



IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

5 **Judgment of the Employment Tribunal in Case No: 8000049/2023 Issued
Following Final Hearing Held at Edinburgh in terms of Rule 47, on the 16th
and 17th August 2023**

10 **Employment Judge J G d'Inverno
Members: Ms J Chalmers
Mr T Lithgow**

15 **Mr Anthony Cullinane**

**Claimant
Not appearing and not
represented**

20 **CAF Rail UK**

**Respondent
Represented by:
Mr Gavin McQueen,
Solicitor
Instructed by Mr Iain
Taylor, Head of Human
Resources**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is:

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(First) The claimant's complaint of Discrimination because of the protected
characteristic of Age is dismissed.

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**Employment Judge: J d'Inverno
Date of Judgment: 23 August 2023
Entered in register: 23 August 2023
and copied to parties**

I confirm that this is my Judgment in the case of Cullinane v CAF Rail UK and that I have signed the Judgment by electronic signature.

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REASONS

1. This case called for Final Hearing before a full Tribunal in conventional “In Person” form, at Edinburgh on the 16th and 17th of August 2023. There was no appearance by or on behalf of the claimant. The Respondent Company was represented by Mr McQueen, Solicitor instructed by Mr Iain Taylor, Head of Human Resources.

Procedural History

2. The case was listed for Final Hearing in terms of Order (Eighth) of the Tribunal’s Case Management Orders of 19th, (with written copy sent to parties on 26th), April 2023, made in the course of the Closed Preliminary Hearing Case Management Discussion which proceeded before the sitting Judge on the first of those dates. The claimant was present and participated in the 19th April Closed Preliminary Hearing.
3. As at 19th April 23, the claimant bore to give notice of 4 complaints, viz;-
- (i) A complaint of Unfair Dismissal in terms of section 98(4) of the Employment Rights Act 1996
 - (ii) and (iii) Complaints of Unauthorised Deduction from Wages and being respectively; from the pay in lieu of notice received by him and in respect of the accrued but untaken paid annual leave entitlement, both paid to him on termination of his employment

(iv) A complaint of Direct Discrimination because of the protected characteristic of Age in terms of which the claimant gave notice of an offer to prove that;

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(a) he was dismissed during his probationary period by reason of his age (he being aged 65) and,

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(b) that in so dismissing him the respondents had treated him less favourably because of his protected characteristic of Age than they had his 3 identified actual comparators and fellow employees, being individuals in the age group 26 to 35, who were not dismissed during their probationary period, and thus;

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(c) that the respondent has directly discriminated against him in terms of section 13 of the Equality Act 2010.

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The Complaint of Unfair Dismissal

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4. On 19th April, and in terms of its Order (Fourth)(b) and (c) of 19th April 23, the Tribunal dismissed the complaint of Unfair Dismissal in terms of section 98(4) of the ERA, for want of jurisdiction, the claimant lacking the requisite 2 year period of continuous employment such as to entitle him to present such a complaint and the Tribunal to consider the same.

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Pay in Lieu of Notice and Holiday Pay

5. In terms of its Orders (Third) and (Fourth) of 19th April 23, the Tribunal Ordered that the respondent furnish the claimant and the Tribunal with a detailed calculation setting out the amounts paid to the claimant as at the Effective Date of Termination of the claimant's employment, 20th January

2023 (respectively) in lieu of notice and by way of compensation for accrued but as yet untaken paid annual leave entitlement.

- 5 6. The Tribunal further Ordered the claimant to write to the respondent's representative and to the Tribunal in response to the calculation confirming either that the claimant accepted that he had received his full entitlement under each and or both Heads of Claim, or in the alternative, and in the event that the claimant continued to stand upon his section 13 ERA claims, fully specifying the amounts which he maintained remained outstanding while also
10 setting out an explanation as to how these arose and were calculated.
7. The respondents timeously complied with the requirements of Order (Third) of 19th April. The claimant failed to comply with, and or to make any response in terms of, Order (Fourth) of 19th April.
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8. Following the issuing of a number of reminders, on 4th August 2023, and in the face of the respondent's Application for Strike Out, the Tribunal reiterated its Order (Fourth) and made the same subject to an "Unless Order" in terms of Rule 38(1). The date set for compliance with the Unless Order was
20 11th August 2023.
9. The claimant failed to comply with the terms of the Order by the date specified and the claimant's complaints under section 13 in relation to notice pay and holiday pay were struck out as at midnight on the date for
25 compliance, 11th of August 2023.
10. By letter dated 15th August 2023, the Tribunal gave written notice to the parties (in terms of Rule 38(1)), of the same having occurred.
- 30 11. Accordingly, there remained outstanding for determination by the Tribunal at Final Hearing, only the claimant's complaint of Direct Discrimination because of the protected characteristic of Age.

The Hearing

12. At the date and time set down for the Final Hearing the respondents were in attendance together with their representative and their witness.
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13. There was no appearance by or on behalf of the claimant, nor had the claimant made communication with either the respondent's representative or with the Tribunal in advance of the Hearing to indicate intended non attendance.
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14. Between 10 am and 10.45 the Tribunal adjourned while the Tribunal Clerk made several attempts to communicate with the claimant, firstly by sending a high priority email to the email address at which the claimant, in terms of his initiating Application ET1, had held himself out as being communicable with, and by placing a number of telephone calls and leaving messages on the answer service to and at the telephone number at which, in terms of his
15 initiating Application ET1, the claimant had held himself out as being communicable with by telephone.
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15. No response was received from the claimant.
16. Upon the Tribunal's reconvening, the respondent's representative made Application at the bar for the claims to be dismissed in terms of Rule 47, on the basis that the onus of proof at first instance sat with the claimant to
25 establish, on the balance of probabilities, primary facts from which the Tribunal could draw an inference of discriminatory motive and, in the circumstance of his non attendance, the claimant could not succeed in discharging that onus.
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17. Upon consideration of the circumstances presented including on the one hand the lack of information as to the reason for the claimant's non attendance notwithstanding the making of such enquiries as were practicable and, on the other hand, the presence of the respondent's witnesses who

were able to speak to the reason for dismissal, the Tribunal determined to proceed and proceeded with, the Hearing in the absence of the claimant.

The Issue

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18. The issue for determination, in relation to the residual complaint of Direct Discrimination was confirmed as that set out at paragraph (Fifth)(a) of the Tribunal's Interlocutory Orders of 19th April 2023, viz;

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“(a) What was the reason, or if more than one the principal reason for the respondent's admitted dismissal of the claimant on 20 January 2023 and in particular,:-

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(i) as is maintained by the respondent, was the claimant dismissed for reason of his performance and conduct during his probationary period, or alternatively,

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(ii) as is averred by the claimant, was he dismissed for reason of his age, he being 65 years of age, in comparison with his fellow Modifications Technicians who were in the age group 26 to 35 and with whom he compares himself and who were not dismissed during their probationary period; and thus, in dismissing him, did the respondent Directly Discriminate against the claimant in terms of section 13 of the Equality Act 2010”

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19. In terms of the Tribunal's Order (Tenth) of 19th April parties had each been directed to intimate and lodge with the Tribunal, a bundle of documents to which they wish to refer the Tribunal at Final Hearing. The respondents had complied with Order (Tenth) and there was before the Tribunal the respondent's Final Hearing bundle extending to some 118 pages to which there was added at the outset of the Hearing a further 14 pages (119-1 to -14) relating to mitigation of loss.

Sources of Written and Oral Evidence

5 20. The claimant had neither intimated nor lodged any documents additional to those contained in the respondent's bundle.

21. The Tribunal heard evidence on affirmation from:-

10 (a) Mr David Newstead, the claimant's Supervisor (first Line Manager) during his probationary period of employment and as at the date of his dismissal; and from,

15 (b) Ms M Suniega, the respondent's Operations Manager and former Modification Coordinator, in which latter capacity she was the claimant's second Line Manager and Dismissing Officer.

22. Both witnesses answered questions from the Tribunal.

20 23. The Tribunal found both witnesses to be both credible and reliable and accepted their evidence as to fact, on that basis.

The Facts

25 24. On the documentary and oral evidence presented, the Tribunal made the following essential Findings in Fact restricted to those necessary for the determination of the issue.

30 25. The claimant, whose date of birth is 14th February 1958, and who was employed by the respondent as a Modification Technician from the 4th of July 2022 up to and including the 20th of January 2023 on which latter date he was dismissed by the respondent, was a person possessing the protected characteristic of Age for the purposes of section 5 of the Equality Act 2010, at the material time for the purposes of his complaint.

