# EMPLOYMENT TRIBUNALS

**BETWEEN**

| **Claimant** | | **Respondent** |
|---|---|---|
| Mr N R Radu | AND | Elis UK Limited |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

**HELD AT** Exeter **ON** 20 March 2023
And in Chambers 21 March 2023

**EMPLOYMENT JUDGE** N J Roper **MEMBERS** Mrs V Blake
Mr I Ley

**Representation**
**For the Claimant: In Person, Did Not Attend**
**For the Respondent: Ms S Cashell of Counsel**

## JUDGMENT

**The unanimous judgment of the tribunal is that the claimant's claims are dismissed.**

## RESERVED REASONS

1. In this case the claimant Mr Ninel Relu Radu claims that he has been discriminated against because of a protected characteristic, namely his race, and also brings a monetary claim relating to alleged unlawful deductions from his wages. The claim is for direct discrimination only. The respondent contends that there was no discrimination, and it disputes the unlawful deductions claim.
2. The Procedural History of This Claim:
3. The claimant is a Romanian national and English is not his first language. The claimant has presented his claim in person, and has not had the assistance of a representative, whether legally qualified or otherwise.
4. The claimant presented these proceedings on 18 August 2021. He was directed to provide further particulars of his discrimination claim and he did so on 8 December 2021. The respondent entered its response on 23 February 2022 denying the various claims. The claimant's claims were then discussed at a case management preliminary hearing which took place by telephone on 29 October 2022, and Employment Judge Rayner prepared

and promulgated a case management order dated 31 October 2022, which was amended on 9 December 2022 and sent to the parties on 16 December 2022 (the First Order").

5. The claimant's claims were identified in the First Order as being for direct discrimination on the grounds of the claimant's race (his Romanian nationality), and in respect of unlawful deduction from wages. The direct discrimination claim consisted of nine specific allegations of less favourable treatment which were set out in the First Order, and it was noted therein that the claimant was unable to name anyone in particular whom he claimed to have been treated better than he was, and that he therefore relied upon a hypothetical comparator.
6. With regard to the claim for unlawful deductions from wages, the claimant conceded that he had received all wages that were due to him, but he asserted that because of certain payments having not been made correctly, or on time, that he had suffered additional financial loss, and that he wished to claim in respect of those additional losses. He was ordered to provide a schedule of loss to include details of the additional losses which he claimed to have suffered because of the late payment of his wages. Employment Judge Rayner also made standard case management orders with regard to the exchange of relevant documents and the agreement of a bundle of documents for the hearing, and for exchange of written witness statements.
7. Employment Judge Rayner also listed this matter for hearing, and it was made clear in the First Order that the hearing would be in person, save for the evidence of one of the respondent's witnesses who now lived in Poland and who would give evidence remotely by video (although subsequently this was not necessary because the respondent did not rely upon this witness).
8. The claimant failed to comply with the orders made. During December 2022 the respondent's solicitors sent a number of chasing emails reminding the claimant that he was in breach of the First Order, and they referred him to various agencies which might assist him in the preparation of his claim. On 12 January 2023 the respondent's solicitors informed the tribunal of the claimant's repeated non-compliance with the First Order, and they made an application for an unless order. On 3 February 2023 the claimant responded to a request for comments by the Tribunal to the effect that he did not understand what was required, and he requested the assistance of an interpreter. The Tribunal office referred the claimant again to various agencies which might assist him, and it directed the claimant to inform the tribunal by 27 February 2023 whether he had obtained this assistance. The claimant failed to reply and on 6 March 2023 the Tribunal directed the claimant to provide an explanation. The claimant replied to the effect that he did not understand what was required of him, and accordingly the Tribunal listed this matter for a second case management preliminary hearing, which took place last week on 16 March 2023. Meanwhile the parties had agreed to exchange their written witness statements on 15 March 2023. The respondent forwarded its written witness statements to the claimant, but the claimant did not reply and failed to provide a witness statement of his own.
9. The claimant was again assisted by a Romanian interpreter at the second case management preliminary hearing which took place by telephone before Employment Judge Lang on 16 March 2023. Employment Judge Lang made various orders at that hearing which were confirmed in a case management order dated 16 March 2023 ("the Second Order"). It seems that written confirmation of the Second Order had not been sent to the parties during the one remaining working day available before the commencement of this hearing.
10. Nonetheless during the second case management preliminary hearing, which ran to nearly four hours given the involvement and assistance of the Interpreter, Employment Judge Lang made three clear orders. These were to the effect that the claimant was required by 9 am on 20 March 2023 (i) to send a written statement of evidence upon which he relies in connection with his discrimination claim and in respect of his unlawful deduction from wages claim and any consequential loss said to have arisen, and why; (ii) to provide a detailed schedule of loss setting how much he claimed in respect of the discrimination claim to include details of any wages subsequently earned from alternative employment; and (iii) any relevant documents upon which the claimant relied in support of his case.

