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EMPLOYMENT TRIBUNALS

Claimant		***Respondent***
Mrs C Ghyselen	**AND**	1. MDY Legal 2. PIDG Limited 3. Ms C Gardiner

PRELIMINARY HEARING CASE

HELD AT: **London Central** **ON:** 31 January 2019

BEFORE: Employment Judge D A Pearl (Sitting alone)

Representation:

For Claimant:	Mr N Hanning, Legal Executive
First Respondent:	Mr S Crawford, of Counsel
Second Respondent:	Mr M Magee, of Counsel
Third Respondent:	Ms J Coyne, of Counsel

JUDGMENT

The claim of disability harassment against the Third Respondent, as set out in paragraph 30 of the particulars in the ET1, is struck out as having no reasonable prospects of success.

REASONS

1. The initial notice of preliminary hearing was amended in December last so that, in addition to normal case management orders, the hearing would also consider the strike out applications made by the Second and Third Respondents. The claim is intricate. The ET1 was presented on 4 August 2018 and the Claimant was legally represented. She states that she is disabled by reason both of diabetes and a hearing impairment. The ET1 goes on to record that she was employed by the First Respondent on 4 July 2016.

There was then said to be a transfer of a part of the undertaking to the Second Respondent in 2018. The Claimant was said not to be included in that transfer and, indeed, the ET1 elsewhere states that her employment is continuing. She alleges a failure to make reasonable adjustments after April 2018. Although she refers to "the Respondent" this would appear to be a reference to the First Respondent.

2. Her claim asserts that she ought as a matter of law to have been transferred over to the Second Respondent in or about May 2018.

3. The claim then goes on to make a specific claim of failure to make reasonable adjustments, presumably against the First Respondent. It then alleges disability harassment against the Third Respondent. There is also a s.15 disability claim against the First and/or Second Respondents in relation to not being offered the opportunity of being employed by the Second Respondent. When it comes to the summary of claims, the Second Respondent is said to have automatically and unfairly dismissed her by not employing her. The First Respondent is said to have discriminated within s.15. The Third Respondent is said to have harassed her. The First Respondent is said not to have made reasonable adjustments. It will be apparent from the foregoing that there is more than a little confusion in the claim form.

4. The only strike out application that I am asked to decide today is the Third Respondent. Ms Coyne in her written submission states that there are three acts relied upon, two out of time and one potentially within time. It is this third act that she says has no reasonable prospect of success. If that submission is correct she then goes on to say that, partly for this reason, there is no continuing act. Inferentially she argues that time should not be extended on a just and equitable basis for such earlier acts. In the course of discussion, it became clear that there was likely to be an application by the Claimant to amend the claim. This comes about because Mr Hanning's firm has been instructed very much at the last minute and he saw various grounds upon which an amendment seemed necessary. In those circumstances, I have given separate directions but also, with the parties' agreement, held that questions of any extension of time on the just and equitable basis should be dealt with once the amendment had been seen and adjudicated upon. This is all to take place at the reliminary hearing that is scheduled for 25 April. Accordingly, the only matter I am now concerned with is whether or not the third alleged claim of discriminatory harassment that is made against the Third Respondent should be struck out.

5. That claim is based upon an allegation that relates to 11 July 2018. This is contained in paragraph 30 of the ET1 and the relevant text is as follows. "On 11 July, at 5.48pm, the Claimant received an anonymous call, with someone laughing down the phone at her in a mocking manner. The Claimant is of the belief that the voice was very similar to Cheryll Gardiner's."

6. In paragraph 13 of the Claimant's witness statement for this hearing she says that she was sure that it was the Third Respondent who was calling

"because I recognised her laugh. I may struggle to hear what is being said sometimes but it depends very much on the environment and the pitch of the noise. In the case of her laugh, having worked with her for a long time, I was able to recognise it". I note that she then goes on to make new allegations against Ms Gardiner, but these are not relevant to the point I have to decide.

7. Ms Coyne submits that there is no reasonable prospect of the Claimant being able to establish this was the Third Respondent who was laughing down the phone and she relies upon the difficulty that the Claimant has in hearing as well as the small but (she says) significant firming up of the case from the ET1 to the recent witness statement. Against the Third Respondent's denial, she asks rhetorically how the Claimant will be able to establish the identity of the person laughing down the phone. There is, in my view, something to commend this submission, if it stood alone. It is a point concerning aural identification evidence and it does appear difficult to see how the Claimant will establish her version of the facts.

8. There are, however two further aspects to this which in my view give the answer to the problem. The first is the investigation that has been made by the Respondent concerning telephone records. The records for the Third Respondent's company mobile and her own mobile show that no call could have been made from those phones. I raised the question about a check on her land line at her desk and I was shown an email that, while not putting the matter conclusively beyond any doubt whatsoever, seemed to infer that the Respondent had taken the obvious step of checking whether or not the office land line was used to make the call. I can only conclude from the follow up enquiries about the mobile phones that there was nothing from the office either. This makes the likelihood of the Claimant establishing that Ms Gardiner made the laughing telephone call even more remote.

9. The second factor is that unwanted conduct must, in order to constitute harassment, be related to a protected characteristic. In my view, Ms Coyne is on strong ground when she submits that there is no reasonable prospect of the Claimant being able to establish this. Her disability is twofold, diabetes and hearing loss, but it is wholly unclear (and she has never said) why it is that the laughing phone call moves out of the field of non-actionable harassment into that of tortious harassment. It can only be a matter that founds a claim if it is related to either of her disabilities and, in my view, there are no prospects that the Claimant will be able to get home on this part of the claim.

10. Therefore, for the reasons I have given, I consider that the claim against the Third Respondent in paragraph 30 of the particulars in the ET1 should be struck out as having no reasonable prospect of success. All other questions relating to the other claims against Ms Gardiner, including the potential time issue, need to be raised at the next preliminary hearing.

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EMPLOYMENT JUDGE PEARL

11 February 2019
London Central
Date and Place of Order

12 Feb. 19
Date Sent to the Parties

For the Tribunal Office

IMPORTANT NOTES

(1) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

(2) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rules 74-84.

(3) You may apply under rule 29 for this Order to be varied, suspended or set aside.

(4) Reasons having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.