26. The claimant's dismissal was effective as at 21st of January 2023 by payment of one month's pay in lieu of notice in terms of Clause 24(c) of the claimant's written terms and conditions of Employment.
- 5 27. The claimant's employment was regulated by written terms and conditions of employment, copied and produced together with its incorporated Annexes relating to annual leave entitlement and probationary period review at pages 69 to 103 of the respondent's bundle.
- 10 28. The Effective Date of Termination of the claimant's employment was 21st January 2023.
- 15 29. The claimant was recruited together with the 3 actual comparator colleagues, with whom he compares himself for the purposes of his section 13 EqA complaint, (fellow Modification Technicians), Fraser Brown, Jordan Brown and Dale Boylan who were in the age bracket 26 to 35.
- 20 30. All 4 employees' employments were subject to the same written terms and conditions and, in terms of Clause 17 thereof, to an initial probationary period of 6 months during which the employees' progress was monitored and appraised.
- 25 31. Clause 17 provides, in the event of unsatisfactory progress, that the employees' employment will be regarded as not yet confirmed and that their probationary period may be extended, or their employment may be terminated in accordance with the provisions relating to notice in terms of Clause 24 of the terms.
- 30 32. The Contract of Employment, during the probationary period was terminable by either party on the giving to the other of one month's notice.
33. The employees, including the claimant were entitled to receive and were required to give one month's notice. In terms of Clause 24(c) the respondent reserved the right to make payment in lieu of notice.

34. During their probationary period employees were subject to 3 reviews:-

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- (a) After 2 weeks, at which objectives were set, standards specified and a basic training plan identified
- (b) A 3 month review and a 6 month review at which employees were assessed on:-
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- Attendance, timekeeping, communication, job performance (efficiency), quality and accuracy of work
 - Work relationships (interpersonal and team) and finally competency in the position

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35. Each of the above competences (factors) were assessed as falling into one of 4 categories:-

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- Strength
 - Area to maintain (i.e. at a satisfactory level)
 - Area to improve
 - Priority area to improve

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36. The probationary scheme provided for 3 potential outcomes at the 6 month review point:-

- (a) Termination of the probationary period and transition to permanent employment
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- (b) Extension of the probationary period to allow further opportunity to improve in required areas
- (c) Termination of employment

37. The aspiration for both comparators and the claimant was that they would progress through their probationary period, improving as required on any areas identified, with a view to their probation being terminated and their employment becoming permanent at the point of the 6 month probationary review.

38. At his 3 month review, the claimant's first identified comparator, Fraser Brown was assessed against all criteria as "area to maintain" (i.e. satisfactory in all areas) (pages 87 to 89 of the respondent's bundle) (the bundle).

39. At the 6 month probationary review employees are assessed against the following characteristics:-

- Timekeeping,
- Attendance,
- Customer focus,
- Good interpersonal skills and ability to work in a team,
- Whether they are improvement oriented and technical expertise against the first 5 characteristics

40. Fraser Brown was assessed at the 6 month review as all "areas to maintain" (that is satisfactory) and, in relation to technical expertise an "area to improve". The assessment was that there was no requirement to extend Fraser Brown's probationary period which was concluded on the 3rd of January 2023.

41. At his 3 month Probationary Review the second identified comparator, Jordan Brown, was assessed as "area to maintain" (that is satisfactory) in relation to: attendance, timekeeping, communication, quality and accuracy of work, work relationships (interpersonal and team) and competency in position. In relation to job performance (efficiency) Jordan Brown was assessed as "strength" with the comment "*Jo has been very strong at the job, and has been a leader in the team.*"

42. At his 6 month probationary review Jordan Brown was assessed as “area to maintain” against all characteristics, with the exception of “good interpersonal skills and ability to work in a team” and “technical expertise”, both of which were assessed as strengths. The overall assessment was that there was no requirement to extend Jordan Brown’s probationary period which ended on the 4th of January 2023.
43. The third named comparator, Dale Boylan was assessed, at his 3 month probationary period, as “area to maintain” (i.e. satisfactory) in relation to; attendance, job performance (efficiency), quality and accuracy of work, work relationships (interpersonal and team), and competency in the position. His communication was assessed as a strength. His timekeeping was identified and assessed as “an area to improve”.
44. At his 6 month probationary review Dale Boylan was assessed as having improved his timekeeping from “an area to improve” to “area to maintain” (i.e. satisfactory). His technical expertise had improved such that it was assessed as a “strength”. He was assessed as “area to maintain” (i.e. satisfactory) against all of the remaining characteristics. The overall assessment was that there was no requirement to extend Dale Boylan’s probationary period beyond the 6 month point and it was brought to an end on the 4th of January 2023.
45. At his 3 month probationary review the claimant was assessed as “area to maintain” (i.e. satisfactory) in relation to; attendance, timekeeping, job performance (efficiency), quality and accuracy of work, and competency. In respect of “communication and work relationships (interpersonal and team)”, the claimant was assessed as “area to improve”.
46. At his 6 month probationary review, the claimant’s timekeeping was assessed as a strength. His attendance, his customer focus and result oriented, improvement oriented and technical expertise were all assessed as “area to maintain” that is “satisfactory”.

47. At his 6 month probationary review the claimant's "good interpersonal skills and ability to work in a team" that is the competency which incorporates both 'communication and work relationships (interpersonal and team)' against which he was assessed as an "area to improve" at the 3 month review, had
5 deteriorated and was assessed as "priority area to improve".
48. Further objectives and goals could not be set at the Review with the comment
10 *"the employee is not interested in continuing with the job and says that no plan could change the current situation. He stated he was not happy and was currently looking for another job."*
49. The claimant refused to sign his 6 month probationary review form. The assessment was that there was a requirement for the claimant's probationary period to be extended, the reasons set out on the review form being, "*Tony has not been able to integrate with the team. Communication needs to improve for the work to flow better.*"
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50. In the course of his 6 month probationary review on the respondent's Melissa Suniega sought to discuss with the claimant a number of incidents which
20 informed the assessment by her of his "interpersonal skills and ability to work in a team" being assessed as a priority area to improve. The claimant became angry, refused to engage with and or address the examples raised and left the meeting stating that he was not coming back.
- 25 51. The respondent's Melissa Suniega did not know whether the claimant was in fact intimating his resignation.
52. The claimant returned to work the following day and conducted himself in a manner which appeared to suggest that nothing had occurred on the previous
30 day.
53. By letter dated 17th January 23, the respondent's Melissa Suniega wrote to the claimant inviting him to attend a formal probation meeting on the 20th of January in order to complete the process and allow an outcome to be agreed

and recorded in relation to the started but not completed 6 month probationary review from which the claimant had unilaterally removed himself.

5 54. The letter advised the claimant that the meeting could result in the termination of his employment and further that he had the right to be accompanied by a colleague or a Trade Union representative.

10 55. The letter advised that Melissa Suniega would be accompanied at the meeting by Anita Shields, the Human Resources Business Partner from the HR Team who would support the meeting.

15 56. At the meeting the claimant again declined to engage with any of the matters which had informed the assessment of his interpersonal skills and ability to work as a team as a priority area requiring improvement. He declined to accept that there was any requirement for him to improve in that area.

20 57. Melissa Suniega decided and advised the claimant at the meeting of her decision to extend his probationary period by a further 3 months, to afford him an opportunity of addressing the areas of concern and their impact on the efficiency of the team in relation to concluding work projects timeously.

25 58. The claimant refused to accept a 3 month extension of his probation and again advised the respondent that he was looking for another job.

30 59. By letter dated 20th January 2023, the respondent's Melissa Suniega wrote to the claimant advising him that having considered the matter following the resumed 6 month probationary meeting held on Friday the 20th of January, the respondent had decided to terminate his employment with the company with immediate effect from 20th January 2023.

60. The reason given for his dismissal in the letter was "*You have failed to meet the company's probationary standards. As outlined in our meeting there have*

been a number of concerns during your probationary period in relation to conduct, capability and performance which was not at the required level."

- 5 61. The claimant was advised that he would receive one month's pay in lieu of notice and payment in respect of any outstanding paid annual leave entitlement.
- 10 62. The claimant was advised of his right to appeal against the decision, in writing, within 7 days of receipt of the letter of 20th January.
63. The claimant did not exercise his Right of Appeal.
- 15 64. The principal reason for the claimant's dismissal was his refusal to engage with the areas of concern identified in the course of his 3 month and 6 month probationary review period in relation to his conduct and its impact upon the capability and performance both of himself and of the team in which he worked, together with his refusal to accept the alternative outcome of the extension of his probationary period for a further 3 months.
- 20 65. The claimant has failed to establish any primary facts from which the Tribunal could infer that in dismissing the claimant as it did, the respondent was motivated by discriminatory concern as to the claimant's age.
- 25 66. Separately and, in any event, the principal reason for the respondent's admitted dismissal of the claimant was a reason wholly unconnected with the claimant's age.
- 30 67. None of the 3 fellow Modification Technicians, with whom the claimant compared himself for the purposes of section 13 of the EqA, had refused to engage with any issues raised with them as issues requiring improvement. As at the date of their 6 month probationary review, they were each assessed as having attained a satisfactory or strength level in respect of each of the criteria against which employees were assessed during their probationary period.

