

JERSEY / JUDGMENT

Diogo Emanuel Sousa Dos Santos v GMK Construction Ltd

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IN THE JERSEY EMPLOYMENT AND DISCRIMINATION TRIBUNAL IN THE MATTER BETWEEN
DIOGO EMANUEL SOUSA DOS SANTOS CLAIMANT AND GMK CONSTRUCTION LTD
RESPONDENT TRIBUNAL

JUDGMENT

Reference: [2025] TRE 215 Date of Hearing: 9 March 2026 Before: Advocate C E Whelan MBE,
Deputy Chair, Ms K Henley and Mrs A Brown, Panel Members For the Claimant: in person For the
Respondent: Mr Seamus Friel

JUDGMENT

Introduction

The Claimant worked for the Respondent from 3 September 2025 until 22 September 2025 as a labourer. He claims discrimination on grounds of age, race and sex, together with unfair dismissal, failure to provide payslips, unpaid notice pay, unpaid wages and deductions. He sought compensation totalling £42,174. Mr. Greg Kelly is a principal of the company and was originally named as a Respondent. He did not appear at the case management hearing or at the substantive hearing. On the latter occasion we were presented with a doctor's letter explaining that health difficulties prevented him from appearing at the hearing. On both occasions the respondent(s) were represented by Mr. Seamus Friel, a highly experienced quantity surveyor giving freelance advice to the Respondent. Mr Friel was not present at any of the material times and the assistance that he gave us was limited to what he knew of the Respondent and of the construction industry generally. Summary of the Claims and Responses The Claimant's account was as follows. Age discrimination: The Claimant says on his applying for the job Mr Kelly told him he looked 40 and laughed, doing so in front of another worker. Race discrimination: The Claimant alleges that Mr Kelly mocked his use of the Portuguese language while he was on a break. Sex discrimination: The Claimant alleges that Mr Kelly grabbed his hip twice and called him "my love". He also says Mr. Kelly sent him a photograph of himself in the shower, and other inappropriate messages. Payslips, wages and notice: He alleges he was not given payslips or notice pay, and says dismissal followed his request for payment. The Respondent defended all claims. Age discrimination: The Respondent denies that this took place. Race discrimination: Again, the Respondent denies that this took place; the Respondent says he employs workers of mixed nationalities without

distinction, many of them Portuguese nationals. Sex discrimination: Once more, the Respondent denies that the incident took place. Payslips: Mr. Kelly says that there was a single delay given a systems update. Staff were asked to be patient and told that payslips could be collected from outside his home. Wages: The Respondent says that the Claimant contacted him excessively over a question of pay and hours; the Respondent had undertaken to attend to the question but became frustrated by the Claimant's persistence. The shower photograph – a head and chest shot – was sent to demonstrate that he was not ignoring the Claimant but was truthfully engaged on a personal task at the time. Employment and performance: The Respondent says that the Claimant was on a trial period and was found unsuitable. That is the consistent theme of messages from Respondent to Claimant which we were shown. Findings and Reasons

1. Identity of the Respondent On the claim form the Claimant names “Greg Kelly, owner of GMK Construction” as the Respondent. We are satisfied, however, that the Claimant's contract of employment was with the company GMK Construction Limited, and we identify that company as the correct Respondent to these proceedings.
2. Employment Status Although the Claimant was employed for just two and a half weeks — which the Respondent characterised as a trial period — we are satisfied that he worked under a contract of employment.
3. Unfair Dismissal The Claimant falls far short of the statutory length of service required to bring a claim of unfair dismissal. That requirement would fall away only if the dismissal were found to be discriminatory, in which case the claim would be treated as one of automatic unfair dismissal. However, we do not find the dismissal to have been discriminatory: the contemporary messages make clear that dismissal was based on perceived performance. The claim for unfair dismissal therefore fails. We add that the messages, although forthright about the Claimant's performance and to an extent eccentric, are not of further consequence in the case, save as referred to below.
4. Notice Pay The dismissal itself is not in doubt. At the hearing, the Claimant produced from his telephone a message of 22 September 2025 from the Respondent, sent during an exchange about pay, which read: “I'll pay you but don't bother goin to work.” The Claimant took this as dismissal and we find that he was entitled to do so. That brings Article 56 of the Employment (Jersey) Law 2003 into play. The relevant provision reads: 56 Minimum period of notice
 - (1) Subject to paragraph (9), the notice required to be given by an employer to terminate the employment of an employee who has been continuously employed for one week or more shall be not less than —
 - (a) one week's notice if his or her period of continuous employment is less than 2 years; The Claimant was accordingly entitled to one week's notice. He did not receive it. We therefore award one week's pay under this head.

5. Failure to Provide an Itemised Pay Statement Article 51 of the Employment (Jersey) Law 2003 requires an employer to provide a written itemised pay statement at or before the time of each payment of wages. The Tribunal may award up to eight weeks' pay as compensation for a breach. The Respondent accepts that electronic delivery of payslips was temporarily unavailable owing to a systems change, and that staff had been asked to be patient in the meantime. Applying the Tribunal's Guidance on Article 51 compensation, we place this breach at the lower end of the scale. There was a genuine reason for the failure, the breach was brief, and the Claimant did not suggest that it caused him particular difficulty. We accordingly award one week's pay under this head. No written terms We note that in the narrative part of the claim form, the Claimant says that he did not receive a 'contract' but has not claimed for no written terms in the types of claim section of the form. We have considered this aspect but find that it created no material loss or legal consequence. The claimant was informed where the handbook could be accessed.
6. Discrimination and Harassment We turn to the three allegations of discrimination. Having considered the evidence, we do not find that any of them is properly to be analysed as amounting to direct or indirect discrimination. We do, however, find it necessary to consider each under the statutory framework of harassment. The Legal Framework: Article 28, Discrimination (Jersey) Law 2013 Article 28 defines harassment as unwanted conduct related to a protected characteristic which has the purpose or effect of:
- violating the person's dignity; or
 - creating an intimidating, hostile, degrading, humiliating or offensive environment. In assessing whether conduct had that effect, the Tribunal must have regard to:
 - the Claimant's own perception;
 - all the circumstances of the case; and
 - whether a reasonable person would regard the conduct as having that effect. Article 28 sets out the test for discriminatory harassment. The Tribunal has identified a three-stage approach (Lally v Barrista Holdings Limited [2020] TRE 126 at paragraph 16): -
- (1) Did the respondent engage in any unwanted conduct?
 - (2) If so, did that conduct relate to the claimant's [protected characteristic]?
 - (3) If so, did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? That is the grid against which we have analysed the incidents put to us by the Claimant. Age: the "looked 40" remark The Claimant alleges that when he mentioned he was 26 years old, Mr Kelly said that he "looked 40, looked old and ruined", and laughed, in front of a colleague. The Claimant told us he felt "uncomfortable". We are mindful of the danger of dismissing any form of harassment as mere "banter"; indeed we are ultra-cautious about this. Nevertheless, we are satisfied that a reasonable person would not regard this incident

as having crossed the threshold required by the statute. Such a person, although alive to the necessary protections put in place by the statute is likely, we find, to allow a margin of tolerance for the realities of interaction between people. We find that this is particularly so in robust workplaces where no malice of any kind is involved. We make the latter observation generally without particular reference to the instant case. The perception of the claimant is only one of three criteria. In this instance we do not find harassment to have taken place in all the circumstances of the case and having in mind the likely view of a reasonable person. Sex: the touching and the shower photograph The Claimant alleges that Mr Kelly touched him on the hips twice and called him “my love”. Mr Friel, a freelance quantity surveyor who represented the company in Mr Kelly’s absence through illness, explained that in confined spaces on building sites — and particularly in roof work — it is commonplace for people to need to squeeze past one another. He also noted that Mr Kelly was in the habit of addressing at least one other male colleague as “my love”. We do not find to the necessary standard that this incident amounted to harassment. We also considered the episode in which, frustrated by repeated calls from the Claimant, Mr Kelly sent him a head-and-chest photograph of himself in the shower to demonstrate that he was not ignoring him. While that conduct might fairly be described as eccentric, we do not find that the conduct as a whole amounted to harassment on the grounds of sex within the meaning of the statute. The harassment claim on grounds of sex fails. Race: mimicry of the Claimant’s Portuguese accent and language This is the incident that has given us the most cause for concern. During a work break, the Claimant says that he was sitting in a van speaking by telephone to his partner in Portuguese. Mr Kelly opened the van door and mimicked the Claimant’s use of the Portuguese language. The Claimant asked for time to finish the call and Mr. Kelly walked away. We were told that Mr Kelly stopped when asked to do so. Nonetheless, the Claimant told us that he felt offended, and we have no doubt that the reasonable person envisaged by the statute would have agreed that this incident — short and unwitnessed though it was — served to violate the Claimant’s dignity or create a humiliating environment, as the statute describes. Article 42 says that the maximum compensation that can be awarded for financial loss and/or hurt and distress is £30,000. Article 39 of the Employment and Discrimination Tribunal (Procedure) (Jersey) Order 2016 sets out four things the Tribunal may consider when deciding how much compensation to award for hurt and distress:

- (1) The extent to which there has been a campaign of discrimination or harassment.
- (2) Whether the discrimination caused the person to lose his or her job.
- (3) The seriousness of the discrimination.
- (4) The length of time that the discrimination continued. The Tribunal divides awards for hurt and distress into three bands. The top band of £20,000 to £30,000 only applies in the most serious cases such as where there has been a lengthy campaign of discriminatory behaviour. The middle band of £5,000 to £20,000 is used for serious cases which do not merit an award in the highest band. Awards in the lowest band of up to £5,000 are appropriate for less

serious cases, such as where the act of discrimination is an isolated or one-off event. In appropriate cases the Tribunal may award no compensation or a nominal amount. In the case of *Flanagan v Island Greetings Ltd* 147/2015 the Tribunal made the following observations about awards of compensation: -

121. The Discrimination Law states that the Tribunal may not award more than £5000 for 'hurt and distress' when a complaint of discrimination is 'well founded'. This is considerably less than the amount of compensation available to the English Tribunals in respect of 'injury to feelings' following an act of discrimination but the Tribunal believes that it is still useful to set out the amounts that it considers will form the bands of compensation for any 'hurt and distress' suffered in successful discrimination cases before it in the manner described in *Vento* above. Accordingly the Tribunal will consider the three bands of compensation for hurt and distress to be as follows: (a) The top band, for the most serious cases, will normally be between £4,000 and £5,000; (b) The middle band, for serious cases which do not fall in the top band, will normally be between £1,500 and £4,000; and
- (c) The lowest band, for less serious cases, will normally be between £500 and £1,500. The Tribunal is aware that an applicant may consider sums of less than £500 to be derisory compensation for the hurt and distress that they suffered following an act of discrimination, when the value of that sum in everyday life is taken into account, and for that reason the Tribunal will endeavour to avoid awarding less than £500 or indeed make no award for hurt and distress at all if the circumstances deem it appropriate to do so." Taking account of all of the ameliorating circumstances — in particular that the conduct was brief, was unobserved and stopped when challenged — we find that compensation of £500 is appropriate under this head.

Conclusion

We have made awards under each of three heads: notice pay, failure to provide a payslip, and harassment by mimicry of his use of the Portuguese language. The claims for unfair dismissal and for discrimination or harassment on grounds of age or sex are dismissed. Both the claim form and the response state the Claimant's gross weekly wage as £686. Our calculations, where appropriate, have been performed on that figure. It will be for the Claimant to account to the tax and social security authorities as he is required to do. Schedule of Awards Head of Claim Basis Award Notice pay — failure to give statutory minimum notice Art. 56, Employment (Jersey) Law 2003 — one week's notice £686.00 Failure to provide an itemised pay statement Art. 51, Employment (Jersey) Law 2003 — one week's pay £686.00 Harassment — mimicry of Claimant's Portuguese accent and language Art. 28, Discrimination (Jersey) Law 2013 — £500.00 Unfair dismissal Insufficient length of service — claim dismissed Nil Age discrimination / harassment Threshold for statutory harassment not met Nil Sexual harassment Conduct not found to be harassment Nil TOTAL AWARD £1,872.00 Advocate C E Whelan MBE, Deputy Chair Date: 24 March 2026 Amended under Article 40(6) of the Employment and Discrimination Tribunal (Procedure)(Jersey) Order 2016

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Prepared on 22 October 2026 · Esheria