EMPLOYMENT TRIBUNALS

Claimant: **Mr S Fofana**

Respondent: **Window Widgets Limited**

RECORD OF A PRELIMINARY HEARING

Heard at: **Bristol (in public; by video)** **On:** **21 January 2025**

Before: **Employment Judge Bradford**

Appearances
For the claimant: In Person
For the respondent: Mr M Williams, Counsel

Respondent's Strike out application

1. This was a preliminary hearing, in public, by video, listed to determine the Respondent's application to strike out the Claimant's claims of direct race discrimination and harassment related to race brought under sections 13 and 26 respectively of the Equality Act 2010.

2. The claims and issues had been clarified at a Case Management Hearing on 26 September 2024. The Respondent had indicated at that hearing an intention to make a strike-out application.

3. The Claimant brings claims of harassment related to race and direct race discrimination arising out of seeing a graffitied label, at the Respondent's warehouse where he worked. The label had a large number '3' printed on it, and above that was written 'SLAVE NO' and an arrow pointing to the number 3 (interpreted as 'slave number 3'). The Claimant says he felt he was being indirectly targeted because he was the only black man in the warehouse. The Claimant did not raise the issue with the Respondent either on the day (18 December 2023) or subsequently, but resigned from his job in early January 2024. He did not cite this as being a reason for his resignation.

4. The Respondent asserts that in 2022 a former employee vandalised the warehouse with anti-modern slavery messages as an act of defiance towards

what he considered to be exploitation of staff. The graffiti was not, according to the Respondent, a reference to historical enslavement. The graffiti had been removed by the Respondent's maintenance department, but this label had been missed as it was not easily visible. The Respondent was unaware of it.

5. The Respondent submitted that the claims should be struck out, pursuant to rule 38(1)(a) of the Employment Tribunal Procedure Rules 2024, as they have no reasonable prospect of success.

6. In relation to the harassment claim, in view of the Respondent's explanation of how the graffitied label came about, it was submitted that the message did not relate to race. Nor did it have the purpose of violating the Claimant's dignity or creating a hostile or intimidating environment. If the message had such an effect, the Respondent submitted that it was not reasonable for it to have done so. The Respondent cited the Claimant's failure to raise the matter at the time, which would have allowed the Respondent to investigate and provide an explanation. Further the label was around the back of a machine which the Claimant would not ordinarily have been working on.

7. As to direct discrimination, there was, the Respondent submitted, no evidence to support the Claimant's argument that the writing of the label and not removing it was in any way because of the Claimant's race.

8. The Respondent relied on *Mechkarov v Citibank NA UKEAT/0041/16*, *[2016] ICR 1121*, with regard to the approach that should be taken in a strike out application in a discrimination case.

9. The Claimant disputed the Respondent's explanation as to how the label came to have been graffitied. He said that this should not have happened. He said he did not report the matter because the Respondent would have done nothing. He talked about how upsetting and painful seeing it had been.

10. I bore mind that a tribunal must first consider whether any of the grounds set out in rule 38(1) have been established; and then, if any ground is established, exercise discretion as to whether or not to order strike-out. The requirement for a two-stage approach was confirmed in *Hasan v Tesco Stores Ltd EAT 0098/16*.

11. I had regard to overriding objective of dealing with cases 'fairly and justly', set out in rule 3 of the Tribunal Rules 2024. This includes, among other things, ensuring so far as practicable that the parties are on an equal footing, dealing

with cases in ways that are proportionate to their complexity and importance, and avoiding delay.

12. Having reviewed the authorities, these confirm that striking out requires a high bar to be met. As highlighted by the House of Lords in *Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391*, discrimination claims are generally fact-sensitive, so it will be rare to strike out at a preliminary stage.

13. In *Balls v Downham Market High School and College 2011 IRLR 21***7**, Lady Smith stating that "*the test is not whether the claim is likely to fail; nor whether it is possible that the claim will fail. It is not a test that can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is a high test*".

14. As to factual disputes, in *Ahir v British Airways PLC 2017 EWCA Civ 1392*, the Court of Appeal considered that there is no bar to striking out discrimination claims that involve disputes of fact, so long as the tribunal is entirely satisfied that there is no reasonable prospect of the facts necessary to find liability being established. The court noted that the issue is not the subject matter of the claim but whether it meets the statutory test.

15. I began by considering the statutory test for harassment as this is generally considered a lower threshold for the Claimant to meet. The Claimant will need to prove, on the balance of probabilities, that the Respondent's conduct, in allowing him to see the graffitied label, was unwanted conduct, related to race and which had the purpose/effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. He will also have to establish that it was reasonable for the conduct to have such an effect.

16. As to unwanted conduct, the Claimant may be able to establish this; it will be a matter for the Tribunal at the final hearing to determine whether the offending label, of which the employer was unaware, amounts to unwanted conduct, given the Claimant's case that it simply should not have been there, and by implication, that the Respondent is responsible.

17. As to whether the graffiti related to race, a tribunal could find that it did. Objectively 'slave' is generally considered derogatory to black people given its historical connotations.

18. Whilst the Respondent's lack of awareness of the offending label means that it is unlikely that a tribunal could find any purpose behind it, the Claimant has

been clear as to the effect he says it had. Whether that was reasonable will be a matter for the tribunal to decide, having heard and tested the evidence. Whilst the Respondent has provided an explanation, the Claimant was not aware of that at the time, and indeed, todays said he does not accept the Respondent's explanation.

19. With regard to discrimination, whilst the Claimant is likely to have difficulties establishing that the offending label amounted to less favourable treatment because of race, given the employer's asserted lack of knowledge, this is a factual dispute. Given that the Claimant does not believe the Respondent's explanation, and the graffiti, viewed objectively, could be considered racist, the facts need to be determined before a decision can be reached.

20. In view of the foregoing, I was not satisfied that the Claimant has no reasonable prospect of establishing his complaint of harassment. The 'test' at rule 38(1)(a) not having been met, I did not need to consider exercising discretion to strike-out.

Employment Judge Bradford

Date: 21 January 2025

SENT TO THE PARTIES ON

13 February 2025 By Mr J McCormick

FOR THE TRIBUNAL OFFICE