68. Their circumstances, with the exception of their age, were not otherwise substantially the same as those of the claimant. In their cases no requirement to extend their probationary period was identified as existing.

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69. In dismissing the claimant, as they did on 20th January 2023, the respondent did not treat the claimant, because of his protected characteristic of Age, less favourably than they treated his named comparators whom they did not dismiss and thus, in so dismissing him, the respondent did not directly discriminate against the claimant in terms of section 13 of the Equality Act 2010.

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Submissions, Applicable Law, Discussion and Disposal

70. In submission, Mr McQueen, under reference to the application of the 2 stage test as explained by Mummery LJ in **Madarassy v Nomura International Plc** [2007] EWCA Civ 33, reminded the Tribunal that the onus of proof sat, with the claimant in a complaint of discrimination to establish, on the balance of probabilities, primary facts from which the Tribunal could, in the absence of another explanation, draw an inference that the respondent had a discriminatory motive in dismissing the claimant (in the instant case dismissed the claimant by reason of or for a reason connected with his age in comparison with his 3 younger fellow Modification Technicians, none of whom were dismissed during their probationary period).

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71. In Mr McQueen's submission, the claimant had failed to discharge that onus of proof, there being no evidence before the Tribunal that went to establish such primary fact or facts and that the burden of proof not having passed to the respondent and thus remaining with the claimant and the claimant having failed to discharge the burden, the claim should be dismissed.

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72. Separately and in any event, let it be assumed that the burden of proof had transferred to the respondent, Mr McQueen urged the Tribunal to accept as both reliable and credible the evidence of the respondent's witnesses and to

find in fact, upon that evidence, that the reasons for the claimant's dismissal were those relating to his conduct and its impact upon capability and performance, both his own and that of the team in which he required to function as an integral member and thus, for reasons wholly unconnected with the claimant's age.

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73. On the evidence presented, the Tribunal accepted the submissions of the respondent's representative and as is made clear by Mummery LJ in the case of **Madarassy v Nomura**, that it is insufficient, for the purposes of switching the burden of proof to the respondent, now in terms of section 136 of the EqA, for a claimant to point only to the possession of a protected characteristic, on the one hand, and the occurrence of less favourable treatment on the other. "*There must be something more*". In the instant case there was no evidence placed before the Tribunal which disclosed such "something more".

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74. Although the Hearing proceeded, in terms of Rule 47, in the claimant's absence the Tribunal gave full consideration to the claim given notice of by and the averments contained within his initiating Application ET1. The Tribunal was unanimously satisfied, that taking the claimant's averments at their highest, that is to say assuming that the claimant had proved all that in terms of his ET1 he gives notice of an intention to prove, would not result in his establishing primary facts from which an inference could be drawn for the purposes of section 136 of the Equality Act 2010.

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75. Separately and in any event, the Tribunal was unanimously satisfied, on the evidence of the respondent's witnesses, that the principal reason, that is to say the actual reason for the claimant's dismissal was a reason wholly unconnected with his age and thus, let it be assumed that the burden of proof had switched to the respondent in terms of section 136(2) of the EqA at the first stage of the 2 part test, which it had not, the respondents had shown, in any event, for the purposes of section 136(3) which disapplies sub section (2), that they had not contravened the provision. That is to say, in relation to the issue before the Tribunal for determination, that the

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respondents in dismissing the claimant, did not treat him less favourably because of his protected characteristic during his probationary period of Age, than they treated his 3 identified comparators whom they did not dismiss (during their probationary period/s) and thus, that the respondent did not
5 directly discriminate against the claimant in terms of section 13 of the Equality Act 2010.

76. The claimant's claim fails and falls to be and, is hereby dismissed.

Employment Judge: J d'Inverno
Date of Judgment: 23 August 2023
Entered in register: 23 August 2023
and copied to parties

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I confirm that this is my Judgment in the case of Cullinane v CAF Rail UK and that I have signed the Judgment by electronic signature.