EMPLOYMENT TRIBUNALS

Claimant: **Mr C House**

Respondent: **Help For Heroes**

Heard at: **Southampton** **On: 4 June 2018 and 12 and 13 December 2018**

Before: **Employment Judge O'Rourke**
Members Ms A Sinclair
Mr P Flanagan

Representation
Claimant: **In Person**
Respondent: **Miss Tutin, Counsel on 4 June 2018**
Miss Balmer, Counsel 12 and 13 December 2018

REASONS

(written reasons having been requested, subject to Rule 62 of the Employment Tribunal's Rules of Procedure 2013)

Background and Issues

1. The Claimant was employed as a groundsman by the Respondent charity, for approximately three years, until his dismissal on grounds of redundancy, with effect 3 July 2017. It is not in dispute that he was disabled at the relevant time, due to suffering from PTSD and moderate depression. As a consequence, he brings claims of unfair dismissal and disability discrimination, to include direct discrimination, discrimination arising from disability and failure to make reasonable adjustments.

2. This matter first came to hearing on 4 June 2018, but due to the then-Respondent Counsel having a family emergency, it was adjourned part-heard, to 12 and 13 December 2018.

3. Issues in respect of each claim are as follows:

Unfair Dismissal

(1) The only issue disputed in respect of this claim is whether or not the Respondent has shown the reason for dismissal. The Respondent states that it was redundancy, but the Claimant asserts that it was a sham and that the real reason was disability. He had no dispute about the procedure followed and further that if his position was redundant and there was no satisfactory alternative, which he accepted, then dismissal would be inevitable. The respondent argued that if it was found that redundancy was not a true reason that the principle in the case of **Polkey** would apply.

Direct Discrimination (s.13 Equality Act 2010)

(2) The detrimental action complained of is the Claimant's dismissal. Did the Respondent treat the Claimant less favourably than they would have treated a non-disabled hypothetical comparator? On such comparison, there must be no material differences between the Claimant and the comparator, to include the Claimant's work performance. Was any such unfavourable treatment because of his disability?

Discrimination arising from Disability (s.15)

(3) In this claim, the Respondent accepted that dismissing the Claimant was unfavourable treatment and that that treatment was at least partially because of something arising in consequence of his disability. It is also accepted that they were aware of his disability at the relevant time. However, they relied on the statutory defence that the dismissal was a proportionate means of achieving a legitimate aim, in view, they would say, of the Claimant's long underperformance and their need for the effective maintenance of the grounds of one of their flagship recovery centres, Tedworth House.

Reasonable Adjustments

(4) The alleged detrimental action was the Respondent's inflexible application of a work plan to the Claimant, resulting in him being overloaded with work. The Respondent denies such inflexibility. Did that provision, criterion or practice put the Claimant at a substantial disadvantage in comparison with a non-disabled person? Did the Respondent take such steps as were reasonable to have to take to avoid such disadvantage? Again, it is accepted that the Respondent knew of the Claimant's disability during the relevant period.

The Law

4. We referred ourselves to s.98 of the Employment Rights Act 1996 and ss.13, 15 and 20 – 22 of the Equality Act 2010. Miss Balmer referred us in her skeleton argument to various items of case law. We remind ourselves that the initial burden of proof in respect of the discrimination claims rests on the Claimant.

The Facts

5. We heard evidence from the Claimant and on behalf of the Respondent from Mr Mark Teadham, Facilities Manager and the Claimant's line manager at the time of dismissal. We also heard from Mrs Susan Turnball the "People Director" of the Respondent and who advised during the dismissal process.

6. The Respondent is a large organisation, with all the requisite managerial and administrative resources that one would expect. Prior to the Claimant being recruited, the Respondent used contractors for their ground work, but considered the service poor and too expensive. They thought of employing a full-time groundsman, who would provide better all-year-round and cheaper service.

7. The Claimant commenced employment on 14 April 2014. The previous year he had suffered an injury which resulted in him being diagnosed with PTSD and moderate depression. This is set out in a medical report, commissioned by the Respondent in October 2015 [10 – 13].

8. It is clear from documentation dating back to mid 2015 that the Respondent was having concerns about the Claimant's performance. A performance review of November 2015 states that:

> "*without knowing the background to Chas's mental health problems it is difficult to fully understand the pressures he feels. What is apparent is that there are times when he is severely lacking in motivation, or simply absent. I accept that he may have informed a colleague of his whereabouts on these occasions, but this has not been relayed to me. If he needs to take a break then he should inform me or the supervisor, before going off-site, or joining in at the Woodland Camp activities, so someone knows where he is and knows what he is doing. Equally, if poor weather means he is unable to cut grass then he should move to other grounds maintenance, such as weeding the various flower beds. It will be sensible to maintain an online diary of these changes for the Estates Manager's benefit. Feeding this into an enhanced task programmer would have demonstrated value to the recovery team*".

9. Mr Teadham said at paragraph 27 of his statement that from that point onwards, in early 2016, the Respondent began to make adjustments for the Claimant's condition, as recommended by the medical advice.

10. Following the medical report and the performance review, the Respondent, in January 2016, instituted a weekly task sheet process (the first example of which is from February 2016 [21]) which the Respondent said broke the Claimant's tasks down into manageable chunks, to be reviewed at the beginning and end of each week. These continued throughout his employment. The Claimant did not accept that the task sheets were brought about because of the medial report, or that they were reasonable and supportive and instead he considered that they were check lists that could be used to "*catch him out*". Mr Teadham denied this, stating that if tasks were not completed, they would be rolled onto the following week, or

sometimes dropped entirely, with contractors or volunteers engaged to complete them. The Claimant agreed in cross-examination that tasks were carried over. Mr Teadham provide a list of some reallocated tasks [138 – 140], dated July 2016. He considered that the Claimant was operating at about fifty-percent efficiency. While the Claimant denied that some of these tasks were in fact completed by others, he provided no evidence to corroborate that denial. In answer to a question from the Tribunal, as to his own assessment of his work-rate, he said that his weekly tasks had reduced to "*about three*" and this was from an unknown number and when pressed as to what that unknown number might be, agreed that "*it was a substantial reduction*".

11. It is clear to us, therefore, that from early 2016, through to the Claimant's dismissal a year and a half later, his workload was substantially reduced, in recognition of medical advice as to his disability and during which time the Claimant remained employed full-time, on the same salary. It was uncontested evidence of Mr Teadham that as a consequence, the Respondent incurred substantial additional cost, in engaging contractors to complete the necessary work. It was not until January 2017, almost a year later that the Respondent decided to invoke its capability procedure.

12. As a further adjustment, the Respondent provided a "nurse call" personal alarm system to the Claimant, for him to effectively summon help, if needed, as the Claimant worked generally on his own. This involved installing signal booster points in the grounds. The Claimant accepted that such a system existed, but denied that it was purely for his use. We find this assertion implausible, in view of the fact that the Claimant was the only person routinely working alone, out in the grounds and the only likely beneficiary of it. We therefore prefer the Respondent's evidence on this point.

13. For a similar purpose to the nurse alarm, Mr Teadham said that they provided the Claimant with a walkie-talkie radio, to reduce his isolation. Again, the Claimant denied that the provision of walkie-talkies was purely for his benefit, but clearly, even if this was the case, it did benefit him, by allowing him to communicate with other staff.

14. Mr Teadham said that there was a general agreement that to reduce the Claimant's sense of isolation, he could drop into one or other of three external buildings on the grounds, the 'tin hut', the 'iron age round house' and the 'wellbeing centre', where both other staff and also 'beneficiaries' i.e. servicemen under treatment, were present. The Claimant accepted that he was permitted to drop into these locations and did so. However, as time went on, Mr Teadham began to be concerned that the Claimant was spending too much time at these places, rather than at his work and was also not informing him that he was doing so.

15. A further OH report was commissioned in August 2016 [95], which made various recommendations and which were followed up by Mr Teadham in a 'wellness action plan', in September [108 – 110]. These recommendations mirrored the previous adjustments and which were continued. Mr Teadham said that from as early as September 2014, the Claimant had been given access to the Respondent's counselling services, to which he was not strictly entitled, as he was an employee, not a 'beneficiary'. Miss Turnball

corroborated this evidence and also provided a list of consultation dates [206A], numbering forty-four appointments, over a two-and-a-half-year period. The Claimant denied that this service was 'counselling', but instead was "*more support*". Miss Turnball stated that by doing so, the Respondent was effectively breaking its own rules. We accept the Respondent's evidence as to this adjustment.

16. At paragraph 55 of his statement, Mr Teadham said the following:

> "*Paul Randall was invited to take over weekly monitoring* (of the Claimant)*, as a fresh approach and a fresh face. As predicted, when I took over day-to-day management from Tom, our relationship had reached a low point and Charles by now saw me as an enemy, just as he came to see Tom as an enemy. Paul's assessment of Charles [176 – 177] was not a surprise to me: there was no progress despite the change in management*".

17. Mr Randall then, in turn, in April 2017, gave his assessment [176 – 177], stating:

> "*My challenge is that I do not have sufficient knowledge of horticulture, gardening and grounds maintenance to be able to challenge and Chas states the support of his output when I questioned things. That said, I can understand the management frustrations with his counter-arguments and denial. That said, my observations are that when questioned, challenged and placed under minimal pressure, Chas shows evidence of anxiety, shaking, downward-looking and less conversational or more confrontational. He will "use" advice given or solicited from various H4H/THRC employees to support reasons behind why he has not completed or carried out tasks, to either the expectation of, or in the way his line manager would want. I am today unable to substantiate whether this has been the case. I get the impression that Chas gets bored quickly with long repetitive tasks. This often results in Chas taking an alternative course of action, using his "experience" to do things "time efficiently".*

18. Mr Randall also made helpful suggestions as to the Claimant's work plan and as to other sources of advice that might be available to him. Also, it was accepted by the Claimant that Mr Randall gave him 1-2-1 coaching sessions, at least once or twice a week. When asked as to the purpose of Mr Randall being appointed, the Claimant said that firstly, it wasn't his idea and secondly, he considered that it was merely because Mr Teadham was on holiday at the time. This is, we find, one of several examples of a somewhat negative approach taken by the Claimant, to whatever steps were taken by the Respondent to make adjustments for his disability. He viewed everything with suspicion, a view, we consider in the circumstances of a clearly well-intentioned and actively-involved employer, one he was not entitled to hold.

19. Over time, however, Mr Teadham was coming to the view that the Claimant's performance was not improving, but in fact worsening and it was having an unacceptable impact on his management time and also leading

to additional cost, by the involvement of contractors. He estimated additional costs, on top of the Claimant's wages, amounted to £50,000 per annum, when the contractors engaged prior to the Claimant's employment had cost £30,000. The Claimant did not dispute these figures.

20. As a consequence, it was decided in January 2017 to commence a capability procedure. A hearing was held on 12 January and a letter of 25 January [145] confirmed its outcome. The Claimant was issued with a first written warning and expected to improve his performance. He didn't appeal that warning and in fact wrote on 27 January [146], stating:

> *"Thank you all for working hard to help find a resolution to the situation we have found ourselves in! Going forward I will do my best, as I always have. I understand that at times I may have been seen to be distracted from my work and for that I am sorry. I will make every effort to improve! You are all very busy people and the last thing I want to do is a be a burden and use too much of your time. Please could I ask for your help, support and compassion and patience, to help move forward, as it may be a bumpy road at times. Life, not just my work, gets a bit overwhelming on occasion and I hate bringing up my condition, but it does get in the way of things a lot! I am getting better at managing it, but I as I have said, with help and support I want to get better at it. I will always thank Elliot and Giles, particularly, but also some others, for the opportunity to work at such an amazing place and use my skills and experience to help create and maintain as relaxing and welcoming environment as we can. Once again thank you!"*

21. At the time, the Claimant had been on a short period of sick leave. The Respondent considered that after his return, his productivity remained low. They continued to monitor his performance and there are several emails from Mr Teadham, where he raises continuous concerns about underperformance and lack of motivation. A particular incident arose on 12 February, when the Claimant was scheduled to meet with Mr Teadham at 2.00pm. Mr Teadham said that the Claimant then subsequently arranged a conflicting meeting with Miss Castleton of HR and accordingly, neither informed him of his non-attendance, nor attended. He said he waited an hour or so for the Claimant, but then, when he didn't arrive, left the premises. On his way out, he saw the Claimant, as he said in his email [155]:

> "*Much to my surprise, you were relaxing by the lodge, with cigarette in hand, joking with Kerry Linham, the Moors Cleaning Manager. You clearly had no intention of completing the former monitoring review. I believe this shows contempt for the formal warning process…. I hope I have made myself clear*".

22. The Claimant considered this email to be "*uncalled for, grossly unfair and obviously very threatening*" [155].

23. The Claimant offered no explanation in cross-examination for his non-attendance or lack of notification to Mr Teadham for not attending the 2.00pm meeting and seeming to consider that he could attend at any point

he wished. We can understand, therefore Mr Teadham would have been irritated by the Claimant's stance and hence his direct and to the point email, simply pointing out that the Claimant was already subject to a written warning and continued behaviour of that nature could escalate matters. We do not consider therefore his email to be unfair, uncalled for or very threatening.

24. By May 2017, despite some marginal improvement in the Claimant's performance, Mr Teadham was coming to the view that the situation was unmanageable and taking up too much managerial time (as evidenced by numerous emails between many managers and also the time spent supervising the Claimant). He said in his statement (paragraphs 59 and 60).

> "*I had, over the time, considered that the post might be made redundant and contracted out and that the delivery of basic grass cutting and leaf clearance work was a cost effective and sensible decision. The other tasks were quite easy to place and tasks which Charles had not delivered for months were simply lapsed. The groundsman tasks he did not undertake could in part be picked up by volunteers, by the horticultural therapist, by corporate days and others within the facilities team. There are some tasks that could be left, edging of flower beds for example - Charles refused to do this as he felt it was a gardener's task, not a groundsman's task. A decision was then relayed to me by Giles Woodhouse that while we were clearly heading towards a further capability/performance process, leading to a final written warning and termination thereafter, it was felt best for Charles, to make use of contractors and other third parties to look after the grounds, as had been discussed on occasions before and make Charles' position redundant. In particular and given Charles' mental condition, it was felt that H4H should best support him, on termination, by a non-judgemental loss of his job and a financial settlement, neither of which would have been the case, had his employment been terminated on capability/performance grounds. Whilst I believed there were entirely genuine grounds for a capability process, leading to termination, I both understood and accepted this decision as being appropriate, given the nature of the organisation that H4H was*".

25. On 26 May 2017, HR wrote to the Claimant [184 – 186], inviting him to a redundancy consultation process, warning him of the possibility of dismissal. The Claimant had no dispute with the process then followed and it resulted, on 7 June, with his dismissal, on grounds of redundancy [197]. Subsequently, he appealed that decision, on 28 June [209], asserting that the real reason for his dismissal was "*perceived performance issues*", related to his disability. He attended an appeal hearing on 19 July and the outcome was that his appeal was rejected [224].

The Claims

Direct Disability Discrimination

26. We find, based on the facts that the Claimant cannot show that he was less-favourably treated than a non-disabled comparator, with the same performance issues. Indeed, the opposite seems to be the case. It is clear to us that in fact, a non-disabled person, similarly underperforming, would have been dismissed at an earlier date.

Discrimination Arising

27. The only issue in this claim is whether or not the Claimant's dismissal was a proportionate means of achieving a legitimate aim. We concur with Miss Balmer's submissions on this point that if the Tribunal finds that the Claimant was dismissed, at least partially because of underperformance, such treatment was a proportionate means of achieving a legitimate aim. In respect of the legitimate aim, the Respondent was entitled to expect a certain and consistent level of productivity from its employees. The decision to dismiss was proportionate, in light of the length of the Claimant's under-performance, his failure to improve, following a warning and the impact upon the Respondent.

28. In the circumstances of this case, it is difficult to see what else the Claimant could have done. It is clear from the chain of events that being a charity of this nature, they were 'practising what they preached' and exercised considerably more understanding than many other employees would have, in similar circumstances.

Reasonable Adjustments

29. The Claimant's claim in this respect is focussed on the alleged provision, criterion or practice of the application of an inflexible weekly work schedule. As should be clear from our previous findings of fact, we disagree. In fact, Mr Teadham and previous managers had been entirely flexible in the application of the work schedule, rolling over tasks, as conceded by the Claimant, or dropping them entirely, or having them done by other means. The sad fact was that the Claimant, for various reasons, including his disability, was unable to maintain a reasonable level of productivity and there was no indication that that situation would improve, despite the many reasonable adjustments made by the Respondent.

Unfair Dismissal

30. We have recorded already Mr Teadham's rationale for pursuing the redundancy route. It is clear, from both his evidence and that of Miss Turnball that at least a part of the rationale was the potential adverse effect on the Claimant of a capability dismissal, both psychologically and in terms of future employability.

31. We are nonetheless satisfied, however, that the principal reason for dismissal was redundancy, with perhaps some element of concerns as to

capability and the psychological wellbeing of the claimant. We do so for the following reasons:

a. The standard of groundwork required at the Respondent's flagship property was a high one and they had reached the conclusion that only professional contractors could achieve that standard particularly with their access to specialised equipment;

b. They considered this would be more cost effective and they said that their current contractors manage to complete the tasks in a day and a half, to two days per week and they intend to continue with that service.

c. Finally, they had experience previously of using contractors.

32. Even, however, if we are wrong in that conclusion and that in fact the true principal reason was capability and that therefore a fair process was not followed, the principle of **Polkey** would inevitably apply. All the evidence indicated that the Claimant would have been fairly dismissed, in any event, by, at the latest, September. The Claimant, fortunately for him, found employment shortly after his notice period expired, on a similar level of salary. Bearing in mind that as well as statutory redundancy pay, he had been paid an ex-gratia month's pay, he is unlikely, therefore, to have incurred any loss of earnings whatsoever, as a consequence of any such unfair dismissal, rendering such a claim futile.

Conclusions

33. For these reasons therefore, we find that the Claimant's claims of unfair dismissal and disability discrimination fail and are dismissed.

_____

Employment Judge O'Rourke

_____

Date 14 January 2019