



# EMPLOYMENT TRIBUNALS

**Heard at:** Croydon (by video) **On:** 4 to 24 May 2021

**Claimant:** Mr Hichem Firjeni

**Respondent:** Secretary Of State For Justice

**Before:** Employment Judge Fowell

Ms S Khawaja

Mrs C Chaudhuri

**Representation:**

**Claimant:** In person

**Respondent:** Mr T Kirk instructed by Government Legal Department

## JUDGMENT

The unanimous decision of the Tribunal is that:

1. The complaint of direct discrimination on grounds of race is dismissed
2. The complaint of harassment on grounds of race is dismissed

## REASONS

### Introduction

1. Mr Ferjeni was a trainee Prison Officer. He began the training in September 2017 but did not pass his initial training course. His contract was terminated on 18 October, and the main reason given was that he had not done well enough on a “use of force” assessment the week before. He appealed against this decision, arguing that it was discriminatory on grounds of race, and mentioning a number of

incidents during his training which had led him to that view. The appeal was unsuccessful however and his employment came to an end on 8 December 2017.

2. The complaints presented are therefore of direct discrimination on grounds of race and of harassment under sections 13 and 26 Equality Act 2010. A list of issues has been agreed, which we shall work through, and in addressing them we heard evidence by video from Mr Ferjeni, and on behalf of the respondent from two of the training staff on the course - Michael Smith and Lee West. We also heard from Louise Spencer, the Prison Governor, who took the decision to dismiss him; Nick Pascoe, Prison Group Director, who held the appeal; and Richard Luscombe, Governor of HM Prison Channings Wood, who dealt with the case of Officer A, relied on by Mr Ferjeni as a comparator. A witness statement was provided by Mr Ferjeni's course mentor, Louise Roberts, but she was not able to attend the hearing. Having considered this evidence, including the documents in a bundle of 348 pages, we make the following findings.

### **Findings of Fact**

3. The parties helpfully prepared a schedule of those facts which were agreed and those which were not, relevant to each factual issue. Before dealing with them in turn we will set out something of the background to this dispute.
4. The training course in question is called Prison Officer Entry Level Training, or POELT. It lasts for ten weeks, and for each candidate it is the start of a 12 month probation period in their new role as Prison Officer (Band 3). The staff on the course consist of Supervising Officers (SO) and what are known as Trainer Expert Advisers. Mr Smith and Mr West were among the trainers on this course.
5. There were 18 candidates, of whom only one other was from an ethnic minority, and it began on 11 September 2017. Each candidate spent the first week at their normal place of work, i.e. the prison they would return to at the end of the course. They were issued with their uniforms and were assigned a mentor. In Mr Ferjeni's case this was Louise Roberts. She was also described as his line manager, but to begin with the role was to prepare him for the course and give him the support and guidance he needed to complete it successfully. The Prison Service is a disciplined service though, and this mentoring came with a degree of scrutiny and challenge. She was in contact with him every day in that induction week, assigning him duties and seeing how he got on.
6. Mr Ferjeni's base was at HMP High Down, which is to the south of London, and west of Croydon. That is where he had been there through the agency for the previous year. That role was as an OSG (Operational Support Grade). As a result he was already familiar with many prison procedures and many day to day aspects of the job, such as search procedures and the use of VHF radios to communicate around the prison.

7. On the Thursday of that first week he was detailed to shadow an SO Morrison. SO Morrison contacted Ms Roberts the following day and said that he was extremely disappointed with Mr Ferjeni's attitude and lack of interest; he accused Mr Ferjeni of rolling his eyes during a briefing and not showing any interest.
8. She recorded those comments (p.101) and it prompted her to arrange an informal meeting with Mr Ferjeni, together with her line manager, Ms Zoe West, the People Hub Manager, that Friday. He apologised for the way he had come across and said he had not realised. He felt that he was familiar with the setting and what Mr Morrison was showing him, and had been approached by plenty of people he knew around the prison that day, which may have given the wrong impression.
9. She also spoke to him about wearing excessive jewellery, specifically, a large skull ring and an extra-large watch, and being in an open-neck shirt with no tie. He said he would not wear the jewellery on the rest of the course.
10. So, at 8.00 am on 18 September 2017 he joined the training programme at HMP Feltham, which is near Heathrow, about five minutes from his home. The trainer for the first few weeks was Mr Michael Smith.
11. The first thing that Mr Smith noted about Mr Ferjeni was that he turned up without a tie. He was not the only one. There were two others in the class, and each of them was pulled up about it. Mr Ferjeni told Mr Smith that he had not been issued with the right size of shirt and could not do the tie up, and Mr Smith told to sort it out for the next day, which he did.
12. Mr Smith also noticed that Mr Ferjeni was wearing a large watch, a bracelet and a necklace or medallion. This was against the rules and a safety hazard. So, he pointed this out too. He did not know that it had already been raised with Mr Ferjeni the week before.
13. The next day Mr Ferjeni was late. It was only a matter of a couple of minutes, but punctuality, like a smart appearance, is one of the points drilled into the new recruits. The reason was that he had needed to be escorted through the prison from the gates and there had been no one to take him there in time. Nevertheless, he was told to make sure that it did not happen again.
14. On Wednesday Mr Ferjeni was late again, as were two others, and Mr Smith took them all to task about it, suggesting that they reconsider their routes to work or that they leave earlier. He also took it on himself that day to email Ms Roberts at HMP High Down about Mr Ferjeni, (p.65) asking her to give him a brief call.
15. They spoke on the Friday (p.101). Mr Smith told her about his concerns and also that Mr Ferjeni seemed very stand-offish and unapproachable. He noted that there had been an ice-breaker exercise on day one when they were supposed to break into pairs and get to know each other before telling the class something

about their partner, but he had not even remembered the other person's name.

16. As a result of that conversation Ms Roberts arranged to come over to Feltham to see Mr Ferjeni the following Monday. Mr Smith also had a regular, short feedback meeting with Mr Ferjeni that Friday, and went over these points.
17. Once again, Ms Roberts brought with her Zoe West, and they explained to Mr Ferjeni how disappointed they were to hear that there were still concerns about presentation and excessive jewellery. They also spoke to him about his demeanour and being approachable. They were getting concerned about his approach and wanted to make sure that he succeeded.
18. Whether as a result of this intervention or his own comments, Mr Smith felt that Mr Ferjeni changed his behaviour for the better from then on, and in fact there were no further concerns until the Use of Force assessment, which was on 11 October, nearly two weeks later.
19. The significance of these early difficulties therefore is that Mr Ferjeni believes that Mr Smith was against him from the outset, and revealed that in a number of comments relied on as acts of harassment or discrimination. There are five of them, all relating to this initial period.
20. The first of these was being told by Mr Smith that he looked like a "knacker-jack". This is said to have happened in the first week at Feltham. No one was very clear about what this meant. Mr Ferjeni had to look it up, much later on, in an online dictionary, the Urban Dictionary, and the only term that came up was "knacker". This was colourfully described as meaning:

"incestuous, boxing, sovereign ring wearing, tracksuited, shaven headed scumbags."
21. Also,

"A knacker is your general scumbag from Ireland. Males wear caps balanced at an upright angle on their head, at least 5 gold rings and sovereigns on each hand, large gold chains around their necks, matching tracksuits or shirt under Satellite Sports stripey jumper. Adidas, puma, nike or burberry clothing essential to fit crowd."
22. We have not attempted to correct the grammar but it expresses in vivid language a modern stereotype. Whether "knackerjack" is some variant of this type remains unclear.
23. According to Mr Ferjeni's witness statement, this was said at some point during the course, seemingly once, but in his oral evidence he said that it was said once to him in private and once in front of the class, and that the room went silent. We had trouble with that last detail, since it is still not clear to us that there is such a term of abuse as a "knackerjack"; and since Mr Ferjeni had to look it up it is

surprising that it caused the room to go silent.

24. This knackerjack comment was not mentioned in his later appeal, or at any stage until the claim form was presented, although he set out in his appeal letter many other details, including that Mr Smith said he looked like a sack of potatoes. Mr Smith clearly did raise with him his appearance. He may have been quite direct about it and used everyday language, even language designed to get a reaction. But we are not satisfied that the specific word – knackerjack – was ever used, or that whatever was said was used more than once. It is simply not a word that Mr Smith was aware of.
25. The second allegation is similar, that Mr Smith told him, “you do not walk like a prison officer”. He places this at their 1:2:1 meeting on the first Friday at Feltham. Mr Smith says that this must have been some wording to the effect that he did not carry himself like a prison officer, and made in the context of the remarks about his appearance and demeanour. That seems to us the most likely explanation.
26. The third was being told that he looked like a sack of potatoes, also at that meeting. Since this was mentioned in his appeal, and Mr Smith accepts that he may have used this expression, particularly about him not doing his shirt up, we accept that he did.
27. Mr Ferjeni also complains about being told off over the wristwatch and bracelet, and again Mr Smith accepts that he did speak to him about that, as he would with anyone. It was against the rules.
28. The final allegation is, in Mr Ferjeni’s description, being ‘reprimanded severely for being a minute late to class’ on the second day. Mr Ferjeni does not dispute that he was a couple of minutes late. Again, Mr Smith agrees that he told him off for this and told him that it was not good enough. Regardless of the reason for his lateness, and whether or not it was fair to blame Mr Ferjeni in the circumstances, Ms Smith’s job was to instil the importance of punctuality on the probationers, so there is nothing out of the ordinary in this. We do not accept that he was reprimanded severely. Mr Ferjeni did not make any such point in his appeal letter, and just said that the criticism was unfair, i.e. because it was not his fault.

#### *The Use of Force assessment*

29. In the third week at Feltham there were a number of important assessments, under the heading ‘Use of Force’. These are practical assessments made after learning about it in the classroom. Since the details are not disputed we will use the description of the process set out by Mr West in his witness statement.  
  
“21. The assessment day is broken into two parts: in the morning the students undertake their assessment on Personal Protection techniques. In the afternoon they undertake their assessment on Control and Restraint (C&R) techniques.

22. The assessments take the form of role play scenarios and are always assessed by two TEAs. One TEA plays the 'prisoner' in the scenario, and the other observes the scenario playing out. Once the scenario is completed the POELT attendee [student] receives feedback from both TEAs.
23. There are eight different scenarios that can be used for each assessment.
24. For the Personal Protection assessment, they all follow a similar format. First, the prisoner will verbally state that they are unhappy about something. The [student] is then expected to use verbal reasoning skills to calm the prisoner. The prisoner then becomes irate and may show or demonstrate that they have a weapon. The prisoner then moves into the [student]'s personal space. The [student] is expected to show that they are trying to create space between themselves and the prisoner. They are then expected to raise the alarm, or if they are unable to do that, then to deliver a defensive strike to enable them to exit the situation safely.
25. For the C&R assessment, the [student]s work in a three-officer team. They are expected to demonstrate using correct techniques dealing with an armed prisoner, safely removing the prisoner from a cell area, dealing with a medical emergency, and placing the prisoner back in a cell area, or on to cellular vehicle.”
30. These are crucial assessments, and all prison officers have to undertake annual refresher training and assessment on these skills.
31. Mr West had done training courses with Mr Smith in the past, but they did not work together on this course, and did not speak beforehand about any of the candidates. Nor had Mr West met or had any dealings with Mr Ferjeni before.
32. Mr Ferjeni was given five attempts at passing the personal protection exercise. Each time was a different scenario and he had feedback each time before going again, and Mr West made sure that he had the option of taking a break. In fact, there were three attempts, then a break, then two further attempts. Each one lasted a minute or two, depending on the scenario, with a few minutes in between for feedback. Mr West made notes on a training log as he went along.
33. There is no hard and fast rule about how many times the test can be taken. There is a policy which allows a second attempt, but Mr West's evidence, which we accept, is that he had discretion to allow further attempts if there are less than 20 in the group and so they have a little time in hand. Given that there were 18 in the group, this seems to have been a generous approach on his part.
34. According to Mr West's statement:
  32. ... In some attempts he failed to use verbal de-escalation techniques before using force, in others he failed to raise the alarm, in others he turned his back to the prisoner creating a risk to himself. Although he was given feedback on these things after each attempt, he failed to implement that feedback effectively and improve to a standard where I was able to pass him in the assessment.

