THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE K ANDREWS**

MEMBERS: **Ms J Beard**
Mr P English

BETWEEN:

Mr R Brackstone

Claimant

and

Beck Interiors Limited

Respondent

ON: **3 March 2021 &**
4 March 2021 in chambers

Appearances:
For the Claimant: **Miss A Meredith, Counsel**
For the Respondent: **Mr J Lewis, Counsel**

RESERVED RECONSIDERATION JUDGMENT

The unanimous decision of the Tribunal is that the Judgment dated 21 December 2020 is varied as follows:

1. The finding of a breach of the duty to make the reasonable adjustment identified at paragraph 5.3(i) of the list of issues stands but the reasons for it are varied as appears below.

2. The finding of a breach of the duty to make the reasonable adjustment identified at paragraph 5.3(iii) of the list of issues is revoked.

REASONS

1. In this matter there was a liability hearing from 17 to 20 November 2020 at which both parties were represented by experienced Counsel. They and the Tribunal worked from an agreed list of issues which, in respect of the claim of a breach of the duty to make reasonable adjustments, said:

> 5. Did a Provision, Criterion or Practice (PCP) of the Respondent put the Claimant (as a disabled person) at a substantial disadvantage in comparison with persons who are not disabled?
>
> 5.1. The PCPs relied upon by the Claimant are:
> i. Failure to apply the Respondent's capability policy in relation to the alleged poor performance of the Claimant when the impact of his mental health issues on his performance should have been considered;
> ii. Subjecting the Clamant to the same management style applied to all able employees despite (it is alleged [but disputed by the Respondent]) knowing of his disability;
> iii. Demoting the Claimant, reducing his pay and/or dismissing him after becoming aware of his mental health problems and/or alleged performance issues.
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> 5.2. The substantial disadvantages relied upon by the Claimant are:
> i. being unable to work in the same way as other employees;
> ii. the reduction in the Claimant's salary of £12,500;
> iii. his dismissal;
> iv. his General Anxiety Disorder was exacerbated;
> v. a formal written warning was issued to the Claimant in relation to alleged performance issues;
> vi. the Claimant's demotion.
>
> 5.3. The reasonable adjustments which it is alleged the Respondent should have made are:
> i. Providing training and/or raising awareness for managers to adjust their management style for the Claimant;
> ii. Providing reasonable periods of time for the Claimant to complete work;
> iii. Seeking medical advice and considering adjustments to the Claimant's role or duties.
>
> 6. Did the Respondent know or could the Respondent reasonably be expected to know that the Claimant had the disability and was likely to be placed at the disadvantage?
>
> 7. If so, what steps was it reasonable for the Respondent to take to avoid the disadvantage?
>
> 8. Did the Respondent take them?

2. No submissions were made regarding the appropriateness or otherwise of the alleged adjustments at 5.3(i) and (iii) above by reference to what is described below as the Tarbuck line of authorities and we were not referred to them (although we did refer ourselves in our Judgment to the limited principle within Tarbuck that the reasonableness or otherwise of adjustments is to be assessed objectively).

3. The Tribunal met in chambers on 8 & 9 December 2020 and the Judgment with full reasons was sent to the parties on 22 December 2020. In addition to findings of breach of contract, unfair constructive dismissal and

discrimination arising from disability, our finding on reasonable adjustments was:

107. Reasonable adjustments: the PCPs relied on at issue 5.1(i) & (ii) are made out on the facts. As for the PCP at 5.1(iii), these acts were done but they did not amount to a practice. Even noting Mr Galloway's written evidence about the respondent's approach to career progression and the possibility that people may move up and down the company ladder, these events concerning the claimant were one off acts in response to a very specific situation.

108. As to whether the proved PCPs put the claimant at the claimed substantial disadvantages in comparison with persons who are not disabled, we find that they did. They clearly led to all of the substantial disadvantages claimed (we note that Dr Kimber-Rogal's report stated in terms that his condition had been significantly exacerbated by his treatment at work). Further, there was a clear disadvantage to the claimant in not applying the capability procedure - which provides specific protection for disabled employees - to him in comparison to a non-disabled employee as he would have benefitted from that protection. Further, the management style at the respondent - specifically not seeking advice either legal or medical with regard to the claimant's condition - plainly put the claimant at a disadvantage not suffered by a non-disabled employee about whom such advice was not required.

109. The respondent cannot be responsible however for any breach of this duty flowing from issuing the formal warning as that was issued before they had the necessary knowledge of his disability.

110. The adjustments sought by the claimant at issue 5.3(i) & (iii) were plainly reasonable in all the circumstances however we find 5.3(ii) was not as there was insufficient evidence to show that the claimant not having enough time to complete work was part of the problem. Indeed, if anything, having more time would have simply allowed him to obsess over detail.

111. The breach of the duty to make reasonable adjustments claim is therefore made out in part.

and in respect of remedy for the unfair dismissal claim we also said:

90 (b) If the respondent had followed an appropriate procedure regarding the claimant's perceived poor performance we conclude that that would in all the circumstances have been more than likely to result in a demotion. The claimant may well have then still resigned but if the process was done properly, that would not have amounted to an unfair dismissal. We wish to explore further with the parties at the remedy hearing the implications of that finding on compensation payable.

4. On 20 January 2021 the respondent applied for a reconsideration as follows:

'The Tribunal found that there was a failure to make reasonable adjustments in the two respects set out at paragraphs 5.3(i) and (iii) of the List of Issues, namely:

"i. Providing training and/or raising awareness for managers to adjust their management style for the Claimant;

iii. Seeking medical advice and considering adjustments to the Claimant's role and duties."

There is clear authority that seeking medical advice, and giving consideration to adjustments is not of itself a step which would or might remove a substantial disadvantage, and therefore cannot constitute a reasonable adjustment. See eg Rider v Leeds City Council UKEAT/0243/11/LA, 27 November 2012 at paras 63-66, and Muzi-Mabaso v Commissioners to HM Revenue and Customs UKEAT/0353/14/DA, 13 November 2015 at para 58 (each approving the line of authority established since the decision in Track *(sic* –

Tarbuck), referred to at para 29 of the ET's). Paragraph 5.3(iii) above falls squarely within this principle.

As to 5.3(i) (providing training and/or raising awareness to adjust management style), the particular aspect of management style identified, at paragraph 108 of the Tribunal's Judgment, is not seeking advice either legal or medical. Again therefore this fails squarely within the above principle. The same applies to the PCP of subjecting the Claimant to the same management style (para 5.101)), in particular in relation to not seeking advice (Reasons paragraph 108): see The Carphone Warehouse Ltd v Martin UKEAT/0371/12/JOJ, 12 February 2013 at para 19.

We respectfully submit that it is in the interests of justice that this be addressed on reconsideration in advance of the remedy decision. It is a short point where there is clear EAT authority and if it is necessary to proceed by way of appeal, that will put the parties to additional cost and there may be difficulties in unpicking the precise impact on the assessment of compensation, and the potential need for a remitted hearing in order to resolve this.

5. By a letter dated 3 February 2021 I indicated that it was appropriate for the application to proceed to be considered at a hearing (notwithstanding that the application had been made late - the necessary extension of time being granted).

6. Lengthy correspondence followed from both parties which appears in the agreed bundle for this hearing. We also had an agreed bundle of authorities as well as written submissions from both Counsel which were supplemented orally.

Relevant Law

7. The power to reconsider is contained in rule 70 of the Employment Tribunal Rules 2013 which states:

A Tribunal may, either on its own initiative … or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

That power extends to reconsidering the whole decision not just that part which prompted the application for a reconsideration as long as the parties have had the opportunity to make relevant submissions.

8. The line of authorities relevant to the question of the permissible nature of reasonable adjustments starts with Tarbuck v Sainsbury's Supermarkets Ltd ([2006] IRLR 664). There the first instance Tribunal found that there had been a failure to make reasonable adjustments because the respondent had not discussed with the claimant what adjustments she might need to assist her in the process of finding alternative employment (in the context of a redundancy situation). The EAT held that this was an error of law primarily because that argument had not been identified or addressed by the parties but in any event also because there is no separate and distinct duty on an employer to consult about what adjustments might be made. The EAT said:

'71. The only question is, objectively, whether the employer has complied with his obligations or not…If he does what is required of him, then the fact that he failed to consult

about it or did not know that the obligation existed is irrelevant….Conversely, if he fails to do what is reasonably required, it avails him nothing that he has consulted the employee…

72. Accordingly whilst, as we have emphasised, it will always be good practice for the employer to consult and it will potentially jeopardise the employer's legal position if he does not do so - because the employer cannot use the lack of knowledge that would have resulted from consultation as a shield to defend a complaint that he has not made reasonable adjustments - there is no separate and distinct duty of this kind.'

9. This approach was subsequently applied in several other cases in varying circumstances.

10. In Spence v Intype Libra Ltd (UKEAT/0617/06), it was found a failure to obtain and consult up to date medical information could not amount to a reasonable adjustment. Those steps were acknowledged as being part of a sensible process to adopt when determining what adjustments, if any, were necessary but:

'43. …The nature of the reasonable steps envisaged in s4(A) is that they will mitigate or prevent the disadvantages which a disabled person would otherwise suffer as a consequence of the application of some provision, criterion or practice… the duty is not an end in itself but is intended to shield the employee from the substantial disadvantage that would otherwise arise. The carrying out of an assessment or the obtaining of a medical report does not of itself mitigate or prevent or shield the employee from anything. It will make the employer better informed as to what steps, if any, will have that effect, but of itself it achieves nothing.'

and

'48. In short, what s4(A) envisages is that steps will be taken which will have some practical consequence of preventing or mitigating the difficulties faced by a disabled person at work. It is not concerned with the process of determining which steps should be taken.'

11. Then in Salford NHS Primary Care Trust v Smith (UKEAT/0507/10):

'48. …Any proposed reasonable adjustment must be judged against the criteria that they must prevent the PCP from placing her at the substantial disadvantage.

