



EMPLOYMENT TRIBUNALS

Claimant: Mr E Nowicki

Respondent: Clipper Logistics PLC

Heard at: Nottingham

On: Monday 24, Tuesday 25 and Wednesday 26 June 2019

Before: Employment Judge Blackwell

Members: Mrs C Brown
Mr P Jackson

Representatives

Claimant: In Person

Respondent: Ms L Gould of Counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:-

1. That the Claimant's claims of direct disability discrimination pursuant to Section 13 of the Equality Act 2010 fail and are dismissed.
2. The Claimant's claims of harassment pursuant to Section 26 of the Equality Act 2010 also fail and are dismissed.
3. The Claimant's claim of unlawful deduction from wages succeeds and the Respondents are ordered to pay to the Claimant the gross sum of £155.54.

RESERVED REASONS

1. Mr Nowicki represented himself and he called to give evidence three former colleagues, Mr A Petrovskis, Mr P Wypych and Mr M Berganski. Ms Gould of Counsel represented the Respondents and she called Mr D Baker, Shift Manager, Mrs S Sumner, HR Manager, Mr S Laidlaw, HR Adviser and Mr A Urwin, the Account Director. There was an agreed bundle of documents and references are to page numbers in that bundle.

2. The first day of the scheduled hearing was lost because there was no Polish interpreter for Mr Nowicki. As a consequence there was not time for oral submissions to be made and the Tribunal directed that both parties submit written closing statements which both parties did. Both parties also commented upon each other's final statements.

Issues and the law

3. The issues and relevant law were set out as a consequence of an attended Preliminary Hearing held by Employment Judge Moore on 14 November 2018. At paragraph 2 she recorded as follows:

"The Claimant's ET1 submitted on 12 July 2018 advanced a number of claims as follows:-

2.1 Direct discrimination on the grounds of disability, specifically due to association with the Claimant's son who the Claimant says is disabled.

2.2 The Claimant asserted that he had been bullied in the section at 8.2 (of the ET1) where he set out details of his complaint and it is accepted that this amounted to advancing an harassment claim.

2.3 The reference to being paid half wages was also advanced which is accepted amounted to a claim under Section 13 of the Employment Rights Act 1996 for unauthorised deduction from wages."

4. Paragraph 15 stated:

"In respect of the substantive hearing the issues to be determined are as follow:-

Section 13 claim – direct discrimination and Section 26 harassment:-

15.1 The Claimant was denied access to training.

15.2 The Respondent tried to dismiss the Claimant.

15.3 The Claimant was singled out by managers and treated differently. Examples were given that he had his safety shoes checked and had his breaks monitored.

15.4 That the Respondent provided alleged false facts to the occupational health doctor and produced a false report.

15.5 That the Respondent displayed behaviours designed to force the Claimant to leave the company.

15.6 Actions by the Respondent on 9 July where the Claimant says he was bullied.

Section 13 Employment Rights Act 1996 unauthorised deduction from wages:-

15.7 That the Claimant had wages withheld from him.”

The relevant law

5. Disability issues:-

“Section 13 – Equality Act 2010 – 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 or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7).

Section 26 Equality Act 2010 - 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.

Section 136 Equality Act 2010 – 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 Special Educational Needs Tribunal for Wales;
 - (f) an Additional Support Needs Tribunal for Scotland.”

Unauthorised deduction from wages

6. Section 13, subsections (1) and (2) Employment Rights Act 1996 is as follows:-

- (1) An employer shall not make a deduction from wages of a worker employed by him unless:-
 - (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or
 - (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
- (2) In this section “relevant provision”, in relation to a worker’s contract, means a provision of the contract comprised:-
 - (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
 - (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

Findings of Fact

1. Mr Nowicki began his employment with Clipper on 2 November 2015 as a Warehouse Colleague at the Swadlincote warehouse.
2. On 2 June 2016 he transferred to the Duke warehouse at Burton-on-Trent working day shifts, 12 hours, four days on/four days off. The Duke warehouse does all the storage and distribution for the Superdry brand. There are around 270 permanent employees, supplemented by between 170 to 600 agency workers at peak times.
3. At page 62 issued on 21 June 2016 is a fitnote in respect of the condition of plantar fasciitis indicating that Mr Nowicki was unable to stand for more than 5 hours per shift. Clipper made the necessary adjustments in accordance with that fitnote.
4. At page 65 followed a further fitnote in respect of the same condition requiring lighter duties and altered hours.
5. This led to a meeting on 19 January 2017 and to Mr Nowicki submitting a flexible working request (see page 69).
6. at page 74 there are the notes of a further meeting in which Mr Nowicki states that he needs to spend more time with his son, there is reference to his son being on the autistic spectrum and to be "medium disabled". There is also reference to the plantar fasciitis and to a complaint about a supervisor. There are further meetings held on 1 February and 3 February culminating in a meeting on 10 February where it is confirmed that Mr Nowicki's request for flexible working is granted.
7. At page 96 is a further fitnote of 17 November 2017 again in relation to plantar fasciitis recommending amended duties including a reduction in hours and no more than one hour of walking/standing. Again Clipper accommodated the recommendations of the fitnote.
8. At page 97 is a further fitnote in respect of the same condition extending from 17 January 2018 to 18 February 2018. This led to a meeting held on 6 February. The notes of which begin at page 98 held by Mr Nowicki's shift manager who asked during the meeting what Clipper could do to support and help and Mr Nowicki's answer was perhaps a different job in the warehouse.
9. It was decided to obtain an occupational health report and Mr Nowicki's consent to disclosure of his GP's notes was obtained.
10. There was some delay but we see at pages 102(a), (b), (c), (d) and (e) Clipper's reference to an occupational health manager. This is the evidence upon which Mr Nowicki bases his allegation that Clipper provided false facts/information to the occupational health professional which led to a false report. There also followed discussions between Mr Baker the shift manager on Mr Nowicki's shift and Mr Ludlow the HR Adviser concerning exactly what work Mr Nowicki was capable of.

11. There then followed on the night shift of 26-27 of March an incident which is plainly at the heart of Mr Nowicki's claims. What is agreed at around 9:00 pm on the 26th there was no work remaining for Mr Nowicki to do in respect of the driving of a reach truck. It is also common ground that Mr Baker asked Mr Nowicki to do other tasks which required him to walk around the warehouse. It is also common ground that Mr Nowicki refused.

12. There was an initial meeting. The notes begin at page 114 and chaired by Mr Baker which led to Mr Ludlow being called in. Mr Ludlow met with Mr Nowicki and the notes are at page 108. Mr Ludlow is recorded as saying "we can't create a job that isn't there". There is a further discussion of what work Mr Nowicki is fit to do and he raises for the first time that he is less able to stand because of the side effect of a supplement that he is taking on his kidneys. Mr Ludlow is also recorded as saying "Emil if you are unable to do the duties that are asked of you we have to ask for you to make the decision if you are fit for work and if you are not fit". Mr Ludlow suggests that Mr Nowicki considers whether it would be better to take a period of rest supported by a sicknote which would mean he could claim statutory sick pay. All this was said in the context that Mr Nowicki had refused to carry out Mr Baker's instructions. There was discussion as to whether there was other sedentary work that Mr Nowicki could have done and we accept that there was but we also accept that it had a lower priority.

13. At page 120 Mr Nowicki raised a grievance bearing a date of 29 March 2018. He complains of harassment by Mr Baker and Mr Ludlow. He complains of them blocking promotion and training opportunities.

14. He complains of "bullying by writing conversation that is not job for me, creating untrue facts and of failure to deal with his queries about wrong payment of wages. Stating that Mr Nowicki is not fit for work by reason of work related stress".

15. On 10 April the grievance hearing is held, chaired by Mr Stretton the senior Operations Manager; the notes beginning at page 125. At 126 Mr Nowicki elaborates on his grievance letter. He refers specifically to Mr Baker checking his shoes and checking his breaks. At page 127 he repeats the allegation against Mr Ludlow, namely "Sam told me that there is no job for me. We don't have admin job for 6 hours".

16. On 19 April Mr Nowicki was due to attend an occupational health appointment but did not do so because he felt too stressed.