11. Employment Judge Lang had refused the respondent's application for an unless order in respect of the provision of this information and these documents, but he did make it clear that failure fully to comply might well give rise to an application to strike out the claimant's claims which would then be determined by the tribunal hearing this claim.
12. The claimant did not fully comply with these orders, but he did make an attempt to do so as follows. The claimant sent an email to the respondent's solicitors late in the afternoon of 16 March 2023 to which he attached what he described as his "declaration" which is effectively a summary statement running to about 30 lines, together with copies of five payslips showing earnings received from his new employment between July and December 2022.
13. There was then a further exchange of emails between the respondent's solicitors and the claimant between 17 March 2023, and the commencement of this hearing on 20 March 2023. By email at 10:43 on 17 March 2023 the respondent's solicitors emailed the tribunal office and sent a copy to the claimant. This email had attached the tribunal bundle and index; three witness statements from the respondent's witnesses; and the claimant's "declaration" which was understood to be his witness statement. It was made clear that the hearing was to be in person at Exeter as previously listed between 20 and 22 March 2023. By email sent to the claimant on 17 March the respondent's solicitors again reminded the claimant that the hearing was listed to take place in person in Exeter (albeit stated to be at the Exeter Law Courts at Southernhay Gardens, rather than the Tribunal hearing centre). That said, the Employment Tribunal hearing centre is also at Southernhay Gardens, and the buildings are very close together.
14. By email dated Friday, 17 March 2023 at 6:01 pm the respondent's solicitors also sent to the claimant its chronology, cast list, skeleton argument and authorities bundle, which the claimant immediately acknowledged with the comments "yes confirm".
15. The claimant then failed to attend this hearing as listed on the first morning of 20 March 2023. A Romanian interpreter was present as earlier requested by the claimant. The tribunal clerk tried to telephone the claimant on the mobile number which he had given to the tribunal office, but the claimant failed to answer this call. The respondent's solicitors then emailed the claimant at 10:02 am on 20 March 2023 confirming that the hearing was in person and that it was the Employment Tribunal hearing centre in Southernhay Gardens Exeter rather than the nearby Law Courts. By immediate return email at 10:09 am on 20 March 2023 the claimant replied to the respondent's solicitors: "Hello, I think I misunderstood, I was supposed to be at the court in Exeter now, I thought it was by phone, if so, I'm sorry because, as I told you, I'm going through a very difficult period with a lot of accumulated stress."
16. The claimant made no communication with the Tribunal Office to the effect that he was unable to attend the hearing as listed. The claimant made no application to postpone this hearing, whether on the grounds of ill-health because of "accumulated stress", or otherwise.
17. The claimant had been repeatedly informed that the hearing of this matter was to take place in person. This was confirmed to him at the second case management preliminary hearing two working days ago by Employment Judge Lang, and also by the respondent's solicitors in the email exchange referred to above.
18. We are satisfied that the claimant was aware that this hearing was due to take place in person in Exeter and that he failed to attend the hearing of his own claim without informing the Tribunal Office of his intentions to that effect, and without seeking any postponement of this hearing.
19. Rule 47
20. The Employment Tribunal Rules of Procedure are in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules"). Rule 47 provides: If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence.

21. The respondent had prepared its case in reply to the claimant's allegations in detail, and its witnesses were present to give evidence in support of the written witness statements. Rather than applying to strike out the claimant's claim for non-attendance, Counsel for the respondent Ms Cashell made an application for this Tribunal to determine the claimant's claims under Rule 47 in the absence of the claimant on the basis of the evidence before the Tribunal. This was by way of the hearing bundle of documents which ran to 139 pages, and to which the claimant had effectively agreed, because he had only requested the addition of the payslips received from his new employer. The evidence also included the witness statements of the three respondent's witnesses, and the claimant's "declaration" by way of his witness statement. Ms Cashell also relied upon her detailed skeleton argument which had already been sent to the claimant.
22. We unanimously agreed that it was in the interests of justice in the above circumstances to proceed in this way, despite the claimant's non-attendance. The claimant's claims had been clarified in the First Order, and the claimant has had every opportunity to confirm his position, and (albeit at the eleventh hour) had submitted his own written witness statement. The respondent's witnesses Mr Malcolm Miles, Mr Adrian Laurie, and Mr Cezar Ristache were all present and gave evidence in person.
23. Applying Rule 47 we decided to proceed with the hearing in the absence of the claimant having considered the information available to us about the claimant's absence, and in the knowledge that there had been a number of practicable enquiries about whether the claimant might attend.
24. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to any factual and legal submissions made by and on behalf of the respective parties.
25. <u>The Facts:</u>
26. The respondent is an industrial laundry company which launders linen for hospitals and the hospital industry. The respondent operates different laundry machines, which have different targets based on the type of laundry which they process. Ironer 1 takes pillowcases and has a target of 500 items per person per hour. Ironer 2 takes duvets and has a target of 150 items per person per hour. Ironer 3 takes sheets and has a target of 200 sheets per hour. Ironer 4 takes bespoke table linen and has a target of 125 items per person per hour.
27. The claimant is Mr Ninel Relu Radu. He is a Romanian National, and English is not his first language. He was employed by the respondent as a Laundry Operative from 19 May 2021 until he left the respondent's premises on 16 June 2021, and he never returned to work. He was only ever employed by the respondent for this period of 29 days. The claimant initially operated Ironer 4 and his role was to peg the corners of clean linen to be taken through the ironers for drying, ironing and folding. The standard target of 125 items of linen per person per hour applied in this position.
28. When the claimant commenced his employment, he was taken through the Staff Induction Checklist Form. He was provided with a medical questionnaire and with the respondent's Group Ethics Policy which he signed. He was provided with the respondent's staff employee handbook and was shown a health and safety training DVD before commencing on the shop floor. Mr Laurie explained to him how the various machine work and explained the basic principles of feeding items into the machinery, and the emergency stop buttons on the feeder. The claimant was also provided with another trained employee as his "buddy" on Ironer 4. This was Mr Dariusz, a Polish national, but Mr Laurie was satisfied that they both had a sufficient level of English fluency to communicate sufficiently and to operate the relevant machinery safely.
29. The claimant failed to meet the necessary required operational targets and when this was discussed the claimant requested that Mr Laurie moved him to a production line with a Romanian speaking colleague to assist with his training. Mr Laurie agreed to move the claimant to Ironer 3 where another Romanian employee namely Nicoleta also worked. The claimant was given a reduced target of 180 sheets per hour, but he failed to meet this necessary operational requirement. The claimant again asked to move to an alternative

machine, and Mr Laurie accommodated this request and moved the claimant to Ironer 1 where he worked with Mr Laurie for a brief time.

30. On 16 June 2021, one of the respondent's shift leaders namely Ms Januszewska complained to Mr Laurie that the claimant and another operative (namely Callum, a White British employee) were on their mobile phones, listening to music, taking excessive breaks, and working slowly. Later that day she brought both the claimant and Callum to Mr Laurie's office and complained that they continued to behave in this manner. Mr Laurie spoke to them about the requirements for them both to work to meet the relevant targets, to concentrate, and not to use mobile phones on the factory floor. Following this discussion, the claimant returned to Ironer 1, but soon after this Mr Laurie was informed that the claimant was leaving the site. Mr Laurie spoke to the claimant and asked him to return but the claimant refused on the basis that the respondent was racist, and he threatened to call the Police. The claimant then sent various threatening messages to the claimant's mobile phone in its office, and he did not return to work.
31. On 6 July 2021 the claimant then returned to the respondent's premises to complain about the respondent's failure to pay him for 30 May 2021. The claimant had failed to clock in on this day which is why he had not been paid. As a gesture of goodwill, a further day's pay was then paid to the claimant. The claimant subsequently submitted a written grievance letter dated 5 July 2021 which asserted that he had suffered racism, but without any specific details.
32. A grievance hearing eventually took place on 1 September 2021 during which the claimant complained about the subject of pay, and he also mentioned that a Polish employee had been racist towards him because he had not spoken to him, and that he wanted to work with Romanian colleagues. The claimant's grievance was investigated and rejected, and the claimant was offered the right of appeal. The claimant declined to appeal the refusal of his grievance.
33. The claimant has raised nine specific allegations of less favourable treatment on the grounds of his race (his Romanian nationality), and our findings in respect of each of these are as follows.
34. Allegation 1 is that the respondent failed to provide the claimant with adequate training, by failing to allocate him to work with a more experienced worker who also spoke Romanian and instead allocating him to work alongside a Polish worker. We reject that allegation, and we find that the claimant was appropriately and adequately trained and was treated no differently as to how Shift Leaders normally approach training with other staff. As a matter of fact, the claimant received extra training from Mr Laurie until he confirmed that he needed no further assistance.
35. Allegation 2 is that on his second day of employment he was placed with a Romanian worker, but the supervisor moved him away to work with someone who did not speak Romanian. The claimant has failed to provide any further explanation of this allegation other than "he was moved and put next to a person of Polish ethnicity." The claimant has not provided any explanation as to why this is less favourable treatment when compared with any hypothetical comparator, nor why any such treatment is said to have occurred because he is Romanian. Accordingly, we reject this allegation.
36. Allegation 3 is that the claimant had to work on Ironer 3, with a target of 200 units per hour. We find that the claimant was moved to Ironer 3 at his own request to work with another Romanian employee, and he was subject to the standard productivity target which applied to all employees. We reject the assertion that the claimant suffered any less favourable treatment in this respect, or that any such treatment was because the claimant was Romanian.
37. Allegation 4 relates to the requirement to meet working targets failing which the claimant might be sent home, including the revised target of 180 units per hour. We reject this allegation because all employees were required to meet the respondent's operational targets, and the target of 180 units per hour was a reduced target and therefore more favourable treatment. We cannot find therefore that the claimant suffered any less favourable treatment, and in any event the claimant has offered no explanation as to why this treatment was on the grounds of his Romanian nationality.

