



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms A Wandzel

**Respondent:** The Hut Group Limited

**Heard at:** Liverpool

**ON:** 23, 24, 25, 26 and  
27 November 2020 and  
15 January 2021  
(in chambers)

**Before:** Employment Judge Benson  
Mrs P J Byrne  
Mr M Stemp

## REPRESENTATION:

**Claimant:** Ms D Janusz, Employment Adviser

**Respondent:** Mr T Gilbert, Counsel

**Polish Interpreter:** Ms Faligowska,

# JUDGMENT

The judgment of the Tribunal is that the claims of race discrimination fail and are dismissed.

# REASONS

## The Issues

1. This is a claim of race discrimination brought by the claimant. The claim is one of direct discrimination only. The claimant is Polish. A Case Management hearing had taken place before Employment Judge Dunlop on 31 March 2020. A List of Issues had been discussed during that hearing, however at the outset of this hearing, at the request of the Tribunal, the parties updated that list, the claimant having provided further particulars of her claim. The List of Issues which we are to

consider are set out below. At this hearing, the claimant sought to amend her claim to include further dates in respect of two of the issues. That application was granted as there was no objection to it by the respondent, who had already been provided with the detail in the witness statements, and as such suffered no prejudice.

2. The claimant's claims relate to circumstances during her employment when she says she was treated less favourably than Romanian workers because of her race. This included her having to work harder, having more difficulty in achieving targets, having to wait longer for a permanent contract, being prohibited from speaking in her own language, and having complaints made as to the length of time she spent in the toilet. She names Romanian workers who she considered were her comparators but relied upon other Romanian workers who she could not name.

3. The Tribunal had the assistance of Ms Faligowska, a Polish interpreter in respect of the claimant's and her witnesses' evidence for which it was grateful.

### **Evidence and Submissions**

4. We heard evidence from:

- a. The claimant and on her behalf, her Polish colleagues, Ms K De Ville Firlej, Ms A Firlej and Mr Marciniak. Mr Machrocki, Ms Wisniewska, and Ms Antos also provided statements but did not attend the hearing to give evidence. As they were not available to be cross examined, only limited weight was attached to their evidence.
- b. On behalf of the respondent; Mr Stelling (Head of Operations), Ms Thompson (Team Manager), Ms Stan (Senior Colleague), Ms Buzas (Interim Shift Manager), Ms Gasowska (Shift Manager), Ms Neacsu (Team Manager) Mr Nolan (People Director) and Mr Carolan (Group Head of Operations).

5. Evidence in chief was provided by way of witness statements together with, on occasions, supplemental questions. The witnesses and the interpreter also had copies of the witness statements in Polish where appropriate. An agreed bundle of documents had been prepared, which was provided electronically. Where documents were referred to in the bundle, Ms Faligowska assisted in interpreting any sections referred to.

6. We had regular breaks to assist all parties, including Ms Faligowska.

7. The parties provided written submissions which were considered as part of our decision making.

### **The Law**

#### Direct Discrimination

8. The definition of direct discrimination appears in section 13 Equality Act 2010 and so far as material reads as follows:

- (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.**

9. The concept of treating someone “less favourably” inherently requires some form of comparison, and section 23(1) provides that:

**“On a comparison of cases for the purposes of section 13 ... there must be no material differences between the circumstances relating to each case”.**

10. It is well established that where the treatment of which the claimant complains is not overtly because of race, the key question is the “reason why” the decision or action of the respondent was taken. This involves consideration of the mental processes, conscious or subconscious, of the individual(s) responsible: the Employment Appeal Tribunal in **Amnesty International v Ahmed [2009] IRLR 884** at paragraphs 31-37 and the authorities there discussed. It may be appropriate for the Tribunal to dispense with constructing a hypothetical comparator if it finds that the protected characteristic had a material influence on the detrimental treatment.

### Burden of Proof

11. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

**“(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**

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

12. Consequently, it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention.

### **Findings of Fact**

13. The claimant worked as an agency worker at the respondent’s premises between October 2017 and August 2019 when she became a permanent member of staff. Her employment terminated in March 2020. The claimant is a Polish national.

14. The respondent is a large organisation. They are an e-commerce business and sell fast moving consumer goods directly to customers and businesses. They specialise in beauty, wellness and lifestyle products.

15. The claimant worked at the respondent’s distribution centre at Warrington. The distribution centre carried out the picking, packing and dispatching of orders. On an average day the respondent would typically dispatch around 150,000 units which could increase to one million in the run-up to Christmas. Approximately 1,800 staff work at the Warrington site and it was generally a rough split of 85% permanent staff to 15% agency staff though that could vary, particularly in the run-up to Christmas. In the Outbound Department, where the claimant worked there would be somewhere between 100-400 people working: the number would fluctuate according

to how busy the respondent was. The respondent's workforce comprises a number of nationalities. Within the packing department the predominant nationality is Romanian. There are smaller number of Polish nationals and then also a mix of other nationalities. Of the packing management team responsible for the claimant, Ms Thompson is Polish; Ms Stan, is Romanian; Ms Buzas is Hungarian; Ms Neacsu is Romanian; and Ms Gasowska is Polish. Ms Gilca, who is also Romanian, was unable able to give evidence to the Tribunal. She was a Team Leader.

16. An order is placed by a customer online and fed into the Warehouse Management System. Once items have been picked to fulfil the orders, the totes containing the orders (large grey boxes used to transport products) are held in the batch buffer until all products for the orders within the batch (usually 32 orders) have been picked and arrived at the buffer.

17. The totes are then released onto the pack floor where if there are multiple units per order they will go through another process called "Re-bin" which is where the items are segregated into individual customer orders for pack and dispatch. Single orders will arrive directly to the packing area without the need for the re-bin process, as they can be shipped one item at a time to the relevant customers. The distribution of the totes between the completed pick process and arrival at re-bin is a fully automated process through a conveyor system.

18. The items to be packed are split into different divisions such as "MyProtein" and "Health and Beauty", in addition to others including luxury brands. Health and Beauty and MyProtein are simply divisions of products for packing. Each division has a different packing process and area. Luxury brands, for instance, require specific training. MyProtein and Health and Beauty, require basic training and new agency workers receive that training when they start. Re-bin work requires additional training. The claimant was trained on all packing and brands.

#### MyProtein v Health and Beauty

19. The claimant alleged that MyProtein products were heavier than Health and Beauty products and the target or KPI was more difficult to achieve. The respondent disagreed. It said that although some of the MyProtein products were 5kg in weight, these were in the minority and most other products were lighter, 2.5kg or 1kg and including very light items such as samples. Having heard the evidence of the claimant and her witnesses who were on the packing floor, carrying out the packing, we find that working in the MyProtein area was more tiring than in the Health and Beauty section, in part because it required lifting heavier items more regularly. Most of the Health and Beauty products were make-up products which were smaller and although there were items such as shampoo which were heavier, they did not compare to the number of heavier items in MyProtein. The claimant found it most tiring when working on re-bin.

20. The respondent has KPIs ("key performance indicators") to analyse performance. Every task in outbound operations has a KPI including packing MyProtein single/multi/or re-bin and packing Health and Beauty single/multi or re-bin. There are two KPIs for each task: a planning KPI which is used for internal purposes and not shared with workers, and an "on the floor" KPI which is shared with workers. The detail of these KPIs was not something of which the claimant was aware. Whilst

working, she and colleagues would be told by Team Managers or Senior colleagues how they were performing against the KPIs but by reference to eg 10% behind target etc. KPIs are calculated using historic data (the previous six to eight weeks performance is used for this) and aligned to current performance. They set out how many products a worker should pack per hour in order to achieve maximum efficiency and this varies on the task being carried out.

21. The claimant alleges that the KPIs in each of the three categories single/multi/re-bin for Health and Beauty and MyProtein were the same and it was more difficult to achieve the KPIs if working in MyProtein as opposed to Health and Beauty. We were shown the KPIs for October 2020, which was the last month before the hearing. The following figures show the target per hour for standard delivery items and then in brackets for next day delivery. These showed for re-bin: 325 (426) (Health and Beauty) and 294 (289) (MyProtein); Multi 107 (166) (Health and Beauty) and 118 (107) (MyProtein) and single 57 (46) (Health and Beauty) and 46 (44) (MyProtein).

22. The respondent did not at the time keep historic KPI information as it amounted to very large amounts of data which the respondent did not, at the time require. It was unable therefore to produce the KPI information from the time of the claimant's employment. Their systems have now changed. Although we would have anticipated that information would have been useful to the respondent to retain, we accept Mr Stelling's evidence on the point and draw no adverse inferences from it. Although therefore the October 2020 KPIs have some relevance, it is limited.

