



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Emil Nowicki

**Respondent:** Clipper Logistics plc

**Heard at:** Leicester (remotely via CVP)

**On:** 3, 6, 7, 8 and 9 September 2021

**Before:** Employment Judge Ahmed

**Members:** Mr A. Beveridge  
Mr M. Alibhai

## Representation

**Claimant:** In person

**Respondent:** Miss Laura Gould of Counsel (instructed by Clarion Solicitors)

## JUDGMENT

The unanimous decision of the Tribunal is that the Claimant's complaints of direct disability discrimination, harassment, less favourable treatment by reason of being a part-time worker and victimisation are all dismissed.

## REASONS

1. In these proceedings Mr Emil Nowicki brings the following complaints:
  - 1.1 Direct disability discrimination;
  - 1.2 Harassment (based on the protected characteristic of disability);
  - 1.3 Less favourable treatment on the grounds of being a part-time worker;
  - 1.4 Victimisation
2. The Claimant previously brought proceedings under case number 2601596/2018

in June 2019. Those were complaints of direct disability discrimination, harassment and an unlawful deduction of wages. The case was heard by a differently constitute tribunal. The first of those two complaints were dismissed. The third succeeded in part. It is accepted that the Claimant has, by issuing previous proceedings, done a 'protected act' and is thus entitled to bring a complaint of victimisation in these proceedings.

3. The Claimant was employed by the Respondent as a Forklift Truck Driver. He has since the events of this case resigned from his employment. The Respondent are a well-known logistics company.

4. The Claimant relies on two disabilities in relation to his disability discrimination complaints. These are an impairment to his feet (specifically the condition of Plantar Fasciitis) and a mental impairment of anxiety and depression. The Respondent has conceded that the Claimant is a disabled person by reason of both of those conditions. It also accepts that it had knowledge of the plantar fasciitis but does not accept knowledge of anxiety and/or depression of the Claimant in relation to those of the Respondent's employees who are said to have discriminated him.

5. It is accepted that the Claimant was a part time worker and is thus able to bring a complaint of detriment by reason of being a part-time worker.

6. This hearing which was conducted remotely by video through the Cloud Video Platform (CVP). The Claimant gave evidence on his own behalf. He did not call any other witnesses. His knowledge of the English language is limited and thus the proceedings were translated to him throughout in the Polish language. The Respondent gave evidence from the following witnesses: Mr Oskars Skudra (a Team Leader), Miss Sharon Sumner (an HR Manager), Mr Gary Snape (another Team Leader) and Mr Liam Widdowson (an Operations Manager). The only other potentially relevant witness was Mr Richard Lees but he was not called. Mr Lees is no longer employed by the Respondent.

7. The allegations are fairly straightforward. They are as follows:

7.1 That on 6 January 2019 Mr Skudra shouted at the Claimant and continued to provoke him in front of others after initially shouting at him;

7.2 That in the investigation that followed the above incident, Mr Lees (the investigating officer) acted in a biased way, mistreating the Claimant through 'physiological and verbal behaviour', accused the Claimant of touching Mr Skudra (in a sexual way), speaking to the Claimant unpleasantly and asking questions designed to degrade and blame him;

7.3 That Mr Widdowson (who dealt with the appeal against the Claimant being given an oral warning again following the incident on 6 January) failed to check all the circumstances, refused to hear the Claimant's witnesses, applied disciplinary action against the Claimant (by upholding the oral warning) and by intimidating him.

7.4 That Miss Sumner 'guided the Managers' through the disciplinary process.

7.5 That on 17 February 2019 (in an unrelated matter to the above) Mr Snape challenged the Claimant at work accusing him of taking breaks that were too long.

8. The Claimant relies upon the above factual allegations in respect of all of his complaints of direct disability discrimination, harassment, less favourable treatment on the grounds of part-time status and victimisation. He has as mentioned earlier subsequently resigned from his employment. He made it very clear in correspondence with the Tribunal that he is not bringing any complaint of constructive unfair dismissal.

9. In the previous proceedings under case number 2601596/2018 the Claimant had relied on his son's disability for a claim of so-called associative disability discrimination. The Claimant initially decided not to do the same in these proceedings but then apparently changed his mind. He applied (in correspondence) to amend his claim to do so. The application was considered on paper an Employment Judge and refused. The Claimant did not seek a reconsideration even though from his previous experience he is obviously familiar with the concept of a reconsideration. Although the application for an amendment had been rejected partly on the grounds that it was *res judicata* (as the Claimant had previously raised similar issues at the hearing in case 2601596/2018) it became clear that the Claimant was seeking to adduce fresh arguments, based on associative discrimination, which he had not mounted before. It was therefore treated as a fresh application to amend. The amendment application was fairly simple: the claimant wished to pursue an allegation that the real reason why the Claimant was discriminated against and victimised as well as harassed was because he has a disabled son. That is to say to bring a further complaint of associative discrimination.

10. We considered the amendment application both by reference to the Presidential Guidance and the principles set out in ***Selkent Bus Company v Moore* (1996) IRLR 661**. Our decision was to refuse the application. Our reasons were as follows: the application was made very late in the proceedings (on the first day of the hearing), there was no satisfactory explanation for the delay. Given that the Claimant had run similar arguments before it was not clear why he had not pursued the argument in these proceedings. The parties would clearly need to adduce further evidence to deal with the allegation, this was likely to result in an adjournment of this hearing causing delay and additional costs. We found the overall balance of hardship favoured the Respondent and we saw no reason why if the Claimant wanted to pursue such an argument he had not said so earlier.

## **THE FACTS**

11. The facts are relatively straightforward and with the exception of one point, not in dispute. On 6 January 2019 whilst doing his rounds, Mr Skudra noticed that the Claimant was sitting on a tower of empty pallets. Mr Skudra has health and safety duties amongst his responsibilities. It is common ground that sitting on a stack of pallets is a health and safety risk. Upon spotting this Mr Skudra shouted the Claimant's name loudly down a long aisle and gestured for him to get up. Mr Skudra was aware that the Claimant had a problem with his feet and could not stand for long periods but he also knew that the Claimant had been allocated a seat in a truck and there was no reason why Mr Nowicki could not sit inside the truck if he needed to sit. Mr Nowicki clearly heard Mr Skudra (as he complains of being shouted at) but ignored him and carried

on. As a consequence, Mr Skudra went closer to the Claimant and told him that he should not be sitting on pallets as they were a health and safety hazard. Assuming that the Claimant would comply Mr Skudra then proceeded to the transport office where he was originally headed.

12. On his return he noticed the Claimant was still sitting on the pallets and speaking to colleagues. Mr Skudra asked the Claimant why he was still sitting on the pallets. This time Mr Nowicki's reaction was aggressive. He got up, grabbed Mr Skudra's hi-vis jacket, jerked it and said: 'there is nothing written on your vest saying you are a Champion, Team Leader, Manager. It says nothing.'

13. The incident was subsequently investigated as a potential disciplinary issue by Mr Lees, the Shift Manager. Mr Lees interviewed a number of witnesses relating to the incident. He also held an investigatory meeting with the Claimant on 9 January 2019. The notes of the meeting are signed by the Claimant as an accurate record. During the course of the meeting, Mr Nowicki admitted that he had sat down on the empty pallets despite having been told not to do so. His rationale was that he was only doing so momentarily and did not see any risk. He also said he had an issue with his legs and that he could not stand for a long time. He also admitted touching Mr Skudra's hi-vis vest and telling Mr Skudra that he had no right to speak to him. Mr Nowicki complained that he had been previously bullied and harassed by Mr Skudra.

14. Following the meeting but before any disciplinary sanction was applied, Mr Nowicki raised a formal grievance alleging that he had been singled out and discriminated against. The disciplinary process was put on hold whilst the grievance was investigated.

15. The outcome of the grievance process was that the Respondent recognised that whilst Mr Skudra had unnecessarily shouted at the Claimant and he could have gone nearer to speak to him, Mr Nowicki had nevertheless admitted sitting on the pallets when he should not as it was a health and safety risk. As a truck driver he was allowed to sit down in his own truck and there was therefore no need for him to sit on pallets. It was found that Mr Nowicki had not been unreasonably singled out or discriminated against.

16. The outcome of the disciplinary issue was that the Claimant was given an oral warning for insubordination. The decision to do was that of Mr John Jones, a Stock Manager. Mr Jones noted that the Claimant had accepted that Mr Skudra had asked him not to sit on pallets due to health and safety reasons and that the Claimant had acted in contravention of those instructions He had then gone on to challenge Mr Skudra's authority. Mr Jones regarded the Claimant's conduct as a failure to follow a reasonable management request which amounted to insubordination. Mr Jones specifically did not issue any formal action or warning in relation to Mr Nowicki pulling Mr Skudra's vest.

17. The Claimant appealed against Mr Jones' decision. The appeal was dealt with by Mr Widdowson, an Operations Manager. Mr Widdowson was aware of the Claimant's issues with his feet but was not aware of any issue in relation to his mental health. Mr Widdowson held a meeting with the Claimant in relation to the appeal

against the oral warning. Again, the Claimant signed the notes of that meeting. At the end of the meeting Mr Widdowson informed the Claimant that he had decided to uphold the appeal. He seems to have taken the view that Mr Nowicki had got off lightly and that a verbal warning was “more than fair”.

18. On 17 February 2019, the Claimant was working under the management of a Team Leader, Mr Gary Snape. Upon examining the hourly reports Mr Snape noticed that Mr Nowicki was behind his target of scanning twenty cartons an hour. He then looked at the warehouse management system which records all activities completed by each individual employee with their handheld terminal scanners. This showed that Mr Nowicki had not done any scanning with his handheld terminal for an hour and 22 minutes in one instance and 20 minutes on another. All employees are supposed to speak to their Team Leader if they run out of work. Mr Nowicki had not reported being short of work. As a consequence, Mr Snape went to see Mr Nowicki and asked for an explanation. Mr Nowicki said that he had been busy lifting down pallets, wrapping them safely and removing empty pallets as he had been requested earlier. These tasks do not require a handheld terminal and so do not get logged on the system. Mr Snape said something along the lines of said “Ah ok, no worries.”

19. The next morning Mr Nowicki asked Mr Snape as to why he had been challenged about not completing targets. Mr Snape replied that he hadn't challenged Mr Nowicki, he had simply asked for an explanation and once it was given that was the end of the matter so far as he was concerned.

20. The following day Mr Nowicki raised a formal complaint against Mr Snape. The actual allegation in these proceedings is that the Claimant was accused of taking breaks that were too long.

## **THE LAW**

21. Section 13 of the Equality Act 2010 (“EA 2010”):

“(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.”

22. Section 15 (2) EA 2010 deals with knowledge of disability and states:

“(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.”

23. Section 26 EA 2010 deals with harassment and states:

“(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.

(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.”

24. Pausing there it is important to know that harassment per se is not protected - it is only relevant if it is related to a protected characteristic.

25. Section 27 EA 2010 states:

- “(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
- (a) B does a protected act, or
  - (b) A believes that B has done, or may do, a protected act.”

26. Section 5 of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (so far as is material) states:

- “(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker—
- (a) as regards the terms of his contract; or
  - (b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.”

## **THE ISSUES**

27. The issues are as follows:

27.1 Did those who are alleged to have perpetrated the acts of disability discrimination have knowledge of the Claimant’s disability?

27.2 Did the Respondent treat him less favourably and if so was the less favourable treatment because of the Claimant’s disability?

27.3 Did the matters referred to in paragraph 6 above constitute conduct which had the purpose or effect of violating the Claimant dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant taking into account the Claimant’s perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect?

27.4 Did the Respondent treat the Claimant less favourably in relation to a comparable full-time worker by subjecting him to a detrimental act or failure to act and if so, was that treatment on the grounds that the Claimant is a part time worker?

27.5 Did the Respondent subject the Claimant to any detriment because he had committed a protected act or because the Respondent believed the Claimant had done or may have done a protected act?

## CONCLUSIONS

### Knowledge of the mental impairment

28. There is no evidence that any of those involved (with the possible exception of Mr Lees who did not give evidence) were aware of the Claimant's anxiety or depression. We are satisfied that none of those involved who are alleged to have directly discriminated against the Claimant by reason of his anxiety/depression had actual or constructive knowledge of the disability. That would be an end to the direct disability discrimination but in the event we are wrong we have gone on to consider the merits of the claim.

### Being shouted at

29. The Respondent accepts that Mr Skudra shouted the Claimant's name down one of the aisles. The reason for that was to gain the Claimant's attention and nothing to do with the impairment to the Claimant's foot condition or his mental impairment. We are satisfied that in a noisy environment Mr Skudra is likely to have done the same with anyone else who was not suffering from a disability. At this hearing for the first time the Claimant suggested that there was also a Mr Singh who was sitting on pallets but nothing was said to him. We do not accept the Claimant's evidence on this. He has never mentioned this at any time during the internal processes or in the many months this case has been proceeding. It is something he raises for the first time in his oral evidence. We do not accept the Claimant's evidence that somebody else was also sitting on the pallets.

30. Mr Nowicki was well aware of the fact that it was a breach of health and safety rules to be sitting on empty pallets and thus his continued insistence upon doing so was undoubtedly an act of insubordination. Anyone else in the same or similar circumstances, with or without a disability, is likely to have been treated in the same way.

31. We do not find that Mr Skudra was consciously or subconsciously influenced in his decision to tell the Claimant to get up from the empty pallets because of any disability. The reason for him acting the way that he did was for health and safety reasons alone. We do not therefore find that there was any less favourable treatment nor we do find any link to either of the disabilities relied on by the Claimant. The incident had nothing to do with Claimant being a part time worker or the fact that he had brought previous proceedings.

32. Being shouted at could potentially amount to conduct which has the purpose or effect of violating the Claimant's dignity but it had nothing to do with the Claimant's disabilities and thus the complaint of harassment must be dismissed

### The Richard Lees disciplinary investigation

33. Although Mr Nowicki has maintained the suggestion that he was accused of touching Mr Skudra in some sexual way, this is not something which does appear in any of the investigative meetings. In fact, the suggestion was not even put to Mr Skudra

at this hearing. The allegation is in any event without substance.

34. There is nothing to suggest that Mr Lees acted in a biased way or that he mistreated the Claimant during the course of the investigation. The notes do not hint at any such suggestion or behaviour. Mr Nowicki fails to identify at what point this alleged behaviour occurred and what it amounted to. He appealed against the original oral warning decision, but he did not say at any point in the appeal that Mr Lees had mistreated him, demonstrated any bias or inflicted the type of behaviour now alleged. The only ground of appeal that Mr Nowicki pursued was that the investigations “were incorrect”. That was clarified in the appeal as meaning that the investigation was not thorough enough. The Claimant points to one individual whom he believes as being sympathetic but was not interviewed. He fails to spot that in fact the individual was interviewed but his account was not particularly supportive of Mr Nowicki.

35. The Claimant has failed to establish any factual evidence to establish that Mr Lees acted in a biased way or any of the other ways alleged by him. There is no link between the alleged treatment and the Claimant’s disabilities or his part-time worker status.

#### The complaint against Mr Widdowson

36. We are satisfied that Mr Widdowson dealt with the appeal against the oral warning properly and proportionately. The Claimant had admitted sitting on pallets and therefore there was no need to investigate that point further. Mr Widdowson quite properly concluded that an oral warning was the appropriate sanction. The decision had nothing to do with the Claimant being a part-time worker or being disabled. There was no complaint either during the meeting or immediately afterwards that the meeting had been conducted in any way other than in a reasonable and professional manner. There is no evidence that Mr Widdowson was aware of any previous proceedings

37. The allegations of disability, less favourable treatment, victimisation, harassment and discrimination by reason of being a part time worker are therefore dismissed.

#### The complaint against Miss Sumner

38. It is not clear what this allegation is. Insofar as it is suggested that Miss Sumner was part of a conspiracy against the Claimant, that is without any factual basis. Mr Nowicki accepted that it was Miss Sumner’s job to lead and guide the Managers through the internal processes.

#### The incident with Mr Snape

39. This allegation has in fact been mis-labelled. It is purportedly an allegation that Mr Snape interrupted the Claimant at work and accused him of taking breaks that were too long. The allegation if understood properly is that the Claimant was challenged for not completing his targets.

40. Mr Snape’s enquiry was entirely innocuous and perfectly proper having regard



to the fact that the Claimant appeared not to have completed his targets. Once the explanation was given (that workers had been asked to undertake other duties) Mr Snape accepted the explanation and left it there.

41. We do not find that there has been any less favourable treatment due to disability or because of the Claimant's part time status. Mr Snape knew of the Claimant's foot condition and his part time status but there is no evidence that he knew of the Claimant's depression or previous proceedings.

42. We are satisfied that Mr Snape would have challenged any other individual whom he believed to be falling behind targets in similar circumstances given that all employees are required to inform their Team Manager if they are short of work. There is therefore no evidence of less favourable treatment.

43. For the above reasons the complaints are all dismissed. We would add there has been very little effort or attempt by the Claimant to link his allegations to his disabilities or part-time status. It seems to us that the Claimant has effectively used these proceedings as a vehicle to ventilate his grievances about the way in which the incident on 6 January was investigated and the outcome despite the fact that he was quite properly found to be at fault and was correctly disciplined.

44. For the reasons given all of the complaints are dismissed.

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Employment Judge Ahmed

Date: 8 October 2021

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***Covid-19 statement: This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was***

*not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.*