Case Number: 3334678/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr N Tyson	v	Cyberfort Limited

Heard at: Aylesbury **On**: 25-28 August 2020

Before: Employment Judge Hyams **Members:** Ms A Gibson
Mr A Kapur

Appearances:

For the claimant: In person
For the respondent: Ms A Pitt, of counsel

JUDGMENT

1. The claim of unfair dismissal succeeds: the claimant was dismissed unfairly.

2. The claim of disability discrimination continues.

REASONS

The claim

1 In these proceedings, the claimant claims that he was dismissed unfairly and that he was subjected to disability discrimination through the respondent contravening sections 15 and 20 of the Equality Act 2010 ("EqA 2010") by that dismissal.

2 The claim form was presented on 9 November 2018. The claimant was dismissed on (it was the respondent's case) 20 September 2018, with pay in lieu of notice being given. Accordingly, no time issues arose.

The issues

3 The issues were the subject of a preliminary case management hearing conducted by Employment Judge Vowles on 28 August 2019. The issues were the subject of paragraphs 5-8 of the record of that hearing (paragraph 6 being where the issues

in the claim of unfair dismissal were listed), but the claimant was not represented at it (just as he was not represented before us) and while the respondent was represented at that hearing, the representative was described as a consultant and therefore was probably not a lawyer.

Unfair dismissal

4 As far as the claim of unfair dismissal was concerned, we found the list of issues in those paragraphs not to be completely apt, and we accordingly let Ms Pitt know on the first day of the hearing before us that we would be looking at the case law described in *Harvey on Industrial Relations and Employment Law* ("*Harvey*") and considering the claim of unfair dismissal by reference to that case law rather than solely by reference to the issues listed in paragraph 6 of Employment Judge Vowles' case management record. Those issues were stated as follows (in paragraph 6.1 of the case management record of Employment Judge Vowles; there was, however, no paragraph 6.2):

> "6.1 The alleged unfairness was:
>
> 6.1.1 The speed of the process. The Claimant attended a meeting on 18 September 2018 and was dismissed on 19 September 2018.
>
> 6.1.2 The dismissal was due to an illness which the Respondent had known about for 2 years but initially denied any knowledge of the illness.
>
> 6.1.3 At the meeting on 18 September 2018 the Claimant's line manager, who was attending as the Claimant's witness, gave evidence against him."

5 It was agreed by the respondent that the claimant was dismissed by the respondent. The respondent's stated reason for the claimant's dismissal was that he had fainted at work on 1 August 2018. It was the respondent's case as advanced by Ms Pitt on the basis of the evidence of Ms Laurie and Mr Watts, that as a result of the claimant having Vasovagal Syncope, there was no alternative to his dismissal. The reason why there was no such alternative was, it was the respondent's case, that the respondent could not otherwise keep the claimant safe: it was the respondent's duty in the law of negligence (commonly referred to as the "duty of care", but frequently also extended to mean many other things to which it does not in fact apply) to dismiss the claimant. That contention raised what were to us the obvious issues of

5.1 what investigation the respondent had carried out to arrive at that conclusion and on what evidence that conclusion was based,

5.2 whether or not that investigation was one which it was within the range of reasonable responses of a reasonable employer to carry out, and

5.3 whether or not the claimant's dismissal was outside the range of reasonable responses of a reasonable employer in the circumstances as they were known at the time of the claimant's dismissal.

6 We accordingly treated those as being at least the primary issues arising in the claim of unfair dismissal.

Disability discrimination

7 Turning to the claim of disability discrimination, there was a major preliminary issue, which was whether or not the claimant had a disability within the meaning of the EqA 2010. The disability on which the claimant relied was "Vasovagal Syncope (sudden faint syndrome)". He was ordered to provide a disability impact statement, and in the statement that he provided in compliance with that order, he said that he had had Diabetes type 2 since 2016 as well as having been diagnosed with Vasovagal Syncope in 2015. The claimant is currently aged 40, and in 2015, he wrote in paragraph 7 of his disability impact statement, the consultant who diagnosed that he had Vasovagal Syncope:

> "didn't want to put me on medication due to my age so I was taught what to look out for and how to overcome an attack. When an attack is starting I start to get very hot with heavy sweating, then I feel unwell, nausea and vomiting follows after this if I haven't managed to stop the attack then I get a very strange feeling starting in my feet and going up through my body and then I pass out. The hospital taught me that when an attack starts, I need to sit down and squeeze my leg muscles like a fighter pilot and mostly this technique works if I catch it in time."