23. We were also referred by the claimant to photographs of documents on the staff noticeboard. One of these, which the respondent confirms is an official document, also demonstrates that the KPIs for MyProtein and Health and Beauty were different. For instance, one of the notices has singles: Food (which we were told is MyProtein) 60 and Health and Beauty 80; and for Multi: Food (MyProtein) 168 and Health and Beauty 140.

24. The claimant refers us to another photograph. This photograph shows a piece of paper stuck over one of the notices on the notice board rather than in it. The photographs were taken one evening between the days of the Tribunal hearing in response to the respondent's challenge about the KPI figures. These contain further targets. The respondent, through Mr Carolan contends that these are not targets produced by the respondent. The only explanation provided by any witness as to where these figures may have come from was from Ms Gawowska who suggested that they may have been the figures produced for discussion by the Shift Managers which were sent between them by email. This was a process which was undertaken by the management intermittently but they were not agreed KPIs and nor could she explain how they might have got on to the notice board. From what can be seen from this document, the singles figures for Health and Beauty are 40 and for MyProtein 50; and for multi 140 for both.

25. In any event these figures and the October 2020 figures show that the KPI were not the same for MyProtein and Health and Beauty, other than in respect of the last figure which the respondent says was not their target. The respondent's business model is to make the packing as efficient and fast as possible. The way that the KPIs are set is based upon the previous 6 to 8 weeks performance. Although

the respondent is without doubt always seeking to improve its performance, using the previous data as the basis for its targets will in the Tribunal's mind reflect the speed at which the workers have been able to pack each of the product areas during that 6 to 8 week period. The KPIs show that there is a difference but not a large one and that it varies across the two product ranges, whether it is standard or next day delivery and whether it is singles/multi or re-bin.

26. That does not however mean that it is more difficult to reach the target in that area as the target is adjusted to take this into account. For instance, Health and Beauty has different challenges. Products tend to be smaller and some more difficult to pack than the MyProtein products. For some, labels were missing so they would need to be printed which would slow the rate of packing down. These are all things which would factor into the figures for the previous 6 to 8 weeks and therefore influence the future KPIs. Finally, we note that the claimant generally met her targets. The targets were therefore achievable in both product areas.

27. For these reasons we find that the MyProtein work was more tiring work as it was heavier, but that it was not more difficult to achieve the KPIs in MyProtein than in Health and Beauty.

#### Allocation of Work

28. The claimant was an agency worker until her offer of a permanent role in August 2019. There was an agency supervisor based on the packing floor who was an employee of the agency company. The immediate managers of staff in the packing department were in seniority order the Shift Manager, the Team Manager and the Senior Colleague.

29. Each day the respondent's planners looked at the orders which had been received, both for standard and next day delivery and plan how many staff they would require for the next day to pick the stock and pack. The respondent operated with three shifts, night, morning and afternoon. The necessary number of core and agency staff were allocated to particular product ranges eg MyProtein and Health and Beauty by the staff members name and it was expected that the named staff would start work in the particular work area on those product ranges. They were not allocated to a particular work station within the work area and the worker could choose which one they went to.

30. Before each shift started, the Team Manager and Senior Colleagues were provided with the planner electronically and it was also available on a screen on the floor. We were shown a copy of an example plan in the bundle. On coming into work, the staff were directed by the agency supervisor and/or Team Manager to the area they were to work if the staff member was unclear or if there was any uncertainty. The claimant and her witnesses allege that this system was not one that was in place and in fact what happened at the beginning of each shift was that there was a race by all agency workers for the Health and Beauty work area. We accept the evidence of the respondent's witnesses that this system was in place and that most people adhered to it. The majority of staff knew where they should go and went to the allocated work area.

31. If anyone did not go to the allocated area and the Managers or Senior Colleagues saw them or it was brought to their attention, normally they would tell them to move back to their allocated area. We heard from Ms Stan and Ms Gawowska that this was not an everyday situation, but not uncommon. We accept their evidence.

32. We do however consider that there may have been a race to particular work stations as these were not allocated. The workers preferred to be next to their friends whilst working and therefore tried to get workstations near one another. With a large number of staff, many of whom were agency staff, we can see that at the start of a shift, it would have been hectic and even a little chaotic.

