



**Case No: 3323899/2021 and 3306529/2022**

# **EMPLOYMENT TRIBUNALS**

**Claimant:** Mr M O Duodu

**Respondent:** (1) Comfort Care Services UK Ltd (CCS)  
(2) Praxedice Masuku  
(3) Amanda Branka  
(4) Abdullah Khan  
(5) Amtul Maham

**Heard at:** Reading Employment Tribunal (in person)

**On:** 17 and 18 October 2024

**Before:** Employment Judge Annand

## **Appearances**

For the claimant: Mr Duodu, representing himself

For the respondent: Mr Sheppard, Counsel

# **RESERVED JUDGMENT**

1. The Claimant's claims of (1) ordinary unfair dismissal under the Employment Rights Act, (2) wrongful dismissal and/or notice pay, and (3) holiday pay, are dismissed on withdrawal.
2. In addition, all claims pursued against the Fourth Respondent (Abdullah Khan) are dismissed on withdrawal.
3. The Claimant's equal pay claim under section 65 of the Equality Act 2010 is not well founded and is dismissed.

# REASONS

## Introduction

1. A preliminary hearing was held on 17 and 18 October 2024 to determine two issues regarding the Claimant's equal pay claim.
2. In essence, the Claimant's claim is that he was paid a lower hourly rate than two of his female colleagues, Ms Kah and Ms Hallem, who were employed to do the same role as him. The Claimant, Ms Kah and Ms Hallem were all employed as Support Workers. In December 2021, the Claimant was given a pay rise to £9.50 per hour and Ms Kah and Ms Hallem were given a pay rise to £10 per hour.
3. The First Respondent accepts that Ms Kah and Ms Hallem were given a greater pay rise than the Claimant, but the First Respondent argues that this was because the Claimant was employed as a Band C Support Worker, and Ms Kah and Ms Hallem were employed as Band B Support Workers. The First Respondent claims Ms Kah and Ms Hallem worked at different times during the week from the Claimant, which meant that they had different responsibilities compared to the Claimant, and that as Band B Support Workers they had more responsibilities than the Claimant.
4. Employment Judge George set out in her Case Management Order of 16 October 2022, the two issues to be decided at the preliminary hearing:
  - 1) Was the Claimant employed on like work with Ms Kah and Ms Hallem during his employment with the First Respondent which lasted between 15 June 2020 and 22 May 2022 within section 65(2) and (3) of the Equality Act 2010?
  - 2) If so, then on the presumption that there was a term of the contract between the Claimant and the First Respondent which was less favourable than the equivalent term in the contracts of employment between Ms Kah and Ms Hallem and the First Respondent respectively, was the difference because of a material difference between the case of Ms Kah and Ms Hallem and that of the Claimant which is not that of sex?
5. At the preliminary hearing on 17 and 18 October 2024, I was provided with a bundle of documents consisting of 418 pages, and three witness statements. The Claimant had produced a witness statement, and I was provided with witness statements from Ms Branker and Ms Fraser for the First Respondent. I heard oral evidence from all three witnesses, oral submissions from both parties, and I was provided with a skeleton argument on behalf of the Respondents.

## The factual background

6. On 15 June 2020, the Claimant was employed by the First Respondent as a Support Worker. The First Respondent is a company that provides care and support to vulnerable adults with mental health needs, challenging behaviour, learning difficulties and individuals recovering from substance or alcohol misuse, in supported housing. The First Respondent operates supported homes in 19 different local authority areas.
7. The Claimant was initially employed on an hourly rate of £9 per hour. He was employed to work 40 hours per week at a care home called Lanterns. The parties were agreed the Claimant's core hours were 3pm-11pm on a Friday and 7am to 11pm on a Saturday and Sunday. The parties were also agreed that the Claimant undertook ad hoc overtime during the week in addition to working his core weekend hours.
8. In the Claimant's contract of employment, the Claimant's 'Job Title' was described as, "Support Worker". There is no reference to his role being a "Band C Support Worker", or to "Band C" anywhere in his contract.
9. The First Respondent's Head of Human Resources, Ms Fraser, gave evidence to the Tribunal that the difference between Band A Support Workers, Band B Support Workers, and Band C Support Workers was covered in the induction training session that all support workers undertake when they start working for the First Respondent. The Claimant denied he had ever been told he was a Band C Support Worker.
10. The Respondent's position on the issue of the bands was somewhat confusing. In the Grounds of Resistance, an explanation was given for the different bands, which the First Respondent said in the preliminary hearing was, in fact, incorrect. In the First Respondent's Grounds of Resistance, they referred to the Claimant as being a Band B Support Worker, and in the First Respondent's witness statements the comparators were described as being Band A Support Workers, but at the preliminary hearing, the First Respondent said this was also wrong. The oral evidence given at the preliminary hearing was that the Claimant was a Band C Support Worker, and his comparators were both Band B Support Workers.
11. At the preliminary hearing, the First Respondent's evidence was that Band A Support Workers worked morning shifts during the week (7am to 3pm). The Support Workers Competency Framework sets out that the Band A Support Worker role involved 122 different role requirements and responsibilities, which included liaising with stakeholders who worked during normal business hours during the week such as doctors, psychiatrists, nurses, and pharmacists. According to the Competency Framework, Band A Support Workers are required to have a Level 3 Diploma in Health and Social Care or NVQ equivalent, and 3 years of hands on experience delivering mental health care/support.
12. The First Respondent's evidence was that Band B Support Workers were employed to work the evening shift during the week (3pm to 11pm). The Competency Framework sets out that the Band B Support Worker role involved 121 different role requirements and responsibilities. Band B Support Workers are required to have a Level 2 Diploma in Health and Social Care or

NVQ equivalent, and 1 year of hands on experience delivering mental health care/support.

13. The First Respondent's evidence was that Band C Support Workers were employed to work during the night shift or at the weekends. The Competency Framework sets out that the Band C Support Worker role involved 97 different role requirements and responsibilities. The Competency Framework states that it is "preferable" for Band C Support Workers to have a Level 1 or 2 Diploma in Health and Social Care or NVQ equivalent, and 3 months of hands on experience delivering mental health care/support.
14. On 6 December 2021, the Claimant was sent a letter informing him that his pay was to increase from £9 per hour to £9.50 per hour.
15. On the same day, Ms Hallem was informed her rate of pay would increase to £10 per hour. Ms Hallem had been initially employed to work, on 25 February 2020, on an hourly rate of £9 per hour.
16. On 6 December 2021, Ms Kah was also informed that her rate of pay would increase to £10 per hour. Ms Kah had been initially employed to work, on 7 October 2017, on an hourly rate of £8.66. This was subsequently increased to £9.33 per hour, before being increase to £10 per hour in December 2021.
17. Ms Branker, an Area Manager for the First Respondent, gave evidence to the Tribunal that a pay rise was awarded to all the staff at Lanterns in December 2021. Band A Support Workers were given a pay rise to £10.50 per hour, Band B Support Workers were given a pay rise to £10 per hour and Band C Support Workers were given a pay rise to £9.50 per hour.
18. The First Respondent provided copies of Ms Kah's Contract of Employment and Ms Hallem's Contract of Employment. Neither contract made reference to "Band B". However, the parties were agreed that Ms Kah and Ms Hallem's core hours were between 3pm and 11pm during the week, which was consistent with when the First Respondent said that Band B Support Workers worked.
19. On 13 December 2021, the Claimant sent an email to HR Officer Amtul Maham stating that there was a disparity in the wages and that there should be equal pay for equal work. The Claimant was aggrieved that his pay had increased from £9 per hour to £9.50 per hour, whereas Ms Hallem's pay had increased from £9 per hour to £10 per hour, and Ms Kah's pay had increased from £9.33 to £10 per hour.
20. On 24 December 2021, the Claimant had a conversation with his Line Manager, Ms Masuku. Ms Masuku made a note of the conversation and emailed it to Amtul Maham on 4 January 2022. In her note, Ms Masuku recorded that she explained to the Claimant that the pay difference was due to whether a worker was a Band A, Band B or Band C Support Worker. She noted, "Band A worked the morning shift Monday to Friday, Band B worked the evening shift, Monday to Friday and Band C worked the awake night shift, or the weekends." Ms Masuku also recorded in her note that the Claimant raised his concern that men and women should be paid the same if they were doing the same role.

21. One of the documents in the bundle for the preliminary hearing was an email sent from Ms Maham to Ms Fraser on 6 December 2021. The email contained a list of the staff at Lanterns, and showed their rates of pay before and after the pay rise that was implemented in December 2021. Each member of staff's name was highlighted in one of three colours. The evidence presented by the First Respondent to the Tribunal was that those names in orange were Band C Support Workers, the names in yellow were Band B Support Workers and those in green were Band A Support Workers. All those in green were awarded a pay increase to £10.50 per hour, all those in yellow were awarded a pay increase to £10 per hour, and all those in orange were awarded a pay increase to £9.50 per hour.
22. The Claimant's name was highlighted in yellow. Originally it was indicated that he would be given a pay rise to £10 per hour. However, it was noted next to his name ("incorrect please change to £9.50"). The evidence of the First Respondent was that the Claimant had been wrongly colour coded as a Band B Support worker, which is why his name was in yellow and the original indication was his pay rise would be to £10 per hour, when in fact he was a Band C Support Worker, and his name should have been in orange, and it should have been indicated that his pay rise would be to £9.50 per hour.
23. The parties were agreed that some of the staff whose names were highlighted in yellow, and who were awarded a pay rise to £10 per hour, were male and some were female, and that some of the staff whose names were highlighted in orange, who were awarded a pay rise to £9.50 per hour, were male and some were female.

### **The relevant law**

24. The equal pay provisions in the Equality Act 2010 make it unlawful for an employer to discriminate between men and women in relation to the terms of their contracts of employment, including in relation to pay. The Equality Act 2010 implies a 'sex equality clause' into every employee's contract of employment, enabling an employee to bring a claim where he or she is treated less favourably than a comparable employee of the opposite sex in relation to a contractual term.
25. Under section 66(2) a 'sex equality clause' has the effect that if a term of the claimant's contract is less favourable to the claimant than a corresponding term of a comparator of the opposite sex's is to the comparator, the claimant's term is modified so as not to be less favourable. Alternatively, if the claimant does not have a term which corresponds to a term of the comparator's that benefits the comparator, the claimant's terms are modified so as to include such a term.
26. When bringing a claim, a claimant must first identify a comparator, namely a person of the opposite sex in the same employment, whose contractual terms regarding pay are more favourable than his or hers. The claimant must also be employed on 'like work' with his or her comparator or 'work rated as equivalent' to his or hers under a job evaluation study, or 'work of equal value'. In this case, the Claimant has identified Ms Kah and Ms Hallem as comparators, and he says he is employed on "like work" to them both.

27. If a Tribunal finds a claimant is employed on like work to a comparator of the opposite sex, the next step is for the employer to show that the difference in pay between the claimant and the comparator can be explained by reference to a 'material factor' which does not involve treating the claimant less favourably than the comparator because of his or her sex. In the absence of a material factor, the claim must succeed. Alternatively, an employer who can point to a material factor explaining a pay differential that does not involve treating the claimant less favourably because of her sex will, in the absence of any suggestion of indirect sex discrimination, bring an end to the equal pay claim.
28. Where it is argued that the material factor is 'tainted' by indirect sex discrimination, the claimant will need to produce evidence, in the form of statistics or otherwise, that the material factor relied upon by the employer is tainted by indirect sex discrimination. If he or she can do this, the employer must then satisfy the Tribunal that reliance on the material factor in question can be 'objectively justified' as a necessary means of achieving a legitimate aim. If the employer shows justification, the claim will fail. If the employer fails to do so, the claim will succeed.

#### "Like work"

29. Section 65(2) of the Equality Act 2010 states that 'A's work is like B's work if (a) A's work and B's work are the same or broadly similar, and (b) such differences as there are between their work are not of practical importance in relation to the terms of their work'.
30. Section 65(3) states that, for the purposes of the comparison in section 65(2), "it is necessary to have regard to (a) the frequency with which differences between their work occur in practice, and (b) the nature and extent of the differences".
31. The test set out in section 65(2) contains two parts, which need to be considered separately. Firstly, a claimant's work must be the same as or, if not the same, 'broadly similar' to that of the comparator. Secondly, the difference between the work the claimant does and the work the comparator does must not be of 'practical importance' in relation to the terms and conditions of employment. In *Waddington v Leicester Council for Voluntary Service* [1977] ICR 266, EAT, the Employment Appeal Tribunal (EAT) confirmed that Employment Tribunals must consider these two parts separately when deciding whether a claimant is employed on 'like work' with a comparator.
32. In *Capper Pass Ltd v Lawton* [1977] ICR 83, EAT, the EAT held that, first, it must be asked whether the work is the same, or, if not, of a broadly similar nature. This involves a general consideration of the type of work involved, and of the skill and knowledge required to do it. Secondly, if the work is found to be of a broadly similar nature, a more detailed examination is required to ascertain whether the differences between the work being compared are of practical importance in relation to the terms and conditions of employment. This involves analysing the nature and extent of those differences and the frequency with which they occur in practice.

33. In *Shields v E Coomes (Holdings) Ltd* [1978] ICR 1159, CA, the Court of Appeal set out that it is for a claimant to prove that he or she does the same work or work of a broadly similar nature, but the evidential burden of showing 'differences of practical importance' rests on the employer.

#### The same or broadly similar

34. Whether the nature of the work being done by the claimant and the comparator is the same or broadly similar is a question of fact for the Tribunal, having considered the type of work involved, and the skill and knowledge required to do it. In *Shields v E Coomes (Holdings) Ltd* the Court of Appeal noted that the job description can be a useful starting point, but the focus must be on the actual work undertaken.
35. When examining whether work is "broadly similar", the EAT has warned Employment Tribunals not to attached too much significance to insubstantial differences. In *Capper Pass Ltd v Lawton*, the EAT stated: "*.. the definition requires the... tribunal to bring to the solution of the question, whether work is of a broadly similar nature, a broad judgment. Because, in such cases, there will be such differences of one sort or another it would be possible in almost every case, by too pedantic an approach, to say that the work was not of a like nature despite the similarity of what was done and the similar kinds of skill and knowledge required to do it. That would be wrong. The intention... is clearly that the... tribunal should not be required to undertake too minute an examination, or be constrained to find that work is not like work merely because of insubstantial differences.*"

#### Any differences of practical importance

36. Once a Tribunal has considered whether a claimant's work is the same or broadly similar to the work of a comparator, the next step is to consider the details of the claimant's and comparator's jobs and enquire whether any differences between them are of 'practical importance in relation to the terms of their work', and this requires a Tribunal to consider the frequency with which any such differences occur in practice, and the nature and extent of the differences.
37. The Equality and Human Rights Commission's 'Code of Practice on Equal Pay' states that differences such as additional duties, levels of responsibility, skills, the time at which the work is done, qualifications, training and physical effort could all be of practical importance.
38. The emphasis at this stage is not so much on the nature of the jobs done by the claimant and the comparator but on the differences in the tasks and duties that they respectively perform. In *Adamson and Hatchett Ltd v Carlidge* EAT 126/77 the EAT held that Tribunals must look closely at the detail to decide if there are any differences in the work actually done, how large those differences are and how often they operate. To help determine the existence or otherwise of such differences, the employer must provide the tribunal with a sufficiently detailed analysis of the jobs in question.

39. The time when work is carried out will not, without more, be regarded as a difference of practical importance for the purposes of sections 65(2) and (3) (*Dugdale and ors v Kraft Foods Ltd* [1977] ICR 48, EAT). Paragraph 36 of the Equality and Human Rights Commission's Code of Practice on Equal Pay also notes that a difference in workload does not itself preclude a like work comparison, unless the increased workload represents a difference in responsibility or other difference of practical importance. Similarly, a difference in the timing of work does not preclude a like work comparison, unless it represents a difference of practical importance, such as greater responsibility.
40. If a claimant is able to demonstrate that he or she is engaged on 'like work' to that of an appropriate comparator then it is presumed that any difference between the salary and that of the comparator is due to the difference of sex.

### Material factor defence

41. Under section 69 of the Equality Act 2010, a sex equality clause will have no effect if an employer can show that the difference in pay is due to a material factor, reliance on which does not involve direct or unjustified indirect discrimination,
42. In *Glasgow City Council and ors v Marshall and ors* [2000] ICR 196, HL, Lord Nicholls stated that the material factor defence will succeed if the employer can show that the factor put forward as the reason for the pay differential at issue is a) genuine and not a sham or pretence, b) the cause of the disparity (i.e. the factor must be 'material' in the sense that it is significant and relevant), c) not 'the difference of sex' (i.e. not due to sex discrimination, whether direct or indirect), and d) a material difference (i.e. a significant and relevant difference between the woman's case and the man's case).
43. In *Rainey v Greater Glasgow Health Board* [1987] ICR 129, HL, Lord Keith stated that 'material' should be construed as meaning 'significant and relevant'. The House of Lords' decision suggests that factors that can be regarded as being 'significant and relevant' go beyond the personal qualities of the respective claimant and comparator (i.e. skill, experience or training) and can embrace extrinsic matters such as administrative considerations affecting the efficient operation of the employer's business or other activity.

### The Tribunal's findings

#### Comparators and different contractual term

44. The first step in a claim for equal pay is for the claimant to identify a comparator, namely a person of the opposite sex in the same employment, whose contractual terms regarding pay are more favourable than his or hers.
45. In this case, the Claimant has identified two comparators of the opposite sex who are in the same employment as him. The parties are agreed that on 6 December 2021, the Claimant was awarded a pay rise to £9.50 per hour and his comparators were awarded a pay rise to £10 per hour.

