EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr S Hill	v	**Associated Security Solutions Limited**

Heard at: **Leeds** **On: 28 & 29 May 2019**

Before: **Employment Judge Shulman**

Members: **Mrs J L Hiser**

Mr M Brewer

Appearance:

For the Claimant: **In person**

For the Respondent: **Mr J Buckle, Solicitor**

JUDGMENT

1. The respondent failed to make reasonable adjustments in relation to the claimant.
2. The claimant is awarded compensation in the sum of £26,378.18, of that sum loss of earnings amount to £18,878.18 and injury to feelings to £7,500.

REASONS

Introduction

1. The claimant has been employed as a Service Engineer by the respondent since 14 February 2009. He complains to this Tribunal that the respondent has failed to make reasonable adjustments. The respondent accepts that the claimant has a disability within the meaning of the Equality Act 2010 (EA), namely, depression which we find to be anxiety and depression.

Issues

2. The issues (to which we will refer in our determination of the issues) are, with the exception of one additional issue, set out at paragraph 5 of the Case Management Summary made by Employment Judge Lancaster on 20 December 2018.

The Law

3. The Tribunal has to have regard to the following provisions of EA – namely section 20(1), (2), (3,) (4), and (5) and paragraph 20(1) of schedule 8 EA. The latter provisions deal with knowledge. As to the test of reasonableness of any proposed adjustments the focus has to be on the practical result of the measures that can be taken – see **Royal Bank of Scotland v Ashton [2011] ICR 632 EAT**. The test of reasonableness is an objective one and it is ultimately the Tribunal's view of what is reasonable that matters – see **Smith v Churchills Stairlifts plc [2006] ICR 524 CA**. Mr Buckle referred us to the cases of **Miss H. Wilcox v Birmingham Cab Services Limited [2011] UKEAT 293** in relation to knowledge and **NCH Scotland v Ms P McHugh UKEATS/0010/06** relating to reasonable adjustments. We do not think that these two cases take us further than those statutory references and cases to which we have referred above.

Evidence

4. There was a degree of conflict on the evidence between the claimant on the one hand and Mr Stephen Turner, the Managing Director of the respondent, on the other. The evidence of the claimant was obviously coloured by the experience of his disability and Mr Turner's by his undoubted achievement of building up what he regards as a family business, and is, therefore, rightly proud of it, but this pride we find did tend to affect the objective nature of his evidence.

Facts

5. The Tribunal having carefully reviewed all the evidence (both oral and documentary) before it, finds the following facts (proved on the balance of probabilities):

    5.1. The business of the respondent is the supply of safes and associated security products. The respondent has several depots and 215 staff including a small HR team. Initially Mr Turner said that he had operational HR experience but no HR training.

    5.2. The claimant had a road traffic accident in or about 2009. The claimant was off work for several months and when the time came for him to return the claimant was able to return by the respondent on light duties. The claimant described this as a phased return, working a couple of hours a day initially as a bench locksmith and then in the field.

    5.3. There was another road traffic accident in which the claimant was involved in February 2016, when the claimant was off work again and he again returned as permitted by the respondent on light duties before resuming his normal work.

    5.4. On a day in December 2016 the claimant broke down whilst at work in front of his manager Andy Palmer. The claimant told us that he cried and was shaking. He said that he was suffering with his work pattern and asked if he could stay closer to base. Mr Palmer advised the claimant to see his Doctor. Mr Turner was made aware of the matter by Mr Palmer.

    5.5. On 15 December 2016 the claimant's Doctor diagnosed the claimant with stress and depression but the claimant carried on working.

    5.6. On or after 9 February 2017 the claimant produced a sick note to the respondent covering the period 19 January 2017 to 19 March 2017 for depression. The sick note suggested amended duties, including reduction

of driving and light duties. The respondent took no action to assist the claimant with these amended duties.

5.7. On 6 March 2017 the claimant was signed off work until 20 March 2017 for depression. In his statement Mr Turner states awareness of the claimant's absence and the reason.

5.8. By August 2017 the claimant was still off work and having to produce sick notes. The claimant's Statutory Sick Pay had run out and the respondent wrote to the claimant providing him with form SSP1 and instructing the claimant as to how to continue to receive sick pay as the respondent had fulfilled its Statutory Sick Pay obligations. From that point the claimant sent his sick notes to the Department for Work and Pensions and not the respondent. The respondent never asked for copies.

5.9. There was no contact from the respondent to the claimant until, the respondent alleges that HR contacted the claimant to discuss his welfare and the respondent further alleges that the claimant did not co-operate as to a return to work discussion and that the claimant asked for no further contact with the respondent. The claimant does not remember saying that but he does remember that he was in a dark place at the time. He was clearly aware that the respondent was at that time wanting a meeting to discuss possible return to work by the time he got to the meeting to which we refer below. What is clear is that there was no contact from August 2017 by the respondent after this alleged contact until the claimant prompted it in the following year.

5.10. The claimant started a course of counselling in March 2018, which his General Practitioner's notes say had a positive effect on him and we find that this prompted the claimant to send an email to the respondent on 4 May 2018 asking for a meeting. The respondent wrote a holding email back to the claimant. The claimant wrote a reminder on 11 May 2018. The respondent moved towards fixing (but did not fix) a meeting. The claimant sent another reminder on 21 May 2018. There was another holding response sent by the respondent. On 1 June 2018 the claimant sent yet another reminder. A meeting with Mr Turner was fixed to take place on 12 June 2018 by an email of 1 June 2018.

5.11. The meeting took place between just the claimant and Mr Turner. No notes of that meeting were shown to us. Mr Turner said that the claimant's job was open but that the claimant would have to go back full time, which included being on-call and working away and that the claimant should supply a Doctor's note as to his fitness. It is in dispute as to whether the working away was for 2 – 3 nights a week or 2 – 3 nights a month. In order for us to decide this case we do not have to make a finding of fact on this particular issue. Alternatively, and not in dispute, is that if the claimant could not comply he could resign and would receive a good reference. The claimant referred to his condition in the meeting and said that he could not comply by going back full time. Mr Turner was unrepentant. In his evidence Mr Turner suggested that the claimant admitted that the claimant's absence was due to drugs misuse and that the claimant's reason for not working away was because he had to look after his dogs. In the absence of other evidence the claimant says in relation to the dogs that he could leave them with his parents who lived nearby. So far as the misuse of drugs is

concerned Mr Turner admitted that he was aware that the claimant was suffering from depression.

5.12. After the meeting the claimant heard no more from the respondent. The claimant wrote an email dated 25 June 2018 to the respondent in which he asked for a phased return to work with lighter duties, having seen his Doctor, who also advised that working away would not be advisable and the claimant alleged disability discrimination. This email was never replied to because Mr Turner said he was waiting receipt of the medical certificate, but there is no communication requesting the medical certificate in reply to the claimant's email. Indeed no sick note was ever requested again by the respondent. Mr Turner put it in what we find is a rather understated manner that "things have got a little bit missed". An email dated 9 July 2018 from the claimant to the respondent went unanswered.

5.13. On 6 September 2018, 18 months after the claimant went on sick, the respondent wrote to the claimant asking him to submit to an Occupational Health examination. The claimant denies that he received this request then and he issued proceedings in the Tribunal on 15 October 2018. Then the respondent sent the request again on 31 October 2018. Throughout the period of the claimant's employment the respondent had the right to refer the claimant to a medical adviser by clause 11.4 of his contract.

5.14. There is one final finding of fact that we have made and that is relating to Mr Turner's attitude to mental health disability. In his evidence he said when he said that he did know from 15 December 2016 that the claimant had been diagnosed with stress and depression, that this was not a disability for a normal person and he did not know why it was not possible to happen in normal person.

Determination of the issues

After listening to the factual and legal submissions made by and on behalf of the respective parties, where applicable:

6. We refer back to the issues as defined by Employment Judge Lancaster. They are numbered in the 5's and this Judgment is being numbered at this point from 6. so that the Tribunal will use the numbering in this Judgment but in square brackets are the numbers from the case summary. Accordingly, we refer to those issues plus one, as we have previously said.

6.1. [5.1] Did the respondent apply the following Provision, Criteria and/or Practice ("the provision") generally, namely, that a requirement that employees be fit to attend and perform their ordinary contractual duties at any place where they could be sent to work? The Tribunal agrees that the provision is the correct provision.

6.2. [5.2] Did the application of any such provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that he could not attend full time or perform all his duties or work away from home? Having regard to the advice that the claimant received from his Doctor which is contained in the email dated 25 June 2018 and having regard to the two previous occasions when the respondent demonstrated its ability to be flexible by putting the claimant on light duties, the application of the provision, the Tribunal finds, put the claimant at a substantial disadvantage as set out in that issue.

6.3. [5.3] Did the respondent take such steps as were reasonable to avoid the disadvantage? The Tribunal cannot find that the respondent took any steps to avoid the disadvantage, reasonable or otherwise. It came down to the claimant either having to resign or comply with the provision.

Employment Judge Lancaster sets out that the burden of proof does not lie on the claimant as to whether or not the respondent took such steps as were reasonable to avoid the disadvantage but that it was helpful to know the adjustments asserted as reasonably required and they were identified as allowing a phased return on lighter duties and working out of the depot only and referring to the numbering rather than repeating each one:

6.3.1. [5.3.1] Whilst the respondent was reasonable in requiring medical confirmation of fitness the respondent did not follow that request up and the reference to Occupational Health came far too late.

6.3.2. [5.3.2] We are satisfied that the respondent left the claimant with no alternative than to return to duties full time and the request to work away may have been in excess of what he was doing immediately before the incident in December 2016.

6.3.3. [5.3.3] See 6.3.1

6.3.4. [5.3.4] This is a statement that the claimant is still currently signed off work and has not attended Occupational Health. This statement is noted.

6.4. [5.4] Did the respondent not know or could the respondent not be reasonably expected to know that the claimant had a disability was likely to be placed at the disadvantage set out below. As Mr Turner himself admits the respondent had knowledge and if there was no knowledge he ought reasonably to be expected on behalf of the respondent to have known the claimant had a disability throughout. He ought also to have known that the claimant was placed at the disadvantage referred to above.

6.5. As to the adjustments we find that it would have been practical, as in the past, to accommodate the adjustments, which were a little different than before, the adjustments being such as would assist the claimant in an orderly return to work and our view, particularly bearing in mind the claimant's recovery from a mental illness and the family nature of the respondent so that any such adjustments would have been reasonable.

6.6. In all the circumstances the respondent failed to make reasonable adjustments and we move now on to the matter of remedy.

7. **Remedy**

7.1. <u>Loss of earnings</u>

We find that the claimant's average weekly wage nett was £388.24.
The period of loss we find as 12 June 2018 up to today, 29 May 2019. If the respondent had made the adjustments which were requested at the time, the claimant would have made his way back to work and nothing else, apart from continuity of employment would have occurred, so no Occupational Health requests and of course these proceedings would not have occurred. The claimant has advised us that the phased weeks would have amounted to three, 12.5 hours in the first week, so he would have earned in that week

£121.33, (these are all net figures), in the second week he would have earned £218.39 and in the third week £291.18, so the total for the first three weeks would have been £630.90 and the total number of weeks apart from those three short weeks, and in addition to them, is 47 weeks. Those 47 full weeks amount to £18,247.28, to which we add the three short weeks £630.90, the total being £18,878.18.

7.2. Vento

We think that whilst the claimant is in the lower band the award should be towards the upper end of that band because of the way the claimant was treated and we therefore award under the Vento guidelines injury to feelings of £7,500.

7.3. Interest

We make no award for interest.

Employment Judge Shulman

Date 20 June 2019