Claim No:6000735/2024

EMPLOYMENT TRIBUNALS

Claimant: Mr S Fofana

Respondent: Window Widgets Limited

Heard at: Bristol **On:** 12th – 14th May 2025

Before: Employment Judge David Hughes
Mrs Patricia Ray
Mr Huw Launder

Representation
Claimant: In person
Respondent: Ms Méabh McGee

JUDGMENT having been sent to the parties on 28.05.2025 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Respondent is a business that deals in plastic and metal parts for windows and suchlike. The Claimant worked for it between 28.09.2023 and 10.01.2024 as a warehouse operative.

2. By a Claim Form dated 28.02.2024, the Claimant claims of race discrimination.

<u>The issues</u>

3. At a Case Management Hearing on 26.09.2024, Employment Judge Ferguson prepared the following list of issues:

1. Direct race discrimination (Equality Act 2010 section 13)

1.1 Did the Respondent do the following things:
1.1.1 On an unknown date, an employee of the Respondent (unknown) wrote "Slave No" and an arrow on the label on the Hubtex machine.
1.1.2 The Respondent failed to remove the label or the writing on the label.
1.2 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant has not named anyone in particular who he says was treated better than he was and therefore relies upon a hypothetical comparator.
1.3 If so, was it because of race?
1.4 Is the Respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to race?

2. Harassment related to race (Equality Act 2010 s. 26)
2.1 Did the Respondent do the following things:
2.1.1 On an unknown date, an employee of the Respondent (unknown) wrote "Slave No" and an arrow on the label on the Hubtex machine.
2.1.2 The Respondent failed to remove the label or the writing on the label.
2.2 If so, was that unwanted conduct?
2.3 Did it relate to race?
2.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
2.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

3. Duplication of Harassment and Direct Discrimination
3.1 The Claimant's complaints relating to race are presented as both harassment and/or direct discrimination. The Tribunal will determine these allegations in the following manner.
3.2 In the first place the allegations will be considered as allegations of harassment. If any specific factual allegation is not proven, then it will be dismissed as an allegation of both harassment and direct discrimination.
3.3 If the factual allegation is proven, then the tribunal will apply the statutory test for harassment under s.26 Equality Act 2010. If that allegation of harassment is made out, then it will be dismissed as an allegation of direct discrimination because under s.212 (1) Equality Act 2010 the definition of detriment does not include conduct which amounts to harassment.
3.4 If the factual allegation is proven, but the statutory test for harassment is not made out, the tribunal will then consider whether that allegation amounts to direct discrimination under the relevant statutory test.

4. Remedy
4.1 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?
4.2 What financial losses has the discrimination caused the Claimant?

4.3 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
4.4 If not, for what period of loss should the Claimant be compensated for?
4.5 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?
4.6 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?
4.7 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?
4.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did either party unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?
4.9 Should interest be awarded? How much?

4. At the final hearing, the Respondent was represented by Ms McGee. She had not appeared at the CMH, nor at the preliminary hearing, but showed considerable skill and judgment in the hearing. The Claimant appeared in person. He was assisted, at times, by his partner, Ms Hayley Edwards. At times, she briefly questioned the witnesses. Ms McGee sensibly took no issue with this, and neither did the Tribunal.

5. The Tribunal heard live evidence from the Claimant, from Gareth Wilks – currently employed as Warehouse Supervisor by the Respondent, until January 2023 as a Warehouse Manager, and from Katherine Woolford, the Respondent's Group HR Manager.

6. Ms Edwards had prepared a statement, in which she referred to matters of which the Tribunal should not have been told – see Employment Tribunals Act 1996, s18(7). The Tribunal was happy that we could put the information that should not have been shared with us out of our minds, and the Respondent was happy for us to continue hearing the case.

7. The parties confirmed at the outset of the hearing that they were content with the list of issues.

<u>What happened</u>

8. The evidence in the case – and the Claimant's submissions – went beyond the list of issues. That was helpful, in providing us with useful

context, but it is important to remember that our function is to resolve the dispute between the parties. That dispute is reflected in the list of issues. To do that, we need to make factual findings. We do so on the balance of probabilities – in other words, if something is more probable than not, it is proven. It is not our job to resolve every possible factual difference that exists between the parties.

