



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Kaba  
**Respondent:** Oltec Group Trading Limited  
**Heard at:** Leeds Employment Tribunal  
**On:** 20 and 21 January 2020 (in Tribunal) and 7 February 2020 (in private)  
**Before:** Employment Judge Deeley, Ms NH Downey and Mr M Taj

**Representation**  
Claimant: In person (with Ms Crayton interpreting)  
Respondents: Mr Ryan (Counsel)

## RESERVED JUDGMENT

1. The claimant's claim for direct discrimination because of religion under s13 of the Equality Act 2010 is dismissed.
2. The claimant's claim for harassment related to religion under s26 of the Equality Act 2010 is also dismissed.

## REASONS

### INTRODUCTION

1. The hearing of this claim took place on 20 and 21 January 2020. The Tribunal Panel met to consider their decision on 7 February 2020.
2. The parties provided a joint bundle of documents. The claimant also provided access to an audio recording of a meeting with the respondent on the first day of the hearing, to which the respondent did not object.
3. The Tribunal heard evidence during the hearing from the following witnesses:

- 3.1. the claimant;
  - 3.2. Mrs Champa Spencer (respondent's Housekeeping Manager and the claimant's line manager);
  - 3.3. Mr Richard Howarth (respondent's Duty Security Manager); and
  - 3.4. Mr John Edwards (respondent's Facilities Management Director).
4. The claimant and the respondent provided helpful written submissions (and the respondent also provided comments on the claimant's written submissions) during the two weeks following the January hearing dates.

## THE ISSUES

5. The issues for this claim were discussed during the Preliminary Hearing and summarised in an Annex to the Case Management Orders, but no formal list of issues was agreed prior to the full hearing of this claim. The Tribunal provided a draft list of issues to the parties, to which the parties agreed at the start of the first hearing day.
6. Mr Ryan noted correctly on the second day of the hearing that the claimant's suspension did not take place on 22 May 2019. The suspension took place on 23 May 2019. The disputed points in the list of issues set out below have been amended to take this into account.

### Direct discrimination – religion or belief (s13 EQA)

7. Did the respondent subject the claimant to the following treatment on 21 May 2019 (as alleged by the claimant) or 22 May 2019 (as alleged by the respondent):
  - 7.1. During that discussion:
    - 7.1.1. did Ms Spencer become angry and shouted at the claimant, stating that he could not take his break whenever he wanted, as alleged by the claimant; and/or
    - 7.1.2. did the claimant state "*I'll take them [my breaks] when I want*" and become aggressive and threatening, as alleged by the respondent?
8. Was the claimant suspended from work from 23 May 2019 onwards, as a result of that discussion on either 21 or 22 May 2019?
9. If the claimant was suspended from 23 May 2019 onwards, was the claimant paid during all or part of any such period of suspension?
10. If so, was that treatment 'less favourable treatment', i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others in not materially different circumstances? The claimant relies on a hypothetical comparator.

11. If so, was this because of the claimant's religion? In particular:

11.1. the claimant alleges that Ms Spencer wished to 'punish' him because of a dispute as to whether he had notified Ms Spencer of his dental appointment on 16 May 2019; and

11.2. the respondent alleges that the claimant was not willing to discuss potentially rearranging other employees' breaks, in order that another employee could take an earlier break and the claimant could take a later break.

