 22 October 2018 but could return to work on 5 November 2018. Ms Xavier was happy with the proposal and Ms Baulch said that she would discuss it with Richardo. The Claimant was not offered a further extension of his fixed-term contract. The Tribunal accepted Mr Pardoe-Matthews evidence that HR did not like granting repeat fixed-term contract extensions and that it was easier to extend an agency assignment.

30 The Tribunal accepts that Ms Baulch's email to Ms Xavier, and the latter's reply, are compelling evidence that the decision to extend Richardo's agency assignment was

taken on 15 October 2018. Whereas up to that date, it was anticipated that the Claimant and Richardo would both be leaving in October, the position then changed and Richardo's agency assignment was extended by agreement before the date on which it would otherwise have ended. Much was made by the Claimant in cross-examination about the lack of documents showing the date on which the agency was advised of the extension of Richardo's assignment. Mr Pardoe-Matthews gave evidence that there were no other documents disclosed due to a combination of the following: an extension before the assignment ended would not require a new purchase order; the approval process for an extension of a fixed-term contract did not apply to agency workers who are provided through a corporate service provider agreement; and agency worker orders are placed via a portal on an externally managed IT system not within the Respondent's control. Both Ms Bird and Mr Pardoe-Matthews candidly accepted that they also would have expected some form of record of when the agency was told but none had been provided and the documents were no longer visible on the system after being sent. Furthermore, the Respondent had changed agency provider in May 2019.

31 The Claimant asked us to infer from the absence of such documents, that they would show that the decision was taken after the submission of his grievance on 26 October 2018. The Tribunal decline to draw that inference. We do not consider that the date of notification to the agency is relevant to deciding the issues before us. It is the Respondent's reasons for reaching the decision to extend Richardo's assignment and not to extend further the Claimant's fixed-term contract which are in issue. Insofar as the chronology assists the Tribunal to determine those reasons, we consider that it is the date on which the decision was made which is critical. That date was 15 October 2018. Moreover, the Claimant's case was undermined by his determined insistence that Richardo was recalled *after* he had already left but whilst the Claimant was still employed. This is inconsistent with the contemporaneous emails which show that the decision was taken *before* Richardo's initial assignment in fact ended.

32 On 18 October 2018, Ms Baulch provided the Claimant with an excellent reference, saying that the Respondent would re-employ him and were sad to be losing him. She described the Claimant as a very reliable, hardworking and focused individual. This is consistent with Ms Baulch's previous high regard for the Claimant which had led to her encouraging him to return previously.

33 The Claimant's fixed-term contract terminated on 26 October 2018. As subsequently accepted by Ms Baulch in her response to the Claimant's grievance, the Redeployment Policy was not applied to the Claimant as she believed that it did not apply to him as he was on a fixed-term contract extended due to staff absence. The Policy is stated to apply to all employees and is intended to minimise the effects of organisational change through restructuring, redundancy and redeployment. It provides that the Respondent will minimise the number of redundancies by reducing agency staff; will offer support to employees throughout any organisational change process and will use redeployment procedures for potentially redundant employees who have not been matched or selected into posts.

34 The Claimant's child was unwell in the final week of his employment. He telephoned the office on 24 October 2018 and his call was transferred to Ms Bird at her desk in the open plan office. Ms Bird asked the Claimant if he had any annual leave to take and the Claimant said that he did not. The Claimant was told that the leave would be unpaid but in fact he had already been paid to 28 October 2018 and, as he accepted in

cross-examination, the Respondent did not claw back any of that payment. The Claimant's responses to Ms Bird could not be heard by those around her. The Tribunal accepted as truthful and plausible the evidence given by Ms Bird that this was an entirely normal conversation which she would have had with any employee, whatever their race or employment status, in the same circumstances.

35 On his last day of employment, 26 October 2018, the Claimant submitted a grievance to the Chief Executive which was subsequently forwarded to Ms Xavier. This grievance was the first time that the Claimant alleged that he had been treated less favourably because he was a fixed-term employee. Ms Baulch only read it sometime after she returned from annual leave on 29 October 2018. Ms Xavier interviewed Ms Baulch on 21 November 2018 and sent her a copy of the grievance the following day. The notes of the interview suggest that discussion was in very general terms only. When asked about the Claimant's allegation that he had been excluded from children's services, the notes record Ms Baulch's explanation as being that he was on a temporary contract and was required to continue with work in adults' services and that discussions and training related to staff developed to support children's services. Ms Baulch denied advising the Claimant not to apply for external jobs or promising that he would have employment in Redbridge but had encouraged the Claimant to look on the job website for any other suitable vacancies and she denied treating the Claimant any differently to others.

36 On 28 November 2018, Ms Baulch provided her response by annotated comments to the text of the grievance. She denied promising the Claimant one of the permanent roles but did say that she would not want him to apply for a permanent job elsewhere as he was an asset to the team providing continuity at a time of high levels of absence. As for the Claimant's complaint about training and work in children's services, Ms Baulch wrote:

"I prioritised training for children services to the three permanent brokerage officers – Martin at this time was on a temporary contract and he was needed to continue with adults work whilst Angie, Fiona and Claire went over to station road to learn about children's placement work from Shirley (Shirley was given VR and left Redbridge on the 20/7/18)."

37 Ms Baulch made clear that Mr Pardoe-Matthews was not involved in the recruitment process for the permanent Brokerage Officer and did not have any input as to who was employed. Ms Baulch apologised for failing to provide written feedback, saying that it had been started but not finished. As for the suggestion that the Claimant had not been included in training because of his ethnicity and/or fixed terms status Ms Baulch said:

"Martin was not included in this training, along with Richardo as both of these staff were on temp contracts/agency and they were required to run the service whilst the permanent staff members had training on CarePlace, again a decision made by me and not Anthony."

38 Ms Baulch did not comment at all on the allegation that Mr Pardoe-Matthews was rude and disrespectful to ethnic minority group and would only speak to white permanent employees, totally excluding him. This was the first time that the Claimant had alleged that Mr Pardoe-Matthews had been rude to him or excluded him on grounds of race or employment status. The Claimant suggested that where Ms Baulch did not expressly deny an allegation in his grievance, she must be taken to admit the fact of his complaint.

We do not accept that this is necessarily the case given that this is a grievance letter and not a legal pleading. The complaint against Mr Pardoe-Matthews related to alleged exclusion said to be because of ethnicity and fixed-term status, Ms Baulch addressed this by explaining that it was her decision about who should do the children's services work and her reasons for doing so.

39 Ms Xavier was responsible for carrying out an investigation into the grievance. The Tribunal considered her investigation to be superficial and perfunctory. The letter rejecting the grievance was sent on 11 December 2018, was very brief and addresses only the general complaint against Mr Pardoe-Matthews and the failure to be appointed to the permanent role. There was no right of appeal offered. The handling of his grievance is not one of the issues before the Tribunal, although in the course of evidence the Claimant maintained that both the investigation and the outcome were a whitewash. The Tribunal considers that best practice would have been to conduct a proper investigation and grievance hearing with a right of appeal, even though the Claimant's employment had ended. The Claimant demonstrated a tendency in oral evidence to describe matters with which he disagreed as a total lie or based upon fabricated documents. The Tribunal has not agreed but considers that the Claimant's disproportionate response and evident distrust may have been avoided had Ms Xavier engaged with the Claimant and addressed the substance of his grievance.

The Law

Unfair and Wrongful Dismissal

40 Under section 108 Employment Rights Act 1996, a person is not entitled to bring a complaint of unfair dismissal in the Employment Tribunal unless they have completed two years' service or where the reason for dismissal is one which is listed in s.108(3). One of the exemptions is where regulation 6 of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 applies.

41 Regulation 6(1) FTER provides that an employee shall be regarded as unfairly dismissed where the reason or principal reason is that he has done a protected act under the Regulations. The list of protected acts in regulation 6(3) includes alleging infringement of the Regulations (either in proceedings or otherwise).

42 The expiry of a fixed-term contract which is not renewed is a dismissal within section 95(1)(b) Employment Rights Act 1996. Dismissals by non-renewal of a fixed-term contract are likely to be potentially fair for "some other substantial reason", but not necessarily so, **Royal Surrey County Council v Drzymala** UKEAT/0063/17/BA.

43 The combined effect of section 86(1) and section 86(4) of the Employment Rights Act 1996 is to exclude the right to a statutory minimum period of notice for those employed under a contract for a term certain of more than one month.

Fixed-Term Employees Regulations 2002 – less favourable treatment

44 Regulation 3(1) FTER provides that an employee has a right not to be treated by his employer less favourably than a comparable permanent employee. This includes the opportunity to receive training, regulation 3(2)(b). However, the regulation 3(1) right is not infringed if the employer can show that the treatment was justified on objective grounds,

regulation 3(3) and regulation 4 (for contract terms).

45 Regulation 2 FTER provides that to be a comparable employee, both must be employed by the same employer and be engaged in the same or broadly similar work.

46 Fixed-term contracts are lawful and recognised in certain circumstances as responding to the needs of both employers and employees. As such, expiry of a fixed-term contract could not of itself constitute less favourable treatment for the purposes of regulation 3(1) and such a dismissal could not be a detriment for the purposes of regulation 3(2), **Webley v Department for Work and Pensions** [2005] ICR 577, CA. At paragraph 36, Wall LJ held that the essence of a fixed-term contract is that it comes to an end at the expiry of the fixed-term period. As set out above, however, if dismissal falls within regulation 6 then it will be actionable.

Direct Discrimination

47 Section 13 Equality Act 2010 provides that a person discriminates against another if, because of a protected characteristic, he treats that other less favourably than he treats or would treat others. Race is a protected characteristic. Conscious motivation is not a requirement for direct discrimination, it being enough that race had a significant influence on the outcome. The crucial question is why the complainant was treated in the way in which they were, particularly in cases where there are no actual comparators identified, **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285.

48 In considering the burden of proof, we referred to s.136 Equality Act 2010 and the guidance set out in the case of **Igen Ltd v Wong** [2005] IRLR 258, CA as approved in **Madarassy v Nomura International Plc** [2007] IRLR 246, CA. This guidance reminds us that it is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of adequate explanation, that the employer has committed an act of unlawful discrimination. The outcome at this stage of the analysis will usually depend upon what inferences it is proper to draw from the primary facts found by the Tribunal. Where the Claimant has proved such facts, the burden of proof moves and it is necessary for the employer to prove on the balance of probabilities that the treatment was in no sense whatsoever on the prohibited ground. If the Respondent cannot provide such an explanation, the Tribunal must infer discrimination.

49 The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination; they are not, without more, sufficient material from which we could conclude that there had been discrimination, **Madarassy** at paragraphs 54-57. The protected characteristic must be an effective cause of any less favourable treatment. We must take care to distinguish between unfair or unreasonable treatment and discriminatory treatment as the two are not the same.

50 Where a discrimination claim is based upon multiple allegations, it is necessary for the Tribunal to consider each allegation individually and also to adopt a holistic approach to consider the explanations given by the Respondent. We should avoid a fragmented approach which risks diminishing the eloquence of the cumulative effect of primary facts and the inferences which may be drawn, for example see **X v Y** [2013] UKEAT/0322/12. We must consider the totality of the evidence and decide the reason why the Claimant received any less favourable treatment.

Conclusions

Unfair Dismissal

51 In the issues set out by Employment Judge Gardiner, the claim is for automatically unfair dismissal contrary to regulation 6 FTER. There is no reference to a claim for “ordinary” unfair dismissal pursuant to section 98 of the Employment Rights Act 1996. In his evidence and submissions, the Claimant maintained that non-renewal of an expired fixed-term contract is a dismissal and can be for some other substantial reason. Both propositions are correct but they only apply where the employee has sufficient service to afford the Tribunal jurisdiction to hear a claim under section 98. The Tribunal does not accept as legally correct the Claimant’s submission that he has a fundamental right to a fair procedure under section 98(4) even without two years’ service. The EAT judgment in Drzymala, upon which the Claimant relies, does not assist him as Ms Drzymala had three years’ continuous service due to repeated extensions of her fixed-term contract and the operation of section 108 Employment Rights Act 1996 was not relevant.

52 Applying Webley, the Tribunal accepts Mr Ross’ submissions that termination of the fixed-term contract by effluxion of time is not sufficient to give rise to an unfair dismissal claim under the FTER. The Claimant must show that there was a breach of regulation 6 FTER in order for the Tribunal to have jurisdiction to hear his claim of unfair dismissal. The Claimant relies upon his complaints to Ms Baulch on 3 August 2018 and 10 September 2018 about the lack of written feedback following his non-selection for the permanent Brokerage Officer role and his written complaint to the Chief Executive sent on 26 October 2018.

53 In order to be a protected act within regulation 6, a complaint made by a fixed-term employee must fall within regulation 6(3), in other words to allege infringement of the Regulations or make the employer think that the employee will make such an allegation. In both his written and oral evidence, the Claimant said that he had requested written feedback twice and that this was not given to him because he was a fixed-term employee. This, however, was not an allegation made to Ms Baulch at the time. The Tribunal has found as a fact that the first time that the Claimant alleged that he had been treated less favourably because of his fixed-term status was in the grievance submitted on 26 October 2018. Any complaint to Ms Baulch was not a protected act within regulation 6(3). Even if either were a protected act, the Claimant did have his contract extended on 19 September 2018, Ms Baulch continued to regard the Claimant highly and her reference dated 18 October 2018 made clear that she would re-employ him and was sad to see him go. This is not consistent with the Claimant’s case that Ms Baulch did not renew the Claimant’s contract after its expiry on 26 October 2018 because of requests for written feedback made in August and September 2018.

54 The grievance submitted on 26 October 2018 was a protected act as it made clear allegations that the Claimant had been excluded from children’s services work and training, and treated less favourably by Mr Pardoe-Matthews, because he was a fixed-term employee and he compared himself to his permanent Brokerage Officer colleagues. Although the Claimant was paid up until 28 October 2018, the date of expiry of his extended fixed-term contract was 26 October 2018. This is clear both from the extension approval document and the email sent to the Claimant on 19 September 2018.

55 With the exception of the first extension where there had been a misunderstanding

by Ms Baulch about the relevant dates, the Claimant's fixed-term contract was always extended a week or more before it was due to expire. The Claimant's case is that on this occasion, the decision not to extend was taken on 26 October 2018 and that Richardo was subsequently recalled after his agency assignment ended to do the work which the Claimant could have done. The Tribunal does not agree. Previous extensions were initiated by Ms Baulch who applied for the relevant approval and provided the business case. Ms Baulch was on holiday on 26 October 2018. She had considered interim staffing requirements on 15 October 2018 and applied for approval to use Richardo, noting that the Claimant was leaving on 26 October 2018. Based upon these facts, the Tribunal concludes that the decision not to renew the Claimant's contract had been taken by 15 October 2018 and, therefore, it pre-dated the protected act. The grievance was not the reason why his contract was not extended once more.

56 The unfair dismissal claim fails and is dismissed.

Wrongful Dismissal

57 Pursuant to the Claimant's contract of employment, he was entitled to four weeks' notice of termination as he had completed more than one month's service. The Claimant's case is that he was not given notice. The Respondent's case is that the fixed-term contract was of its nature the notice required and, further, that the Claimant was told by email sent on 19 September 2018 that his employment would terminate on 26 October 2018. The Claimant submitted that notice could not be given until 26 October 2018 when the extended fixed-term expired and that the period referred to in the email sent on 19 September 2018 was intended for work and not notice.

58 The Tribunal prefers the submissions of Mr Ross and finds those of the Claimant legally incorrect. As Wall LJ held in **Webley**, the essence of a fixed-term contract is that it comes to an end at the expiry of the fixed-term period. No further notice is required. The notice provision in the Claimant's contract of employment is expressly stated to apply if the fixed-term contract is terminated *before* the end of the period specified, by either party. There is no requirement that notice of termination must use specific words, although it would be better if it did. The email sent on 19 September 2018 makes clear that the Claimant is staying until 26 October 2018 (but paid until 28 October 2018) and that he had annual leave to take "before you go". The email is not ambiguous, it is notice given on 19 September 2018 to the Claimant that his fixed-term contract will expire on 26 October 2018.

59 The Claimant is not entitled to statutory notice pursuant to section 86 of the Employment Rights Act 1996 and, even if he were, such notice was given by the email sent on 19 September 2018.

60 The wrongful dismissal claim in respect of notice fails and is dismissed.

Age discrimination

61 The Claimant advances a single complaint of age discrimination, namely that Richardo's agency assignment was extended in October 2018 when the Claimant's fixed-term contract was not. At the relevant time Richardo was in his late 20s and the Claimant was 54 years old.

62 Based upon our findings of fact, the Claimant and Richardo were treated differently in October 2018. Richardo had his agency assignment extended and the Claimant did not have his fixed-term contract extended. At the time, both men were providing their services to the Respondent and both were approaching their expected termination dates. Both had been unsuccessful in applying for a permanent Brokerage Officer role in the new structure. The circumstances of the two men were, however, materially different because the Claimant was an employee of the Respondent and Richardo was not. It was administratively easier to extend an agency assignment than a fixed-term employment contract. Richardo had not previously expressed an unwillingness to work a short extension, as the Claimant initially did in September 2018. The Tribunal finds that these were the reasons why Ms Baulch chose to offer a four-week extension to Richardo and not to the Claimant. Age played no part at all in her decision.

63 The claim of age discrimination fails and is dismissed.

Race Discrimination

64 The Claimant relies on 10 acts as set out in the issues listed at paragraph 2.3 above. We have found that Mr Pardoe-Matthews did not interfere in the outcome of the Claimant's job interview process in the summer of 2018 and so the treatment set out at paragraph 2.3e did not occur. Each of the other acts did in fact take place to some extent.

65 The Claimant was not appointed to a permanent role in 2016. He made no complaint about this at the time and was subsequently re-engaged at the instigation of Ms Baulch who had been on the interview panel for the permanent role. Ms Baulch and the Claimant had a good working relationship, she regarded his work highly. This is not consistent with the Claimant's case that he was not appointed because of his race. Dealing with this inconsistency in his case, the Claimant submitted that he believed that Ms Baulch was happy to work with him on a temporary basis but did not want him to work for the Respondent on a permanent basis. There was no evidence to support the Claimant's belief beyond the fact that he was not appointed. By contrast, interview notes from the first interview confirm that he was not appointed because he came fifth out of seven candidates, having performed particularly poorly on the written test. This had nothing whatsoever to do with the Claimant's race (being Black African, of African birth or with an accent).

66 The issues at paragraph 2.3b and 2.3c overlap to some extent. Mr Pardoe-Matthews accepted that he had little interaction with the Claimant and regular contact and discussions with the three white, permanent Brokerage Officers. For the reasons set out at paragraph 9, the Tribunal accepted his evidence that this was entirely work-related reasons and was not in any way due to race. The three permanent Brokerage Officers (Clare, Angie and Fiona) were involved in the transition from 1 July 2018 to a merged adults and children's service and spent time with the outgoing children team to ensure that experience was not lost. The Claimant was not involved in that process and, it follows, did not need to be involved in discussions about children's services. The genuine, contemporaneous reason for the repeated extensions of the Claimant's contract were to provide consistent cover whilst permanent Brokerage Officers were recruited and to enable the release of the existing permanent Brokerage Officers for training on children's services. This had nothing whatsoever to do with the Claimant's race.

67 The Tribunal has found the notes of the interview on 1 August 2018 to be accurate

and that the Claimant did not perform well at his interview. He accepted that he had answered only two out of five questions in the written test. This is consistent with his poor performance in the written test in 2016. There was no discussion about ethnicity or accent and no reason why the Claimant says that the decision was affected by his race. No matter how strongly the Claimant believes that he was a strong candidate because he was already doing the job and his refusal to accept that he performed poorly at interview, leading him effectively to believe that it must be because of his race, he has adduced no evidence from which the Tribunal could find that race played any part in the decision.

68 The Claimant twice asked Ms Baulch for written feedback and this was not provided to him. The Respondent's case is that Ms Baulch intended to provide written feedback and had begun to draft the same, but that due to oversight and work pressure failed to complete it. Despite their good working relationship, the Claimant did not accept that this was a genuine oversight and maintained that it was a deliberate refusal due to his ethnicity and his fixed term contract. There is no evidence to show that there was any refusal to provide feedback, to the contrary, the supervision notes on 10 September 2018 show that Ms Baulch had agreed to provide it to the Claimant. Ms Baulch provided an excellent job reference on 18 October 2018 which is consistent with a desire to help the Claimant progress in his career and inconsistent with the suggestion that she would therefore deliberately withhold written interview feedback. The Claimant again relies on his belief but has not proved facts from which we could conclude that race played any part in the failure to provide feedback, far less that a white fixed-term employee in the same position would have received the feedback.

69 The specific training identified in paragraph 2.3g was to take place between 28 September 2018 and 16 October 2018. The Claimant's fixed-term contract was due to expire on 26 October 2018. Mr Pardoe-Matthews did not make the decision about who should be released for training, the decision maker was Ms Baulch. From as early as May 2018, Ms Baulch had decided to prioritise training for the permanent members of the team who would be in the new structure following the recruitment exercise. This is consistent with the reasons given for repeatedly extending the Claimant's fixed-term contract. If the Claimant had been successfully appointed to a permanent role, we infer that he would have been sent on this training. This is consistent with her decision that Richardo, British born and with no accent, was not included in the training either. The Claimant's race played no part in Ms Baulch's decision about training.

70 The Claimant was not redeployed under the Redeployment and Redundancy Policy because Ms Baulch did not believe that it applied to him due to his fixed-term employee status (which will be considered below). The Claimant has adduced no evidence from which we could find that an actual or hypothetical fixed-term employee of a different race would have been treated more favourably.

71 The Claimant complains that Ms Bird asked him whether he had annual leave remaining whilst she was in open-plan office. The Tribunal does not consider that a reasonable worker in the Claimant's position would or might take the view that such a question was a detriment. It was an ordinary question and the Claimant's reply would not have been heard by anybody standing nearby. We have found that this was an entirely normal conversation which Ms Bird would have had with any employee, whatever their race or employment status, in the same circumstances.

72 Finally, the Claimant says that the failure to extend his contract in October 2018

was an act of race discrimination. As set out in the age discrimination claim, we have concluded that there were material differences in the circumstances of the Claimant and Richardo: the difference in their employment status, the greater administrative ease of extending an agency assignment and the Claimant's statement on 10 September 2018 that it was time for him to move on. The Claimant has not established primary facts from which we could conclude that there has been less favourable treatment because of race.

73 This is a discrimination claim based upon multiple allegations and the Tribunal reminded itself of the need to consider the totality of the evidence and decide the reason why the Claimant received any less favourable treatment. The Claimant's race discrimination claim was based upon his *belief* that his race (Black African, born in Africa, accent) was the reason for the conduct alleged and a difference in treatment compared to Richardo and/or the three permanent Brokerage Officers. The **Madarassy** tests requires more than a difference in treatment and a difference in status, or a genuine belief in discrimination. There is no evidence of that "something more" and there is not sufficient material from which we could find discrimination because of race. Ms Baulch had worked well with the Claimant for many years, inviting him to return when there was a vacancy, encouraging him to apply for a permanent post in the new structure, for which he was unsuccessful due entirely to his own performance at the interview, and providing an excellent reference to help him in his career. Looked at holistically, this is not consistent with the Claimant's case that she did not want him as a permanent employee because of his race.

74 The claim of race discrimination fails and is dismissed.

Fixed-Term Employee Regulations – less favourable treatment

75 The acts relied on in this claim are the same as for race discrimination. For the same reasons: (a) the Claimant's non-appointment to a permanent position in 2016 was entirely due to his performance at interview; (b) the Claimant's non-appointment to a permanent position as Brokerage Officer was entirely due to his performance at interview on 1 August 2018; (c) Mr Pardoe-Matthews did not interfere in that outcome; (d) Ms Baulch failed to provide written feedback due to a genuine oversight due to pressure of work; and (e) the request by Ms Bird was not a detriment and would have been asked of any employee. The Claimant has not established facts which would suggest that a permanent member of staff was or would be treated more favourably. These acts had nothing whatsoever to do with the Claimant's status as a fixed-term employee.

76 For the remaining five acts relied upon, these all relate to the Claimant's involvement in children's services work and training in the context of the restructure, and subsequent termination of his fixed-term contract because he did not secure a permanent role in the new merged service. The Respondent accepts that the Claimant was not involved in children's services work and/or the training because Ms Baulch decided to prioritise the training and development of the permanent staff who would still be in the service after the merger had completed. Ms Baulch also accepted in her response to the Claimant's grievance that the redeployment policy was not applied to the Claimant because his employment was fixed-term and ended upon expiry of that term.

77 The purpose of the Claimant's fixed-term employment was to provide cover in the adult's services. This was a challenging time for the service which was facing significant staffing problems and a high volume of work. The Claimant was a regular and reliable

presence in the adult's team and his work was highly regarded. The proposed merger and consequent voluntary redundancies in the children's service gave rise to a risk that experience would be lost to the new merged service. Ms Baulch decided to prioritise the training of her permanent team whilst simultaneously extending the Claimant's fixed-term employment to enable that training and work experience to take place. The Tribunal accepts that the Respondent has established that the prioritisation of the permanent employees who would remain in the new, merged service over the Claimant who did not get a permanent post, was in pursuit of the legitimate aims of ensuring the retention and skills of the brokerage team and equipping new, permanent members of staff with the skills necessary to undertake their jobs.

78 The Claimant submitted that the employer cannot rely on objective justification to exclude a fixed term employee. The Tribunal disagrees. Regulation 3(3) FTER provides an objective justification defence if the employer can show that its decisions were a proportionate means of achieving those legitimate aims. This requires the Tribunal to balance the discriminatory effect upon the Claimant against the needs of the Respondent and to be satisfied that the steps taken were appropriate in the circumstances.

79 Even if not shared with the Claimant at the time, the very rationale for the extensions to the Claimant's contract between 5 May 2018 and 26 October 2018 was to enable the release of the permanent brokerage officers for training in children's services whilst maintaining business as usual. It would not be appropriate or proportionate to expect the Respondent then to release the Claimant for the same training, in a service which he would not be supporting as his contract was due to end and he had not secured a permanent role at competitive interview, and require a permanent Brokerage Officer to remain in adult's services providing business as usual instead. The business case for the Claimant's fixed-term employment would thereby be significantly undermined.

80 For these reasons, the decisions to prioritise the permanent Brokerage Officers (Angie, Clare and Fiona) with regard to involvement in children's services and training as set out at issues 3.2b, c and g were objectively justified.

81 The Redeployment and Redundancy Policy is said to apply to all employees, which on its face includes the Claimant as a fixed-term employee. Not all employees will be entitled to the benefit of the policy, for example where the reason for dismissal is their conduct or performance. The policy is limited in application to restructuring and redundancy situations and extends support to potentially redundant employees who have not been matched or selected into posts. The Claimant, however, was not at risk of redundancy in a restructure. He was a fixed-term worker whose contract, although extended, was expiring upon effluxion of time and would not be renewed. This was a dismissal but the reason would be some other substantial reason, not redundancy, and so failure to apply the policy was not a detriment to him. Perhaps more fatally to this claim, however, is the submission of Mr Ross that the Claimant has identified no actual comparator and the FTER do not permit a hypothetical comparator. For these reasons, the failure to redeploy the Claimant was not in breach of regulation 3 FTER.

82 Finally, there is the decision not to extend the Claimant's fixed-term contract in October 2018. As was made clear in **Webley**, the failure to extend is not a detriment as there is no permanent employee comparator. The Claimant's complaint is that Richardo, an agency worker, was extended and that he, a fixed-term employee, was not. Regulation 2 makes clear that a comparator must be employed by the same employer; Richardo was

not. He is not an actual comparator upon whom the Claimant can rely.

83 In the issues set out by Employment Judge Gardiner, the claims under regulation 3 FTER do not include a complaint that the Respondent failed to give the Claimant the appropriate opportunity to secure permanent employment by informing him of vacancies. This was a new matter brought up in the Claimant's submissions and not addressed in evidence. It was not included in the pleaded case and, as such, was not an issue to be determined by the Tribunal.

84 The claims of less favourable treatment because of fixed-term employee status fail and are dismissed.

Employment Judge Russell

7 April 2020