



EMPLOYMENT TRIBUNALS

Claimants Mr D Thomson & others
(see attached updated schedule)

Represented by Mr A Line, Counsel

Respondent The Royal British Legion Poppy Factory

Represented by Mr A Solomon, Counsel

Before: Employment Judge K Andrews

**Preliminary Hearing held on 9 January 2018 at
London South Employment Tribunal**

JUDGMENT

1. The claim brought by Mr C McVeigh (2301718/2017) is struck out as it has no reasonable prospects of success.
2. An order for costs in favour of the respondent is made against Mr McVeigh in the sum of £1,750 payable within 14 days (although it is understood that this will be discharged by his union).

Reasons

1. This hearing was listed to consider the respondent's application dated 10 November 2017 for a strike out of certain claims and deposit orders in respect of all remaining claims.
2. Since the previous preliminary hearing a number of claims have been withdrawn. The schedule attached to this Judgment is a complete list of claims remaining after this hearing. Where Judgments pursuant to withdrawals are outstanding they have been promulgated separately as have the deposit orders made at this hearing and amended case management orders.

3. At this hearing I was greatly assisted by both the written and oral submissions made by both Counsel. There was an agreed bundle of documents before me the relevant parts of which I considered. That bundle included a witness statement by Ms Mills, chief executive of the respondent, which was relied upon by the respondent simply as context for their applications which is how I treated it.

4. Background

5. In short, the background to these claims is the practice of the respondent (probably one of the best-known charities in the country) to conduct tours of its factory premises where the claimants worked at the relevant time and the treatment said to be experienced by the claimants during those tours.

6. In the claim form received by the Tribunal on 1 June 2017 Mr McVeigh was identified as a claimant and at paragraph 2 of box 8.2 it was stated that ‘...each Claimant has a disability or disabilities which satisfy s. 6 of the Equality Act 2010...’.

7. At the previous preliminary hearing the respondent admitted that the claimants were disabled with the exception of Mr McVeigh (and others who have now withdrawn their claims). Accordingly I ordered that a disability impact statement and such GP and other medical evidence as was readily available should be disclosed.

8. On 12 October 2017 the claimants’ representatives confirmed - amongst other things - that Mr McVeigh did not have a disability.

9. Also on 12 October 2017 the claimants’ representatives filed further and better particulars in which it was identified that the unwanted conduct relied upon included Mr McVeigh being questioned by a member of a public tour with words to the effect of ‘what was he doing there as he was not disabled’.

10. An amended grounds of resistance was filed by the respondent on 10 November 2017 in which the respondent first applied for a strike out of Mr McVeigh’s claim. That application was repeated in a letter of the same date. The basis of the application was that as Mr McVeigh had conceded he is not disabled his complaint of harassment on grounds of disability has no reasonable prospect of success.

11. On 6 December 2017 Mr McVeigh’s representatives responded to that application and stated ‘The Claimants do not need to have a qualifying disability in order to succeed in a claim for harassment related to disability. The legal test is whether there was a humiliating or offensive environment related to disability rather than related to their disability.’ Although they did not specifically use these words, it is clear that they are referring to a claim of associative discrimination and Mr Line confirmed today that that is the basis upon which Mr McVeigh’s claim is pursued.

12. Relevant Law

13. As far as disability discrimination is concerned it is uncontentionous that a claimant may bring a claim based both on the fact of his or her own disability and also when he or she is closely associated with another person who is disabled and who suffers unwanted conduct of the kind proscribed by the Equality Act 2010 (Coleman v Attridge Law 2008 IRLR 722).
14. Further it is uncontentionous that a claimant cannot make a claim of harassment based on a disability which he has claimed but not proved (Peninsula v Baker 2017 IRLR 394).
15. The power to strike out a claim is found at rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013 which provides that a Tribunal may strike out all or part of the claim on the ground that it is scandalous or vexatious or has no reasonable prospect of success. It is well recognised that discrimination claims should not be struck out summarily save in the clearest of cases (Anyanwu v South Bank Students Union 2001 IRLR 305) but equally that the Tribunal retains the discretion to do so (Jaffrey v Department of Environment etc 2002 IRLR 688).

