



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4104072/2019**

**Held in Dundee on 22, 23 & 24 October and 12 December 2019**

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**Employment Judge J Hendry  
Tribunal Member J McCullagh  
Tribunal Member AB Grant**

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**Mr W Debek**

**Claimant  
In person**

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**Bosch Rexroth Ltd Scotland**

**Respondent  
Represented by  
Mrs L Miller,  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The unanimous judgment of the Tribunal is that:

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1. The claimant's application for a finding of unfair dismissal does not succeed and is dismissed;
2. The claimant's application for a finding that the respondent was in breach of section 13 and 26 of the Equality Act 2010 does not succeed and is dismissed.

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E.T. Z4 (WR)

## REASONS

1. The claimant in his ET1 seeks findings that he was unfairly dismissed for making health and safety disclosures in terms of section 43B of the Employment Rights Act 1996 and that his dismissal was automatically unfair. The claimant also made an application that the respondent was in breach of the Equality Act arising from an incident where he was racially abused by a colleague at work. The respondent denied the factual basis underpinning the claims and also argued that in relation to the race discrimination claim that they took all reasonable steps to prevent acts of discrimination in terms of section 109(4) of the Equality Act 2010.

### Issues

2. The issues for the Tribunal were in the first instance essentially factual. The Tribunal had to examine what happened on 28 February 2019 when the claimant was at work and whether he had made a protected health and safety disclosure. The Tribunal also had to consider the reason for the termination of the claimant's employment and whether it related to the alleged disclosure. The Tribunal then had to consider the claim for race discrimination and whether the respondent had made out the statutory defence in terms of section 109(4) of the Equality Act 2010.
3. The Tribunal heard evidence from the claimant on his own behalf. We considered the documents lodged and contained in the Joint Bundle of the documents. This bundle was added to in the course of the hearing with the consent of parties.
4. The Tribunal heard evidence from the following witnesses on behalf of the respondent:
- Thomas Lamont, Team Leader  
James King, Production Manager  
Derek J Donnelly, Head of UK Facilities, Security and HSE  
Andrew Mackay, HR Director
- The claimant gave evidence on his own behalf.

The Tribunal made the following findings in fact:

5. The claimant is a Polish national. He has worked in the UK for some years latterly as a Security Officer assigned to the respondent's premises in Glenrothes. In that role he became acquainted with some of the respondent's personnel including Mr Donnelly.
- 5 6. The claimant has a good understanding of English.
7. The claimant was keen to join the respondent company. He asked about vacancies in their production facility at Glenrothes. The claimant was eventually interviewed for a post as "Assembly Associate" on 31 January 2019 at which an interview assessment form was completed (JB17). The  
10 claimant also completed an Equal Opportunity Form (JB16) prior to the interview.
8. The claimant was successful at interview and received a letter from the respondent company on 7 February 2019 (JB18) offering him temporary employment as an Associate (Category F) in their Assembly Department.
- 15 9. The hours of work were 37 hours per week. The claimant was due to start on 11 February 2019 which he did.
10. The respondent company also sent the claimant a statement of terms and conditions of employment (JB19).
11. The claimant's weekly wage was £317.61 plus an hourly "NC" rate of  
20 £2.20. The wage was payable monthly.
12. The terms and conditions document was signed by the claimant on 10 February. There are references in it to disciplinary and grievance procedures.
13. The respondent has an induction process which the claimant completed.  
25 An induction checklist was completed and signed by the claimant on 11 February. It included reference to general information about the company together with references to various policies including an Equal Opportunities and Dignity at work policy and the disciplinary and grievance procedures. The claimant was not given copies of the policies  
30 themselves. These were available on the company intranet and from the HR department at Glenrothes.

14. It was company policy that all employees including agency staff had to go through the company induction process.
15. Once the claimant had completed the induction process he received on the job training from an experienced employee Mr Feeney.
- 5 16. The respondent assembles electric engines of various sizes at Glenrothes. There are two “wash areas” where components for the engines are washed clean prior to them moving onto the assembly line where the motors are built.
- 10 17. The materials put in the wash are generally not heavy. The cylinder blocks that are washed weigh 20kg. Larger heavier cylinder blocks are occasionally washed. They are washed in another wash opposite the one the claimant worked in. There is a crane there lift them and to allow them to be handled safely.
18. The wash liquid used is not toxic.
- 15 19. During his first week of work the claimant and Mr Feeney would obtain a large bin containing metal parts, principally metal cylinder blocks which would be washed and dried by them in the wash area to which they were assigned. The cylinder blocks would then be “lapped” or ground on one side to allow visual inspection of the timing face. A quality check was expected to be carried out at this stage and any defective parts were not passed on to the assembly line. There was guidance as to the level of defect that was acceptable. A detailed manual showing the operation of the wash area was available at the claimant’s workstation called the Document Assembly Associate Training Manual (JB23). At page 152 of the Manual there were diagrams showing acceptable and unacceptable defects.
- 20 20. The claimant had obtained an engineering qualification in Poland. He was keen to work in engineering and assembly. He progressed well through the induction process and was voluble indicating to his managers that he was enjoying the work and coping well with it.
- 25 21. After working with Mr Feeney for a number of days the claimant was put, the following week, on the wash process on his own. The process