38. Allegation 5 is that Mr Laurie approached the claimant in the workplace and told the claimant in front of his colleagues that he was not meeting his targets. We accept Mr Laurie's evidence that this did not take place. There was an occasion which Mr Laurie addressed the entire team about their targets and achievements, but he did not single out the claimant. This allegation is rejected as being unfounded and unproven.
39. Allegation 6 is that the claimant was wearing earphones to alleviate the noise and was told by his Shift Leader to go home. We reject this assertion. We accept Mr Laurie's evidence that the Shift Leader's complaint to him was that the claimant and Callum had been on their phones throughout the day and were listening to music on their headphones. This was a reasonable complaint for an employer to make about the conduct of these two employees. The claimant has not proven any less favourable treatment in this respect, particularly as the Shift Leader also complained about Callum (who is not Romanian).
40. Allegation 7 is that the respondent had productivity targets which it required the claimant to meet. We reject this assertion of discrimination. All the respondent's laundry operatives had production targets which were appropriate to the machinery that they were working on. It is plain that these targets do not relate to the race of the particular operatives in question. There was no less favourable treatment applied to the claimant in this respect, and no suggestion that any treatment which the claimant suffered was on the grounds of his Romanian nationality.
41. Allegation 8 is that the respondent monitored and enforced targets against the claimant but not others. We reject this assertion which is factually incorrect. All of the respondent's production operatives were monitored and there was no less favourable treatment in this respect.
42. Finally, Allegation 9 is that other (unnamed) workers refused to speak to the claimant or to train him. In the first place we have already found that the claimant was appropriately and adequately trained. This allegation appears partly to be a repetition of the allegation that a fellow employee of Polish ethnicity did not speak to the claimant. The claimant has failed to offer any evidence as to why this is said to be less favourable treatment when compared to other (non-Romanian) employees, or why this conduct is said to be related to the claimant's race. The claimant was invited to provide such information during the grievance hearing but was unable to do so. In addition, we accept Mr Laurie's evidence that colleagues did assist the claimant on the various machines. Mr Laurie's evidence is to the effect that the claimant talked too much with others rather than being ignored by others, and he was disruptive to his colleagues when they were attempting to work. We reject this final allegation on the basis that there was no less favourable treatment applied to the claimant, and in any event, we cannot see how this is said to have been on the basis of his Romanian nationality.
43. With regard to the claim for unlawful deduction from wages, during his grievance the claimant claimed that he had not been properly paid for work done in week 11 and week 12. However, the claimant's payslips clearly demonstrated that the relevant wages had been paid. Secondly, the claimant also stated that he had not been paid for 30 May 2021. The claimant had raised this prior to his grievance but despite the fact that there was no evidence that the claimant had worked on that day, it was paid to the claimant on 16 July 2021. The claimant accepted during the first case management preliminary hearing that all monies had been paid to him, but that he was seeking consequential loss as a result of late payment. The claimant has failed to provide any evidence to this tribunal as to what consequential losses are said to have arisen as a result of the late payment of sums which were due to him. He has not discharged the burden of proof upon him in this respect. In these circumstances we find that there are no sums which are due to the claimant which he has not already been paid, and that he has failed to prove that he has suffered any financial loss as a result of the late payment of any sums due to him.
44. The claimant subsequently made contact with ACAS under the Early Conciliation procedure on 2 July 2021 (Day A), and ACAS issued the Early Conciliation Certificate on 13 August 2021 (Day B). The claimant presented these proceedings on 18 August 2021.
45. Having established the above facts, we now apply the law.