9. The Respondent's business – at least insofar as it concerns this case – was in plastic and metal window parts. These consist, so we understand (and nothing turns on the technicalities of this) of pieces of plastic or metal of different lengths.

10. These items, and possibly other products, are stored in a warehouse at the Respondent's premises at Quedgeley West Business Park, Gloucester. We were shown photographs of an aisle in the warehouse. This showed an aisle some metres wide, with shelving up to 7 levels on either side of the aisle.

The Hubtex machine

11. In the middle of the aisle is an orange machine. This was referred to before us as a Hubtex machine – or similarly-pronounced variations on that spelling – after the manufacturer of the device.

12. The Hubtex is a machine similar to a fork-lift truck. Along the front of it – although that concept should not be approached in too technical a manner – is a gantry, which stands on top of where the forks in a fork-lift truck would be. It extends for some distance either side of the body of the machine – to which we will refer as the "truck".

13. On the truck-side of the gantry, there are gates, through which operators can enter the gantry. There is a gate on either side of the gantry.

14. Although the Hubtex has a cabin, it does not need to be operated from the cabin. An operator can operate it from controls on the gantry.

15. The Respondent has two Hubtex machines on the site that concerns us.

16. The machines are battery operated. The batteries are rechargeable. There are 4 batteries in all.

17. Mr Wilks said in his statement that the batteries are rotated regularly to ensure that the machines can run efficiently. Although this Tribunal lacks technical knowledge of these machines, that seems to us to make sense. Batteries unused for some time not working when required is a phenomenon with which we are familiar.

18. However, Mr Wilks also said that the batteries can be charged “in situ” – whilst on a particular Hubtex, without being removed and taken to the location the Respondent used for charging the batteries. He told us that this happened often, becoming more frequent as the Respondent became more experienced in using the Hubtex machines.

19. We accept that this is so. However, it indicates what might be termed some ‘woolly thinking’ on the part of the Respondent: it wanted, for seemingly sensible reasons, to rotate the batteries. Yet it readily adopted a practice that was at odds with this apparently sensible decision. The Tribunal can see how that would happen, but it suggests a less than entirely rigorous approach to management.

20. The Hubtex machines go up and down the aisles. Operators on the gantry fetch stock from the shelves, which they then pass to operatives.

21. We were told, and accept, that the Hubtex machines can only be operated by trained operators. The Claimant was not a trained operator.

22. The floor between the shelving in the aisles has marking apparent on it. This, we were told, has a tracking system, which keeps the Hubtex on course. It is not, however, confined to these markings as if they were rails.

It can move sideways, and does so – there are two sets of the markings visible on the image shown to us.

23. When it needs to move back along an aisle along which it has progressed, the Hubtex does not do a 180-degree turn. It simply goes backwards (if one is treating the end with the gantry on it as the front).

24. Mr Wilks said in his statement that:

> *…as we have two Hubtecs that operate along the racking every day, no-one else usually goes in during the working day as it would be a potential H&S hazard….*

25. The Tribunal asked Mr Wilks about a scenario that had occurred to us: that a Hubtex operative at one end of the aisle might get a product from a high shelf, for a colleague who also needed a product from a low shelf at the other end of the aisle. Might not the operative walk past the Hubtex, down the aisle, and fetch the product from the low shelf, whilst their colleague on the Hubtex got the product from the higher level shelf? Mr Wilks' answer was that it "*probably does happen, but it shouldn't*".

26. The Claimant's evidence was that operatives regularly walked past the Hubtex machines, several times a day.

27. It is improbable that the theoretical position described by Mr Wilks in his statement, is correct. This was not, for the reasons we will go onto, a workplace in which there was strict adherence to rules and proper workplace norms. The images shown to us show that there was ample space for someone to walk past the Hubtex and down an aisle. It defies experience and reason to think that operatives will stay at the end of the aisle, rather than walk past the machine when that will speed up whatever task is in hand.

28. It is to Mr Wilks' credit that he recognised in evidence that this probably did happen. It is less to the Respondent's credit that, in its grounds of resistance, it said:

The Respondent avers that the message referred to by the Claimant in his Claim form stating "Slave no" was written on a battery label, and the battery sits at the back of the machine, which was facing the wall and not easily visible…

29. The implication that the Hubtex machine stood against a wall, was simply wrong.

The Claimant's employment

30. The Claimant was taken to his contract of employment and the Respondent's grievance procedure and anti-harassment policy, although he was not taken through the specifics of either.

31. Nothing turns on the contract for the purposes of these proceedings, at this stage.

The Claimant is suspended

32. On 28.11.2023, Annemarie Stone, another employee of the Respondent, reported that the Claimant had said to her "*Annie you're so sexy"*, and then "*you look sexy when you're in leggings".*

33. The Claimant was suspended on full pay. A letter dated 29.11.2023 told him that:

The decision to suspend you on full pay has been taken for the following reasons:
• To protect all parties whilst a full investigation into the allegations made is undertaken.

34. On the same day it was written, an investigation meeting took place, starting at 14:10hrs. The Claimant admitted making the comments, but contended that they were made in a "*…playful/fun gesture and not in any way meant as a sexual nature"*. He described the comments as having been made in passing in the warehouse, and Ms Stone giving him "*the fingers*" – which we take to mean an abusive gesture that may be made with one or two fingers – and pummelling his back with boxing-type blows. He described the exchange as "*banter*".

35. In the course of the investigation, Ms Stone was spoken to. She described the mentioning of leggings as "*a massive step over my line*", but when asked about pummelling the Claimant, she said:

No, I can't recall that. Maybe I've touched him on the arm, or on the back possibly.

36. She also described exchanges with other employees. There were comments from someone whose initials were LP, who would instigate comments about a new boyfriend, which she described as a "*running joke*" of which she tired. The notes of the meeting with her include the following exchange:

KW[1]	What's the culture in the warehouse like?
AS	Good. Everyone talks about something, and sometimes there can be sexy comments, but it's not aimed at anyone specifically.
KW	So culturally, people are making comments about the news or people. Are they potentially derogatory?
AS	Not all the time. Can be cheeky, just banter. It's normal, I can't really explain it.
KW	Can you give me an example?
AS	Something on the news or TikTok; "she's nice."
KW	And this can be sexual in nature?
AS	Not all the time. Just chit-chat and cheeky. Hard to put my finger on.
KW	Do you participate?
AS	Depends on what it is. For example, JD will bring something up about himself and we will all laugh. I will join in with that.
KW	Do you do that because you think it's funny or because you feel you need to?
AS	A bit of both. I'm the only woman so want to feel like I fit in. I will avoid arguments; I'll walk away from those sorts of conversations.

37. The Claimant was spoken to again on 05.12.2023. It would unduly prolong this decision to set out in full what he says, but he describes a working environment in which jokes and banter were commonplace, and being warned by another employee – MH – that people were talking about him behind his back.

[1] Ms Woolford

38. At this point, it is worth setting out our understanding of the term 'banter'. It is a term of some elasticity, that can encompass anything from humorous repartee with a slight edge, to serious abuse. A definition of it as playful teasing or joking would overlook that what is playful to the observer may seem less so to the object of the teasing, that jokes can wear thin, be unpleasant or simply unfunny.

39. Other employees were spoken to. Jason Dando, on 07.12.2023, described a workplace culture in which banter featured, and agreed that it would not be a stretch for AS to put her hand on someone's back or arm. On the same day, Dan Cullen referred to "*standard warehouse culture, a little laddish. There's AS too, but she's like one of the lads"*.

40. Again on the same day, Martin Hentschke was spoken to, and said that employees spoke to the Claimant:

> *With less respect. It's the same way they talk to LP[2]. They're short and abrupt. There was a time I went to JD with a problem, and he was absolutely fine with me. But when LP was stood next to me, he was different, and I had the thought that it was because LP was standing next to me. He's abrupt and patronising to SF and LP. RR is slightly racist, but JD turns a blind eye. RR sings the Mr Boombastic song in front of SF, SF just laughs. I don't know if he sings it in front of JD, but JD turns a blind eye anyway. RR says things like "he wears a rasta hat, why does he wear that hat if he's not from Jamaica, he's from Africa." JD said he "can't stand it when he's eating, people from that country, they eat like that" or something like that. I just walked away.*
> *RR was talking about black people in general. I told him he was being racist. AS said, he's just old, what he's saying is stupid. This was before SF started. He doesn't say those sorts of things now, but I don't think RR likes black people. I don't think JD or AS do either, but they don't say anything. LP will stick up for himself.*

41. Reg Reid described singing the song Mr Bombastic to the Claimant, claiming that the Claimant liked it because he laughed, and singing reggae songs, stating that the Claimant "…*likes Bob Marley, he has dreadlocks…"*.

[2] Llukaj Perparim, an employee who, we were told, is Polish.

42. Paul Organ and Llukaj Perparim both described workplace banter, and Mr Perparim mentioned comments in which colleagues speculated on a supposed lack of intelligence in the Claimant.

43. We set out the foregoing not because we have to reach any decision on the rights and wrongs of it, but because it paints a picture of a workplace in which banter was tolerated, in which attempts at humour which engage a person's race or sex were commonplace, in which Mr Reid felt comfortable playing to his stereotypical assumptions about the Claimant based on his colour and hairstyle.

44. This is relevant to the issues we have to decide, for the following reason. It points to a somewhat lackadaisical approach by management. The Respondent did hold a disciplinary process into Mr Reid's behaviour, which resulted in him being given a final written warning for gross misconduct, the Respondent accepting his mitigation that he admitted having sung the songs 'Bombastic' and 'Iron Lion Zion' to the Claimant, but denying any offensive intent. On the basis of what we have seen, that seems an appropriate reaction by the Respondent. Ms Woolford's approach to dealing with complaints and investigations does not seem to us to be open to reasonable criticism. But that the Respondent reacted appropriately when it learned of this, makes it all the more telling that it allowed the workplace culture we have described, to develop.

45. A disciplinary meeting for the Claimant was held on 13.12.2023. The Claimant was issued with a final written warning – the same sanction as would later be imposed on Mr Reid – and his suspension came to an end on 14.12.2023.

<u>Complaint against Ms Stone</u>

46. In the course of the meeting with him on 05.12.2023, the Claimant asked for matters that he had raised, to be investigated.

47. An investigation was conducted, which led to a letter being sent to the Claimant on 18.12.2023. The letter identifies 6 points, only one of which was touched upon in the evidence before us. That was an allegation that:

Anne-Marie Stone approached you when you were with Paul Organ and Martin Hentschke and shouted at you all, saying 'How many people does it take to do this job? Two men training 1 person! No wonder they don't fucking employ men anymore!'

48. The finding on this allegation was:

Unfortunately none of the witnesses could specifically recall this incident and therefore I have been unable to confirm or deny whether this incident took place as you recalled it. I have therefore been unable to reach a conclusion on this point.

49. The Claimant was unhappy about the investigation, and in particular that Ms Stone had not been suspended. He said that he was told by Ms Woolford that there would be a full investigation into his allegations, and that Ms Stone would be suspended.

50. Ms Woolford denied telling the Claimant that anyone would be suspended. She did tell him that there would be an investigation, and there was. In her live evidence, she appeared somewhat frustrated that no witness had recalled the incident the Claimant had described. That meant that she could not uphold the complaint.

51. We think that Ms Woolford's evidence on this is likely to be more reliable. We think it inherently improbable that she would have offered the Claimant an assurance that Ms Stone would be suspended. We emphasise that we do not think the Claimant to have lied about this. We simply think that he is wrong.

52. In the course of this investigation, the Claimant did share with Ms Woolford that he had been told that all of the Black men who had previously worked for the Responded had been dismissed. The Claimant declined to tell her who had told him this, which hampered her ability to investigate, but she told us that it was not true that all Black men previously employed by the Respondent had been dismissed.

Graffito

53. It is not in dispute that, in April 2024, there was a graffito on one of the Hubtex batteries. Above the number "*3*" are the words "*slave no*", with an arrow pointing down towards the number 3.