17. At page 140 by letter of 21 May Mr Stretton rejected all of Mr Nowicki's heads of grievance though he did say that the complaint about the failure to pay correct wages was being looked into.

18. A further appointment to attend occupational health was made and indeed Mr Nowicki did attend on 4 June 2018 and the report is at pages 145 to 147. Again this is the only evidence available to us in respect of the allegation that the report was false. Mr Nowicki almost immediately made the allegation that he now advances in his letter of 8 June at page 148.

19. Mr Nowicki having appealed Mr Stretton's grievance outcome as he was entitled to do, a hearing was convened on 14 June and the notes begin at page 149, Mr Urwin being the General Manager at that time chairing the appeal hearing. There is discussion on Mr Nowicki's request to work a 6 hour shift as an administrator and Mr Urwin explained, which he confirmed in evidence, that admin jobs were required to work a 12 hour shift because although he accepted that there had been a period when a few employees worked a 6 hour shift, that had proved unsuccessful because there was no continuity and jobs were forgotten or left uncompleted. Mr Nowicki's trade union representative recommended that there ought to be a fact finding meeting with Mr Nowicki with a Polish speaker to assist in understanding his grievances. That was duly arranged on 25 June 2018 and this is perhaps the most lucid account of Mr Nowicki's complaints, most of which are repeated before us at pages 153 and 154.

20. On 12 July Mr Nowicki makes a new allegation against Mr Baker in respect of an incident which occurred on 9 July and involved a colleague called Zoltan. That was separately investigated and it is clear from the contemporaneous documents that what happened was that Mr Baker saw Mr Nowicki talking to Mr Zoltan and sent Mr Taylor to ask what was the purpose of the discussion. A satisfactory explanation ie a work related explanation was given to Mr Taylor and the matter was taken no further. However Mr Nowicki records it at page 155 as the manager "bullying him by wrong accusation and trying to separate him from other staff and damage his mental state". At 175 on 1 August Mr Urwin reconvenes the grievance appeal hearing and it deals principally with the issue of pay queries which Mr Urwin promised to investigate and indeed did so.

21. At 181 the appeal hearing is again reconvened on 9 August.

22. In our view what Mr Nowicki is recorded as saying at page 182 is indicative of his approach to his employment and his attitude towards Clipper, for example he says:

"I have a right to work. Company must set up everything. Manager can set up everything. All my problems are from Manager. He must resolve my problems."

He rejects Mr Urwin's explanation as to why admin need to work a full 12 hour shift. The discussion goes on to cover the events of 26 and 27 March and the alleged falsification of the evidence to the occupational health professional. There is further discussion about the errors in the payment of wages to Mr Nowicki for which Mr Urwin acknowledges that "we got it wrong".

23. By now of course Mr Nowicki has submitted the claim form which is the subject of this hearing but we note that the outcome of his appeal is recorded in a letter of 27 September 2018 at pages 190 to 192. In respect of wages Mr Urwin acknowledges failures on the company's part and agrees to write off an overpayment of £379.28. He also undertakes to provide detailed explanations for each wage slip and tables the first example.

24. He goes on to explain why admin roles were not available to Mr Nowicki and finally he deals with the complaints of bullying, harassment and discrimination.

25. It is clear that Mr Urwin undertook a thorough and detailed examination of Mr Nowicki's complaints. The notes of the hearings disclose an objective and detailed approach.

Conclusions

Direct disability and harassment

26. The first matter to be determined is whether we accept that Mr Nowicki's son is disabled within the meaning of Section 6 of the 2010 act. Mr Nowicki asserts that he is. The Respondents do not accept that he is and puts Mr Nowicki to proof. There is a limited amount of material available to us. We note that at one point Mr Nowicki was invited to bring documents establishing the fact of his son's disability and Clipper were at that point satisfied with the evidence provided. We have also seen the document at page 64 which is of limited value. However, on balance we accept that Mr Nowicki's son by reason of his autism is disabled.

27. Turning now to the specific matters for determination.

The Claimant was denied access to training

28. There seem to be two main allegations in that regard. The first is that he was not trained on a type of truck called DNA. It is accepted that he was not trained to drive the DNA. The explanation given throughout the grievance process and repeated in evidence by Mr Urwin was that there were only two DNA trucks and they had twenty individuals qualified to operate them. The second matter is that, and again it is common ground that Mr Nowicki was not trained to perform an admin role. This allegation is linked to the allegation that alternative work ie an admin role should have been found for Mr Nowicki. It is common ground that there were vacancies which Mr Nowicki did not apply for. The issue appears to be that Mr Nowicki wished only to work 6 hour shifts and Clipper have throughout asserted, that they required for continuity reasons, admin staff to work the full normal 12 hour shift.

29. In our view as to this allegation Mr Nowicki cannot even establish less favourable treatment because there is no actual or even hypothetical comparator to whom he can point in respect of each allegation. We accept that for a time one or two individuals did work 6 hour admin shifts but that practice was stopped for the continuity reasons that Mr Urwin explained. Further there is nothing other than Mr Nowicki's bare assertion to indicate that the decisions taken in that regard were tainted by discrimination. The allegations must therefore fail.

The Respondent tried to dismiss the Claimant

30. In our view this allegation is linked to the fifth allegation, namely that the Respondent displayed behaviours designed to force the Claimant to leave the company and we will deal with them together. It seems to us and in particular relying upon the document at pages 153 and 154 that these allegations are founded almost entirely on what was said by Mr Baker and Mr Ludlow during the night shift of 26/27 March 2018. We have carefully re-read the notes of the two discussions held during that shift.

31. We also take into account Mr Nowicki's poor command of the English language. We accept that he believes that he was threatened with dismissal during that shift. However as with so much of Mr Nowicki's case that is not a reasonable conclusion to draw from what was said to him. He may well have misunderstood it although Mr Urwin was at great pains to assure him that the company was not wishing to dismiss him but those notes, supported by the direct evidence of Mr Baker and Mr Ludlow do not establish the allegation. Indeed it is clear that both Mr Ludlow and Mr Baker wanted to find a way forward that would both enable Mr Nowicki to continue to work as indeed he did, and fulfil Clipper's requirements in terms of efficiently performing the warehouse tasks.

32. We also take note of the fact that Clipper has throughout the relevant period both accommodated Mr Nowicki's request for shift changes and flexible working. It also complied with the recommendations of the various fitnotes in terms of light duties and hours of work. We also note that Mr Urwin's conduct in dealing with Mr Nowicki's grievance appeal was both thorough and sympathetic. These are not the actions of an employer seeking to drive an employee out. Again all we have is Mr Nowicki's assertion of discriminatory behaviour. There is no evidence to support that allegation, nothing from which an inference can be drawn. These two allegations must also fail.

The Claimant was singled out by Managers and treated differently - Examples were given that he had his safety shoes checked and had breaks monitored

33. It seems to us that this is essentially an allegation made against Mr Baker and it is linked with the sixth allegation:

“Actions by the Respondent on 9 July where the Claimant says he was bullied.”

We will deal with these two allegations together. We note in reading the documents contained within the bundle that Mr Nowicki has in addition to the complaints against Mr Baker complained about four other managers but the allegations against them do not appear in his proof of evidence nor in his Claim Form.

34. Thus, essentially the complaints are about Mr Baker. There are three specific complaints. The first in regard to the allegation that Mr Baker checked to see that the coloured shoes which Mr Nowicki was wearing were of the correct safety specification. Mr Baker accepts that he did so. Mr Baker's evidence is that he would have, and indeed did check others were he was not sure whether a particular shoe met the required safety specification. We accept Mr Baker's evidence on that point and thus it is clear that Mr Nowicki was not “singled” out and was not therefore treated less favourably.

35. The second matter complained of was that Mr Baker checked that Mr Nowicki had taken the specified rest period and had not checked other worker's rest periods. Mr Baker's assertion is that he did not check anybody's rest breaks because that was not for him to do. We accept that evidence and therefore there is no evidence of less favourable treatment.

36. The third matter complained of is the incident on 9 July which we have described above at paragraph 20 of our findings. Again, there is no actual or hypothetical comparator advanced by Mr Nowicki to establish less favourable treatment. Mr Baker's reasons for acting as he did are credible and reasonable and we accept them. The only evidence to support Mr Nowicki is that of Mr Petrovskis, who stated that "Manager Daren Skene Baker always looking something on Emil. This was very visible".

That the Respondent provided alleged false facts to the occupational health doctor and produced a false report

37. It seems to us that this allegation typifies Mr Nowicki's approach. On seeing the OH report he fired off a letter making the same allegation that he pursues now. He was taken in cross examination to the referral form beginning at page 102a and invited to point out any part of the document which was false or erroneous. He could not. Yet he persisted both in evidence and in his submissions with the allegation that the referral contained in some way false information. We have read the document and it seems to us to be a perfectly objective referral containing all the necessary information.

38. Turning now to the ensuing OH report beginning at page 145, the only specific matter which Mr Nowicki says was false was the conclusion that he was unlikely to be disabled within the meaning of the Equality Act. That of course is not a matter of falsity but a matter of opinion and one which with respect to Mr Nowicki the assessor is more likely to have right on the information then available. Thus, there is absolutely no factual basis for this allegation and as with all the others we simply have Mr Nowicki's assertion of discriminatory behaviour unsupported by any evidence.

39. Thus, all the claims of direct discrimination fail and so does the associated claim of harassment. We accept that Mr Nowicki holds the view that Clipper acted in a manner that suggested that they wished to dismiss Mr Nowicki and that he genuinely holds the view that he was bullied by Mr Baker. However Mr Nowicki's perception is only one of the three matters that we have to take into account in determining an allegation of harassment pursuant to Section 26 the others being "the other circumstances of the case" and "whether it is reasonable for the conduct to have that effect". Again for the reasons set out above Clipper's conduct cannot reasonably have led to Mr Nowicki's perception.

40. We would comment that in our view Mr Nowicki is plainly a difficult employee to manage and Clipper have thus far made eminently reasonable efforts so to do.

Unlawful deduction from wages

41. We spent a disproportionate amount of time in dealing with this matter. Neither the further and better particulars advanced of the monetary claim by Mr Nowicki at pages 17 and 18, nor those paragraphs of his proof of evidence dealing with the point showed the sum that Mr Nowicki was claiming nor how it had been calculated. We therefore asked him overnight on the first actual day of the hearing to produce a calculation which showed the sum he claimed was owing and how he had reached that conclusion. He produced a 24 page handwritten document which left us little the wiser as to his method of calculation but led to a conclusion that £356.77 was owed.

42. The matter was further complicated by the fact that Mr Nowicki had given credit in the sum of £550.66 in relation to what he says was an agreement between himself and a shift manager that in return for being paid two weeks' wages for a period of absence caused by an assault by a security guard on Clipper's premises he would not take the matter further. We have assumed for the purposes of determining the unlawful deduction from wages claim that what Mr Nowicki says is true, Clipper did not have the opportunity to challenge the matter because it emerged on the final day. However if assuming what Mr Nowicki says is correct that increases the unlawful deduction from wages by that sum, ie £550.66 because Mr Nowicki has given credit for it. Clipper do not in any event accept that he is entitled to that sum of £550.66.

43. The Clipper evidence was clearly set out in the document at page 200 and it arrived at the conclusion that there was an overpayment of £379.28. That same sum is referred to in the grievance appeal outcome letter, see page 191 and which Mr Urwin confirmed that Clipper would not seek reimbursement of the overpayment.

44. The Respondent's position was changed during the hearing as a consequence of Mr Nowicki demonstrating that he had not agreed in writing to a change in the way in which he was paid and Clipper accepted that because of that, although he had accepted it orally, there was an unlawful deduction of wage which would entitle Mr Nowicki to a payment of £155.54.

45. In conclusion Mr Nowicki has not established either a sum owed or a satisfactory method of calculation of that sum and therefore we cannot find in his favour. We do however understand Clipper's approach and we therefore award the sum of £155.54 in accordance with their calculation.

Employment Judge Blackwell

Date: 20 August 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE