EMPLOYMENT TRIBUNALS

Claimant: Mr K Bouhanna

Respondent: Future Academies

Heard at: London Central (by CVP video)

On: **7 – 10 November 2023**

Before: Employment Judge Brown

Members: Mr D Kendall
Mr A Adolphus

Appearances

For the Claimant: In person
For the Respondent: Ms G Holden, Counsel

JUDGMENT

Having been sent to the parties on 10 November 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

Preliminary

1. By a claim form presented on 4 July 2022 the Claimant brought complaints of direct discrimination because of race and direct and indirect discrimination because of religion or belief.

2. The Claimant describes himself as Arabic and of the Muslim faith.

3. The Claimant was engaged as an agency worker at Pimlico Academy to assist the Respondent's caretaker site team during the summer term of 2022.

4. In its amended Response, the Respondent accepted that the Claimant was a contract worker within the meaning of s 41 Equality Act 2010.

5. The issues in the claim were set out by EJ Spencer in a case management hearing on 8 February 2023 as follows:

> *1. Direct Discrimination contrary to section 13 of the Equality Act 2010*
> *The Claimant claims he was subjected to a number of detriments because of his race and or religion. It is his case that he was treated less favourably than his colleagues Javier and Joe and that this less favourable treatment was because of his race and or religion. In particular the Claimant alleges the following acts of less favourable treatment on the part of Mr Wilcock:*
>
> *a. he was not provided with a key to the store and/or lift. In consequence he was unable to access gloves/clean gloves and was provided with dirty gloves.*
> *b. he was told on 1st July 2022, (via a telephone call from the agency), that the Respondent had directed that he should stop using his phone at work.*
> *c. He was told to help the team with their tasks, but the team (Joe and Javier) were not told to help him with his tasks.*
> *d. He was given the dirty jobs such as cleaning drains and using the sweeping machine which his comparators did not have to do.*
> *e. He was dismissed. It is the Claimant's case that the reasons subsequently given by the Respondent for dismissing him (that he spent too long in the toilets and that had been missing from the site on 1st July) were unreasonable and untrue and support his case that the dismissal was tainted with discrimination.*
>
> *2. The issue for the Tribunal is to decide whether the Claimant was treated less favourably than his colleagues and/or a hypothetical comparator who was not Muslim or of Arabic descent in the manner set out above. If so, was that because of his race or religion.*
>
> *Indirect Discrimination*
> *3. The Claimant also claims indirect discrimination in relation to his ability to pray while at work. It is his case that the Respondent had a provision, criterion or practice (a PCP) that the team had to take their break from 12 to 1. It is his case that this put him at a disadvantage because he needed to pray at 1:10 and needed to take his break at a different time.*

4. The issue for the tribunal is whether the Respondent had such a PCP. If so, did the PCP put those of the Muslim faith at a particular disadvantage when compared with those who were not Muslim, and did it put the Claimant at that disadvantage?

5. If so, was the PCP a proportionate means of achieving a legitimate aim?

6. The Tribunal heard evidence from the Claimant. For the Respondent, it heard evidence from Alan Wilcock, Site Manager; Joe Alexander, agency caretaker at the relevant time; and Javier Gonzalez, also an agency caretaker at the relevant time. There was a Bundle of Documents. Both parties made submissions.

Relevant Facts

7. Claimant worked at Pimlico Academy for 13 days in summer 2022, in June and until 1 July, as an agency worker. He was engaged through the Barker Ross Group agency. His normal hours were 08.00 – 16.30, p121.

8. Pimlico Academy, "the Academy", is run by Future Academies.

9. Alan Wilcock was Site Manager at the Academy. He had been employed there for 15 years.

10. Joe Alexander and Javier Gonzalez were also working as agency worker caretakers at the Academy while the Claimant worked there. Mr Alexander had worked as an agency worker for the Academy for around 6 years. Mr Gonzalez had worked as an agency caretaker there for about 7 months, although he mainly worked at another of the Respondent's schools, Churchill Gardens Primary Academy, which was situated beside Pimlico Academy.

11. It was not in dispute that the caretaker team of Messrs Wilcock, Alexander and Gonzalez took their lunchbreak every day from 12 – 1 pm. The Claimant also took his lunchbreak at that time. He therefore saw Mr Wilcock at lunchtimes.

12. Both Messrs Alexander and Gonzalez had had full site inductions by the time the Claimant joined and they had both been given a set of keys to the various areas of the Academy.

13. Mr Wilcock told the Tribunal that the Academy engages agency staff when the need arises. He gave evidence that the Claimant was engaged to cover a busy period and that Tony Mahendra, the Respondent's Regional Site Manager, had informed Mr Wilcock that the Claimant would only be working at Pimlico Academy for a short time. Mr Wilcock told the Tribunal that the Claimant was mainly needed to help cover the busy exam period, when 220 desks and chairs needed repeatedly to be set out and taken away from the sports hall, where students were undertaking exams.

14. The Claimant, on the other hand, told the Tribunal that he had been informed by his agency and by Mr Mahendra that the agency job could lead to full time employment.

15. The Tribunal did not hear evidence from the agency or from Mr Mahendra. However, it accepted that the agency and Mr Mahendra might have indicated to the Claimant that there was a possibility of full time employment in the future. However, the Tribunal accepted Mr Wilcock's evidence that he understood that the Claimant had been engaged for a short period of time, to cover a particularly busy period.

Keys

16. The Claimant was not given his own set of keys. He told the Tribunal that this made it difficult for him to carry out tasks such as delivering parcels, because he might need to use the lift.

17. Mr Wilcock and Mr Alexander both told the Tribunal that keys are expensive and that the Claimant was not required to open up the school in the morning or close it at night. Mr Wilcock told the Tribunal that, as the Claimant was only going to be engaged to cover a busy period, he did not make the Claimant a key holder. He accepted that this may have made it difficult for the Claimant to deliver parcels inside the school premises when he did not have a key for the lift, but he gave evidence that the lift key, on its own, cost £49.

18. Mr Alexader told the Tribunal that only Mr Wilcock had a key to the lift, in any event. He said, "The key for the teachers' classrooms is the master key … Even teachers don't have one. You have to be there for a while."

19. The Tribunal found it entirely plausible that a newly appointed agency worker would not be given a set of keys to school premises at the beginning of their engagement. It accepted that Mr Wilcock did not make the Claimant a keyholder during the Claimant's 13 day engagement because he did not believe the Claimant would be there for long and keys were expensive.

Induction

20. The Claimant was not given a full site induction. He told the Tribunal that he was very experienced, was familiar with the operation of fire alarms and could undertake skilled work, such as painting and repairing furniture.

21. Mr Wilcock told the Tribunal that the Claimant was not given an induction because "his main job was to help during exams; he was not going to open up or lock the building, or be there full time. It takes ages and ages to do a full induction, he would have to learn the fire panel – it takes at least a week and a half to 2 weeks to learn all the panels."

22. Again, the Tribunal accepted that Mr Wilcock did not give the Claimant a full site induction because he believed that the Claimant was there to help out for

a limited period of time and did not need a full induction, which would have been time consuming.

Jobs

23. It was not in dispute that the Claimant often worked outdoors at the Academy. He was able to undertake outside jobs without keys.

24. He alleged that he was given the dirty jobs to do, such as blowing and gathering leaves and cleaning drains. He said that Joe Alexander never did these tasks while the Claimant was there.

25. Mr Alexander gave a list of the tasks which Mr Alexander undertook: a. Using the billygoating machine which cleans the playground; b. Using the leaf blower to blow leaves as there are trees in the outside areas; c. Cleaning the outside areas using shovels and brooms; d. Sorting parcels for the teaching staff; e. Waterflushing to ensure there is no legionella in the water; f. Cleaning all of the Academy premises, including the bins; g. Fixing broken items like chairs and toilets; h. Dealing with contractors who need to come on site, because they may not have DBS checks and need to be supervised.

26. The Claimant gave evidence that the Claimant undertook all these jobs, too.

27. It was agreed that there was an app onto which teachers would enter jobs which needed to be done. There was a traffic light system for tasks and urgent jobs would be highlighted “red”. The agency caretakers could select a task to undertake from the list, although Mr Mahendra and Mr Wilcock would require “red” tasks to be carried out immediately.

28. Mr Alexander agreed that Mr Alexander would undertake the jobs such as delivering parcels around the school, because he had the keys and knew where all the offices and classrooms were. He said that the Claimant would have taken a long time to deliver parcels because he would not have known all the relevant locations.

29. It was not in dispute that, on several occasions, the Claimant set out desks in the sports hall for exams the next day.

30. On all the evidence, the Tribunal found that the Claimant undertook a range of tasks and was not confined to the dirty, outside jobs. Insofar as Mr Gonzalez and Mr Alexander undertook more indoor tasks, the Tribunal found that this was because they had keys to all parts of the premises and knew their way around, and so they would complete these tasks more quickly. The Tribunal considered that it was natural for any caretaker who had recently started work to be given more straightforward tasks, which did not yet require detailed knowledge of the premises.

Gloves

31. The Claimant told the Tribunal that Mr Alexander gave him dirty and smelly industrial gloves to use. He said that Mr Wilcock had instructed him, when he started, to ask Mr Alexander for anything he needed. He said he had asked Mr Alexander for clean gloves and Mr Alexander had never provided them. However, he also told the Tribunal that he had his own gloves.

32. Mr Alexander vehemently denied that he had given the Claimant dirty gloves.

33. All the Respondent's witnesses told the Tribunal that the practice, when they needed clean gloves, was for caretakers to tell Mr Wilcock and for Mr Wilcock would go to the hardware shop to buy them. The Claimant never asked Mr Wilcock for clean gloves. He never complained, during his employment, to him, that he had not been given clean gloves.

34. On all the evidence, the Tribunal concluded that the Claimant was not concerned about the gloves during his short engagement. If he had had an issue with the gloves, he could have asked Mr Wilcock for gloves, or complained about the gloves he was provided with. He had ample opportunity to do so, given that he saw Mr Wilcock frequently at lunch. The fact that he never raised the matter with Mr Wilcock indicated that he was not unhappy with the gloves he had.

35. In addition, the Tribunal accepted Mr Alexander's evidence that he had not intentionally given the Claimant dirty gloves, even if the Claimant thought that the gloves were dirty. The Claimant did not raise the cleanliness of the gloves as an issue, so Mr Alexander was not aware that the Claimant perceived them to be unsatisfactory in this regard.

Working with Others

36. It was not in dispute that exams were taking place in the period when the Claimant worked at the school.

37. The Claimant told the Tribunal that he was often asked to help Messrs Alexander and Gonzalez put out tables and chairs in the sports hall, but that they were never asked to help him with his tasks.

38. Mr Wilcock told the Tribunal that the exam set-ups were the most important thing the team did – if the exam hall was not set up, then the invigilators could not put exam papers on desks and 220 children would be unable to sit their exams.

39. He said that there were times when this needed to be done very quickly, after sports games, and before exams the following day. He said that the main reason the Respondent needed an extra caretaker was to turn around exam halls very quickly.

40. Both Mr Wilcock and Mr Alexander told the Tribunal that setting out so many desks and chairs is a big job and can take hours.

41. The Tribunal accepted that setting up exam halls in a school was an extremely important job. It found that setting out so many desks and chairs can take a very long time. It found that more than one person was required to do this task, so that it could be done more quickly and in time for exams starting.

42. The Tribunal therefore found that setting up exam halls was a team task – it needed more than one person. Accordingly, the Claimant was not "helping" the other caretakers to set up the exam halls, this was team work, of which the Claimant was a part.

43. It found that the Claimant worked with others on team work. He worked on his own when there were individual jobs to be done.

Wednesday Night

44. One Wednesday night, after the school day, the sports hall needed to be set up for an exam the following morning. The Claimant worked, after his normal hours, with Mr Alexander, to set up the hall.

45. However, the Claimant went home before the task was complete, meaning that Mr Alexander stayed to complete the job on his own.

46. There was a dispute about whether the Claimant left at 18.00 (on Mr Alexander's evidence) or 19.30 (on the Claimant's evidence).

47. At the Tribunal, the Claimant questioned whether Mr Alexander had had any authority to ask him to stay late, to set out the desks. He said that neither Mr Wilcock nor Mr Mahendra had asked him to work late that day.

48. However, even on the Claimant's case, he had worked after his normal hours on that day. He clearly accepted, at the time, that he was required to work late. The Tribunal considered that his questioning, at the Tribunal, of who had required the late working, was disingenuous. The Claimant knew, on that Wednesday, that there was important work which needed to be done after hours.

49. There was no dispute that the Claimant was always paid for all hours he worked overtime.

50. The Tribunal accepted Mr Alexander's evidence that, whatever time the Claimant left, it was an absolute necessity that the exam hall was set up with all the desks and chairs for the following morning, so that Mr Alexander was required to stay on his own, until at least 21.00, to ensure that this was done.

51. Mr Alexander was annoyed about the Claimant going home and leaving him to set up the exam hall alone. He told Mr Mahendra that the Claimant had left him to finish the job on his own. Mr Mahendra later said, of the Claimant, to the agency that, " Absconding from site while the other Agency staff are working isnt helpful to the school at all." P72.

The Claimant Allegedly Going Missing and Using his Phone

52. There was a substantial dispute of fact about whether, on a regular basis, the Claimant went missing while at the school, so that Mr Wilcock and the other agency workers did not know where he was for substantial periods of time.

53. The Claimant had a radio for communication with Mr Wilcock and his fellow agency workers. He told the Tribunal that the radio was defective, so that the voice on it was unclear, and that he could not hear the radio in the noisy school environment. He gave evidence that he mentioned this to someone else called Eric in the office. He also gave evidence that he did not have Mr Wilcock's telephone number.

54. Mr Wilcock told the Tribunal that he had telephoned the Claimant several times, on the Claimant's telephone, so the Claimant must have had access to Mr Wilcock's number.

55. It was not in dispute that, on at least one occasion, Mr Gonzalez looked for the Claimant when the Claimant was in the toilet.

56. Both Mr Gonzalez and Mr Alexander told the Tribunal that the Claimant went missing, could not be found, and spent about 30 minutes each time he went to the toilet, which he did several times a day.

57. The Tribunal noted that the Claimant had provided numerous excuses about why he could not be contacted during the working day. The Tribunal noted that, rather than complaining to his manager, Mr Wilcock, about the radio, he allegedly spoke to someone called "Eric". Even on the Claimant's case, if he did not have Mr Wilcock's number, he apparently took no steps to obtain Mr Wilcock's number, in order to stay in contact with Mr Wilcock while he was at work. The Tribunal concluded that the Claimant's behaviour in this regard was not the conduct of someone who was keen to stay in communication with his manager, or to be contactable when at work. Rather, it was the behaviour of someone who was happy to avoid communication from his manager and colleagues.

58. The Tribunal will return to the Claimant's alleged disappearances below.

59. On 1 July 2022 the Claimant's agency told the Claimant to stop using his phone for personal matters at work.

60. Messrs Alexander and Gonzalez both gave evidence that they considered that the Claimant preferred being on his phone, rather than working.

61. Mr Alexander told the Tribunal that Mr Mahendra had come out from his office and had seen the Claimant on his phone. He said, "I think Tony had a word with him and told him off. I noticed it other times, e.g. if I left him on the playground I would come back and see him on his phone. He was always on

his phone. I remember that Tony rang the agency to say the Claimant needed to stop doing this."

62. The Claimant alleged that Messrs Wilcock, Alexander and Gonzalez used their phones all the time at work, looking at Youtube videos and playing music. The Claimant told the Tribunal that he worked very hard and that the Respondent's evidence was lies.

63. Mr Wilcock denied that he used his phone for personal matters at work – he said that he had work emails and the helpdesk app on his phone, so that he needed to use it for work. Messrs Alexander and Gonzalez denied using their phones for personal business at work.

64. On 1 July 2022 Messrs Wilcock, Gonzalez and Alexander all tried to contact the Claimant for a long period, but could not get hold of him. The Claimant told the Tribunal that he was with a contractor fixing a water pump, that he could not hear his radio and then he was on his break.

65. Whatever the reason for his colleagues not being able to contact the Claimant, the Tribunal accepted that he was not contactable for about an hour on 1 July.

66. When Mr Wilcock did find the Claimant that day, after lunch, he asked the Claimant to go to the sports hall, to set out desks. The Claimant responded that he did not know where the sports hall was.

67. The Claimant told the Tribunal that he had forgotten where the sports hall was and that he did not hear Mr Wilcock.

68. Mr Alexander told the Tribunal, and the Tribunal accepted, that the sports hall was a massive building and was easy to see.

69. The Tribunal did not accept that the Claimant had forgotten where the sports hall was. He had worked there on a number of previous occasions. The Tribunal accepted Mr Alexander's evidence that, by its nature, the sports hall was large and easily identifiable.

70. The Tribunal found that the Claimant was deliberately uncooperative when Mr Wilcock told him to work in the hall.

71. Given that Claimant was uncooperative when Mr Wilcock asked him to set out desks, which was a normal caretaking task, given that the Claimant's general lack of communication demonstrated that he was happy not to be contactable in work, and given that he went home on a Wednesday night leaving Mr Alexander to complete a crucial task on his own, the Tribunal preferred the Respondent's evidence about the Claimant's work performance.

72. It therefore accepted the Respondent's evidence that the Claimant was absent for long periods of time when at work and that he used his phone for personal use more than work colleagues, to the extent that Messrs Alexander

and Gonzalez thought that he neglected his work in favour of his phone, and to the extent that Mr Mahendra asked his agency to tell him not to use it.

73. The Tribunal accepted that Mr Wilcock considered that the Claimant's commitment to work was unsatisfactory.

74. The Tribunal accepted Mr Wilcock's evidence that, when the Claimant told him that he didn't know where the sports hall was, Mr Wilcock thought, "enough is enough" and that the Claimant's engagement should be terminated.

75. The Tribunal found Mr Wilcock to be an honest and convincing witness. He openly accepted that the standard of the Claimant's work, when the Claimant carried out a task, was high. Mr Wilcock's criticism of the Claimant concerned the Claimant's availability and commitment to work.

Termination of the Claimant's Engagement

76. Mr Wilcock contacted Tony Mahendra to ask him to terminate the Claimant's engagement.

77. Mr Mahendra emailed the Claimant's agency at 13.10 on 1 July 2022 saying, "The Teams at Pimlico has given up with the Agency Personnel. Following my conversation I had last week I haven't seen much great deal of improvement, besides it's almost 1 hour the teams haven trying to reach for this guy. Therefore, his last shift will be today." P73.

78. Mr Mahendra emailed the agency again at 13.48 saying, "The teams are working so hard to support 2 schools and having a second conversation … within 2 days isn't something I am [not] prepared to. Absconding from site while the other Agency staff are working isnt helpful to the school at all. Pls finalise his payment and make arrangements to cancel his assignment with us." P72.

79. The agency responded, saying that the Claimant was unhappy, had said the radio was unclear and that other people took 1 hour breaks and watched him work, p71.

80. Tony Mahendra replied further saying, "Speaking to the estates team, they all have confirmed that the agency guy to be a liability. The entire team has been trying to reach over his own phone and the radio and he never picked up the phone. The radio has been used by many people working in the site and I am not too sure why the agency person could not hear. Given the current condition we are expecting staff (including Agency) to work on their full potential which we didn't get from K. Also on Wednesday he didn't finish his work in the School but just left leaving with one person to do the job. He should understand that before demanding any additional money he should make sure that he's able to deliver the work required by the school. Overall we are not willing to take someone who doesn't want to take responsibility and ownership of works." P71.

81. The Claimant finished work for the Respondent on 1 July 2022.

The Claimant's Time for Prayer

82. The Claimant told the Tribunal that he prayed at about 13.00 each day for about 5 minutes. He said that he would work an extra 5 minutes at the beginning and end of the day to make up for this, because it was outside the 12.00- 13.00 lunch hour. He did this extra work himself – he was never asked to do it by Mr Wilcock, or anyone else.

83. There was no suggestion that the Respondent ever sought to deduct any money for the Claimant taking a break to pray.

84. The Claimant told the Tribunal that he had asked Mr Alexander to enquire of Mr Wilcock whether the Claimant could change the time of his lunch break. The Claimant never raised the matter with Mr Wilcock himself.

85. The Tribunal did not accept that the Claimant asked Mr Alexander to ask Mr Wilcock to change his lunch hour. If he had wanted to, the most obvious solution would have been for the Claimant to ask Mr Wilcock himself to change the lunchtime. The Claimant saw Mr Wilcock regularly at lunch.

86. The Tribunal found that the Claimant was freely able to pray for 5 minutes at around 13.00 each day. He had no need to change his lunch hour to do so.

Race and Religion

87. The Claimant did not give evidence that anyone at the Respondent ever said anything negative about his race or religion, in any way. When asked, in evidence, why he said that the Respondent's treatment of him was because of race or religion, he replied saying that he had been treated differently and that was discrimination.

CCTV

88. The Claimant suggested that the CCTV at the school should have been provided as evidence. However, the Tribunal concluded that it would not have been appropriate for the Respondent or the Tribunal to examine hours of CCTV evidence to establish when the Claimant went to the toilet or used his telephone or other matters. That would have been disproportionate to the issues in the case.

Relevant Law

` **Discrimination**

89. By *s39(2)(c)&(d) Equality Act 2010*, an employer must not discriminate against an employee by dismissing him or subjecting him to a detriment.

Direct Discrimination

90. 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."

91. Race and religion are both protected characteristics, *s4 EqA 2010.*

92. 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.*

Causation

93. The ET must decide whether or not the alleged discriminator's reason for the impugned action was the relevant protected characteristic. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls said that the phrase "by reason that" requires the ET to determine why the alleged discriminator acted as he did? What, consciously or unconsciously, was his reason?." Para [29]. Lord Scott said that the real reason, the core reason, for the treatment must be identified, para [77].

94. However, if the Tribunal is satisfied that the protected characteristic is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it had a significant influence, *per* Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576. "Significant" means more than trivial, *Igen v Wong, Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437, EAT.

Detriment

95. In order for a disadvantage to qualify as a "detriment", it must arise in the employment field, in that ET must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to "detriment". However, to establish a detriment, it is not necessary to demonstrate some physical or economic consequence, *Shamoon v Chief Constable of RUC [2003] UKHL 11.*

Burden of Proof

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

97. In approaching the evidence in a case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and Annex to the judgment.

98. In *Madarassy v Nomura International plc* 2007 EWCA Civ 33, [2007] ICR 867, Mummery LJ approved the approach of Elias J in *Network Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865 and confirmed that the burden of proof does not simply shift where M proves a difference in protected characteristic and a difference in treatment. This would only indicate a possibility of discrimination, which is not sufficient, para 56 – 58 Mummery LJ.

Indirect Discrimination, Section 19 EqA.

99. By *s19 EqA*:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Liability of Discriminators, Employers and Agents

100. In *CLFIS (UK) Ltd v Reynolds* [2015] EWCA Civ 439, [2015] IRLR 562, [2015] ICR 1010), Underhill LJ said that liability will only be established where the protected characteristic formed the motivation for the individual performing the act complained of; unwittingly acting on the basis of someone else's tainted decision will not be sufficient: 'I see no basis on which [the individual employee who did the act complained of] can be said to be discriminatory on the basis of someone else's motivation'.

101. In *Alcedo Orange Ltd v Ferridge-Gunn* [2023] EAT 78, [2023] IRLR 606 the EAT held that the *Reynolds* approach still applies to direct discrimination complaints,

102. *Ss109 & 110 Equality Act 2010* provide

“109 Liability of employers and principals
(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer
(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.
(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—
(a)from doing that thing, or
(b)from doing anything of that description. […]" .

110 Liability of employees and agents
(1) A person (A) contravenes this section if—
(a) A is an employee or agent,
(b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and
(c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).[…]".

103. In *Yearwood v Commissioner for Police for the Metropolis* [2004] ICR 1660 and *Kemeh v Ministry of Defence* [2014] ICR 625 the EAT and Court of Appeal, respectively, confirmed that an "agent" for the purposes of the Equality Act 2010 was an "agent" at common law.

104. *Kemeh v Ministry of Defence* [2014] ICR 625 concerned the interpretation of s32 Race Relations Act 1976, the predecessor provision to 109 EqA. There was no equivalent in s 32(2) to the phrase in s109 sub-section (1) 'whether or not it was done with the employer's knowledge or approval'. However, Elias LJ, who delivered the leading judgment, said, at paras 11–12 (p 379):

'11. Read literally, subsection (2) might suggest that the principal must authorise the act of discrimination itself before liability arises. But I agree with the EAT in Lana v Positive Action in Training (Housing) Ltd [2001] IRLR 501 paragraph 32 (Mr Recorder Langstaff presiding) that this would virtually render the provision a dead letter. In my judgment, Parliament must have intended that the principal will be liable wherever the agent discriminates in the course of carrying out the functions he is authorised to do. It is a moot point whether the common law would in any event impose liability in these circumstances. The scope of the principal's liability for an agent at common law is not entirely clear, although it seems likely that he will be liable for certain tortious acts of the agent, such as misrepresentations, provided they are sufficiently closely related to the agent's actual or apparent authority: see Bowstead and Reynolds on Agency, 19th edn, para. 8–182. Whether racial abuse would fall within that principle is problematic, but s.32(2) removes the uncertainty which might otherwise exist."

Discussion and Decision

105. The Tribunal took into account all its findings of fact and the relevant law when coming to its decisions. For clarity, it has set out its findings on each issue separately.

Issue: The Claimant was not provided with a key to the store and/or lift. In consequence he was unable to access gloves/clean gloves and was provided with dirty gloves.

106. The Claimant was not provided with keys during his engagement by the Respondent. The Tribunal found that Mr Wilcock did not make the Claimant a keyholder during the Claimant's 13 day engagement because Mr Wilcock did not believe the Claimant would be there for long and keys were expensive. That was an entirely non-discriminatory reason.

107. The Tribunal found that Mr Wilcock would have treated any newly started, short term agency caretaker in the same way.

108. Messrs Alexander and Gonzalez were not appropriate comparators because they had been agency caretakers at the Respondent's school for 6 years, in Mr Alexander's case, and 7 months, in Mr Gonzalez' case.

109. The Respondent did not treat the Claimant less favourably than it would have treated another newly started, short-term agency caretaker, whatever the race or religion of that caretaker. Not giving the Claimant keys was not an act of race or religion discrimination.

110. The Tribunal also accepted Mr Alexander's evidence that he did not intentionally give the Claimant dirty gloves.

111. He therefore did not treat the Claimant less favourably than he would have treated a comparator, whatever their race or religion.

112. Furthermore, the Tribunal found that the Claimant did not consider that the Respondent's provision of gloves was an issue during his employment, otherwise he would have raised it with Mr Wilcock. He never did. The Tribunal found that the Claimant did not consider that he was put at a disadvantage by the gloves. Given that the Claimant had his own gloves and could have asked Mr Wilcock about gloves, the Tribunal also found that a reasonable person would not have considered themselves disadvantaged by the Respondent's provision of gloves. There was no detriment to the Claimant in relation to the gloves.

113. The Respondent did not discriminate against the Claimant by giving him dirty gloves.

Issue: The Claimant was told on 1st July 2022, (via a telephone call from the agency), that the Respondent had directed that he should stop using his phone at work.

114. The Tribunal found, as a fact, that the Claimant used his phone for personal calls more than work colleagues, to the extent that Messrs Alexander and Gonzalez thought he neglected his work in favour of his phone. The Tribunal accepted the Respondent's evidence on this. It accepted that Mr Mahendra had also noticed the Claimant using his telephone excessively and that he telephoned the agency to raise it as an issue.

115. This was nothing to do the Claimant's race or religion. It was entirely due to the Claimant's persistent use of his phone. This was not race or religion discrimination.

Issue: The Claimant was told to help the team with their tasks, but the team (Joe and Javier) were not told to help him with his tasks.

116. The Claimant's complaints about being required to help his colleagues concerned the task of setting up exam halls with desks and chairs. The Tribunal found that setting up exam halls was a team task – it needed more than one person. Accordingly, the Claimant was not "helping" the other caretakers to set up the exam halls, this was team work, of which the Claimant was a part.

117. On the evidence, the Tribunal concluded that the Claimant did not appreciate how important setting up exams halls was, and how quickly it might need to be done.

118. The Tribunal found that the Claimant worked with others on team work. He worked on his own when there were individual jobs to be done.

119. The Claimant was not treated less favourably than his comparators – all members of the team were required to help with the exam hall set ups. This was not discrimination.

Issue: The Claimant was given the dirty jobs such as cleaning drains and using the sweeping machine which his comparators did not have to do.

120. The Claimant undertook a range of tasks and was not confined to the dirty, outside jobs.

121. Insofar as Mr Gonzalez and Mr Alexander undertook more indoor tasks than the Claimant, the Tribunal found that this was because they had keys to all parts of the premises and knew their way around, and so they would complete these tasks more quickly. This was nothing to do with race or religion.

122. The Tribunal considered that it was natural for any caretaker who had recently started work to be given more straightforward tasks, which did not yet require detailed knowledge of the premises. The Tribunal found that the reason the Claimant was given more outdoor tasks was that he was newly appointed and did not have keys or detailed knowledge of the indoor layout of the school including all classrooms and offices. His race and religion were no part of the reasons particular jobs were allocated to him.

Issue: The Claimant was dismissed. It is the Claimant's case that the reasons subsequently given by the Respondent for dismissing him (that he spent too long in the toilets and that had been missing from the site on 1st July) were unreasonable and untrue and support his case that the dismissal was tainted with discrimination

123. The Tribunal found that Mr Wilcock contacted Mr Mahendra on 1 July 2022 to ask him to terminate the Claimant's engagement because the Claimant could not be contacted for about an hour during the working day and, when Mr Wilcock did find him, the Claimant was uncooperative about helping to set up the exam hall.

124. The Tribunal found that this was in the context of the Claimant having left Mr Alexander to finish setting up an exam hall on his own on a previous Wednesday night.

125. Mr Wilcock considered that, "enough is enough".

126. The Tribunal found that these reasons were reflected in Mr Mahendra's emails to the agency that day, terminating the Claimant's engagement,

"The Teams at Pimlico has given up with the Agency Personnel. Following my conversation I had last week I haven't seen much great deal of improvement, besides it's almost 1 hour the teams haven trying to reach for this guy. Therefore, his last shift will be today." P73.

"Absconding from site while the other Agency staff are working isnt helpful to the school at all.." P72.

"Speaking to the estates team, they all have confirmed that the agency guy to be a liability. The entire team has been trying to reach over his own phone and the radio and he never picked up the phone. The radio has been used by many people working in the site and I am not too sure why the agency person could not hear. Given the current condition we are expecting staff (including Agency) to work on their full potential which we didn't get from K. Also on Wednesday he didn't finish his work in the School but just left leaving with one person to do the job…" p71

127. These reasons were nothing to do with the Claimant's race or religion. The Claimant's dismissal was not race or religion discrimination.

Indirect Discrimination

Issue: The Claimant also claims indirect discrimination in relation to his ability to pray while at work. It is his case that the Respondent had a provision, criterion or practice (a PCP) that the team had to take their break from 12 to 1. It is his case that this put him at a disadvantage because he needed to pray at 1:10 and needed to take his break at a different time.

The issue for the tribunal is whether the Respondent had such a PCP. If so, did the PCP put those of the Muslim faith at a particular disadvantage when compared with those who were not Muslim, and did it put the Claimant at that disadvantage?

128. The Tribunal accepted that the caretaker team at the Respondent took their lunchbreak between 12 and 1pm.

129. The Claimant prayed at about 1pm for about 5 minutes. He was freely able to do this. There was no restriction on him at all.

130. The Claimant told the Tribunal that he would work an extra 5 minutes at the beginning and end of the day to make up for this, because it was outside the 12.00- 13.00 lunch hour. However, he did this voluntarily– he was never asked to do it by Mr Wilcock, or by anyone else.

131. There was no suggestion that the Respondent ever sought to deduct any money for the Claimant taking a break to pray.

132. The Tribunal found that the Claimant was freely able to pray for 5 minutes at around 13.00 each day. He had no need to change his lunch hour to do so.

133. The Claimant did not contend that, on the day he could not be contacted for an hour and was dismissed, he had been praying during that time.

134. The Tribunal found, on the facts, that the Claimant was not placed at any disadvantage by the Respondent's practice of the team taking a lunch break between 12 and 1pm.

135. His indirect discrimination complaint therefore also fails.

136. All his complaints fail and are dismissed.

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Employment Judge Brown

6 June 2024

London Central

REASONS SENT to the PARTIES ON

6 June 2024

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FOR THE TRIBUNAL OFFICE