33. Once allocated to a work area it was expected that the worker would continue in that area unless moved at the instruction of the Team Manager or Senior Colleague. Once logged into a work station, they would continue to work there unless they decided to leave it or were directed to move by the Managers or Senior Colleagues.

34. The respondent's business required flexibility and staff would be moved to different areas throughout the shift according to where they were needed to fulfil the respondent's orders. The Shift and Team Managers had access to a management system which provided up to date information on the number of orders being placed in the different product areas throughout the day. This was known as the Order Well. This indicated to them which areas required more staff at any time and they would ask the necessary numbers of staff to move. Staff were constantly moving between product areas and a staff member could be asked to move between 5 and 20 times during a shift.

35. The system did not tell the Shift or Team Managers which staff should be moved, just the number required. The Team Managers would look for those nearest to them who were appropriately trained to move to the new task. The claimant was trained on all packing work and was frequently chosen to move.

36. If a worker left the work station, for instance to go to the toilet, they could find when they returned, that someone had logged them out and was working at their work station. Alternatively, if it was very busy, that one of the Team Managers had allocated another worker to that station to ensure that the packing continued. They would also be automatically logged out after 10 minutes. In any of these situations, the worker would have to find another station within the product area they were assigned to at the time. This was something which was a common occurrence and one which the Team Managers regularly received complaints about. It happened to all workers, not exclusively to the claimant or Polish members of staff. Ms Thompson confirmed that complaints were made by all nationalities, not just Polish workers. The Team Manager would assist them in finding another station if one was not immediately available or apparent. If there was no vacant work station in the area they were working, they might be moved to another area. We consider that this was a fast-moving environment and although it was not permitted for a worker to log another out, it was difficult for the Team Managers to know if workers did this to each other. The Team Manager's major concern was having the right number of appropriately trained people in the places they were needed.

37. The Team Managers or Senior Colleagues did not necessarily know the nationality of the agency staff. Agency staff came and went and worked in different parts of the business at different times.

38. It was in the respondent's interests that all staff were kept busy packing products. It was not in the interest of the Team Managers to move staff to areas that were less busy. We do not accept that this was done deliberately for any reason by the respondent's management/supervisory team. The Team Managers or Senior Colleagues had no knowledge or control over the number or weight of the products that were to be packed at a particular work station. This was an automated process.

#### Speaking Polish

39. We do not accept that the claimant was told by Elena Neascu that she must not speak Polish. The words the claimant alleges that she said were 'no Polish'. This was alleged to have happened in November 2019. It was, the claimant says while she was discussing a technical issue with her Polish colleague, Ms de Ville Firlej. Ms de Ville Firlej says that she witnessed this event and was also told not to speak Polish by Ms Neascu and Ms A Firlej was also present when she alleges the comment was made to the claimant. The claimant also asks us to accept that in 2016, when the claimant was also working at the respondent, Ms Neascu shouted that she 'hated all Polish people and she would get rid of [them] all'. Ms Neascu denies that she made either of these comments on these occasions or on any other occasions. We have to make a decision as to who we believe on this issue. We found the evidence of Ms Neascu credible. She answered her questions clearly and we could see no reason why she would object to nationalities within the workplace speaking to each other in their own language. This was a common and normal occurrence. This was a multinational workplace and there seems no reason why this would be a problem for her. We had some concerns that the evidence of the claimant and her two witnesses on this point were self-supporting. We were told that Ms de Ville Firlej has also brought a claim to the Tribunal of race discrimination on the same basis. A further factor for us was the allegation that Ms Neascu had made the comment in 2016. We cannot see how if such a comment was 'shouted' as the claimant suggests and was of such a provocative nature, that there would not have been a complaint at the time, either from the claimant herself or from other colleagues, Polish or otherwise who the claimant says 'found it disgusting.' There appear to have been none. We conclude therefore on the balance of probabilities that this later comment was not made, and further than the claimant was not told 'no Polish' on or about November 2019.

#### Permanent contract

40. The claimant worked between October 2017 and August 2019 as an agency worker. The respondent engaged a number of agency staff and in agreement with the agencies it contracted with at that time, it offered a proportion of such staff permanent contracts each month. There were limits agreed with the agency as to the proportion of staff it could offer contracts to. It selected the staff who were offered such contracts according to their KPIs and attendance, and having taken feedback on the individual's attitude, behaviour and conduct. The Shift Managers would ask the Team Managers and Senior Colleagues and a list of names was then put forward



to HR. The Shift and Team Managers and Senior Colleagues were a mixed nationality group.

41. During her time as an agency worker, the claimant complained to her manager that she was very tired working on MyProtein and asked if she could be given lighter work. The claimant also complained about other workers taking her work station. The claimant was reprimanded by the agency supervisor when working on re-bin if she was slow and not meeting the target.

42. There was no statistical evidence provided by the claimant or the respondent which would demonstrate how quickly Romanian agency workers were offered permanent contracts compared with the claimant. Mr Stelling explained that no such evidence existed, as the nationality of agency workers was not recorded by the respondent and that it no longer worked with the agencies at the time to obtain that information. The claimant herself was however able to identify that Romanian workers who had joined the agency after her, were moved to permanent contracts before her, as such core or permanent staff wore red rather than yellow vests when working.

43. The claimant's representative initially asked for disclosure of copies of all of the agency contracts which had been offered. This was an excessive request and the respondent did not immediately respond. It was only a few weeks before this hearing that the respondent provided the explanation above when it sent a few sample contracts of Romanian staff. Ms Janusz asks us to draw inferences from this. We do not consider that it is appropriate to do so. The claimant's request was excessive and we consider that the reason that the respondent did not provide it was not that it would harm its case, but rather it was a task which would involve a great deal of work and effort. There were a large number of permanent contracts offered in the claimant's time working with the respondent. The information which the claimant actually needed was not copies of the contracts but statistic information as to the numbers offered to agency staff and the nationalities of those individuals. When the respondent did not reply, the claimant's representative did not make application to the Tribunal for its disclosure or ask for the statistical information. Essentially the issue drifted.

#### Reporting the claimant

44. When a worker left the work station they were signed in to, an inactivity report in real time was produced to the Team Managers and Senior Colleague. We were shown an example of such a report. This listed the names of those inactive in order of how long that inactivity had lasted. That report was passed to the agency supervisor who would speak to those who had been away from their station or inactive on it for an excessive time.

45. On a date in July 2019, the day was quiet and the claimant had gone to the toilet. When she returned she was told that Ms Gilca and Ms Neascu were looking for her. The inactivity report was provided to the agency supervisor and the claimant's name appeared on that report. She was spoken to by the agency supervisor and given a file note (which we understand is a form of reprimand).

46. The claimant says there were Romanian colleagues in the toilet and she believes she was treated differently from them. There is no evidence before us from the claimant or respondent whether anyone else who was in the toilet that day was reported or reprimanded.

### Decision

47. It was agreed at the outset of the hearing that the issues which the Tribunal needed to decide were as follows:

48. Did the respondent treat the claimant in the following ways?:

- a. Did Elena Neascu, Christina Glica and/or Ramona Buzas assign the claimant tasks where the target was more difficult to achieve when compared with the tasks being performed by workers of Romanian nationality?
  - i. This is alleged to have occurred “every day”
  - ii. The alleged comparators are Mirela Stoica, Georgiana Marin, Alina Vkd, Madalin Marinica, Georgiana, Vanvura, Mariana Bongoi Goles, Georgiana Marin, Yvette Blanka Costa
- b. Did Cristina Gilca, Elena Neascu and/or Romona Buzas assign the claimant tasks where heavier lifting was required when compared with the tasks assigned to workers of Romanian nationality?
  - i. This is alleged to have occurred “every day”
  - ii. The alleged comparators are Mirela Stoica, Georgiana Marin, Alina Vkd, Madalin Marinica, Georgiana, Vanvura, Mariana Bongoi Goles, Georgiana Marin, Yvette Blanka Costa
- c. Did Hanna Thompson and Liliana Gasowska allow staff of Romanian origin to take over the claimant’s post when the claimant went to use the toilet?
  - i. This is alleged to have happened once a day
  - ii. The alleged comparators are Mirela Stoica, Georgiana Marin, Alina Vkd, Madalin Marinica, Georgiana, Vanvura, Mariana Bongoi Goles, Georgiana Marin, Yvette Blanka Costa
- d. Did the respondent award a contract to the claimant later than it would have awarded a contract to a hypothetical Romanian comparator who had also come to work for the respondent through an employment agency?
  - i. The claimant does not provide a date for this allegation
  - ii. The claimant relies upon a hypothetical comparator

- e. Did Eleana Neascu prohibit the claimant from speaking Polish “around Black Friday in November 2019”
  - i. If so, did Eleana Neascu similarly prohibit Romanian workers from speaking Romanian?
  - ii. The alleged comparators are Mirela Stoica, Georgiana Marin, Alina Vkd, Madalin Marinica, Georgiana, Vanvura, Mariana Bongoi Goles, Georgiana Marin, Yvette Blanka Costa
- f. Did Christina Glica and Elena Neascu report the claimant to the agency for spending excessive time in the toilet in July 2019?
  - i. The alleged comparator is “a hypothetical comparator of worker who was in toilet when there was no work at that moment” (bundle p46)

49. If so, did those acts amount to less favourable treatment by the respondent of the claimant in comparison with the claimant’s real or hypothetical comparators?

50. If so, was the less favourable treatment because of the claimant’s race?

51. When did the acts/omissions alleged to have been committed by the respondent occur?

52. Did any of the acts/omissions amount to a course of conduct extending over a period of time? If so, when did that period end?

53. If any of the claims have been brought out of time, is it just/equitable to extend time?

54. We have had in our mind in this case section 136 Equality Act 2010 relating to the burden of proof. Where appropriate in reaching our decision, we have considered whether the claimant has shown facts from which we can reasonably conclude that the claimant has been less favourably treated than her Romanian colleagues because she is Polish. If we have concluded there are such facts we have considered whether the respondent has been able to demonstrate that any treatment is not because the claimant is Polish.

### **Allocation of Tasks**

#### **Targets**

55. The claimant has shown that she was moved from packing Health and Beauty products to MyProtein on a regular basis. She accepted that all workers were regularly moved between product areas throughout the day. Our findings are that targets or KPIs for MyProtein were not more difficult to achieve than for Health and Beauty or that she was moved to areas where she had less to do and so it was more difficult for her to meet her targets. The claimant met her targets. The claimant has not shown that she has been assigned tasks or required to move to areas where her target was more difficult to achieve than her Romanian comparators. We do not find

that the claimant has established facts from which we can reasonably conclude that there has been race discrimination.

56. This claim fails and is dismissed.

#### Heavier lifting

57. We accept that the claimant has demonstrated that working on MyProtein involved heavier lifting than on Health and Beauty and that the claimant was often moved to packing MyProtein products from Health and Beauty. We find however that the claimant has not shown that she and her Polish colleagues were moved more often than other staff including Romanian workers. The respondent has demonstrated that all staff were moved regularly, many times each day in response to the fluctuating needs for numbers in each area. The claimant had a perception that when the Team Managers were looking for people to be moved, the claimant and other Polish colleagues were chosen. She believed this was because of her race. We find that the Team Managers and Senior Colleagues were not selecting on the basis that they were favouring Romanian workers, rather they were looking for the nearest workers who could work best in the areas where they needed the additional staff.

58. It was accepted by the claimant that the Shift Manager, Team Manager and Senior Colleagues moved staff around on numerous occasions each day. They did so according to the real-time information in the Order Well in a fast-paced environment. They were responding to and driven by the system. We accept that Ms Buzas and Ms Neascu, and although we did not hear from Ms Gilca, we accept she adopted the same process as the other Team Managers and Senior Colleagues, looked for the nearest people to move who were trained to do the work which was needed. The claimant having worked in the area for some time was experienced and trained in all of the products. She was therefore more likely to be moved more often and to all areas where more people were required.

59. Further there was confusion in any event as to workers' nationalities. We noted that the respondent's witnesses said that they were often unable say what language a worker was speaking, other than it was not their own. The claimant herself understood Ms Buzas to be Romanian whereas she was in fact Hungarian.

60. The claimant has not shown that facts from which we can reasonably conclude that the decisions to move the claimant were made because she was Polish.

61. This claim fails and is dismissed.

#### Did the Ms Thompson and Ms Gasowska allow Romanian staff to take over the claimant's post when she went to the toilet?

