Case No. 2401136/2024

EMPLOYMENT TRIBUNALS

Claimant: Mr J Masele

Respondent: Sodexo Limited

Heard at: Manchester (in public) **On:** 9th, 10th & 11th April 2025

Before: Employment Judge Anderson
Mr D Wilson
Mr B McCaughey

Representatives

For the claimant: In Person

For the respondent: Mr James (Advocate)

JUDGMENT

1. The claim of direct race discrimination is not well founded and is dismissed.

2. The claim of unlawful deduction from wages is well founded. The Respondent is ordered to pay the Claimant the gross sum of **£6549.83** from which it may make any necessary deductions.

REASONS

Introduction

1. The Claimant, Mr. Jean Masele brings proceedings for direct race discrimination and unlawful deduction from wages against his employer Sodexo Limited.

Procedural Matters

2. The hearing took place in a Tribunal room that did not have a functioning audio recording system. Therefore, the Tribunal hearing was not recorded. The parties were informed of this at the outset.

3. Following introductions, the case was discussed generally with the parties. The Tribunal had a record of a previous Preliminary Hearing to assist and used this as the basis for the discussion.

4. In terms of the direct race discrimination case, it was confirmed by the Claimant that the detriment relied upon was the demotion of the Claimant on or around the 1st October 2023. No other detriments were relied upon. This also accorded with the understanding of the Respondent.

5. In terms of the wages claim, the Tribunal sought to clarify at the outset with the Respondent the basis upon which the claim was defended. It was submitted that the Respondent relies upon Hogg v Dover College [1990] ICR 39 to establish that the Claimants employment terminated and then recommenced on fresh terms and conditions. At this point in time, the Tribunal indicated to the Respondent that this point did not appear to be pleaded in the Grounds of Resistance.

6. The Respondent also clarified that it was not relying upon clause 24 of the contract of employment, i.e. the variation clause.

7. In respect of direct race discrimination, the issues before the Tribunal were as follows:

a. On or around the 1st October 2023, did the Respondent because of the Claimants race downgrade his role from that of a PCO to an OSO?

b. Did the Claimant reasonably see this as a detriment?

c. If so, has the claimant proven facts from which the tribunal could conclude that's in any of those respects the claim is treated less favourably than someone in the same material circumstances of a different race was or would have been treated? The claimant says he was treated worse than:

   i) Mr SZ (Asian male)
   ii) Ms IA (Asian female)
   iii) Mr GS (White male)
   iv) Mr MG (White male)
   v) Mr AT (White male)
   vi) A hypothetical comparator of a different race to the Claimant. (A hypothetical comparator was not explicitly referenced in the list of issues. However, the Tribunal considered that in a case such as this it was obliged to consider a hypothetical comparator)

d. if so, has the claimant also proven facts in which the tribunal could conclude that the less Favourable treatment was because of race?

e. If so, has the respondent shown that there was no less favourable treatment because of race?

8. In respect of unlawful deduction from wages, the issues were as follows:
   a. were the wages paid to the claimant from the 1st of October 2023 less than the wages he should have been paid?
   b. (The respondent does not rely upon the deduction being authorised by statute or a written term of the contract)

c. did the claimant have a copy of the contract or written notice of the contract before the deduction was made?
d. Did the claimant agree in writing to the deduction before it was made?
e. How much is the claimant owed?

9. Whilst time limits were referred to in the case management order, it was clear that both claims had been made within the relevant time limits. There was no suggestion otherwise during the hearing or in closing submissions.

10. In accordance with the overriding objective, the Tribunal made allowances for the fact that the Claimant was unrepresented. As part of the discussion on day one, general guidance was provided to parties and witnesses as to the Tribunal process, for example, the helpfulness of referring to page numbers, asking short questions, asking one question at a time, not talking over people and allowing a question and answer to finish. The Tribunal also allowed the Claimant additional latitude in terms of how he conducted his cross examination and the range of questions that were asked. We also note that Mr. James on behalf of the Respondent assisted the Tribunal by not objecting on the grounds of relevance to questions that he otherwise may have.

11. The Claimant provided a witness statement and was cross-examined on its contents. He also called Ms. Ahmed and she provided a witness statement and was cross-examined on its contents.

12. The Respondent called Bethany Parr, Paul Worrall, and Marie Durning. All provided evidence via witness statements and were cross examined.

13. All oral evidence was given by way of oath or affirmation.

14. In terms of submissions, the evidence concluded at 12.50 on day two. The Claimant had been emailed a copy of Mr. James' written submissions that morning. We returned at 14.40, the parties having had the opportunity to consider their submissions. However, upon the parties return, the Claimant made a request for submissions to be the following day. The Tribunal retired to consider this request and took the decision to allow the parties to give their

submissions on the morning of day three with a rough time allocation of thirty minutes each. Whilst this extended the length of the hearing, it was still possible to complete the hearing within the hearing window, the Claimant was unrepresented and this adjustment would cause minimal prejudice to the Respondent.

15. At the start of the third day, the Tribunal received the written submissions of the Claimant. The Claimant's written submissions contained a contention that he was prevented from cross-examining his witness. The Tribunal sought clarification from the Claimant as to what was meant by this as the reference to cross examination and own witness was confusing as was the statement overall. The Claimant said that he had wanted to ask Ms. Ahmed questions. This did not accord with the recollection of the Tribunal. The Claimant was not prevented from asking Ms. Ahmed questions. A witness statement had been provided and was cross-examined on in the normal way. Ms. Ahmed's witness statement was brief as was the cross-examination. The Claimant was given the opportunity to re-examine Ms. Ahmed. The point was made in respect of re-examination that it was an opportunity to ask questions that arose out of the cross-examination in respect of anything that needed clarifying or was unclear. This was an innocuous exchange at the time yet in written submissions it took the form of a stark statement. The Tribunal was concerned that this assertion had been made in this way and raised it with the Claimant. The Tribunal having raised the point, the Claimant explaining his position and the Tribunal then explaining its recollection of the process, the Claimant said that the point should be taken out and the point was withdrawn.

16. Finally, prior to the commencement of closing submissions on the morning of day three, the Claimant corresponded with the Tribunal regarding ACAS negotiations. This was not appropriate. Such discussions are inadmissible by reason of statute. The confidentiality of discussions is routinely highlighted to all parties by ACAS. Even when taking into account the Claimant's status as an unfamiliar litigant in person, it was difficult to see what the Claimant was seeking to achieve by this communication other than seeking to use it to influence the Tribunal. The Tribunal have excluded this from their consideration entirely.

Facts

17. The Tribunal made the following findings of fact on the balance of probabilities.

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18. The Claimant commenced employment with the Respondent as a Prison Custody Officer (PCO) in April 2019. The Claimant worked at Forest Bank Prison.

19. In March 2021, the Claimant was injured at work. The Claimant was assisting a colleague who was involved in the control and restraint of a prisoner. The Claimant experienced a knee injury.

20. In May 2022, the Claimant submitted a grievance regarding the injury he sustained. The Claimant describes the grievance being due to the Respondents lack of ethics and honesty. A point of the dispute is whether or not it was permissible to rely upon body cameras or whether it was necessary to secure and use CCTV as well.

21. In July 2022, the Claimant underwent knee surgery. This has been described as ACL replacement surgery. Immediately following this surgery, he was absent from work, returning on alternative duties in November 2022 for a period of six months.

22. This was a temporary arrangement. The Claimant would undertake the duties of an Operational Support Officer (OSO). However, we also find that at times some of the duties undertaken by the Claimant were that of a PCO.

23. The roles of PCO and OSO are distinct roles. Within the OSO role there is also a Night Support Officer role, which is the type of duties that were being undertaken by the Claimant.

24. The Tribunal has the job descriptions before it and we have read these. In broad terms, the role of a PCO includes regular direct prisoner contact

including control and restraint. Whereas the OSO role is a support role with more restrictive prisoner contact and is capable of being done on a more sedentary basis. The PCO pays more than the OSO rile.

25. In September 2022, the Claimant's grievance was rejected. The Claimant appealed this. The Claimant met with David Smart, Deputy Director. He received confirmation on the 14th March 2023 that he would be permitted to view the CCTV.

26. The Claimant alleges in his witness statement that the CCTV footage was tampered with. The Tribunal is not able to make this finding of fact. The evidence before the Tribunal is a bold, unparticularised assertion by the Claimant. This was a feature of the Claimant's evidence overall. In terms of the Claimant's credibility, at times the Claimant would make stark, bold allegations but then fail to provide supporting evidence. The result of this is that the Tribunal was able to rely on parts of his evidence that was straightforward or narrative detail but treated the assertions that he would make with scepticism.