46. This is a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct discrimination only. The protected characteristic relied upon is race, as set out in sections 4 and 9 of the EqA.
47. As for the claim for direct discrimination, under section 13(1) of the EqA 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.
48. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that 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. However, this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
49. The claimant also claims in respect of deductions from wages which he alleges were not authorised and were therefore unlawful deductions from his wages contrary to section 13 of the Employment Rights Act 1996 ("the Act"). Under section 24(2) of the Act, where a Tribunal makes a declaration that there has been an unlawful deduction from wages it may order the employer to pay such amount as a Tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of.
50. We have been referred to and we have considered the cases of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL; Igen v Wong [2005] IRLR 258 CA; Madarassy v Nomura International Plc [2007] ICR 867 CA; Browning v Crumlin Valley Collieries [1926] 1KB 522; Burrett v West Birmingham Health Authority [1994] IRLR 7; Morgan v West Glamorgan County Council [1995] IRLR 68; Laing v Manchester City Council [2006] ICR 1519; Agarwal v Cardiff University and another [2019] IRLR 657; Augustine v Data Cars Ltd UKEAT/0254/20/AT'; Gould v St John's Downshire Hill [2021] ICR 1; and Royal Mail Group Limited v Efobi [2021] UKSC 33.
51. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 ("the ACAS Code").
52. Direct Discrimination Claim:
53. For the reasons set out in our findings of fact above we cannot find that the claimant has discharged the burden of proof upon him in connection with any one of the nine specific allegations of direct discrimination. The claimant has been unable to establish either that he suffered any less favourable treatment when compared with an appropriate comparator, nor that, even if he had, any such less favourable treatment was because of his race, namely his Romanian nationality.
54. With regard to the claim for direct discrimination, the claim will fail unless the claimant has been treated less favourably on the ground of his race than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The claimant needs to prove some evidential basis upon which it could be said that this comparator would not have suffered the same allegedly less favourable treatment as the claimant.
55. In Madarassy v Nomura International Plc Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination". The decision in Igen Ltd and Ors v Wong was also approved by the Supreme Court in Hewage v Grampian Health Board. The Court of Appeal has also confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura

International Plc remain binding authority in both Ayodele v Citylink Ltd [2018] ICR 748 and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18.

56. In this case, we find that no facts have been established upon which the tribunal could conclude (in the absence of an adequate explanation from the respondent), that an act of discrimination has occurred. In these circumstances the claimant's claim of direct discrimination fails, and it is hereby dismissed.
57. Unlawful Deductions Claim:
58. For the reasons explained above, we find that the claimant has not discharged the burden of proof upon him in this respect. We have found that there were no deductions unlawfully made from the claimant's wages, and there are no sums which are due to the claimant which he has not already been paid. The claimant has also failed to prove that he has suffered any financial loss as a result of the unlawful deduction of any sums due to him. For these reasons we dismiss the claimant's claim under sections 13 and/or 24(2) of the Act.
59. Reconsideration:
60. For the reasons explained above this Judgment was determined in the absence of the claimant. If the claimant intends to make any application for reconsideration under Rule 71, then any such application must be in writing to the Tribunal, and it must be copied to the respondent for its comments. Any such application should include the following: (i) exactly why the claimant failed to attend this hearing; and (ii) only to the extent that such is alleged, which of the Tribunal's findings of fact above are said to be incorrect and why; and (iii) why (if such is alleged) the Tribunal was not entitled to reach the conclusions in this Judgment based on the evidence before it; and (iv) why it is in the interests of justice for this Judgment to be varied or revoked. The respondent should confirm within 14 days of receipt of any such application whether it contests that application for reconsideration, and if so why.
61. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 26 to 44; a concise identification of the relevant law is at paragraphs 46 to 51; how that law has been applied to those findings in order to decide the issues is at paragraphs 52 to 58.

Employment Judge N J Roper
Dated 21 March 2023

Judgment sent to Parties on 29 March 2022

For the Tribunal Office