operating the wash is normally a one-person operation in that one person is rota'd or scheduled to work there, however, if other associates, such as those on assembly, are temporarily free from their duties they regularly help out in the wash process. The claimant had observed this. The factory was busy at this time.

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22. The claimant started work on his own during the week beginning 25 February.

23. On the first morning on his own the claimant spoke to Mr Derek Donnelly the respondent's HSE manager who had known him when he was a security guard and commented that he was enjoying his job.

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24. The team leader Mr Lamont spoke briefly to the claimant before the shift started that morning. The claimant raised no issues with him. Mr Lamont was in the habit of walking around the various assembly processes that he oversaw checking that there were no difficulties. Later in the morning while in the course of doing this he was advised by workers on the assembly line that cylinder blocks had been passed to them which showed signs of damage on the timing face. The defects were unacceptable and they should have been rejected. If they had been incorporated in the motors then this would have led to it being defective and if noticed scrapped.

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25. Mr Lamont and one of the assembly associates, Mr O'Donnell, approached the claimant in the wash area and told him that the cylinder blocks were damaged. The claimant said that he did not have time to carry out the requisite checks.

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26. Mr Lamont advised the claimant that the quality checks were part of the process and an important part of his duties. The claimant became annoyed and reiterated forcibly that he did not have time to "f...ing do that". Mr Lamont reminded him that the quality checks were part of his job. He told the claimant that he wouldn't be there long if he did not carry out these quality checks. The claimant became angrier and stated: "I'm f...ing going!" He then made comments such as the company was "a shit company". He made a reference to a briefing that staff had received a few days earlier about the company making substantial profits and

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commented to the effect that the company couldn't give him an extra man for assistance on the wash but was making millions of pounds in profit. He picked up his belongings and made his way to the locker room. Mr Lamont understood by his comments and actions that the claimant was walking out. During this period the claimant was repeatedly asked by Mr Lamont to hand over his security pass which allowed access to the factory. The claimant repeatedly refused.

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27. The claimant went to the canteen area. He stayed there for a short period. He was still angry. In order to exit the premises he would have to return and walk past other staff including Mr Lamont and also Mr King the manager whose office had a view of the production lines and the wash. The claimant decided to leave by the fire door.

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28. Mr Lamont arrived in the canteen and was told by a member of staff there that the claimant had left via the fire door and had 'kicked it in'. Mr Lamont looked out of the fire door and saw the claimant walking away. He shouted at him. The claimant did not look back but lifted his hand and made a dismissive gesture. He then made his way to the exit of the factory and left.

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29. Mr Lamont reported these events at points when they were occurring to Mr King. Mr King stayed in his office because he assumed that the claimant would come back to the wash area or as he was leaving would walk past his office allowing Mr King to then speak to him about what had happened between him and Mr Lamont. When he discovered that the claimant had left via the fire exit he assumed that the claimant was leaving his employment for good.

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30. Mr King spoke to the HR manager Mr Mackay and was asked by him what he wanted to do about the situation. Mr King indicated that as the claimant was on his probationary period then, given his behaviour, he did not want someone who behaved in that way to remain as an employee. Mr King then later discussed the incident with Mr Lamont and typed an incident report dictated to him by him (JBp31). The document was later signed by Mr Lamont and Mr Mackay on 2 April when Tribunal proceedings had been started.

31. Mr Mackay took a note of the discussion he had with Mr King on 28 February (JBp35). He confirmed that the claimant should be dismissed. Mr Mackay accordingly drafted the letter dated 1 March 2019 based on the information given to him by Mr King about the incident (JBp37). Mr King retrospectively confirmed his instructions by e-mail of 4 March (JBp36).

32. The letter of 1 March written to the claimant was in the following terms:

*“Dear Wojciech,*

*Following the events of 28<sup>th</sup> February 2019 your manager has taken the decision that you will be summarily dismissed. This is due to the fact that you left site premises, refused to hand in your ID badge and kicked and banged on a fire safety door to an extent that could have caused damage to the property.*

*This is regarded as Gross Misconduct covered in the company handbook as malicious or neglectful damage to property, failure to carry out reasonable instruction and leaving the premises early without prior permission.*

*Your leave date will be recorded as the 28<sup>th</sup> February 2019. You will receive all payments due up to and including this date. This includes any outstanding holiday entitlement. These payments will be made in March as the above information was received too late to be included in the February pay run.*

*Should you have any questions please do not hesitate to contact your manager Jim King. ....”*

Mr Mackay later arranged for the security pass to be deactivated.

33. On the morning of 1 March the claimant telephoned Mr Mackay. He was apologetic about the incident. He was told that his employment was terminated.

34. The claimant appealed the termination of his employment by letter received by the respondent on 4 March (JB9). The claimant asked for his dismissal to be reconsidered. He wrote:

5 *"I have started the job on the wash on the 18.02, and have worked very hard with co-worker for about one week, we have been constantly busy and he didn't have time to show me things as we need it to keep up with the production requirements, very heavy lifting was involved, and myself experienced back pain, however has been mentioned to me by other people that I would have to do the same amount of work by myself..."*

10 *From 26.02 I have worked with the colleague on the wash and the job was done as he knew everything about the job, but he only worked from 0600 to 1400 and unfortunately his contract ended on Wednesday. Thursday 28.02 I have worked on the wash myself, people started coming from the lines for things and this gave me great amount of pressure as I couldn't do things fast enough on my own, at some point I was called by Team leader Thomas to see cylinder block*  
15 *and there was wee mark on the timing face and I know as I have Diploma in Motor Vehicles Engineering that this is not good and tried to explain that I have no time to do everything by myself as I just have started as well, the Team Leader said that the guy from nightshift can, but I spoken to Jimmy as come to my work early and he said me that*  
20 *he have another guy to help, and we both know that this job requires two people as very heavy lifting is involved and great amount of motors is needed every shift. I have to say that no manual handling training has been given to me and no risk assessment has been shown for this job. After my explanation to Team Leader he has stated: 'you won't*  
25 *be here very long: and went to see Jim King. I went outside as started feeling dizzy and breathless, after couple of minutes decided to go to hospital, Team Leader was constantly on my back and keep asking for my badge and I didn't wanted to returned my card as I said: T I have my things in my locker and going off sick. After that I went to*  
30 *canteen and went outside through the fire door as I was short of breath, spend their couple of minutes and wanted to return as thought that Jim King my (might) come and I could explain myself, and have chopped the door as they have locked and never kicked or banged them, then My Team Leader opened the door and asked if that's me*  
35 *going away, and I stated I'm going off sick and went to A&E unit in Victoria Hospital and received help, however I have called to HR on*



*Thursday and stated that I'm off sick (sore back) and asked for my employment status and was told that my card has been deactivated, on Saturday received dismissal letter. I'm very disappointed that I have been treated that way by my Team Leader and that no one wanted to speak to me to find out what I have got to say, during my time on the wash I have been called 'Polish Bastard' but didn't reported this to management."*

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35. The claimant took advice about his legal position immediately after leaving the premises on 28 February.
- 10 36. The claimant wrote a second letter in similar terms to the respondent which they received on 8 March (JB11). The second appeal made reference to the Public Interest Disclosure Act.
- 15 37. The respondent's managers considered the position. Mr Mackay wrote to the claimant on 11 March indicating that the company did not accept that he had raised any disclosure and that the decision to terminate his employment remained in place.
- 20 38. The respondent has a Dignity at Work Policy (JB36). They have a Disciplinary Policy (JB37). They have a diverse workforce. There are no records of any previous claims for race discrimination being made at Glenrothes or dealt with by the HR department.
- 25 39. The respondent company has risk assessments for their various processes which they review periodically. There is no record of any reported back injury being caused by anyone operating the wash system. It is not regarded as heavy manual work by the company. The risk assessment for the wash was produced (JB3). The ergonomics for the wash process was checked on 5 April 2018 (JB32). Both washes were checked together and the wash tasks analysed. The finding was that for males there would be a possible risk the process was not recommended and redesign or action should be taken to control the risk.
- 30 40. Once the assessment had been made it was discussed with Mr Donnelly whose remit it was to deal with such matters. He had authority to make changes and buy equipment if he deemed it necessary. He questioned

the methodology of the assessment as he did not understand the finding  
He was told that both washes had been considered together. The second  
wash, that the claimant worked on, did not have a crane for lifting the  
heavier cylinder blocks. This was what Mr Donnelly understood to be the  
5 problem which gave rise to the assessed possible risk. Mr Donnelly  
explained to the analyst that the second wash did not handle the larger  
cylinder blocks only the 20kg ones but that if it was going to handle the  
heavier blocks then a crane would be provided to handle these. It was  
accepted that the provision of the crane would reduce the risk to  
10 acceptable levels.

### **Witnesses**

41. We did not find the claimant to be a particularly credible or reliable witness.  
We found it very difficult to reconcile the evidence that we had heard that  
he was happy in his new position with his evidence he gave that he was  
15 overworked and suffering back problems. He produced text messages  
from Mr Feeney which he said supported his position. Mr Feeney gave  
no evidence before us and we put little weight to their terms in the face of  
the clear evidence we had heard from the respondent which cast some  
doubt on Mr Feeney's claims to have injured his back at work.

20 42. During the course of the claimant's evidence he admitted that he had  
repeatedly refused to hand over his security card to Mr Lamont and had  
exited the premises through the fire exit and ultimately left the premises  
by this unofficial route. It appeared to the Tribunal that it was likely that  
he had become flustered being on the wash on his own and piqued about  
25 being pulled up over defects in the cylinder blocks being sent to the  
assembly line. He had made clear to the respondent his wish to move on  
to the assembly line. We gained the impression that the wash was a  
relatively straightforward process and one which the claimant thought was  
below his capabilities and this added to his annoyance when pulled up  
30 about problems with his work.

43. We have no doubt from the evidence that he became angry and left the  
premises. No evidence was produced from him to show that he had  
visited a hospital about any alleged strained back, or any evidence from

his family about recently developing back problems, or indeed that he had sustained any particular back injury through the wash process. Given the difficulties we had with his evidence we found it impossible to give sufficient credence to his allegation that he had been called a “Polish bastard” at around this time. The timing seems, as did the allegation that he had made a whistleblowing complaint to be rather convenient. He had apparently not mentioned these matters to either Mr Donnelly who he was on good terms with and whose remit was Health and Safety, his team leader Mr Lamont who made regular enquiries as to how he was getting on or indeed it appears to Mr Feeney with whom he remained in contact.

44. The respondent’s witnesses were generally credible and reliable witnesses. The principal witness of what happened on the 28 February was Mr Lamont and he appeared to us to be a relatively straightforward witness although the Tribunal had some concerns that both Mr Lamont and Mr King had somewhat exaggerated the allegation that the claimant had in some way “booted down the security door” as both put it. No evidence of damage to the door was produced. We considered that if this was actually what had been said by the staff member to Mr Lamont it was not meant to be taken literally but rather was a description of the claimant ‘storming’ out in a temper. As we noted there was no evidence produced from that source.

45. We accepted, however, that the situation that developed was unusual and difficult for Mr Lamont to deal with and that the claimant was angry.

46. Mr King, with the caveat above, was accepted by us as a credible and reliable witness.

47. Mr Donnelly appeared to us to be an honest witness. He had previously been on reasonably friendly speaking terms with the claimant when he was a regular Security Guard and who had a brief exchange with him on the morning of 28 February from which he understood the claimant was getting on well and enjoying his job.

48. Finally, Mr Mackay was a credible and reliable witness who gave his evidence in a straightforward and professional manner and we concluded that we could place some confidence in such evidence.

## Submissions

49. The claimant was advised that he could make submissions and that these could be divided into both factual and legal submissions but that the Tribunal would not expect him as a lay person to make any detailed legal submissions. The claimant after hearing submissions made by Mrs Miller who helpfully agreed to do her submissions first indicated that the comment "Polish bastard" was not nice. He had been annoyed by it. He did not believe the employers had followed the ACAS code because he was given no appeal. He believed that there was a considerable health and safety risk for anyone working at the wash. He had respect for Mr Donnelly and the ergonomics assessment showed that there was a problem. Mr Feeney had injured his back working at the wash and so had the claimant and Mr Lamont had threatened him with dismissal and this was wrong. He had made a public interest disclosure related to health and safety and suggested that the respondent did not look after employees properly. The race discrimination claim was not properly investigated.
50. At the preliminary hearing the claimant had indicated that he thought that the person who had called him Polish bastard was called Craig and that he was not an employee but temporary or agency worker. Mr Mackay contacted the agency that the respondent used and ascertained that there was someone called Craig who was there at the relevant time. He attempted to contact him but was unsuccessful in doing so.
51. Mrs Miller provided the Tribunal with oral and written submissions. Essentially, her position was that no protected disclosure had been made. Mr Lamont corroborated to an extent by Mr King and made it clear that no disclosure information was made. There was no reference to health and safety matters nor indeed indication of a relevant failure. She accepted that if a disclosure in relation to the wash process causing back injury had been made it would be in the public interest the other elements for a successful protected disclosure did not exist in her view. She made reference to the case of ***Cavendish Munro Professional Risk Management v Geduld [2010] IRLR 38***, to the case of ***Kilraine v London***

***Borough of Wandsworth [2018] EWCA civ 1436*** and to the case of ***Eiger Securities LLP v Korshunova UKEAT/0149/16***.

52. Turning to the race discrimination Mrs Miller submitted that the claimant's evidence could not be relied on. He alleged that he was called Polish bastard by an agency worker during his induction period when working alone in the wash area. The context alleged is that he claims they were speaking about Bosch being a good company to work for and the claimant stated he had been working continuously since he arrived in the UK. He claims that for some reason the agency worker then referred to him as "Polish bastard!". The remark was not reported to anyone at the time even although he was a new employee. The claimant was a security guard and was familiar with Derek Donnelly who he saw regularly. He made no reference to this to Mr Donnelly, to his team leader or to Mr King. He only made the allegation after his employment had been terminated. The Tribunal accepted the respondent's evidence and there was no basis for either claims. Mrs Miller then went on to make various comments in relation to remedy. Re-engagement would not be appropriate given the claimant's behaviour. Compensation to take account of the fact that after the claimant left because of lack of business the company changed from a continental shift system accordingly employees were earning less. The claimant seems to have failed to mitigate his loss in that he has applied for a building surveying apprenticeship and seems happy with this change of career. If the Tribunal awards anything in relation to the race discrimination claim it should be at the very lowest band of the Vento scale.

**Discussion and Decision.**

53. A worker such as the claimant is protected by the Employment Rights Act 1996 ('The Act') if they make 'Whistleblowing' disclosures.

***43A Meaning of protected disclosure***

***In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.***

**43B Disclosures qualifying for protection**

**(1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –**

**(a) that a criminal offence has been committed, is being committed or is likely to be committed,**

**(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**

**(c) .....**

**(d) that the health or safety of any individual has been, is being or is likely to be endangered,**

54. Protection against dismissal for ‘whistleblowing’ is contained in section 103A ERA which provides as follows:

**“An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.”**

55. It was quite properly accepted by the respondent company that if the claimant had made a disclosure about the risk of injury caused by the wash process then that was capable of being a protected disclosure. They denied that any such disclosure had in fact been made and that in any event the claimant had been dismissed because of his behaviour. We found that as a fact no disclosure was made to Mr Lamont, the purported disclosure coming at a later stage with the lodging of an appeal. In any event, we concluded that there was ample evidence that the claimant was dismissed for his behaviour, storming out and refusing to hand over his pass) rather than for any health and safety concern.

56. In relation to the claims under the Equality Act these were rejected because of the findings that we made. We did consider for completeness the terms of Section 109 of the EA and whether the statutory defence could have been made out. We had some concerns about whether it would have succeeded. We are in no doubt the respondent tried hard to maintain

a working environment that is non-discriminatory and have the appropriate policies and training in place. However, the policies themselves did not cover all of the current protected characteristics. We were also somewhat surprised that the Team Leader did not seem aware of the policies and had not received appropriate training. We also we found the heavy reliance on the fact that there had been no recorded claims for race discrimination or other forms of discrimination as conclusive that none had actually occurred in the workplace to be perhaps a little complacent. In relation to the claimant's induction we were worried that the exercise was more of a 'tick box' exercise and rather rushed.

57. We would be surprised that banter and the normal tensions that arise in a workplace have not, on occasion, led to language being used that might later form a claim under the EA. We bear in mind that workers can often fail to take formal, or even informal, action for a variety of reasons and without some surveying or monitoring of attitudes and experiences in the workplace it is difficult to say that all reasonable steps have been taken at least in the view of this Tribunal. In addition, as we noted earlier the induction is a busy period for staff who have to absorb a lot of information and we had some doubts that sufficient time was allowed for discussing common issues about discrimination such as the use of possible discriminatory language or behaviour that would be regarded as unacceptable. We noted that the claimant had sight of policies during induction (and the appropriate box was ticked) but was not given hard copies to consider or refer to later and we were concerned that much of the impact of such policies could have been lost. In the event we did not need to rule on the matter but we trust our comments will be noted.

**Employment Judge: James Hendry**

**Date of Judgment: 12 December 2019**

**Date Sent to Parties: 13 December 2019**