



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON CENTRAL
BEFORE: EMPLOYMENT JUDGE ELLIOTT
MEMBERS: MS L JONES
MR M SIMON

BETWEEN:

Mr C Adekunle Claimant

AND

Argus Software (UK) Ltd Respondent

ON: 29, 30 November and 1, 2, 3 and 6 December 2021
(3 and 6 December 2021 In Chambers)

Appearances:
For the Claimant: In person
For the Respondent: Mr C Khan, counsel

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that the claim fails and is dismissed.

REASONS

1. By a claim form presented on 10 January 2021 the claimant Mr Carl Adekunle brings a claim of race discrimination. He worked for the respondent as a Senior Project Manager from 4 November 2019 to 23 September 2020.

This remote hearing

2. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.
3. In accordance with Rule 46, the tribunal ensured that members of the

public could attend and observe the hearing. This was done via a notice published on Courtserve.net. There were student observers on day 2 who attended at the tribunal building and viewed the hearing by CVP from a room at the tribunal. Otherwise, there were no other members of the public in attendance at this hearing.

4. The parties and observers were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no difficulties of any substance.
5. The participants were told that it was an offence to record the proceedings.
6. The tribunal ensured that each of the witnesses, who were all in different locations, had access to the relevant written materials which were unmarked. We were satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

The issues

7. There were three preliminary hearings prior to this full merits hearing. The first on 13 May 2021 could not take place substantively due to lack of notice to the respondent and the second on 25 May 2021 before Employment Judge Snelson. The third took place on 7 September 2021 before Employment Judge Hodgson who made orders for specific disclosure, granting in part an application made by the claimant.
8. There was an agreed list of issues as follows:

Direct race discrimination, section 13 Equality Act 2010

9. Has the respondent subjected the claimant to a detriment contrary to section 39 of the Equality Act 2010, namely in its decision to dismiss the claimant on 23 September 2020?
10. Has the respondent treated the claimant less favourably than it treated or would have treated a real or hypothetical comparator? The claimant relies on Mr Matthew Sharpe as an actual comparator. Is Mr Sharpe an appropriate comparator for the purposes of the claim?
11. Has the claimant proved primary facts from which the tribunal could conclude in the absence of any other explanation, that the difference in treatment was because of race?
12. Was the reason for the claimant's dismissal because of his race? The claimant describes himself as of Black British origin.

Remedy

13. If the claimant succeeds, the tribunal will be concerned with remedy. What, if any, remedy should be awarded in respect of any proven unlawful discrimination? The tribunal has the power to make a declaration or recommendation and/or the power to award compensation for loss of earnings, taking into account the claimant's duty mitigate his losses and an award for injury to feelings.
14. What, if any, aggravated damages award should the tribunal make?
15. It became clear that we would only be in a position to deal with liability and not remedy at this hearing.

Witnesses and documents

16. There was an electronic bundle of 560 pages.
17. For the claimant the tribunal heard from the claimant himself.
18. For the respondent the tribunal heard from five witnesses:
 - a. Ms Justine Willard, Senior Director of Consulting and the claimant's line manager from June 2020 and the dismissing officer this witness is in USA.
 - b. Mr Justin Bertwistle, Senior Consultant (Consultant at the material time).
 - c. Mr Richard Brammer, Enterprise Account Manager
 - d. Mr Joe Pilletteri this witness is in Canada former Senior Vice President of Global Client Enablement and former manager of Ms Willard.
 - e. Mr Paul Broadley, Vice President of Development, the appeal officer.
19. The respondent produced a witness statement for Mr Matthew Sharpe, Programme Manager and the claimant's comparator. Mr Sharpe's statement had been exchanged with the claimant. Mr Sharpe left the respondent's employment on 26 October 2021 and did not give evidence. We could only attach limited weight to this statement which was drawn up and approved by him before he left the respondent's employment.
20. We had a chronology and a cast list from the respondent. We asked for an organisational chart and some racial statistics for the respondent and these were provided on day 3. We also asked whether there was any documentation to assist us with the comparator issue. This had been dealt with in the Order made by Judge Hodgson on 7 September 2021. The respondent undertook a further search during this hearing and was not able to locate any such documents prior to the close of evidence.
21. In addition on day 3, the claimant applied for copies of the Job

Descriptions of himself and his comparator. After hearing from both parties, we made the unanimous decision to refuse the application. The reason for this was because the claimant accepted and the parties agreed that both the claimant and Mr Sharpe were subject to the same performance criteria. We took the view that seeing the Job Descriptions would not assist us any further.

22. We had written submissions from the parties to which they spoke. All submissions were fully considered whether or not expressly referred to below.

Findings of fact

23. The claimant worked for the respondent as a Senior Project Manager. His employment commenced on 3 November 2019 and his remit covered Europe, the Middle East and Africa (EMEA). He was responsible for delivering complex projects with clients across EMEA. He has a first class degree in Computer Science as well as a PhD in Computer Science and is certified as a Project Management Professional. The claimant has over 12 years' experience delivering projects across a number of industries.
24. The claimant's employment ended on 23 September 2020. The respondent said that the reason for dismissal was poor performance and the claimant's case was that the reason for dismissal was his race. He describes himself as Black British.
25. The respondent is a commercial real estate software provider and is part of the Altus Group, which is a worldwide organisation with Headquarters in Toronto. The respondent employs around 150 people in the UK. The respondent also works with others across global teams who are not based in the UK and the workforce is around 221 people. The Group employs around 2,000 people worldwide.
26. The claimant's first interview was with his original line manager Ms Locascio followed by an on-site interview at which his comparator Mr Sharpe and another Senior Project, Ms Jamieson were in physically present. We were told that Ms Jamieson is also black. The more senior interviewers, Ms Locascio and Ms Justine Willard, who became in line manager in June 2020, joined by telephone. Ms Locascio was US based and not in the UK. Ms Willard was UK based until September 2020 when she became US based.
27. There was a question as to whether a third interview was necessary, but it was not and the claimant was offered the role. The claimant's view was that it was Ms Locascio who made the decision to employ him. Ms Locascio was Ms Willard's direct report. We find that Ms Willard was a decision maker in relation to the recruitment of the claimant.

28. In November 2019 there were three Project Managers reporting to Ms Locascio, two of whom were black, the claimant and Ms Jamieson and one of whom was white, Mr Sharpe. In 2020 the respondent carried out a restructure which led to redundancies. Ms Jamieson and two other white Project Managers were dismissed through this exercise.
29. The claimant's case is that the members of the respondent who were racially prejudiced against him were Ms Willard and her line manager Mr Pillitteri, the Senior Vice President of Global Client Enablement. The claimant was asked if any of his other colleagues were racially prejudiced against him and he said not to his knowledge.
30. Ms Willard first heard of concerns about the claimant's employment within the first two months when his then line manager Ms Locascio told her that she was having difficulties with the claimant not wanting to come into the office.
31. The five projects for which the claimant was responsible were called Orbitas, Helaba Invest, Savills IM, Chelsfield and St Modwen. The last two projects were not in issue in these proceedings.
32. There were five or six members of the team in which the claimant worked. He was the Project Manager on the five projects mentioned above. His role was to manage the work set out in the Statement of Works, create and track the project plan and deal with any issues arising. There are regular internal team meetings and external meetings with the client. The team includes "*consultants*" who have the expertise on the software and who customise it for the client's needs. Mr Justin Bertwistle was the lead consultant on the Helaba project with Mr Richard Brammer as the senior sales consultant, who "*owned*" the relationship with the client. The claimant's role was to lead the work with this team.
33. A project generally lasts 8-12 months and the respondent gauges the ability of a Senior Project Manager by his or her ability to close a project to the client's satisfaction. The parties agreed that there are three criteria for measuring success for a Project Manager: client satisfaction, coming in on budget and completing the project on schedule.

The claimant's probation review

34. It was not in dispute that on 7 February 2020 the claimant passed his three month probationary period. He had a review meeting with Ms Locascio, the record of which was at page 132. Ms Willard had expressed some concerns to Ms Locascio prior to the decision that the claimant should pass his probationary period, but she left the decision in Ms Locascio's hands as the line manager.
35. The grades that could be given on the review were U – Unsatisfactory,

P – Poor, S – Satisfactory, G – Good and E – Excellent. Aside from a few criteria marked as not applicable, the claimant scored S as satisfactory in 8 categories and G as good in 2 categories. The claimant agreed that he was still in training at this stage in February 2020 and he said there was much to learn.

36. The claimant signed the probation review on 10 February and Ms Locascio signed it on 12 February 2020.
37. We saw that on 11 February 2020 a client sent the claimant an email, copied to a large number of individuals at the respondent, including Ms Willard, raising a query on the Savills project (page 136). Ms Willard sent an email to the claimant saying: “*Last week when Niall and I spoke, it was communication that the report would be fully tested and could be delivered to SIM by end of week. What’s changed?*”. It was put to the claimant that he had made promises to the client and under-delivered. The claimant denied this and said it was not he who had made promises to the client, he thought it was Ms Willard who had done this.
38. On 27 February 2020, shortly after the claimant passed his probation, a lengthy concern was raised by the client on the Orbitas project by email (page 147). It was addressed to Mr Pillitteri and Ms Willard. The client was concerned about the lack of continuity on the project with a number of departures from the respondent and ongoing delays. The client said he was concerned whether the project would ever see completion. There were no specific criticisms of the claimant personally in this email.
39. There was a dispute between the parties as to whether Mr Pillitteri had conversations with the claimant in March 2020 about his performance. If Mr Pillitteri did have performance related conversations with the claimant in March 2020, we find that he was not sufficiently clear with the claimant for him to understand that his performance was in question.

The Helaba project

40. As set out above the claimant was the Project Manager for this and Mr Brammer was the account manager. The claimant said in evidence that he did not believe that Mr Brammer was racially prejudiced against him. Helaba was a new client to the respondent and was business that Mr Brammer had won. Mr Brammer first met with this client in February 2019 and reached an agreement with them in December 2019, not long after the claimant joined.
41. The project involved incorporating two software products to create a bespoke arrangement for the client. Mr Brammer said that within three months of the claimant joining, he started to have concerns about his performance.

42. The claimant's counterpart at Helaba, was a Mr SS who was the client's internal Project Manager. Mr Brammer was initially concerned about the claimant's relationship with Mr SS as he did not see in the claimant any rapport, industry knowledge or product experience. Mr SS told Mr Brammer that he initially got on well with the claimant but was concerned about his knowledge of the industry and product experience. Mr Brammer accepted that the claimant was new to their business and said that in his experience a new joiner should gain a good overview in about 4 weeks.
43. Mr Brammer said that the claimant would often have one to one meetings with the client without informing him and that the claimant discussed a substantial change to the work without telling him. The claimant denied this and took the tribunal to the meeting invitations which were recurring meeting invites, to which Mr Brammer was added as an optional invitee.
44. Mr Brammer agreed that this is what the invitations showed, but the documents did not show when his name was added as an invitee and it did not show that he actually attended the meetings. Mr Brammer's evidence was that he was told by SS by telephone that meetings were taking place between himself and the claimant and the discussions were of a commercial nature, which Mr Brammer as the Account Manager should have known about. Mr Brammer said that the claimant gave incorrect information to the client.
45. One of Mr Brammer's complaints was that the claimant told the client that one of the respondent's products had been "*blacklisted*". The client was experiencing problems in terms of emails not getting through. We were taken to an email from the claimant to the client dated 27 February 2020 copied to Mr Brammer and others (page 156), saying "*Justin has escalated the issue internally and Richard and I are involved in understanding and finding a solution. At the top level, it seems related to AWS IP addresses and blacklisting.*" The claimant disputed that he had told the client that the product was blacklisted and said that the comment did not necessarily mean that the problem related to the respondent's software.
46. The client replied "*Thanks for getting back on this. Quite interesting just started and already blacklisted*". Mr Brammer stepped in to the email correspondence to seek to reassure the client (page 154).
47. On 9 March the client told the claimant that the problem had become more persistent (page 153) and we saw Mr Brammer's email of that date to technical colleagues saying: "*Sorry guys I told Carl all of this and he just ignored me ... not happy*". The claimant's evidence was that he did not know what this was about.
48. Mr Brammer also contended in his evidence that the claimant was not

detail orientated and would attend meetings when not needed which Mr Brammer considered was in an effort to increase his billable hours. Mr Brammer was critical of the claimant's manner with clients which he said could be quite forceful and short and that he did not interact well with other members of the team.

49. On 14 April 2020 Mr Brammer emailed Ms Willard about the Helaba project and his concerns about the claimant including his view that the claimant had his "*wires crossed*" in relation to the client's requirements. Mr Brammer's evidence was that the claimant had said that the client was not going to use their Voyanta reporting product and this caused a huge worry to the client because they were planning to use this product. Mr Brammer had to spend time correcting the position and reassuring the client. In evidence the claimant said he could not recall this.
50. In the email of 14 April (page 205) Mr Brammer told Ms Willard, speaking of the client: "*Luckily these guys are nice and could see the issue but hasn't looked like our team are fully aligned. Is there an architecture diagram done for Helaba that Carl can see? Also is it worth suggesting that no definitive statements or comments should be made unless someone is 100%? I know hes new and likely the reason for this but i don't think we have many lives left with this client until they kick off.*" We find that in April 2020 Mr Brammer was raising performance concerns about the claimant on the Helaba project.
51. Mr Brammer also said that the claimant could be a little too forceful with members of the team, telling them how to do things when he lacked the knowledge of the product or the way their systems worked and that the claimant also raised his voice to the team. Mr Brammer understood that the claimant wanted to stamp his authority on the team but it meant that Mr Brammer had to spend time coaching and trying to help the team when they felt concerned about how the claimant had spoken to them.
52. On 26 August 2020 the claimant was included in a thank you email from Mr Brammer to the team, copied to the Helaba client thanking everyone for sorting things out on the project. The claimant saw this as contradictory to the suggestion that he was not performing well (page 518). Mr Brammer explained that he was replying to an email from the client and he was not going to say in an email that went to the client, "*team you did an amazing job, but Carl you let the team down*". Mr Brammer said that if he had wanted to be "*mean*" he could have left the claimant out of this email but he chose not to do so. We find that this email does not show that there were no performance concerns with the claimant. This was an external email to the client and we find that the respondent is unlikely to wish to reveal to their client, any performance issues they may be having internally.
53. At around the end of May/beginning of June 2020, the claimant's line

manager Ms Locascio had a conversation with Ms Willard as to her thoughts about putting the claimant on a Performance Improvement Plan (PIP) because of her mounting concerns about the claimant's performance. Ms Locascio asked for Ms Willard's assistance in collating some information. Ms Willard spoke informally with a number of people in the team and in particular to Mr Bertwistle as the lead consultant. Ms Willard was aware that Mr Bertwistle had spoken to his own line manager Mr Niall Harris about his concerns about the claimant's performance and it was through a conversation with Mr Harris that Ms Willard decided to contact Mr Bertwistle. Ms Willard asked Mr Bertwistle to confirm the content of their conversation in an email.

54. Mr Bertwistle sent the email to Ms Willard on 4 June 2020 giving feedback on his experience of working with the claimant on Helaba (page 244). Mr Bertwistle said that he found the claimant difficult to contact during the preceding two weeks but that had been resolved. He set out the following concerns:

*"- Carl does not engage well with clients, coming across as quite rigid and almost uncomfortable in calls.
- Carl struggles with his knowledge of what is required for the project, this leads to him occasionally repeat items which have already been discussed during calls with a client, or to form incorrect conclusions about what is required from the content of the call.
- Unlike other PMs Carl does not come across as a 'team-player' who digs in and helps out, nor do I feel he supports the consultants other than with providing hours.
- Carl can sometimes 'drop you in it'. There have been a couple of occasions where I've forewarned Carl on items that the client will likely wish to discuss for example Helaba and managing the expectations of what is included in the SoW, or an email that will need to be responded to before the client follow's up. However Carl appears to responding to these situations and has been known to raise them on a call unexpectedly and then go silent, leaving the consultant to handle the matter.
- Carl often cancels meetings, sometimes suddenly, even though I have sent items which need to be discussed. When I speak with the client the same day, they seemed surprised that Carl had cancelled the call.*

Overall, it is my feeling that Carl could be struggling and is maybe not fully engaged."

55. The claimant did not consider Mr Bertwistle to be racially prejudiced against him and said their working relationship was professional and they sometimes had more personal conversations. The claimant complained that there was a lack of specifics in what Mr Bertwistle had said to Ms Willard. The claimant denied that he was not available to be

contacted during working hours. He did not recall “*dropping Mr Bertwistle in it*” as Mr Bertwistle had said.

56. The claimant said he found it painful to read Mr Bertwistle’s statement as he was not aware that he was doing anything to put him under pressure. Mr Bertwistle found working with the claimant exceptionally difficult and this had a significant effect upon him in that it triggered problems for him with an underlying health condition.
57. On Mr Bertwistle’s complaint that the claimant had a tendency to cancel meetings at the last minute, the claimant said that the bundle contained 13 examples of meeting cancellations and all but one was due to the client requesting the cancellation. He said that reasons were always given in the notification for the cancellation.

Meeting with Ms Willard on 12 June 2020

58. On 12 June 2020, upon becoming his line manager, Ms Willard held a telephone meeting with the claimant to inform him about recent changes in the organisation and to address some performance concerns. Her record of this meeting was set out in an email of that date to HR Business Partner Ms O’Doherty and to her own line manager Mr Joe Pillitteri (page 248). The concerns set out by Ms Willard in that email were:

- 1 . *Concerns with familiarity of what is required to move a project forward. Carl asked if this was project/task related or product related. I confirmed it was both however the primary focus was on the concerns about managing the project tasks/scope.*
2. *Cancelling meetings suddenly/last minute.*
 - a. *Carl stated he only thought this happened once. I told him there were accounts from both Client and internal but did not provide specifics.*
3. *Concerns that he is not generally available during business hours or seems to take calls while on the road/out and about.*
 - a. *He stated that he normally tries to keep business hours and his calls are generally limited to Jabber/WebEx as he does not have a company phone. He also stated he’s willing to take calls from his personal mobile. I said we could look into a company mobile but that the expectation was he keep normal working hours in a WFH environment. If he needed to take partial days for personal reasons I suggested he take his available leave. I asked if there were any factors we as a Company should be aware of that might interrupt his ability to WFH, he said there were none.*
4. *Timeliness and responsiveness to communication.*
5. *Effectiveness of communication with Clients.*

59. The claimant’s complaint about the meeting with Ms Willard on 12 June was the lack of specifics to enable him to do something about it and

that she spoke to him in themes or generalisations. The claimant was asked whether he said that Ms Willard's failure to provide him with more detail was because of his race. He initially said "you will have to ask her that". When it was explained to the claimant that counsel for the respondent would not be asking Ms Willard this, he said that it was his case that she spoke to him in "themes" or generalisations, because of his race.

60. The claimant asked Ms Willard why he was not placed on a PIP if that had been Ms Locascio's thinking. Ms Locascio left the respondent on or about 8 June 2020 and her departure came as something of a surprise to Ms Willard. Ms Willard took advice from HR who told her that as the claimant did not have his two years service, or "tenure" as she put it, the respondent was not obliged to follow a performance process and they could just "let him go".
61. On 12 June 2020 Ms Willard sent an email to Ms O'Doherty copied to Mr Pillitteri (page 248) confirming the content of her conversation with the claimant. The email was sent at the request of HR. It said:

"I wanted to make you aware that I had a call with Carl Adekunle this morning regarding the recent changes in the organization and also to address performance concerns which have been raised from both internal team members and Clients. I did not provide Carl with specific examples about performance concerns which have been raised but talked in more general themes. We discussed the following at a high level:

- 1. Concerns with familiarity of what is required to move a project forward. Carl asked if this was project/task related or product related. I confirmed it was both however the primary focus was on the concerns about managing the project tasks/scope.*
- 2. Cancelling meetings suddenly/last minute.*
 - a. Carl stated he only thought this happened once. I told him there were accounts from both Client and internal but did not provide specifics.*
- 3. Concerns that he is not generally available during business hours or seems to take calls while on the road/out and about.*
 - a. He stated that he normally tries to keep business hours and his calls are generally limited to Jabber/WebEx as he does not have a company phone. He also stated he's willing to take calls from his personal mobile. I said we could look into a company mobile but that the expectation was he keep normal working hours in a WFH environment. If he needed to take partial days for personal reasons I suggested he take his available leave. I asked if there were any factors we as a Company should be aware of that might interrupt his ability to WFH, he said there were none.*
- 4. Timeliness and responsiveness to communication.*
- 5. Effectiveness of communication with Clients.*

Aside from the concerns I raised I asked Carl if he had any questions about the transition. His only question was who would help manage the resource pool. I said we would circle back on this next week.”

62. It is not in dispute and as stated in the email, that Ms Willard spoke to the claimant in using general themes rather than specifics about his performance.

Meeting on 19 June 2020

63. On 19 June 2020 the claimant attended a meeting with Ms Willard and Mr Pillitteri during which he was told that there were both internal and external complaints about his performance. They repeated the themes that had been discussed on 12 June. The claimant accepted (his witness statement paragraph 13) that Ms Willard gave him an example of a concern she had with his management of the Orbitas project. This was that the project estimate did not convey sufficient information about when the project would be completed or how many hours would be needed.
64. On 22 June 2020 Ms Willard sent an email to Ms O’Doherty and Mr Pillitteri saying: *“What are the next steps to move things forward? You previously mentioned that we likely do not need to introduce a PIP. Joe is on holiday this week but want to make sure we have our ducks in a row so he can action things upon his return”* (page 255). We were not taken to Ms O’Doherty’s reply.

The Orbitas project

65. The Orbitas project which the claimant had joined in January 2020, was discussed at the 19 June meeting and the estimates he had been providing for the project. The claimant accepted in evidence that he was told about this and was told that his work on this project was giving rise to concerns. The claimant accepted that he understood that he needed to improve his work on the project.
66. There was some frustration on the part of the client at the way the claimant was handling the matter. On 10 March 2020 the client emailed the claimant saying *“Hi Carl, As I explained (twice) at the end of our call and on your subsequent call, I will handle this. Nothing further is required from your end at this time.”* The claimant said that this was because the client’s internal team were doing work that he thought they should not be doing and he had told them this.
67. On 16 March 2020 the claimant sent an email to the team on the Orbitas project copied to Ms Willard and Ms Locasio, saying that they would be restricting meetings on this project because there were a limited number of billable hours available (page 179). The amount of billable hours is agreed at the outset in the Statement of Works and to exceed that limit either means renegotiating with the client or using

non-billable hours. By March 2020 the claimant was reaching the end of the limit of billable hours. His role as the project manager was to manage the scope of the work and the hours used.

68. Ms Locascio asked the claimant to keep an eye on the hours because if they ran out then they would be into non-billable territory. The claimant set up a plan for two non-billable tasks (page 177). On 19 March 2020 Ms Willard asked the claimant for an estimate of how much they would be “over” the billable hours on the project (page 176). On 25 March, having had no reply, Ms Willard chased for a response on this. The claimant accepted that he had missed the email of 19 March. On 25 March Mr Pillitteri chased Ms Willard for the information so that he could manage the client relationship.
69. The claimant replied on 25 March giving his prediction. On two aspects he estimated 60-80 non-billable hours and on the remaining third aspect he gave no estimate (page 175). Based on this information Mr Pillitteri and Ms Willard decided to round it up to 100 hours in terms of their estimate to the client.
70. On 23 June the claimant sent an email to Ms Willard saying that although Orbitas had a closing date of the end of June, “*this is borderline and the project may go into the first week of July*”. Ms Willard was keen to offer the support he needed replying the same day, despite the commencement of her maternity leave, saying: “*Can you elaborate on which resource you need Joe or I to speak to? I will happily reiterate the messaging to push the project to closure for month end*” (page 263). Ultimately the project had to be extended until the end of December 2020.
71. By 10 September 2020 the claimant told Mr Pillitteri the following:

*“Reported non-billable hours (as of 10 Sept 2020): 450.25 hours.
Estimated hours to end of project: 364 hours (Discussed on 05 Aug 2020)
Estimated total non-billable hours: 814.25 (450.25 + 364)”*
72. The claimant did not accept that by March 2020 he had been told to work on closing the project. Ms Willard’s evidence was that month to month the claimant told her that the project was about to close. We find that in May 2020 he had given the close date for the project as 30 June 2020 (page 260) and by 10 September 2020 he estimated completion in December 2020 (page 471).
73. It cost the respondent around \$200,000 to run the project between February and September 2020. It was massively overbudget and beyond schedule. Ms Willard calculated the cost as the equivalent of two years’ salary for the claimant. Ms Willard said that the claimant had failed to alert management to the problems so that they were not able to step in and manage it more effectively. The claimant was asked in

evidence, based on two of the criteria for a good Project Manager being managing on budget and on schedule, did he agree that he was not doing a good job? He said: "*based on those two criteria, no*". In terms of the third criterion, there had also been a client complaint by phone to Ms Willard. In submissions the claimant did not dispute that Orbitas was overbudget and behind schedule (paragraph 6). He disputed that there was a client complaint because he had not seen a written record of it. Ms Willard said it was a telephone call and we find for reasons set out below, that Ms Willard did receive such a call.

74. Ms Willard went on maternity leave for a short period of just over two months commencing on 22 June 2020 and returning on 1 September 2020. There was some confusion as to whether Mr Harris or Mr Pillitteri was responsible for the day to day management of the claimant during Ms Willard's short maternity absence but we considered that nothing turned on this in terms of the matters in issue. There was also a dispute as to whether Mr Pillitteri held weekly one to one meetings with the claimant while Ms Willard was away. Again for the same reason we did not find it necessary to make a finding of fact upon this.
75. Mr Pillitteri's evidence was that during July and August 2020, while Ms Willard was away, the claimant's performance did not improve. The Orbitas project was relatively small for the respondent and not overly complex, involving about \$235,000 in revenue. Ms Willard's expectation was that a Senior Project Manager should be able to manage it without difficulty.
76. When Ms Willard returned from maternity leave in early September 2020 she received a call from the client on the Orbitas project asking that the claimant be removed from a series of meetings. The client told Ms Willard that he had serious concerns about the claimant's ability to lead the project.
77. In late August 2020 a decision was made to remove the claimant from the Helaba project. The client called Mr Brammer to say they had concerns with the claimant's approach, they found him difficult to work with and they had been unhappy with his performance from the outset. They also told Mr Brammer that they had concerns about his knowledge of the product. It is not in dispute that Helaba did not expressly ask for the claimant to be removed from the project, they raised the problem with Mr Brammer to leave the decision with the respondent as to what to do. We find there were two decision makers on this. The first was Mr Brammer, based on paragraph 11 of his statement, where he said "*we took the decision to remove the claimant from the project*". The claimant did not assert that Mr Brammer was racially prejudiced against him. We find on a balance of probabilities that the second decision maker was Mr Pillitteri as he said that he told the claimant about the decision and referred to the "*company's decision*" to remove him. Ms Willard was on maternity leave and Mr Pillitteri was the most senior manager overseeing the project.

78. Mr Brammer found a replacement Project Manager who was a senior consultant and a third party contractor. Mr Brammer received a call from the client shortly after she joined, to say that they were happy with the new Project Manager.

The decision to dismiss

79. Over the course of July and August 2020 Mr Pillitteri and Ms Willard noted that the claimant's performance had not improved. When Ms Willard returned from maternity leave in early September she received a call from Orbitas asking that the claimant be removed from a series of meetings because they were concerned that he did not have the necessary expertise. Ms Willard and Mr Pillitteri began to review the claimant's work and they saw the extent of the problems on Orbitas which was nearly 10 times over budget and had still not closed.
80. On 10 September 2020 the claimant sent an email to Mr Pillitteri setting out that the non-billable hours already spent amounted to 450, several times over the 60-80 estimate which he had given six months earlier in March and he estimated a need for a further 364 hours (page 471). The total was 814 non-billable hours to finish the project. This meant that Mr Pillitteri had to go to the client to ask for more money.
81. Mr Pillitteri replied saying: "*This plan just burns another 100 hours with no gain*". The claimant accepted that Mr Pillitteri was frustrated with him but said that there were justifications for what happened.
82. Mr Pillitteri's evidence was that in addition to the problems on Helaba and Orbitas, the Savills client was not happy with the claimant in terms of the communications they were receiving and he had to put in a senior consultant to manage the relationship.
83. Following a review of the claimant's work, Ms Willard and Mr Pillitteri jointly made the decision on 23 September 2020 to terminate the claimant's employment. Mr Pillitteri said that they considered dismissing the claimant earlier, but they needed to find a suitable replacement to avoid any further impact on the clients. In his oral evidence on day four, Mr Pillitteri sought to take sole ownership of the decision to dismiss but this was not what he said in paragraph 11 of his witness statement: "*Towards the end of September, myself and Justine took the decision to dismiss the Claimant from his employment*". We also noted that in paragraph 12 of her statement Ms Willard said "*we took the decision to dismiss the claimant*". Based on their respective witness statements we find that Mr Pillitteri and Ms Willard were joint decision makers and it was not Mr Pillitteri alone.
84. The dismissal letter was at page 499, sent by Ms O'Doherty, the HR officer. The claimant was told that the reason was his performance and specifically the following.

- “1. Concerns with familiarity of what is required to move a project forward, both project/task related and product related, although the primary focus was on the concerns about managing the project tasks/scope.*
- 2. Cancelling meetings suddenly/last minute - accounts had been provided from both client and internally.*
- 3. Concerns about general availability during business hours or the perception of taking calls while on the road/out and about.*
- 4. Timeliness and responsiveness to communication.*
- 5. Effectiveness of communication with Clients.*

Justine has now returned from maternity leave and outlined that she is still hearing concerns from projects about your performance, both from internal and external parties. Justine referred to one example where you had provided incorrect estimates and a project which had originally been estimated at 80 hours eventually overrun by 800 hours. Overall, the feedback being received was that you were not managing expectations or working the projects correctly. Given the lack of progress since June the decision was made to terminate your employment effective immediately.”

85. Mr Pillitteri described the reason for dismissal in oral evidence as follows: *“I had to go through the requirements of the business and look at the capacity that we had and what was best. In your case, you were let go for non-performance and concern from clients and the risk that you were putting the company under because of the lack of financial control and transparency on what was going on. That was the reason for your termination and you know that we brought you on to take these tough decisions and unfortunately you didn’t perform”.*
86. The claimant was not required to work his notice period of one month and was paid in lieu. He was also given some outplacement assistance.
87. The claimant accepted in evidence that the five points set out in the dismissal letter mirrored the themes discussed with him by Ms Willard on 12 June 2020.

The appeal against dismissal

88. On 28 September 2020 the claimant appealed against his dismissal by email to Ms Mistry, an HR Business Partner (page 503-504). This was the first time the claimant raised the allegation of race discrimination.
89. The appeal officer was Mr Paul Broadley, Vice President of Development supported by Ms Mistry from HR. An initial appeal meeting took place on 13 October 2020 when Mr Broadley told the claimant that his complaint of race discrimination would be investigated. Mr Broadley held investigatory meetings with a number of people

including Mr Sharpe, Ms Willard and Mr Pillitteri. The matter of the process followed was not in issue for us. The claimant asked why Mr Broadley spoke to Mr Sharpe and he explained that it was to investigate the circumstances of his removal from the Allianz project, as Mr Sharpe was the claimant's comparator. Whilst we considered that it was not good practice from a process point of view for Mr Broadley to hold an investigation meeting with both Ms Willard and Mr Pillitteri at the same time, we were not concerned with process in this case.

90. On 30 October 2020 Mr Broadley sent his appeal letter (page 547-548). He told the claimant that he did not uphold the appeal in relation to failing to follow process. This matter was in any event not in issue for us. In relation to his complaint that he had been treated less favourably than Mr Sharpe, Mr Broadley said:

"I now inform you of my decision on your appeal in relation to the other ground cited by you in the appeal hearing and email, specifically that your dismissal was unfair because we did not follow our Disciplinary policy. In relation to this first ground of appeal, I find there is sufficient evidence that you were provided with adequate feedback on your poor performance and were given the opportunity to improve. You did not proactively manage projects, especially around the billable and non-billable hour and causing a huge financial loss of approximately \$168,000(USD) for the Altus Group on the Orbitas project. As an organisation we are not bound to follow every part of the Disciplinary and Grievance process. Your performance had been discussed with you and were given the opportunity to improve but didn't and were subsequently dismissed because of your poor performance.

As stated above in detail, in terms of your allegation relating to race discrimination I find no evidence to substantiate your claim and do not uphold it. It is clear that Matthew Sharpe was never removed from the Allianz project based on performance. Matthew continues to bill hours against this project (time sheets have been shared with you) and continues to be part of the SteerCo meeting as well,"

The claimant's comparator

91. The claimant's comparator was Mr Matthew Sharpe, who the tribunal was told is white. He worked for the respondent in total for about 2.5 years and held the same job title as the claimant as a Senior Project Manager. He left the respondent's employment on 26 October 2021 having resigned on 27 September 2021. We had a statement from Mr Sharpe. He had left the respondent's employment by the date of this hearing and chose not to give evidence. As we did not hear from him, we could only attach limited weight to the content of his statement.
92. The claimant drew a comparison with Mr Sharpe's involvement on a the Allianz Project. Mr Sharpe started work on this project in January 2019.

Mr Pillitteri said it was the most complex project on which he had worked in 40 years and it was ongoing having gone through a number of changes. He said that by comparison, whilst Orbitas was worth less than \$300,000, Allianz was worth around £7.4million. The Allianz project was not overbudget or beyond schedule. The claimant disputed this saying in submissions that it was "*common knowledge*" that it was overbudget and beyond schedule. It is not a project that he was involved with and it was raised for the first time in the claimant's submissions. We did not have this in evidence and we make no finding that Allianz was overbudget.

93. It is not in dispute that Mr Sharpe's role changed in relation to the Allianz project. Ms Willard made reference to Mr Sharpe being "*removed*" from the project but she qualified this, saying that his role changed. There is no dispute that he was removed from his role as the Project Manager. He continued to bill work on the Allianz project after he ceased being Project Manager, he remained on the steering committee for the project and stayed on in an advisory capacity because he had the background knowledge.
94. On Ms Willard's evidence we find that when Mr Sharpe was removed as Project Manager on Allianz, like the claimant he had less than two years' service.
95. We did not hear from Mr Sharpe. Mr Brammer's oral evidence was that it was more about wanting a "*fresh face to invigorate the project*". He said he spoke to COO of Allianz about it, but he was not told the reason why they wanted a fresh face.
96. Mr Pillitteri was the senior executive in charge of the Helaba project. His evidence was that the project was not overbudget or behind schedule. It was subject to multiple Change Requests. Mr Pillitteri held regular quarterly meetings with the respondent's own Chief Executive and the COO of Allianz, Mr AS. The meeting in relation to Mr Sharpe was held at the respondent's Headquarters in Toronto. Mr AS of the client asked if they should move Mr Sharpe from the face to face operation of the project because of a conflict between Mr Sharpe and the client's project manager – we refer to him as "T". Mr Pillitteri had been helping to navigate that conflict over the previous 4 to 5 months and agreed it made sense to move Mr Sharpe, that T should remain in place from the client's side and Mr Sharpe would stay on for transitioning his replacement and oversight of the project. Nothing was put in writing. Mr Pillitteri described it as a "*gentlemen's agreement*" between the three of them around the table and Mr Pillitteri agreed to implement this.
97. Mr Pillitteri's experience is that it is common to have conflict on projects, they weighed the options and due to the complexity of the client's business it made sense to leave T on the project and move Mr Sharpe. They brought in Mr Wallbridge as the new Project Manager

from the respondent's side; Mr Sharpe was involved in the recruitment of Mr Wallbridge and they worked together on the project for 3 months to allow Mr Wallbridge to build up his understanding of the workstreams. The transition plan was at page 533. Mr Sharpe continued to bill time to the project.

98. Mr Pillitteri said that it was not a performance issue with Mr Sharpe. From his point of view, Mr Sharpe had good self-awareness about the conflict with T and they did have a working relationship even though they were at odds. He thought Mr Sharpe did a good job at fielding unreasonable requests from T and delivering the messages from their side which was not always easy. By way of example there was a disagreement over a reporting system, ARES, which T did not like. Mr Sharpe was able to explain why they recommended it.
99. Mr Pillitteri was asked whether he received feedback from Allianz on Mr Sharpe's performance. He said he was very involved in the project, attending on-site meetings with the client every six weeks, prior to the pandemic when it was no longer possible to fly. He was actively involved and spoke to all the key players on the team for feedback. We find based on his evidence that he did receive feedback on Mr Sharpe's performance.
100. Our finding of fact is that Mr Sharpe was not removed from the Allianz project. He was moved into a different and lesser role than Project Manager whilst retaining oversight and steering of the project. He helped to recruit his replacement into that role. He continued to bill time on Allianz after the change of role as we saw from the time sheet at page 395 for August and September 2020. We find on Mr Broadley's evidence that Mr Sharpe continued to attend client facing meetings with Allianz after he ceased to be the Project Manager, although not to the same degree.

The reason for dismissal

101. We find as a fact that the reason for the claimant's dismissal was poor performance and not his race. Our reasons are as follows.
102. We find that the claimant satisfied the initial burden of proof. There were issues with Mr Sharpe on Allianz and he remained in employment. There were issues with the claimant on Orbitas and Helaba in particular, yet he was dismissed. This was enough on our finding for the burden of proof to shift to the respondent. We then considered the explanation given by the respondent.
103. The claimant acknowledged that on Orbitas, certainly on the two criteria of on-budget and on-schedule, he did not perform well. Unless he saw documentary evidence of a client complaint, he did not accept it. We find on a balance of probabilities that when the project was so far over budget and schedule, the client was unlikely to be happy and we accept

and find on Ms Willard's evidence that the client did complain verbally to her on her return from maternity leave in early September 2020. This deals with the third criterion of client satisfaction.

104. The client on Helaba had also complained about the claimant as we saw for example from Mr Brammer's email of 14 April 2020. The decision was made at the end of August 2020 by Mr Pillitteri and Mr Brammer that the claimant was to be removed as Project Manager of Helaba and the claimant was told on 3 September 2020 to hand to a new Project Manager. As we have found above, Helaba called Mr Brammer to say they had concerns with the claimant's approach, they found him difficult to work with and they had been unhappy with his performance from the outset.
105. Ms Willard held meetings with the claimant on 12 and 19 June 2020 to bring performance concerns to his attention. The claimant's case was that Ms Willard had a "*hidden agenda*" towards him. We find that if Ms Willard had a hidden agenda, she had opportunities in February 2020 when she could have brought some influence to bear on Ms Locacsio, her direct report, not to pass the claimant's probation, or in June 2020 when she brought performance concerns to his attention. Instead, on 23 June she asked the claimant what resourcing he needed to help him (page 263 quoted above). We find that Ms Willard did not have a hidden agenda.
106. We took into account that when the claimant joined, two out of three Project Managers in his team were black and Ms Willard recruited the claimant. Ms Jamieson's employment terminated during a restructure during the pandemic along with two white Project Managers. We drew no adverse inference from this.
107. It was agreed between the parties that client satisfaction was one of three performance criteria for a successful Project Manager. On the issue of the comparison with Mr Sharpe, there was a client relationship issue which was narrow and this was the relationship with the internal project manager, referred to as T. The client on Allianz wanted a fresh face for day to day project management. At the same time the client continued to respect Mr Sharpe's overall abilities and wanted a continuation of his steering and oversight which he provided and he attended client facing meetings after his removal as Project Manager. There was therefore a material difference in circumstance between the claimant and Mr Sharpe, in that there were no performance concerns with Mr Sharpe and that is the reason he remained in the respondent's employment.
108. The claimant generated complaints from both Orbitas and Helaba and on Orbitas the project was substantially beyond budget and beyond schedule. The claimant did not meet the respondent's performance criteria for a successful Project Manager.

The relevant law

Direct race discrimination

109. Direct discrimination is defined in section 13 of the Equality Act 2010 which provides that 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.
110. Section 23 of the Act provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.
111. Bad treatment per se is not discriminatory; what needs to be shown is worse treatment than that given to a comparator - ***Bahl v Law Society 2004 IRLR 799 (CA)***.

The burden of proof

112. Section 136 of the Equality Act deals with the burden of proof and provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. This does not apply if the respondent can show that it did not contravene that provision.
113. One of the leading authorities on the burden of proof in discrimination cases is ***Igen v Wong 2005 IRLR 258***. That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.
114. Lord Nicholls in ***Shamoon v Chief Constable of the RUC 2003 IRLR 285*** said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He suggested that Tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.
115. In ***Madarassy v Nomura International plc 2007 IRLR 246*** it was held that the burden does not shift to the respondent simply on the claimant establishing a difference in status and a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase “*could conclude*” means that “*a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination*”.
116. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court endorsed the approach of the Court of Appeal in ***Igen Ltd v Wong***

and *Madarassy v Nomura International plc*. The judgment of Lord Hope in *Hewage* shows that it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other

117. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in *Igen v Wong* approved the principles set out by the EAT in *Barton v Investec Securities Ltd 2003 IRLR 332* and that approach was further endorsed by the Supreme Court in *Hewage*. The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.
118. More recently in *Efobi v Royal Mail Group Ltd 2021 IRLR 811* the Supreme Court confirmed the approach in *Igen v Wong* and *Madarassy*.

Conclusion

119. For the reasons set out above, we find that the claimant was dismissed for poor performance and not because of his race. He was in materially different circumstances to those of his comparator Mr Sharpe. The claim fails and is dismissed.

Employment Judge Elliott
Date: 6 December 2021

Judgment sent to the parties and entered in the Register on: 06/12/2021

_____ for the Tribunal