54. The Claimant said that, on 18.12.2023, he and other employees were undertaking a stock-take in the warehouse. In the course of so doing, he noticed the graffito. This much was not seriously disputed, and we find that it happened.

55. The Respondent's position is that it did not know of this graffito until April 2024, when it received the Claimant's claim form in this case.

56. The parties' respective contentions as to the graffito are as follows: the Claimant says it must have been written on the morning of 18th December, when he says he noticed it during a stock take. The Respondent says that is likely to have been there for some considerable time, and was probably written by a disgruntled ex-employee named Tony Bennett.

57. We did not hear from Mr Bennett, understandably enough. But we were told that he worked for the Respondent in 2022, and felt that he was over-worked and under-paid. He took to writing graffiti referencing 'modern slavery' and 'slavery' around the Respondent's premises. Mr Wilks had these graffiti removed, but believes that the one that the Claimant saw was missed, because it was not readily visible.

58. On balance, we find the Respondent's account of the likely origin of the graffito that the Claimant saw in December 2023, more probable than the Claimant's account. It is consistent with the account of the graffiti we were told Mr Bennett had written. If one wanted to write an offensive graffito aimed at the Claimant, it would be bizarre to write it in terms that are ambiguous – an ambiguity we will address further below – and in a place that is less than entirely conspicuous, notwithstanding our finding that employees did walk down the aisles and would have seen the back of the

Hubtex machines, and in what the images show to be relatively small text, that does not stand out.

59. It is curious that the graffito was not noticed by the Claimant before 18.12.2023. However, on balance, the curious nature of this fact does not persuade us that the graffito was of more recent origin than the Respondent contends. It was not put to the Claimant that he had seen the graffito earlier but only decided to mention it in December 2023 because of pique at his suspension, possibly because the Respondent's position was that the graffito was obscured by the Hubtex machine's location. We have not accepted that. But, as we have observed, the graffito is written in relatively small text. The Claimant took one picture of it standing a short way from the Hubtex machine. It cannot be described as prominent or attention-grabbing. We find that it could well have been overlooked.

60. There is also the workplace culture that we have described. In such a culture, we think the graffito may have been overlooked all too easily.

61. We accept that Mr Wilks and Ms Woolford were not aware of the graffito until April 2024. We accept that, when they learnt of it, they acted appropriately. But the Respondent's account – which we have accepted – is that it was written by an employee of it. The Respondent's management may not have known of the graffito, but on the Respondent's account – which, we repeat, we have accepted on this point – the Respondent did know of it.

62. Having accepted that the graffito was written by Mr Bennett, we find that the meaning that Mr Bennett intended it to carry was a criticism of his working arrangements.

63. Mr Bennett did not, however, make that point clear in this graffito. He simply referred to slavery.

64. The graffito could bear a number of meanings. It could carry the meaning that Mr Bennett intended. It might have been understood as a

comment on obedient machinery, unobjectionably owned, taking the place of the labour of humans, or on humans' relationship to machines. But when one hears the word slavery, English-speakers in this jurisdiction, in this decade. will probably first think of the enslavement of Black people by White people.

65. As to the arrow pointing to the number 3, the Claimant contends this to be a reference to him being slave number 3, the first two being Black men the Respondent has previously dismissed.

66. We do not accept that. We think it makes the mistake of seeking to find a coherent meaning to an inarticulate graffito. We do not think that is how someone would reasonably interpret the graffito. We think it would reasonably be interpreted as a comment along the lines of the machines and employees of the Respondent being in a state of slavery.

67. Whilst Mr Bennett did not intend to write a graffito that related to race, he wrote one that, we find, did relate to race. This is because the term "slave" will, we find, evoke in contemporary English speakers the enslavement of Black people.

68. The Claimant feels this strongly. All right-thinking people regard slavery as a monstrosity. The Claimant, an evidently-proud Black man, feels the evil of slavery viscerally. That is understandable, and respectable. We accept the Claimant's sense of hurt at the graffito is genuine.

69. His interpretation of the graffito, whilst relevant, is not determinative. We have reached our understanding of the meaning the graffito would be likely to convey independently of the meaning that the Claimant attributes to it. Indeed, we have not accepted part of the meaning he attributes to it.

Law

Equality Act 2010 ("EA")

70. EA s13 provides as follows:

13 Direct discrimination
(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.
(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.
(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.
(6) If the protected characteristic is sex—
(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;
(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy [, childbirth or maternity]1 .
[...]2
(8) This section is subject to sections 17(6) and 18(7)[3].

71. We were referred to Burrett -v- West Birmingham Health Authority[4], in which the following was said:

…the fact that the complainant considers that she or he is being less favourably treated or is being demeaned does not of itself establish that there is less favourable treatment. That is for the … Tribunal to decide.

72. Insofar as causation is concerned, if there was less favourable treatment, it must be because of the Claimant's protected characteristic. In O'Neill -v- Governors of St Thomas More RCVA Upper School[5], the EAT said:

(i) The tribunal's approach to the question of causation should be "simple, pragmatic and commensensical." (ii) The question of causation has to be answered in the context of a decision to attribute liability for the acts complained of. It is not simply a matter of a factual, scientific or historical explanation of a sequence of events, let alone a matter for philosophical speculation. The basic question is: what, out of the whole complex of facts before the tribunal, is the "effective and predominant cause" or the "real or efficient cause" of the act complained of? As a matter of common sense not all the factors present in a situation are equally entitled to be treated as

[3] It was not contended that ss17(7) or 18(7) were relevant to this case.
[4] [1994] IRLR 7
[5] [1997] ICR 33

a cause of the crucial event for the purpose of attributing legal liability for consequences. (iii) The approach to causation is further qualified by the principle that the event or factor alleged to be causative of the matter complained of need not be the only or even the main cause of the result complained of, though it must provide more than just the occasion for the result complained of. "It is enough if it is an effective cause:"

73. EA s26 provides as follows:

26 Harassment
(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
(2) A also harasses B if—
(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).
(3) A also harasses B if—
(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and
(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.
(5) The relevant protected characteristics are—

- *age;*
- *disability;*
- *gender reassignment;*
- *race;*
- *religion or belief;*
- *sex;*
- *sexual orientation.*

74. We were referred to Tees Esk and Wear Valleys NHS Foundation Trust -v- Aslam[6] as authority for the proposition that a particular claimant's view that the conduct complained of is related to the protected characteristic is relevant, but not determinative.

75. EA s136 provides as follows:

[6] UKEAT/0039/19/JOJ [2020] IRLR 495

136 Burden of proof
(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.
(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.
(5) This section does not apply to proceedings for an offence under this Act.
(6) A reference to the court includes a reference to—
(a) an employment tribunal;
(b) the Asylum and Immigration Tribunal;
(c) the Special Immigration Appeals Commission;
(d) the First-tier Tribunal;
(e) the Education Tribunal for Wales;
(f) the First-tier Tribunal for Scotland Health and Education Chamber.

76. When we heard submissions on remedy (as to which, see below), we were referred to the 6th addendum[7] to the Presidential Guidance[8] on the guidelines for awards for injury to feeling following De Souza v Vinci Construction (UK) Ltd[9], commonly referred to as "the Vento[10] guidelines". The guidance in the 6th addendum is appropriate for this case, as the Claim Form was presented before 06.04.2024. The guidance, as updated by the 6th addendum, provides as follows:

In Vento v Chief Constable of West Yorkshire Police (No. 2)… the Court of Appeal in England & Wales identified three broad bands of compensation for injury to feelings awards, as distinct from compensation awards for psychiatric or similar personal injury. The lower band of £500 to £5,000 applied in less serious cases. The middle band of £5,000 to £15,000 applied in serious cases that did not merit an award in the upper band. The upper band of between £15,000 and £25,000 applied in the most serious cases (with the most exceptional cases capable of exceeding £25,000).
…
The Court of Appeal in De Souza invited the President of Employment Tribunals in England & Wales to issue fresh guidance which adjusted the

[7] https://www.judiciary.uk/wp-content/uploads/2023/03/Vento-bands-presidential-guidance-April-2023-addendum.pdf
[8] https://www.judiciary.uk/wp-content/uploads/2013/08/Vento-bands-presidential-guidance-5-September-2017.pdf
[9] [2017] EWCA Civ 879 [2018]ICR 433
[10] Vento v Chief Constable of West Yorkshire Police (No. 2) [2002] EWCA Civ 1871 [2003] ICR 318

Vento figures for inflation and so as to incorporate the Simmons v Castle uplift…
…the Vento bands shall be as follows: a lower band of ***£1,100 to £11,200*** *(less serious cases); a middle band of* ***£11,200 to £33,700*** *(cases that do not merit an award in the upper band); and an upper band* ***of £33,700 to £56,200*** *(the most serious cases), with the most exceptional cases capable of exceeding* ***£56,200***.

Conclusions on the issues on the question of liability

77. The list of issues directs us to consider harassment before direct race discrimination.

78. We have found that Mr Bennett, in or about August 2022, wrote the graffito in question. He did so whilst employed by the Respondent, at his workplace. It may seem harsh to the Respondent, but that means that the Respondent wrote the graffito.

79. Equally harsh may seem the conclusion that the Respondent failed to remove a graffito that went unnoticed. But that finding is inevitable.

80. We have found that the graffito did relate to race.

81. We find that the graffito did not have the purpose of violating the Claimant's dignity, or creating an intimidating, hostile, degrading , humiliating or offensive environment for the Claimant. It was intended as a commentary on working conditions.

82. We find, however, that, once noticed, the graffito did have the effect of violating the Claimant's dignity, and creating a hostile, humiliating and offensive environment for him.

83. We also find that it was reasonable for the graffito to have that effect.

84. For the reasons set out in the list of issues, our conclusions mean that the Claimant's claim for direct race discrimination must be dismissed.

85. If we are wrong on the issue of harassment, our factual findings of course remain the same. Our conclusions on the issues would be that the writing of the graffito, and the failure to remove it, did constitute less favourable treatment to the Claimant, because, once it was noticed, it was likely to cause him to feel distress.

86. We would find that the Claimant has proven a set of facts – the presence of the graffito and its likely effect – from which we could make a finding of discrimination. But we would find that the presence of the graffito and the failure to remove it each occurred for a non-discriminatory reason, not related to race. They occurred because of Mr Bennett's unhappiness at his working conditions, and because no-one noticed the graffito earlier on.

Decision on remedy

87. Having given our decision on liability orally, we heard evidence and submissions on the appropriate remedy.

88. The Claimant's schedule of loss seeks an award of £300,000 for pain and suffering, and £200,000 lost earnings.

89. The Claimant gave evidence on remedy. He had already adopted his schedule of loss as part of his evidence.

90. The Respondent challenged the Claimant that he had not resigned because of the graffito, but because of difficulties in his working relationship with Ms Stone.

91. The Claimant resigned by an email dated 11.01.2024. The email read:

Dear Katherine,
After much deliberation, I have decided that this is no longer the right environment for me. The hostile behaviour of other members of staff towards me is affecting my mental health and well-being, so I must now do what's best for me. I can no longer work in a place that I feel uncomfortable in and am now being forced to speak to a dishonest person who I feel can manipulate my every word.
I will return my uniform within the next few days and am grateful for the experience.

Kind regards,
Seedy Fofana

92. The Respondent put to the Claimant that this explanation for his resignation was truthful.

93. In his live evidence, the Claimant accepted that the person to whom he referred as "*dishonest*" in his resignation email was Ms Stone.

94. Ms Woolford in her statement describes the Respondent being mindful of tension between the Claimant and Ms Stone leading it to allocate them to different tasks, the Claimant in a Hubtex team and Ms Stone operating a fork-lift truck. After the Christmas break, Ms Woolford says that the Claimant did not want to engage with Ms Stone, and was asking for another fork-lift driver to assist him.

95. Andrew Price, the Warehouse and Logistics Manager, spoke to the Claimant on 10.01.2024, telling him that he needed to work with Ms Stone if she was nearest to him, rather than interrupting another operator.

96. We do not wish to be unkind to the Claimant when we say that his evidence on why he resigned was somewhat rambling. He said that he had no confidence in the Respondent investigating things, and felt that in the investigation into his allegations about Ms Stone, his colleagues had not told the truth. He said that the graffito was the reason why he resigned, but did not want the Respondent to know this. Somewhat contradictorily, he then said his resignation was not only due to the graffito, but the "*whole treatment, the way I was spoken to*", and that he felt that Ms Stone was still targeting him.

97. It is not disputed that 18.12.2023 was the first day of the stock take. That exercise continued for 4 days. During that time, and until he ended his employment, the Claimant said that he continued to see the graffito. Whether or not that is right, it would certainly have been on his mind that it was there.

98. It is also not disputed that the Claimant did not report the graffito to anyone, or attempt to remove it himself. His explanation for this was that he lacked confidence in any investigation the Respondent might carry out, that it was not for him to remove the graffito, and he was determined to take his case to this Tribunal.

99. This explanation does the Claimant no credit. We understand that it was not for him to remove the graffito – why should he clean up someone else's vandalism? – but if it was to be removed, someone had to remove it. That wasn't going to happen, unless its presence was reported. The Claimant could have done that. He might have gained some satisfaction from seeing it removed. Had the Respondent's management been told of it and not removed it, that too would have been eloquent. But the Respondent's management cannot be criticised for not addressing a problem of which they were unaware.

100. We accept that the Claimant was determined to bring this issue to the Tribunal. He was, in a phrase, spoiling for this fight. His anger and hurt at racism are understandable. But that is no reason not to seek to address matters amicably, rather than keeping this complaint up his sleeve until he started this claim.

101. We do not accept that the Claimant resigned because of the graffito. We prefer the reason that he gave in his resignation email. The simple fact is that, however hurtful he found the graffito, he was willing to put up with it after he had seen it, in preference to telling management so they could address it.

102. The Claimant told the Tribunal that he had applied for many jobs, but had been unsuccessful. He said that, when he applied for jobs, he was asked about how his previous employment had come to an end. He produced no evidence of job applications, but the more fundamental difficulty about his claim for lost earnings is that we find him to have resigned not because of the graffito, but because of the tension with Ms Stone. That, and the broader workplace culture, are not the subject of this claim.

103. The Claimant was invited to address us on the *Vento* guidelines, as updated, and given the opportunity to consider them before doing so. He contended that his case falls into the upper Vento bracket.

104. We do not agree. This was a hurtful graffito, but it was one written by a rogue employee, not intended to refer to the Claimant's race, in not-prominent writing. The Respondent's management of the workplace certainly had shortcomings, but we have found that management was not aware of the graffito, and when it learnt of it, took appropriate steps.

105. We consider this case to fall within the bottom bracket of the Vento guidelines. We consider that the appropriate award is £3,000.

106. We appreciate that this sum will disappoint the Claimant. But the CMO had referred him to the Vento guidelines, despite which he still put forward a claim massively over the sums contemplated by the guidelines. We cannot let unrealistic expectations lead us to make a higher award than is warranted by the facts of the case.

107. There is then the question of whether or not to make a recommendation. The Claimant in his ET1 sought a recommendation that the Respondent train all their staff on racism and discrimination and the importance of honesty.

108. In his live evidence, the Claimant sought a recommendation to take responsibility for what had happened to him, to teach staff about honesty, and to help victims.

109. The Claimant's criticism of the honesty or otherwise of his colleagues are not part of this claim. The responsibility of the Respondent is settled by our decision.

110. Is it appropriate to make a recommendation as to training on racism and discrimination? We would certainly not discourage such training. But we are mindful that the Respondent behaved appropriately when it learnt of the graffito. We think that the Respondent, encouraged by Ms Woolford,

is likely to learn from the criticisms made in our decision, and do not think a formal recommendation necessary.

111. For the sake of completeness, neither party addressed us on the ACAS Code of Practice.

Employment Judge David Hughes
Date 11.06.2025

REASONS SENT TO THE PARTIES ON
29 July 2025

FOR THE TRIBUNAL OFFICE