#### "Like Work" – The same or broadly similar



46. In this case, the Claimant claims he was employed on 'like work' with his comparators
47. The Claimant, Ms Kah and Ms Hallem, were all employed as support workers, working at Lanterns, a supported house for vulnerable service users. The primary aims of the support workers were a) to support the service users and b) support the managers in the day-to-day operations of the supported housing unit.
48. The First Respondent did not dispute that the nature of the work being done by the Claimant was broadly similar to the work being done by Ms Kah and Ms Hallem.
49. Even if this had been disputed, I would have found the work being done by the Claimant was broadly similar to the work being done by Ms Kah and Ms Hallem. It is clear from the Competency Framework, that there was very considerable overlap in terms of the tasks carried out by the support workers in all three bands. In other words, the Competency Framework listed 97 tasks or responsibilities of a Band C Support Worker. The Band A and Band B Support Workers were also required to undertake those same tasks or responsibilities, as well as having to undertake additional tasks and having additional responsibilities.

#### Any differences of practical importance

50. The next step was to consider the details of the Claimant's role as a Band C Support Worker and the comparators' roles as Band B Support Workers in order to decide whether any differences between them are of 'practical importance in relation to the terms of their work'. I took into account the frequency with which any such differences occur, and the nature and extent of the differences.
51. The First Respondent argued that the Band B Support Workers liaised with stakeholders to a significantly greater degree than the night staff and weekend workers. This was because the Band A and Band B staff worked during normal business hours, and the Band C staff worked the night shift or at weekends, when the majority of the stakeholders were not working. The First Respondent also argued that the staff who worked the evening shift during the week (Band B Support Workers) had a greater range of responsibilities than the Band C Support Workers.
52. Under the Competency Framework for Support Workers, there are 20 different categories listed. In nearly every category the Band B Support Workers are required to undertake additional tasks and have more responsibilities, which were not required of the Band C Support Workers. For example, under the heading "Support Service Users", the Band B and Band C Support Workers were both required to "actively engage with the SU to understand them as a person, their history, current situation, aspirations, motivations, likes and dislikes", "actively engage with the SU to understand their illness, how it impacts them and others, triggers, medications and therapies etc", "actively engage with the SU to understand their support needs (including mental health, physical health, behavioural, social activity,

and independent living) support plans etc”, and “In conjunction with SU, inter-professional stakeholders and KWS implement a personalised support plan”. However, only Band B Support Workers are required to “Carry out periodic assessments of SU support plan and progression against plan. Agree and document required changes with SU and stakeholders, implement changes.” Band C Support Workers were not required to do this.

53. In nearly every category of the Competency Framework, Band B Support Workers were required to carry out “periodic assessments” of different issues and agree and document any changes with the service user and stakeholders. The Band C Support Workers were not required to do this. In addition, Band B Support Workers also had additional responsibilities that required them to liaise with other people who worked outside of the First Respondent’s organisation, which the Band C Support Workers were not required to do. For example, the Band B Support Workers were required to “actively support SUs to access education, training, voluntary or paid employment, facilitate support via employment officer”, and “Attend stakeholder meetings to maximise outcomes for SUs and service. Document key points and follow-up actions, execute actions and provide timely feedback.” The Band C Support Workers were not required to do this.
54. As a result of the evidence presented at the hearing, I concluded that the Band C Support Workers did not have the same range and level of responsibilities as the Band B Support Workers, and that the differences in the roles are of ‘practical importance’ in relation to the terms of their work.
55. I did not find that Band B and Band C Support Workers carried out the same roles but just at different times. The Band B Support Workers have more responsibilities in terms of the paperwork that needs to be completed regarding the service users. The Band B Support Workers have to carry out periodic reviews, and document those reviews. They were also required to liaise with a wider range of third parties (“stakeholders”) than Band C Support Workers, and were required to do this more frequently. While I accept that Band C Support Workers may need to consult with medical professionals during the night or at the weekend if there is an emergency, or if they have an urgent concern, the majority of the consultations with third parties (such as doctors, nurses, pharmacists, and other mental health experts) occurred during normal business hours.
56. In addition, Band B Support Workers were required to have a higher level of qualification and more “hands on” experience than Band C Support Workers. This is consistent with the fact that the Band B Support Workers role required they carried out additional tasks and had greater responsibilities than the Band C Support Workers.
57. For these reasons, I found that Band B Support Workers were required to undertake more tasks and had more responsibilities than the Band C Support Workers. I concluded the differences in the roles are of practical importance in relation to the terms of their work. I therefore did not find that the Claimant was employed on “like work” to his comparators, Ms Kah and Ms Hallem. As a result, the Claimant’s claim for equal pay cannot succeed and is dismissed.

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Employment Judge Annand  
Date: 6 November 2024

Sent to the parties on:

8 November 2024

For the Tribunal Office: