EMPLOYMENT TRIBUNALS

Claimant: **Mr David Weedon**

Respondents: **Nestle UK Ltd**

Heard at: **Nottingham** **On: 1, 2 and 3 August 2022**
Reserved to: 4 August 2022
(In chambers)

Before: **Employment Judge M Butler**

Members: **Mr R N Loynes**
Mr A Wood

Representation

Claimant: **In person**
Respondent: **Miss S Brewis, Counsel**

Covid-19 statement:
This was a partly 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.

RESERVED JUDGMENT

1. The unanimous Judgment of the Tribunal is that the claim of Victimisation is well founded and succeeds.

RESERVED REASONS

The Claim

1. By a claim form submitted to the Tribunal on 27 January 2021, the Claimant brought a claim of Post Termination Victimisation against the Respondent following a period of Early Conciliation from 9-25 January 2021. The Claimant worked for the Respondent as a Logistics Operative from 14 September 2006 until 8 October 2019. He worked at the Respondent's Tutbury factory. The Respondent is a manufacturer of food and drink products employing 8000 employees across 20 sites in the UK and Ireland.

2. Following deductions from his pay after a period of medical suspension and sickness absence, the Claimant raised a grievance on 9 May 2019. Prior to this, on 20 April 2019, the Claimant issued proceedings against the Respondent in the Employment Tribunal for Disability Discrimination. His grievance was not initially upheld but on appeal the outcome was that he be paid £8084.20 to cover his Company sick pay shortfall.

3. The Grievance Appeal Officer, Mr Andrew Watson, considered that the Claimant's relationships with a number of employees within the Respondent had irretrievably broken down. As a result of this, settlement negotiations were initiated and a COT3 agreement was concluded under the terms of which the Claimant's employment was terminated, he was paid a sum of money and withdrew his claim of disability discrimination.

4. The Claimant's disability is anxiety and depression, and this is not disputed by the Respondent. Because of his mental health, the Claimant did not work for just under a year after termination of his employment with the Respondent. He then contacted the Staffline Recruitment Agency ("Staffline") who placed him with XPO Logistics ("XPO") at their East Midlands Gateway premises ("The Gateway"). XPO's main client at The Gateway is the Respondent. The Claimant commenced work as an Agency Worker at The Gateway towards the end of September 2019.

5. The Respondent then discovered the Claimant was working at The Gateway and says that there was an understanding with XPO that if any of the Respondent's former employees applied for a position at The Gateway, the Respondent would be informed of this. After correspondence and discussions between the Respondent and XPO, the Claimant's placement at The Gateway was terminated. The Claimant says this was based on an instruction from the Respondent to XPO, and, inter alia, his dismissal was the direct consequence of him having raised a grievance and made a claim of disability discrimination against the Respondent a year earlier.

6. The Respondent denies these allegations and says that the person who the Claimant alleges gave the direction to XPO to dismiss the Claimant, Mr Richard Hastings, did not know the Claimant, was unaware he had previously raised a grievance or submitted a claim against the Respondent and gave no direction that the Claimant should be removed from The Gateway.

7. The Claimant says that his removal from The Gateway at the behest of the Respondent seriously impacted on his mental health as a consequence of which he has been unable to work and is unlikely to be able to work again.

The Issues

8. Although the Claimant considers this to be a complicated case, the reality is that the issues are relatively straightforward. The Respondent accepts that the raising of a grievance and submitting a claim for disability discrimination were protected acts of the Claimant. They also accept that dismissal is a detriment. The issues are, therefore:

    8.1 Was Mr Hastings aware of the Protected Acts?

    8.2 Did he direct that the Claimant should be dismissed from his role with XPO?

    8.3 If so, did the Claimant suffer a detriment or detriments as a consequence?

The Evidence

1. We heard evidence from the Claimant and, for the Respondent, from Mr Richard Hastings, Head of Logistics for Nestle UK and Ireland, and Mr Andrew Watson, Nestle UK and Ireland Beverages Manufacturing Services Manager who heard the Claimant's grievance appeal.

2. There were two bundles of documents. The Respondent's bundle extended to 282 pages. The Claimant submitted a bundle of 231 pages which contained substantially the same documents as the Respondent's bundle. The bundles were not agreed because the Respondent considered that the Claimant's bundle contained without prejudice correspondence which should not be put before the Tribunal.

3. In the event, we were not referred to any without prejudice documents during the course of the hearing.

4. References to page numbers in this Judgment are to page numbers in the Respondent's bundle unless it is made clear that we are referring to pages in the Claimant's bundle.

The Oral Evidence

5. The witnesses produced written witness statements and were cross-examined.

The Claimant's Evidence

6. At the commencement of the hearing, the Employment Judge discussed with the Claimant whether he would need breaks during the hearing and, if so, whether the timing of those breaks should be set for a specified time during each session, or he would simply ask when needed a break. It was agreed that breaks would be scheduled into the hearing but that the Claimant could also ask for a break when he needed one. During the hearing, on several occasions, the Claimant became distressed and appeared to be having something akin to a panic attack. He was clearly using a deep breathing technique as a coping mechanism, but he was given time to compose himself and recover from these episodes when it became apparent to the Tribunal that this was what he required.

7. Otherwise, the Claimant gave his evidence in a straightforward and honest manner. We had no concerns that he was attempting to exaggerate his evidence and it was clear that he truly believed in his claim and the events he alleged formed the basis of his claim. The Employment Judge spent some time at the commencement of the hearing explaining the procedure to the Claimant and what he should try to avoid during the hearing, for example, giving evidence as opposed to asking questions of the Respondent's witnesses when he cross-examined them. He also strayed from the issues at times and, when this was pointed out to him by the Employment Judge, he fully accepted the points made to him with good grace and without argument.

The Evidence of Mr Watson

8. Mr Watson's evidence and cross-examination was brief. The Claimant initially thought Mr Watson had been called to give evidence to illustrate that he had poor working relationships with his colleagues. In response to a suggestion from the Employment Judge, however, Miss Brewis confirmed that he was there to highlight the fairness of the Respondent towards the Claimant and how well he had been treated. Mr Watson's evidence was given in a calm, straightforward manner and we believe honestly. Having said that, his evidence was largely irrelevant to the issues before us.

The Evidence of Mr Hastings

9. The panel was of the unanimous view that Mr Hastings evidence lacked credibility and was frequently unreliable. We found his evidence to be inconsistent and even at odds with the Respondent's submissions. The relevant time period was October 2020. We found that Mr Hastings could remember in detail some of the events that took place during that time but could not remember others. He had, for example, initially only made reference to one meeting with XPO personnel at which the Claimant was discussed yet, having apparently consulted his diary, he amended his statement to say that there were actually two meetings. His diary entries were not produced, and he was unable to confirm whether these two meetings on 9 and 13 October 2020 took place via telephone or teams meetings.

10. Mr Hastings repeatedly said there was "an understanding" between the Respondent and XPO that the Respondent would be informed if any of its previous employees applied for jobs with XPO. No written agreement to this effect was produced and Mr Hastings was unsure if there was one. Further, there was no indication that XPO was aware of any such understanding. Indeed, at page 229, an email from Ms M Boulton of Staffline to Ms A Jevons-Saunders of XPO said that Staffline had only screened applicants for previous employment at XPO. We conclude, therefore, that there was no such agreement or understanding.

11. In an email dated 13 October 2020 (page 226), Mr P Robinson of XPO emailed one of his colleagues, Mr A Stinton, saying,

    "Can you advise if you have a Dave Weedon working for us on Case Pick. Richard Hastings mentioned him on a call on Friday and he is a known troublemaker who they had to remove from Tutsbury factory and Nestle would like him removed from site".

    The contents of this email do not rest well with Mr Hastings insistence that he knew nothing of Mr Weedon or his history. In a later email also sent on 13 October 2020 by Mr Robinson to Mr Stinton, Mr Robinson said:

    "As discussed, can we look to end his assignment please, we will need to manage this carefully with the Agency provider, but Richard has made a point to write to me directly and he spoke to Ang (Miss Jevons-Saunders) and I last Friday".

    However, one of only two written communications produced from Mr Hastings to Mr Robinson was earlier on 13 October 2020 in which the brief message was *"Dave Weedon!"* It seemed to us highly likely there was another written communication from Mr Hastings to Mr Robinson which has not been produced to us. Later on, the same day (page 225) Mr Robinson emailed Mr Hastings saying:

    "FYI – we will need to manage this carefully, but I have asked for him to be removed over the next 48 hours" to which Mr Hastings replied, *"Thanks Phil".*

12. We noted with interest that neither Mr Robinson nor Ms Alice Spink (who attended the meetings with Mr Hastings and Mr Robinson), both of whom could have easily corroborated Mr Hastings account, were called to give evidence.

13. Mr Hastings was also asked in evidence when he first became aware that the Claimant had raised a grievance and previously brought a claim against the Respondent. He said he was unaware of this until asked by the Respondent's Solicitors to provide a witness statement some six weeks before this hearing. This seems to be quite remarkable given that the claim was submitted to the Tribunal in January 2021 and Mr Hastings was always going to be the principal witness for the Respondent.

14. We have some difficulty in accepting that the Respondent's Solicitors would not have communicated with Mr Hastings before asking him to produce a witness statement, and this only six weeks before the hearing, when the whole case rested on the protected acts claimed by the Claimant.

15. Mr Hastings further, and somewhat inconsistently, tried to persuade us that it was XPO's decision to terminate the Claimant's work at XPO because they were so embarrassed at having failed to screen his application and notify the Respondent that he had previously worked for them.

16. For the above reasons, we treated the evidence of Mr Hastings with a significant degree of circumspection.

Findings of Fact

17. In relation to the issues before us we find the following facts on the balance of probabilities.

17.1. The Claimant was employed by the Respondent as a logistics operator between 14 September 2006 and 8 October 2019. He did not enjoy good relationships with his colleagues and the Respondent's Management and began suffering from anxiety and depression as a result. Grievances were raised both by and against the Claimant.

17.2. On 30 January 2019, the Claimant emailed Mr Ben Chapman, a Human Resources Business Partner of the Respondent, making a subject access request in which the Claimant said his mental health was suffering as a result of issues that had arisen between him and other employees. Mr Chapman, being concerned about the Claimant's mental health, placed him on medical suspension on full pay until an Occupational Health Review could be arranged (pages 170-173). After the Occupational Health Review, the Claimant obtained a fit note from his GP as a result of which the Respondent treated as him being absent on sick leave which did not attract full pay.

17.3. There was disagreement between the Claimant and Respondent over the status of the Claimant's absence. As a result, he raised a grievance against the decision not to pay him full pay during his sickness absence and also submitted a claim for disability discrimination against the Respondent on 20 April 2019.

17.4. The grievance was investigated (pages 174-186) by Mr Elliott Morgan, the Respondent's Logistics Planning Manager, who by letter dated 26 July 2019 (page 195) did not uphold the grievance.

17.5. The Claimant appealed and his appeal was heard by Mr Watson who upheld the appeal resulting in a payment receiving £8084.20 in respect of the shortfall between his full pay and what he was paid under his fit note.

17.6. During the course of the appeal and bearing mind the claims submitted to the Employment Tribunal by the Claimant, Mr Watson became concerned as to whether the relationship between the Claimant, his colleagues, the Respondent's HR Team and the recognised Union had irretrievably broken

down to the extent that it could not be repaired. Mr Watson had the benefit of Occupational Health advice and noted himself that the Claimant appeared to be very ill. This led to negotiations between the Claimant and the Respondent's HR Team which culminated in a COT3 agreement arranged through ACAS. The Claimant's employment was accordingly terminated and a settlement sum was paid to him. The Claimant had not returned to work since being medically suspended and there were no restrictions on his future employment in the COT3 agreement.

17.7. The Claimant was not then well enough to obtain work until February 2020 when he undertook some agency work prior to the first Covid lockdown. Whilst he had plans to set up his own business as a forklift truck instructor, this was not possible due to the pandemic.

17.8. He subsequently noticed that XPO were advertising for workers at their new facility at The Gateway and he applied for a position through Staffline. He was successful in his application and commenced work there on or around 28 September 2020. His presence was immediately noted by some of the Respondent's personnel as evidenced by the communications at pages 223 and 224. In particular, Ms Maxine Cuthbert of the Respondent's Human Resources Team notified Mr Craig Rowe "*that the Company are aware and are already dealing with this situation".* Mr Rowe asked in his email to Ms Cuthbert of 1 October 2020 whether the fact of *"the Claimant working at the East Midlands Gateway poses a risk to us".*

17.9. There is no evidence before us of any agreement or understanding between the Respondent and XPO to the effect that XPO was obliged to notify the Respondent if any of its former employees applied for a position at the Gateway. Indeed, on the balance of probabilities, we find there was no such agreement or understanding.

