



# EMPLOYMENT TRIBUNALS

## ***Claimants***

## ***Respondent***

(C1) Mr Subramanya Chellappan  
(C2) Mrs Priya Subramanya

**AND**

ABM Facility Services Ltd

**Heard at:** London Central      **On:** 5-8 and in Chambers on 21 November 2019

**Before:** Employment Judge Nicolle

**Members:** Mrs J Griffiths  
Dr S Jary

## **Representation**

**For the Claimants:** Mr S Kuttappan, Friend

**For the Respondent:** Mr A O'Neill, Solicitor

## RESERVED JUDGMENT

1. The claims of both Claimants for direct race discrimination fail and are dismissed.
2. The claims of both Claimants for direct discrimination on account of their religion and belief fail and are dismissed.

## REASONS

### **Background**

3. Tribunal claims were issued by both Claimants on 11 March 2019. It was acknowledged by Mr O'Neill that matters after the commencement of the ACAS conciliation process by Mrs Subramanya on 1 February 2019 and Mr Chellappan on 4 February 2019, but prior to the initiation of Tribunal proceedings on 11 March 2019, could be considered. However, his position, and that accepted by the Tribunal, was that matters subsequent to 11 March 2019 could not form part of the claims being advanced by the Claimants.

4. The hearing took place over four days. The Tribunal heard evidence from the Claimants and also on behalf of the Claimants, Mr Ibrahi Kani Annifa (Mr Kani). The Respondent called Sophie Buckingham (Ms Buckingham), David Axworthy (Mr Axworthy) and Jason Steel (Mr Steel) as witnesses. There was an agreed trial bundle of 206 pages.

5. The claims were for direct race discrimination and for direct discrimination because of the protected characteristic of religion under s 13 of the Equality Act 2010. The Claimants are Hindus and originate from the Tamil speaking region of Southern India. They have been living and working in the UK for approximately 10 years. Their case is they were subjected to discriminatory treatment by the Respondent on account of their religion and/or race.

6. At the case management hearing on 10 July 2019 the Claimants' claims of marital discrimination and contractual claims (unpaid pay and holiday pay) along with Mrs Subramanya's claim of unfair dismissal were withdrawn. These claims are therefore dismissed and do not need to be considered. At the case management hearing a list of issues was agreed between the parties. Further clarification of the issues was provided on 17 October 2019. I considered the list of issues and accepted it in full. The List of issues comprises:

Mr Chellappan

The allegations of direct discrimination are:

**2 (a)** *He was not provided with full uniform which is still the case. This is PPE he had to pay for it himself and continues to do so.*

**2 (b)** *He applied for a security job in August 2018 but was not successful. This decision was made by Gavin [Buttigieg] and Mr Bullard.*

**2 (c)** *Patricia said they would make allegations about it to the building manager and DH and Jason would listen to her.*

**8 (a)** *Abusive behaviour by Jason and DH which happens repeatedly even after this claim was made.*

**8 (b)** *He applied for a promotion to the role of team leader in January 2019, but this was refused. Rodrigo was appointed by Daryl.*

Mrs Subramanya

The allegations of direct discrimination are:

**2 (a)** *She raised a complaint to UK HR of the Respondent by email in respect of an unreasonable refusal by supervisor Jason to change her shift (necessitated by a doctor's appointment).*

**2 (b)** *At a grievance meeting she was told by the manager (Tom) that lots of complaints were being made about her in November 2018.*

**2 (c)** *She continued to be discriminated against at work. Jason was sharing the Claimant's personal and sensitive information with DH and called her GP without consent.*

**2 (d)** *As a result of legitimately refusing a site transfer she suffered unfavourable treatment e.g. she was not allowed free access to drinking water in the kitchen area, she was prevented from social interaction with co-workers and she was monitored excessively on the CCTV.*

**2 (e)** *Her suspension on or about 22 February 2019 and thereafter encouraging colleagues to sign statements to say that she was abusive.*

**2 (f)** *Her previous manager (Mr Kani) called her manager (Mr Bullard) and was told that she will be sacked.*

**8 (a)** *She was more frequently told to clean the toilets by Mr Bullard than her comparators.*

**8 (b)** *When she was wearing Hindu religious markings on her forehead (Bindi) she was told to remove these by Mr Bullard her manager. The last request was in January 2019.*

**8 (c)** *She was not allowed to change her break time to take her medicine. She requested this to Mr Bullard, and it was refused. This took place in January 2019. Everybody else was allowed to change breaks.*

**8 (d)** *She was unfairly accused of not cleaning properly by Mr Bullard. This happened several times on 4 December 2018 and since.*

7. The Tribunal did not hear evidence in relation to a number of these issues whether in the witness statements or bundle.

#### Consolidation of the First and Second Claimants' claims

8. Following a preliminary hearing before Employment Judge Russell on 10 July 2019 it was determined that the claims of the First and Second Claimant should be consolidated. This was on the basis of the Claimants being married and their claims arising from substantively the same background and facts. Whilst the Claimants relied on different events in support of their respective claims it was agreed by both parties' representatives that a single judgment should be given covering both claims. Nevertheless, the Tribunal considers it appropriate to deal with its findings in respect of the individual Claimants separately within this judgment.

#### The interpreter

9. Following the preliminary hearing on 10 July 2019 Employment Judge Russell stated that the Claimants require an “Indian” interpreter for days one and two of the full hearing. This was reflected in paragraph 4 of the case management order dated 1 August 2019. Paragraph 13 of the Order provided that the Claimants should take steps to ensure that they meet with the interpreter before the hearing and ensure they and the interpreter are fully prepared for the hearing.

10. It was apparent that the interpreter, Ms I Samsonroy, who attended the hearing, spoke Tamil. However, on days two and three of the hearing Mr Kuttappan raised a concern on behalf of Mrs Subramanya that difficulties were being encountered as a result of the interpreter being a Tamil speaker from Sri Lanka rather than the Tamil speaking area of Southern India.

11. On this issue initially being raised by Mr Kuttappan during the afternoon of Tuesday 5 November 2019 it was agreed by Mrs Subramanya that she had no difficulties with the interpreter and was happy to proceed. Whilst there might have been minor issues regarding dialect these were not of such an extent that she considered an issue existed and she did not want the hearing to be adjourned for the provision of a replacement interpreter.

12. Notwithstanding the position set out above Mr Kuttappan raised a further concern regarding the interpreter during the course of Mrs Subramanya’s evidence at 12:30 on Wednesday 6 November 2019. Mr O’Neill expressed concern regarding potential wasted costs and placed the Claimants on notice that in the event of the hearing having to be adjourned and relisted there would be an application made for the Respondent’s wasted costs.

13. Once again on Mr Kuttappan being given the opportunity to take instructions from the Claimants he confirmed that no objection existed to Ms Samsonroy as the interpreter. Further, the Tribunal observed that Mr Chellappan spoke a relatively good level of English and he confirmed that he did not consider that any issues existed with Ms Samsonroy’s interpretation of English to Tamil and vice versa. Therefore, the hearing proceeded. At the conclusion of the hearing Mr O’Neill made an application for his client’s costs in the figure of £190 on the basis of a notional one hour of the Tribunal’s time being wasted on days two and three (30 minutes of each day) dealing with the concerns raised by Mr Kuttappan in respect of the interpreter. The Tribunal sets out its decision in relation to this application separately below.

#### Witness Statements

14. The case Management Order following the Preliminary Hearing required the parties to exchange witness statements on 22 October 2019. During the first day of the hearing it became apparent to the Tribunal that an issue existed regarding the Claimants’ witness statements. Further versions of the witness statements for Mrs Subramanya and Mr Kani had been produced on the morning of the hearing and given to the Tribunal (but without explanation) but not provided to Mr O’Neill.

15. Mr Kuttappan explained that the reason for the further statements being provided was that the Respondent had in his view failed to comply with the Tribunal's order for the contemporaneous exchange of witness statements on 22 October 2019. Mr O'Neill explained that there had been a delay in serving the Respondent's witness statements given that there was an outstanding request for the Claimants to respond with a view to clarifying the outstanding issues to be determined by the Tribunal. Mr Kuttappan thought it appropriate to update the witness statements of Mrs Subramanya and Mr Kani to reflect matters referred to within the Respondent's witness statements.

16. The Tribunal was therefore required to spend significant time reviewing the respective statements of Mrs Subramanya and Mr Kani given that the Respondent objected to revised and expanded witness statements being included. The Tribunal decided that the revised witness statement of Mrs Subramanya should be admitted. The Tribunal determined that certain paragraphs of Mr Kani's expanded witness statement should be admitted and directed that he should produce a revised witness statement to incorporate these additional paragraphs in a single document which he did and his revised witness statement was admitted as evidence on the second morning of the hearing.

#### Strike-out application

17. During the course of Mrs Subramanya's cross examination on the first afternoon of the hearing, Mr O'Neill made an application for the strike out of the entirety of the Claimants' claims. Having heard submissions from both Mr O'Neill and Mr Kuttappan the Tribunal rejected the application for a strike out of the claims and gave reasons on the morning of 5 November 2019. Written reasons were not requested. The hearing continued with the cross examination of Mrs Subramanya.

#### Findings of Fact

18. The Respondent provides facilities management services for clients at multiple locations in the UK, to include the servicing of office accommodation and shopping centres. Mr Axworthy, General Manager, gave evidence that approximately 5,000 employees are engaged by the Respondent in the provision of its facility management services.

19. The Second Claimant worked, and the first Claimant continues to work, at the Victoria Place shopping centre in London. The shopping centre is above Victoria Station. The Respondent was awarded the contract for the provision of cleaning and security services at the shopping centre in October 2017. Whilst the security contract is operated 24/7, the cleaning contract is undertaken between 5am and 11pm.

20. The Tribunal noted that the bundle contained no contracts of employment for the Claimants, no policies such as grievance, disciplinary and data protection,

no work and roster arrangements, no data on the characteristics of the workforce and no training records for supervisors and managers.

21. The Respondent engages a total of 34 staff at the shopping centre comprising 16 cleaners and 18 security staff. There is typically a relatively high turnover of cleaning staff. Mr Axworthy stated that the position had stabilised more recently.

22. Recruitment is largely by word of mouth. During Mr Kani's relatively brief period of employment between May and August 2018 he was involved in the recruitment of a number of individuals to include both Claimants. The Respondent then has a relatively short and informal recruitment process to include undertaking "right to work" checks.

23. Mrs Subramanya started work with the Respondent on 5 May 2018. She had applied for the position as she had heard via her husband that there were possible vacancies, and this had come to his knowledge from Mr Kani. Mr Kani is the Claimants' next-door neighbour. Mr Kani previously worked alongside Mr Chellappan for approximately four years at ASDA.

24. Mr Chellappan started work with the Respondent as a cleaner on 31 August 2018. Whilst a security position was discussed, which represented his preference, there was no vacancy, so he accepted a position as a cleaner but remained interested in a security position as and when a vacancy arose.

25. A dispute arose in the evidence as to the extent of Mr Kani's relationship with the Claimants. This is relevant in the context of Mr Kani's evidence regarding issues arising pertaining to the Claimants in his short period of employment. Mr Kani gave evidence that the Claimants were not his friends but merely neighbours and in the case of Mr Chellappan, a former work colleague.

26. The Tribunal finds that Mr Kani's relationship with Mr Chellappan went beyond that of neighbours and work colleagues. We make this finding for a variety of reasons to include Mr Kani's involvement in the recruitment of the Claimants, continuing involvement in issues relating to the Claimants' employment and particularly those pertaining to Mrs Subramanya notwithstanding that he had left the Respondent's employment to include telephone calls and a meeting with Mrs Subramanya and/or her son in his home to discuss matters relating to her employment.

27. The Respondent operates a roster system for cleaning and security staff. Mrs Subramanya always worked the shift between 2pm–10pm. Mr Chellappan worked the shift between 7am–3pm therefore the only overlap between the Claimants' respective shifts was between 2-3pm.

28. The Respondent's cleaning staff at the shopping centre are diverse in terms of their race, nationality and ethnicity. English is the common language for workplace communication. The Tribunal observed that Mr Chellappan appeared to have a reasonable level of English. Whilst Mrs Subramanya claimed to speak virtually no English, we find that she had sufficient for basic workplace

communication to include using the staff radios to call for assistance and receive instructions regarding her duties.

29. At all material times the Claimants were the only members of the cleaning staff who are Hindus of Indian origin. The majority ethnic/national group amongst the cleaning staff during the relevant period were those of Latin American origin (primarily Colombian) but it is apparent that the cleaning staff comprised a diverse range of workers to include those of North African and Eastern European origin.

30. Mr Kani gave evidence that during his period with the Respondent he did not consider the cleaning staff congregated with others of common language or national origin during the course of their breaks. Mr Axworthy gave evidence to the contrary.

31. There was disputed evidence as to the extent to which the cleaning staff are assigned to cleaning particular areas. Cleaners could be rostered to clean the toilets, the food court, the mall or on a lower level of frequency, the compactor. Mrs Subramanya complained that she was disproportionately required to clean the toilets, was required to clean both the gents and the ladies' toilets whilst other female cleaners were only required to clean the ladies and unlike other cleaners on other shifts was required to clean the toilets without support from a colleague.

32. The Respondent's evidence was that it had flexibility to assign the cleaning staff as required. This would involve cleaning both gents and ladies' toilets as needed and that there was no policy that female cleaners would only be required to clean the ladies' toilets. We find that the Respondent's practice was to require cleaning staff to work in different areas of the shopping centre at its discretion to include cleaning both male and female toilets.

33. Whilst we acknowledge that cleaners may regard some tasks as more undesirable than others e.g. the cleaning of the toilets, we did not find any evidence to support Mrs Subramanya's contention she was being asked to clean the toilets more than other members of the cleaning roster. We also find that given that the Respondent operated a five-shift pattern at the shopping centre (with some overlap between some of the shifts) with a maximum of 14 cleaning staff that there would inevitably have been a requirement for flexibility of the cleaning staff engaged in any given shift to cover more than one area. Almost invariably that this would include the cleaning of toilets as a significant part of the allocated duties.

34. Mr Chellappan primarily undertook his duties in the vicinity of the compactor. Whilst Mr Kani gave evidence that during his period with the Respondent between May and August 2018 that Mr Chellappan had also undertaken significant duties on the mall we find this to be inconsistent with Mr Chellappan's evidence and find that the majority of Mr Chellappan's duties during the course of his employment have been undertaken in the vicinity of the compactor.

35. The cleaning staff do not have a dedicated team leader but rather are supervised and managed by the Security Supervisor, formerly Mr Kani and now Mr Steel.

36. The Respondent's policy is to provide a uniform for its staff. A document was included in the bundle (page 165C) showing front and rear photographs of the cleaners' uniform standards. The uniform includes a t-shirt and high visibility jacket (both of which carry the logo of the Victoria Place Shopping Centre), trousers and protective footwear. The Tribunal heard that the Respondent permitted staff to wear their own trousers as long as they were black and similar to the uniform provided.

37. Mrs Subramanya was provided with a full complement of uniform on or shortly after the commencement of her employment. A significant part of Mr Chellappan's claim is that he was discriminated against by the failure of the Respondent to provide him with a full complement of uniform and in particular the failure to provide him with trousers and protective footwear.

38. Mr Kani gave evidence that whilst he was employed as a manager, he processed a bulk order for the provision of uniforms in August 2018. He stated that he would have anticipated the order being processed and the delivery made within approximately three weeks.

39. Mr Chellappan's evidence was that as a result of a failure by the Respondent to provide him with a full complement of uniform he had to spend a significant amount of his own money (circa £1,200) on buying numerous pairs of trousers and several pairs of protective footwear. He said that he had not retained any receipts for such purchases. Further, there is no evidence that he raised the Respondent's failure to provide him with a full complement of uniform in writing nor that he had been compelled to spend his own money to make good the Respondent's deficiency in not providing him with a full complement of uniform on a timely basis.

40. The Respondent was not aware of the failure to provide Mr Chellappan with trousers and shoes but nevertheless accepted that its systems were short of the required standard. It was accepted that the Respondent's system was somewhat ad hoc with no or inadequate records being maintained of uniform allocated to individual employees. Employees were not required to sign for uniform allocated to them. The evidence of Ms Buckingham was that Mr Chellappan had only been provided with a full complement of uniform a few weeks prior to the hearing.

41. Mr Kani's evidence was that Mr Chellappan not having the corporate trousers would have been obvious to other employees albeit not members of the public. We find that the differences in the attire worn by Mr Chellappan would have been very limited from a visual perspective.

42. There was a significant shortfall in the Respondent's standards and procedures for the allocation of the uniform and in particular the failure to maintain appropriate records and undertake ongoing checks to ensure that all



employees had the required personal protection equipment (PPE) to include safety shoes. The Respondent's witnesses acknowledged this.

43. We do not find any evidence to support the expenditure of approximately £1,200 Mr Chellappan claims to have incurred on trousers and shoes. We make this finding primarily in the absence of any receipts of such expenditure but also on the basis that we find it highly improbable that it would have been necessary for him to buy replacement trousers every two weeks as contended.

44. In relation to Mrs Subramanya a dispute existed in the evidence as to whether there had been concerns regarding her performance prior to her sending an email on 1 October 2018 following an incident with Mr Steel on 26 September 2018. Further, there was a dispute in the evidence as to whether Mrs Subramanya had raised any concerns regarding her treatment prior to this time. Mr Kani's evidence was that there were no concerns regarding Mrs Subramanya's performance during the course of his period as her manager which ended with his dismissal on 23 August 2018.

45. Mr Steel gave evidence that he had issues with Mrs Subramanya's attitude from the start of employment. There is no documentary record of performance concerns being raised prior to the letter of concern sent to the Claimant dated 3 December 2018.

46. Mr Kani gave evidence that there was an occasion during his time as a manager when he had spoken to Mr Steel and another supervisor, Dragos Horeaba (DH) regarding the unacceptable way in which they were speaking with Mrs Subramanya. Mr Kani gave evidence that he started to feel that Mr Steel and DH's treatment of Mrs Subramanya was "racially related". He went on to say that Mrs Subramanya, and another Indian employee by the name of Muntaz, who is a Muslim, were the only people being picked up on.

47. The conduct of Mr Steel and DH towards Mrs Subramanya during the period prior to the end of Mr Kani's employment on 23 August 2018 is not referred to in the pleadings or the agreed list of issues. It was also not referred to in Ms Subramanya's witness statement. It was not put to Mr Steel in cross examination by Mr Kuttappan. We find no evidence that this conversation took place but even if it had we consider that any complaint of race or religious discrimination dating from at latest August 2018 would have been out of time although potentially still relevant in the context of a claim that Mrs Subramanya was subjected to a course of conduct on account of her race and/or religion culminating in her suspension with effect from 27 February 2019.

48. The first significant event relating to Mrs Subramanya concerned an incident on 26 September 2018 with Mr Steel and DH regarding her notification of a hospital appointment. Mrs Subramanya was understandably upset that Mr Steel questioned the necessity of her taking leave and had taken it upon himself to question her doctor regarding the nature of the procedure and the likely time she would be absent from work. The Respondent states his conduct was wholly unacceptable.

49. It is apparent that Mrs Subramanya was extremely upset by both the manner of Mr Steel in questioning the genuineness of her required absence but also as a result of his contacting her doctor. Further, in giving evidence Mrs Subramanya referred to Mr Steel as having made a motion of rubbing his hand down his arm during the meeting on 26 September 2018. Mrs Subramanya interpreted this as Mr Steel questioning the seriousness of the medical procedure she was required to attend.

50. Mrs Subramanya discussed the incident with her son who assisted her to set out her concerns in an email sent to Mr Axworthy and the Respondent's HR email address at 18:46 on 1 October 2018. The email included a transcript of a telephone conversation between Mrs Subramanya's son and Mr Steel on 27 September 2018. This call was recorded without Mr Steel's knowledge.

51. The call between Mrs Subramanya's son and Mr Steel included the following comments made by Mr Steel:

“Priya is always moaning”

“I did speak to a person regarding her information”

“She keeps coming up with different things all the time, I am not bullying her! She is bullying other people”

52. The Respondent treated Mrs Subramanya's email of 1 October as her invoking the Company's grievance procedure. In a letter dated 25 October 2018 from Stacey De Jesus, Senior HR Advisor (Ms De Jesus) she was invited to attend a grievance meeting on 30 October 2018.

53. The grievance meeting was subsequently rearranged for 22 November 2018 and was chaired by Rob Hunter, General Manager (Mr Hunter). Mrs Subramanya was accompanied by her son.

54. During the course of the grievance meeting Mrs Subramanya's son stated:

“They are treating her differently. One day she was sitting in the cafeteria and a few people across from her started saying something in Colombian (“Puta”). I translated it on my phone and its means “bitch”.

55. It was not until a letter dated 8 January 2019 that Mrs Subramanya received an outcome letter from the grievance hearing held on 22 November 2018.

In this letter Mr Hunter stated:

I would like to apologise on behalf of the company for the behaviour of the security guard as he had no authority to contact your doctor in the first place about your health and to seek advice on your condition.

He went on to state:

Action will be taking in relation to the security guard and further training for all management on site going forward.

56. Also, in Mr Hunter's letter he referred to concerns raised by Mrs Subramanya regarding her employment with the Respondent and made the following relevant comments:

I asked if you were comfortable to continue working at Victoria Place and you stated that you were happy to work there, I offered you the possibility to look at other jobs available at the same location and others close by with ABM to which you said you did not want to consider.

He went on to state:

In your grievance meeting you mentioned that you were not happy with the treatment you are receiving at Victoria Place by your work colleagues. I would like this to be investigated and have forwarded this on to HR. I would kindly ask you to email our HR department with your concerns and document precise occasions with dates that you feel that you have been treated differently.

57. There is no record of Mrs Subramanya emailing the HR department with her concerns nor of this issue being investigated by HR or otherwise.

58. On 6 December 2018 David Bullard, Senior Soft Services Supervisor (Mr Bullard) sent Mrs Subramanya a letter titled "letter of concern". This referred to a meeting he had held with Mrs Subramanya on 3 December 2018. The concerns raised regarding Mrs Subramanya's performance comprised:

- Lack of cooperation with other team members;
- Refusing to cover for them in the toilets when they are on break;
- Refusing to work in the toilets except for every other week.

59. Mr Bullard referred to having received numerous reports from other members of staff that Mrs Subramanya was spending more time in the break room than authorised.

He stated:

You were hired as a cleaner therefore you can be asked to work in any of the positions or to conduct any ad hoc works here at Victoria Place.

60. Mr Bullard stated that the letter was not intended to be a formal warning but listed the following improvements which Mrs Subramanya was required to make:

- Maintain your work area to a high standard at all times;
- Take your breaks only at authorised times;
- Be more cooperative and flexible with other members of the team.

61. As a reply to Mr Bullard's letter of 6 December 2018 Mrs Subramanya sent an undated letter to the Respondent at George House (no named recipient) in

which she complained about being assigned to “toilet cleaning duty” by Mr Rodrigo. Further, in this letter she complained about her perception that she was being “treated differently” and gave the example of being criticised for taking too long over her breaks and being deprived of the opportunity to access drinking water during her break time. We are unable to make any finding as to when and to whom this letter was sent and there is no evidence of any action being taken by the Respondent on receipt of this letter.

62. On 18 December 2018 at 10:46am Mr Chellappan sent an email to Mr Axworthy and the Central HR email address referring to his having been placed on toilet duty that day. He was unhappy with this as a result of the effect of cleaning the toilets on various health conditions and particularly in connection with the exposure to chemical cleaners used in the toilets. He referred to having been told that if he did not agree to work in the toilets he would be suspended.

63. At 12:39pm that day, Mr Chellappan received a reply to his email from Mr Axworthy. Mr Axworthy pointed out that all members of the site team are required to carry out other tasks from time to time and this task is no different. He said that he was not aware that Mr Chellappan had provided any evidence of his medical conditions which would prevent him carrying out the cleaning of the toilets. He nevertheless said that this was something which would be reviewed in due course. In the meantime, Mr Axworthy advised that Mr Chellappan would be required to work on his normal schedule the following day.

64. It was accepted in evidence by Mr Chellappan that at no time was he actually required to clean the toilets. We have previously found that all, or the overwhelming majority, of Mr Chellappan’s duties were undertaken in the vicinity of the compactor. We are not in a position to make a finding as to whether any medical conditions affecting Mr Chellappan would have provided justification for his not working with chemical cleaners in the toilets.

65. A letter signed by three members of the cleaning staff was sent dated 17 December 2018. The letter expressed concern regarding Mrs Subramanya’s attitude to include a failure to “failure to comply with her duties” and her being “disrespectful”. The letter was signed by Hector Florez (HF), Maria Hernandez (MH), and Ali Hamlaoui (AH). When giving evidence Mr Axworthy believed HF to be from Latin America, MH to be white, and AH to be from North Africa.

66. There was an incident regarding Mrs Subramanya’s shift on 30 December 2018. A misunderstanding took place as to whether she was available following a period of ill health to work on 30 December which was an allocated shift pattern. As a result of this issue Mrs Subramanya sent an email to Mr Axworthy and UK HR at 21:28 on 30 December 2018. This was responded to by Mr Axworthy in an email of 12:56pm on 4 January 2019 when he apologised for a “miscommunication” and stated that Mrs Subramanya would be paid for the allocated but unworked shift on 30 December 2018. We therefore do not consider that there was any genuine basis for an ongoing complaint from Mrs Subramanya in respect of this issue.

67. A further letter in very similar form to that dated 17 December 2018 was received by the Respondent on 7 January 2019 this time signed by Patricia Liney Mejia Lopez (PL), who is understood to be of Latin American origin. It was noted by the Tribunal that the content, format and spelling errors in the letter showed a remarkable degree of similarity to that dated 17 December 2018. As such the Tribunal finds that there was almost certainly an element of collaboration between PL and the earlier complainants regarding Mrs Subramanya's conduct. We do not, however, find that this similarity indicates that Mr Steel or other members of the Respondent's managerial staff were party to such collaboration.

68. We find that the letters of 17 December 2018 and 7 January 2019 are clearly indicative of dissatisfaction amongst the other cleaning staff with Mrs Subramanya. We set out our conclusions as to the basis of this concern later in this decision.

69. On 15 January 2019 Mr Bullard sent a Memo to all cleaning staff regarding break times and a concern that some members of staff were taking breaks when they felt like it. He set out the allocated 45-minute break time for each shift.