8 In the final paragraphs of that statement, the claimant wrote:

> "8. At work my condition hadn't affected me as I was able to control this using the methods taught to me by cardiology, also if I got hot I could cool down in the bunker as it is air conditioned, unfortunately the same can't be said when I have been at home, if I over exert myself or if I get too hot or simply not eating at regular times an attack would occur.
>
> 9. I have to plan my days carefully if I want to go out, I need to make sure I have enough food, make sure I am not going to get too hot, make sure I am not going to over exert myself. This means for me that most of my time is spent indoors and this does have an adverse effect on my personal life, even something simple like diy can cause an attack.
>
> 10. I have to be careful in my day to day activities as to try and make sure an attack doesn't happen but this is not always possible, my condition doesn't affect my driving as I am sitting down.

11. unfortunately the incident that happened at work in 2018 was caused by a very low mood from the loss of my mum which caused stress and an underlying illness believed to be a cold/flu causing the incident to happen.

12. the GP prescribed me with compression stockings to try and help keep this under control, unfortunately this condition is never going to get better, possibly it will get worse over the years causing me to need medication, but at the moment I try my best to keep this under control so I will not need medication."

9 Section 6(1) of the EqA provides:

"A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

10 As far as we were concerned, it was impossible to avoid the conclusion that a faint has a substantial impact on one's ability to carry out normal day-to-day activities, so that the main issue for us was whether or not the claimant was likely to faint at any time. That is because of paragraph 2 of Schedule 1 to the EqA 2010, which so far as relevant is in these terms:

"**Long-term effects**

(1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."

11 Another relevant part of that schedule is paragraph 5, which provides:

'(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

(2) “Measures” includes, in particular, medical treatment and the use of a prosthesis or other aid.’

12 In deciding whether or not the claimant was disabled, we were obliged to take into account any guidance issued by the Secretary of State issued under section 6(5) of the EqA 2010. The current such guidance includes this section:

> “B12. The Act provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, ‘likely’ should be interpreted as meaning ‘could well happen’. The practical effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question (Sch 1, Para 5(1)). The Act states that the treatment or correction measures which are to be disregarded for these purposes include, in particular, medical treatment and the use of a prosthesis or other aid (Sch 1, Para 5(2)). In this context, medical treatments would include treatments such as counselling, the need to follow a particular diet, and therapies, in addition to treatments with drugs. (See also paragraphs B7 and B16.)
>
> B13. This provision applies even if the measures result in the effects being completely under control or not at all apparent. Where treatment is continuing it may be having the effect of masking or ameliorating a disability so that it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined, or if it is known that removal of the medical treatment would result in either a relapse or a worsened condition, it would be reasonable to disregard the medical treatment in accordance with paragraph 5 of Schedule 1.
>
> B14. For example, if a person with a hearing impairment wears a hearing aid the question as to whether his or her impairment has a substantial adverse effect is to be decided by reference to what the hearing level would be without the hearing aid. Similarly, in the case of someone with diabetes which is being controlled by medication or diet should be decided by reference to what the effects of the condition would be if he or she were not taking that medication or following the required diet.”

13 Apparently in slight contrast, paragraph C9 of that guidance is in these terms:

> “Likelihood of recurrence should be considered taking all the circumstances of the case into account. This should include what the person could reasonably be expected to do to prevent the recurrence. For example, the person might reasonably be expected to take action which prevents the impairment from having such effects (e.g. avoiding substances to which he or she is allergic). This may be unreasonably difficult with some substances.”

14 It was the respondent's case in regard to the claim of disability discrimination that the claimant was not disabled but that if he was then there was no reasonable step that could be taken to enable him to be retained in his post. It was also the respondent's case that the claimant's dismissal was a proportionate means of achieving the legitimate aim of taking reasonable care for his safety and avoiding a negative investigation by the Health and Safety Executive.

15 If we found that the claimant was disabled within the meaning of the EqA 2010 then we would need to apply section 136 of the EqA 2010, which 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."

16 The issues arising in the claim of disability discrimination as stated by Employment Judge Vowles were entirely apt. We will return to them if the claimant satisfies us at the resumed hearing to which we refer at the end of these reasons that he was disabled at the time of his dismissal.

The evidence which we heard and read

17 We heard oral evidence from the claimant on his own behalf, and, on behalf of the respondent, from

17.1 Mr Neil Armal, who was (and remains) the Service Operations Manager for the Newbury Data Centre at which the claimant worked, and who was as such the claimant's line manager;

17.2 Mr John Taylor, who at the time of the claimant's dismissal was the respondent's Service Desk Manager, who line managed Mr Armal;

17.3 Mr Mike Watts, the respondent's Service Operations Manager and a director of the respondent; and

17.4 Ms Kate Laurie, who is currently the respondent's Group Head Of People, who was previously the respondent's Head of HR.

18 A bundle with approximately 170 pages was put before us. Having read the relevant documents in that bundle and having heard the above oral evidence, we made the following findings of fact.

Our findings of fact

The business of the respondent and the site at which the claimant worked

19 The respondent's business is the remote and secure storage of computer data. That storage requires the maintenance of a number of network servers in highly secure conditions. The respondent's main storage facility is in Ash, near Sandwich, in Kent, and at the time of the claimant's dismissal it had one other data storage facility, at which the claimant worked. That facility was at Newbury, in Berkshire, and was on the site of a former nuclear bunker at Greenham Common. The Newbury facility was much smaller than the facility at Ash, and had significantly fewer employees.

20 Access to the storage facility at Newbury was secure in that at the time of the claimant's dismissal there was a need to enter a number on a key pad, with the number differing for some of the doors.

21 The facility at Newbury consisted of an office and a bunker which consisted of a corridor off which there were data rooms on either side, all of which were locked: entry to them was gained as we describe in the preceding paragraph above. There was in addition a Faraday cage, but it was used only for the storage of equipment.

22 There was no mobile telephone signal in the large majority of the facility at Newbury. The only way in which anyone in the bunker or the office could be contacted or make contact with anyone outside the bunker was by the use of a land-line telephone.

The relevant events in chronological order

23 The claimant's witness statement started with this paragraph:

> "I started work with The Bunker Secure Hosting LTD on 11th November 2012 (no contract of employment provided). I have always had very good relationships with my work mates as well as very good feedback from department heads about my performance."

24 That paragraph was not challenged in regard to the existence or otherwise of any statement of the claimant's terms of employment satisfying the requirements of Part I of the Employment Rights Act 1996 ("ERA 1996"). Nor was it challenged otherwise, although we saw from what Mr Armal was recorded to have said to Mr Taylor in the note of a meeting of 2 August 2018 to which we return below (the note was at pages 47-48 of the bundle; any reference below to a page is to a page of that bundle) that Mr Armal had a less than rosy view of the claimant's attitude to work at times.

25 It was the claimant's evidence in paragraph 4 of his witness statement that he had had a "1st incident" of fainting at work during 2014 in the presence of Mr Armal. Mr Armal denied that and denied knowing that the claimant had fainted at work at any

time until the events of 1 August 2018 which led to the claimant's dismissal. We did not need to resolve this conflict of evidence in the circumstances, as it was not material. However, the fact that the claimant had not on his own evidence had a fainting fit at work after 2014 and on Mr Armal's evidence at all before 1 August 2018 was material. It was also material that it was Mr Taylor's evidence that he also did not know about the claimant having Vasovagal Syncope before the events of 1 August 2018.

26 There was at page 36 a copy of a letter dated 9 November 2015 from a consultant cardiologist, writing from the Royal Berkshire Hospital, which after recording that the consultant (Dr Katrin Balkhausen) had seen the claimant in an outpatient clinic, was in these terms:

> "**Diagnoses: Reflex vasovagal syncope**
> **Depression**
>
> ...
>
> He was diagnosed with recurrent vasovagal syncopes and had advice regarding hydration in the past.
>
> He tells me that over the last 10 months he has not experienced further episodes of vasovagal syncope and has managed to read the symptoms preceding an episode and take appropriate measures.
>
> We touched again today on regular hydration, use of compression stockings and calf muscle pump activation and being aware about symptoms and surroundings that provoke these episodes.
>
> I have not arranged for further regular follow up and I am happy to discharge him back into your care."

27 The claimant described what happened on 1 August 2018 and shortly afterwards in paragraphs 4-6 of his witness statement, which were in the following terms:

> "4. ... On the 1st August 2018 I arrived at work for 7am (the start of my shift) I had a handover and began checking my emails as well as the days calendar to see if we had any customers in and have a pot of porridge as I normally did. I set about working doing remote hands as they came in and was quite busy. I started feeling unwell around 11am and remember saying to Annie King I felt drained. My manager Neil Armal went out to get his lunch around 11:30.
>
> 5. I thought maybe I needed food, as it was quiet, I had my lunch at my desk while continuing to monitor emails. Unfortunately, this is where things start getting hazy, I remember doing more remote hands and feeling very hot although I was in an air-conditioned bunker, I went for a cigarette with Annie King to get some fresh air. I had to run to the toilet the hotness was really bad now and I was sweating profusely. I went into our reception and sat on the

sofa; I do not know who called Neil Armal to do the tape changes but Marc Collins had given me some water. I somehow got upstairs; I do not remember anything until I was brought too by a paramedic. [PLEASE REFER TO INCIDENT INVESTIGATION ON PAGE 76 OF THE DOCUMENT BUNDLE]

6. After this incident happened, we were asked to fill out a night worker assessment, my answers indicated I needed to be referred to occupational health and this was never done. [PLEASE SEE NIGHT WORKER ASSESMENT PAGES 67+68 OF THE DOCUMENT BUNDLE]"

28 Mr Armal was not involved "greatly", as he put it in paragraph 7 of his witness statement, in the management of the claimant's situation on 1 August 2018. As Mr Armal said in that paragraph:

> "I was not greatly involved with the incident when Nick fell ill at work on 1st August 2018. It was managed by a colleague, but I instructed them to ensure a colleague came to take over from Nick and to make sure that the data centre was manned."

29 We accepted that evidence, which was in any event not challenged. The immediate aftermath of the situation was managed by Mr Taylor, whose witness statement contained the following passage describing what happened on 1 August 2018 and the immediate response to what had happened that day:

> "6. On 1st August 2018, I received a phone call from an employee who was concerned about Nick becoming ill whilst at work and the way Neil had dealt with him. I then had a further call later that evening saying that Nick he was now home, and that Neil had arranged cover for the rest of this shift and the next 3 days as he was likely to be off. Nick also called me that evening to say he would be visiting his GP in the morning as he had been advised to do so by a paramedic, but they had not taken him to hospital.
>
> 7. After the incident on 1st August, we were concerned that the issues had not been dealt with appropriately, so an initial health and safety investigation was conducted by Ken Mowat, our Head of Data Centres, with Neil on 2nd August 2018 [pages 47 – 48 of the Bundle].
>
> 8. I later carried out a further disciplinary investigation around how the incident on 1st August was managed, as I felt that we could have managed it better. I was disappointed with how Neil managed the incident and how he had spoken to and about Nick. We have a strong ethical approach to how we work with and speak to our colleagues and it was subsequently found that Neil was in breach of this and disciplinary action was taken as an outcome [pages 68 – 78 of the Bundle].
>
> 9. I also held a Welfare Visit with Nick over the phone, during which he stated that he thought it was a virus that had caused him to be ill on 1st August.

I also brought up that Nick had mentioned that he suffered from various medical conditions, including a condition that made him feel faint, which he had also mentioned to another employee who attended to Nick when he was ill on 1st August. This was the first that I had heard about this condition and I was concerned about the impact of this on Nick working safely, in particular when working alone [pages 49 to 55 of the Bundle].

10. Nick stated that he suffered from a sudden fainting syndrome but did not give any specific details. He just stated he was aware of the condition, that he did not take any medication, and that just had to sit down when he felt and [sic] episode coming on. He also mentioned that it had no impact on him as he could control it himself by sitting down and squeezing his leg muscles. We went also through his other medical conditions, but Nick was clear that none of these were impacting him in his capacity to work, including the sufficient [sic] fainting syndrome.

11. However, even though Nick said that it was not impactful, having heard that the incident on 1st August led to the need to call an ambulance, and that he seemed quite unwell, disorientated and unstable on his feet, I felt had to take the reference to the sudden fainting syndrome seriously.

12. I asked Nick if Neil knew about his medical conditions including the sudden fainting syndrome and he said he did. I subsequently spoke to Neil about this, however, and he was surprised and said he knew nothing about this condition.

13. Nick stated he had been to his GP after the episode and was told he needed to improve his lifestyle, diet, give up smoking and increase his exercise. I finished the conversation by asking if we could contact his GP ourselves, after having been advised to do by Kate Laurie, our Head of HR, to ensure we were doing all we could to support him.

14. We also later asked Nick to fill in a night worker assessment in which he identified the issues we already knew of. These would usually lead to an occupational health assessment but did not in on this occasion as we were already liaising with his GP [pages 66 – 67 of the Bundle].

15. After our discussion, even though Nick was clear that none of these were impacting him in his capacity to work, I made the decision that we need to take him off shift until we could be sure that he was safe to work alone. Again, after having heard about the incident on the 1st August, I absolutely had to keep his safety and our risk at the forefront. I spoke to Nick about this and he agreed and was in the end was very keen to get off shift.

16. I then put together a rota to ensure that we had cover whilst Nick was off shift. Nick worked as 1 of 4 Service Engineers working 12-hour days on a shift pattern of 4 days working, 4 days and nights off, 4 nights working and then 4 days and nights off.

17. I realised it was going to be tough as Neil was on holiday and so we only had 3 shift workers for cover, which would mean they would be under a lot of pressure to pick up the hours and work. However, our Receptionist was also happy to help by working extra hours watching Nick to ensure he was never alone [pages 162 – 166 of the Bundle]."

30 The claimant did not take issue with that passage of Mr Taylor's witness statement, but in any event we accepted it as being entirely accurate.

31 Mr Mowat's investigation led to the report at pages 76-78. On page 76 there was this passage (which was not challenged and which in any event we accepted as accurate):

'• At around 15:45 Nick was still on the sofa and a client was due in at 16:00. Marc Collins arrived into reception saw that Nick was unwell. He was cold and clammy and felt sick. He was given a drink of water by Marc, which he spilt down himself. Marc then decided to take Nick upstairs to the main office, to ensure the reception area was clear for the client.

• I asked Marc "on a scale of 1-10 (1 being normal and 10 Needing an Ambulance) how ill he thought Nick was at this point?" 5/6 was his answer.'

32 On pages 77-78, there was this passage, which we also accepted was accurate:

"• 18:55 Ken Mowat arrived on site and is informed that 111 operator has dispatched paramedic to site. Kameron is asked by Ken Mowat to contact on site security so they aware that an ambulance is expected on site.
• 19:00 John Taylor escalated the issue to on call Director Chris Scott.
• 19:10 Paramedic arrived assessed and treated Nick. Within a short period of time an ambulance arrived and after consulting with the paramedic they left as it was not necessary to take Nick to hospital.
• 19:45 John Taylor was updated that Nick had been assessed and was fit to go home but needed to attend his doctors in the morning."

33 The night worker assessment to which Mr Taylor referred in paragraph 14 of his witness statement had on its first page (at page 66) these bullet points (which were stated to be taken from a Department of Business Enterprise and Regulatory Reform source):

"• You must offer night workers a free health assessment before they start working nights and on a regular basis while they are working nights. In many cases it will be appropriate to do this once a year, though employers can offer a health assessment more than once a year if they feel it is necessary.
• Workers do not have to take the opportunity to have a health assessment (but it must be offered by the employer).

- A health assessment can be made up of two parts: a questionnaire and a medical examination. The latter is only necessary if the employer has doubts about the worker's fitness for night work."

34 On page 2 of the form (at page 67), there were 4 questions and tick boxes in the following form:

Health Assessment - For the employee to complete	**Yes**	**No**
Q1. Do you suffer from <u>any</u> [original emphasis] of the following conditions (you do not have to disclose which one(s) to your manager): • Diabetes • Heart or circulatory disorders • Stomach or Intestinal disorders • Any health condition which causes difficulties sleeping (except occasional Insomnia) • Chronic chest disorders, especially If night-time symptoms are troublesome • Any medical condition requiring medication to a strict timetable or medication that causes side effects that could be unpleasant or dangerous if working at night?	Go to Q2	Go to Q4
Q2. If you answered yes to question 1, has this been assessed by Occupational Health before, and were you assessed as fit for nights with or without adjustments?	Go to Q3	Refer to OH
Q3 Has your condition deteriorated or treatment changed since your last assessment?	Refer to OH	Go to Q4
Q4 Any there [sic] other health factors that might affect fitness at work such as pregnancy or would you otherwise like to discuss your health and night work in confidence with an Occupational Health Nurse?	Refer to OH	Fit for nights do not refer

35 The claimant completed that form and signed it on 21 August 2018. He had ticked the boxes for "yes" in answer to questions 1, 3 and 4, and the "no" box in answer to question 2.

36 Four days earlier, Ms Laurie sent the letter at pages 63-65 to the claimant's named GP, Dr Ford. It was in these terms:

> "I would be grateful if you would provide a medical report on your patient, Nicholas who works for our Company.

As employers, we are obviously concerned as to the health condition our employee which results in persistent short term absences and Nicholas has fedback to us that you has [sic] a number of health conditions that we feel ploace [sic] him at risk as a lone and night worker. (In particular, Diabetes Type 2– which he stated was under control and sudden fainting syndrome. Since this disclosure of the fainting syndrome and a recent incident when a paramedic had to be called, we have had to take him off his night and shift pattern, an integral part of the role. We would like to be able to assess Nicholas so he will be able to attend work more regularly, be able to carry out the role for which he is employed and if he is not able to work during the night or alone at the weekends understand if there may be other alternatives. Additionally, it may be of assistance if you are able to advise us of any appropriate measures that we could reasonably take to facilitate more regular attendance at work.

...

I should be very grateful if you could provide the information indicated/answer the following questions concerning the health Nicholas as part of your report:

It would be helpful if you could include your medical opinion in respect of the following:

1. Nicholas has talked to us about the following conditions:
   a. Diabetes - type 2
   b. Sudden fainting syndrome
   c. Depression
   d. Bad back

   Please confirm you have the same understanding of his challenges and any information about his medical history in their regard it would help for us to know.

2. Do you consider that he is fit enough to continue in his position and carry out all their duties as described above?
3. Do you consider his role and in particular the night work and weekend work where he is alone detrimental to his health conditions or places him at risk of injury/further illness?
4. Do you advise him to not work nights or work alone?
5. Should Nick be driving?
6. Could you provide any information on what absence level could be expected going forward for an employee with this condition?
7. If you do not believe they will be able to carry out their position, it would be helpful if you could advise me what, if any, kind of work they are able to do.
8. Do you consider that there are any reasonable adjustments I should consider to facilitate their ability to perform the role?
9. Could you provide information on any relevant treatment Nicholas is receiving or has been referred for?

10. Do you consider Nicholas has, or will have, a disability under the meaning described in the Equality Act 2010 (i.e. an impairment which has, or is likely to have, a substantial and long-term adverse effect upon the ability to perform normal day-to-day activities)?
11. Could you also advise what, if any, affect this condition has on their day-to-day life outside work?
12. Is Nick on any medication that may make lone working, night working or heavy lifting a risk.
13. Please give any additional information that might assist us in making our assessment."

37 At pages 79-80, Dr Ford had responded in a letter dated 3 September 2018:

"As one of Mr Tysons General Practitioners I am happy to answer the requested questions regarding this patient's medical history. Details are as follows:

1. Firstly you stated that Mr Tyson describes that he has diabetes, sudden fainting syndrome, depression and a bad back. Your letter states 'please confirm you have the same understanding of his challenges and any information about his medical history'. We agree that Mr Tyson does have diabetes, mechanical lower back pain, agoraphobia, anxiety states, asthma, sleep apnoea, previous fractures and he has also had what appear to be occasional respiratory tract infections.
2. Yes, I feel that Mr Tyson is likely fit enough to carry out his roles, however as a lone worker, if he was to suffer with a fainting episode then this would cause a problem for himself and for the company at large therefore I would advise that he is not left to work alone and he may be best placed on a different shift pattern when there are other people around in order to help support him should he have any further fainting syndrome type attacks.
3. I believe I have answered this above. I believe that if left alone and he does have the potential to suffer with a fainting episode and therefore collapse and has not been witnessed by any individuals he would obviously be by himself in this state. This is not a state that we would condone and if he could work alongside another colleague then that would be advantageous for him.
4. I would advise that he should work with a colleague whenever possible in whatever shift pattern he is working in.
5. Anyone who has a syncope of fainting episode, where one loses consciousness, should refrain from driving for at least 4 weeks or until investigations have been concluded and a diagnosis has been made. Of note is that on the 2nd August 2018, Mr Tyson presented to the surgery complaining that he had had an 'unwell' spell whilst working but he was conscious the whole way through and there was no syncope episode whereby he collapsed, fainted and lost consciousness therefore at present he is fit to drive. Should he

experience another syncope episode where he faints or loses consciousness, then he would need further investigations and again refrain from driving for one month.

6. This is very hard to prove but he is obviously expected to take over and above the national average for sickness absence rates in the general population.
7. This is difficult to answer as I am not sure what your company provides.
8. Possibly, if he could work alongside someone during his shift or shift pattern or shift time were changed so that he is working alongside another colleague.
9. I have provided a full global summary with this report of Mr Tysons medical history which includes any conditions he has had and treatment provided.
10. I do not believe that Mr Tyson will have a disability under the meaning described in the Equality Act 2010. However this is at the present time and I cannot foretell the future or what Mr Tysons future conditions will be.
11. I cannot comment on this as I am not sure what Mr Tysons activities are on a day-to-day basis outside of work.
12. I can confirm that Mr Tyson is on Glucophage, Sertraline and Omeprazole and to my knowledge they do not cause any risk on a person who is working alone, working at night or lifting any heavy items.
13. In summary, as Mr Tysons GP I have put together a brief response to your questions and do hope that this is helpful."

38 Ms Laurie did not obtain any further medical advice about the claimant's health and, critically, about the likelihood of the claimant suffering a further fainting episode at work, especially if the claimant took the steps that he had himself described as being able to head off a fainting fit.

39 Ms Laurie told us during oral evidence when we, with Ms Pitt's permission, searched the internet for descriptions of the effects of Vasovagal Syncope, that she (Ms Laurie) had herself searched the internet for those effects and had found at least one of the pages that we had found. However, there was no print-out of the results of her search in the bundle, and no mention of that search in Ms Laurie's witness statement. We could see from our search of the internet that the term "Vasovagal Syncope" is a description of a tendency to faint, that there are many potential causes of it, and that a number of potentially effective steps can be taken by the person who suffers from it, to avoid fainting.

40 As we say above, Mr Taylor had by then stopped the claimant working his usual shifts and ensured that the claimant was not working alone at any time. Ms Laurie and Mr Taylor held a meeting with the claimant on 18 September 2018 which they described as a "capability meeting". Mr Taylor described it and what happened after it in the following passage of his witness statement:

"23. I then attended the meeting on the 18th September in Newbury and Nick brought Neil along with him. During the meeting Kate and Nick talked through in detail how we had been arranging cover and discussed our concerns regarding the options. Nick agreed these were unacceptable. My feeling during the course of this meeting was that Nick felt we were making a 'mountain out of a molehill' and that he felt his condition did not impact him barely at all, and that he also did not really understand the impact to himself or the business if he were to be ill [pages 137 – 141 of the Bundle].

24. Nick mentioned buying a lone worker alarm that he could use to alert our Ash Data Centre and they would then contact the Newbury Data Centre site security, which sounds like a good idea in theory. However, the Newbury Data Centre is based on Greenham Business Park and the site security are external and had nothing to do with The Bunker. I was personally concerned as we would then be relying on an external security company to respond and that Nick could be ill in an area inaccessible to them.

25. After the end of the meeting Kate and I had a discussion and we talked through the lone-worker alarm option and if there was anything else that could allow Nick to continue in his role. I expressed concern that if he were alone, even if he raised the alarm or we spotted him in trouble on the CCTV, that to get him help would be difficult. The external site security might not have been able to get in, and so we would have to rely on an employee from home going to site, which could mean he was in danger for many minutes.

26. As the site security guards were also not employees of The Bunker, Kate and I felt it was not acceptable for them to have to deal with an employee at an increased risk of harm and expect them to be the first responders. Even if we were to advise them that this was the case, we believed if would not be reasonable for them to have to attend as it was outside of their responsibility.

27. Also, at the time, technology was a problem due to the construction of the building. Sections of the Data Centre are surrounded by a Faraday cage, and this blocks all radio, phone and WIFI signals so even if Nick could set off the alarm, it would not trigger anywhere or alert anyone.

28. Kate and I then met again the following morning to go over our concerns once again. She then called Nick and she talked him through why we felt the lone-worker alarm would not work and why we felt we could not continue Nick's employment. He was extremely upset but I felt Kate very clearly explained all of the issues and that there was nothing we could do to resolve this situation and for him stay safe on site [pages 142 – 143 of the Bundle].

29. This was a very difficult decision for Kate to come to, but I was fully supportive of her decision-making process and I had come to the same conclusion. I would have been very uncomfortable with Nick coming back to a role with a lone working element and we simply had no other roles or adjustments we could make which would remove this aspect of the job or allow him to continue his employment."

41 Ms Laurie's witness statement was in consistent terms. As indicated in paragraph 28 of Mr Taylor's witness statement, Ms Laurie held a meeting with the claimant on 19 September 2018 by telephone, and on that day took the decision that the claimant should be dismissed. The notes of the meeting were at pages 142-143. They included this passage at the bottom of page 142:

> "I am pleased you now have compression socks, however you state yourself that you will have this condition and although these may help, you do not know if they will alleviate the chance you may have an episode."

42 The notes continued at the top of the following page:

> 'Nick, I feel that you are not taking your own health and the risk it poses for you to be working alone in the Bunker in the way that myself and the company do. The GP has stated in the letter that "as a lone worker, if he was to suffer with a fainting episode then this would cause a problem to himself and for the Company at large therefore I would advise that he is not left to work alone and he may be best placed on a different shift pattern when there are other people around in order to help support him should he have any further fainting syndrome type attacks." This concern raised by your GP echoes our concerns, even when the fainting episode does not amount to a full faint, you are unwell and unable to carry out your responsibilities. We cannot take the risk that this may happen and we are aware that over half of your time working with us is as a lone worker in a locked down and secure area where no-one in the vicinity is able to get to you even if they are an outside company or paramedic .
>
> It may not have happened in the past but that does not mean it will not happen in the future, I believe that you have far more 'spells' of feeling unwell than the 2 you mentioned yesterday and that although you did not faint you would have been at risk had you been on your own or in the bunker.
>
> I am going to look into why this has not been acted upon earlier as you state that you told us previously as I believe we should have acted earlier to understand this.
> Therefore by looking at all of the information Nick, I have to conclude that you are not capable of fulfilling your role with us at the Bunker.
>
> This means that sadly we will have to terminate your contract with us."

43 Those notes were enclosed with the letter dated 20 September 2018 at page 144, by means of which the claimant's contract of employment was terminated with

effect from that day, on the payment of notice pay, with an additional two weeks' pay as a goodwill gesture.

44 The claimant appealed against the decision to dismiss him, and Mr Watts dismissed the appeal.

45 We heard evidence that the respondent would not expect any employee of the respondent who could gain access to the Newbury facility and who was called out in the event of an emergency (of any sort, including if the claimant were unwell) to arrive there in less than an hour. We heard evidence that the respondent employs mechanical/technical engineers who are on call 24 hours a day (there being three of them, they were on call for a week at a time, with the following two weeks free of any on-call responsibility unless they were asked to provide additional on-call cover) and that they live about 30 to 40 minutes' travelling distance from the Newbury site. We accepted all of that evidence.

46 However, we heard that since the claimant was dismissed, the respondent had improved its internal telephone system at Newbury in that each technician now has a Dect telephone, i.e. one which is connected reliably by wireless connection to the telephone base unit, which is on a land line, and that the handset has an emergency alert system which operates when the handset is immobile for a particular period or a button on it is pushed.

A discussion

47 The respondent had (see paragraphs 33 and 34 above) asked the claimant to complete its night worker questionnaire, and received from the claimant three answers that showed that the respondent should (on the basis of what was in the questionnaire) have referred the claimant's case to an occupational health adviser. Instead, the respondent had simply accepted what was in the claimant's GP's letter of which we have set out the majority in paragraph 37 above, as justifying the conclusion that the claimant should be dismissed.

48 That letter did not confirm that the claimant had Vasovagal Syncope; rather, it somewhat pointedly did not confirm that. Otherwise, the letter from Dr Ford was conditional, except in paragraph 4, where it contained advice that the claimant should not be left to work on his own, but that had to read against the background of the other statements in the letter about risk, which were all conditional.

49 The respondent had itself quoted (see paragraph 33 above) central government guidance about the need to have the claimant examined medically if the respondent had doubts about the claimant's fitness for night work.

50 Without such advice, most likely from a specialist occupational health doctor, but if necessary also from a consultant specialist, the respondent could not know about the magnitude of the risk of the claimant fainting, the steps which he could take to minimise that risk, and their likely effectiveness. Nor could the respondent know

50.1 what steps it could take to minimise the risk of the claimant fainting at work, and their likely effectiveness, and

50.2 what was the magnitude of the risk to the claimant if he were left in his position, carrying on doing night work alone.

Our conclusions

Unfair dismissal

51 We came to the conclusion on the above facts that it was outside the range of reasonable responses of a reasonable employer to dismiss the claimant without having procured at the very least an occupational health assessment of the risk to the claimant's health of lone working. That is for the reasons which we set out in the four preceding paragraphs above.

52 Another way of looking at the matter was to say that the respondent had not carried out enough of an investigation into the risks to the claimant's health if he were retained in his post, continuing to work alone at nights and weekends, before deciding to dismiss him for us to be able to conclude that the respondent's investigation was within the range of reasonable responses of a reasonable employer.

Disability discrimination

53 Having regard to the Secretary of State's guidance which we have set out in paragraphs 12 and 13 above, we were of the view that the claimant may at the material time have been disabled by reason of the Vasovagal Syncope, but that in the absence of relevant expert evidence about the likelihood of his fainting recurring, we could not reliably conclude that he was disabled within the meaning of the EqA 2010. If, however, the respondent adduced no such evidence, then we would have to conclude that the claimant was so disabled.

54 As for whether or not dismissing the claimant was a proportionate means of achieving a legitimate aim, the burden of proof was on the respondent. In the absence of an occupational health report, in our view the respondent could not satisfy us on the balance of probabilities that it was such a means of achieving such an aim.

55 As for whether or not any reasonable adjustments could have been made, in the absence of such an occupational health report we could not conclude that there had been a failure to make such adjustments.

56 We stated the effect of the three preceding paragraphs above as provisional views on 27 August 2020 and then gave the parties time to consider their positions. Ms Pitt them, having taken instructions, applied for an adjournment so that the respondent could obtain relevant expert evidence addressing all of the issues

referred to in the preceding three paragraphs above. We granted that application, and the case is now adjourned to 7 and 8 January 2021, when we will consider such evidence as is before us then, and come to firm conclusions on those issues.

_____

Employment Judge Hyams

Date: 30 September 2020

JUDGMENT SENT TO THE PARTIES ON

8 October 20

FOR THE TRIBUNAL OFFICE