



**EMPLOYMENT TRIBUNALS**

**Claimant: Mrs J Johnson**

**Respondent: Carrs of Sheffield (Manufacturing) Limited**

**PUBLIC PRELIMINARY HEARING**

**Heard at: Leeds by CVP video hearing      On: 10 September 2021**

**Before: Employment Judge Shepherd Appearances:**

**For the Claimant: Mr C Myers (family representative) For the Respondent: Ms Masters, counsel**

**JUDGMENT**

1. The claimant's application to amend her claims to include claims of disability discrimination relating to her own alleged disability (section 15 discrimination arising from disability and a reasonable adjustments claim) is refused.
2. The respondent's application to strike out the claims of direct discrimination by association with the claimant's late husband and the claim of direct age discrimination are refused.
3. The respondent's application that the claimant be ordered to pay a deposit as a condition of continuing to advance the allegation of direct age discrimination is refused.
4. The claimant is ordered to pay a deposit of £100 by **1 October 2021** as a condition of continuing to advance the claim of direct discrimination by association.

**REASONS**

1. I heard submissions from Ms Masters on behalf of the respondent and Mr Myers and the claimant.
2. I had sight of a bundle of documents up to page 131 and a number of authorities provided on behalf of the respondent.<sup>32</sup> At an earlier Preliminary Hearing for case management purposes on 17 May 2021 the claims and issues were identified by Employment Judge Eeley. The claims identified included, in addition to claims of disability discrimination by association

with her husband, a claim of disability discrimination relating to the claimant's own disability of anxiety and depression.

3. This Public Preliminary Hearing was listed to consider the respondent's application for strike out of the disability-related claims as having no reasonable prospect of success or the order of a deposit as the claims had little reasonable prospect of success. Together with respondent's objection to the amendment of the claims to include claims in respect of the claimant's disability.

4. The claims set out in the claim to the Tribunal appear to be unfair dismissal, discrimination by association with the claimant's husband, direct age discrimination, wrongful dismissal, holiday pay and notice pay.

5. The claim of disability discrimination in respect of the claimant's own impairment is not within the claim form and it would require an amendment.

6. In her claim to the Tribunal the claimant refers to age discrimination, disability by association and that her mental well-being has been seriously affected. There is no claim of discrimination on the grounds of the claimant's disability. It is now approaching one year since the dismissal and it should be considered whether the application to amend should be allowed.

7. Upon consideration of the documents and discussion, it is clear that the claimant would not have had the protected characteristic of being a disabled person at the time of the alleged discriminatory treatment, the termination of her employment. She had been off with stress in the tragic circumstances of her husband's severe illness. She continues to suffer from anxiety and depression and it may well be that she would have the protected characteristic of being a disabled person now. However, the Tribunal must assess whether the claimant was a disabled person at the time of the dismissal.

8. I am satisfied that to allow the application to amend the claim would cause substantial prejudice to the respondent. However, the claimant can continue with her remaining claims. The balance of prejudice is in favour of the respondent. Whilst it is not within the Tribunal's function is to decide on the merits of the claim on the amendment application. However, it is obvious that this claim could not succeed and the claimant would suffer no injustice or hardship by not being able to pursue the claim in respect of her disability.

9. With regard to the claim of direct discrimination by association with her late husband, I heard submissions from Ms Masters on the basis that it would be appropriate to strike out this claim as it would be necessary to establish that the dismissal was on the grounds of the claimant's association with her late husband and because of his motoneuron disease, not simply because the claimant was caring for her husband. If she had been unable to work as a result of caring for her husband or another person on grounds other than the disability she would have been treated no differently.

10. Mr Myers and the claimant indicated that the respondent had treated her entirely differently once she had informed them of her husband's diagnosis and her dismissal was because of his disability. If that is established and it is shown that the reason for the claimant's dismissal was that her husband had been diagnosed with motor neurone disease then there is a possibility that the claim of direct discrimination because of the claimant's association with her disabled husband could succeed. However, that is only a possibility and I am satisfied that it has little prospect of success.

11. Under Rule 39, where a Tribunal at a preliminary hearing considers that any allegation or argument in a claim has little reasonable prospect of success, it may make an order requiring the party to pay a deposit of not more than £1000 as a condition of continuing to advance that allegation or argument. Rule 39(2) requires the Tribunal to make reasonable enquiries about the party's ability to pay the deposit and to have regard to that when deciding the amount of the deposit.

12. The threshold for making a deposit order, “little reasonable prospect of success”, is lower than that for striking out a claim, but the Tribunal must have a proper basis for doubting the likelihood of the party being able to establish the essential facts. The Tribunal is entitled to take into account not only the purely legal issues, but also the likelihood of the party being able to establish the facts essential to his or her case, and in doing so, to reach a provisional view as to the credibility of the assertions being put forward: see: *Van Rensburg v Royal Borough of Kingston-upon-Thames* UKEAT/0095/07.
11. I am not satisfied that the claim of direct discrimination by association with the claimant’s late husband’s disability has no reasonable prospect of success and I refuse the application for it to be struck out. However, I am of the opinion that the claim has little reasonable prospect of success and, in those circumstances, I have made enquiries of the claimant’s means and order her to pay a deposit of £100 as a condition of proceeding with that allegation.
12. With regard to the claim of direct age discrimination, the claimant indicated that she had a right wrist injury in 2002. She had an injury to her left wrist in April 2020 and a medical report was provided to the respondent. It was dated 19 August 2020 and appears to have led to the termination of her employment. The claimant said that if she had been within a younger age group she would not have been dismissed by reason of her capability.
13. In addition, it was not clear that was the reason for the dismissal. The response to the claimant’s appeal referred to the claimant as having had no intention of returning to work. It was also indicated that it was the view of the appeal committee that the claimant had “effectively retired”.
14. I do not accept that there are no reasonable prospects of success or little reasonable prospects of success in respect of the claim of age discrimination and I make no order to strike that claim out or to order the claimant to pay a deposit as a condition of pursuing that claim.
15. As I explained to the Claimant, she must note that if she pays the deposit and loses the claim for the reasons I have identified in this order, not only will she lose the deposit, but more importantly she is at much greater risk of having to pay some or all of the Respondent’s legal costs.
16. I have issued separate Case Management Orders in respect of the continuing claims.

**Employment Judge Shepherd**

Date: 10 September 2021

Sent to the parties on: 13

September 2021

For the Tribunal :