16. Submissions

17. Mr Solomon for the respondent says simply that Mr McVeigh's claim must fail as it was based on his alleged disability that he did not have. Further if he is asserting that he does not need to have a disability to succeed in a claim for harassment based on association, he has not put that claim forward and if he wished to put it he must seek leave to amend his claim.
18. In reply Mr Line for Mr McVeigh accepts that the claim as originally drafted said that he was disabled but says that it is clear from subsequent correspondence and the further particulars that the claim is in fact broader and it is incongruous to interpret his claim otherwise.

19. Conclusions

20. Mr McVeigh's claim was very clearly put in the claim form namely that he is disabled and received treatment during public tours that amounted to harassment related to his disability. The letter on 12 October 2017 confirmed that in fact Mr McVeigh was not disabled but did not, and nor did the further particulars filed on the same date, clarify the basis of his continuing claim. I accept that the letter was written in response to an order that only asked for confirmation of the fact of disability. However at that stage it must have been apparent to the solicitors acting for Mr McVeigh that the basis of his claim had changed. Notwithstanding that no further clarification was given nor any application to amend was made.

21. I agree that the claim as now described for Mr McVeigh is capable of being a claim of associative discrimination but on the documents before me that claim has not been made. It is simply not good enough for a claimant to say that it must have been obvious that a claim has somehow morphed into another one. The facility to apply to amend claims is there for a reason and one that Mr McVeigh's solicitors should have taken on his behalf if a claim of associative discrimination was being made.
22. Exceptional though it is, therefore, I am persuaded to strike out Mr McVeigh's claim as it has no reasonable prospect of success.
23. Costs
24. Further to that decision the respondent made an application for costs against Mr McVeigh pursuant to rule 76 (1) of the Employment Tribunal Rules of Procedure 2013.
25. This application was made on the basis that I have found the claim had no reasonable prospect of success and that those representing Mr McVeigh would and should have known that this was the case if they had taken instructions properly. As a result of this state of affairs the respondent has incurred unnecessary costs in respect of Mr McVeigh's claim.
26. This application was resisted on behalf of Mr McVeigh. No previous warning had been given to him that a costs application would be made if this strike out application was successful and, Mr Line said, the issue did involve some complexity and consideration of authority.
27. I conclude that a costs order is appropriate on the basis that the claim had no reasonable prospects of success. The lack of a costs warning is not fatal to an application for costs even though some prior warning may well have been desirable and indeed polite on the day. I do not agree with Mr Line that the issue was particularly complex legally or factually. In the end, it amounted to a simple analysis of what was said on the claim form and subsequently.
28. As to the amount of costs to be ordered, Mr Solomon was unable to give me an immediate answer as to the sum sought and no costs schedule or supporting paperwork was available. He did tell me, having taken instructions, that the respondent has incurred solicitors' costs to date of some £30,000 and his brief fee for today was £3,500. He invited me to assess that half of the costs incurred are referable to Mr McVeigh but limited the amount sought to £5,000.
29. In the absence of proper calculations or documentation from the respondent, I summarily assess costs payable by Mr McVeigh (although it is understood that the union will be discharging this on his behalf which is

why there is no evidence of means before me) at £1,750 being half of Mr Solomon's brief fee for today.

Employment Judge K Andrews
Dated 11 January 2018

Schedule of Claimants

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|-------------------|---------------|
| 1. Mr D Thomson | 2301705/2017 |
| 2. Mr P Hammerton | 2301706/2017 |
| 3. Mr G Dymock | 2301707/2017 |
| 4. Mr P Wills | 23017010/2017 |
| 5. Mr G Lock | 23017011/2017 |
| 6. Mr P Hayton | 23017014/2017 |
| 7. Mr J Yarwood | 23017015/2017 |
| 8. Mr D Tobin | 2302284/2017 |
| 9. Mr M Stubbs | 2301993/2017 |