



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000403/2024

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Held in Edinburgh on 9 & 10 June 2025

Employment Judge Sangster

10 **Mr D Ukaenwe**

**Claimant
In Person**

15 **Sodexo Limited**

**Respondent
Represented by
Ms A Stobart
Advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant's complaints of direct race discrimination do not succeed and are dismissed.

REASONS

25 **Background**

1. The claimant presented complaints of direct race discrimination and unfair dismissal. His complaint of unfair dismissal was struck out on 25 September 2024, as the claimant had insufficient service to pursue that complaint. In a judgment sent to the parties on 9 December 2024, Employment Judge King confirmed that claimant's application to amend his claim was permitted in one respect, and that it was just and equitable to extend the time limit for presentation of the complaints.

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2. The parties lodged a joint bundle of documents for the final hearing, extending to 200 pages. A further document was added during the hearing.

3. The claimant gave evidence on his own behalf. He did not call any further witnesses.
4. The respondent led evidence from:
 - 4.1. Donny Wornin (**DW**), Soft Services Manager; and
 - 5 4.2. Derek Charmichael (**DC**), Deputy Facilities Manager.

Issues to be Determined

5. The issues to be determined were discussed at a preliminary hearing held on 20 January 2025, and recorded in the note issued by Employment Judge Hoey following that hearing. They are as follows:

Direct Discrimination – s13 EqA

6. Did the respondent do the following:
 - 6.1. Dismiss the claimant on 7 December 2023; and/or
 - 6.2. On or around October 2023 DC requested that the claimant carry out biohazard cleaning without adequate training.

7. If so, was that act less favourable treatment?
8. If so, was the treatment because of race? The claimant asserts it was because he is black.

Remedy

9. What financial losses has the dismissal caused the claimant?
10. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
11. If so, did the respondent or the claimant unreasonably fail to comply with it?
12. If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

13. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?
14. What interest should be awarded?

5 **Findings in Fact**

15. This judgment does not seek to address every point about which the parties have disagreed. It only deals with the points which are relevant to the issues which the Tribunal must consider to decide if the complaints made succeed or fail. If a particular point is not mentioned, it does not mean that it has been overlooked, it simply means that it is not relevant to the issues. The relevant facts, which the Tribunal found to be admitted or proven, are set out below.
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16. The respondent is a provider of outsourced facilities management services. The respondent provides custodial and rehabilitative services and operates seven prisons across the UK, on behalf of its client, the Scottish Prison Service.
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17. Following a period of study, the claimant secured a Level 3 Diploma in Plumbing Studies (6035-03), in 2015. He then worked in a series of different roles before commencing employment with the respondent on 18 October 2022, as a Maintenance Plumber. He was based at HMP Addiewell. The job description for the role stated that individuals must have obtained the relevant plumbing trade qualification and be able to perform tasks alone, or in a team, to a high standard without constant supervision. He entered into a contract of employment with the respondent which stated that his salary was £31,000.
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25 As part of his role, he often required to work alone, including undertaking on-call work, on a rota system.
18. In October 2023, whilst the claimant was on call over the weekend, he was asked to address a faulty staff toilet. This required removal of the back stack of the toilet, which resulted in excrement spilling onto the floor. Having completed the job, the claimant informed a prison officer that a biohazard clean would be required, and put a sign on the toilet door, stating it was out
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of order. He did not however inform the Duty Manager that a biohazard clean was required. Only the Duty Manager would arrange the biohazard clean. As a consequence, it was not done.

5 19. DC was acting up as Deputy Head of Facilities at that time. When he attended
work on the following Monday, he received complaints about the condition the
toilet had been left in. He noted that excrement had been left on the floor of
the toilet. He asked the claimant to meet him at the toilet to discuss the
situation with him. He suggested steps that the claimant could have taken,
10 during the repair, to mitigate the amount of waste spilling onto the floor and
asked the claimant if he would have left a private customer's toilet in the same
condition. The claimant indicated that he would not. DC asked the claimant if
he had informed the Duty Manager that a biohazard clean was required, so
that this could be arranged. The claimant indicated that he had not. DC
15 informed the claimant that he would arrange this, and went back to the office
to make the calls to do so. While he was there the claimant came and said he
had attempted to clean the toilet area. DC stated that he had not asked him
to do that and, as it would still need to be biohazard cleaned in any event,
there was no need for him to have done so. A biohazard clean was then
20 conducted.

20. Around the same time, the respondent identified that the claimant may not
have the qualifications required to enable him to undertake his role with the
respondent, as a Maintenance Plumber. This, coupled with a number of
25 concerns regarding the standard of his work, led them to schedule and hold
a formal investigation meeting with the claimant. This took place on 30
October 2023. DW conducted this meeting and a notetaker was also present.
Each of the concerns in relation to the claimant's work were discussed with
him. The respondent's concerns regarding the claimant's qualifications were
30 also discussed. DW stated that it appeared the claimant was qualified to
undertake the role of plumber's mate, rather than a plumber. The claimant
stated that he understood that he was fully qualified as a plumber. He was
asked to provide evidence of this, but could not do so to the respondent's
satisfaction. At the conclusion of the meeting, DW indicated that, due to the

issue regarding the claimant's qualifications, and the potential risks (to the claimant and others) of him potentially performing tasks as a lone worker which he was not qualified to undertake, he was suspended on full pay, pending further investigation. The claimant subsequently received a letter confirming this.

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21. By letter dated 28 November 2023, entitled '*Invite to Formal Meeting – SOSR*', the claimant was invited to a formal meeting to be held on 7 December 2023. He was informed that the meeting was to discuss his '*qualifications and credentials to perform the duties required as a qualified plumber*', as well as a number of stated concerns in relation to his performance. The letter highlighted that '*the outcome of this meeting may be termination of your employment for it some other substantial reason, due to your unsuitability to work in regulated activity.*' Enclosed with the letter was a pack of information to be used at the hearing. This included 2 print outs in relation to the qualification which the claimant holds, namely City & Guilds Level 3 Diploma in Plumbing Studies (6035-03). The first document, entitled '*Introduction*' stated '*Who is the qualification for?*' and provided the following response '*For candidates who want to work as plumbers in the building services engineering sector. This qualification does **not** make candidates fully qualified plumbers or plumbing and heating engineers (see Appendix 2).*' Appendix 2 was also enclosed. Appendix 2 is a template '*Disclaimer*'. It states that the document must be completed by the candidate and the tutor as part of the qualification induction, and contains a section at the end for the signature of the candidate and tutor. The text of the disclaimer is as follows:
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*'You have been enrolled on the **Level 3 Diploma in Plumbing Studies (6035-03)**. This is a qualification that tests both practical and knowledge based skills in a realistic working environment. When you have successfully completed this qualification you will be at **Improver/Plumbers Mate** level.*

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In order to fully qualify as a Plumber you will need to fully meet the performance criteria as laid down in the national occupation standards put

together by Summit Skills, the Sector Skills Council. This is covered in the City and Guilds 6189 Level 2 and 3 NVQ Diploma in Plumbing and Heating.

*Your tutor/assessor will be able to explain how you make progress on to the City and Guilds 6189 Level 2 and 3 NVQ Diploma in Plumbing and Heating. **However, you should be aware that relevant performance units will need to be carried out in industry.** Completion of the 6189 will enable you to apply to join a competent person's scheme.*

I can confirm that as part of my induction the above statement has been explained and I understand that completing the City and Guild Level 3 Diploma in Plumbing Studies (6035-03) qualification will not make me a fully qualified Plumber.

22. The claimant attended the meeting on 7 December 2023. DW conducted this and a note taker was present. At the meeting the concerns regarding the claimant's performance were discussed. In relation to his qualification to undertake the role, the claimant confirmed that his qualification was a Level 3 Diploma in Plumbing Studies (6035-03), and that he did not have the City and Guilds 6189 Level 2 NVQ Diploma in Plumbing and Heating, or the City and Guilds 6189 Level 3 NVQ Diploma in Plumbing and Heating. At the conclusion of the meeting DW adjourned to take further advice from the respondent's HR team. DW determined, having done so, that the claimant's employment would require to be terminated, as the claimant did not have the appropriate qualifications to undertake his role. While there was no suggestion that the claimant had misrepresented his qualifications when he applied for his role, and DW appreciated that the matter ought to have been picked up by the respondent at the recruitment stage, he concluded that the claimant did not have the qualifications which he ought to have to undertake the role of Maintenance Plumber. The health and safety risks that this created meant that the claimant could not continue in his role. Had it not been for that issue, the claimant's employment would have continued, and the performance issues identified managed via a performance improvement process.

23. Following the adjournment, DW indicated to the claimant that his employment would be terminated, with 4 weeks' notice, on the grounds of some other substantial reason, because he was not qualified to undertake the role he had been employed to do, namely Maintenance Plumber. The claimant's employment terminated on 8 December 2023, and he was paid 4 weeks' salary in lieu of notice.
24. The claimant submitted a letter, dated 21 December 2023, appealing against the decision to terminate his employment. The claimant did not assert race discrimination in his letter. He was invited to an appeal hearing. The appeal hearing was rescheduled, at the claimant's request. The claimant did not attend the rescheduled appeal hearing, as he had secured alternative employment by that point. He was informed, by letter dated 15 April 2024, that his appeal had been considered on the papers, but was not upheld.
25. The claimant commenced alternative employment on 12 February 2024, earning substantially the same as he did while working for the respondent.

Respondent's submissions

26. Ms Stobart, for the respondent, in summary, submitted that:
- 26.1. The respondent's evidence should be preferred to that of the claimant.
- 26.2. The claimant has not demonstrated that he was treated less favourably. Any employee in the same situation would have been treated in the same way.
- 26.3. There is no evidence to suggest that the respondent's actions were because of race.

Claimant's submissions

27. The claimant, in summary, submitted that:
- 27.1. His evidence should be preferred to that of the respondent.

27.2. He has worked in a number of other organisations, with the same qualifications.

27.3. He has suffered injury to feelings as a result of the respondent's actions.

Relevant Law

5 *Direct Discrimination*

28. Section 13(1) of the Equality Act 2010 (**EqA**) states that:

'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.'

29. The basic question in a direct discrimination case is: what are the grounds or
 10 reasons for treatment complained of? In ***Amnesty International v Ahmed***
 [2009] IRLR 884 the EAT recognised two different approaches from two
 House of Lords authorities - (i) in ***James v Eastleigh Borough Council***
 [1990] IRLR 288 and (ii) in ***Nagaragan v London Regional Transport*** [1999]
 IRLR 572. In some cases, such as ***James***, the grounds or reason for the
 15 treatment complained of is inherent in the act itself. In other cases, such as
Nagaragan, the act complained of is not inherently discriminatory but is
 rendered so by discriminatory motivation, being the mental processes
 (whether conscious or unconscious), which led the alleged discriminator to
 act in the way that he or she did.

20 30. It is unusual to have direct evidence as to the reason for the treatment
 (discrimination may not be intentional and may be the product of unconscious
 bias or discriminatory assumptions) (***Nagarajan***). The Tribunal should draw
 appropriate inferences as to the reason for the treatment from the primary
 facts with the assistance, where necessary, of the burden of proof provisions,
 25 as explained in the Court of Appeal case of ***Anya v University of Oxford***
 [2001] IRLR 377. *"Most cases turn on the accumulation of multiple findings of
 primary fact, from which the court or tribunal is invited to draw an inference of
 a discriminatory explanation of those facts"* (***Madarassy v Nomura
 International Plc*** [2007] IRLR 246).

31. When considering an appropriate hypothetical comparator, there must be no material difference between the circumstances relating to each case (s23(1) **EqA**), that *‘what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator’* (paragraph 3.23, **EHRC Code of Practice on Employment (2011)**). *‘The circumstances’* relevant for a comparison include those that the alleged discriminator takes into account when deciding to treat the claimant as it did (**Shamoon v Chief Constable of the RUC** [2003] IRLR 285).
32. For direct discrimination to occur, the relevant protected characteristic needs to be a cause of the less favourable treatment *‘but does not need to be the only or even the main cause’* (paragraph 3.11, **EHRC: Code of Practice on Employment (2011)**). The protected characteristic does however require to have a *‘significant influence on the outcome’* (**Nagarajan**). Significant in this context means more than trivial (**JP Morgan Europe Limited v Chweidan** [2011] IRLR 673)

Burden of proof

33. Section 136 EqA states that:
- ‘If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision.’*
34. There is a two-stage process in applying the burden of proof provisions in discrimination cases, explained in the authorities of **Igen v Wong** [2005] IRLR 258, and **Madarassy v Nomura International Plc** [2007] IRLR 246, both from the Court of Appeal. The claimant must first establish the first stage or a prima facie case of discrimination or harassment by reference to the facts made out. If the claimant does so, the burden of proof shifts to the respondent at the second stage to prove that they did not commit those unlawful acts. If the second stage is reached the Tribunal is obliged to uphold the claim unless the respondent can show that it did not discriminate.

35. In **Madarassy**, it was held that the burden of proof does not shift to the employer simply by a claimant establishing that they have a protected characteristic and that there was a difference in treatment. Those facts only indicate the possibility of discrimination. They are not, of themselves, sufficient material on which the Tribunal “could conclude” that on a balance of probabilities the respondent had committed an unlawful act of discrimination. Something more is required, but that need not be a great deal (**Deman v Commission for Equality and Human Rights and ors** 2010 EWCA Civ 1279, CA). The Tribunal has, at the first stage, no regard to evidence as to the respondent’s explanation for its conduct, but the Tribunal must have regard to all other evidence relevant to the question of whether the alleged unlawful act occurred, it being immaterial whether the evidence is adduced by the claimant or the respondent, or whether it supports or contradicts the claimant’s case, as explained in **Laing v Manchester City Council** [2006] IRLR 748, an EAT authority approved by the Court of Appeal in **Madarassy**.

Observations on Evidence

36. There was a dispute between the parties as to whether the claimant was instructed by DC to personally carry out biohazard cleaning, without adequate training.
37. The claimant asserted that he was instructed by DC to personally carry out biohazard cleaning of the toilet area, following the repair he had conducted over the previous weekend. The claimant indicated that he had protested, stating that he was not trained to do so, nor vaccinated. He stated that DC continued to insist that the claimant personally undertake the biohazard clean, despite his protestations, and the claimant subsequently did so.
38. DC stated that he did not instruct the claimant to do so, and would not do so, for a number of reasons:

38.1. While staff had previously conducted biohazard cleaning (and DC was previously trained to conduct biohazard cleaning), staff no longer did so. Prisoners had been trained to undertake this task and were paid to do so (at a rate significantly reduced from the sum which staff had previously been paid for the task);

38.2. Biohazard cleaning is a two-man job. The claimant could not have undertaken this himself;

38.3. He was aware that the claimant was not trained in biohazard cleaning, and no job would be instructed or undertaken unless the respondent's 3 checks for safety (correct training, correct equipment and a safe environment) were satisfied; and

38.4. As an ex-union representative, he would never ask someone to undertake a task they were not trained to do.

39. On balance, DC's evidence was preferred. The Tribunal accepted that, for the reasons he stated, DC would not have issued this instruction to the claimant. It was also noted that DC was trying to arrange a biohazard clean when the claimant later approached him to say that he had cleaned the area. DC would not have been making those arrangements if he had instructed the claimant to undertake the task, and would not have responded stating that the claimant was not instructed to do so, and a full biohazard clean would still be required in any event, if he had in fact instructed the claimant to undertake this task. A full biohazard clean was then undertaken by prisoners, not the claimant.

40. While there was detailed evidence in relation to the performance concerns identified, given the evidence in relation to the reason for the termination of the claimant's employment, and how those concerns would have been addressed had there not been an issue regarding the claimant's qualifications, the Tribunal concluded that these were not in fact relevant to the claimant's dismissal, so there was no reason to address these, in detail, in this judgment.

Discussion & Decision

Direct Discrimination

41. The Tribunal considered each asserted act of direct discrimination, considering whether the alleged treatment occurred, whether it amounted to less favourable treatment and, if so, what the reason for that treatment was: was it because of race.

DC requesting that the claimant carry out biohazard cleaning without adequate training.

42. The Tribunal's findings in fact in relation to this are set out in paragraph 19. The reasons the Tribunal reached those findings are explained in paragraphs 36-39. As the Tribunal concluded that the asserted conduct did not occur, the claimant's complaint in relation to this does not succeed and is dismissed.

Dismissing the Claimant

43. It was not disputed that the claimant was dismissed. The Tribunal considered whether that conduct amounted to less favourable treatment. The claimant relied on hypothetical, rather than actual, comparators.

44. The Tribunal concluded that any Maintenance Plumber (or indeed any other employee) employed by the respondent, who the respondent believed was not in fact qualified to undertake the role they were employed to do, would have been dismissed by the respondent. A hypothetical comparator in these circumstances would accordingly have been treated in exactly the same way as the claimant was treated.

45. Given these findings, the Tribunal concluded that the claimant did not establish that he was treated less favourably than someone would be treated by the respondent in the same, or not materially different, circumstances. As he did not establish a prima facie case, the burden of proof did not shift to the respondent.

46. Even if the burden of proof had shifted to the respondent however, the Tribunal would have reached the conclusion that the claimant's race did not

influence the respondent's actions, and there was no basis upon which it could be inferred that the respondent's treatment of the claimant, in dismissing him, was because of race. The Tribunal was satisfied that the respondent genuinely held concerns that the claimant's qualifications entitled him to work as a plumber's mate only, and that he was not a fully qualified plumber. His continued employment accordingly presented a health and safety risk. Those concerns, alone, were the reason the claimant was dismissed. Their decision to do so was not influenced, in any way, by the claimant's race

- 10 47. For these reasons, the claimant's complaint of direct race discrimination, in relation to his dismissal, does not succeed.

Employment Judge: M Sangster
Entered in register: 17 June 2025
and copied to parties