EMPLOYMENT TRIBUNALS

Claimant: Mr D Whelan

Respondent: South Gloucestershire Council

Heard at: Bristol **On:** 1st, 2nd, 5th to 8th October 2020

Before: Employment Judge C H O'Rourke
Mrs D England
Mr C Williams

Representation
Claimant: Mr M Williams - counsel
Respondent: Mr D Leach - counsel

JUDGMENT

The Claimant's claims of disability discrimination, protected disclosure and unfair dismissal fail and are dismissed.

REASONS

(written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided)

Background and Issues

1. The Claimant was employed as a Young Persons Support Engagement Worker, for approximately nine years, until his dismissal, with immediate effect, on 16 October 2018.

2. Prior to that dismissal, the Claimant had been off sick for approximately eight months, due to mental health problems, in particular depression and PTSD. The dismissal was on grounds of capability, resulting in the Claimant taking ill-health retirement.

3. As a consequence, the Claimant brings claims of disability discrimination (failure to make reasonable adjustments and discrimination arising from disability), protected disclosure and unfair dismissal. There is no dispute that the Claimant was disabled at the relevant time, subject to s.6 Equality

Act 2010 (EqA). The issues in respect of those claims are set out in an agreed list of issues [68-76] and we do not therefore rehearse them here, but will deal with them in more detail below.

4. There was a preliminary issue as to the admissibility of the documentation from 2011-14, in respect of earlier adjustments, made in respect of the Claimant's dyslexia, to which the Respondent objected, on grounds of relevance. We agreed that these documents were not relevant and following discussion, it was further agreed that the documents would be removed from the bundle, but that related paragraphs in the Claimant's statement would be retained, leaving the Respondent to cross-examine, as they saw fit.

The Law

5. Mr Leach referred us to the following authorities:

    a. **Griffiths v Sec of State for Work and Pensions [2017] EWCA Civ 1265**, which stated that it was not a reasonable adjustment to seek to reduce stress for an employee, as employers '*would have the invidious task of having to assess … the stress suffered, as a result of any hardship'.* (180A).

    b. **Ishola v Transport for London [2020] EWCA Civ 112**, which indicated that '*Not all one-off acts and decisions necessarily qualify as PCPs. In order so to qualify, they must be capable of being applied in future to similarly-situated employees.*'

    c. **Tarbuck v Sainsbury's Supermarkets Ltd [2006] UKEAT IRLR 664** and **Chief Constable of South Yorkshire Police v Jelic [2010] IRLR 744**, which dealt with the issue as to whether or not an employer was obliged to create a new position for a disabled employee. The former case stated that '*Nor can there be an obligation on the employer to create a post specifically, which is not otherwise necessary, merely to create a job for a disabled person'*, (49), whereas the latter states '*we do not accept .. the submission that a Tribunal is precluded, as a matter of law, from holding that it would be a reasonable adjustment to create a new job for a disabled employee, if the particular facts of the case support such a finding'* (45).

    d. **Wade v Sheffield Hallam University [2013] UKEAT/0194**, which indicated that an employer is not obliged to place a disabled employee in a role which they believe they cannot perform.

    e. **Morse v Wiltshire County Council [1998] UKEAT IRLR 352**, which set out that the test for deciding whether an adjustment is reasonable, or not, is an objective one for the Tribunal.

The Facts

6. We heard evidence from the Claimant and on his behalf, from his wife, Katherine Whelan and Julia Leary, the Claimant's then union

representative. On behalf of the Respondent, we heard from Sam West, the Claimant's immediate line manager, Fiona Maply-Simms, the Practice Manager and Mr West's line manager, Dr Robin Cordell, an Occupational Health (OH) specialist, Peter Beaudro, the team manager for all concerned and finally Nicola Clements, an HR assistant who advised throughout most of the matter.

7. The Respondent is self-evidently a large employer with considerable administrative resources.

8. Chronology

    a. 2016-2017 – apart from a period of sickness absence in 2016, related to stress [287], the Claimant attended for work and no issues arose.

    b. 27 March 2017, the Claimant has a supervision meeting, in which he records being '*wiped out at the weekend'* [318].

    c. 30 May 2017 – the Claimant, at another supervision meeting, records his dissatisfaction with the IT-related adjustments previously made for his Dyslexia [331]. These issues continue for several months, resulting in a table of reasonable adjustments being drawn up in late September, to include a reduced case load, subject to review [369-370].

    d. 24 November 2017 – at another supervision meeting, the Claimant states that he is '*feeling negative all the time'* and taking medication for depression, referring to adverse childhood experiences [385].

    e. 14 December 2017 – the Claimant is signed off sick, with anxiety and depression, returning to work on the 28th.

    f. 5 January (all dates hereafter 2018) – he states, at another supervision meeting that his IT provision is '*working fantastically'* [397].

    g. 30 January – the Claimant submits a fit note, stating that he suffers from PTSD and anxiety and will be off sick for two weeks, at least at that point. However, he is never to return to work.

    h. 28 March – following a referral by the Respondent to OH, the Claimant is examined by a Dr Parker, who concludes that he was unfit for work, due to complex PTSD, potentially for up to six months, with perhaps a permanent reduction in caseload and for him to be reviewed in 12 weeks [410].

    i. 21 May – a first formal ill-health meeting is held with the Claimant, with Mr West and Ms Clements in attendance [451]. There is discussion as to the possibility of the Claimant's return to work, with the Claimant suggesting '*a different type of role'*, in particular the '*missing persons duties'*. This function was carried out on a duty rota basis by all staff in the team and involved receiving reports as

to missing children, who once found and returned to their home would then be interviewed, with Department of Education guidance being that that should take place within 72 hours [102]. Ms Clements records that '*as the team had undergone several structural reviews of late and this role hadn't been created, it is unlikely that it is felt that it is needed. However, your suggestion will be passed on to management for their consideration.'* She also referred to reasonable adjustments being '*usually up to a maximum of 20% going forward.'* When challenged, in cross-examination, as to where she had obtained this figure, she said that it was '*a rule of thumb'*, by way of guidance only and that implementing adjustments of more than 20% was likely to have operational consequences for the rest of the team. However, she stressed that this was a management decision in the end, not hers. We note, in this respect that in fact, in the earlier temporary adjustments, in September 2017, the Claimant's case load had been reduced to fifteen, from an average of thirty, therefore clearly exceeding any 20% limit. The letter also mentioned the possibility of medical redeployment within the Council and ill-health retirement. In respect of the former that would only be offered on OH advice and would require the Claimant to be given seven weeks' notice of termination on his current role, during which period support would be provided to him to secure an alternative role. Ms Clements concluded the letter by stating that she would need to talk to the Claimant's managers '*about how much your role has been adjusted to support you already and how much more we are able to do to adjust it further. The intention being that we can present both yourself and Cordell Health* (OH) *with a clearer picture of what your role would look like with permanent supportive adjustments.'*

j. 22 May – following the meeting, Ms Clements emailed Mr West and Ms Mapley-Sims, stating that '*this isn't about creating roles to fit individuals because that isn't what we do …' and that it wasn't just a case of slotting him into it, because it suited him … It would have to be advertised to the wider team, even if this was low-key advertising within the team etc.'*. That meeting took place on 11 June, although there are no notes of it. Mr Beaudro also attended for part of it. Mr West wrote before the meeting referring to the Claimant's case load and saying it having increased after a temporary reduction from fifteen to twenty, he was '*just about coping and started to struggle due to his personal issues'* on that latter figure [460].

k. 13 June – Ms Clements sends the Claimant a document entitled '*Reasonable adjustments and support for Darren Whelan'*, which she and his managers had drawn up and agreed should be sent to OH. It states that '*the difficulty with the type of work Darren does is that we have no way of shielding him from entering into conversations with a family that may trigger his symptoms of PTSD. There is no way of knowing what issues, or difficulties these families will bring up, during their visits with Darren and unfortunately it is often the case that abuse, domestic violence etc. has to be raised and discussed.'* They suggest a permanent

reduction in his case load to 25, a slower case allocation, extended timescales for case recording and other IT-related matters [467].

l. 21 June – the Claimant is again seen by Dr Parker of OH. He states that '*it is unlikely that any adjustments would enable a sustained return to work at this time, due to the severity of his ongoing symptoms. However, I have again highlighted some potential adjustments, in more detail, for consideration in the future, in the sections below.'* He suggests a further review in 8 weeks [472]. He considers that it will be '*more likely than not that he will be in a position to return to work, in some capacity, within three to four months of the date of this assessment … there is still considerable uncertainty over whether or not Mr Whelan will be able to return to his substantive role due to the high likelihood that he will be required to work with families where abuse has occurred, which may act as a trigger for a recurrence of his symptoms.'*

m. 26 June – Ms Clements comments on the report, stating that '*I am reading between the lines in the report, but I think what they are suggesting is that the likelihood will be that Darren will not really know if he can cope with the work until he comes back and gives it a go, which is kind of what we expected.'* [476].

n. 22 August – the Claimant is again examined by OH, this time by Dr Cordell, Dr Parker having left the Practice. The report states that the Claimant is fit for work with adjustments, those adjustments being, '*in an adjusted or redeployed role as he is not fit for the FYPS case management role, at least in the medium term (for the next several months),* with return on a phased basis, in six weeks. He suggests an adjusted role within the team, but that would depend '*on there being a suitable role that is low intensity; this is something that you could judge between you.'* Alternatively, he considers that the Claimant could be redeployed within the Council generally, which would have the advantage of '*having fewer triggers for his mental health problems'*. The Doctor suggested a meeting of the Claimant and his managers was necessary and that '*I would be happy to join such a meeting or case conference, by telephone, if you felt this helpful; alternatively, with Mr Whelan's consent, I could speak with you and HR ahead of such a meeting.'* [485].

o. 29 August – an HR representative wrote to the Claimant, on Ms Clements' signature block, inviting the Claimant to a '*second formal ill-health meeting'* for 11 September [487]. It was undisputed evidence that at this point Ms Clements was on leave.

p. 3 September – Ms Clements returns from leave and receives a message that OH had called, suggesting she call Dr Cordell. Ms Clements said that she simply clarified points from Dr Cordell's report, with Dr Cordell being confused as to the nature of the discussion, thinking that that was when a further case management meeting was arranged.

q. 4 September – Ms Clements writes to the Claimant, in respect of

the previously-arranged meeting, but re-titling it as '*a final ill-health meeting'* and adding in a paragraph as to the potential for the Claimant's dismissal. She said that the previous letter had been incorrect in referring to a second meeting, which was not appropriate in terms of long-term sickness absence. She felt that she had therefore to correct it, in order that the Claimant knew where he stood.

r. 11 September – the meeting proceeded, but was abruptly cut short, as the Claimant raised concerns about what he considered to be unauthorised discussions between Dr Cordell and Ms Clements about his condition, to which he had not given consent. Ms Clements said that she would investigate. In her subsequent letter, Ms Clements also offers the Claimant a further case conference, with Dr Cordell in attendance, for 25 September (changed to 2 October), to which he agrees [496]. She sets out what is likely to be discussed at that conference, with eight bullet points as to possible options. On the same day, she also wrote to Mr West and Ms Mapley-Sims [499], asking them to investigate short-term or project work that the Claimant might be able to undertake. Ms Mapley-Sims replies the next day, setting out the three main aspects of the Team's work, to include case management, the running of parenting courses and return home interviews (RHIs). She states that there is no project work. She sets out a rationale as to why she considers that latter role unsuitable for the Claimant, considering both his mental state and the operational difficulties creating a stand-alone role would exacerbate [500].

s. 2 October – following the case conference meeting, Dr Cordell provides a final OH report which states that the Claimant would be fit for a redeployed role, once available, but should be considered permanently unfit for his substantive role '*with vulnerable children and families'.* He said that treatment for the Claimant's PTSD was likely to take '*a year or two'.* The Claimant would be fit to work in library roles or administrative functions, but could not drive, due to his medication. He recommended that '*it will be in the interest of his long-term health, to be re-deployed, rather than retire on ill-health grounds.'*

t. 16 October – a final ill-health meeting is held, at which the Claimant's employment is terminated [520]. The letter following it states that it was '*therefore our intention to attempt to permanently redeploy you, giving you support with one to one 'get the job training'. At our meeting today, it was clear you were unwell and you stated that you had talked through redeployment with your union rep and your wife and you just didn't feel that currently you were in a position to work at all. We talked through what this meant and you made the decision that you would like to be paid in lieu of notice and then take the option to apply for ill-health retirement. Therefore, today we have dismissed you on the grounds of lack of capability due to ill-health'.* The Claimant's evidence at this Hearing, before us, confirmed this account. The Claimant was offered an appeal, but did not raise one until January, outside the

Respondent's ten-day limit and therefore it was not considered.

u. 7 January 2019 – there was then some to-ing and fro-ing between the Claimant and the Respondent as to the nature of that ill-health retirement and particularly as to whether the benefits should be deferred or 'active'. The Claimant wished the active option, because the payments would be slightly more, but the Respondent pointed out that, under that option, such payments could be open to review within a couple of years, whereas the 'deferred' option was permanent and unreviewable. In any event, the Respondent acceded, subsequently, to his request and granted him active membership [562].

9. Protected Disclosure. We deal with this claim first, out of the sequence in the list of issues, because it relates to the Respondent's motivation in the steps it took. The issues are whether or not the Claimant, by raising his concerns about Dr Cordell's apparent breach of his medical confidence, made a protected disclosure and if it was, whether he suffered the detriment of '*a change in recommendations from Dr Cordell, from stating that the Claimant was temporarily unfit to work with vulnerable families, to saying that he was permanently unfit to work with vulnerable families.'* [74]. We consider that potentially, the disclosure by the Claimant was protected, bearing in mind the low threshold for the public interest to be engaged. Clearly, it could be in the public interest that medical professionals maintain their patients' confidentiality, unless consent is given otherwise. It was evident from Dr Cordell's evidence that he acknowledged that he had been less than clear in the wording he used in his report, as to obtaining the Claimant's consent to discuss his case with the Respondent. Ms Clements said that she assumed that because the doctor had asked her to call him that he had obtained the necessary consent. She said that the conversation was purely one of clarification, in respect of the options of either redeployment or ill-health retirement, but Dr Cordell was unsure as to the detail, referring to his note of the time, as it being a 'clarification call' with no additional questions being asked. It was common ground that the Claimant was angry as to potential breach of his confidence and on balance we consider that his disclosure to the Respondent was protected. However, we do not accept that as a consequence, he suffered the claimed detriment and we do so for the following reasons:

a. We do not consider that in fact there is a significant change in recommendations between the two reports. The 22 August report [485] suggests at best a possible return to the Team, at least not for several months, but only to a '*role that is low intensity'* and subject, in any event, to review after six weeks. As will be clear from our subsequent findings, we don't consider that any such 'low intensity' role existed. The main thrust of the report is to recommend redeployment, as it would '*have the advantage of having fewer triggers for his mental health problems'*. The final report simply firms up that recommendation, with the benefit for Dr Cordell of being better able to understand, at the case conference, the real ramifications, for the Claimant, of the tasks carried out in the substantive role.

b. We accepted Dr Cordell's evidence that he was not in any way discomfited by the accusation, acknowledging that there had been confusion and considering it routine feedback for his Practice's processes in future. He didn't suffer any professional or business ramifications due to this complaint and therefore we accept his absolute denial that it motivated him in any way to alter his opinion, or to cause detriment to the Claimant.

10. Accordingly, this claim is dismissed.

11. Reasonable Adjustments. We turn next to this claim.

a. PCPs. While there are seven PCPs listed, we consider that in fact there are really only three, namely that employees be required to attend regularly for work and carry out that work; secondly that the RHI work be done on a rota basis and thirdly that medical redeployment require the giving of notice and redeployment being sought during that notice period. The other PCPs are either, we consider, repetitions, or, in the case of the 'at risk register', simply not the case, as no such register existed in the circumstances applying to the Claimant.

b. Substantial Disadvantage. The Respondent accepts and we agree that the PCPs in relation to attendance at work and the RHI rota requirement did place the Claimant at a substantial disadvantage. It does not, however, accept that the redeployment notice requirement did so. We concur, for the following reasons:

   i. That PCP would place any employee subject to medical redeployment, but not necessarily disabled, at the same disadvantage.

   ii. Applying **Griffiths**, whether or not the Claimant suffered stress as a consequence, is not something that an employer can be expected to have to take into account.

c. Did the Respondent fail to comply with the requirement to provide reasonable adjustments to avoid the substantial disadvantage (as we have found them to be)? The adjustments then and now suggested are as follows:

   i. the creation of a stand-alone RHI role.

   ii. Permitting the Claimant to carry out family training, again as a stand-alone role; and

   iii. Part-time work.

   iv. Or some adjusted role within the Team.

d. Our findings in this respect are that objectively the Respondent did not fail to comply with this duty as to the proposed adjustments as it

would have been unreasonable to do so, or alternatively they would have had no prospect of getting him back to work, for the following reasons:

i. The Respondent provided a clear and rational explanation as to why it was both operationally and personally unrealistic for the Claimant to carry out the RHI role. Despite previous re-organisations that role had never been considered suitable as stand-alone, due to the unpredictable nature of the work flow and the statutory guidance that interviews be carried out within three days. It therefore shared that work within the team, to balance out the available work and to lessen the load, on those days when there were multiple reports received. On those days when there were few or no reports, the person on duty could get on with their substantive role, which the Claimant would not have been able to do. Allocating this role alone to the Claimant would have increased the workload for the rest of the Team and resulted in days when the Claimant would have little work to do and other days when he could have more than he could cope with.

ii. All the medical evidence indicated that he would be unlikely to be able to cope with such work and it at least had the potential to trigger his PTSD. This was especially so, as the work was unpredictable and unscreened, therefore potentially putting the Claimant into a situation where he was being confronted with traumatic issues, which could have had a severe adverse effect on him. To put the Claimant in such a position, even in a trial period, may well have been a breach of the Respondent's duty of care to him.

iii. We don't agree, as asserted by Mr Williams that these considerations were '*post facto*'. We accepted the evidence of the Respondent's witnesses that they gave it due consideration at the time and that is evidenced by the OH focus on that issue throughout. It is the case that Ms Clements was doubtful as to the practicability of this step from the outset, but there is clear evidence of her deferring to the managers with most experience on this point and which opinion of theirs was unchanging throughout the process. The proposal was simply not practicable. While it was unwise of Ms Clements to refer to the 20%, as it could indicate an arbitrary limit to adjustments offered, it was clear from past adjustments that in fact such limit, which she said was merely a rule of thumb, had been exceeded in the Claimant's case and there is nothing to indicate that had suitable adjustments been possible that it would not have been exceeded again. On a similar point, nor do we consider that an earlier direct engagement with the Claimant would have changed that situation, particularly when, in the early stages, his medical prognosis was so unclear.

iv. Nor do we agree that this was a 'box-ticking exercise' by the Respondent. The entire history of the Claimant's employment shows evidence of the Respondent making considerable endeavours to make adjustments and provide support to the Claimant, to permit him to remain at work. There is no dispute that he was a valued employee and when fit for work that he performed well. We believe that Ms Clements was genuinely surprised when the Claimant announced his decision not to pursue medical redeployment, but instead to retire on ill-health. In that context, it is not plausible that the Respondent was following a 'box-ticking' procedure, to arrive at a pre-determined outcome.

v. The assertion on the family training point had not been raised by the Claimant at all during the procedure, or in his appeal, or was pleaded, or in his witness statement, giving us the impression that this assertion is now a belated 'make weight'. The Respondent clearly had no opportunity to advance evidence on this point, but it is clear from the description of the function that it was episodic, with two or three eight-week-long courses over the year, therefore generating less than one day a week of work.

vi. In respect of the part-time assertion, this is again belated, not having been raised before this hearing, but could not, even if instituted, have allowed him to carry out his substantive role (as no recommendation had been made by OH that part-time work might ameliorate the trigger points he might face) and would have caused considerable organisational difficulties in carrying out the RHI role, without even considering the issue as to the effect on the Claimant's health.

e. For these reasons, therefore, the claim of failure to make reasonable adjustments is dismissed.

12. Discrimination Arising From Disability. The Respondent accepts that the Claimant's dismissal was unfavourable treatment. Other alleged acts of unfavourable treatment are also pleaded.

a. Firstly. the Claimant's inability to return to work, which we regard as simply the prelude to his dismissal and therefore all the same issue.

b. Escalation of the sickness procedure from second meeting to final meeting. We accepted Ms Clement's evidence that the first letter was a mistake by another while she was on holiday and that in any event, further meetings would have served no purpose, thereby causing no detriment.

c. In respect of Dr Cordell's telephone conversation with Ms Clement, we have dealt with this issue under the protected disclosure and do not consider that the Claimant suffered any detriment as a consequence.

d. Offering redeployment only on notice was not something arising in consequence of the Claimant's disability, but a consequence of the Respondent's set procedure on these matters, which they did apply to all medical redeployments, regardless of any disability.

e. We don't accept that the refusal to allow the Claimant's out of time appeal was something arising in consequence of his disability, as, again it was the Respondent's standard procedure and while the Claimant may have been indisposed, he did have union representation throughout which no doubt, if he had instructed them, could have drafted an appeal on his account, or requested an in-time extension to do so. The impression we had, on the evidence was that this request was, in turn, a box-ticking exercise by the Claimant, on legal advice, merely to demonstrate exhaustion of the Respondent's internal processes.

f. In respect of the pension scheme, there is simply no detriment. The recommended deferred scheme could easily be interpreted as more beneficial to the Claimant and in any event, his request for active membership was promptly granted, to no disadvantage to him.

13. In respect of the one act of unfavourable treatment, his dismissal, we do find that the Respondent's decision in this respect was a proportionate means of achieving a legitimate aim, particularly in the context, as we have found that there were no reasonable adjustments that could be made. The legitimate aim was the provision of effective and efficient management of the service and it was proportionate to achieving that aim, because, at the time of dismissal, the Claimant had been on continuous sickness absence for over eight months, with no indication of early return and he had opted firmly against any redeployment, outside of his own team.

14. For these reasons, therefore, the claim of discrimination arising is dismissed.

15. Unfair Dismissal. In the context of our findings against disability discrimination, it is difficult, short of gross failures in procedure, to conclude that dismissal on grounds of capability was unfair. The Claimant had been on sick leave for over eight months, with no indication of prompt return. The Respondent had ample evidence as to his condition and its effect on his ability to return to work and certainly did not require any final GP's report, to certify this. The Claimant himself indicated in the final meeting that he was incapable of working in any position for the foreseeable future, reinforced by his successful application for ill-health retirement and categorically ruled out any redeployment. There were criticisms of the Respondent's procedure in this process, to include the lack of formal note-taking, the lack of clarity of who took responsibility for the dismissal procedure and the mis-titling of the final meeting, but we don't consider such failures to be sufficiently material to render this dismissal unfair. Even were we minded to do so, dismissal in this case was inevitable and therefore a 100% Polkey reduction would have been

appropriate, although such finding is, we consider, unnecessary.

Conclusion

16. Accordingly, therefore, the Claimant's claims of disability discrimination, protected disclosure and unfair dismissal fail and are dismissed.

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Employment Judge O'Rourke

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Date: 8 October 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON 22nd October 2020
By Mr J McCormick

FOR THE TRIBUNAL OFFICE