**Harassment – religion or belief (s26 EQA)**

12. Did the respondent engage in the conduct set out under the heading direct discrimination above?

13. If so, was that conduct unwanted?

14. Did that conduct have the purpose or effect (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) of:

14.1. violating the claimant's dignity; or

14.2. creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

15. If so, was that conduct related to the claimant's religion?

**FINDINGS OF FACT**

1. The respondent provides integrated facilities management services on an outsource basis to organisations, including housekeeping, security, mechanical and electrical support services. Its headquarters are based in Wigan. However, the majority of the respondent's 500 employees work at the respondent's client sites.
2. The claimant was employed by the respondent as a cleaner and worked at the Light Shopping Centre in Leeds (the "**Light**"). The respondent provided housekeeping services to the Light's centre managers, including front of house cleaning for the mall ("**mall duties**") and cleaning for non-public areas (known as "**backhouse duties**"). The claimant was based in the backhouse area and his duties included manoeuvring and emptying heavy bins for the Light's tenants.
3. The claimant started working for the respondent on 20 November 2017 for 30 hours per week, working shifts from 3pm-11pm each day. The shift pattern for the cleaners at the Light involved working four days on, followed by four days off. Most of the other cleaners' shifts ran from 7am-3pm (morning shift) and 11am-7am (night shift). The respondent arranged the cleaners' shifts such that there were two cleaners

working on mall duties and one cleaner working on backhouse duties at any time, apart from during the night shift when only one cleaner worked.

4. The cleaners reported to Mrs Spencer, who managed a team of around 13 cleaners. Mrs Spencer had worked at the Light for around 12 years, initially as a cleaner before she was promoted to Housekeeping Manager`. Mrs Spencer reported to the respondent's Area Manager for West Yorkshire (initially Mr Glen Kildoff and later Mr Will Smith, both of whom had left the respondent's employment by the time of this hearing). The respondent's Area Manager works on a regional basis and was not based at the Light.
5. The respondent also provided other facilities management services to the Light, including security services. There were three duty security managers assigned to the Light, including Mr Howarth.
6. The claimant is Muslim and observes Ramadan each year. The period of Ramadan in 2019 started on 5 May and continued until 4 June. The hours in which the claimant fasted during the period of Ramadan in 2019 were from around 3am to 9pm each day, depending on the exact hours of daylight on each day. The claimant would also pray each day during Ramadan.

#### *Relevant contract terms*

7. The respondent provided a copy of the claimant's contract of employment, signed by both parties on 13 November 2017. The first page of the respondent's standard contract included terms stating:

*"4 Place of work*

*Your normal place of work may be variable and you will be required to travel within a 25-mile radius of your home address as part of your normal job duties, for which no expenses will be paid...*

*At any time the client may request the removal or expulsion of an employee from their premises due to their unsuitability or if there is a serious breach of Client's or the Company's Regulations, or by mutual agreement. In such situations, the Company will try to find the employee suitable alternative work and they may be transferred to another assignment with an increase or decrease in rate of pay or may be dismissed, depending on the seriousness of the complaint. If no suitable alternative work can be found or the employee rejects the offer of alternative work, then the employee's contract will be terminated due to "some other substantial reason".*

8. The claimant's evidence was that he did not receive the first page of this contract. However, we find that the claimant did receive the first page of the contract because:
  - 8.1 the claimant accepted that he and Mr Kildoff signed the final page of the contract on 13 November 2017; and

- 8.2 we accept Mr Edwards' evidence that the contract is normally printed on double sided paper and the claimant accepts that he received the remainder of his contract.

*Cleaner's breaks and events on 6 May 2019*

9. The respondent's cleaners were entitled to two breaks during a shift, consisting of one paid break of twenty minutes and one unpaid break of thirty minutes. The 3pm-11pm shift was organised such that each of the three cleaners would normally take turns to have their first break at either 5pm, 5.30pm or 6pm and then take another break later in the shift.
10. The respondent allocated breaks at the start of each shift on the daily roster because the duties required during the shift could change daily.
11. The respondent's witnesses gave conflicting evidence when questioned whether the claimant had to take his breaks at a different time to the other two cleaners working on his shift. Mrs Spencer and Mr Edwards' witness statements both stated that only one cleaner could take a break at any time, so that there were two cleaners available to carry out any tasks required. However, we accept Mrs Spencer's evidence during the hearing when she stated that:
- 11.1 the other cleaners working on the claimant's shift would not normally cover the claimant's duties during his break because he worked on backhouse and they covered mall duties;
- 11.2 some of the cleaners were unable to perform the claimant's duties because the 'backhouse' work involved shifting heavy bins;
- 11.3 the main reason why Mrs Spencer did not want to arrange the claimant's break at the same time as another cleaner's break was because they were likely to chat and take a longer break than they had been allocated.
12. The claimant and Mrs Spencer discussed the claimant's fasting for Ramadan on 6 May 2019. However, the contents and outcome of that discussion are disputed.
13. We find that there was a misunderstanding between the claimant and Mrs Spencer about whether the claimant had asked to change his break arrangements for 6 May 2019 only or for the whole of Ramadan. We find that:
- 13.1. the claimant believed that they had agreed that he could take one single break after 9pm for the whole of Ramadan;
- 13.2. whereas Mrs Spencer believed that they had agreed to these arrangements as a one-off change to the claimant's breaks for 6 May 2019 only.

*Claimant's breaks from 6 May to 15 May 2019*

14. We find that during the period from 6 May to 15 May 2019 (inclusive):

- 14.1. the claimant took his breaks in the form of a single combined break of 50 minutes after 9pm each night;
- 14.2. the claimant did not contact the control room to log that he was taking a break or returning from a break on those dates; and
- 14.3. neither Mrs Spencer nor the claimant's supervisor questioned the times when the claimant took his breaks at any time before 21 May 2019.

*Discussions re claimant's dentist's appointment - 16 May 2019*

15. The claimant asked Mrs Spencer if he could take leave on 16 May 2019 to attend a dentist's appointment. Mrs Spencer tried to find another employee who would be willing to swap shifts with the claimant, but the respondent was unable to arrange this. However, it is disputed whether the claimant's leave was approved by Mrs Spencer.

16. We find that there was a further misunderstanding between the claimant and Mrs Spencer regarding the arrangements for 16 May 2019. The claimant understood from the discussion that he had arranged to take a day's leave with Mrs Spencer. Mrs Spencer understood from the discussion that the claimant would confirm that he intended to take a day's leave.

17. We also find that:

- 17.1. Mrs Spencer called the claimant on 16 May 2019 to ask why he was not at work and the claimant replied that he had taken the time off to attend a dentist's appointment;
- 17.2. Mr Will Smith later spoke with the claimant and asked the claimant about the matter, but did not speak to the witnesses that the claimant had named; and
- 17.3. the claimant and Mrs Spencer did not discuss the claimant's dentist's appointment again after this date.

*Text message on 21 May 2019*

18. Mrs Spencer sent a text message to Samuel (the claimant's temporary supervisor) on 21 May 2019, regarding the claimant's breaks. Neither Mrs Spencer nor Samuel have retained a copy of that text message. However, the claimant contacted Samuel after submitting his claim and provided Samuel's text in response as part of the hearing file. That document stated that Samuel's recollection of the message was that he should ensure that the claimant took two breaks during that day's shift.

19. We find that the message stated that the claimant should take two breaks, instead of one break. The claimant accepted Mrs Spencer's evidence that the text message did not refer to an agreement regarding Ramadan, contrary to the wording of the claimant's witness statement.
20. We find that Mrs Spencer was likely to have sent the text message because the claimant's shift on 16 May 2019 was not covered due to the misunderstanding between the claimant and Mrs Spencer regarding arrangements for that day. We find that this issue prompted Mrs Spencer to speak to the claimant's supervisor and review his break arrangements. In reaching this finding, we note that claimant had previously taken his breaks without question from Mrs Spencer or his supervisor.

*Claimant's discussion with Wayne Smith on 21 May 2019*

21. We accept the claimant's evidence that he spoke to Mr Wayne Smith (respondent's Security & Housekeeping Manager) after Samuel told him about the text message on 21 May 2019. We find that they discussed the arrangements for his breaks during Ramadan and that Mr Wayne Smith said that he would speak to Mrs Spencer. The claimant took a break at 9pm on 21 May 2019 because Mr Wayne Smith told him that he could take a break when he was able to break his fast.
22. However, we also accept Mrs Spencer's evidence that Mr Wayne Smith did not speak with her regarding the claimant's breaks before the incident on 22 May 2019.

*Incident on 22 May 2019*

23. It is common ground that Mrs Spencer had allocated the claimant a break at 7.30pm on 22 May 2019 before his shift started on that day. It is also common ground that Mrs Spencer and the claimant had an argument about the claimant's break times shortly before the claimant's shift started on 22 May 2019. However, the tone and contents of that argument are disputed.
24. We find that Mrs Spencer's knowledge of Muslim practices during Ramadan was as follows:
  - 24.1. we accept Mrs Spencer's evidence that she was aware that Ramadan lasted for around a month. We also accept her evidence that she has neighbours who are Muslim who sometimes fast during Ramadan, but who do not fast for the whole of the Ramadan period;
  - 24.2. we accept that Mrs Spencer was not aware of the timings of the claimant's fast during Ramadan before the incident on 22 May 2019. In reaching this finding, we note that the claimant had previously asked to take his break at 9pm on 6 May 2019. However, we also note that the time at which the claimant could break his fast varied depending on the time of sunset on each day during Ramadan;

- 24.3. we accept the claimant's evidence that he took his breaks at a time to enable him to break his fast during the previous Ramadan period in 2018. However, we accept Mrs Spencer's evidence that she was not aware that the claimant had adjusted his break times during the Ramadan period in 2018.
25. Mrs Spencer states at paragraph 11 of her statement: "*I knew he was fasting and gave him the 7.30pm break for 50 mins.*" We accept Mrs Spencer's evidence that she did not have a particular reason for choosing 7.30pm as the claimant's break time. We also accept Mrs Spencer's evidence that:
- 25.1. she did not think it was appropriate from a health and safety perspective for the claimant to wait until 9pm for his break, given the manual demands of his duties; and
- 25.2. she knew that the claimant was fasting. However, she did not know that he was unable to eat until after 9pm on that day.
26. Both the claimant and Mrs Spencer agree that:
- 26.1. they were standing in the corridor near the staff locker room area when the incident started;
- 26.2. Mrs Spencer asked the claimant if the 7.30pm break time in the roster 'was okay' for him;
- 26.3. the claimant said that he could not take his break at 7.30pm because he could not eat before 9pm on that day;
- 26.4. Mrs Spencer said that the claimant could not do whatever he wanted and that he should ask for permission before changing his break time.
27. Mr Howarth was standing in the staff locker room and overheard the claimant and Mrs Spencer having an argument. Mr Howarth joined them and stated that one of the security guards (who also fasts during Ramadan) checks with his manager before changing his break times.
28. Our further findings relating to the argument on 22 May 2019 are as follows:
- 28.1. we accept Mr Howarth's evidence that both the claimant and Mrs Spencer were arguing, raising their voices and not listening to each other;
- 28.2. we find that the claimant told Mrs Spencer that he had previously asked her permission to adjust his breaks. Mrs Spencer said that the claimant had asked her ages ago. Mrs Spencer then said that the claimant could take a break at 9pm, but that he had to ask her before changing his break times. The claimant said that he was going to take a break at 9pm anyway;



28.3. we find that both the claimant and Mrs Spencer were both angry and upset and that both were pointing their fingers at each other during the argument;

28.4. we accept Mr Howarth's and Mrs Spencer's evidence that the claimant and Mrs Spencer were standing close to each other during the argument. However, we find that if Mr Howarth believed that the claimant posed a potential physical threat to Mrs Spencer, then he would have reported that the claimant was in fact aggressive towards Mrs Spencer in his incident report at the time. Indeed, Mr Howarth stated in his contemporaneous incident report that the claimant was 'as close to being aggressive in his arguing manner as you can be'. Mr Howarth did not state in that report that the claimant was in fact aggressive towards Mrs Spencer. We also note that Mr Howarth also gave oral evidence that he 'steered' Mrs Spencer away from the area of the incident at the end of the argument, which was omitted from both his incident report and from his witness statement.

29. After the argument had finished:

29.1. the claimant started his shift. He took his break at 9pm that evening and then continued to work for the rest of his shift; and

29.2. Mrs Spencer and Mr Howarth went to the control room together.

*Mrs Spencer's complaint re incident on 22 May 2019*

30. In summary, Mrs Spencer and Mr Howarth took the following action after the incident on 22 May 2019:

30.1. Mrs Spencer was upset after her argument with the claimant and discussed the incident with Mr Howarth. Mr Howarth suggested that Mrs Spencer raise the issue with Mr Stephen Hickey (a centre manager at the Light, who worked for the respondent's client);

30.2. Mrs Spencer then spoke to Mr Hickey about her argument with the claimant. Mr Hickey told Mrs Spencer that she and Mr Howarth should provide a report of the argument because the respondent's managers at the Light were required to provide daily reports to the Light's centre managers. These daily reports included any incident reports, including incidents relating to members of the public and staff;

30.3. Mrs Spencer and Mr Howarth then emailed the incident reports relating to the argument to several recipients including Mr Hickey, Mr Oakley (who worked with Mr Hickey) and Mr Will Smith; and

30.4. Mrs Spencer spoke to Mr Will Smith and said that she was upset by the incident and felt scared of the claimant. She told Mr Will Smith that she felt that she could not work with the claimant any more.

31. We find that the respondent's client decided not to permit the claimant to return to the Light on or shortly after 23 May 2019. In reaching this finding we have considered the following evidence:

31.1. it is agreed that the claimant was not subject to any formal disciplinary action at any time during his employment. However, we accept that Mrs Spencer and Mr Edwards' evidence that Mrs Spencer had previously complained to Mr Hickey that the claimant had not followed her instructions;

31.2. we accept Mr Edwards' evidence that it is common for clients to refuse to confirm withdrawal of permission to attend site in writing because they 'do not want to get involved' in any disputes between the respondent and its employees.

*Events after 23 May 2019*

32. Mr Will Smith phoned the claimant and told him not to attend work at the Light on 23 May 2019. The claimant did not work any shifts for the respondent and did not receive any pay from the respondent (apart from his notice pay) from 23 May 2019 onwards.

*Claimant's meeting with Will Smith on 31 May 2019*

33. Mr Smith arranged an off-site meeting with the claimant on 31 May 2019. The claimant provided an audio recording of around 30 minutes of that meeting, which demonstrated that the discussions that took place during that meeting were far more extensive than the summary minutes which Mr Smith typed during the meeting. However, the claimant did not raise any specific complaints regarding that meeting as part of these proceedings. During that meeting, we find that:

33.1. the claimant and Mr Smith discussed the incident on 22 May 2019;

33.2. Mr Smith informed the claimant that the client had withdrawn its permission to allow the claimant to work at the Light and that the only alternative roles available for the claimant were temporary roles based at Trinity Walk in Wakefield; and

33.3. the claimant stated that he would need to speak with his family before deciding whether to accept an alternative role due to the travel distance and time involved.

34. The claimant raised a grievance on 7 June 2019 regarding the way in which the respondent handled the incident on 22 May 2019, his removal from the Light and the offer of alternative work in Wakefield. Mr Dan Brotherton (Regional Manager) heard the claimant's grievance on 11 July 2019 and rejected it. The claimant appealed and Mr Edwards heard the grievance appeal on 7 August 2019, but also rejected it.

35. In the meantime, the respondent terminated the claimant's employment with effect from 22 July 2019 due to the lack of alternative roles for the claimant. The respondent paid the claimant for his one week notice period.

*Claimant's text to Mrs Spencer on 30 October 2019*

36. We note that the claimant texted Mrs Spencer on 30 October 2019 regarding these proceedings, at around the time of the Preliminary Hearing of his claim. We do not consider that it was appropriate for the claimant to have contacted Mrs Spencer because the respondent was represented by solicitors in relation to these proceedings. However, we have considered the contents of the text message and the witnesses' evidence relating to that message and have concluded that they do not alter our findings of fact as set out above.

## LEGAL PRINCIPLES

*Discrimination and harassment (religion or belief)*

1. The Tribunal has considered the legislation and caselaw referred to below, together with any additional legal principles referred to in the parties' written submissions.
2. Claims of discrimination and harassment related to religion or belief are governed by the Equality Act 2010 (**EQA**). Section 39 states that it is unlawful for employers to discriminate against their employees, including in relation to the terms of their employment and by subjecting them to a detriment. Section 40 states that it is unlawful for employers to harass their employees.
3. Discrimination includes direct discrimination. Direct discrimination and harassment are defined by the EQA as follows:

### **13 Direct discrimination**

- (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.

...

### **26 Harassment**

- (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 in subsection (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 – ...religion;

...

4. In addition, s23 of the EQA states in relation to comparators for direct discrimination cases that:

**23 Comparison by reference to circumstances**

(1) On a comparison of cases for the purposes of section 13...there must be no material difference between the circumstances relating to each case.

...

*Direct discrimination*

5. There are two key questions that the Tribunal must consider when dealing with claims of direct discrimination:
  - 5.1. was the treatment alleged 'less favourable treatment', i.e. did the respondent treat the claimant less favourably than it treated or would have treated others in not materially different circumstances;
  - 5.2. if so, was such less favourable treatment because of the claimant's religion?
6. However, the Tribunal can, in appropriate cases, consider postponing the question of less favourable treatment until after they have decided the 'reason why' the claimant was treated in a particular way (*Shamoon v Chief Constable of the Royal Ulster Constabulary* 2003 ICR 337 HL).
7. In relation to less favourable treatment, the Tribunal notes that:
  - 7.1. the test for direct discrimination requires an individual to show more than simply different treatment (*Chief Constable of West Yorkshire Police v Khan* 2001 ECR 1065 HL);
  - 7.2. however, an employee does not have to experience actual disadvantage for the treatment to be less favourable. It is sufficient that an employee can reasonably say that they would have preferred not to be treated differently from the way an employer treated or would have treated another person (cf paragraph 3.5 of the EHRC Employment Code); and
  - 7.3. the motive and/or beliefs of the parties are relevant to the following extent:
    - 7.3.1. the fact that a claimant believes that he has been treated less favourably does not of itself establish that there has been less favourable treatment (e.g. *Shamoon*);
    - 7.3.2. in cases where the conduct is not inherently discriminatory, the conscious or unconscious 'mental process' of the alleged discriminator is relevant (e.g. *Amnesty International v Ahmed* 2009 ICR 1450 EAT); and

7.3.3. for direct discrimination to be established, the claimant's religion must have had a 'significant influence' on the conduct of which he complains (*Nagarajan v London Regional Transport* 1999 ICR 877 HL).

8. The Tribunal also notes that if an employer treats all employees equally unreasonably, it is not appropriate to infer discrimination (e.g. *Laing v Manchester City Council & another* 2006 ICR 1519 EAT and *Madarassy v Nomura International plc* 2007 ICR 867 CA).

### *Harassment*

9. There are three elements to the definition of harassment:
- 9.1. unwanted conduct;
  - 9.2. the specified purpose or effect; and
  - 9.3. that the conduct is related to a relevant protected characteristic: see *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336.
10. A single act can constitute harassment, if it is sufficiently 'serious' (cf paragraph 7.8 of the EHRC Code).
11. The burden of proof provisions apply (see below). When a tribunal is considering whether facts have been proved from which it could conclude that harassment was on the grounds of religion, it is always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on the grounds of religion. The context may, for example, point strongly towards or strongly against a conclusion that harassment was on the grounds of religion. The tribunal should not leave the context out of account at the first stage and consider it only as part of the explanation at the second stage, after the burden of proof has passed: see *Nazir v Asim & Nottinghamshire Black Partnership* [2010] IRLR 336 EAT.
12. In considering whether the conduct had the specified effect, the Tribunal must consider both the actual perception of the complainant and the question whether it is reasonable for the conduct to have that effect. That entails consideration of whether, objectively, it was reasonable for the conduct to have that effect on the particular complainant. It is intended to exclude liability where the complainant is hypersensitive and unreasonably takes offence: see *Dhaliwal*.

### *Burden of proof*

13. The burden of proof is dealt with by s 136 Equality Act 2010, as follows:

#### **136 Burden of proof**

...

(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 subsection (2) does not apply if A shows that A did not contravene the provision.

...

(6) A reference to the court includes a reference to -  
(a) an employment tribunal;

...

14. The Court of Appeal in *Igen Ltd v Wong* [2005] ICR 931 gave guidance as to the application of the burden of proof provisions. That guidance remains applicable: see *Ayodele v Citylink Ltd* [2017] EWCA Civ 1913. The guidance outlines a two-stage process:

14.1. First, the claimant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an unlawful act of discrimination against the complainant. That means that a reasonable tribunal could properly so conclude, from all the evidence before it. A mere difference in status and a difference of treatment is not sufficient by itself: see *Madarassy v Nomura International plc* [2007] ICR 867, CA.

14.2. The second stage, which only applies when the first is satisfied, requires the respondent to prove that it did not commit the unlawful act.

15. The Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 made clear that it is important not to make too much of the role of the burden of proof provisions. Those provisions will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they are not required where the Tribunal is able to make positive findings on the evidence one way or the other.

## **APPLICATION OF THE LAW TO THE FACTS**

16. Applying the law to the facts, our conclusions are as set out below. In many respects, our conclusions flow inevitably from the findings of fact and can be briefly stated.

### ***DIRECT DISCRIMINATION***

*Was the claimant treated less favourably than a comparator?*

17. We have set out our findings of fact regarding the words and actions that took place during the incident on 22 May 2019 in detail above.

18. The relevant hypothetical comparator for the claimant's direct discrimination complaint is a non-Muslim employee who:

18.1. had been the subject of previous complaints by Mrs Spencer to Mr Hickey;

- 18.2. had previously had misunderstandings with Mrs Spencer regarding adjustments to break times on 6 May and leave arrangements on 16 May 2019;
- 18.3. had a good reason to request adjusted break times, of which Mrs Spencer was not fully aware; and
- 18.4. had argued about break times with Mrs Spencer, in a similar manner to the argument that we have found took place on 22 May 2019 between the claimant and Mrs Spencer.
19. We find that the respondent did not treat the claimant less favourably than it would have treated a hypothetical comparator in not materially different circumstances to the claimant. The key reasons for our decision are:
- 19.1. the context to the argument between the claimant and Mrs Spencer on 22 May 2019 included:
- 19.1.1. Mrs Spencer had previously complained to Mr Hickey that the claimant had not followed her instructions;
- 19.1.2. Mrs Spencer had spoken with the claimant's supervisor regarding the claimant's break arrangements, following the misunderstanding regarding the claimant's dental appointment on 16 May 2019;
- 19.1.3. the claimant believed that Mrs Spencer was seeking to renege on previously agreed arrangements regarding his breaks and that she was 'punishing' him for taking leave on 16 May 2019; and
- 19.1.4. the claimant was annoyed by the text message that Mrs Spencer sent to Samuel on 21 May 2019 regarding his breaks;
- 19.2. Mrs Spencer felt undermined by what she perceived to be the claimant's challenges to her authority on 22 May 2019, including his statement that he would take his break at 9pm regardless;
- 19.3. we have found that both the claimant and Mrs Spencer were angry and upset during the argument on 22 May 2019 and that both raised their voices and were not listening to each other during the argument;
- 19.4. Mr Howarth would have prompted Mrs Spencer to report any incident to Mr Hickey and to the respondent which was similar to the incident on 22 May 2019; and
- 19.5. the respondent would have removed any employee from the Light if their client had withdrawn permission for the employee to work at that site. We note that the first page of the claimant's contract of employment (which we found he received) states expressly that: *"At any time the client may request the removal or expulsion of an employee from their premises due to their unsuitability"*.

*If so, was such less favourable treatment because of the claimant's religion?*

20. Given our finding that there was not less favourable treatment, we do not need to make any findings as to whether the treatment was because of the claimant's religion.

## **HARASSMENT**

*Was there unwanted conduct?*

21. We find that the claimant did experience unwanted conduct, in that:

21.1. Mrs Spencer stated on the roster that the claimant would take a single break at 7.30pm, i.e. rather than after 9pm (or at a later time after his fast had ended that day); and

21.2. the claimant and Mrs Spencer proceeded to argue about his breaks, as set out in our findings of fact above.

However, we do not find that Mrs Spencer acted in this manner because she intended to 'punish' the claimant in relation to the arrangements for his dentist's appointment, as alleged by the claimant.

*Was such conduct related to the claimant's religion?*

22. Whilst we accept that there was unwanted conduct, we find that the conduct was not related to the claimant's religion because of the context in which the events took place. The context includes our findings that:

22.1. we accepted Mrs Spencer's evidence that the reason for scheduling separate breaks for the shift's cleaners was to avoid employees taking prolonged breaks due to 'chatting';

22.2. we accepted Mrs Spencer's evidence that she was aware that the claimant was fasting, but that she was not aware that he was unable to end his fast at 7.30pm;

22.3. we accepted Mrs Spencer's evidence that she was concerned about the impact on the claimant's health and safety of working for a longer period before taking a break;

22.4. it was not disputed that Mrs Spencer asked the claimant if he was 'okay' with his scheduled break time of 7.30pm on 22 May 2019, in response to which the claimant could have explained why he needed to take a later break; and

22.5. we found that Mrs Spencer would have proceeded to have an argument with any employee discussing adjustments to break times in a similar manner to



that set out in our findings, regardless of the reason for requesting such adjustments.

*Did the conduct have the purpose or effect of: (i) violating the claimant's dignity; or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?*

23. In the light of our conclusion that the conduct was not related to the claimant's religion, we do not need to consider the purpose or effect of the conduct. However, even if such conduct was related to the claimant's religion we have concluded that the conduct did not have the purpose or effect required by the test at s26 of the EQA.

24. *Purpose* - We find that Mrs Spencer's conduct did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The key reasons for our decision include:

24.1. our findings set out in relation to the question of whether the conduct related to the claimant's religion;

24.2. Mrs Spencer told the claimant that he could take his break at 9pm, but that he should ask permission to do so; and

24.3. Mrs Spencer did not seek to prevent the claimant from taking his break at 9pm on 22 May 2019.

25. *Effect* - Given the context in which the conduct took place, we found that the respondent did not intend to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him. However, we must also consider the effect of the conduct.

26. We accept the claimant's evidence that he was in fact upset and offended by the conduct because:

26.1. the claimant believed that he already had an agreement to adjust his break times with Mrs Spencer from 6 May 2019 onwards; and

26.2. the claimant was unhappy with communications regarding arrangements for his leave/shift cover on 16 May 2019 and with the text message that Mrs Spencer sent to Samuel regarding his breaks on 21 May 2019.

27. However, we find that it was not reasonable for the conduct to have that effect on the claimant in the context in which the events took place. The key reasons for this conclusion include:

27.1. we accepted Mrs Spencer's evidence regarding her limited knowledge of the claimant's practices during Ramadan;

27.2. Mrs Spencer had previously agreed to adjust the claimant's break times on 6 May 2019 (albeit, that there was a misunderstanding between Mrs Spencer and the claimant as to whether this was a one-off or a continuing arrangement);

27.3. it is not disputed that Mrs Spencer asked the claimant if he was 'okay' to take a break at 7.30pm – there was no suggestion that Mrs Spencer intended to force the claimant to take his break at 7.30pm;

27.4. the claimant could have explained his practices during Ramadan to Mrs Spencer in more detail on 22 May 2019, before the argument started. In reaching this finding, we note that the claimant was willing to discuss his requirements with Mr Wayne Smith on 21 May 2019;

27.5. Mrs Spencer told the claimant that he could take his break at 9pm, but that he should ask permission to do so; and

27.6. the claimant did in fact proceed to take his break at 9pm on 22 May 2019.

### **Conclusions**

28. The claimant's claims for direct discrimination and harassment therefore fail and are dismissed.

**Employment Judge Deeley  
19 February 2020**