70. As a result of the concerns raised by other staff members in the letters of 17 December 2018 and 7 January 2019 Mr Axworthy was appointed to investigate which included his interviewing the Claimants on 16 January 2019. Handwritten notes were taken of these meetings and included in the bundle. Relevant extracts from the individual interview notes are as follows:

HF

"Always talks on phone while working"  
"Always rude to everybody. She is rude to customers and swears at everyone"  
"She will not clear tables or floor"  
"Get rid of her"

MH

"Always on phone"  
"Does not clean well"  
"She never covers, she will not help us"  
"Swears at other people and very rude"  
"Always telling others what to do"  
"Suggest Priya works on another site as a fix"  
"She doesn't want to do toilets"  
"Complaining about everything and everyone"

AH

"Swears at staff". He has witnessed this.  
"Complains about others to me"

71. In responding as set out above the complainants were to a certain degree asked leading questions by Mr Axworthy, for example, “is she rude to you”? Whilst we do not consider that this impacted the objectivity of Mr Axworthy’s investigation it would have been preferable for him to have asked more neutral questions. Further, it would have been appropriate for Mr Axworthy to ask for more specific details of the conduct complained about.

72. Further to the grievance outcome letter Mrs Subramanya’s son sent an email to Mr Hunter at 23:34 on 16 January 2019. This related to the inappropriate communication with Mrs Subramanya’s doctor. The email that was forwarded to Ms De Jesus who responded in an email of 10:32am on 17 January 2019. She confirmed that action had been taken in regard to the security team and further that training had been arranged for the team.

73. Mr Steel was verbally reprimanded regarding his conduct in this matter i.e inappropriate contact with Mrs Subramanya’s doctor. Further, he was required to undertake additional training regarding GDPR. We also heard evidence that DH had been similarly reprimanded and required to undertake GDPR training but saw no documentary confirmation that this was indeed the case. We find that the Respondent regarded the conduct of Mr Steel and DH as inappropriate and responded appropriately to Mrs Subramanya’s concerns being raised.

74. There then followed a series of complaints from various parties regarding Mrs Subramanya’s conduct in the period 24-29 January 2019. We consider it appropriate to summarise these complaints given that they were primarily the instigating factor triggering Mrs Subramanya’s suspension and eventual dismissal.

75. In an email of 24 January to Mr Bullard and Mr Axworthy, DH referred to an incident early that afternoon at approximately 16:30 with Mrs Subramanya. In summary he stated:

“She had a bad attitude”

“Started to call me Hitler and to tell me and Jason fuck you”

“Hitler you ok fuck your family, fuck all your family”

76. DH responded by calling Mrs Subramanya a “bitch”. DH explained that as a Romanian the family is the most important thing in this life. He acknowledged that he should not have called Mrs Subramanya a “bitch”.

Other staff provided statements:

Marian Matei (MM)

“She started to scream after Dragos “Hitler” and “fuck your family”

“She screamed after me (approximately 18:00) “fuck you” “fuck your family”

Mr Steel

“Priya made a beeline to the control room and asked, “what was the problem” in a rude and aggressive tone.

“This abuse is not limited to today or to either Dragos or myself but pretty much Priya has issues and is abusive with everybody”.

### Chloe

Employed by Tortillo (a franchise in the shopping centre) gave a statement on 29 January 2019. She said that she heard a woman (believed to be Mrs Subramanya but not stated) saying “fuck you” to a customer in the shared dining area under her breath.

77. The statement of Chloe related to an incident with a customer by the name of Mr Maynard (Mr M). Mr M is a homeless person who frequently visits the shopping centre. Mr Axworthy and Mr Steel acknowledged the existence of a problem with homeless people at the shopping centre. Mrs Subramanya gave evidence that she had experienced two previous unpleasant incidents with Mr M whilst cleaning the gentleman’s toilets at the shopping centre.

78. Mrs Subramanya reported the incident with Mr M to the British Transport Police on the evening of 29 January 2019. Mrs Subramanya gave evidence that Mr M had been sitting at a table in the food court and had beckoned her over to his table to clear waste materials. She was unwilling to do this as it did not constitute part of her role to bring her cleaning bin to individual tables. Mr M did not accept this and according to Mrs Subramanya became verbally aggressive and threw the rubbish on the floor. Mr M complained that Mrs Subramanya had sworn at him.

79. Mrs Subramanya called on her radio transmitter to report the incident with Mr M to the Respondent’s security. It took three calls for a response to be received. Mrs Subramanya complained that when a member of the Respondent’s security team attended his first priority was to interview Mr M rather than obtain her version of events.

80. As a result of the various incidents in the proceeding days (and in particular the complaint from Mr M) Mr Steel sent an email at 01:42 on 30 January 2019 to Mr Bullard and to Mr Axworthy. This email included reference by Mr Steel to Mrs Subramanya coming to the control room at 20:39 on 29 January 2019 and verbally abusing him and making demands that he gave her a copy of the report he was making, the statement and the CCTV footage. Mr Steel went on to refer to Mrs Subramanya “ranting/swearing/making demands”. He concluded by saying:

“I really cannot work with this lady, she is rude to customers and colleagues all I can see she likes making conflict”

81. We had some concern regarding Mr Steel’s final comment. In particular we questioned whether his reference to Mrs Subramanya “making conflict” was in respect of the complaint she had raised in her email of 1 October 2018 following

the incident on 26 September 2018. We had heard evidence that Mr Steel had been “told off” regarding his role in contacting Mrs Subramanya’s doctor on 26 September 2018 and been required to undertake additional training.

82. As a result of the various complaints regarding Mrs Subramanya’s conduct she was required to attend an investigation meeting conducted by Mr Axworthy on 22 February 2019. Amir Ascam (Mr Ascam) was in attendance as a translator. Mrs Subramanya complained to the Tribunal that he was not a Tamil speaker and Mr Steel gave evidence that Mr Ascam speaks Urdu as well as English. We acknowledge the practical difficulties of having appropriate translating services in the context of workplace grievance and disciplinary investigation meetings given the diverse composition of the Respondent’s workforce but note that there was no contemporaneous complaint from Mrs Subramanya.

83. The notes taken during the course of the investigation meeting on 22 February 2019 show that Mrs Subramanya put forward various explanations to include:

“They are making up stories. Dragos was calling me a bitch, everyone is ganging up on me”

In relation to Chloe:

“The lady doesn’t like me and is lying”

“They all speak the same language and are ganging up on me, when I complain nothing done. Everyone is speaking to me too many times. I asked what they are doing as they are all racist”.