27. The Internal Management of the prison have regular absence review meetings, usually on a Thursday morning. Present are the members of the Senior Leadership team together with members of HR.

28. Ms. Lynsey Wright was Head of Residence. She was the Claimant's Departmental Manager.

29. Ms. Wright has not given evidence before the Tribunal. On behalf of the Respondent it is submitted that she has had ill health, the details of which are said to be sensitive in nature. She is back at work as of this week, but has previously had absence and also been on restricted duties. This is the stated reason for her non attendance. No medical evidence has been put before the Tribunal.

30. One particular meeting in September 2023 is of importance. The Senior Leadership Team was present, which includes Ms. Durning, Ms. Wright and from HR, Ms. Parr and the more senior Ms. Rebecca Burt, HR Business Partner.

31. The Tribunal heard evidence from Ms. Parr. Paragraph 7 of her witness statement requires careful consideration. Given the length of the overall statement, paragraph 7 covered a crucial event in a single paragraph and contained wording that caused difficulty.

32. In respect of the decision to move the Claimant to an OSO role, in evidence before us, when asked by the Tribunal, Ms. Parr did not seek to rely upon the phrase 'it was agreed that' which is the wording in her witness statement and instead made the point that this was a decision taken by Ms. Wright.

33. In evidence, Ms. Parr was asked whether or not there was a note of this particular meeting. It transpired that whilst minutes were not taken, there may have been HR notes taken in the form of bullet points, using HR notebooks. These have not been disclosed to the Claimant or provided to the Tribunal. Ms. Parr said that she has not provided them to the solicitors acting for the Respondent. This is a clear breach of the obligation of disclosure.

34. The Tribunal formed the impression from the evidence of Ms. Parr that HR were not proactive within the Respondent and that there also appeared to be a problem in giving clear, straightforward, accurate advice. More specifically, in addition to any problems regarding this meeting, Ms. Parr does not appear to have given Ms. Wright any guidance as to how she should conduct a meeting in which she is effectively changing the terms and conditions of the employee. For example, if HR are not present as a witness then the advisability of taking notes and keeping records, the process to be followed or the basis upon which action was being taken in accordance with the contract.

35. In this meeting, prior to any consultation with the Claimant, a decision has clearly been taken that he will undertake OSO duties.

36. Ms. Wright appears to have been under the impression that the Claimant was already being paid at OSO rate.

37. Ms. Wright met with the Claimant briefly. There is no note of this meeting. The Claimant suggests it was a short discussion.

38. Both parties agree that pay was not discussed due to Ms. Wright believing that the Claimant was already paid at OSO rate. Beyond that we have the evidence of the Claimant and an email from Ms. Wright after the event as to what was said.

39. We find that the Claimant did not consent to any variation to his contract. There is no sensible evidence to the contrary.

40. There is a letter sent on the 10th October 2023 to the Claimant. Although it is marked by email, in his subsequent grievance, the Claimant refers to receiving it in the post.

41. The 10th October letter refers to 'agreed changes to your terms and conditions'. It is signed by Kathryn Pendlebury Head of People Services. It was said by Ms. Parr that any letter regarding changes to terms goes out in the name of Ms. Pendlebury. There was no evidence or suggestion that Ms. Pendlebury had any role in the sending of this letter.

42. The Tribunal finds that this is a boilerplate letter sent out when terms and conditions are being varied, with items such as relevant dates being inserted. There is nothing wrong with using template letters, but the letter must be accurate. There were no agreed changes to the Claimant's terms and conditions. The letter is inaccurate and misleading in this respect.

43. The bottom of the letter contains a signature section with the following words 'I confirm I have read, understood and accept the changes to my terms and conditions as detailed above'. This remains unsigned to this day.

44. Upon receipt of this letter, the Claimant put a grievance in objecting to the changes. The grievance was dated 17th October 2023. The grievance letter included the statement 'I would like to know therefore ground the decision of downgrading me is based'. Whilst this sentence is capable of being interpreted more than one way, one interpretation is that the Claimant was seeking to understand the legal basis upon which the downgrade occurred.

45. None of the Respondents witnesses were able to assist the Tribunal with identifying and explaining the legal basis upon which it was said that they had in mind at the time as to why they were acting as they did or the lawful authority as to why they were acting as they did.

46. It is not in dispute that the words 'dismissal', 'termination' 'the sack', 'reinstatement' or reengagement' or similar were ever used by either the Respondent or the Claimant.

47. Before the Tribunal the Claimant says that he was fit for work as a PCO in October 2023. The Respondent says that this is not supported by the evidence and submits that a finding of fact on this point is crucial to the proper determination of the discrimination claim.

48. The Tribunal finds that as of October 2023, the Claimant was not fit for work. We consider this is established by the Occupational Health report in July 2023 and the subsequent statements by the Claimant, for example in his grievance meeting in November 2023 when asked whether he had completed his physio with the response "I am struggling now so I am unsure.." This, combined with **the lack of** any positive medical evidence stating that the Claimant was fit for work as a PCO leads to this finding.

49. The Tribunal also reminds itself of the evidence of Mr. Worrall regarding the recruitment of PCO's, which the Tribunal accepts. There was a shortage of PCO's. The Respondent wished as many staff as possible to be working at PCO level in areas where it had a need for that. The Tribunal finds that if the Claimant were fit for full duties as a PCO in October 2023, this would have been welcomed by the Respondent and members of the management team.

50. The Claimant's grievance was heard by Mr. Worrall in November 2023. Whilst the grievance is described as being partially upheld, this does not appear to have resulted in any change of position by the Respondent. Nor did it establish the basis upon which the Respondent was said to have acted at the time.

51. Mr. Worrall did accept that there had been a lack of welfare contact with the Claimant whilst he was off sick and there was no return to work interview completed. Mr. Worrall did offer an apology in this respect.

52. The Claimant appealed this grievance. The appeal was heard in December 2023 by Marie Durning, Acting Deputy Director. She upheld the decision of Mr. Worrall.

53. On 17th February 2024, the Claimant commenced proceedings in the Employment Tribunal. This claim included an unlawful deduction from wages claim. The Claimant objection to the variation has been maintained throughout.

54. In February 2025, the Claimant resumed duties as a PCO. The Claimant remains an employee of the Respondent.

55. In respect of the named comparators, we accept the evidence of the Respondent in respect of the period of absence of the individuals and the work undertaken. The Claimant and Ms. Ahmed were able to give some evidence on this point, but this was in general terms whereas the Respondents evidence was more specific and detailed. To a certain extent, this is to be expected, the Respondent is more likely to have access to the necessary information. The Tribunal makes clear that it has not accepted this evidence unquestioningly, we have been critical of both sides in respect of evidence given. However, in relation to comparators, the evidence of the Respondents witnesses was straightforward, factual and credible.

56. We find that SZ had a period of absence of around six months and then returned to PCO duties.

57. IA is a reference to Ms. Ahmed who gave evidence on behalf of the Claimant. Her situation was not related to sickness absence but rather a breakdown in working relationships. We deliberately do not go into further findings as these are disputed between Ms. Ahmed and the Respondent and are collateral to these proceedings. It is sufficient to say that this was not sickness absence and was not in any way comparable to the Claimant's situation.

58. GS was absent for five months. He then moved into a Senior PCO role. This was at a greater level of pay and responsibility to the PCO role. He was fit and qualified in the view of the Respondent to undertake this role.

59. MG (also referred to as RM) was absent for a period of nine months rather than 11. Upon his return he was able to return to full duties as a PCO.

60. In contrast to the above, the Claimant had been absent for 11 months by October 2023. He was also not fit for work as a PCO. The motivation of the Respondent was following this length of time to bring matters to a head. We find this because it is corroborated by the few documents that exist from around this period, it is consistent with the evidence of Ms. Parr, which we have scrutinsed carefully and criticised where appropriate and we also accept that the Respondent did not wish the temporary situation to continue indefinitely.

61. In terms of the work that the Claimant undertook between October 2023 and February 2025 that fell within the definition of a PCO, the Tribunal finds that the Claimant was undertaking this work in error. Essentially, insufficient care or thought was being applied and the Claimant was on occasion being given what can only be classed as PCO work. The Respondent has recently arranged for the Claimant to be paid for this specific work at PCO rate and that payment has been processed with a view to it being received by the Claimant at the end of April 2025.

The Law

62. S.13 Equality Act 2010 provides

(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.
(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.
(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.
(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

63. Section 23 Equality Act 2010 provides:

(1) On a comparison of cases for the purposes of section 13, 14, 19 or 19A there must be no material difference between the circumstances relating to each case.

64. Section 136 Equality Act 2010 provides

Burden of proof
(1)This section applies to any proceedings relating to a contravention of this Act.

(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.

(4)The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

65. The leading authority in respect of the burden of proof is Madarassy v Nomura PLC [2007] IRLR 246. Mere disparate treatment will not, without something more be sufficient to reverse the burden of proof.

66. Bahl v The Law Society [2004] IRLR 799 is well known authority for the proposition that the mere fact that the actions of an employer are unreasonable does not automatically mean that they are discriminatory.

67. Section 13 Employment Rights Act 1996 provides:

Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

68. In Hogg v Dover College [1990] ICR 39 an employee successfully claimed that the change to his contract of employment was such that it amounted to a dismissal and thus entitled him to claim unfair dismissal.

69. We were also referred to Smith v Trafford Housing Trust [2012] EWHC 3221 in the High Court. It is authority for the proposition that once a contract ends there is no right to be paid post that contract.

70. In Jackson v The University Hospitals of North Midlands NHS Trust [2023] EAT 102, the Employment Tribunal President, Judge Clarke, sitting in the EAT held:

"The case of Hogg v. Dover College and its usual companion, Alcan Extrusions v. Yates [1996] IRLR 327, are familiar fare to employment lawyers when giving advice about the consequences of an employer's decision to restructure its workforce. When an employer has neither sought nor achieved agreement with the affected employees, and when it does not wish to take the so-called "fire and re-hire" option, it may consider the risky option of unilaterally imposing a change to terms and conditions of employment. The options available to an employee in response are widely understood to comprise: (1) to resign and claim constructive unfair dismissal, subject to qualifying service and showing that the breach was repudiatory; (2) to waive any repudiatory breach/affirm the contract and agree to work under the new terms; (3) depending on the nature of the change, to refuse to work under the new terms and (in terms) dare the employer to dismiss; (4) to "stand and sue" by working under protest but bringing proceedings for breach of contract and/or any shortfall in wages (the classic case being Rigby v. Ferodo Ltd 1988 ICR 29 HL); and (5) to work under the new contract but assert dismissal from the old contract, which – subject again to qualifying service – can form the basis for a complaint of unfair dismissal. The fifth option is the Hogg dismissal." (Para 30).

Conclusions

71. The Tribunal will consider each claim in turn.

Direct Race Discrimination

72. We start with some of the points that have arisen in this case.

73. The Tribunal did not hear from Ms. Wright, who for the purposes of this case was the decision maker. The Tribunal has taken this point into account. It is a point of some concern. By not having the decision maker before the Tribunal the Claimant has not had the opportunity to cross-examine the decision maker and to seek to obtain evidence through cross examination that would indicate

that the decision was tainted by race. In turn, the Tribunal has not had the opportunity to hear from the decision maker.

74. Whilst the Tribunal understands the concept of there being no property in a witness, it is important to acknowledge that this individual is accused of the sole discriminatory act and remains employed by the Respondent. To expect the Claimant to call such a witness is artificial.

75. We have considered this disadvantage to the Claimant. The Tribunal readily recongnises that in some cases, this could be a point of real significance. However, in the present case, the Tribunal has reached the conclusion that there is little that could have been put to the witness that establishes potential racial discrimination.

76. In considering this disadvantage, we have looked at the other aspects of the Claimants case, whether it is in his pleadings, witness statement or grievance or grievance appeal documentation. We have not been able to identify a basis upon which an inference of discrimination would be drawn.

77. The Tribunal has found that as a fact around September/October time, the Claimant was not fit for work as a PCO. At the very least, the Respondent did not have sufficient information from which it could conclude that the Claimant was fit to work as a PCO. We remind ourselves of the basic evidence, conformed by Mr. Worrall that there is a shortage of Prison Officers. The Tribunal concludes that the Respondent wanted the Claimant to be working as a PCO and it would have been to the benefit of the Respondent for the Claimant to be working as a PCO.

78. The Claimant submits to us in strong language that the way he was treated was because of his race. Effectively, the core of the submission is that such a poor approach would not have been taken in relation to someone of a different race. We reject this submission. The Tribunal has been critical of the approach of the Respondent. It has considered whether to draw adverse inferences from the approach of the Respondent. The Tribunal does not do

so. The Tribunal finds that the approach of the Respondent is not because of the Claimant's race. It is down to poor thought processes that it would have applied in respect of any individual. The underlying point made in Bahl v The Law Society regarding unreasonable conduct not automatically equating to discrimination is apt here.

79. Whilst the Claimant puts his case on the basis that this was an overt discriminatory decision, the Tribunal has also considered whether it is possible to establish a prima facie case that subconsciously the Claimant was treated less favourably because of race. We do not find this to be the case. There is simply no racial element, whether conscious or subconscious.

80. The point is that however the case is put, there is no evidence tainting any part of this decision with race.

81. In terms of actual comparators, no comparator is in a similar situation. No comparator has been identified who had the same level of absence as the Claimant. The evidence of Ms. Ahmed assisted the Respondent in this respect. There is also the crucial factor that the Claimant was not fit for work as a PCO on the 1st October 2023. These points are a sufficient answer to the Claimant's reliance on actual comparators.

82. The Claimant particularly relies upon AT. The Tribunal concludes based upon he evidence it has heard from both sides that AT was not in a comparable situation. The period of sickness was much shorter, around 4 weeks, but also the Respondent had a clear business need for AT to undertake 'Details' duties at PCO level.

83. We have also considered whether any of the comparators relied upon could be evidential comparators to assist in the use of a hypothetical comparator. We have not been able to identify an individual or factor from which an inference of discrimination was drawn. Within each of the comparators, there is a clear distinction between the Claimant which not only makes them unsuitable to be an actual comparator, but also there are straightforward

explanations for their situations and therefore it is not appropriate to draw inferences of discrimination.

84. In terms of a hypothetical comparator, we find that a hypothetical person of a different race to the Claimant and in this case white has been referenced for these purposes, would have been treated in the same way. The underlying motivations of the Respondent would be the same and they would result in the same outcome.

85. The burden of proof does not shift to the Respondent under s.136 in this case.

86. Therefore, the claim of direct race discrimination is not well founded and is dismissed.

Unlawful Deduction From Wages

87. The Respondent contends that there can be no unlawful deduction because the Claimant was dismissed within the meaning of Hogg v Dover College and therefore, he was paid in accordance with his new job.

88. Firstly, we consider the pleading point. We determine that the point is not pleaded. Para 13 of the Grounds of resistance refers to ‘formally changed’. It does not refer to dismissal, termination, the ending of a contract. It does not refer to Hogg v Dover College.

89. Therefore:
    a. The point is not pleaded in the ET 3.
    b. It was not raised at the Preliminary Hearing that took place in this case
    c. It was not inserted into the list of issues.
    d. It did not form part of the amended Grounds of Resistance following the Preliminary Hearing
    e. It is not explicitly referred to in the witness statement
    f. It is not explicitly referred to in the documents.

90. We consider that it is prejudicial for this to be raised now. The Claimant is unrepresented. He was not aware prior to the first day of this case when the Judge asked the Respondent as to what its case was that the Respondent was asserting that it had dismissed the Claimant. . He has not brought a claim of unfair dismissal, nor sought a previous amendment to that effect, not least because he has not been told of the termination.

91. The prejudice is greater to the Claimant than to the Respondent. The Claimant has been denied the opportunity to raise a potential claim and faces a new defence at the door of the Court. In contrast, the Respondent faces the prejudice of not being able to run a defence, but that prejudice must be seen in the context of it being of its own making. The Respondent is a large company. It has been legally represented throughout by specialist national solicitors.

92. Nonetheless, the Tribunal has considered the Respondents case as articulated at the start of the hearing and via submissions in the alternative.

93. Paragraph 30 of **Jackson** cited above is a basic statement of the law.

94. If the Respondent's submission were to be accepted it would not only be contrary to the stated legal position in **Jackson** but also undermine the concept of a unilateral variation and an employees ability to claim unpaid wages following the variation.

95. We have not been referred to a case in which it is the Respondent alleging that there had been a Hogg v Dover College dismissal. The underlying rationale is that it is the employee that makes such a claim in order to bring proceedings.

96. Because Hogg v Dover dismissals and the resulting cases are contended for by Claimants, it is right that an employer need not use express words of termination in order for Claimant's to contend that they are dismissed. However, the wording of para 30 of **Jackson** again explains the underlying point. The five propositions are expressly described as "the options available

to an employee" together with the facts that these are the options available to an employee whose employer has not gone down the fire and rehire route.

97. The contrast in the present case is that the Tribunal has before it an employer saying that it dismissed the employee in the Hogg sense but not fire and rehired. In para 30 of **Jackson**, the stage before you get to the five options is that the employer has not gone down the fire and rehire route. The Respondents submissions would result in there being no distinction between fire and rehire and a Hogg v Dover dismissal. If it (Hogg) were a matter to be relied upon by a Respondent then there is no material distinction between fire and rehire and a Hogg dismissal, both being terminations by an employer with an immediate rehiring.

98. Para 30 of **Jackson** provides a clear roadmap in this case. It is not claimed to be a case of fire and rehire. The Claimant has then chosen option 4 which is to stand and sue. This route is in accordance with established understanding of the law, is straightforward and does not require the necessary contortions that would be required to reword para 30 of James in order to then apply Hogg v Dover in a way that we are not aware of it being applied previously.

99. The contract of employment contains a variation clause at clause 24. I raised this with the Respondent at the outset and the opportunity was taken to take instructions. The Respondent had not pleaded reliance on clause 24, it did not follow the wording of the clause at the relevant time and did not rely upon the clause before me.

100. The contract of employment expressly states that the Respondents policies do not have contractual effect.

101. Therefore, the Tribunal finds that this was a unilateral variation by the Respondent in response to which the Claimant took the option of 'stand and sue'.

102. The Claimant had an express term in his contract as to his pay. To pay him less than that express term was an unlawful deduction. The deduction

was not authorized by statute, by the contract of employment or by prior written consent.

103. Having found there was a deduction, the Tribunal proceeds to note the following points.

a. The Claimants objection was clear in terms of raising a grievance, appealing that decision and pursuing Employment Tribunal proceedings. The objection persisted.
b. The Respondent has not pleaded affirmation. In submissions, it was confirmed that it does not rely on affirmation.

104. Before the Tribunal, the Respondent accepted the jurisdiction of the Tribunal to consider the claim up to February 2025 when the Claimant recommenced full Prison Officer duties.

105. The respondent has undertaken the necessary calculations. It has provided those calculations to the claimant in writing prior to the final day of this case. The tribunal is told that the calculations are on a gross basis. Therefore, under the Income Tax (Earnings and Pensions) Act 2003 the respondent must pay to the claimant this sum and make any necessary tax and National Insurance deductions from it. As the claimant remains employed, we would also anticipate pension deductions being made from this. The Respondents calculations include and therefore deal with any prior overpayment and also deals with any sums that will be paid to the claimant at the end of April 2025.

106. Therefore the claim of unlawful deduction from wages is well founded. In accordance with the respondents calculations, which have not been contradicted by the Claimant, we ordered the Respondent to pay to the claimant the sum of £6549.83.

107. As a concluding remark, the Tribunal seeks to explain to the parties where the Respondent went wrong. The Respondent is a large business with

access to support and advice. It did not handle this situation well. It did not follow the basic position in law when seeking to vary contractual terms. This situation was entirely avoidable. The Tribunal was unimpressed with the level of thought or effort that went into this situation or the basic points of keeping notes or where documents do exist, complying with disclosure obligations. These points are separate to the question of whether there was an unlawful deduction, but rather they seek to explain that the Claimant has not succeeded on a technicality but rather on the basis that the Respondent has not followed the basic steps that it needed to and the root cause of that was a passive approach by HR and a lack of general thought to the point.

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Employment Judge Anderson

14th April 2025
Revised Under Rule 67 on 12th May 2025

JUDGMENT SENT TO THE PARTIES ON
12 June 2025

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990
ARTICLE 12

Case number: **2401136/2024**

Name of case: **Mr J Masele** v **Sodexo Limited**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is:12 June 2025

the calculation day in this case is: 13 June 2025

the stipulated rate of interest is: **8% per annum**.

Paul Guilfoyle
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note:
   www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.