RESERVED **Case No. 2419927/2020**

EMPLOYMENT TRIBUNALS

Claimant: Mr Abdulabi Alamin
Respondent: Muller UK & Ireland Group LLP

HELD AT: Manchester (by CVP) **ON:** 1 & 2 February 2022 & 24 February 2022 (in chambers)

BEFORE: Employment Judge Shotter

Members: Mr Q Colborn
Mr S Stowe

REPRESENTATION:

Claimant: In person
Respondent: Ms R Urmston, solicitor

Interpreter Mr N Kishi

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

The claimant was not unlawfully discriminated against on the grounds of his race and his claim for direct race discrimination brought under section 13 of the Equality Act 2010 and harassment brought under section 26 are not well-founded and dismissed.

REASONS

Preamble

1. This has been a remote hearing by video which has been consented to by the parties. The form of remote hearing was Kinley CVP video fully remote. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that the Tribunal was referred to are set out in the agreed bundle of bundle of 172 pages together with additional documents that were not numbered produced by the claimant, and 3 witness statements. The

respondent produced a cast list and chronology that had not been agreed by the claimant. The contents of the documents have recorded where relevant below.

2. The parties agreed the issues to be decided were as recorded in the Case Management Summary following the preliminary hearing attended by both parties held on the 5 July 2021 and sent on 24 July 2021. The issues relating to liability are as follows:

Harassment related to race (Equality Act 2010 section 26)

2.1 Did the respondent do the following alleged things:

2.1.1 In August 2020 did Colin Legge, the red team supervisor, prevent the claimant from going to the toilet in between breaks?

2.1.2 On or around 20 August 2020 did Colin swear at the claimant and tell him he would no longer work there?

2.1.3 If so, was that unwanted conduct?

2.1.4 Was it related to race?

2.1.5 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

2.1.6 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Direct race discrimination (Equality Act 2010 section 13)

2.1.7 What are the facts in relation to the following allegations:

(1) In August 2020 did Colin, the red team supervisor, prevent the claimant from going to the toilet in between breaks?

(2) On or around 20 August 2020 did Colin swear at the claimant
(3) and tell him he would no longer work there?

(4) Did the respondent inform Cordant that the claimant was no longer required for work?

2.1.8 Did the claimant reasonably see the treatment as a detriment?

2.1.9 If so, has the claimant proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances *of a* different race was or would have been treated? The claimant says he was treated worse than other members on the same team.

2.1.10 If so, has the claimant also proven facts from which the Tribunal could conclude that the less favourable treatment was because of race?

2.1.11 If so, has the respondent shown that there was no less favourable treatment because of race?

The claims

3 In a claim form received on 16 December 2020 following ACAS Early Conciliation between16 October and 26 November 2020, the claimant brings two complaints. The first complaint is that the respondent had discriminated against him because of his race contrary to section 13(1) of the Employment Rights Act 1996 ("the ERA"). The claimant described his protected characteristics as Arabic/Libyan race and relies on unnamed actual comparators who worked in the red team.

4 The claimant also brings a complaint of harassment under section 26 of the EqA relating to the alleged actions of Colin Legge, the supervisor, in August 2020. The claimant produced a "Case Story" dated 12 September 2021, and an amended "Case Story" dated 7 December 2021 with various appendices. The claimant alleged Colin Legge in August 2020 told him he could only go to the toilet in his break times when other workers were allowed to go to the toilet and for cigarette breaks outside the break times. On the 20 August 2020 the claimant went to the toilet outside his break time, returned to his workstation when Colin Legge swore at him and said "you will not be working here anymore" having explained, when the claimant asked why, that the workers who go for a smoke/to the toilet outside work times were "permanent employees" and the claimant was an agency worker. The evening of the 20 August 2020 the claimant's employer Cordant People Ltd ("Cordant"), an agency company who has not been joined as second respondent in these proceedings, texted the claimant stating the respondent no longer needed him to work there.

5 The respondent denies the claimant's claims and the grounds are set out in the amended Grounds of Resistance, maintaining the claimant had been repeatedly told about taking excessive breaks and that he was required to wear personal protective equipment. In August 2020 he was given a final warning about taking too long breaks which he ignored, and the respondent asked Cordant not to provide the claimant again. It is denied Colin Legge swore as alleged, and that he told the claimant that permanent workers could go for breaks outside formal break allocations.