17.10. Mr Hastings along with Miss Spink had two meetings with Mr Robinson of XPO on 9 and 13 October 2020. These meetings took place either over the telephone or TEAMS meetings. Miss Spink mentioned in the first meeting that she had bumped into the Claimant who used to work for the Respondent. At the latest, by the time of the second meeting on 13 October 2020, we find that Mr Hastings was fully aware of the Claimant's history with the Respondent and we also find that he described the Claimant to Mr Robinson as a troublemaker and someone they did not want to be working at The Gateway. Accordingly, Mr Robinson directed a colleague to contact Staffline and the Claimant's Agency Contract was terminated on 14 October 2020. For the avoidance of doubt, we find Mr Hastings' evidence at paragraph 11 of his witness statement that,

"the decision we made(was) in the context of the site, rather than the individual" to be unreliable.

17.11. The Claimant submitted his claim of victimisation to the Tribunal on 27

January 2021.

The Law

18. Section 27 of the Equality Act 2010 provides: -

> *''(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.*
>
> *(2) Each of the following is a protected act—*
>
> *(a) bringing proceedings under this Act;*
>
> *(b) giving evidence or information in connection with proceedings under this Act;*
>
> *(c) doing any other thing for the purposes of or in connection with this Act;*
>
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act.*
>
> *(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*
>
> *(4) This section applies only where the person subjected to a detriment is an individual.*
>
> *(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."*

19. In ***Warburton v The Chief Constable of Northamptonshire [2022] EAT 42*** the Court considered the approach to be taken in respect of detriment and causation in victimisation claims. In relation to detriment, it said that the test is:

    "Is the treatment of such a kind that the reasonable worker would or might take the view that in all the circumstances it was to his detriment?" (following ***Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL***).

    The EAT's Judgment said that detriment is to be interpreted wildly saying it is not necessary to establish any physical or economical consequence and that

    "It is enough that the reasonable worker might take such a view".

    Therefore, "if a reasonable worker (although not all reasonable workers) might take the view that, in all the circumstances, it was to his detriment, the test is satisfied".

20. In relation to causation or the "the reason why" question a Tribunal must ask whether the protected act had a significant influence on the outcome (citing **The *Chief Constable of Greater Manchester v Bailey [2017] EWCA Civ 425*** and ***Page v Lord Chancellor [2021] ICR 912 CA***.)

21. The burden of proof is set out in section 136 of the Equality Act 2010. It provides: -

> *"(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.

22. Section 136 was discussed and refined in ***Igen Ltd v Wong [2005] IRLR 258 CA*** and ***Madarassy v Nomura International Plc [2007] EWCA Civ 33.*** Following those Judgments, the Claimant must show more than the possibility of discrimination before the burden of proof shifts to the Respondent. The primary facts must be such that a reasonable Tribunal, having heard all the evidence from both sides, could conclude that the Respondent committed (not merely "could have committed") the Discriminatory Act.

Submissions

23. The Claimant made an oral submission which supplemented his written submissions and the various documents upon which he has relied throughout the hearing. He was at times very emotional and had to pause on several occasions. Miss Brewis submitted written submissions which she supplemented by oral submissions. We do not rehearse these submissions here in any detail, but confirm that we fully considered them in reaching our decision.

24. The Claimant concentrated on the effects on his mental health and personal life which the Respondent's actions had had on him. His submissions took for granted that he had been victimised by the Respondent. Miss Brewis concentrated on the lack of knowledge by Mr Hastings that the Claimant had done a protected act in which circumstances the Respondent could not have victimised the Claimant.

Discussion and Conclusions

25. This is a case which essentially rests on the evidence of one witness, Mr Hastings. In our examination of his evidence, we concluded that it was inconsistent, lacking in credibility and to a significant extent unreliable. His memory was somewhat selective in that he had to amend his witness statement, having consulted his diary, to confirm that what he said at paragraph 9 of his statement was inaccurate. There he said there was only one meeting with Mr Robinson but, having consulted his diary, he accepted there had been two. We were at a loss to understand why he had not consulted his diary at the time he was preparing his witness statement. When he acknowledged there had been two meetings, he could not remember the format of those meetings but could apparently remember that over the course of both meetings the Claimant was only discussed for about 90 seconds.

26. His evidence of how the Respondent's Agency Contract came to be terminated was totally inconsistent. For example, he said at paragraph 11 of his statement that the decision "We" made was in the context of the site rather than the individual. In his oral evidence, he changed that view to suggest the decision was made by XPO due to their embarrassment at not having complied with "an understanding" that the Respondent should be consulted if a previous employee of theirs applied for a

position at The Gateway. In this context, we found Mr Hastings' evidence to be unreliable.

27. Mr Hastings' evidence that he did not know who the Claimant was and had no knowledge that he had previously raised a grievance and submitted a claim against the Respondent until six weeks before this hearing we found to be equally unreliable. Further, there was no evidence whatsoever before us of any agreement that XPO was obliged to consult the Respondent if one of the Respondent's previous employees applied for a position at The Gateway. There were no witnesses from XPO who could have corroborated Mr Hastings' evidence. Indeed, the only evidence we have is an email from Staffline to XPO indicating that they had only been screening job applicants for previous employment with XPO. All the evidence before us, therefore, leads to there being no agreement to screen for previous employment with the Respondent and no unwritten understanding that this would be done.

28. Due to this lack of credibility and the unreliability of Mr Hastings' evidence, we formed the view that Mr Hastings was fully aware by 13 October 2020 of the Claimant's history with the Respondent. As a result of this, he labelled the Claimant as a troublemaker and prevailed upon XPO to terminate the Claimant's Agency Contract.

29. The Respondent has sensibly conceded that the raising of a grievance by the Claimant and his claim against the Respondent were protected acts. So, we move to consider whether the Claimant suffered a detriment. Following the decision in ***Mr D Warburton v The Chief Constable of Northamptonshire Police***, the standard to be applied in determining whether the Claimant suffered a detriment is that of the reasonable worker (although not all reasonable workers). Thus, the test to be applied is not wholly objective and does not rest solely with the view of the Tribunal.

30. After a period of unemployment and a few agency assignments, the Claimant had settled well into his position with XPO at The Gateway. At page 226, an email from Mr Robinson to Mr A Stinton of XPO asked whether there were any problems with the Claimant. Mr Stinton's response was *"No issues. In fact, quite the opposite".* It seems, therefore, that the Claimant was well regarded by XPO which supports the Claimant's evidence on the point. The Claimant had reached the stage after only a matter of days on this assignment where he was happy to be making a contribution and hopeful that the benefit of his experience would lead to more stable employment. In our view, a reasonable worker would consider that having his Agency Agreement terminated summarily in these circumstances would constitute a detriment for the Claimant. This is also the Tribunal's conclusion.

31. We have to consider the question of causation. Was the protected act the reason why the Claimant suffered this detriment and in this regard we must question whether the protected act had a significant influence on the outcome?

32. Having found that Mr Hastings was aware of the Claimant's history with the Respondent, although he denied this, it is difficult to conclude that these protected acts, as a result of which Mr Hastings deemed him to be a troublemaker, were not the reason why Mr Hastings prevailed upon XPO to have the Claimant's Agency Contract terminated. Mr Hastings accepted in his oral evidence that some previous employees of the Respondent had been engaged by XPO at The Gateway because of their experience in engineering or automation. No evidence of this was produced and no evidence was produced to show that XPO had complied with the understanding that they should notify the Respondent that these workers had previously worked for them. As noted above, this was because we found there was no such understanding. Our conclusion, is therefore, that the reason why Mr Hastings gave instructions to terminate the Claimant's Agency Contract was because of the protected acts he had done.

33. In relation to the burden of proof, it is evident to the Tribunal that following the decisions in Igen and Madarassy, there are clearly facts from which we could find that the actions of Mr Hastings and therefore the Respondent amounted to victimisation. The Claimant was working at XPO's The Gateway without incident. The Respondent was alerted to his presence there at the beginning of October and email communications showed this was *"being dealt with".* Mr Hastings was alerted to the Claimant's presence by Miss Spinks. He then described the Claimant as a troublemaker to Mr Robinson at XPO. The following day, the Claimant's Agency Contract was terminated. These are clearly facts from which we can conclude the Claimant was victimised with the result that the burden of proof shifts to the Respondent to explain why it says there was no victimisation.

34. Mr Hastings explanation is that the Respondent did not want previous employees to work at the Gateway and bring with them historical issues which might adversely affect the new way of working it wished to pursue at the new facility. He did not elaborate on these historical issues, but we gained the sense that, at least in part, this was a reference to trade union activities at the Tutbury facility. There were no statistics to support Mr Hastings evidence that other previous employees of the Respondent were taken on by XPO with the Respondent's approval because of their experience. No statistics were produced to demonstrate this. Our finding of fact in relation to the Claimant was that Mr Hastings described him as a troublemaker, and this is why his contract was terminated. The Respondent has not provided a satisfactory explanation to satisfy the burden of proof upon it and we find that victimisation is made out.

35. For the above reasons, the Claimant's claim of post termination victimisation is well-founded. A Remedy Hearing will now be listed and orders for that hearing will be made and sent out with this Judgment.

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Employment Judge M Butler

Date: 7 September 2022

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