62. Packing MyProtein products was less strenuous work than Health and Beauty and we consider that workers would have preferred that work as it was less tiring. Indeed, the claimant accepts that she asked to be moved from MyProtein for that reason. We consider that some workers would gravitate to that area if possible. We do not however consider that the claimant has demonstrated facts from which we

can reasonably conclude that these two Polish Managers were allowing Romanian staff to take over the claimant's workstation when she went to the toilet. As set out in our findings of fact, workers were moving around all the time. It was clearly difficult for the Managers to keep track on who was at each work station and they would not necessarily know if this had been done unless it was brought to their attention. It was clear to us that their focus was in having the right number of people in each work area and that fluctuated throughout the day. Workers taking over each other's work stations was an issue they received regular complaints about. Complaints came from all nationalities. Where this happened, they sought to find other work stations for them to go and would direct them back to the area they were allocated, but we accept that this did not always happen. We find that being signed out of a work station was happening to all workers, not just those of Polish nationality. Romanian workers were the majority of the workers and it was therefore unsurprising that when the claimant returned to her work station it was occupied by a Romanian worker. We do not accept that Ms Thompson and Ms Gasowska were passive and intimidated by the Romanian workers, and therefore allowed the Romanian workers to take over the claimant's post as the claimant suggests. Both Ms Thompson and Ms Gasowska's evidence was clear and credible and we do not accept that either of them were intimidated.

63. We find that the claimant has not shown facts from which we can reasonably conclude that these Team Leaders, because of the claimant's race, allowed Romanian workers to take her workstation when she left it. This claim fails and is dismissed.

Did the respondent award a contract to the claimant later than it would have awarded a contract to a hypothetical Romanian comparator who had also come to work for the respondent through an employment agency?

64. The claimant has not shown facts from which we can reasonably conclude that she was offered a contract later than a hypothetical Romanian worker. The evidence upon which the claimant relies is that she saw Romanian workers who started after her gaining yellow vests, which indicated they were permanent members of staff. The claimant was unaware of the criteria which the respondent used to decide who to offer contracts to. Other than the claimant's view that her comparators had worked as agency staff for a shorter time than she had, there is no evidence before us that there was no material difference in the circumstances of Romanian workers and the claimant. Her evidence was not sufficient for us to conclude that the respondent's decision was because she was Polish. For the reasons set out above, we do not draw any adverse inferences in the respondent not providing copies of all the contracts they were requested to provide, and as such the claimant's only evidence is insufficient for the burden to pass to the respondent.

65. In any event, even if the claimant was able to shift the burden to the respondent, the respondent has demonstrated to us that there were reasons not related to the claimant's race for her not having been offered such a contract. These were that there were only a limited number of contracts available each month, and that there were issues with the claimant's attitude, which impacted upon the report she would have received from her Managers and the agency. To gain a contract, the respondent would select the best from a bank of agency workers. The claimant on her own admission, claimed that she was tired and asked to be moved, she spent

longer than she should in the toilet and complained about others taking her place. Ms Gasowska in her evidence confirmed that the claimant's attitude was a lot poorer than her colleagues. Although the claimant had hit her KPIs, as attitude was one of the factors taken into account when deciding who to offer the limited contracts to, this impacted negatively upon the claimant.

66. This claim fails and is dismissed.

Prohibition on speaking Polish

67. The claimant has not shown that Ms Neascu made the comment that the claimant should not speak Polish.

68. As such this claim fails and is dismissed.

Reporting of claimant for spending excessive time in the toilet (July 2019)

69. We accept that either Ms Neascu and/or Ms Gilca reported the claimant when she spent too long away from her workstation in July 2019 when she went to the toilet. That report was to the agency supervisor. The claimant's evidence in respect of this claim is again limited. She says that there were Romanian workers in the toilet at the same time that she was. She is however unable to name them and relies upon a hypothetical comparator. She is unable to say whether the Romanian workers were also reported or not or indeed whether a hypothetical Romanian worker would have been reported. The claimant has not been able to show facts from which we can reasonably conclude that she was reported to the agency because of her race.

70. The respondent has in any event, provided an explanation as to why the claimant was reported that day and has demonstrated that their report provides details of all workers who had spent excessive time away from their work stations. As such even if the claimant had been able to shift the burden to the respondent, we accept that the decision to report was not because of the claimant's race, it was because it was part of the normal reporting process to the agency on all workers who were away from their work station for an excessive time.

71. This claim fails and is dismissed.

**Delay**

72. The Tribunal apologises for the delay in providing its judgment. Unfortunately, the first available date upon which the Judge and members were able to meet to make their decision was 15 January 2021.

Employment Judge Benson  
Date: 5 February 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON  
8 February 2021

FOR THE TRIBUNAL OFFICE

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