Evidence

7 The Tribunal heard evidence from the claimant on his own account, and on behalf of the claimant, Día Malian, an agency worker who worked on the same shifts as the claimant on unknown dates between 26 July and 13 August 2020. Día Malian did not work with the claimant on the 20 August 2020, the date when the alleged discrimination took place. Mr Malian described himself as a Libyan Arab Muslim and in direct contrast to the claimant's oral evidence on cross-examination that he was unsure whether other workers who were Arabic speaking Libyans had worked before

the 20 August 2020 in the claimant's team, Día Malian confirmed he had been working. When this was put to him the claimant changed his evidence to there were no Arabs or Libyans in the red team, stating "even if there was, working once and not again." This was not the evidence of Mr Malian who described shifts in the plural and not singular.

8 Día Malian confirmed in oral evidence that he was "never prevented" by Colin Legge from using the toilet, he went to the toilet in his authorised break times, was never asked by Colin Legge not to go to the toilet and chose to go in his breaks because "I was keen on protecting my employment." Mr Malian like the claimant was aware that the respondent had authorised break times for those permanent employees and agency workers working shifts.

9 Día Malian also confirmed he had only seen the claimant going to the toilet during the three scheduled breaks in the shift, and there was the one time only when the claimant asked Colin Legge if he could go to the toilet outside his break. The claimant's written evidence was that in August 2020 Colin Legge instructing him he could only go to the toilet during his designated break times was a "new instruction." In direct contrast to the claimant's evidence Día Malian understood in July 2020 that he was to go to the toilet in his breaks.

10 In the claimant's original "Case Story" filed with the Tribunal, he described how "many times, I felt under pressure and stressed because of the amount of harassments in many occasions where I could not go to the toilet due to the fact I was not allowed to go to the toilet when I need." The differences in the versions of the "Case Story" was put to the claimant in cross-examination and his explanation was that he had amended it and no other explanation was given. The claimant's reference to "many occasions" when he was harassed and prevented from going to the toilet reflects his tendency to exaggerate.

11 The claimant was not a credible witness, and the Tribunal found he had exaggerated his evidence with reference to the incident on the 20 January 2020 when he alleged Colin Legge had said the word "fucking" to him. There were a number of conflicts between the evidence given by the claimant, and that given by Colin Legge, and the Tribunal concluded on the balance of probabilities Colin Legge's version of events was the more believable taking into account the evidence undermining the claimant's credibility given by the claimant's own witness. Día Malian. When it came to the conflicts in the evidence on the balance of probabilities the Tribunal preferred the evidence given by Colin Legge supported by contemporaneous documents compared to the less than credible evidence given by the claimant which was not.

12 The Tribunal did not accept contemporaneous emails were fabricated as alleged by the claimant with no basis whatsoever, and the email which followed from Cordant supported Colin Legge's evidence and undermined the claimant's oral evidence that he had complained about discrimination to someone called Charlie in Cordant.

13 The Tribunal was referred to an agreed bundle and a number of additional documents, which it has taken into account. It has heard oral submissions made by and on behalf of both parties, which the Tribunal does not intend to repeat, it has

attempted to incorporate the points made by the parties within the body of this judgment with reasons and has made the following findings of the relevant facts.

Facts

14 The respondent is a national dairy business with a warehouse in Trafford Park, Manchester. The warehouse work is carried out by a mix of permanent employees and agency workers, including workers engaged by Cordant People Limited. The claimant had contracted with Cordant People Limited ("Cordant") and he was engaged to work in the Trafford Park warehouse as an agency worker on various days between December 2018 and 20 August 2020 depending on the need for agency workers. The claimant was not an employee of the respondent. At the time he was completing an MSc studying at a university in Salford and continued working for Cordant after he graduated.

The claimant's employment

15 The claimant was engaged to carry out work across a number of teams, including the red team in part of the warehouse known as "the chill department," a refrigerated dairy. The claimant worked with many different people and nationalities. He alleges in these proceedings that employees who were "Arab and Muslim" were allowed to go to the toilet and a smoke when he was not, and this was an act of unlawful discrimination. At no stage during the period of time the claimant worked for the respondent did he raise such a complaint either to Cordant or any manager within the respondent. The Tribunal found there was no evidence of this allegation. The claimant was required to wear personal protective equipment ("PPE") along with his colleagues as the warehouse was busy and in the chill department, cold.

16 Colin Legge was and remains one of the supervisors in the chill department responsible for 24 staff consisting of permanent employees and agency workers. His duties included enforcing the respondent's health and safety procedures, particularly the use of PPE and ensuring there are enough staff to cover those on shift breaks to avoid disruption of the work that included loading and unloading vehicles of crates of milk. The undisputed evidence of Colin Legge was if there are insufficient people working in the chill department because others were on breaks production was affected because milk built up, packers stopped work and targets were not met for which Colin Legge was answerable and would be question on by the shift supervisors and higher-level managers.

17 Permanent employees and agency workers had designated breaks. Each worker was given three breaks, two twenty-minute breaks and one thirty-minute break with a ten minute "period of grace" per break in every 12-hour shift, and there was never more than a three-hour gap. Workers of different races, nationalities, religions and backgrounds worked for the respondent, and Colin Legge did not differentiate between any individuals who could also leave the chill department to go to the toilet, pray, break fasts during Ramadan, take a drink from the water fountain or smoke. Providing the workers did not take advantage of such short breaks Colin Legge was unconcerned with their movements, however this was not the case with the claimant who exploited the position for his own ends and to avoid carrying out work.

18 Colin Legge had known the claimant for the entire time he had worked, initially in the capacity of assisting the supervisor until December 2019 after which Colin Legge was solely in charge. Contrary to the claimant's questions on cross-examination Colin Legge was not "Muller shift leader" and he was not bound by the Agency Handbook and Induction Procedure provided to the claimant by Cordant, of which Colin Legge had no knowledge and so the Tribunal found.

19 If Colin Legge was unhappy with an agency worker's performance he reported it to Paul Carroll and/or the despatch team orally as Colin Legge, unlike shift leaders, did not have a work email address. All Colin Legge could do was remove an underperforming worker from the warehouse which he never did because of the adverse effect on the shit. A poorly performing agency worker was better than no worker. He had no say over who returned to work via the agency company. He had no power to take any other action, including disciplinary proceedings i.e. giving informal and formal warnings under a Disciplinary Procedure. Colin Legge had no power over agency workers, and if he wanted to complain about an individual agency worker would need to take the complaint further up the management line, which he did concerning the claimant's performance, and it was ignored. Colin Legge could have sent the claimant home; however did not because of the effect on the production line. Colin Legge had no option but to accept the services of an agency worker when they turned up on the day for work and to reject a worker would affect productivity for which Colin Legge was answerable.

20 Colin Legge's perception was that the claimant took advantage of the official breaks by prolonging the time he was away from his station, frequently walking off the production line for drinks at the fountain and toilet breaks when the claimant would go out one door in the warehouse and come back through another to avoid detection before he went off and took the authorised break. Colin Legge told the claimant on numerous occasions that he could not take frequent breaks prolonging the official break as and when he wanted, and the claimant ignored this instruction. There was an issue between the parties concerning the number of unauthorised breaks the claimant had taken. On cross-examination by the claimant Colin Legge's evidence was that the claimant had taken up to 30 breaks in one shift. There was no supporting documentary evidence as Colin Legge did not keep any records, and it was clear to the Tribunal that Colin Legge's perception was that the claimant was away from the production line regularly up 30 times in a shift, and had prolonged his official breaks by approximately a total of 30 minutes per shift. The Tribunal on the balance of probabilities found Colin Legge's analysis on the number of breaks being up to 30 times per shift exaggerated although it was honestly held and reflected his belief that the claimant was taking advantage of the situation by his absences, however short.

21 The undisputed evidence before the Tribunal was that the claimant was using earbuds and listening to his phone whilst working, in direct contravention of the respondent's health and safety procedures which required workers to wear PPE including ear protectors. Colin Legge's perception was that the claimant would take breaks to use his phone in addition to drinking from the water fountain, going to the toilet and so on. It is undisputed Colin Legge allowed workers additional breaks to go to the prayer room and this was not an issue for the claimant.

22 The claimant's evidence was that in or around December 2019 a casual conversation took place with Colin Legge when Colin Legge showed interest in the claimant, who told him he was Libyan and Arabic. The claimant's argued that in any event Colin Legge would have known he was Libyan because of his name. Colin Legge denied knowing the claimant was Libyan and Arabic and could not recall the conversation. On the claimant's evidence it took place late 2018 and early 2019, 4-years before giving this evidence for the first time at this liability hearing. On the balance of probabilities the Tribunal accepted Colin Legge's evidence, there was no reason for him to store the conversation in his memory as the conversation was not significant at the time, and the claimant's race/ethnicity was not and never had been an issue for him as borne out by the factual background to this case. The claimant's evidence was that Colin Legge was discriminatory because of the fact he was Libyan and Arabic and yet a period of approximately 2-years went by when no discrimination was alleged. The Tribunal found, having explored Colin Legge's thought process in his dealings with the claimant, that he had no issue with the claimant's protected characteristics, and it did not cross his mind that the claimant was Libyan and should have known this from his name as maintained by the claimant.

23 Dia Malian was "never prevented" by Colin Legge from using the toilet and he went to the toilet in his designated breaks, able to work within those confines. There was no satisfactory evidence Colin Legge stopped any agency worker from going to the toilet as the claimant alleged in his Grounds of Complaint, and the claimant's evidence was that permanent employees could go to the toilet outside their breaks when agency workers could not, which on the face of it was not a complaint of direct race discrimination or harassment.

<u>20 August 2020 incident</u>

24 The claimant had been told by Colin Legge over a period of time not to repeatedly leave the chill, the claimant having confirmed that he had no medical condition that required frequent breaks. The claimant was aware that he should minimise his unauthorised breaks, and that Colin Legge was unhappy when he repeatedly left the chill area and not wearing PPE.

25 Towards the end of the claimant's 12-hour shift on 20 August 2020 the claimant took a break that lasted longer than 30 minutes and continued to work the shift. Colin Legge spoke with the claimant and told him that he could no longer work for the respondent. The incident concerned the claimant taking breaks and had no connection with PPE, it involved the claimant being on his break for more than thirty minutes, which was the trigger. Colin Legge spoke with Paul Carroll and pointed out the claimant to him, complaining about the claimant taking long breaks up to fifty minutes and not wearing PPE. The Tribunal found Colin Legge's evidence in this regard consistent. There is an issue as to whether Colin Legge complained to Paul Carroll and/or took the claimant to see Paul Carroll as the evidence had become confused over the passage of time and nothings hangs on this.

26 The claimant alleges Colin Legge swore at him using the word "fucking" and clarified on cross-examination Colin Legge had said "I told you fucking don't go to the toilet" and in the alternative "fucking I told you not to go to the toilet, only go on break times." The Tribunal recognises swearing can be commonplace in certain industries,

however there was no evidence Colin Legge swore in the workplace either at the claimant or anybody else until the claimant's allegation as to the events on 20 August. It is notable that the claimant's allegation was not referenced in any of the ensuing email exchanges between Cordant and the respondent. The Tribunal is no doubt Colin Legge was frustrated by the claimant's behaviour, but that does not necessarily mean he swore at the claimant as alleged and the Tribunal finds, on the balance of probabilities it preferred Colin Legge's evidence that he had not sworn at the claimant. In any event, it is not credible a causal link existed between using the word "fucking" in the context described by the claimant and the claimant's protected characteristics, as argued by the claimant. The claimant does not raise any allegations against Colin Legge that he was ever sworn at before within the 20-month period when the claimant maintains Colin Legge knew or should have realised he was a Libyan Arab. It is not credible that Colin Legge swore the one time when he informed the claimant that as a result of his behaviour he was not going to work for the respondent via the agency again. In conclusion, the claimant's allegation that Colin Legge swore at him by saying the word "fucking" is not credible against the factual matrix in this case and so the Tribunal found.

27 By email sent on 20 August 2020 at 14.37 from the respondent's despatch department setting out the agency requirements for the 20 and 21 July 2020, reference was made to having received a complaint about the claimant "taking unnecessary breaks and is not complying with site rules regarding PPE he has been challenged on a number of occasions about wearing this type of protection this sort of behaviour is totally unacceptable. Can you please ensure he doesn't come back on site."

28 The email was not written by Colin Legge, who had no knowledge as to why the dates 20 and 21 July 2020 for agency workers were incorrect. The claimant alleged it was fabricated by Colin Legge and/or the respondent for the purposes of this litigation. The Tribunal did not agree. The Tribunal questioned if the email was fabricated as alleged, why this was the case, taking into account the email chain which followed as recorded below. The claimant was unable to explain why it had been fabricated other the suggesting there was a conspiracy on the part of the writer, Michael Redfern, who did not give evidence. With the exception of the dates, which may have been the result of a typographical error, there is no dispute between the parties that the claimant stopped working for the respondent and there was an issue with him taking unnecessary breaks. The 20 August 2020 email does not contradict that and the email exchange that followed reinforced the evidence of Colin Legge. The 20 August 2020 email needs to be interpreted in context with the emails that followed, which could not have been fabricated and nor was there an allegation made by the claimant that they were.

29 The claimant spoke with Cordant about the fact that he could no longer work in the respondent's business. On the 26 August 2020 Cordant emailed the respondent's despatch supervisors, including Michael Redfern "Abdul keeps asking why he isn't wanted back on site. Can I have more info to tell him please."

30 Paul Carroll responded on the same date "I was informed last week that he was told on numerous occasions about wearing PPE by my manager and by the production supervisor. Also he was taking 40-50-minute breaks compared to everyone else having their normal 30 minutes. This is totally unacceptable as it was causing some of

the other agency staff to miss their breaks because of how long he as missing." Cordant reposed "He has been crying down the phone to me saying how much he loves his job. Is there any way we could give him a disciplinary and another chance?" It is notable Cordant do not report the claimant was denying the allegations, but suggesting he was disciplined for them. There was no hint from Cordant that the claimant had been subjected to unlawful discrimination and the claimant's evidence that he informed Charlie by text that it was race discrimination had no credibility. The claimant was unable to produce the text message, and yet his witness statements exhibited a number of texts from 18 December 2018 including the email from the respondent thanking the claimant for his hard work in 2018. The claimant's oral evidence was that he had lost his phone.

31 Paul Carroll's response was "I'm not surprised he loves the job having 50-minute breaks. There's no way we can have him back Charlie because then everyone else will start to do the same and they think they can get away with it as well, and the fact that he can't follow our company site rules regarding PPE is also no good."

32 Cordant responded on 28 August 2020 "just relaying his message…He thinks you must mean someone else, he said he has never taken long breaks like this and always wears the correct PPE."

33 The final email in the chair, sent by Paul Carol to Cordant confirmed "it is Abdul because he had pointed him out to me. We can't have people being constantly told about their PPE and the lengths of their breaks, it's not fair on the other agency. With him taking up to 40-50 minutes breaks, it has a knock-on effect with the guys after him, then they think it's OK to have the same amount of break time."

34 On the 26 October 2020 the claimant commenced early ACAS conciliation.

35 On the 18 November 2020 the respondent spoke with Colin Legge who alleged the claimant had taken a break for 50 minutes "at a time…so I took him to despatch where myself and Paul C asked him to leave…if his break was at 22.00 he would disappear at 21.40 then return and go on his break at 22.30 and he did it a lot hence the warnings."

36 Paul Carroll was interview and his recollection was the claimant worked as a "runner at the time and was told on numerous action he was taking 50-minute breaks and repeatedly told about PPE."

37 In cross examination the claimant raised an issue with the contradiction in the claimant's evidence given in his written statement and the investigation. At paragraph 15 in his witness statement Colin Legge confirmed he made contact with Paul Carroll "I think I did this by phone" and yet in the investigation referred to taking the claimant to despatch. Bearing in mind the fact that it is undisputed Colin Legge made contact with somebody from despatch which resulted in the claimant not returning to work for the respondent, it is irrelevant whether this was by phone, at the end of the shift when the claimant was taken to despatch or according to Paul Carroll's contemporaneous email sent on 28 August, 8-days after the incident, when the claimant was pointed out to him. Paul Carroll was told about the claimant and he acted on it, as evidenced by the contemporaneous exchange of emails. Nothing hangs on Colin Legge's

recollection in the context of agency workers coming and going and the passage of time.

Law

Direct Discrimination (s.13 of the Equality Act 2010 ("Ea."))

38 S.13(1) of the Equality Act 2010 (Ea.) provides that 'A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others'.

39 S.23(1) provides that on a comparison for the purpose of establishing direct discrimination there must be '**no material difference between the circumstances relating to each case'** [the Tribunal's emphasis]. In the well-known case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL (a sex discrimination case), Lord Scott explained that this means that 'the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class'. The Tribunal took into account this test when it considered Mr Alamin's claim of direct discrimination.

40 The EHRC Employment Code states that the circumstances of the claimant and the comparator need not be identical in every way. Rather, 'what matters is that the circumstances which are relevant to the [claimant's treatment] are *the same or nearly the same* for the [claimant] and the comparator'— para 3.2. This is relevant to the comparator relied upon by Mr Alamin, who was not in the same or nearly the same circumstances him, and the Tribunal formulated a hypothetical comparator which included the claimant's agency status and the excessive breaks he took, concluding a hypothetical comparator who did not possess the protected characteristics of Arabic/Libyan race would have been treated no differently to how the claimant was treated.

41 Section 13 EqA requires not just consideration of the comparison (the less favourable treatment) but the reason for that treatment and whether it was because of the relevant proscribed ground. These two questions can be considered separately and in stages; or they can have intertwined: the less favourable treatment issue cannot be resolved without deciding the reason why issue. As was observed by Lord Nicholls in Shamoon at paragraph 11: "…tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? … If the former, there will … usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable then was or would have been afforded to others." As can be seen from its findings of facts, the Tribunal in the case of Mr Alamin examined all of the facts in the case to ascertain whether he was treated less favourably, concluding he was not for the reasons given below, having accepted Colin Legge's explanation was untainted by race discrimination.

Harassment

42 The EHRC Employment Code provides that unwanted conduct can be subtle, and include 'a wide range of behaviour, including spoken or written words or facial expressions' para 7.7. Where there is disagreement between the parties, it is important that an Employment Tribunal makes clear findings as to what conduct actually took place.

43 Section 26 EqA covers three forms of prohibited behaviour. In the claimant's case the Tribunal is concerned with conduct that violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment — S.26(1) It states that a person (A) harasses another (B) if:

- A engages in unwanted conduct related to a relevant protected characteristic — S.26(1)(a), and

- 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 — S.26(1)(b)

44 The word 'unwanted' is essentially the same as 'unwelcome' or 'uninvited' confirmed by the EHRC Employment Code at para 7.8. Unwanted conduct means conduct that is unwanted by the employee assessed subjectively.

45 S.26(4) states that, in determining whether conduct has the proscribed effect, a tribunal must take into account the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. There can be cases where the claimant when alleging the acts violated his or her dignity, is oversensitive and it does not necessarily follow that an act of harassment had objectively taken place despite a subjective view that it had.

Burden of proof

46 In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and Igen Limited and others v Wong [2005] IRLR 258 apply. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that he did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondents and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case disability], failing which the claim succeeds.

47 Lord Justice Mummery in Madarassy v Nomura International plc [2007] ICR 867, CA, it was held: 'The bare facts of a difference in status and a difference in

treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'

48 Section 136 of the EqA. provides: (1) this section applies to any proceedings relating to the contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

Conclusion: applying the law to the facts

Harassment related to race (Equality Act 2010 section 26)

Turning to the agreed issues as follows:

49 Did the respondent do the following alleged things:

49.1 In August 2020 did Colin Legge, the red team supervisor, did not prevent the claimant from going to the toilet in-between breaks. The Tribunal found that the rule was workers were to go to the toilet in their designated breaks. A number of workers, permanent employees and agency workers took short breaks outside their designed breaks, including the claimant and they were not prevented from doing so. The claimant was not prevented from going to the toilet, drinking from the water fountain and using his phone during periods that were not designated break times. Colin Legge was concerned with the extent to which the claimant took breaks, for whatever reason, expanding his designated breaks times from 30 minutes to 40/50 minutes.

49.2 On or around 20 August 2020 did Colin Legge swear at the claimant and tell him he would no longer work there, the Tribunal found the claimant was not sworn at on the balance of probabilities, and he was informed that he would not be working there any longer.

49.3 With reference to the issue, if so, was that unwanted conduct, the Tribunal found that the claimant being told he would not be working for the respondent any longer was unwanted conduct.

49.4 With reference to the issue, was it related to race, the Tribunal found there was no causal connection between the claimant's race. In order to constitute unlawful harassment under S.26(1) EqA, the unwanted and offensive conduct must be 'related to a relevant protected characteristic'. There is nothing in the factual matrix set out which properly leads it to the conclusion that the conduct in question is related to the claimant's race, and it is notable the claimant alleged in the Grounds of Complaint that he was told he was "let go" because whilst permanent employees could take breaks outside designated periods, agency workers could not. If this were the position, even on the claimant's own case, there was no causal connection with race.

49.5 Having explored with Colin Legge the reason for his treatment of the claimant, it found the claimant's conduct as described above, was the sole reason. The claimant had been warned numerous occasions beforehand about his actions, although these were not formal disciplinary warnings given the fact Colin Legge did not have the power to discipline an agency worker. The claimant continued to take advantage of the respondent's break system and there are no inferences that can be drawn from the surrounding circumstances which points to race being the reason behind Colin Legge's intentions. Having arrived at this finding the Tribunal was not required to deal with the remaining section 26 issues as the conduct was not related to race. If the Tribunal is wrong on this point, it would have gone on to find Colin Legge's conduct did not have the purpose of violating the claimant's dignity and his behaviour did not have the proscribed purpose.

Direct race discrimination (Equality Act 2010 section 13)

50 With reference to the first issue, namely, what are the facts in relation to the following allegations in August 2020:

50.1 Did Colin Legge, the red team supervisor prevent the claimant from going to the toilet in between breaks, the Tribunal found he had not. The claimant's evidence was that on 20 August he had an urgent need to go to the toilet and went. It was on the claimant's return Colin Legge spoke to him. The final straw for Colin Legge was the claimant taking a break that lasted for more than thirty minutes, which is different to preventing the claimant from going to the toilet. Mr Malian, an Arab/Libyan confirmed in oral evidence that he was "never prevented" by Colin Legge from using the toilet, he went to the toilet in his break times and was never asked by Colin Legge not to go to the toilet excepting in break times. The respondent's policy was that workers should go to the toilet in their designated break times, they could also go to the toilet outside this and the evidence before the Tribunal was that the claimant exploited the position by prolonging his break times and taking many short breaks. A hypothetical comparator in the same position as the claimant i.e. having been warned over a period of time about his breaks and who was not Libyan Arab, would not have been treated any differently. The Tribunal took the view that the PPE position with the claimant was peripheral and the real issue for Colin Legge was extended breaks and taking a number of breaks away from the line, even if they were short. It was the extent to the claimant's behaviour taken as a whole that put the production and the breaks of other agency workers at risk because of the knock-on effect and there was no causal connection with the claimant's protected characteristic..

51 On or around 20 August 2020 did Colin Legge swear at the claimant and tell him he would no longer work there; the Tribunal has dealt with this above.

52 With reference to the issue, did the respondent inform Cordant that the claimant was no longer required for work, the Tribunal found that it did.

53 With reference to the issue, did the claimant reasonably see the treatment as a detriment, the Tribunal found that he did.

54 With reference to the issue, if so, has the claimant proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances *of a* different race was or would have been treated, it found he was not. The claimant says he was treated worse than other unnamed members on the same team. The claimant relies on hypothetical comparators. There was no evidence any other members of the team took the same prolonger breaks as the claimant. The claimant's own witness did not take breaks outside his allocated break times.

55 With reference to the issue has the claimant proven facts from which the Tribunal could conclude that the less favourable treatment was because of race, he has not. The Tribunal took into account the burden of proof provisions applying it to the evidence before it, concluding the burden of proof has not shifted to the respondent. If the Tribunal is wrong on this issues it would have gone on to find Colin Legge had provided an explanation for his actions untainted by race discrimination. The reason why Colin Legge acted as he did was for a genuinely non-discriminatory reason, and there were no factors justifying a finding of unconscious discrimination.

56 In conclusion, the claimant was not unlawfully discriminated against on the grounds of his race and his claim for direct race discrimination brought under section 13 of the Equality Act 2010 and harassment brought under section 26 are not well-founded and dismissed.

18.3.22
Employment Judge Shotter

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

22 March 2022

FOR THE SECRETARY OF THE TRIBUNALS