



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr K Marsland

**Respondent:** Sky In Home Services Limited

**Heard at:** Cardiff **On:** 11 November 2020

**Before:** Employment Judge S Jenkins  
Mrs P Humphreys  
Ms S D Atkinson

**JUDGMENT** having been sent to the parties on 16 November 2020 and reasons having been requested by the Claimant, in accordance with Rule 62(3) of the Rules of Procedure 2013:

## REASONS

### Background

1. The hearing was to deal with the Claimant's claim of direct discrimination on the ground of sex, the Claimant contending that his automatic exclusion, by virtue of being male, from a trainee programme for home service installation engineers which was restricted to women, discriminated against him.
2. The Respondent's case was that it disputed that direct discrimination had occurred by reference to the permissible comparison of the Claimant with a female person, but also that, in any event, its training programme amounted to permissible positive action and therefore did not amount to discrimination.
3. We heard evidence from the Claimant on his own behalf, and from Mr Tony McGarry, Recruitment Manager, on behalf of the Respondent, and we considered the documents in a bundle of documents spanning 121 pages to which our attention was drawn.

### **Issues and Law**

4. Section 13 Equality Act 2010 (“EqA”) provides that direct discrimination arises where someone is treated less favourably than others because of a protected characteristic, in this case sex. That involves an element of comparison, and Section 23 provides that, when undertaking that comparison, there must be no material difference between the circumstances relating to each case. In other words, in this case, there must be no material difference between the Claimant’s circumstances and the circumstances of a hypothetical female comparator.
5. Even if something might, on its face, be directly discriminatory, Section 158 EqA, entitled “Positive Action: General” provides that when an employer reasonably thinks persons who share a protected characteristic suffer a disadvantage connected to the characteristic, or the participation in an activity by persons who share a protected characteristic is disproportionately low, it is not prohibited from taking action which is a proportionate means of achieving an aim of encouraging persons who share a protected characteristic to overcome or minimise the advantage, or to participate in the activity.
6. For completeness, Section 159 EqA contains further provisions relating to positive action in recruitment and promotion, allowing an employer, for similar purposes, to treat a person more favourably than another because of a protected characteristic in relation to recruitment or promotion, but only where the person is as qualified as the other to be recruited or promoted.

### **Findings**

7. The facts of this case were very largely not at issue, the areas of difference between the parties being ones of interpretation in relation to the question of comparability of the Claimant’s position for the purposes of Section 13, and whether the programme adopted by the Respondent involved general positive action and thus fell within Section 158, or involved recruitment and thus fell within Section 159. Our findings are as follows:
8. The Claimant has an HND in Electronic Engineering, a degree, and over 20 years’ experience in engineering roles.
9. The Respondent is the well-known company principally involved in the provision of satellite television services. It employs a number of home service installation engineers in relation to those services.
10. In early 2018 the Respondent identified that females were under-represented in its home service area, with only 2% of its engineers being

female. It therefore adopted the goal of improving that percentage to 20% by 2020, which it has confirmed it has not achieved.

11. As part of its method of improving representation of women amongst its engineering workforce, the Respondent introduced a training programme restricted to women to provide them with the skills to be able to apply for engineering roles.
12. The programme operated for a fixed four-month period, during which those participating were formally engaged under a contract, and in relation to which they were paid a salary equivalent to £21,000 per annum. In terms of the training provided, there was some classroom training, but by far the largest element, some 90%, involved buddying or shadowing, where the trainee would travel with an engineer and observe them undertaking their work. The trainee did not undertake any specific duties themselves.
13. The programme was operated in areas where it was anticipated that the Respondent would have a forthcoming need for engineers, and the trainees were then encouraged to apply, along with other internal and external applicants, for those roles. Recruitment for the engineering roles was then undertaken separately, involving online tests, videos and interviews.
14. In November 2019, the Claimant came across information about the programme, which was entitled "Trainee Women's Programme" on the Respondent's website, and applied for a place. On 12 November 2019, he received an email telling him that his application was unsuccessful as the programme was open to women only.
15. The Claimant attempted to complain about his rejection, and what he perceived to have been discriminatory treatment, and ultimately, on 20 January 2020, received an email from Mr McGarry. In this he explained that the programme did not guarantee any role as an engineer, and that anyone who went on the course would still have to apply for a role in a competitive process. Mr McGarry also explained that the purpose of the programme was to support women who were under-represented to achieve skills and be able to apply for an engineer's role. He concluded by saying that whilst the Claimant's application for the trainee programme had not been accepted, in light of the Claimant's engineering experience they would welcome a future application from him.
16. It transpired that the Claimant, who lives in Anglesey, would in any event have been refused access to the programme due to being too far away from the required areas. It also transpired that female applicants for the programme had been rejected on that basis.