33. On the fifth attempt, Mr Ferjeni used unjustifiable and excessive force by striking the "prisoner" across his back with a training baton without giving any verbal warnings. The "prisoner" could not see the strike coming because of the direction of the blow. Mr Ferjeni was asked to explain why he believed his actions were lawful but he failed to give any reason.
35. Mr Ferjeni says that he did use de-escalation techniques on the last prisoner, but he signed the training record to confirm that he did receive feedback at each stage, and this was not raised at the time. In fact, one of the agreed facts was that he was told by Mr West that he failed to use verbal de-escalation techniques before using force, so we accept Mr West's account of this exercise.
36. He also failed the Control & Restraint assessment. Again, it is best described in Mr West's statement:
  - “36. For the second assessment (C&R), Mr Ferjeni was designated as "number one head support officer" and was in charge of the three officer team. Mr Ferjeni was given two opportunities to demonstrate the required standard. On the first attempt, he used excessive force on the 'prisoner's' head by maintaining two hands on one side of the head and pushing the head against the floor. Mr Ferjeni attempted to address his head support five times during the scenario, at the direction of the instructors, but demonstrated a lack of knowledge of the technique taught.
  37. Mr Ferjeni then instructed the team to bring the prisoner to a standing position while in a triangular fixed rest position. This is a position used when a prisoner is in the prone position on the floor. It is a 'natural rest position' enabling staff to change over while in control of the prisoner if one of them is injured. The scenario was stopped by the instructors due to safety concerns for the prisoner's head, neck and spine.
  38. On the second attempt, Mr Ferjeni failed to support the prisoner's head with the correct (taught) technique. He demonstrated a lack of knowledge in dealing with a medical emergency by failing to check and support the airway and failing to control the team. He also failed to offer support to the prisoner. The scenario was halted due to health and safety concerns for all persons involved in the assessment scenario, after Mr Ferjeni twisted the prisoner's head.
37. None of this was challenged, and is again supported by the records made at the time, so we accept this account too.
38. The upshot was that Mr Ferjeni failed the course. The term used was that he was “referred to establishment” meaning that he was sent back to HMP High Down. Mr Smith informed Ms Roberts about the failures and that prompted a letter from the Governor, Ms Louise Spencer, inviting Mr Ferjeni to a meeting to discuss his future. All decisions about dismissal of staff have to be made by the Governor, and she had a number of options to consider. She could have given him another chance to take the assessments again at another site, or have offered him a role as an OSG for a while before taking the course again. She wanted to know why he had failed and to gauge for herself whether he was likely to make a success of

any further attempt.

39. They met on 16 October, five days after the assessment. Mr Ferjeni was accompanied by his Prison Officers Association (POA) representative (Mr Roy Bhanot), and his mentor Louise Roberts. Ms Spencer naturally asked him why he had failed the assessment. His view was that he had performed to a satisfactory standard, so essentially it was not his fault. She pressed him about the fact that he had struck a 'prisoner' across the back, and his justification was simply that the prisoner was holding a weapon. Nor did he acknowledge his failure to use verbal reasoning or communication techniques beforehand. He was in fact surprised that he had not passed.
40. We accept that that was his approach, since it was very much the approach adopted by Mr Ferjeni at this hearing. In fact he said very little about the dismissal meeting in his witness statement.
41. Ms Spencer's main concern therefore was that he showed no recognition of the seriousness of this assessment or of the reasons for failing the assessment. She expected that he would say that he appreciated where he had gone wrong and would work hard to get it right, but that was not his view at all. That made it very difficult for her to justify any re-assessment, or indeed retaining his services at the prison at all. There was a practical difficulty about retaining him, as he had been an OSG through an agency, not the prison service, but her main concern was about his contact with prisoners, given the way he had approached these assessments. Excessive use of force on a prisoner in any circumstances was a real concern.
42. Even then, she hesitated and decided to speak to the trainer directly, to find out more about the reasons. They had a telephone discussion about it that day, and Mr West gave her a straightforward factual account of what had occurred. That reinforced her concerns.
43. She then arranged a further meeting the next day with Mr Ferjeni. He was accompanied by Mr Bhanot and this time it was a short meeting. She told him that he had failed his probation. The letter she gave him set out all of the reasons in detail, much as described in the sections quoted above from Mr West. She noted:

We also discussed some of the other concerns over your performance during your probation to date, including issues with you not wearing correct uniform and excessive jewellery, as well as two occasions when you were late for training; you explained you had not allowed sufficient time to get to the prison and through to the classroom.”

44. These however were points which had been raised by Mr Ferjeni in the meeting. She went on:

“However, I had considerable concern about the levels of excessive use of force you



had shown during the assessments, and that you had continued to do so despite repeated assessments and clear feedback from your trainer. My concern was exacerbated by your lack of acknowledgement in our meeting of why you had failed these assessments, and your failure to recognise the importance of engaging with prisoners and not using force that is excessive or unjustified. As a result of my concerns, I took the decision to terminate your employment as a result of failed probation.”

45. All this is consistent with her evidence at this hearing, and we accept too that she took the decision seriously and with reluctance.
46. Mr Ferjeni appealed against this decision and had an appeal hearing with Mr Nick Pascoe on 24 November. This was during his notice period, which expired on 8 December. Although not mentioned in his appeal letter, which focussed on the remarks and actions of Mr Smith, his main ground of appeal, and his main argument at this hearing, was the difference in treatment between him and his colleague, Officer A. Officer A also failed the Use of Force assessment. He was returned to his place of work, on the Isle of Wight, and was then allowed to re-take the test. That decision was made by Mr Richard Luscombe, from whom we also heard. At that time he was the Deputy Assistant Governor, and he took the view that a lot had been invested in Officer A, particularly in hotel expenses on the course in London. He had also only failed narrowly, in respect of his control and restraint technique.
47. We heard evidence from Mr Luscombe that Officer A failed this re-assessment too, and that when he returned to the Isle of Wight they discussed what he should do next. He even asked Officer A to demonstrate an arm-lock to him, and had to stop the exercise because of the excessive force being used. He asked Officer A to reflect on how that level of force would be seen by prisoners, and how he might be putting himself and colleagues at risk. On reflection, Officer A decided not to seek a further meeting with the Governor and resigned from the Prison Service, even though he was given the chance to apply for a role as an OSG.
48. Mr Pascoe was a Prison Group Director, now retired, i.e. he was in charge of a number of prisons. His approach was very much the same as that of Ms Spencer. He felt that dismissal was a harsh outcome but the problem was that Mr Ferjeni failed to acknowledge that he had failed the assessment, and failed badly. Even as an OSG he would have contact with prisoners and he was concerned about Mr Ferjeni's attitude. In his oral evidence he was frank that if Mr Ferjeni had said he was sorry, and that he had got it wrong, and would like to be an OSG instead, he would have said yes. It was in his gift. But that was not the case and so he upheld the dismissal.
49. Returning to the list of agreed facts, the findings above have covered the remaining areas of dispute about what occurred and so we turn to consider whether this amounted to discrimination or harassment

## Conclusions

50. To begin with, there is a particular provision at paragraph 136 Equality Act 2010 dealing with the burden of proof:
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
  - (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
51. This was considered by the Court of Appeal in **Ayodele v CityLink Limited** [2017] EWCA Civ 1913, where the Court explained that this involved a two-stage approach: in the first stage, the claimant has to prove facts from which the Tribunal *could* conclude, having heard all the evidence, that discrimination had occurred; and if so, there is a second stage, when the respondent has the burden of proving that this was not the case.
52. This is in keeping with the guidance in **Madarrassy v Nomura** [2007] ICR 867 which established that it is not enough a claimant to show that he had a protected characteristic, in this case race, and was dismissed - “something more” is required.
53. Starting with allegations of harassment, the test under section 26 Equality Act is as follows:
- (1) A person (A) harasses another (B) if—
    - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
    - (b) the conduct has the purpose or effect of—
      - (i) violating B's dignity, or
      - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
54. All of the allegations are raised as harassment or discrimination in the alternative, although the remarks by Ms Smith would normally fall into the category of potential harassment and the decision to dismiss, and the related decisions not to allow a re-test or reassignment would fall into the category of discrimination.
55. Of the remarks attributed to Mr Smith, the only ones upheld were those relating to the sack of potatoes comment, his use of jewellery, the lack of a tie, his lateness, and the making of some remark about carrying himself like a prison officer. None of these appear to us out of the ordinary in the circumstances. They do not therefore indicate a “something more” which would be explained by a racial motive

or subconscious bias. The expectations of prison officers are set out in the Learning Assessment Record provided to Mr Ferjeni, and the way in which these issues were raised does not seem heavy handed, and he was not singled-out unfairly. Others were spoken to about lateness and ties, and the details duly noted. We are satisfied that Mr Smith would have used these terms with anyone. His style is no doubt direct, as one would expect in such an initial training role.

56. Turning to the discrimination complaint, the test under section 13 Equality Act is 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.
57. What has to be shown is that because of his race, Mr Ferjeni was treated less favourably than Officer A.
58. The two circumstances, in our view, are not really comparable, mainly because Officer A's was a much less serious failure. He was only unsuccessful in respect of the control and restraint, and as a matter of technique rather than something fundamental. It was therefore more likely that he could correct this on a further attempt. There would also be no cause for concern about his interactions with prisoners generally.
59. The hotel cost was also raised as an issue. That difference may not be entirely fair but it is not in any way linked to race and so may be allowed as a further, partial explanation.
60. If we were to take a hypothetical comparator instead, we would need to consider the case of, put simply, a white student who had failed his assessment in the same way and who demonstrated the same lack of acknowledgement or recognition afterwards. It is difficult to see any other outcome in those circumstances, and we accept that Ms Spencer would also have dismissed such a person, and with equal reluctance.
61. There is also the question of whether he should have been given the chance to go back to his job as an OSG. Again, he did not in fact have such a role, so this would have been more complicated than for Officer A, but again we accept the rationale given by both Ms Spencer and Mr Pascoe that this raised concerns about his interactions with prisoners, which made such a re-grading inappropriate, and that would have been the case with a hypothetical comparator. That was not less favourable treatment therefore. And so the complaint of discrimination must also be dismissed.
62. For completeness, none of the later allegations concerning dismissal can amount to acts of harassment either, since they were not related to race, and none of the earlier allegations against Mr Smith can amount to direct discrimination, since Mr

Ferjeni was not treated less favourably than others.

*Time limits*

63. There was also an issue about whether the claim was submitted in time, which is now somewhat hypothetical. Mr Ferjeni ought to have presented his complaints of discrimination within three months of the acts complained of (section 123 EA 2010). On the face of it, the claim has been submitted out of time in respect of all allegations except the outcome of the appeal on 8 December 2017, unless it can be said that they form part of a continuing act.
64. The comments attributed to Mr Smith appear to us all part of a separate episode, and the key point here is that he had no discussion with Mr West about the candidates or the assessment. Hence the first batch of allegations from week one at Feltham are all clearly not part of a continuing act at the time of dismissal.
65. The main allegation of discrimination is the dismissal. That was a decision taken by Ms Spencer and upheld on appeal. Inevitably that appeal was connected with the dismissal, and so it would be artificial to say that it was not a continuing act. The discrimination claim was therefore in time.
66. Against that background, was it just and equitable to allow the allegations of harassment against Mr Smith to be considered? Given that they are important background matters, certainly from Mr Ferjeni's point of view, we conclude that it was just and equitable to hear evidence on all points and so they were also in time.
67. However, for the reasons already given, we do not accept Mr Ferjeni's version of events, or his case generally, and so the claim must be dismissed.

Employment Judge Fowell

Date **06 May 2021**

JUDGMENT & REASONS SENT TO THE PARTIES ON

Date **24 May 2021**

FOR THE TRIBUNAL OFFICE