



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Mhonda

**Respondent:** Asda Stores Limited

**Heard at:** Manchester

**On:** 2, 3 and 5 April 2019

**Before:** Employment Judge Franey  
Mrs D Radcliffe  
Mr S Stott

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Ms R Kight, Counsel

# JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaint of harassment related to race contrary to section 26 Equality Act 2010 fails and is dismissed.
2. The complaint of direct race discrimination contrary to section 13 Equality Act 2010 fails and is dismissed.

# REASONS

## Introduction

1. By a claim form presented on 7 March 2018 the claimant complained that he had been subjected to race discrimination during his work as a security guard for the respondent at its store in Salford. His claim identified incidents in December 2017 and February 2018.

2. By its response form of 11 June 2018 the respondent denied any unlawful treatment of the claimant. It said that it was not liable for any harassment of him by

customers, and nor was it liable if its own employees had harassed him or discriminated against him because it had taken all reasonable steps to prevent that happening. It denied that its employees had done so in any event.

3. The complaints and issues were discussed and identified at a case management hearing before Employment Judge Franey on 23 July 2018. There were three allegations of direct race discrimination, two allegations of harassment related to race by managers, and two allegations that the respondent racially harassed the claimant by failing to take adequate steps to protect him from such harassment by customers.

4. At the preliminary hearing the effect of the “reasonable steps” defence was explained to the claimant. He chose not to apply to bring in any individual managers as respondents. At the start of the final hearing the Tribunal checked with him and that remained his position. The case therefore proceeded against Asda Stores Limited alone.

### **Issues**

5. At the start of the final hearing both parties confirmed that the List of Issues recorded in the Case Management Order remained valid. The issues to be determined by the Tribunal were therefore as follows:

#### **Direct race discrimination**

1. **Are the facts such that the Tribunal could conclude that because of his race the claimant was treated less favourably than a hypothetical comparator, or in the alternative his white British colleague, Nathan, in relation to any or all of the following allegations:**
  - (a) **On 9 December 2017, when the claimant alleges he was told he would be dismissed if he failed to explain or lied about the events of 8 December 2017;**
  - (b) **On 18 December 2017, when the claimant alleges that Tracey Corrigan stopped him from intervening in relation to a shoplifter and accused him of wrongdoing; and/or**
  - (c) **On 13 February 2018, when the claimant alleges he was detained in the canteen by Scott Best and Dominique Clayton for 45 minutes and had his holiday request refused?**
2. **If so, can the respondent nevertheless show that there was no contravention of section 13?**

#### **Harassment related to race – section 26 Equality Act 2010**

3. **Are the facts such that the Tribunal could conclude that on any of the following occasions the claimant was:**
  - (i) **subjected to unwanted conduct;**
  - (ii) **which was related to race; and**
  - (iii) **which had the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?**

- (a) On 8 December 2017 was Tracey Corrigan angry or aggressive towards the claimant and did she say *“I don’t care, you deserve that, and that is what you are”* in response to a customer allegedly saying to the claimant *“being a black African [you] have no right to tell [me] to use the basket”* and *“dick head African get out of my face”*;
  - (b) On 13 February 2018 did Dominique Clayton say to the claimant that she did *“not care that [you are] an African who wants to travel to Africa”*; and/or
  - (c) Has the respondent (through Scott Best and Dominique Clayton) omitted to take adequate steps to protect the claimant from alleged harassment by customers by refusing to assist him on two occasions:
    - (1) On an occasion in 2017 when a female customer shouted at the claimant saying *“you smelling black African, why are you looking at me, do you think I am a thief? Are you a perv? Go away”*.
    - (2) On an occasion in 2017 when a shoplifter or shoplifters called the claimant *“black African”* and kicked him?
4. If so, can the respondent nevertheless show that there was no contravention of section 26?

**Time Limits**

5. If any of the matters for which the claimant seeks a remedy occurred on or before 12 November 2017 (three months before presentation of the claim form allowing for the effects of early conciliation), can the claimant show that:
- (a) It formed part of conduct extending over a period ending after that date; or
  - (b) It would be just and equitable to allow a longer period for bringing the claim?

**Vicarious Liability**

6. If it is found that any of the respondent’s managers have contravened the Equality Act 2010, did that occur in the course of their employment?
7. If so, can the respondent nevertheless show that it took all reasonable steps to prevent them from doing that thing or anything of that description?

**Remedy**

8. If any of the above complaints succeed, what is the appropriate award for injury to feelings and interest?

**Evidence**

6. All the witnesses gave evidence pursuant to a written witness statement.
7. The claimant was the only witness on his side.
8. The respondent called as witnesses Tony Cliffe, the Store Manager; Scott Best, the Deputy Store Manager; Dominique Clayton, a Section Leader at the store; and Tracey Corrigan who was employed as a Service Colleague at the store.

9. We had an agreed bundle of documents running to over 150 pages. A number of documents were added to that bundle by agreement during the hearing and allocated page numbers. Any reference to page numbers in these Reasons is a reference to that bundle unless otherwise indicated.

10. In addition, the parties agreed that the Tribunal should view CCTV footage. It had pictures but not sound. We viewed footage of an incident on 8 December 2017 and further shorter clips of incidents on 16 September 2015, 25 March 2017, 13 August 2017, 9 and 16 September 2017, and 29 November 2018.

### **Relevant Legal Principles**

11. Discrimination against an employee is prohibited by section 39(2) Equality Act 2010:

**“An employer (A) must not discriminate against an employee of A's (B) –**

**.... (d) by subjecting B to any other detriment.”**

12. Harassment during employment is prohibited by section 40(1)(a). By section 212(1) conduct which amounts to harassment does not also amount to a “detriment”.

13. The protected characteristic of race is defined by section 9(1) as including colour, nationality or ethnic origins.

14. Section 109(1) makes an employer liable for anything done by its employees in the course of employment. However, there is a defence available under section 109(4):

**“In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A**

**(a) from doing that thing, or**

**(b) from doing anything of that description.”**

15. In interpreting the Act we had regard to the Code of Practice on Employment issued by the Equality and Human Rights Commission (“the Code”).

### **Direct Discrimination**

16. The definition of direct discrimination appears in section 13 and so far as material reads as follows:

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

17. The concept of treating someone “less favourably” inherently requires some form of comparison, and section 23(1) provides that:

**“On a comparison of cases for the purposes of section 13 ... there must be no material differences between the circumstances relating to each case”.**

18. It is well established that where the treatment of which the claimant complains is not overtly because of race, the key question is the “reason why” the decision or action of the respondent was taken. This involves consideration of the mental processes, conscious or subconscious, of the individual(s) responsible: see the decision of the Employment Appeal Tribunal (“EAT”) in **Amnesty International v Ahmed [2009] IRLR 884** at paragraphs 31-37 and the authorities there discussed. It may be appropriate for the Tribunal to dispense with constructing a hypothetical comparator if it finds that the protected characteristic had a material influence on the detrimental treatment.

### Harassment

19. The definition of harassment appears in section 26 which so far as material reads as follows:

- “(1) **A person (A) harasses another (B) if -**
  - (a) **A engages in unwanted conduct related to a relevant protected characteristic, and**
  - (b) **the conduct has the purpose or effect of**
    - (i) **violating B’s dignity, or**
    - (ii) **creating an intimidating, hostile, degrading, humiliating or offensive environment for B...**
- (4) **In deciding whether conduct has the effect referred to sub-section (1)(b), each of the following must be taken into account -**
  - (a) **the perception of B;**
  - (b) **the other circumstances of the case;**
  - (c) **whether it is reasonable for the conduct to have that effect.**
- (5) **The relevant protected characteristics are ...race”.**

20. The phrase “related to” a protected characteristic was originally introduced as an amendment to the Sex Discrimination Act 1975 in 2008 following the decision of the High Court in **Equal Opportunities Commission v Secretary of State for Trade and Industry [2007] ICR 1234**. Burton J decided that the phrase “on the ground of sex” failed properly to implement the formulation in the amended Equal Treatment Directive (EU/2002/73 EC) which proscribed unwanted conduct “related to” sex. The latter phrase encompassed conduct associated with sex even if not caused by it.

21. As to the kind of behaviour which might contravene section 26, the EAT in **Richmond Pharmacology v Dhaliwal [2009] ICR 724** said in paragraph 22 that

“...not every racially slanted adverse comment or conduct may constitute the violation of a person’s dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which

we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.”

#### Liability for Third Party Harassment

22. The provisions making an employer liable if an employee was harassed by third parties were introduced in 2008 and survived in section 40 of the Equality Act 2010 until its repeal in 2013. Now an employer can be liable for harassment in those situations only if its own failure to prevent such incidents was itself related to race in some way. That was confirmed by the Court of Appeal in **Unite the Union v Nailard [2019] ICR 28**. Underhill LJ said at paragraph 99 that the repeal of the third party harassment provisions meant that

“the 2010 Act, for better or for worse, no longer contains any provision making employers liable for failing to protect employees against third party harassment as such, though they may of course remain liable if the proscribed factor forms part of the motivation for their inaction...”

#### Burden of Proof

23. The burden of proof provision appears in section 136 and provides as follows:

- “(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.
- (3) But sub-section (2) does not apply if A shows that A did not contravene the provision”.

#### Time Limits

24. The time limit for bringing a claim appears in section 123 as follows:-

- “(1) subject to Sections 140A and 140B proceedings on a complaint within Section 120 may not be brought after the end of –
  - (a) the period of three months starting with the date of the act to which the complaint relates, or
  - (b) such other period as the Employment Tribunal thinks just and equitable.
- (2) ...
- (3) for the purposes of this section –
  - (a) conduct extending over a period is to be treated as done at the end of the period;
  - (b) failure to do something is to be treated as occurring when the person in question decided on it.”

#### **Relevant Findings of Fact**

25. This section of our Reasons sets out the broad chronology of events. There were some primary disputes of fact about the core allegations which we will address and resolve in our discussion and conclusions section.

Background

26. The respondent is a well-known national chain of supermarkets with a store in Lower Broughton in Salford which has approximately 39 employees. It is a small but busy store with manual checkouts and self-service checkouts. The management structure within the store consists of the Store Manager (Mr Cliffe), his Deputy (Scott Best) and the Section Leader, Ms Clayton.

27. The claimant became employed by Asda in May 2014 when he was transferred in under the Transfer of Undertakings (Protection of Employment) Regulations 2006. He was already working at the store for an outsourced security provider, Securitas. He had been working in the UK for about ten years by then as a professional security guard. He was registered with the security industry regulatory body, the Security Industry Authority ("SIA"). English is not his first language.

28. When the claimant's SIA registration lapsed it was not renewed. The claimant was adamant that there was a legal obligation for him to remain registered with the SIA and to have a badge number, but he did not establish the source of any such obligation that in our hearing. Mr Cliffe explained that as he was directly employed by Asda he did not need his own SIA badge number or registration. We accepted that evidence.

29. The claimant was not given a uniform until July 2017. He continued using his Securitas uniform after the transfer. Later on a departing colleague gave him an Asda tunic. His white British comparator, Nathan Hewitt, joined Asda in 2017 and was given an Asda uniform straight away.

30. In the period with which we were concerned the claimant tended to work the morning and early afternoon shifts until 3pm, and was followed by Mr Hewitt for the afternoon/evening shift from 3pm to 11pm.

31. The duties of the security guard at the store were to be stationed on a podium near the front door and monitor what was happening in the store by means of CCTV. The role also involved patrolling the store periodically and keeping an eye on people who might be shoplifting, approaching and dealing with them as appropriate. It also included preventing people who had been banned from entering the store. Shoplifters could be apprehended within the store but in general terms were not to be followed out of the store. Each security guard had a body mounted camera which could be activated if a customer was becoming aggressive.

32. Incidents of suspected or actual shoplifting were very common, taking place several times a day. The role of security guard was busy and challenging.

33. In 2016 or 2017 the store received three shortwave radios which were for use by security guards. Mr Cliffe told us that radios of that kind were usually used in much larger stores, and it may have been a mistake that they were provided to his store. In most of the period with which we were concerned there was only one security guard at work at any one time, and therefore the radios were not used.

34. It was made more difficult for the claimant by the fact that he was periodically subjected to racist abuse by customers with whom he was coming into conflict. One elderly woman with a walking stick was known to hold racist views and had been

reported to the police for abusing two Jewish men outside the store. She was known as "Rita". From time to time she would abuse the claimant as being black African and tell him he should return to his own country. She was banned from the store but would return.

### Training and Policies

35. Following his transfer in the claimant signed a number of training record sheets at pages 120-126. They dated from February 2015. At page 120 he signed to acknowledge receipt of the ethics policy. That made provision for an ethics hotline to which members of staff could report any concerns. He signed to acknowledge training on working safely and dealing with violent situations (page 121) and to confirm that he understood the use of the security occurrence book (page 123).

36. In November 2016 he signed to confirm receipt of some training about diversity (page 127).

37. The respondent's diversity and inclusion policy appeared at pages 48-53. It made clear that no form of discrimination, harassment, victimisation or bullying would be tolerated. The protected characteristics under the Equality Act 2010 were specified, including race as referring to colour, nationality, ethnic or national origin. An explanation was given about types of discrimination including direct discrimination and harassment. The policy set out how colleagues should behave, and there was a section headed "taking action in response to unacceptable behaviour". That included the following points:

- **"Whether a complaint is raised formally or not, we must act quickly and professionally to put a stop to it and appropriately deal with those concerned.**
- **Where colleagues are concerned about raising the issue through the grievance process, colleagues can contact Asda Ethics.**
- **If an informal route is not an option to resolve the issue then the formal grievance procedure should be followed.**
- **Document all conversations and investigations as these will provide crucial evidence in any potential Employment Tribunal claims. Take care over the language used – all emails and conversations in respect of the claim are disclosable in the event of a Tribunal."**

38. The disciplinary policy appeared at pages 54-68. One of the examples of gross misconduct was serious harassment, discrimination or bullying of other colleagues.

39. The occurrence book was a notebook in which security guards could record incidents. It was not regularly inspected by managers. However, there was a computer based system known as "Arena" which enabled security guards to report incidents. It required incidents to be categorised but the computer form also had space for the security guard to insert a brief description of what had happened. Entries on Arena were reviewed each Monday by Mr Cliffe. If alerted to an incident he could then consult the occurrence book.

40. We now summarise in date order the series of incidents raised in the claim form or in the evidence. The seven incidents for which the claimant sought a remedy (see the list of issues above) will be highlighted in **bold**.

26 March 2015

41. In his witness statement the claimant said that on 26 March 2015 he told a colleague, Arwin, not to serve a female customer because she had been banned from the shop. The colleague ignored what he said and served the customer anyway. The banned customer said in front of other customers to the claimant:

**“You don’t have any powers in this country, this is not Africa.”**

March/April 2015 – “Idiot” Incident

42. In late March or early April 2015 there was an incident between the claimant and Ms Corrigan. The claimant alleged that she had called him an idiot. Ms Corrigan’s evidence was that she asked the claimant not to speak to her like she was an idiot. However, the claimant complained about this matter and it resulted in a letter of 2 April 2015 (page 119) from the Asda Service Team. The letter apologised for Ms Corrigan having called him an idiot. It said that the claimant's complaint letter (which we did not see) was passed to Mr Cliffe to investigate and take appropriate action. In fact Mr Cliffe was not told anything about it. The claimant accepted that he had not complained that Ms Corrigan was being racist when she called him an idiot.

First Incident August 2017 – “Black African” / Kick

43. The first matter for which the claimant sought a remedy was in relation to an occasion in 2017 when a shoplifter called the claimant “black African” and kicked him. In his witness statement he described an incident of this kind with Rita on 14 July 2017, although there was no mention of her having kicked him. At page 131I there appeared an extract from the occurrence book for 2 September 2017 in which the claimant recorded that the woman who kicked him had come in again.

44. In fact this appears to have taken place and to have been recorded in the Occurrence book in August 2017 at page 131H. The entry made by the claimant on that occasion was as follows:

**“Theft/Assault**

**A woman became nasty after I caught her for stealing wine....CCTV saved.”**

45. He alleged that managers failed to come to his assistance. We will return to this issue in our conclusions.

16 September 2017 Rita

46. On 16 September 2017 there was a further incident with Rita. The occurrence book at pages 131J-131K recorded that the claimant was told that she was in the shop by a colleague and went over to speak to her. She became nasty, saying to him:

**“You come to Africa, why did you come? Is it just for begging money?”**

47. That incident was reported to the police by the respondent.

**Second Incident 19 September 2017 – “perv/stinking African”**

48. The second matter for which the claimant sought a remedy appeared to have occurred on 19 September 2017. The occurrence book entry at page 131L recorded a woman saying to him:

**“You are a perv, stinking African.”**

49. It recorded she went on to accuse him of being a paedophile and that he got no help in the shop. She pushed past him.

50. In his witness statement the claimant explained that he was ashamed to be treated that way in front of other customers, and that Mr Cliffe heard her shouting because he was near but nothing was done. We will return to this issue in our conclusions.

**Third Incident 8 December 2017 – “Dickhead African”/SIA Badge**

51. The third matter for which the claimant sought a remedy occurred on 8 December 2017. The claimant alleged that in a confrontation with a male customer he was told that being black African he had no right to tell the customer to use a basket instead of his own bag to load groceries in the store. He alleges that the customer said to him:

**“Dickhead African, get out of my face.”**

52. The claimant's case was that he reported this to Mr Best. A few minutes later, however, he was approached by Ms Corrigan asking him for his SIA number so that the customer could make a complaint about the claimant. The claimant's SIA membership had lapsed and he had no number. He alleged that he told Ms Corrigan what the customer had called him, and she said:

**“I don't care, you deserve that and that is what you are.”**

53. Ms Corrigan denied this and said that when she approached the claimant for his SIA badge number he was rude to her, accused her of instigating things and said that she was not his manager.

54. The occurrence book note of the incident on 8 December 2017 appeared at pages 131M. In its entirety it read as follows:

**“Tracey – shouting to me I had a problem with a male customer when I stopped/asked him to use our basket. The man was annoyed and shouted ‘dickhead’ to me and he wanted to see my security badge. Discrimination. It went nasty because this man was entertained by Tracey who also wanted to see my badge. She demanded about it. Later went to store manager...”**

55. The claimant completed an Arena report of this at page 132. It simply said that a male who was spotted trying to walk off with shopping became aggressive to the security guard. The issue was solved and no further action needed. There was no mention of any racist element.

56. We viewed CCTV footage of this event. We will return to this issue in our conclusions.

**Fourth incident 9 December 2017 – Witness Statement**

57. That led to the next allegation for which the claimant sought a remedy, relating to the following day when Mr Best asked the claimant to do a witness statement about what had happened. The claimant was given a form which contained an endorsement which appeared in the template witness statement at page 135A as follows:

**“I hereby confirm that the information given in this statement is to the best of my knowledge, truthful, accurate and in no way malicious. I understand that any attempt by me to deliberately mislead or falsify the truth may lead to disciplinary action against myself which may include my dismissal.”**

58. The claimant maintained that the attempt to get him to sign a statement with this declaration amounted to direct race discrimination and we will return to that in our conclusions.

**15 December 2017 - Rita**

59. An Arena entry of 15 December 2017 (page 13) recorded that the old lady “Rita” had come into the store and was told to leave again. It recorded that she had been charged by the police for various crimes including racism.

**Fifth Incident 18 December 2017 – Female Shoplifter**

60. On 18 December 2017 there occurred the fifth incident for which the claimant sought a remedy. The claimant became suspicious of an elderly female customer who went round the store putting items in her own shopping bags instead of loose in her trolley. The claimant saw her push her fully loaded trolley out of the store instead of paying for the groceries.

61. His claim form alleged that he informed Ms Corrigan of this but that she intervened and accused him of doing wrong when he tried to stop her. He said this was done in the presence of other customers and made him feel ashamed. In his witness statement the claimant gave a slightly different account in which he said that Ms Corrigan followed the lady outside, brought her back into the store, and said in front of everyone in the shop:

**“Hey security, you said this woman stole some shopping, here she is now.”**

62. The claimant maintained that this was done by Ms Corrigan on racial grounds to embarrass and humiliate him. He said she had not done it to any of the white British guards.

63. Ms Corrigan had no recollection of this incident.

64. The occurrence book entry for this event was found at page 131N. It recorded that an old lady in her 70s had walked into the shop with the intention of stealing a full trolley. The entry made by the claimant said:

**“When I asked colleagues to assist Deputy Manager just ignored me.”**

65. We will return to it in our conclusions.

**Sixth and Seventh Incidents: Annual Leave Issue 13 February 2018**

66. These two issues related to annual leave.

67. The policy on booking holidays appeared in the colleague handbook at page 89. It said:

**“Holiday requests will be authorised depending on departmental cover and operational requirements. Holidays will be authorised on a first come, first served basis and can be booked well in advance. However, you must always book and receive authorisation before booking holiday or travel arrangements.”**

68. In early February 2018 the claimant approached Mr Best to book annual leave from 5 to 26 April. He was told that the first week of that period was a problem because the other security guard, Mr Hewitt, had already booked leave in that week.

69. It was common ground that the claimant then spoke to Mr Hewitt and it was agreed that Mr Hewitt would take his leave at a different time so the claimant could have his three weeks off to go to Africa to see his elderly mother, who had not been well.

70. The factual dispute related to the precise sequence of events on 13 February 2018. There was a discussion in the canteen between the claimant, Mr Hewitt, Mr Best and Ms Clayton. The allegation made by the claimant was that during that discussion Ms Clayton told him that she did not care that he was an African who wanted to travel to Africa. He alleged that she blocked the doorway and prevented him from leaving the canteen for 45 minutes.

71. Ms Clayton denied this. She said that during the discussion in the canteen the claimant had accused her of refusing his holiday request because he was African. She was offended by this and admitted standing up but denied blocking the doorway. She denied having said the words attributed to her by the claimant.

72. We will return to this matter in our conclusions.

**29 November 2018 – Female Customer**

73. This incident occurred after the claim was presented but featured in evidence.

74. Amongst the CCTV clips which the claimant wanted us to view was an incident on 29 November 2018 when the claimant was engaged in a dispute with a female customer at the till area and she threw a sausage roll which hit him in the face. The CCTV footage showed that Mr Best and Ms Clayton came running over to deal with the incident at around the same moment.

75. The claimant alleged that a little while earlier he had told Mr Best that the customer was putting items in her bag on the aisle, but that Mr Best had declined to do anything about it, having been influenced in that by Ms Clayton. Mr Best said he did not recall that discussion. Ms Clayton said that she had not spoken to Mr Best about it at all because they were working on different aisles.

## Submissions

76. At the conclusion of the evidence each side made an oral submission to the Tribunal to help us make our decision.

### Respondent's Submission

77. Ms Kight began by reviewing the legal framework. She reminded us of the importance of holding the claimant to the case as set out in his claim form and the List of Issues. She emphasised the need for the employer's own conduct to be related to be race if it was to become liable for failing to prevent harassment of the claimant by other parties (see **Nailard**).

78. Ms Kight then addressed each of the matters for which the claimant sought a remedy in accordance with the order in the List of Issues. The complaint about the approach for a statement on 9 December could not succeed because that was a standard form of wording used irrespective of race. If it was the claimant's case that there was to be a biased investigation, there was no evidence to support that. Mr Cliffe had listened to Ms Corrigan because he had seen she was upset and then asked Mr Best to investigate. In any event the claimant had not been required to give a statement so there was no less favourable treatment.

79. In relation to 18 December 2017, there was no record of the claimant's allegations in the occurrence book or any Arena report, and it was the claimant's case that no racist comments were made. Ms Corrigan did not recall the issue but denied she would have humiliated the claimant in that way.

80. The allegation that the claimant had been detained in the canteen for 45 minutes on 13 February should fail on the facts. There was a difference between what appeared in the claim form and his oral evidence. In contrast the evidence of Ms Clayton was clear and consistent. She had become angry because the claimant accused her of discriminating against him. The holiday request had eventually been approved. We were invited to dismiss all the allegations of direct race discrimination.

81. Turning to the harassment allegations, we were invited to conclude in relation to 8 December 2017 that the absence of any record of the allegations about Ms Corrigan in the claimant's records in the occurrence book and the Arena report showed that it had not happened as he alleged. The real issue was the claimant thought Ms Corrigan had no business asking him or his SIA badge number and this was the cause of the dispute. Even if she did agree that he was a black African, that could not constitute harassment as it was a trivial matter.

82. As to the comment alleged by Ms Clayton on 13 February 2018, the same was true in that even if it was said it could not have the proscribed effect. In any event Ms Clayton said it was the claimant who had accused her of being racist. It was not a comment related to race if she had said it: it was simply confirming that she did not discriminate on that basis. There had been no grievance or complaint about it.

83. As to the two allegations of liability for failing to prevent harassment by third parties, Ms Kight submitted that the allegation in relation to the kicking incident must fail because the claimant said he had not asked Mr Best or Ms Clayton to help him,

and there were concerns about the reliability of the claimant's evidence concerning the incident on 19 September. Ultimately he was only suggesting that they had failed to intervene to help him where there was a suspected incident, not that he had ever asked for help and not received it. In any event there was no evidence that any of this was related to race.

84. The oral submissions also addressed the uniform issue, the reasonable steps defence, and time limits.

#### Claimant's Submission

85. The claimant had prepared a written submission which he read out. He went through the background and asked why colleagues would behave as they had if they had been fully trained. Ms Corrigan should have been made aware he had no SIA badge. The absence of a badge put him in a difficult position. Colleagues should have been made aware it was for a manager to intervene, not for a service colleague. He could not record everything in the occurrence book and had to ignore some things even if he had been offended by them. The failure to allow him to use a radio had contributed, although he accepted that failing to provide a radio was not itself race discrimination. There were limits to what he could put on the Arena reports.

86. Following that submission the Tribunal took the claimant through each individual incident and ascertained his position on it.

87. He made clear that his concern with the template statement used on 9 December was that the investigation had already been pre-judged for reasons which amounted to race discrimination.

88. The entries in the occurrence book for 18 December were limited because he could not write down everything. Referring to the CCTV was enough.

89. His evidence about events of 13 February should be accepted, not the evidence from the respondent's witnesses.

90. The occurrence book entry for the harassment allegation about 8 December was very limited, and the fact that there was no reference there to the use of the word "African" should not count against him.

91. He submitted the reasonable steps defence should not succeed because Asda had failed to carry out its duties properly. That was evident from the way he had been treated.

#### **Discussion and Conclusions**

##### Legal Framework

92. This was a case about race discrimination or harassment related to race, not a case simply about good or bad management. The claimant had to prove facts from which the Tribunal could conclude that he was treated less favourably because of race or that he was subjected to unwanted conduct related to race which violated his

dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for him.

93. In general terms it is not enough for a claimant in a direct race discrimination case to prove that he was treated worse than a white colleague in the same circumstances was or would have been treated unless there is also some evidence from which the Tribunal could infer that the difference in treatment is because of race. If that is the position then the burden falls on the respondent to show the reason for the treatment.

94. As to harassment, the question of whether conduct is “related to” race is broader than the formulation for direct discrimination but there still must be some connection between the treatment and the race of the claimant.

95. Our approach was to deal firstly with the allegations that managers or colleagues employed by Asda discriminated against the claimant by their own actions, then to consider the two allegations that they failed to respond appropriately to occasions when the claimant was racially abused by customers.

96. Before that there were five background matters raised in evidence that it is convenient to address briefly.

#### Radios

97. The first matter was the question of radios. It was surprising that the store had radios but did not use them. Mr Cliffe explained that the radios may have been allocated to this store by mistake as they were generally used in the much larger superstores, and in general terms they were only for the use of the security guards. However, there was some force in the claimant's point that if he had a radio and the Store Manager or Deputy Manager had one too, it would have been a means for him to have summoned assistance without leaving his security podium or alerting a suspected shoplifter to what was going on. However, the claimant accepted that the fact the radios were not used in that way was not related to race in any way.

#### Uniform

98. The second background matter was about uniform. The claimant was treated differently from his white comparator, Nathan Hewitt. On becoming an Asda employee the claimant was not given a full Asda uniform, whereas Mr Hewitt was given a full uniform when he joined in 2017.

99. However, we were satisfied the reason for that difference in treatment had nothing to do with race. Mr Hewitt was a direct entrant and did not have an existing security uniform so Asda had to provide him with one. In contrast, when the claimant transferred into Asda's employment he was already working at the store with a Securitas security uniform which he retained. He was provided with replacement shirts and trousers by Asda but continued to use his Securitas fleece. Later on the claimant was given an Asda security tunic by a departing colleague, but we accepted he was not provided with one by Asda until he requested it in the summer of 2017.

100. It would have been better if the claimant had been provided with his own Asda branded uniform when he first transferred in 2014, and we understood why the

failure to do that made the claimant feel differently treated once Mr Hewitt started, but it did not lend any support to his case that there had been race discrimination.

#### Racism from Customers

101. The third background matter was the racism which the claimant experienced from customers.

102. It was clear that he did have to endure racist abuse from customers, and it was not just Rita who subjected him to that treatment. Security work is difficult enough without the added burden of periodic racist abuse from customers and it was bound to have an effect on the claimant. It was a very difficult situation for him and to his credit that he had been able to do his job for so long without any issues about performance or conduct on his part.

#### Policies and Training

103. The fourth background matter related to policies and training.

104. The policy on diversity and inclusion which appeared at pages 48 to 53 in the bundle was well written. It covered the definition of harassment and race as a protected characteristic. It made clear the zero tolerance approach and encouraged members of staff to report incidents when they happened.

105. As for the training, we noted the annual training exercise to staff which involved viewing some video footage and then answering questions on it, and we noted that had now become available on the intranet. It was clear the respondent did have a systematic approach to training staff on diversity issues and keeping that training refreshed every year.

#### Occurrence Book and Arena Entries

106. The fifth background matter was that there were incidents where the records made at the time omitted reference to what the claimant now told us had been racist words or behaviour. The claimant said that any omissions in the occurrence book or the Arena documents were due to the limited nature of those documents. He said that the occurrence book entry often was only a brief note but he noted the timings and channels on the CCTV so that if the matter had to be investigated the details would be available by CCTV.

107. In considering this we took account of the fact that English is not the claimant's first language and he cannot be expected to express himself as precisely on paper or in a computer entry as if it were. However, the CCTV records video only, not audio, so if it was a question of words being used to the claimant that would not be an effective way of recording them. Further, if he recorded racist words in the occurrence book but not in the Arena entry, management might never know about them.

108. Indeed, we noted that on some occasions the claimant did record racist words in the occurrence book, and although there was no set categorisation for a racist incident on the Arena form it was open to the claimant to record that there had been

racism in the brief narrative. He sometimes did that (for example, page 131Ri and page 131Si).

109. Putting these matters together we concluded that the lack of any reference in the occurrence book or the Arena record to racist words or behaviour did weigh against the claimant's reliability on those matters where he told us in this hearing that such things had been done or said, particularly where they were part of the allegations about colleagues that formed the basis of his claim.

### The Allegations

110. Against that background we turn to the allegations which the claimant made that there had been direct discrimination or harassment in the way colleagues dealt with him. We will approach these in chronological order rather than the order in which they appear in the List of Issues. We will then deal with the two allegations about failure to respond to racism by customers. Before each incident we will reproduce the formulation from the list of issues.

**On 8 December 2017 was Tracey Corrigan angry or aggressive towards the claimant and did she say "I don't care, you deserve that, and that is what you are" in response to a customer allegedly saying to the claimant "being a black African [you] have no right to tell [me] to use the basket" and "dick head African get out of my face";**

111. This was an allegation of harassment by Ms Corrigan.

### The different accounts

112. In his claim form the claimant put it as follows: he had spoken to a customer to get the customer to use an Asda basket rather than his own bags. The man became angry and said that as a black African the claimant had no right to tell him what to do and called him a "dickhead African". The Deputy Manager, Mr Best, came over. Then Ms Corrigan spoke to the customer and came over to ask the claimant for his SIA badge number. In his ET1 the claimant said that she had no right to do that as it was a step that a manager should take rather than a service colleague. He told her there was no badge and she became angry and accused him of being rude. He then told her of what the customer had said to him, and he alleged Ms Corrigan said "I don't care, you deserve that and that is what you are". He said she was screaming in his face when she said that.

113. In his witness statement (page 11) the claimant gave a slightly different form of words from the customer and he made clear that the customer himself had asked the claimant for his SIA badge number before Mr Best dealt with the matter. On page 12 he recounted what happened when Ms Corrigan asked him for his badge and the claimant said he had none. He said that Ms Corrigan said "you deserve to be called a black African".

114. In relation to the documents from the time we noted the occurrence book entry at page 131M which recorded the customer calling the claimant a "dickhead" but did not record anything about him being black or African, although it did have the word "discrimination" as part of the entry.

115. As for the interaction with his own colleague, the occurrence book said that the incident turned nasty because the man had been entertained by Ms Corrigan.

The Arena report at page 132 said simply that the male had become aggressive but the issue was solved and no further action was needed.

116. Ms Corrigan's account was that she had asked the claimant for his badge number because the customer wanted it and she was looking to placate him and defuse the situation. She told us the claimant then became angry and said that the incident had been instigated by colleagues and that she was not his manager. That rudeness on the part of the claimant annoyed her so she turned and pointed at him as she was walking away. She denied having said "you deserve it" or "that's what you are".

117. Mr Cliffe's evidence was that the claimant did not tell him there had been any racist behaviour when the claimant spoke to him about the incident with Ms Corrigan.

### Discussion

118. The claimant made the point that if managers had made colleagues aware that he did not have a badge number the incident between himself and Ms Corrigan would not have happened because she would have known there was no point asking him for it. However, it was understandable that managers did not do so when none of the directly employed security guards have badge numbers in the first place. This point did not take his case any further.

119. We noted that neither the occurrence book nor the Arena record made any mention of overtly racist comments by the customer, and it is possible that the word "discrimination" in the occurrence book simply meant that the claimant thought the customer was only calling him a "dickhead" because the customer was racist, rather than because an expressly racist term ("African dickhead") had been used.

120. We also noted the claimant had not reported to Mr Cliffe any racism on the part of Ms Corrigan, and that Ms Corrigan gave a coherent account of how the dispute between them flared up without any reference to race.

### Conclusion

121. On the balance of probabilities, the Tribunal concluded that Ms Corrigan's account was correct. The claimant did not tell her that he had been called "black African" or "dickhead African". If that had happened, and if Ms Corrigan had said "well that's what you are" in the way he alleges, the comment recorded in the occurrence book would not have been written as it was.

122. We concluded that the claimant's real concern at the time, as it was in our hearing, was that it was not the place of a service colleague (as opposed to someone in management) to ask him for his SIA badge. The occurrence book entry made clear that he blamed Ms Corrigan for having entertained the customer at all. He reacted badly to being challenged by a colleague rather than by a manager, and challenged her intervention in a way that she considered rude, leading to the flare-up between them. The allegation that Ms Corrigan used words which were related to race failed on the facts, and nor was her conduct in challenging his rudeness related to race in any way.

123. This allegation failed.

**On 9 December 2017, ... the claimant alleges he was told he would be dismissed if he failed to explain or lied about the events of 8 December 2017;**

124. The claimant alleged that there was direct race discrimination the following day when he was told that he would be dismissed if he lied about what happened the previous day. This allegation was put in a narrow way and in a slightly broader way, and we considered both aspects.

125. The narrow point was that the wording of the declaration told the claimant that he was liable to disciplinary action if he gave false information. That was plainly the use of a standard form document for internal investigations. We accepted the respondent's evidence about that. The claimant said it would not be done for white security guards, but there was no evidence of that at all. There was no less favourable treatment of the claimant in the use of the declaration.

126. The broader argument was that from the outset Mr Cliffe had concluded the claimant was in the wrong in this incident, so the claimant was worried that when he gave his account in such a statement he would then face a biased enquiry leading to dismissal for giving a false account. Ms Corrigan was not asked to provide such a statement.

127. We considered the evidence available carefully. We were satisfied that the claimant did perceive himself being treated differently from Ms Corrigan. Immediately after speaking to Ms Corrigan Mr Cliffe did not want the claimant to tell him what had happened, but said to the claimant that he must have done something wrong to make Ms Corrigan so upset. That gave the claimant the impression her account was going to be believed, not his. He was worried about a biased enquiry.

128. However, in our judgment that response by Mr Cliffe was not influenced by race. Mr Cliffe's evidence was that he did not know what had happened but he had seen that Ms Corrigan was upset and was saying that she did not want to work with the claimant any more because he was rude. As Store Manager he wanted to calm her down, then he asked Mr Best to find out from the claimant what had happened. Mr Best reported back to Mr Cliffe that the claimant was refusing to give a statement, and then it turned out that Ms Corrigan dropped her complaint in any event. It meant there was no need for Mr Best to approach Ms Corrigan for a statement. The fact that Ms Corrigan was not approached for a statement was due to timing. The decision had been taken to get the claimant's account first of all and the need to get Ms Corrigan's account did not arise because the matter was resolved informally.

129. Accordingly, the claimant's concern about a biased enquiry was a misunderstanding on his part. There was no evidence from which we could conclude that his race played any part in this matter. This allegation failed as well.

**On 18 December 2017...the claimant alleges that Tracey Corrigan stopped him from intervening in relation to a shoplifter and accused him of wrongdoing;**

130. The claimant alleged direct race discrimination when Ms Corrigan intervened and accused the claimant of doing the wrong thing in the presence of other customers in a way that she would not have done for a white security guard.

131. The occurrence book entry for this incident at page 131N just said that the claimant asked colleagues and the Deputy Manager to assist and they ignored him.

It made no reference to Ms Corrigan having done what the claimant alleged. Ms Corrigan had no recollection of this incident but was clear that she would not have humiliated the claimant in that way.

132. On balance the Tribunal concluded unanimously that there had been an incident where Ms Corrigan queried what the claimant had said about a customer, and did so at the front of the shop without taking the claimant to one side. However, we concluded that the claimant was oversensitive to this because of his concerns about the badge incident some ten days earlier. He was very conscientious and professional and took pride in doing his job properly. He overreacted to being challenged in front of other people in the store, including customers.

133. We were satisfied that Ms Corrigan had no intention of humiliating or embarrassing the claimant. In any event, there was no evidence from which we could conclude that race was a factor in the way in which she dealt with him. There was no suggestion of racist language on this occasion. Nor was there evidence of a white security guard in the same position being treated more favourably by Ms Corrigan. The allegation that this amounted to direct race discrimination failed as well.

**On 13 February 2018 ...the claimant alleges he was detained in the canteen by Scott Best and Dominique Clayton for 45 minutes and had his holiday request refused**

**On 13 February 2018 did Dominique Clayton say to the claimant that she did “not care that [you are] an African who wants to travel to Africa”;**

134. We then turned the incidents arising in relation to the canteen and annual leave matter on 13 February 2018. This included allegations of direct race discrimination in relation to the claimant being detained in the canteen and Nathan Hewitt being given preference over holiday booking because he was a white security guard. There was also harassment alleged in relation to Ms Clayton’s alleged comment.

135. The allegation in the claim form was that the claimant was called into the canteen by Ms Clayton and accused of booking holidays even though Mr Hewitt had already booked his. The exchange became heated. The claim form said that the claimant was rescued from the canteen by Mr Cliffe “who took me in his off” – meaning, we concluded, his “office”.

#### Holiday Booking

136. It is convenient to deal firstly with the allegation that there was any preference for Mr Hewitt over his holidays because he was white. We rejected that. The holiday policy at page 89 said holidays were allocated and approved on a first come/first served basis. There was no challenge to the evidence that Mr Hewitt had already booked his holiday before the claimant sought to book his annual leave. This was nothing to do with race.

#### Canteen

137. As to events in the canteen, there was no contemporaneous record in the occurrence book or any Arena report for this incident. We made a decision based solely on what the witnesses told us in their statements and in person.

138. In his witness statement (page 6) the claimant said that he was called into the canteen and confronted about holidays by Ms Clayton. Mr Hewitt and Mr Best were already there. He said he explained he was going to Africa so a short trip would not be cost effective, and said that Ms Clayton replied that she did not care about him going to Africa because Nathan would be going on holiday first. His statement said that Mr Cliffe then took Ms Clayton into the office and had discussions with her, and then after 45 minutes he was told to go home. His claim form differed because it said Mr Cliffe took him away first. In any event, the claimant accepted in cross examination that he did not know whether Ms Clayton had been informed by Mr Cliffe that his holiday had already been authorised.

139. The account given by Ms Clayton and Mr Best was different in some respects. They said that the claimant and Mr Hewitt came into the canteen together. Mr Hewitt said he had been made to change his holidays. Ms Clayton assumed the claimant had made Mr Hewitt change his holiday dates and asked the claimant why, when Mr Hewitt had booked his dates first. On Ms Clayton's account, the claimant then said "My request has been refused because I'm African". Ms Clayton was offended by this allegation of discriminatory behaviour and confirmed that the decision was nothing to do with race. Mr Cliffe called the claimant into the office and then told Ms Clayton that the claimant could have his holidays.

#### Findings of Fact

140. Putting those matters together, and noting the conflict in evidence on some respects, we concluded that the facts of this matter were as follows.

141. Firstly, we accepted that the claimant and Nathan Hewitt had sorted matters out between them before the canteen incident, but Mr Cliffe had not formally approved it because otherwise Ms Clayton would have been aware. We concluded the claimant was right to say that Mr Hewitt went in to the canteen first. Mr Hewitt then told Ms Clayton in the canteen that he had had to change his holiday dates and Ms Clayton formed the view, mistakenly, that the claimant had forced Mr Hewitt into that. When she saw the claimant passing she called him into the canteen and they discussed the matter. The discussion became heated as Ms Clayton was not aware that Mr Hewitt had agreed to the change, and the claimant was confused as to why that misunderstanding had occurred.

142. We concluded that Ms Clayton did not physically prevent the claimant from leaving. We found as a fact that at one point during the discussion she was by the door and the claimant explained that he was reluctant, understandably, to push past her to leave. Although he felt he could not leave, and was there past his finish time of 3pm, there had been nothing to prevent him leaving. When Mr Cliffe heard the disagreement he called the claimant into his office, sorted it out and formally approved the change to Mr Hewitt's leave to allow the claimant his three weeks as requested.

143. As to the alleged comment by Ms Clayton, we found as a fact that the claimant accused Ms Clayton of refusing his request because he is African. We noted the discrepancy between the claim form and the claimant's account. We also noted that Mr Best and Ms Clayton gave consistent evidence, and we also noted that the claimant had been to ACAS to commence early conciliation on 12 February, the day before this incident. It was clearly in his contemplation that there had already

been race discrimination. We concluded it was likely that he would make that accusation in this incident the following day.

144. We found that when Ms Clayton said that she did not care that he was going to Africa she was responding to the claimant's accusation that she had treated him less favourably because he was African. It was also a reiteration that the policy was "first come, first served", whatever the destination.

### Conclusion

145. The length of time the claimant was in the canteen did not amount to a detriment or to less favourable treatment because of race.

146. The comment made by Ms Clayton was unwanted conduct related to race. It was unwanted because the claimant did not want to hear his manager say she did not care he was going to Africa. It was about his race.

147. The question was whether it had the effect of violating his dignity or creating the environment proscribed by section 26(1)(b)(ii). We were satisfied Ms Clayton did not have the purpose of creating that environment, so we took into account the factors set out in section 26(4). The claimant's perception helped him, but the circumstances did not. He introduced his race into the discussion. Further, it would not in our judgment be reasonable for a comment made in these circumstances (responding to his accusation) to have the proscribed effect, particularly bearing in mind what was said in **Richmond Pharmacology**. It did not have the required effect in our judgment. This allegation of harassment also failed.

**Has the respondent (through Scott Best and Dominique Clayton) omitted to take adequate steps to protect the claimant from alleged harassment by customers by refusing to assist him on two occasions:**

**On an occasion in 2017 when a female customer shouted at the claimant saying "you smelling black African, why are you looking at me, do you think I am a thief? Are you a perv? Go away".**

**On an occasion in 2017 when a shoplifter or shoplifters called the claimant "black African" and kicked him?**

148. Finally we turned to the two allegations that managers had harassed the claimant by failing to deal properly with incidents where the claimant was racially abused by customers, meaning he was not adequately protected from future incidents.

149. In the claim form the claimant's complaint was that nothing was done when suspected shoplifters called him names. He said that when he was kicked he got no help and instead people laughed, and when he called Mr Best and Ms Clayton they had refused to help him.

150. These were allegations of harassment under section 26, so three things needed to be proven: firstly, that there had been unwanted conduct by way of a failure to assist the claimant or take action as appropriate; secondly, that such failure was itself related to race (**Nailard**), and thirdly that such failure had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

Unwanted Conduct – Failure to Assist

151. We considered whether the claimant had proven facts from which we could conclude that there had been unwanted conduct in the form of a failure to assist him or to deal properly with these incidents.

152. In relation to the incident on 30 August 2017, the occurrence book note at page 131H made no reference to the claimant not being helped on that occasion, unlike some other entries in the occurrence book. In cross examination the claimant accepted that (contrary to the claim form) he had not asked for help from Mr Best and Ms Clayton on this occasion. We concluded that there had been no failing by managers to assist him and no failure to deal properly with the incident. The allegation failed on the facts.

153. In relation to the incident on 19 September 2017, we had the entry in the occurrence book, the screenshot at page 131W, and sight of some CCTV footage of the incident. The occurrence book recorded the racist and insulting language used by the customer and the fact that the claimant was pushed by the customer. It also recorded that he had no help in the shop. The claimant's case as it developed in his oral evidence was not that he asked for help, but that Mr Cliffe must have heard him from the nearby Fresh Produce aisle and should have come over to deal with the altercation when he heard it. The CCTV footage did not support the claimant's case. Mr Cliffe was not visible in it. There was no apparent reaction from the claimant's colleague who was at a till with another customer just a couple of metres away. We concluded that the claimant was assuming Mr Cliffe had heard the altercation, but that was only an assumption. We accepted Mr Cliffe's evidence that he had not heard it. For those reasons the suggestion that the manager failed to come to the claimant's assistance when requested or when he overheard it failed on the facts.

Related to Race

154. In any event, we were satisfied there was no evidence to show that any such failings, even if proven, were related to race. It was not enough to say that the customers were being racist towards the claimant. Any failure to assist him had itself to be related to race. It was a busy store. Mr Hewitt might not have been subjected to racist abuse in the same way as the claimant, but Mr Cliffe explained that Mr Hewitt was generally working on the shift that went up to 11.00pm so faced confrontations and abuse from potential shoplifters, no doubt on occasion fuelled by alcohol. There was no evidence suggesting that managers were any quicker to come to his aid.

155. The allegations that the way in which Asda dealt with these incidents amounted to harassment related to race failed.

**Outcome**

156. All complaints were dismissed on their merits. That conclusion meant that we did not need to consider the reasonable steps defence and nor did we need to make any decision about time limits in relation to the incidents in August and September 2017.

Employment Judge Franey

29 April 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

2 May 2019

FOR THE TRIBUNAL OFFICE

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