EMPLOYMENT TRIBUNALS

Claimant: **Mr J McHugh**
Represented by **In person**

Respondent: **ERBA Corporate Services Ltd**
Represented by **Mr G Baker - Counsel**

Heard by CVP on **14-16 June 2021**

Before: **Employment Judge Martin**

REASONS

1. Oral reasons were provided at the conclusion of the hearing. These reasons are prepared at the request of the Claimant.

2. By a claim form presented on 1 September 2018 the Claimant brought claims of race discrimination, disability discrimination, breach of contract, unfair dismissal and whistleblowing. By the time of this hearing the only remaining claim was of disability discrimination the others having been withdrawn by the Claimant.

3. The hearing was held by CVP due to ongoing restrictions during the Covid-19 pandemic. The disability the Claimant relies on is post traumatic stress disorder (PTSD) following his time in the military. The Claimant found the hearing difficult but wanted to continue. The Tribunal offered him as much assistance as possible so that he felt comfortable giving evidence and asking questions of the Respondent. Breaks were offered frequently as well as giving the Claimant time to go off camera when needed.

The law

4. The Respondent provided a good and accurate summary of the law in its submissions and this is reproduced below.

> *Section 13 of the Equality Act 2010 ("EqA 2010") provides that:*
> *"(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"*
> *Pursuant to section 23 EqA 2010:*

"(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case. (2) The circumstances relating to a case include a person's abilities if— (a) on a comparison for the purposes of section 13, the protected characteristic is disability".

So, in disability discrimination cases the Tribunal must consider whether someone with the same abilities, (but without the disability) would have been treated less favourably (see High Quality Lifestyles Ltd v Watts [2006] I.R.L.R. 850).

Section 136(2) and (3) EqA 2010 provide that:
"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."
But subsection (2) does not apply if A shows that A did not contravene the provision.

The Tribunal can avoid confusing debates about the correct comparator by cutting through the issues as recommended by Lord Nicholls at paragraph 8 in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 at paragraph 79:

"11 ….employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others." .

The Claimant has the burden of showing "facts from which the court could decide, in the absence of any other explanation", that the "reason why" the Respondent investigated him in the way they did, dismissed him and did not uphold his appeal was his race or religion.

It is not enough to show a difference in treatment. To get over the burden of proof at Section 136 of the Equality Act 2010, the Claimant must show "something more" than a difference in treatment – see Mummery LJ at Madarassy v Nomura International plc [2007] I.C.R. 867 at paragraph 56:

*"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which * a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".*

Unreasonable treatment is not enough. As Simler P held in Chief Constable of Kent Constabulary v Bowler EAT 0214/16 at paragraph 97:
"Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic. That does not mean that the fact of unreasonable treatment is irrelevant".

However, if the Tribunal are able to make positive finding as to the reason for the treatment, the burden of proof provisions will not need to be relied upon. Per Lord Hope in Hewage v Grampian Health Board [2012] UKSC 37 at paragraph 32:

> *"…it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."*

Submissions

5. Both parties gave submissions which were considered in full by the Tribunal in coming to its decision.

Findings of facts and Conclusions

6. These written reasons only contain evidence which is relevant to the issues and necessary to explain the decision. Not all evidence is set out in these reasons, but all evidence and submissions were heard and considered.

7. The issues for the T to determine are set out in the Case management order of EJ Tsamados as follows:

    a. Was the Claimant a disabled person because of his PTSD (depression and anxiety)

    b. Has the R subjected him to the following treatment:

        i. Dismissing him

        ii. Ms Mayrinck dismissing him by reason that he was "not mentally agile enough".

8. The Claimant was employed from 1 May 2018 as Senior HR Manager UK and Ireland. The effective date of termination of his employment was 13 June 2018.

9. For the purpose of this decision, we started by taking the Claimant's case at its highest and proceed on basis he was a disabled person. It did not become necessary given the Tribunal's conclusions to decide whether the Claimant was in law a disabled person at the relevant times.

10. Much of the evidence was one person's word against another. In these circumstances the Tribunal must decide whose evidence it finds more likely to be correct on the balance of possibilities. Where the Tribunal has found one person's evidence to be more likely to be correct this does not mean that the other person is lying.

11. The Respondent says it dismissed the Claimant due to his performance. The Claimant says he was dismissed because he has PTSD from his time in the military. The essential question to be determined is why the Respondent dismissed the Claimant. It is not for the Tribunal to say whether a particular piece of work was done to a sufficient standard - that is a

management decision for the Respondent to make.

12. We heard evidence of several matters which the Respondent says amounted to poor performance. The Claimant blames this in large on the haphazard organisation and processes. For example, he pointed to having no proper contract, no employee handbook and no proper on- boarding process (induction). He also disputes some of the criticisms of his work, for example the Vietnamese employment contract and the Irish contract. He pointed to work he says he did well for example the GDPR project and the company handbook.

13. The Respondent was a start up company in the UK albeit part of a much larger global group. The Claimant's role was to put in place the HR documentation and policies in accordance with UK legislation and practice. His manager Ms Maynrick was not fully conversant with UK employment law legislation which is why the Claimant was employed.

14. The Claimant agreed in his evidence that until a security incident on or around 24 May 2018 did not mention his mental health. The security incident was a bomb scare and staff were not allowed to leave the building.

15. The Claimant gave evidence of many matters he was not happy with or which he says contradicts the reason given by the Respondent for the termination of his employment. These include:

    a. Few days after being appointed being given pay rise. In a letter to Mr Visarini dated 2 July 2018 the Claimant says Ms Maynrick mentioned his mental agility. Ms Maynrick's explanation was that when the Claimant was employed, she had a budget to work to and realised that the salary offered to him was not market rate and also that her budget allowed her to pay the Claimant more.

    b. He complains that he notified Ms Maynrick of a dental appointment and she arranged for him to conduct an interview at the same time (5 May 2018).

    c. That on 11 May 2018 he was asked for a completed 30-day plan as part of his onboarding and asked him to do headcount tracker although when asked to do this he replied *"Sure, no problem*".

    d. On 4 June 2018, during the Claimant's annual leave, Ms Maynrick telephoned at 7 am saying he should go to the office

16. Ms Maynrick gave evidence of work not done to the standard she expected of a Senior HR Manager which included:

    a. 14 May 2018 – the Irish contract issue not drafted well. Mr Bishop from the Irish office sent an email pointing this out and asking for the UK solicitors to review the contract.

    b. 15 May handbook – The claimant sent a draft handbook to Ms Maynrick – this was not implemented

c. The headcount tracker was not completed to the required standard
d. 17 May Ms Maynrick emails the Claimant in relation to the Irish contract saying "*you cant take (sic) these key mistakes .. you must focus on details – they are important*".

e. The 30-day plan was not done in a timely fashion not being sent until 12 June 2018.

17. On 24 May 2018 was the bomb scare during which the Claimant said in evidence he first told the Respondent about his PTSD. However in his letter to Mr Virani of 2 July 2018 he says he told Ms Maynrick shortly after he started his employment. Given his evidence at the tribunal and that Ms Maynrick denies she was told of his PTSD at that time (or later) the Tribunal finds on balance that he did not tell her. The Tribunal took into account the Claimant's evidence that he found it very difficult to talk about this and often alluded to things rather than told people exactly what his medical situation was.

18. On 30 May 2018 the Claimant missed two telephone calls from the Respondent for which he apologised.

19. On 12 June 2018 Ms Maynrick told the Claimant that his work was not up to standard. The Claimant says that there was reference to his mental agility during the discussion. This was denied by Ms Maynrick.

20. On 13 June 2018 a letter of dismissal was sent to the Claimant. This letter referred to the Claimant's performance as being the reason for dismissal.

21. The Tribunal finds that Ms Maynrick was unhappy with the Claimant's performance before the bomb scare which is when the Claimant says he told the Respondent of his PTSD. The Tribunal finds that the issue of the Claimant's performance was noted and raised before the bomb scare and continued after it.

22. The Tribunal must determine whether the term mental agility was used as alleged by the Claimant. This is one person's word against another. Ms Maynrick said did not use that term to the Claimant. Ms Sandea says never heard that term being used at any time. On balance the Tribunal finds that this term was not used. Even if it had been used, was it a reference to his mental impairment? On the Claimant's case, this term was first used before the bomb scare incident which is when he said he first told the Respondent about his PTSD. The Claimant has imputed a negative meaning to this phrase connected to his mental health. The Tribunal finds that this term could mean many things. For example, as the Respondent submitted it could mean he was not quick enough. This term, if said, was made in relation to specific performance issues, for example, the Vietnamese contract and the GDPR project.

23. The Tribunal considered whether the Claimant mentioned his mental health on day of the bomb scare to Gemma Sandean. The Claimant was with Ms Sandean at the time of the bomb scare.

24. The Claimant says he told Ms Sandean because the bomb scare revived

memories of his time in the military. He first said that he told her that he suffered with PTSD. During his evidence he accepted he may have said he got anxious without mentioning PTSD as he finds it very hard to talk about, even now.

25. Ms Sandean's evidence was that she was scared during the bomb scare and that the Claimant reassured her telling her not to worry, that he was in the military and knew the authorities had the expertise to deal with these issues. Her evidence was that the Claimant did not tell her about his PTSD or any other mental condition and that he just reassured her.

26. The Tribunal found Ms Sandean to be a very credible witness. The Claimant accepted in his evidence that he found it very hard to discuss his mental health issues, and often used euphonism's for PTSD. On balance the Tribunal finds Ms Sandean's evidence to be more credible and that the Claimant did not tell her of his PTSD.

27. The Tribunal then considered whether the Claimant told Ms Maynrick he had PTSD. The Tribunal has found he did not tell her before the bomb scare. He says he told her on the day of the bomb scare. Ms Maynrick's evidence was that she was not at the office that day and that she could not recall the incident. Ms Sandean gave evidence that she did not think Ms Maynrick was in the office at that time. The Claimant suggested it was not credible for Ms Maynrick not to recall the bomb scare as it was so significant. The Tribunal considered this and concluded that the bomb scare would have been significant for the Claimant if it triggered memories of his time in the military and he had been in the building at that time. However, this may not be the case for Ms Maynrick who had not been in the military. On balance the Tribunal find that she was not in the office that day, so the event would have not had the significance it had for people who were there and experienced it firsthand.

28. The Claimant says his discussed his PTSD the following day in Cote Bistro. Ms Maynrick says that he did not. The Tribunal finds that Cote Bistro is a public place with customers and staff around. Ms Maynrick told the Tribunal that one of the reasons for hiring the Claimant was because of his military background as her father had been in the military. Ms Maynrick accepted that the Claimant may well have told her about the incident, but not specifically about his PTSD. The Tribunal finds it unlikely that the Claimant would have spoken to her about PTSD in public place given how emotional he gets when talking about it and how difficult he finds it to discuss it. Taking this together with Ms Maynrick's evidence the Tribunal finds on balance that the incident may have been discussed but not his PTSD.

29. The Tribunal then went on to consider whether the Claimant spoke to Mr Virani about his PTSD. The Claimant's evidence is that he tried to speak to him and that he spoke to Ms Sandean saying wanted to talk to Mr Virani. Ms Sandean gave evidence that she told Mr Virani in very general terms that the Claimant wanted to speak to him. Mr Virani thought it was about a line management issues (Ms Maynrick had told him about her concerns about the Claimant's performance) so did not want to get involved. The Claimant did not contact Mr Virani by telephone, WhatsApp or email. The Tribunal finds that Mr Virani did not know the Claimant had PTSD.

30. The Tribunal notes that in emails sent after the termination of the Claimant's employment, the first related to salary owed. In the second dated 26 June 2018 the Claimant writes *"I believe the reason for my dismissal was because I attempted to make the managing director aware of the erratic behaviour of my line manager Canan Mayrinck and I have documentary evidence that shows I raised these calls to his EA and other company directors and I was dismissed by Canan by email without any formal meeting or right of appeal as soon as she (Canan) became aware of my communications and I consider this to amount to unlawful dismissal and breach of contract".* And in another email references whistleblowing.

31. The Tribunal finds that had the Claimant believed that the termination of his employment was because of his PTSD, he would have raised this at the earliest moment. The fact that it took until 2 July 2018 to raise the issue of PTSD indicates to the Tribunal that this is not what he believed to be the reason for his dismissal. The extract from his email of 26 June 2018 state why he believed he had been dismissed and this did not relate to his PTSD.

32. The Tribunal finds that, at the time the Claimant was employed the Respondent was disorganised and that there were no proper policies or paperwork or procedures in place. This perhaps not surprising given it was a start up and the Claimant was employed to deal with these matters. The Tribunal finds that had this been a different claim for example unfair dismissal, then the procedure and process adopted would inevitably have led to a finding of unfair dismissal. However, the ambit of the Claimant's claim is very narrow. Whilst the Tribunal finds that Ms Maynrick should have communicated her concerns about the Claimant's performance more clearly and preferably in writing, the Tribunal finds that the Claimant was dismissed because he did not achieve a satisfactory standard in the first weeks of his employment and the Respondent did not have confidence that he would achieve the required standard going forward.

33. There was no evidence to show that a person who did not perform as required by the Respondent and who did not have PTSD would have been treated differently.

34. The Claimant's claim is dismissed.

Employment Judge Martin
Date: 12 July 2021