“Yes, they are all lying I never said anything, when I clean toilets I am on my own and everyone else has someone with them”

84. Mrs Subramanya was sent a letter dated 27 February 2019 by Mr Axworthy advising her that she would be suspended from work until further notice pending investigation into “a serious allegation in that you have been abusive to a member of the public and your work colleagues”. The Tribunal notes that there was no evidence that the Respondent followed up Mrs Subramanya’s complaints about her colleagues.

85. Matheus Pavan, General Manager (Mr Pavan) sent Mrs Subramanya a letter dated 4 March 2019 inviting her to a disciplinary hearing on 6 March 2019. In summary this referred to the following allegations of gross misconduct:

“Unprofessional and abusive behaviour displayed on 24 January at approximately 16:30; on 24 January 2019 approaching DH at approximately 18:00 hours calling him “Hitler” and saying, “fuck you” “fuck your family”.

On 29 January the complaint from Mr M in which it is alleged Mrs Subramanya told him to “fuck off”.



86. Attached to Mr Pavan's letter were various documents to include witness statements from Mr Steel, MM, DH, Chloe and a report of complaints from Mr M.

87. In a further letter from Mr Pavan dated 6 March 2019 Mrs Subramanya was advised that the disciplinary hearing had been rescheduled for 8 March 2019.

88. Mrs Subramanya and Mr Chellappan initiated Employment Tribunal proceedings on 11 March 2019.

89. Notwithstanding the above it is relevant for us to record that in a letter from Mr Pavan dated 20 March 2019 Mrs Subramanya was advised that her employment was being terminated with immediate effect from 8 March 2019 for gross misconduct as result of the allegations set out in the letter inviting her to a disciplinary hearing. Mrs Subramanya had failed to attend the disciplinary hearing and the decision was therefore made in absentia.

90. Mr Kuttappan questioned the Respondent's witnesses as to whether they had been provided with equal opportunities training. Ms Buckingham stated that she had not. She did, however, believe that the Respondent's managers and supervisors had been provided with equal opportunities training. Mr Axworthy and Mr Steel gave evidence that they had undertaken online equal opportunities training.

## Law

91. Under s13(1) of the Equality Act 2010 read with s9, direct discrimination takes place where a person treats the claimant less favourably because of race than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

92. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as he was.

93. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A can show that he or she did not contravene the provision.

94. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. The tribunal can take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

95. The Court of Appeal in Madarassy, a case brought under the then Sex Discrimination Act 1975, states:

‘The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal ‘could conclude’ that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.’

96. The relevant time-limit is at section 123(1) Equality Act 2010. The tribunal has jurisdiction if the claim is presented within three months of the act of which complaint is made. By subsection (3), conduct extending over a period is to be treated as done at the end of the period. If the claim is presented outside the primary limitation period, i.e. the relevant three months, the tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable.

### Conclusions

97. We now apply the law to the facts to determine the issues. If we do not repeat every single fact, it is in the interest of keeping this decision to a manageable length.

98. In reaching our conclusions, we will apply the burden of proof under the Equality Act 2010. In some incidences, the Respondent’s explanation is so connected with the incident itself that we have considered it at stage one when deciding whether the burden of proof shifts.

99. We had regard to all of the facts in respect of each alleged incident of discrimination separately and we have also considered them collectively. The sub-headings below refer to the allegations as set out in the agreed list of issues dated 10 July 2019.

100. Whilst the claims of Mr Chellappan and Mrs Subramanya were consolidated, we consider it appropriate that our conclusions are set out separately in respect of the individual Claimants.

101. The Claimants do not rely on different facts for the claims of direct race and religious discrimination. We consider that the allegations of race and religion or belief are to a large extent based on the same facts and we do not consider it necessary to set out our conclusions separately in relation to the Claimants’ race and religion claims but rather will set out our conclusions based on the allegations that they suffered direct discrimination under s.13 of the Equality Act on the grounds of race and/or religion.

### Mr Chellappan

102. The numbers below are in accordance with the list of issues dated 10 July 2019.

**2 (a)** *He was not provided with full uniform which is still the case. This is PPE he had to pay for it himself and continues to do so.*

103. Whilst we find that Mr Chellappan was not provided with a full complement of uniform until shortly before the hearing, we then need to consider what the reason was for the Respondent's failure in this respect. The Respondent's evidence was that the failure to provide Mr Chellappan with a full complement of uniform was partly as a result of a lack of awareness that his uniform was deficient but more generally as a result of administrative incompetence on the its behalf.

104. Mr O'Neill argued that the Respondent's provision of a full complement of uniform to Mrs Subramanya was in itself sufficient to defeat Mr Chellappan's claim regarding failure to provide him with full uniform on the basis that Mrs Subramanya was of the same race and religion. We did not accept this as necessarily constituting justification of the Respondent's acknowledged shortcomings but rather asked ourselves the question as to whether the failure to provide Mr Chellappan with a full complement of a uniform was on account of his race and/or religion.

105. We considered the acknowledged lack of obvious visual differential between the work clothing as worn by Mr Chellappan and that required in accordance with the Respondent's uniform policy. We find it likely that there was a false assumption within relevant members of the Respondent's management responsible for the ordering and allocation of uniform that Mr Chellappan already had a full complement of uniform to include trousers and shoes.

106. We find that, whilst more recent recruits than Mr Chellappan were allocated full complements of uniform, this arose as a result of the Respondent's misconception that he already had full uniform rather than any deliberate omission to provide him with uniform in preference to more recent joiners. We find that the failure to appreciate Mr Chellappan's lack of full uniform was at least in part explained by his having lower visibility than other cleaning operatives as a result of being primarily assigned to the less visible compactor area.

107. We consider that Mr Chellappan sending an early and comprehensive email of concern regarding the request for him to work in the toilets evidences his willingness and ability to provide written communication of his dissatisfaction with any workplace issue. We note that this was the only occasion on which he did so. We consider that this is relevant in the context of the various other complaints relied upon by Mr Chellappan in support of his claim and in particular the issue which existed throughout his employment until recently regarding the failure by the Respondent to provide him with a full complement of uniform. We took account of the failure by Mr Chellappan to raise a complaint or grievance regarding the Respondent's shortcoming and failure to retain receipts for items of clothing and footwear he claimed to have purchased at his own expense and

then to notify the Respondent of such expenditure and seek appropriate reimbursement.

108. We consider the very prolonged failure to provide Mr Chellappan with a full complement of uniform, and in particular required PPE, could constitute less favourable treatment on account of his race and/or religion. This was particularly the case given that later recruits were provided with full uniform. We find that this creates an inference of less favourable treatment and therefore was sufficient to shift the burden of proof. We do, however, accept the Respondent's explanation that its failure was a result of inadvertent oversight and administrative incompetence. We also accept the Respondent's explanation that there was no awareness of the deficiencies in Mr Chellappan's uniform given that visual differences were not obvious and to a certain degree he was out of sight in the compactor area.

**2 (b)** *He applied for a security job in August 2018 but was not successful. This decision was made by Gavin [Buttigieg] and Mr Bullard.*

109. This allegation was withdrawn on the basis it was out of time. Given that Mr Chellappan commenced early conciliation on 4 February 2019 any matters prior to 5 November 2018 are out of time. In any event the evidence of Mr Kani was that there were no security vacancies in August 2018.

**2 (c)** *Patricia said they would make allegations about him to the building manager and DH and Jason would listen to her (assumed to be the allegation of 6 March 2019 in the ET1).*

110. We heard no evidence from Mr Chellappan or the Respondent on this issue and note that it was neither referred to in his witness statement, nor any of the documents in the bundle nor the subject of cross examination. We therefore find no evidence to support this allegation.

**8 (a)** *Abusive behaviour by Jason and DH which happens repeatedly even after this claim was made.*

111. We heard no evidence from Mr Chellappan on this issue and note that it was neither referred to in his witness statement nor any of the documents in the bundle. We therefore find no evidence to support this allegation.

**8 (b)** *He applied for a promotion to the role of team leader in January 2019, but this was refused. Rodrigo was appointed by Daryl.*

112. We heard no evidence from Mr Chellappan or the Respondent on this issue and note that it was neither referred to in his witness statement nor any of the documents in the bundle. We therefore find no evidence to support this allegation.

*Request to clean toilets and threatened suspension for refusing to do*

113. Whilst not in the list of issues, it is referred to in the ETI, and is a matter on which we heard evidence. We do not find any evidence that Mr Chellappan was treated unfavourably either as a result of the request for him to work in the toilets, the initial decision of the Respondent that he would be suspended as a result of refusing to do so and further as a result of the early response and acceptance of Mr Chellappan's objection by Mr Axworthy. Further, it is likely that Mr Chellappan was the only member of the Respondent's cleaning staff not required to clean the toilets.

114. Whilst we consider that the burden of proof shifted to the Respondent in respect of allegation 2(a) (no provision of full uniform) we are satisfied that the Respondent provided an explanation to rebut an inference that this failure was on account of Mr Chellappan's race and/or religion. We do not find that the burden of proof shifted to the Respondent in respect of the other allegations. We therefore find that Mr Chellappan's complaints of race and/or religion and belief discrimination fail.

Mrs Subramanya

**2 (a)** *She raised a complaint to UK HR of the Respondent by email in respect of an unreasonable refusal by supervisor Jason to change her shift (necessitated by a doctor's appointment).*

115. As set out in our fact finds the contact made by Mr Steel with Mrs Subramanya's doctor on 26 September 2018 constituted detrimental treatment. It was acknowledged by the Respondent, to include Mr Steel when giving evidence, that he had behaved inappropriately.

116. We need to consider whether the Respondent had an explanation for this conduct. The Respondent's position is in effect that Mr Steel, and to a certain extent DH, were acting inappropriately and were subsequently reprimanded for such conduct. We find that at the time of this incident that Mr Steel and DH already had significant issues with Mrs Subramanya and as a result of such issues were suspicious regarding the fact, reason for and duration of her impending absence.

117. It is significant that Mrs Subramanya's grievance in respect of this matter was upheld. We find that Mr Steel and DH's conduct is explained by their anxiety to ascertain availability of cleaning staff to fill rotas and that Mr Steel took an excessively and inappropriately zealous approach in seeking to ascertain the likely duration of Mrs Subramanya absence. We considered whether Mr Steel might have been motivated by antipathy towards Mrs Subramanya in his report of the incident on 29 January 2019. We consider that Mr Steel may well have been irritated by Mrs Subramanya raising the complaint in this matter and by his concerns regarding her performance and attitude but find no grounds to infer that this was on account of her race and/or religion.

**2 (b)** *At a grievance meeting she was told by the manager (Tom) that lots of complaints were being made about her in November 2018.*

118. We find that the reference to “Tom” was erroneous. The grievance meeting in question was that undertaken by Mr Hunter dated 22 November 2018. We do not consider that any evidence exists to support this allegation.

**2 (c)** *She continued to be discriminated against at work. Jason was sharing the Claimant’s personal and sensitive information with DH and called her GP without consent.*

119. We consider that this allegation interrelates with 2 (a) above and repeat our findings as set out in that respect.

**2 (d)** *As a result of legitimately refusing a site transfer she suffered unfavourable treatment e.g. she was not allowed free access to drinking water in the kitchen area, she was prevented from social interaction with co-workers and she was monitored excessively on the CCTV*

120. We consider that evidence exists that Mrs Subramanya raised concerns that she was treated less favourably than her colleagues in respect of rest breaks, monitoring whether excessive time was taken on breaks and access to drinking water. We also consider her being called “puta” by one or more of the Colombian cleaners, should have been investigated as whilst not a racist term in itself it could where directed at a person of a specific race and/ or religion constitute less favourable treatment. We make this finding based on the concerns being raised by, or on behalf of, Mrs Subramanya on 22 November 2018, in the undated letter in December 2018 and on 22 February 2019.

121. We consider the failure to investigate Mrs Subramanya’s concerns could constitute less favourable treatment on account of her race and/or religion and create an inference of less favourable treatment and therefore was sufficient to shift the burden of proof. We make this finding as a result of the concerns having been clearly raised and not investigated without any explanation being provided by the Respondent as to why this was not the case.

122. We accept the Respondent’s explanation that it invited Mrs Subramanya to particularise her concerns in the grievance outcome letter dated 8 January 2019, which she failed to do, and that the concerns raised by her were then overtaken by the events in the period 24 – 29 January 2019 which then led to the investigation meeting on 22 February 2019, her suspension on 27 February 2019 and dismissal on 8 March 2019, but not communicated until a letter dated 20 March 2019. The concerns should have been investigated but we accept that the Respondent has rebutted an inference that the failure to do was on account of her race and/ or religion. We also place reliance on the Memo to all cleaning staff regarding compliance with break times dated 15 January 2019 as evidence to rebut an inference that Mrs Subramanya was being singled out for more punitive treatment regarding compliance with allocated break times. We make this finding based on the significant evidence that a sequence of events occurred culminating in the allegations against Mrs Subramanya that provided an explanation for the respondent to rebut an inference of less favourable treatment on account of her race and/or religion.

**2 (e)** *Her suspension on or about 22 February 2019 and thereafter encouraging colleagues to sign statements to say that she was abusive.*

123. We find that Mrs Subramanya's suspension was effective on 27 February 2019 and not 22 February 2019 and that it arose from the investigation meeting held with Mr Axworthy on 22 February 2019. We find no evidence that Mrs Subramanya's colleagues were encouraged to or indeed signed statements to say that she was abusive after her suspension and therefore do not find evidence to support this allegation.

124. We find that the investigation undertaken by Mr Axworthy in respect of the complaints raised by other members of the cleaning staff in December and January was appropriate. Further, we find that the Respondent had legitimate grounds for concern regarding the nature and number of complaints raised regarding Mrs Subramanya.

125. In relation to Mrs Subramanya's suspension on 27 February 2019 we find that the Respondent had genuine grounds based on the multiple complaints raised by employees, Chloe of Tortillo and Mr M to have genuine and reasonable concerns regarding Mrs Subramanya's conduct. Whilst we are mindful that Mrs Subramanya raised concerns regarding whether her treatment by her colleagues may be on account of her race, in the absence of any other evidence, we do not find that in initiating an investigation, the conduct of the investigation by Mr Axworthy and the suspension of Mrs Subramanya supports an inference that this course of conduct was on account of her race and/or religion.

126. We find that the Respondent's approach to the incident with Mr M was arguably indicative of a predetermined view that Mrs Subramanya was always at fault. We reach this finding in the context of the complaint coming from a known regular homeless person attending the centre and also in the context of Mrs Subramanya feeling sufficiently strongly regarding the matter that it was reported by her to the British Transport Police. We nevertheless consider that on the balance of probabilities that the Respondent would have adopted this approach to any employee given the plethora of complaints received regarding Mrs Subramanya in the preceding week.

127. We have considered whether on the balance of probabilities it was likely that Mrs Subramanya used abusive terms such as "fuck you" and "Hitler". Mrs Subramanya stated that she was not familiar with the use of "fuck you" or "fuck off" and did not know who Hitler was. We do not accept her evidence in this respect. Given that Mrs Subramanya has lived and worked in the UK for approximately ten years we do not consider it credible that she would not have come across such abusive language. We also consider that it would be unlikely that she would not have had some awareness of the name Hitler. We also need to consider whether it was likely that the Respondent's management (primarily Mr Steel) would have engineered the collusion between multiple members of the cleaning staff, Chloe of Tortillo and Mr M (a homeless visitor to the shopping centre) to fabricate evidence to incriminate Mrs Subramanya. We considered but rejected this possibility.

128. We do, however, consider that there were shortfalls in the Respondent's investigation of the concerns raised by Mrs Subramanya. We find that it would have been appropriate for further investigation to have been undertaken as to whether there was any evidence to support Mrs Subramanya's assertion that the treatment, she was receiving from her colleagues was on account of race. However, we do not consider that the Respondent's shortcoming in this respect is in itself sufficient to give rise to an inference of less favourable treatment on account of Mrs Subramanya's race and/or religion.

**2 (f)** *Her previous manager (Mr Kani) called her manager (Mr Bullard) and was told that she will be sacked.*

129. We consider that on the balance of probabilities that Mr Kani had such a conversation with Mr Bullard we are not in a position to form a firm view as to whether Mr Bullard would have made such a statement in the absence of Mr Bullard to give evidence (he subsequently left the Respondent's employment). Given the multiple issues with Mrs Subramanya we find it likely that such a comment may have been made but we find that given that there is no evidence that Mr Bullard was directly involved in the disciplinary process resulting in Mrs Subramanya's dismissal, that there is therefore no evidence that any such comment if made to Mr Kani was capable of constituting less favourable treatment on account of her race and/or religion.

**8 (a)** *She was more frequently told to clean the toilets by Mr Bullard than her comparators.*

130. We do not find that any evidence exists that supports Mrs Subramanya's contention that she was treated unfavourably in the allocation of cleaning duties and in particular that she was required to clean the toilets disproportionately to other cleaners, was required to clean the men's toilets whilst other female cleaners were only required to clean the ladies toilets and that she was not provided with support in cleaning the toilets when this was provided to other cleaners.

**8 (b)** *When she was wearing Hindu religious markings on her forehead (Bindi) she was told to remove these by Mr Bullard her manager. The last request was in January 2019.*

131. We heard no evidence whether in Mrs Subramanya's witness statement or in the bundle of documents to support this allegation.

**8 (c)** *She was not allowed to change her break time to take her medicine. She requested this to Mr Bullard and it was refused. This took place in January 2019. Everybody else was allowed to change breaks.*

132. We heard no evidence whether in Mrs Subramanya's witness statement or in the bundle of documents to support this allegation.



**8 (d)** *She was unfairly accused of not cleaning properly by Mr Bullard. This happened several times on 4 December 2018 and since.*

133. Mr Bullard raised concerns with Mrs Subramanya regarding the quality of her cleaning in the Letter of concern dated 6 December 2018. Various concerns regarding the quality of Mrs Subramanya's cleaning were raised by her colleagues and Mr Steel. We do not find that this was on account of her race and/or religion.

134. Whilst the above allegations are relied on by Mrs Subramanya as constituting a course of conduct of less favourable treatment on account of her race and/or religion we do not find that any such course of conduct took place. We therefore find that those incidents which took place prior to 2 November 2018 (Mrs Subramanya commenced early conciliation on 4 February 2019) are in any event out of time.

### Costs

135. Mr O'Neill reserved the Respondent's position in relation to a costs application if a separate remedy hearing were required. Given our decision that the Claimants' claims fail this will therefore not arise.

136. Mr O'Neill did make a cost application in respect of the one hour of the Tribunal's time (30 minutes on each of days 2 and 3 of the hearing) taken up by issues raised by Mr Kuttappan regarding the adequacy of the interpreter.

137. Mr O'Neill stated that the Respondent was seeking £190 as a cost award to reflect one hour of his professional charged time. Mr Kuttappan confirmed that he was not being paid whether for time incurred or on a contingency fee basis for his representation of the Claimants and therefore the assessment of any costs award is solely based on an award for which the Claimants will be responsible pursuant to Rule 76(1).

138. Whilst we consider that the raising of issues with the interpreter on two separate days was wholly unnecessary given that on both occasions the Claimants had confirmed they had no real concerns with the interpreter we are mindful that this constituted one hour of the Tribunal's time in the context of the four day hearing. We are also mindful that the Respondent occupied approximately one and a half hours of the Tribunal's time with what the Tribunal determined was a misconceived strike out application. Further, we are mindful of the difficulties faced by the Claimants (and particularly Mrs Subramanya given her acknowledged very limited English) to give full instructions to Mr Kuttappan.

139. We therefore do not consider that the Claimants' conduct in respect of the issue with the interpreter was sufficient for the Tribunal to exercise its discretion to award costs on the basis that it constituted abusive, disruptive or otherwise unreasonable conduct under Rule 76 (1) (a). The threshold is not therefore met, and it was not necessary to take account of means of the Claimants. We therefore reject this application.

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**Employment Judge Nicole**

Dated: **5 December 2019**

Judgment and Reasons sent to the parties on:

6 December 2019

For the Tribunal Office