17. Mr McGarry confirmed however, that the process of recruiting to the programme involved; first, the question of the applicant's sex, and then the question of their location; and that the Claimant was rejected only on the basis of his sex, notwithstanding that he would, in any event, have been rejected on the basis of his location.
18. Mr McGarry also confirmed, in answer to a question from the Tribunal, that a female applicant with similar qualifications and experience in engineering as the Claimant would not have been rejected, certainly not automatically.
19. In terms of subsequent engineering roles, some positions became available in approximately March or April 2020. It seems that the Claimant was not aware of those, and certainly did not apply for them.

### **Conclusions**

20. Applying our findings to the issues identified at the outset, our conclusions are as follows:
21. We were satisfied that there had indeed been less favourable treatment of the Claimant by reason of his sex than was afforded to a comparable woman. He was excluded from the training programme purely and specifically due to the fact that he was a man. We noted the Respondent's contention that he would also have been excluded by virtue of his home location, and that female applicants were indeed excluded for that reason. Mr McGarry's clear evidence however, was that the sifting process operated in two distinct stages; first by reference to sex, then by reference to location. We also noted that the Claimant's rejection letter purely referred to his sex and made no mention of location. In our view, the fact that the Claimant may also have been excluded from the programme due to a reason not connected to his sex was no answer to the point that he was initially, and in fact, excluded because of his sex.
22. We then turned to consider whether that less favourable treatment could be excused by the application of Section 158 and we were satisfied that it could. We noted the Claimant's contention that the trainee role was a proper role and therefore that Section 159 applied, and did so in circumstances where there was not the required equivalence of qualification between the Claimant and a female comparator to enable the exception available under Section 159 to be applied. We agreed that there was not that required equivalence. However, we did not consider the engagement of trainees on the programme amounted to recruitment to a job. The programme was described as a training programme, operated for a limited period, and involved only training and, very largely and primarily, observation. It did not involve the trainee undertaking any actual work.

23. Whilst there was an expectation, and indeed a hope, that trainees on the programme would apply for engineering roles, which was fundamentally the aim of the programme, that was an entirely separate process and there was no guarantee that any applicant would be successful, or indeed more successful than a male applicant such as the Claimant. We did not consider that the payment of a fairly generous salary for the duration of the programme altered that view. We considered that the programme was aimed at encouraging women to overcome the clearly apparent disadvantage and low participation in engineering, which we considered was a legitimate aim.
24. The question then for us to address was whether the Respondent's actions in operating the training programme for women only was a proportionate means of achieving the aim of encouraging women to overcome that disadvantage or to participate in the activity of engineering where their participation was disproportionately low, and we concluded that it was.
25. In that regard, we noted the provisions of the EHRC Code of Practice on Employment, specifically chapter 12 of that Code. We noted that Section 12.17 of the Code refers specifically to disadvantage experienced by women in pursuing careers in engineering, and also that the possible action which might be taken to overcome disadvantage includes providing training opportunities in work areas or sectors for the target group, for example work placements. That is what the Respondent was trying to address and what the Respondent implemented.
26. Overall therefore, we were satisfied that the steps taken by the Respondent were ones which were proportionate means of achieving the legitimate aim of removing disadvantages experienced by women and encouraging their participation in engineering, and therefore, whilst the programme was, on its face, discriminatory, that was excused by virtue of the application of Section 158 EqA. The Claimant's claim of direct discrimination therefore failed.

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Employment Judge S Jenkins  
Dated: 3 December 2020

REASONS SENT TO THE PARTIES ON 4 December 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS