



EMPLOYMENT TRIBUNALS

Claimant

Mr A

v

Respondents

- (1) B Ltd
- (2) Mr C
- (3) Mr D
- (4) Mr E
- (5) Mr F
- (6) Mr G
- (7) Mr H
- (8) Mr I
- (9) Mrs J

PRELIMINARY HEARING

Heard at: Bristol

On: 13 October 2016

Before: Employment Judge Livesey

Appearances

For the Claimant: in person

For the Respondent: Mr Williams, counsel

JUDGMENT

1. The Respondents' application to strike the claim out is dismissed.
2. The claims against the Second to Ninth Respondents inclusive are dismissed upon withdrawal.
3. The Claimant was not a disabled person as defined by the Equality Act during the material period.
4. The Claimant did and does hold philosophical beliefs as to the abhorrence of paedophilia and/or the sexual abuse of children and of domestic violence towards women.

REASONS

1. Introduction

1.1 Since the original two issues had been listed for determination at this Preliminary Hearing (paragraphs 4 and 5 below), two further matters had arisen (paragraphs 2 and 3) and part of one of the original issues had fallen away, because the Respondent had accepted that the Claimant's wife was disabled at the material time.

1.2 The following documentary evidence was produced at the Hearing;

R1 a bundle of documents;

R2 a further small bundle of medical information which was disclosed late.

The Claimant gave evidence in support of the two main issues (disability and philosophical belief). He did not call his wife to give evidence in support of a statement which was not relevant to those issues. The Respondent relied upon the written statement of Mr Armstrong.

2. Second to Ninth Respondents

2.1 The Respondent had originally intended to rely upon the statutory defence within the Equality Act. The Claimant had then applied to join 8 further respondents on 7 March 2016 and had intimated the possibility of applying to join a further 5. The Second and Third Respondents were formally joined on 26 April and the Fourth to Ninth Respondents were also added on 6 July. They were all served and Responses had been received.

2.2 On 9 August 2016, the Respondents' representatives withdrew the First Respondent's reliance upon the statutory defence. They alleged that there was no longer any purpose served by pursuing the claims against the Second to Ninth Respondents and they suggested that they should be removed from the proceedings.

2.3 The Employment Judge took time to describe and explain the legal position to the Claimant. He was given time to consider whether he wished to pursue claims against the other Respondents. Having done so, he indicated that he no longer wished to pursue them and those claims were therefore dismissed upon withdrawal.

3. Strike out application

3.1 The Respondent had made an application to strike out the claims on 4 October 2016 due to the Claimant's alleged failure to comply with the case management direction in relation to the provision of a witness statement for this hearing.

3.2 On 9 March 2016, the Tribunal ordered that witness statements were to have been exchanged by 23 September. The Claimant sought a two week extension to that date but a much shorter extension, to 4.00 pm on 3 October,

was granted on 22 September. The Respondent alleged that, on that day, the Claimant contacted them at 5 minutes before the deadline and indicated that he would not be able to comply until the following day. The Respondent granted a short further extension and, although he sent some statements the next day, the Claimant did not send one of his own.

- 3.3 Yesterday, timed at 6.55 pm, the Claimant sent his own statement and that of his wife to the Respondent and the Tribunal. The statements did not address the issues which had to be determined at the Preliminary Hearing but, rather, the substantive issues in the claim. His wife's statement was a second hand account of the Claimant's experiences at work.
- 3.4 Striking out a claim for non-compliance with an order is a draconian sanction and ought to be reserved for the clearest cases of non-compliance, particularly where parties had repeatedly failed to adhere to directions and/or significant prejudice has been caused as a result. The Respondent alleged that it was an appropriate section in the circumstances, particularly given the contents of its email of 28 September 2016 in which it set out a full account of the manner in which the Claimant had failed to comply with Tribunal orders.
- 3.5 The Claimant explained that he was experiencing a great many difficulties in his life. He attributed many of them to the Respondent's actions but he was also attempting to care for his wife who had expressed suicidal ideations. He was finding the stress of conducting the litigation difficult.
- 3.6 The Claimant's evidence had been expected to cover the issues of disability and philosophical belief. A statement concerning the Claimant's philosophical belief had been served in accordance with the directions on 23 March. In relation to disability, an impact statement had been served on 4 May 2016, together with some limited medical evidence. Neither statement had been prepared in an orthodox fashion, but at least the Claimant had provided the Respondent with evidence which enabled it to understand the nature of his arguments in both respects.
- 3.7 Accordingly, it was not appropriate to strike out the Claimant's claims a fair hearing could still take place since the Respondent indicated that it was not prejudiced by dealing with the Preliminary Hearing on the basis of the two documents referred to in paragraph 3.6 above. Nevertheless, the Employment Judge was at pains to point out to the Claimant that further breaches of Tribunal orders were unlikely to be dealt with so sympathetically in the future. The Claimant was warned that further failures on his part were likely to be met with 'unless' orders or other sanctions and that he should not be surprised if a more stringent view was taken in the future.

4. Philosophical Beliefs

- 4.1 The Claimant alleged that that he holds two philosophical beliefs which are protected under the Equality Act and which form the basis of several of his complaints of direct discrimination or harassment, as referred to within paragraphs 7, 10 and 11 of the Case Management Summary of 9 March 2016;

4.1.1 A belief in the abhorrence of paedophilia and/or the sexual abuse of children;

4.1.2 A belief in the abhorrence of domestic violence towards women.

The Employment Judge had referred to the test set out in the case of *Grainger-v-Nicholson* [2010] ICR 360, EAT and paragraph 2.59 of the EHRC's Code in paragraph 8 of her Case Management Summary.

4.2 A belief is defined to include any religious or philosophical belief (s.10 Eq A) but, since 2007, there has been no requirement that a philosophical belief should have been similar to a religious belief. Nevertheless, as Burton J stated in *Grainger*, it was necessary for it to have a similar cogency or status (paragraph 26).

4.3 The 5 questions which had to be addressed under *Grainger*, which mirrored those in the EHCR Code, were;

4.3.1 Whether the belief was genuinely held;

4.3.2 Whether it was a belief or simply an opinion or a viewpoint based upon the present state of information;

4.3.3 Whether it concerned a weighty and substantial aspect of human life and behavior;

4.3.4 Whether the belief has attained a level of cogency, seriousness and cohesion;

4.3.5 Whether the belief was worthy of respect in a democratic society, not incompatible with human dignity and not in conflict with the fundamental rights of others.

4.4 The Claimant's statement in relation to his beliefs commenced with the following opening sentence;

"it is my belief that it is wrong to have conduct in actions or statements which harm all lead to the harm of children or women."

That statement was considerably broader than the beliefs which were captured by the Employment Judge at the Preliminary Hearing on 9 March (see paragraph 4.1 above). Nevertheless, as a survivor of child sexual abuse, he gave evidence that he has campaigned to raise awareness of the issue with the NSPCC, Women's Aid (a domestic violence charity), the Children's Society and NAPAC, the National Association of People Abused in Childhood. He stated that he had attended meetings with the NSPCC and had discussed means of raising awareness of their objectives and of ways of raising funds although, in cross examination, he admitted to having been unaware of yesterday's launch of the charity's Christmas '*Little Stars*' campaign. In relation to Women's Aid, he stated that he had contacted Conservative Party headquarters on the charity's behalf in order to lobby in relation to its objectives which, he said, had served to increase funds. In respect of the Children's Society, he had signed petitions and contacted his local MP about the issues which they campaigned for. He had offered to speak at a NAPAC conference and had discussed the possibility of working on the charity's helpline. He stated that he continues to fight to prevent the normalisation and/or acceptability of harm to children or women. He believes that it is the responsibility of "*parents, ordinary children, the police, child protection agencies, charities, NCOs [sic; NGOs] and government*" to take such a stance.

He gave evidence passionately on those issues and with a great deal of conviction.

- 4.5 The Claimant accepted in cross-examination that the views that he holds are likely to be similar to many held by others, but he did not accept that he held them in the same way that others might. By way of example, he provided a detailed account of how he had helped a homeless female victim of domestic abuse in Bath, by providing her with money, a tent, a sleeping bag and the wherewithal to obtain a formal identity so that she was able to claim benefits.
- 4.6 The Respondent argued that the views held by the Claimant were merely '*conventional mores which had been looped together in an attempt to construct protection under the Act*'. Mr Williams did not argue that the type of views expressed by him could *never* amount to a philosophical belief; he saw a distinction between a person who simply agreed, when asked, that child sexual abuse was abhorrent and someone who ploughed their own time and resources into the establishment and running of a charity dedicated to the purpose of raising awareness of the issue and of providing support to victims. The Respondent argued that the Claimant's views were superficial and were akin to someone saying that people ought to be nice to one another or that war was bad. He accepted, however, that it was possible for an individual to hold a philosophical belief in pacifism.
- 4.7 Whilst it was undoubtedly the case that the Claimant's views were likely to be held by the vast proportion of society and that the activities which he considered abhorrent were prohibited in law, the evidence had to be analysed through the prism of the *Grainger* test;
 - 4.7.1 The beliefs were clearly genuinely held by the Claimant, rooted in his own childhood experiences. Although the Respondent stated that it did not challenge this element of the test, by asserting that the Claimant's beliefs were superficial, Mr Williams appeared to be asserting that the Claimant did not hold his views sufficiently strongly or as fervently so as to have qualified as philosophical beliefs. In this case and, for the reasons set out above, that was not accepted by the Judge;
 - 4.7.2 The beliefs were not merely opinions based upon the present state of information (see, further, paragraph 45 of the decision in *McClintock-v-The Department of Constitutional Affairs* [2008] IRLR 27). The Respondent disputed that the Claimant's beliefs qualified under this limb, but they were not simply transitory opinions. There was no room for alleging, as there had been in *McClintock*, that the Claimant might change his mind if presented with different information;
 - 4.7.3 The beliefs were certainly weighty since they concerned an important aspect of human life, conduct and behavior. That was not in dispute;
 - 4.7.4 The beliefs had attained a level of cogency, seriousness and cohesion since they were the subject of numerous high profile campaigns aimed towards greater public awareness and support for victims. Those purposes and aims had become the very *raison d'être* of a number of charitable organisations and pressure groups;

4.7.5 The beliefs were certainly worthy of respect in a democratic society and were reflected by its laws. Again, the Respondent did not challenge that element of the test.

4.8 Accordingly, on the basis of the evidence that was heard, the Judge concluded that the Claimant held two philosophical beliefs as defined under section 10 of the Equality Act.

5. Disability

5.1 The Claimant's disability had been described as depression (see paragraph 3 of the Case Management Summary of 9 March). His wife's disability had been conceded by the Respondent, as stated above.

5.2 A person has a disability if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day to day activities (s. 4 of the Equality Act). Schedule 1 of the Act contains further guidance in relation to the definition. In addition, the Judge took into account the '*Guidance on the Definition of Disability*' pursuant to Schedule 1, Part 1, paragraph 12.

5.3 The Claimant had been employed from January 2008. In the Schedule of allegations that had been produced, his complaints of disability discrimination concerned events which took place between 2008 (2 alleged sexual assaults) and his resignation in February or March this year.

5.4 The Claimant's impact statement [197-200] started by describing the impact which the alleged discrimination had had upon him, not his underlying disability. In the second section, however, he went on to state as follows;

"I suffer from depression, anxiety, flashbacks my Childhood Sexual Abuse, trauma, difficult emotions, additional traumas created from each incident at Computerworld which would compound in the previous trauma and events and create additional flashbacks."

He described feelings of distress, stress and anxiety whilst at work which caused him to be unable to concentrate properly at times. He also experienced similar emotions at home; a loss of sleep, distress, stress and anxiety. When cross-examined, however, the Claimant admitted that he could not remember ever having been diagnosed with depression. If he had been, he believed that it was before 2005.

5.5 In terms of supporting medical evidence, the Claimant had disclosed a number of documents which were in R1 or R2. They were in the following categories;

5.5.1 Photographs [201-4]; these were said to have been of a skin rash which he suffered before he had resigned;

5.5.2 An ECG [205]; This appeared to have been dated 17 December 2015. The Claimant stated that it was taken because he had suffered chest pains but the investigations revealed that he had a healthy heart;

5.5.3 A list of medication that he had been prescribed which started in January 2005 [206-210]; He was prescribed Citalopram, a well-known antidepressant. He was prescribed one 20 mg tablet per day and the prescription remained the same until January 2016. He accepted, during his evidence, that there may be a significant proportion of the population who take antidepressants without suffering substantial impairments to their normal day-to-day activities. Since deciding to discontinue his medication, he stated that he has become more tearful, but more 'in contact' with his feelings;

5.5.4 Correspondence from B&NES Primary Care Talking Therapies Service ([211-2] and R2); There appeared to have been three assessments of the Claimant's mental health that had been carried out in recent months;

- August 2015 [211]; when he was assessed to have had symptoms of 'moderate' depression and anxiety;
- November 2015 [212]; when his assessment was almost identical;
- September 2016 (R2); when his score for depression was the same, but his score for anxiety had risen to 'severe'.

The Claimant attributed the recent deterioration to the state of his wife's health and the stress which has arisen from the litigation. Despite his consultation with B&NES, he stated that he did not receive any therapy;

5.5.5 Medication in relation to his wife's health [213]; Not relevant for the current purposes;

5.5.6 Sick/Fit Notes [214-226]; These revealed that the Claimant had had 2 weeks off work in 2008 due to depression but, other than a further period of absence in 2012 as a result of pancreatitis which gave rise to the need for an abdominal procedure, he had maintained a good attendance record until the late summer of 2015, when he was unable to work due to stress.

5.6 The Claimant had not produced any formal, dedicated medical evidence. He stated that he had asked his GP who had been uncooperative. He had asked a different doctor at the same surgery who had offered to provide a report, but on payment of a fee of £60. Other than apparently telephoning the Tribunal to explain the problem, he had not taken other steps to overcome the apparent deficiencies in his evidence.

5.7 On the face of the evidence that was available, it appeared that the Claimant became incapable of work and in need of support from B&NES in the late summer and early autumn of 2015 as the situation at work deteriorated from his perspective. It became clear through cross-examination, however, that the Claimant had started undertaking other work even though he was signed off sick with the Respondent; he worked for Interserve [446] and The Lunch Company from December [463] and, after his employment with the Respondent came to an end, his work for them increased significantly. He also undertook a small amount of work for an estate agent [463]. The Claimant stated that he was in dispute with HMRC and/or The Lunch Company over his employment status and is in correspondence with HMRC in an attempt to sort it out.

- 5.8 Although Mr Armstrong was not called to give evidence by the Respondent, his statement contained some relevant information; that the Claimant had discussed his alleged childhood abuse 6 or 7 years earlier at work and had been 'teary' at the time but he had nevertheless '*remained very focused on his job*' and had been '*an outstanding employee in his field*'. When performance issues had been raised in 2013, a warning had been issued. The Claimant had not attempted to explain his performance on the basis of any underlying disability or mental impairment.
- 5.9 The Claimant's evidence on disability had been, frankly, rather vague and, in part, inconsistent. There was certainly a possibility that he had been disabled throughout the period with which the Tribunal would be concerned at the final hearing, but the Employment Judge was not satisfied that that was probably the case on the basis of the evidence which had been presented. Although an individual's ability to work is not the litmus test for determining whether they are substantially impaired in their day-to-day activities, the Claimant's ability to do so for such a long period was important in the Judge's view. Further, just when the evidence appeared to suggest that his impairments may have been more significant, it was apparent that he was undertaking other work for other employers, engaging in correspondence with HMRC and lengthy, detailed correspondence with the Tribunal. There was no doubt that the Claimant has had many issues to deal with in the recent past, particularly relating to the mental health of his wife, but there was insufficient evidence upon which the Judge could properly conclude that the Claimant had been a disabled person within the statutory test between 2008 and March 2016.

Employment Judge Livesey

Bristol

Dated 13 October 2016

Sent to the parties on
17 October 2016 by email only