Case Numbers: 3200186/2020
3200187/2020 & 3200882/2020

EMPLOYMENT TRIBUNALS

Claimants:	**(1) Mrs R. Khanom** **(2) Mr. A. Hoque** **(3) Ms. M. A. Rubi**
Respondents:	**(1) London Borough of Tower Hamlets** **(2) Principle Recruitment Associates Limited (Creditors Voluntary Liquidation)**
Heard at:	**East London Hearing Centre (by Cloud Video Platform)**
On:	**28 – 30 July, 11 November and (in chambers) 12 November 2021**
Before:	**Employment Judge Hallen,**
Members:	**Ms. G. Forrest** **Ms. A. Berry**
Representation	
Claimant:	Ms. S. Sullivan- Solicitor
Respondent:	Ms. A. Ahmad- Counsel

RESERVED JUDGMENT

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V by Cloud Video Platform. A face-to-face hearing was not held because the relevant matters could be determined in a remote hearing.

The unanimous judgment of the Tribunal is that: -

1. **The Claimant's claims for direct race discrimination contrary to section 13 Equality Act 2010 ('EA') are not made out and are dismissed.**

2. **The Claimant's claims for harassment contrary to section 26 of the EA are not made out and are dismissed.**

3. **The second Claimant's claims for unfair dismissal and breach of contract against the second Respondent are stayed for six months from**

the date of this judgment. If no application is made by the second Claimant to resurrect the proceedings within this time, they stand dismissed. The first and second Claimant make no claims against the second Respondent.

REASONS

Background and Issues

1. The first Claimant, Mrs Khanom worked as a Passenger Assistant for the Council's school bus service from April 2019 to 25 November 2019. The second Claimant, Mr Hoque is married to the first Claimant and worked as a driver for the Council's bus service from November 2014 to 25 November 2019. The third Claimant, Ms Rubi, worked as a Passenger Assistant for the Council for approximately 23 months with her services being terminated on 25 November 2019. All three of the Claimants were agency workers and were employed by the second Respondent which is in creditors voluntary liquidation. Only the second Claimant pursues a claim for unfair dismissal and breach of contract against this Respondent. These claims were stayed for six months at the substantive hearing and will be dismissed if the second Claimant does not make an application to the Tribunal to resurrect them. All three Claimants are Bengali and make claims for direct race discrimination and harassment against the first Respondent. The issues are identified below.

2. On the first day of the substantive hearing on 28 July 2021, the Claimants claims under section 19 of the EA were withdrawn by the Claimant's representative. On the fourth day of the hearing on 11 November 2021, the Claimant's representative sought to resurrect these claims. The application was made on the basis that the first Respondent had, after the first 3 days of the hearing, provided rudimentary information on the race of Passenger Assistants on the same route 53 that the first and third Claimant worked on, and it was argued that this information was not available at the time that the section 19 claims were withdrawn. The Tribunal rejected the application on the basis that the information provided by the first Respondent did not help the Tribunal in considering the section 19 claims because the information provided was not based on accurate records kept by the Council, it did not cover the ethnicity and race of all the Passenger Assistants and the Council did not keep the ethnicity of all agency staff in any event. Furthermore, the application was made on the fourth day of the hearing and would prejudice the Respondent in having to prepare its defence as the Council did not keep records of the ethnicity and race of agency staff and would have to obtain them from the agency itself which was in voluntary liquidation.

3. Employment Judge Gardiner identified the legal issues in all three Claimant's claims at preliminary hearings on 8 June 2020 in respect of the first and second Claimant and on 9 July 2020 in respect of the third Claimant. The claims made in these proceedings were clarified in the course of the Preliminary Hearing to be as follows:

By the First Claimant

3.1 Direct discrimination by the First Respondent on grounds of the First Claimant's Bangladeshi nationality in the following respects:

3.1.1 Being told on 25 November 2019 that she could no longer work for the First Respondent as a result of her conduct during the incident on 21 November 2019, when other white European workers also involved in the incident were permitted to continue working. The First Claimant compared her treatment with the treatment received by the driver Josef and the other Passenger Assistant on duty;

3.1.2 Being told in a humiliating and degrading way on 25 November 2019 that she was no longer permitted to work for the First Respondent. The First Claimant relied on the matters set out at paragraphs 5, 7 and 8 of the Particulars of Claim namely that she was told by Ms Lillywhite to wait in the waiting area, that Ms Lillywhite has asked for the return of her hi-vis vest which belonged to her and shouted at the Claimant, 'Get out from my building', 'Did you not hear me, I don't' want to see you anymore', 'where is Abdul, I am going to sack him' and that Ms Lillywhite had told the first Claimants husband, the second Claimant that she could wait in his car for hours waiting for her husband and whether that was a racist assumption, that the first Claimant was completely dependent on her husband;

3.1.3 Being given an irrational reason why she could not continue working in circumstances where the First Claimant had no sufficient opportunity to clear up after Pupil A had vomited, given that the bus driver drove off shortly after the bus had arrived;

3.1.4 Being denied an adequate opportunity to put her version of events before the decision was taken that she could no longer work for the First Respondent;

3.1.5 Not being invited to a disciplinary hearing;

3.1.6 The sanction of being told that she could no longer work for the First Respondent was too harsh in circumstances where at most a warning would have been sufficient;

3.1.7 Failing to provide the First Claimant with notice of the decision that she would not be offered any further work;

3.1.8 Failing to respond at all to the First Claimant's grievance lodged on 5 December 2019.

4. In the alternative, the First Claimant contended that the above individually or cumulatively amounted to harassment by the First Respondent because of her Bangladeshi nationality, contrary to Section 26 of the Equality Act 2010.

5. <u>By the Second Claimant</u>

5.1 Direct discrimination on grounds of the Second Claimant's Bangladeshi nationality in the following respects:

5.1.1 Being told on 25 November 2019 that he could no longer work for the First Respondent as a result of his conduct on 25 November 2019;

5.1.2 Being told in a humiliating and degrading way on 25 November 2019 that he was no longer permitted to work for the First Respondent. The Second Claimant relied on the matters set out at paragraphs 9 and 10 of the Particulars of Claim namely that he was followed by Ms Lillywhite with two other members of staff who demanded his bus keys and swipe card and was told to go and was phoned on the same day by Ms Osborne at home and when he tried to explain what had happened Ms Osborne hung up the phone;

5.1.3 Being given an irrational reason why he could not continue working for the First Respondent, namely that he refused to obey the First Respondent's instruction on 25 November 2019 that he should drive his wife home;

5.1.4 Being denied an adequate opportunity to put his version of events before the decision was taken that he could no longer work for the First Respondent;

5.1.5 Not being invited to a disciplinary hearing;

5.1.6 The sanction of being told that he could no longer work for the First Respondent was too harsh in circumstances where at most a warning would have been sufficient;

5.1.7 Failing to provide the Second Claimant with notice of the decision that he would not be offered any further work;

5.1.8 Failing to respond at all to the Second Claimant's grievance lodged on 5 December 2019.

6. In the alternative, the Second Claimant contended that the above individually or cumulatively amounted to harassment by the First Respondent because of his Bangladeshi nationality, contrary to Section 26 of the Equality Act 2010.

<u>By the third Claimant</u>

6.1 Direct discrimination by the Respondent on grounds of the Claimant's Bangladeshi nationality in the following respects:

6.1.1 Being told on 25 November 2019 that she could no longer work for the First Respondent as a result of her conduct during the incident on 21 November 2019, when other white European workers also involved in the incident were permitted to continue working. The Claimant

compared her treatment with the treatment received by the driver Josef and the other Passenger Assistant on duty;

6.1.2 Being told in a humiliating and degrading way on 25 November 2019 that she was no longer permitted to work for the Respondent;

6.1.3 Being given an irrational reason why she could not continue working in circumstances where the Claimant had no sufficient opportunity to clear up after Pupil A had vomited, given that the bus driver drove off shortly after the bus had arrived;

6.1.4 Being denied an adequate opportunity to put her version of events before the decision was taken that she could no longer work for the Respondent;

6.1.5 Not being invited to a disciplinary hearing;

6.1.6 The sanction of being told that she could no longer work for the Respondent was too harsh in circumstances where at most a warning would have been sufficient;

6.1.7 Failing to provide the Claimant with notice of the decision that she would not be offered any further work;

6.1.8 Failing to respond at all to the Claimant's grievance lodged on 5 December 2019.

7. In the alternative, the First Claimant contended that the above individually or cumulatively amounted to harassment by the First Respondent because of her Bangladeshi nationality, contrary to Section 26 of the Equality Act 2010.

8. At the hearing on 8 June 2020 Judge Gardiner decided it was appropriate for all three claims made by the Claimants to be consolidated and heard together.

9. The Tribunal had an agreed bundle of documents in front of it. All three of the Claimants gave evidence and had a Bengali interpreter at their disposal. The Respondents called four witnesses. They were the joint decision makers in respect of the termination of the Claimant's agency service, namely Amanda Osborne (Route Manager) and Sheba Khanom (Contracts Monitoring Officer), as well as Charmaine Lillywhite (Route Manager) and Richard Williams (Business Manager for Operational Services). All witnesses prepared written witness statements and were subject to cross examination and questions from the Tribunal.

Facts

10. Mrs Khanom and Ms Rubi were agency staff who worked as Passenger Assistants (PAs) on the Council's transport services. The job description of both PA's was at page 137 of the bundle. The key purpose and responsibility of a PA was 'to assist service users from location to location in a caring and sympathetic manner' in a way that provided an effective transportation service which met the needs of Tower Hamlet's multi-racial community. This

included being responsible for the well-being of passengers and users whilst in the care of the service and working as part of a team in providing a high quality and cost-effective passenger transport function to a variety of clients and users.

11. On 21 November 2019 SH, head teacher at P Special School sent an email to Amanda Osborne's colleague Emma Parker, the Transport Operations Manager. Ms Parker was off work on long term sick leave at the time. Sheba Khanom and Ms. Osborne were jointly acting up into the Transport Operation Manager's post during her absence, which was why both Ms. Osborne and Ms. Sheba Khanom dealt with the matter. P School is a Primary and Secondary Autistic Special School maintained by the London Borough of Tower Hamlets. It is one of the schools for which the Council supplies transport services including bus services and passenger assistant support. Mr H's email included an email from one of his teaching staff which complained about an incident that had occurred that day on TH53 bus route and which Mr H expanded upon in his email. The complaint concerned the behaviour and attitude of 2 Passenger Assistants on bus Route 53 earlier that day in dealing with children from the school on the bus and in particular the way they had handled an incident relating to a child (Pupil A) who had been sick on the bus.

12. The Passenger Assistants working on that day were the Claimants, Mrs. Rubeya Khanom and Mina Akhter Rubi. At the hearing, the two Claimant's asserted that there was another PA on the bus that day who was a white European PA and was a direct comparator who they said did not have her service terminated. The Respondent denied that this was the case. The Tribunal did not accept that there was another PA on the bus that day. The Claimant's did not mention her presence to the Respondent at any time prior to the termination of their services and the evidence presented to the Tribunal which included the rota of PAs for 21 November showed that it was only the two Claimants working on this day. The documentary evidence in the bundle and the oral evidence supported the Respondent's position that there was no third PA on the bus. The rota at page 141 of the bundle showed that the PA called Diane who is of Black West Indian descent was off work on sick leave (with no return date from sick leave) on the day in question. The attendance documentation was based on payroll data. The tribunal also noted how Mrs. Rubaiya Khanom evaded questions in cross examination and diverted her answer away from a direct question about what the third PA was doing on the coach during the shouting and commotion of herself and Ms Rubi. In addition, both the first and third Claimant's came up with the name of Alex who they said was the third PA at the Tribunal hearing and both said she was of white European descent. The Tribunal did not accept this evidence which it felt was manufactured by both Claimants at the hearing to assist their case.

13. The Head Teacher referred to what had been reported to him by his member of staff. Mr H expressed his general concerns that the PAs were not effectively managing incidents like the one reported to him that day, which was part of their role. He also expressed a concern that the assistants often wanted to get away quickly after the bus arrived and did not necessarily offer the school's children the support that they needed.

14. The school staff member referred to by the headteacher, Ms C explained in her email that an incident had occurred that morning involving the Passenger Assistants on bus 53. A pupil from her class had vomited heavily on the bus ride, covering his coat, down to his shoes and into both hands. Two members of the school's Teaching Assistants ("TAs") team were already present waiting for the arrival of bus 53 as there were three pupils from Ms C's class on the bus. As soon as the bus parked up, the PAs were shouting very loudly asking for the TAs. The TAs saw Pupil A in a state, shivering and with vomit all over him. They

asked for gloves and tissues to clean him up which the TAs provided. However, whilst doing this the PAs started shouting loudly again for another child, Pupil B, to be taken off the bus. Ms C advised that there was an on-going issue that the Passenger Assistants were finding it hard to manage Pupil B.

15. Ms C explained her view that the incident was not handled very well by the PAs. It was clear that Pupil A had been traumatised by the incident and he had wet himself, which had never happened before. The shouting was unnecessary, and the Passenger Assistants should have been able to tend to his needs more effectively, for example, at least wipe his hands clean. A crowd had gathered around bus 53 due to the commotion made by the Passenger Assistants. In terms of another Pupil B, Ms C reported that the Passenger Assistants were often overwhelmed by her behaviour. In response to the emails, Ms. Osborne instigated further enquiries which involved her colleague Sheba Khanom meeting with Mrs. Rubeya Khanom and Ms Rubi on 22 November to discuss what had happened. Ms. Osborne did not attend the meeting.

16. On Friday 22 November 2019, Ms Lillywhite informed Mrs. Rubeya Khanom and Ms Rubi that it was necessary to have a meeting with them both when they had completed their morning school run. They both came back to the depot at Blackwall after their morning run at about 9.30 am. Both Claimants said that they were made to wait for over an hour for this meeting, but the Tribunal did not accept this. The morning run started at 8 am and it took about an hour and a half to complete and return to the depot so the Claimants would have returned just before 9.25am. Sheba Khanom (at the time, joint Acting Operations Manager) took the meeting as she was asked to conduct it by Ms Osborne, and she was proficient in Bengali and could take the meeting both in English and Bengali. Ms Lillywhite left the meeting after Sheba Khanom joined and took no further part in it.

17. Ms Sheba Khanom interviewed both Mrs. Rubeya Khanom and Ms Rubi about what had taken place and the complaint was discussed with them. She took the two through the emails from Mr H and Ms C. Ms Sheba Khanom questioned both passenger assistants, asking them to explain what had happened at the school on the previous day. Ms Rubi explained that once the bus arrived at the school premises, Pupil A started to vomit. Ms Rubi said she tried to clean the child, but he started to vomit again and again very aggressively. Ms Rubi admitted that she felt overwhelmed and scared and started to shout for the school's Teaching Assistants to take the child off the bus. Mrs Rubeya Khanom also admitted she did not know what to do in the circumstances.

18. Both Passenger Assistants said that they waited for the school's Teaching Assistants to take the child off the vehicle and then cleaned the seat as much as they both could. Ms Sheba Khanom explained to the Claimants that this was a serious matter, that as Passenger Assistants it was part of their duties to help and clean children on the vehicle. She also explained that they had both failed to complete an incident log. Ms Rubi apologised and said she had made a mistake, whilst Mrs Rubeya Khanom, said she did not know she had to do an incident form. Ms Khanom asked the Claimants to complete the form. At the hearing, both Claimant's denied the version of events provided by the Respondent of this meeting saying that they had not done anything wrong and had not made any apologies or admissions of wrongdoing. The Tribunal did not prefer their evidence. It was more likely, in the Tribunals view, that given the nature of the complaint from the school and the commotion on the bus described by Ms C in her email that Ms. Sheba Khanom's account of events was correct. There were no notes of the meeting.

19. Ms Sheba Khanom told them at the meeting that the matter would be considered by management, and they would be informed of the outcome the following Monday 25 November 2019. As part of her investigation into the complaint, Ms Sheba Khanom also spoke to the bus driven Josef Bellotti separately to gather further information about what happened during the incident the previous day. Mr Belloti confirmed Pupil A was not sick during the travel to school and started to vomit when parked up in the school. Both the first and second Claimant said that Mr Belloti was a comparator to them as he was also working on the bus. However, the Tribunal found that Mr. Belloti was the driver of the bus and not a PA. He had entirely different responsibilities to the Claimants and was not involved in the incident that the first Respondent was investigating. Therefore, the Tribunal did not accept that the bus driver was an actual comparator.

20. After gathering the above information about the complaint, Ms. Sheba Khanom shared her findings and discussed the matter with Amanda Osborne on the afternoon of 22 November 2019. Ms. Lillywhite was in the meeting but only to provide information about a previous concern involving the first and third Claimant and another PA, Forida Yeasman.

21. The meeting between Ms Osborne and Ms Sheba Khanom was to determine whether the Council would end the first and third Claimants placements. It was clear to them both Mrs. Rubeya Khanom and Ms Rubi did not cope with cleaning up a child who had vomited. This in turn raised concerns about how they would cope with more difficult situations, if called upon, as the students had medical needs and behavioural issues which could include for example seizures, soiling and spitting. The concerns about their behaviour in dealing with the incidents on 21 November 2019 combined with concerns about working relations with work colleagues, failure to comply with reporting procedures and previous complaints about not adequately carrying out their duties as Passenger Assistants led to the decision to stop using them as agency workers.

22. Given these concerns about their suitability for the role of agency Passenger Assistants they made the decision to stop using Mrs Rubeya Khanom and Ms Akhter Rubi as agency workers and to inform their employment agencies that they would no longer be required. It was the afternoon of Friday 22 November 2019 by the time they had made their joint decision. The agency was informed on Friday 22 November 2019 that the first Respondent would not be using the two again. However due to the time the final decision was made it was agreed between Ms Osborne and Ms Khanom that Charmaine Lillywhite would inform both agency staff on Monday 25 November 2019 at the beginning of their morning shift that the Council would no longer be requiring their services.

23. At the hearing, the Tribunal ascertained that the procedure for ending the placement of agency workers was not the subject of any written procedures such as the Councils disciplinary, appeal or grievance procedures. The evidence presented by the first Respondent was that apart from undertaking a basic investigation of conduct or performance issues to ascertain whether the Council would continue to use the services of agency workers, the first Respondent did not apply any more detailed procedure to such workers. Agency workers were not entitled to any of the rights afforded to employees such as the right to paid suspension, a disciplinary investigation or hearing, an appeal hearing or the right to raise a grievance. Ms. Osborne and Ms Sheba Khanom gave evidence to the Tribunal which was accepted that if the Council did not wish to use the services of any agency worker any longer, the manager of the worker simply informed the agency, and the worker would no longer be used by the Council.

24. On the morning of Monday 25 November 2019, Ms Lillywhite spoke separately to Ms Khanom and Ms Rubi and explained that following the incident on 21 November 2019 their placements as Passenger Assistants with the Council would be ending and they needed to leave the site. There was some dispute about the timing of this meeting. However, on balance, the Tribunal accepted the Respondent's evidence that the meetings took place at around 7.30 am and were relatively short meetings between Ms Lillywhite and the first and third Claimants who she met separately to relay the decision of Ms Osborne and Ms Sheba Khanom of Friday afternoon. Ms. Lillywhite had previously been told of this and the reasons for it by Ms Osborne in a telephone call on Friday evening. Ms. Rubi left the site right away, but Mrs Rubeya Khanom did not leave and remained outside in the depot a distressed state.

25. When Ms Lillywhite spoke to the first and third Claimants, she asked them for their high visibility vests, as she believed them to be Council property. Ms Rubi gave her vest to Ms Lillywhite. Mrs. Rubeya Khanom said it was her own vest and Ms Lillywhite did not take it. The two Claimant's gave evidence to the Tribunal that was not accepted that Ms Lillywhite acted in an abusive manner and was insulting to them. In particular, Mrs Rubeya Khanom had said that Ms Lillywhite had told her to wait in the waiting area, that she had asked her for the return of her hi-vis vest which belonged to her and shouted at her, 'Get out from my building', 'Did you not hear me, I don't' want to see you anymore', 'where is Abdul, I am going to sack him.' Whilst the Tribunal accepted that Ms Lillywhite had mistakenly asked her for the return of the hi- vis vest as she did not know it belonged to Mrs. Khanom, she did not persist with the request. The Tribunal did not accept that Ms. Lillywhite made the other statements attributed to her. The Tribunal found that this was unlikely to have happened as Ms Lillywhite had previously had a good working relationship with all three Claimants which was not disputed by them. Further, Ms Lillywhite is a manager who worked in a busy office and the Tribunal accepted her evidence that it was not her style to raise her voice or act towards her staff in an abusive or insulting manner.

26. Shortly after the meeting, Mr Abdul Hoque, the second Claimant, who was an agency driver, and the first Claimants husband, came into the passenger transport office in which Ms Lillywhite was based. She asked him if he could give his wife his car keys because her contract had been ended. Ms Lillywhite did not want Mrs Khanom standing outside the depot until Mr. Hoque finished his school run, because she would be waiting outside for about an hour for him to finish. Ms Lillywhite was aware that Mr Hoque always brought his wife into work with him in his car in the morning, took her home and then they would come back together in the afternoon for the afternoon school run. Ms Lillywhite was thinking of the first Claimant's welfare, because she was upset, and she did not know whether she had a bus pass to get home. At this point Abdul Hoque approached Ms Lillywhite in an aggressive and intimidating manner shouting 'you can't do that you're a nothing you are not a manager .... all you are is a passenger assistant and a radio controller you can't do nothing'. Ms Lillywhite told Mr Hoque that as she was a manager, he should not be speaking to her in such an aggressive manner. Ms. Lillywhite said that Mr. Hoque had no sense of personal space as he continued shouting in her face and the Tribunal accepted this evidence. She told him to get away from her as he was very aggressive, and she felt intimidated. Mr Hoque left the office and went outside to smoke. Mr Hoque also gave evidence to the Tribunal that Ms Lillywhite had demanded his car keys off him in a demeaning manner so that she could place his wife in the car whist Mr Hoque completed his duties. The Tribunal did not accept this evidence. As specified above, Ms Lillywhite had not asked for or demanded Mr Hoque's car keys from him. She had asked him to give his keys to his wife so that she could wait in his car and not wait unaccompanied in a distressed state in the respondents' offices or outside them in the depot. This was due to Ms Lillywhite being concerned about the welfare

of Mrs Khanom. The first Claimant also gave evidence to the Tribunal which was not accepted that Ms Lillywhite had told the first Claimants husband, Mr Hoque that she could wait in his car for hours waiting for her husband to return from his shift so that he could take her home. The first Claimant said that this was a racist assumption, that the first Claimant was completely dependent on her husband. As specified above, the Tribunal found that Ms Lillywhite acted in the way that she did out of concern for the Claimant and for no other reason.

27. Ms. Lillywhite gave evidence to the Tribunal that she was really shaken and distressed by Mr Hoque's behaviour and started to cry and the Tribunal accepted this evidence. This was on the basis that two other staff members JS and WA approached her whilst she was crying near the photocopier. As a result of Mr Hoque's conduct towards Ms Lillywhite, JS called Amanda Osborne, who told JS to tell Ms Lillywhite to get the bus keys from Abdul Hoque and to take another member of staff with her when she did this and ask Mr Hoque to leave the site. She walked to the vehicle with JS to get the keys from the vehicle and asked MP (another driver) to get Abdul Hoque's swipe card as she thought he might come back later and gain access to the yard. Abdul Hoque refused and shouted at MP saying he would not return the card to another driver as he was not the manager. Mr Hoque's aggressive shouting was heard by other staff in the building and 2 drivers witnessed what had happened.

28. Mr. Hoque told the Tribunal that it was Ms Lillywhite who was rude and aggressive towards him, but the Tribunal did not accept this. Whilst he was followed by Ms Lillywhite with two other members of staff who had asked for his bus keys and swipe card, this was entirely down to Mr Hoque's aggressive conduct towards Ms. Lillywhite who was following Ms Osbornes direction to remove Mr. Hoque from his duties. Mr. Hoque also said that on the same day he was telephoned at home by Ms Osborne and when he tried to explain what had happened Ms Osborne hung up the phone. The Tribunal did not accept this evidence either. On 25 November. Mr. Hoque was rude and aggressive towards Ms Lillywhite and was unmanageable. The Tribunal did not accept that he gave an honest account of the events of the day. In addition, Mr Hoque on a few occasions when he gave evidence to the Tribunal lost his temper and raised his voice during cross examination. Furthermore, the first Respondent produced a number of witness statements from other drivers who witnessed Mr Hoque's behaviour towards Ms Lillywhite which confirmed to the Tribunal that Mr Hoque's conduct towards Ms Lillywhite was unacceptable. The Tribunal found that a hypothetical comparator acting in the same way as Mr Hoque acted would also have had his agency relationship terminated by the first Respondent.

29. On 26 November 2019, the first and second Claimant's son telephoned Ms Osborne to complain about what had happened and to obtain details of how he could make a complaint. Ms Osborne advised Mr Hoque's son that he needed to go to the fist respondent's web site and raise a corporate complaint. Mr Hoque said to the Tribunal that during this call, Ms Osborne had not wished to hear his version of events and had hung up on him. The Tribunal did not accept this evidence. The telephone call was with Mr Hoque's son and not Mr Hoque. Ms Osborne did not hang up on Mr. Hoque's son. Ms Osborne subsequently contacted the agency responsible for Mr Hoque to explain the situation and to confirm that she did not want Abdul Hoque back because of his aggressive and inappropriate behaviour towards local manager Ms. Lillywhite on 25 November 2019.

Law

Direct Race discrimination

30. By s39(2) Equality Act 2010, an employer must not discriminate against an employee by subjecting him to a detriment or dismissing him. By s39(7) EqA dismissal includes constructive dismissal. By s40 EqA an employer must not harass his employee.

31. Direct discrimination is defined in s13 EqA 2010 and harassment is defined in s26.

32. The shifting burden of proof applies to claims under the Equality Act 2010, s136 EqA 2010.

33. Direct discrimination is defined in s13(1) EqA 2010: "(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."

34. By s9 EqA 2010, race is a protected characteristic and race includes colour; nationality; ethnic or national origins.

35. In case of direct discrimination, on the comparison made between the employee and others, "there must be no material difference relating to each case," s23 Eq A 2010. The requirement for comparison in the same or not materially different circumstances applies equally to actual and to hypothetical comparators, as highlighted in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11.

36. In Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065 (at para 29) Lord Nicholls explained that outside the field of discrimination law:

> "Sometimes the court may look for the 'operative' cause or the 'effective cause'. Sometimes it may apply a 'but for' approach. For the reasons I sought to explain in Nagarajan v London Regional Transport [1999] ICR 877, 884-885, a causation exercise of this type is not required either by section 1(1)(a) [direct discrimination] or section 2 [victimisation]. The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminatory act as he did?"

37. In Khan the Chief Constable had withheld a reference from a police officer who had brought race discrimination claims against the force. The Chief Constable could not give a reference because the proceedings were still live, and he did not want to be prejudiced by any reference given at that stage. Thus, as a matter of "but for" causation, had it not been for the race discrimination claims, a reference would have been supplied. At paragraph 77 Lord Scott observed under the heading 'The causation point':

> "Was the reference withheld "by reason that" Sergeant Khan had brought the race discrimination proceedings? In a strict causative sense it was. If the proceedings had not been brought the reference would have been given. The proceedings were a causa sine qua non. But the language used in s.2(1) is not the language of strict causation. The words "by reason that" suggest, to my mind, that it is the real reason, the core reason, the causa causans, the motive, for the treatment complained of that must be identified."

38. In Amnesty International v Ahmed [2009] ICR 1450, Underhill P explained at para 3

> "We turn to consider the "but for test" [...] This is therefore a useful gloss on the statutory test; but it was propounded in order to make a particular point, and we do not believe that Lord Goff intended for a moment that it should be used as an all-purpose substitute for the statutory language. Indeed, if it were there would plainly be cases in which it was misleading. The fact that a claimant's sex or race is

> a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment."

39. In relation to the direct discrimination claims based on race, the burden of proof rests initially on the employee to prove on the balance of probabilities facts from which the tribunal could decide, in the absence of any other explanation, that the employer did contravene that provision. To do so the employee must show more than merely that he was subjected to detrimental treatment by the employer and that the relevant protected characteristic applied. There must be something more. If the employee can establish this, the burden of proof shifts to the employer to show that on the balance of probabilities it did not contravene that provision. If the employer is unable to do so, we must hold that the provision was contravened, and discrimination did occur. We also considered the well-known provisions of Igen Ltd v Wong [2005] IRLR 258 in this respect, which we do not repeat here.

Harassment

40. s26 Eq A provides "(1) A person (A) harasses another (B) if—
A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of — violating B's dignity, or 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— the perception of B; the other circumstances of the case; whether it is reasonable for the conduct to have that effect."

41. In determining whether particular conduct is "related to" a protected characteristic, an employment tribunal must make a clear finding of fact, based on the evidence before it. In Tees Esk and Wear Valleys NHS Foundation Trust v Aslam UKEAT/0039/19 a tribunal upheld a complaint of harassment related to race (the claimant being a British-Asian Indian), following a comment made by a psychiatrist, and overheard by the claimant, about Islamic State (ISIS). Allowing the employer's appeal, the EAT found that the tribunal had failed to make a clear and distinct finding that the conduct related to the claimant's British-Asian Indian race. At best, it had formed this view on the basis of a "perception" of ISIS as "an international organisation connected with Asian people, in particular those in such areas as Pakistan, Afghanistan and Iran". This was not a proper finding, because there was no evidence before the tribunal to support it. It was not something of which the tribunal could take judicial notice. The fact that the claimant considers that the conduct was related to a particular characteristic is not necessarily determinative, nor is a finding about the motivation of the alleged harasser.

42. Whether it was reasonable for A's conduct to have the effect it did on B is an objective test. A's conduct will only be considered as having the necessary effect on B where it is reasonable for the conduct to have that effect. Therefore, provided any offence caused is unintentional there will be no harassment if B is being "hypersensitive". According to the EAT, in a case concerning the RRA 1976, the question of reasonableness in this context is a matter of fact for the tribunal to determine, having regard to all the relevant circumstances including the context of the conduct (Richmond Pharmacology v Dhaliwal [2009] IRLR 336).

Conclusion and Findings

43. In the first instance the Tribunal had to determine if all three of the Claimants had been subject to direct discrimination by the First Respondent on grounds of the Claimant's Bangladeshi nationality. The Tribunal noted that all three of the Claimants raised matters that related to the procedures that the first Respondent adopted in relation to the termination of their respective services repeating collectively what they said were a number of procedural irregularities outlined by Judge Gardiner in the issues that he identified.

44. These procedural issues raised by all three Claimants were, being given an irrational reason why they could not continue working for the First Respondent, being denied an adequate opportunity to put their version of events before the decision was taken that they could no longer work for the First Respondent; not being invited to a disciplinary hearing; the sanction of being told that they could no longer work for the First Respondent was too harsh in circumstances where at most a warning would have been sufficient; failing to provide them with notice of the decision that they would not be offered any further work; failing to respond at all to their grievances lodged on 5 December 2019.

45. In the facts section of this judgment, the Tribunal found as a matter of fact that the procedure for ending the placement of agency workers was not the subject of any written procedures such as the Councils disciplinary, appeal or grievance procedures. The evidence presented by the first Respondent was that apart from undertaking a basic investigation of conduct or performance issues to ascertain whether the Council would continue to use the services of agency workers, the first Respondent was not required to apply any more detailed procedure to such workers. Agency workers were not entitled to any of the rights afforded to Council employees such as the right to paid suspension, a disciplinary investigation or hearing, an appeal hearing or the right to raise a grievance. The Tribunal accepted the evidence of the first Respondent that if the Council did not wish to use the services of any agency worker any longer, the manager of the worker simply informed the agency, and the worker would no longer be used by the Council.

46. The Tribunal found therefore that none of the procedural irregularities relied upon by all three Claimants were material in a claim for direct race discrimination as a hypothetical comparator in the same circumstances as the Claimants were in would similarly not have been entitled to the application of procedural safeguards that would ordinarily apply to employees of the first Respondent such as the application of a disciplinary or grievance procedure.

47. The Tribunal was of the view that an organisation such as the first Respondent which prides itself on being an equal opportunities employer should look again at the absence of protection offered to agency workers especially in relation to the termination of service. If the first Respondent had a basic procedure in this regard, it may not find itself having to face similar litigation again in the Tribunal.

48. All three Claimants said that they had been given an irrational reason why they could no longer be used by the first Respondent. As stated above, the Tribunal found that the first Respondent was not obliged to give any reason for no longer using the services of any of the Claimants as the Tribunal accepted the evidence of the first Respondent that no reason had to be provided to the agency workers that it used if it did not wish to use their services any longer. Nevertheless, in this case, the Tribunal found that the first and third Claimants were told by the first Respondent on 22 November of the concerns that the Respondent had about their performance and conduct in dealing with Pupil A on 21 November and that both of them had admitted that that they were overwhelmed and did not know what to do in the

circumstances. The Tribunal found that the Claimants were given a rational reason by the first Respondent after a basic investigation had been undertaken and they were given the opportunity of putting their case. Similarly, with regard to the second Claimant, the Tribunal also found that he was told that his conduct on the morning of 25 November towards Ms Lillywhite was so serious that it warranted the termination of his service. He was an experienced agency driver providing services to the first Respondent for five years and would have been well aware that he should not have behaved in the way that he did towards a manager. All three claimants were agency workers and the Respondent was only required to inform the agency that they no longer required their services. If all three claimants had been Council employees and afforded the right to a full independent investigation and a formal disciplinary process, then there would have been a range of alternative penalties other than termination of employment available.

49. Both the first and third Claimant alleged that they were told on 25 November 2019 that they could no longer work for the first Respondent as a result of their conduct during the incident on 21 November 2019, when other white European workers also involved in the incident were permitted to continue working. They compared their treatment with the treatment received by the driver Josef and the other Passenger Assistant on duty.

50. At the hearing, the two Claimant's asserted that there was another PA on the bus on 21 November who was a white European PA and was a direct comparator who they said did not have her service terminated. The Tribunal did not accept that there was another PA on the bus that day. As found in the facts section of this judgement, the Claimant's did not mention her presence to the first Respondent at any time prior to the termination of their services and the evidence presented to the Tribunal which included the rota of PAs for 21 November showed that it was only the two Claimants working on this day. The documentary evidence in the bundle and the oral evidence supported the Respondent's position that there was no third PA on the bus. The Tribunal did not accept the evidence of the first and third Claimants that Alex was present on the bus and that she was of white European descent as it felt it was manufactured by both Claimants at the hearing to assist their case. Both the first and second Claimant said that Mr Belloti was a comparator to them as the bus driver. However, in the facts section of this judgement, the Tribunal found that Mr. Belloti was the driver of the bus and not a PA. He had entirely different responsibilities to the Claimants and was not involved in the incident that the first Respondent was investigating. Therefore, the Tribunal did not accept that the bus driver was an actual comparator.

51. As a consequence of the finding that there were no actual comparators upon which the first and third Claimants could rely, the Tribunal constructed a hypothetical comparator. The Tribunal then asked itself if the Claimants had cited a hypothetical comparator being an agency worker not of Bangladeshi nationality in exactly the same circumstances as they found themselves in, would the first Respondent would have also terminated the services of the comparator as a consequence of their performance and/or conduct on 21 November 2019? The Tribunal answered this question in the affirmative. It was clear to the first Respondent that Mrs. Rubeya Khanom and Ms Rubi could not cope with something as simple as cleaning up a child that had vomited. This in turn raised their concerns about how they would cope with more difficult situations, if called upon, as the students had medical needs and behavioural issues which could include for example seizures, soiling and spitting. The concerns about their behaviour in dealing with the incident on 21 November 2019 combined with concerns about working relations with a work colleague previously and their failure to comply with reporting procedures led to the decision to stop using them as agency

workers. The Tribunal found that if a hypothetical comparator had behaved in the same way, the comparator would also have had their agency contract terminated.

52. The Tribunal reminded itself that with a claim for direct race discrimination, the Claimant's must show that they have been treated less favourably than a real or hypothetical comparator. The less favourable treatment must be because of their race. This required the tribunal to consider the reason why the Claimants were treated less favourably: what was the Respondent's conscious or subconscious reason for the treatment? The tribunal had to consider the conscious or subconscious mental processes which led the first Respondent to take a particular course of action in respect of the Claimants, and to consider whether the protected characteristic of race, played a significant part in the treatment. In relation to direct discrimination based on race, the burden of proof rests initially on the employee to prove on the balance of probabilities facts from which the tribunal could decide, in the absence of any other explanation, that the employer did contravene that provision. To do so the employee must show more than merely that he was subjected to detrimental treatment by the employer and that the relevant protected characteristic applied. There must be something more. If the employee can establish this, the burden of proof shifts to the employer to show that on the balance of probabilities it did not contravene that provision. If the employer is unable to do so, the Tribunal must hold that the provision was contravened, and discrimination did occur.

53. The Tribunal found that the Claimants claims of direct discrimination were not made out on the evidence. There was no comparator and both PA's were treated in the same was that a hypothetical comparator would have been in exactly the same circumstances as the Claimants found themselves. Given the seriousness of what happened on 21 November, the Tribunal found that a PA of any nationality would have been let go by the first Respondent in similar circumstances. This was Sheba Khanom's, (the joint decision maker along with Ms Osborne) clear unchallenged evidence. The Tribunal noted that it was not put to her by the Claimant's representative that her decision to end the service of the first and third Respondent was due to direct discrimination due to their Bangladeshi nationality. In the case of the second Claimant, Mr Hoque, his service was terminated due to his rude and aggressive conduct towards Ms Lillywhite on 25 November. The Tribunal found that a hypothetical comparator acting in the same way as Mr Hoque acted would also have had his agency relationship terminated by the first Respondent.

54. In conclusion with respect to the claims of direct race discrimination made by all three Claimants, the Tribunal was of the view that there were no facts from which the Tribunal could conclude that discrimination had occurred, and the burden of proof did not shift to the first Respondent to provide an adequate non-discriminatory explanation for its actions.

55. The Tribunal then went on to consider the Claimant's claims of harassment. The Tribunal noted that all three Claimant's repeated the procedural irregularities specified in paragraph 44 above as examples of harassment. The Tribunal did not consider the first Respondents failing to apply its disciplinary or grievance procedures to agency workers in respect to the termination of their service amounted to unwanted conduct related to a relevant protected characteristic. The first Respondent gave evidence which was accepted that the Claimants did not have the right to have its disciplinary or grievance procedures applied to them on the basis that no agency workers were entitled to have these procedures applied to them. The Tribunal could not see how the non-application of such procedures could amount to 'unwanted conduct.' Nor could it be related to a protected characteristic as the evidence accepted by the Tribunal was that no agency workers were subjected to the

disciplinary or grievance procedures. If the Tribunal is wrong in this conclusion, the Tribunal had to ask itself whether it was reasonable for the first Respondents conduct in not applying the procedures to have the effect it did on the first second and third Claimants. This is an objective test. The first Respondents conduct will only be considered as having the necessary effect on these Claimants where it is reasonable for the conduct to have that effect. The Tribunal found that it was not reasonable for the first Respondents conduct to have had that effect as the Claimants were not entitled to the application of the disciplinary or grievance procedures. Furthermore, as the Tribunal found above the first and third Claimants were given an opportunity to put their version of events and the first Respondent had rational reasons for dispensing with the services of all three Claimants.

56. The first and second Claimants made more specific allegations of harassment against the first Respondent. The first Claimant alleged that she was told by Ms Lillywhite to wait in the waiting area, that Ms Lillywhite has asked for the return of her hi-vis vest which belonged to her and shouted at the Claimant, 'Get out from my building', 'Did you not hear me, I don't' want to see you anymore', 'where is Abdul, I am going to sack him.' She also alleged that Ms Lillywhite had told the first Claimants husband, the second Claimant that she could wait in his car for hours waiting for her husband and that was a racist assumption, that the first Claimant was completely dependent on her husband.

57. With regard to the assertion that she was asked to wait in the waiting area for an inordinately long time, the Tribunal found that this could not have been the case on 25 November as the Claimant was only at work for a short period of time before being told her services were no longer needed. In relation to the wait on 22 November, the Tribunal found that the wait was only for a short time before she met with Ms Sheba Khanom. Ms Lillywhite had asked for the return of the hi vis vest but did so mistakenly believing it to be the property of the Council. When she was told that it was not, she did not pursue the matter. The Tribunal found that Ms Lillywhite had not acted in a humiliating way towards the Claimant as the meeting on 25 November was relatively short, had occurred in a busy office and Ms Lillywhite had had a good relationship with the Claimant prior to the meeting and was not likely to have conducted herself in the way alleged by the Claimant.

58. Furthermore, with regard to Ms Lillywhite asking the second Claimant if he could give his wife his car keys because her contract had been ended, the Tribunal found as a matter of fact that Ms Lillywhite did not want Mrs Khanom standing outside the depot until Mr. Hoque finished his school run, because she would be waiting outside for about an hour for him to finish. Ms Lillywhite was aware that Mr Hoque always brought his wife into and from work with him in his car. Ms Lillywhite was thinking of the first Claimant's welfare, because she was upset, and Ms Lillywhite did not know whether she had a bus pass to get home. The Tribunal did not accept Mr Hoque's evidence that Ms Lillywhite had demanded his car keys off him in a demeaning manner so that she could place his wife in the car whist Mr Hoque completed his duties. She had asked him to give his keys to his wife so that she could wait in his car and not wait unaccompanied in a distressed state in the first Respondents' offices or outside them in the depot. This was due to Ms Lillywhite being concerned about the welfare of Mrs Khanom. The first Claimant also gave evidence to the Tribunal which was not accepted that Ms Lillywhite had told the first Claimants husband, Mr Hoque that she could wait in his car for hours waiting for her husband to return from his shift so that he could take her home. The first Claimant said that his was a racist assumption, that the first Claimant was completely dependent on her husband. The Tribunal found that this was not the case as Ms Lillywhite acted in the way that she did out of concern for the Claimant and for no other reason.

59. If the Tribunal is wrong in this conclusion, the Tribunal has to ask itself whether it was reasonable for Ms Lillywhite's conduct in asking Mr Hoque for his keys in order that his wife could wait in the car to have the effect it did on the first and second Claimants. This is an objective test. Ms Lillywhite's conduct will only be considered as having the necessary effect on these Claimants where it is reasonable for the conduct to have that effect. The Tribunal found that it was not reasonable for Ms Lillywhite's conduct to have had that effect. Ms Lillywhite was only acting in the way she did out of consideration for the first and second Claimants as she did not want the first Claimant to wait in the Councils offices in a distressed state.

60. Finally, the Tribunal considered the second Claimants specific claims of harassment. He asserted that he was told in a humiliating and degrading way on 25 November 2019 that he was no longer permitted to work for the First Respondent. He relied on the matters set out at paragraphs 9 and 10 of the Particulars of Claim namely that he was followed by Ms Lillywhite with two other members of staff who demanded his bus keys and swipe card and was told to go and was phoned on the same day by Ms Osborne at home and when he tried to explain what had happened Ms Osborne hung up the phone.

61. In the facts section of this judgment, the Tribunal found that Mr Hoque on the morning of 25 November 2019, came into the passenger transport office in which Ms Lillywhite was based. She asked him if he could give his wife his car keys because her contract had been ended. Ms Lillywhite did not want Mrs Khanom standing outside the depot until Mr. Hoque finished his school run, because she would be waiting outside for about an hour for him to finish. Ms Lillywhite was aware that Mr Hoque always brought his wife to and from work and was thinking of the first Claimant's welfare, because she was upset, and Ms Lillywhite did not know whether she had a bus pass to get home. At this point Mr. Hoque approached Ms Lillywhite in an aggressive and intimidating manner shouting 'you can't do that you're a nothing you are not a manager .... all you are is a passenger assistant and a radio controller you can't do nothing'. Ms Lillywhite told Mr Hoque that as she was a manager, he should not be speaking to her in such an aggressive manner. Ms. Lillywhite said that Mr. Hoque had no sense of personal space as he continued shouting in her face and the Tribunal accepted this evidence. She told him to get away from her as he was very aggressive, and she felt intimidated. The Tribunal did not accept Mr Hoque's evidence that Ms Lillywhite had demanded his car keys off him in a demeaning manner so that she could place his wife in the car whist Mr Hoque completed his duties. The Tribunal found on balance that Ms Lillywhite had not asked for or demanded Mr Hoque's car keys from him. She had asked him to give his keys to his wife so that she could wait in his car and not wait unaccompanied in a distressed state in the respondents' offices or outside them in the depot.

62. Ms. Lillywhite gave evidence to the Tribunal that she was really shaken and distressed by Mr Hoque's behaviour and started to cry and the Tribunal accepted this evidence. Mr Hoque's aggressive shouting was heard by other staff in the building and 2 drivers witnessed what had happened. Mr. Hoque said that it was Ms Lillywhite who was rude and aggressive towards him, but the Tribunal did not accept this. Whilst he was followed by Ms Lillywhite with two other members of staff who had asked for his bus keys and swipe card, this was entirely down to Mr Hoque's aggressive conduct towards Ms. Lillywhite who was following Ms Osbornes direction to accordingly remove Mr. Hoque from the depot.

63. Mr. Hoque also said that on the same day he was telephoned at home by Ms Osborne and when he tried to explain what had happened Ms Osborne hung up the phone. The Tribunal did not accept this evidence either. Mr Hoque had during the course of his actions on 25 November towards Ms Lillywhite acted in an aggressive, rude and unmanageable manner. The Tribunal did not accept that he gave an honest account of the events of the day. The Tribunal did not accept that the first Respondent through the actions of Ms Lillywhite had harassed Mr Hoque on the basis of his race.

64. On 26 November 2019, the first and second Claimant's son telephoned Ms Osborne to complain about what had happened and to obtain details of how he could make a complaint. Ms Osborne advised Mr Hoque's son that he needed to go to the first Respondent's web site and put in a corporate complaint. Mr Hoque said to the Tribunal that during this call, Ms Osborne had not wished to hear his version of events and had hung up on him. The Tribunal did not accept this evidence. The telephone call was with Mr Hoque's son and not Mr Hoque. Ms Osborne did not hang up on Mr. Hoque's son.

65. The second Claimant's claims of harassment were dismissed as in the Tribunals view there was no rational or logical connection to the second Claimant's race.

66. Accordingly, the Tribunal dismissed the complaints of direct race discrimination and harassment of all three Claimants.

Employment Judge Hallen
Date: 29 November 2021