49. Adjustments that do not have the effect of alleviating the disabled person's substantial disadvantage as we have set it out above are not reasonable adjustments within the meaning of the Act. Matters such as consultations and trials, exploratory investigations and the like do not qualify.'

and later confirmed that matters preparatory to substantive action being taken are not free-standing reasonable adjustments.

12. In Rider v Leeds City Council (UK/EAT/0243/11) a passage from Environment Agency v Rowan ([2008] ICR 218) which summarises the position well, was quoted with approval:

'64. "…a trial period …a consultation, or the obtaining of medical and other specialist reports; these do not themselves mitigate or prevent or shield the employee from anything. They serve to better inform the employer as to what steps, if any, will have that effect, but of themselves they achieve nothing." '

and later under discussion and conclusions, stated that the making of an assessment in itself is not capable of amounting to a reasonable adjustment.

13. In Muzi-Mabaso v Commissioners for HMRC (UKEAT/0353/14) a passage from Royal Bank of Scotland v Ashton ([2011] ICR 632) was quoted with approval:

> '55. "… so far as reasonable adjustment is concerned, the focus of the tribunal is … an objective one. The focus is upon the practical result of the measures which can be taken… it is an error - for the focus to be upon the process of reasoning by which a possible adjustment was considered. As the cases indicate, and as a careful reading of the statute would show, it is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment. It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reasons." '

14. Finally, in Watkins v HSBC [2018] IRLR 1015, 29:

> 'It is well established law that the concept of a reasonable adjustment is not to be narrowly applied. Any modification to a PCP which would or might remove the substantial disadvantage caused by the PCP in principle may amount to a relevant step for the purposes of s 20(1)…
>
> To this general principle there is a qualification about consultation. Consultation may be a precursor to the taking of a step for the purposes of s 20(1) but it is not a step in itself; for it does not of itself remove any disadvantage: see Tarbuck …. In principle the same will be true of making an assessment; it will not of itself remove any disadvantage. On the other hand, the provision of managerial support to a disabled person may amount to the taking of a step: thus in Tarbuck a failure to provide support to a disabled employee in a job search was found to be a breach of the duty to make reasonable adjustments.'

15. So, in summary it is well established that the taking of a step that is simply part of the process of establishing what might be a reasonable adjustment – a gateway as Mr Lewis put it - cannot <u>itself</u> be a reasonable adjustment. The parties agreed upon that proposition but where they differed is how that principle should be applied to the facts of this case which Miss Meredith says can be distinguished. In particular she says that the taking of medical advice in itself was an adjustment that would have prevented the exacerbation of the claimant's GAD.

16. Other uncontroversial relevant legal principles that can be shortly stated are:

    a. Project Management v Latif [2007] IRLR 579: in a reasonable adjustments claim, the respondent must be able to understand the broad nature of the adjustment proposed and be given sufficient detail so it can engage with whether that adjustment can be reasonably achieved or not. Otherwise, there is an impossible burden on the respondent to have to prove no other steps might reasonably have been taken i.e. to prove a negative.

    b. Abbey National plc v Chagger [2010] ICR 397: when assessing remedy in relation to a discrimination claim, it is necessary to ask what would have occurred had there been no unlawful discrimination.

Discussion & Conclusions

17. The first issue between the parties was whether it is appropriate to reconsider the Judgment at all. Mr Lewis's argument was two-fold. First, he says on the usual principles of the interests of justice it is appropriate because – for whatever reason – the Tarbuck line of authorities was overlooked by Counsel at the liability hearing, was not addressed and has led to an error of law. Second, he says that it is also in the interests of justice to proceed because if the reasonable adjustments breaches survive as found, this will cause difficulty at the forthcoming remedy hearing as a consequence of the Chagger principle which would lead to the respondent having to prove a negative.

18. We agree with Miss Meredith that it is not appropriate at this stage to reconsider a finding simply because it may present that problem at a remedy hearing. If it does then the place to deal with that is at the remedy hearing. She also confirmed that at that remedy hearing the claimant will be relying only on the reasonable adjustments as drafted and will not be seeking, as Mr Lewis had suggested, a second bite at that particular cherry.

19. We agree with Mr Lewis, however, that the interests of justice generally do require us to reconsider our findings in respect of the reasonable adjustments claim in light of the Tarbuck line of authorities. The fact that this was not raised at the liability hearing is not a bar to us doing so now. Ultimately it would be unjust to allow a decision to stand that did not take into account the relevant legal principles.

20. Turning then to the reconsideration, and applying the Tarbuck line of authorities we ask ourselves first whether the proposed reasonable adjustment at paragraph 5.3(iii) could remove or ameliorate the substantial disadvantage caused by the relevant PCPs or would it be it part of a process to establish what adjustments there might be?

21. Miss Meredith argued that the failure of the respondent to seek medical advice in respect of the claimant was in itself a step that would have prevented the exacerbation of his GAD and therefore could be a reasonable adjustment. In support of this she referred to paragraph 110 of the claimant's liability witness statement and also paragraphs 25 (b) & 27(c) of her liability submissions as well as the contents of Dr Kimber-Rogal's report of October 2020 which was considered at the liability hearing. Having considered all those references carefully we do not find that there was any evidence before us to this effect. There was undoubtedly evidence that the treatment of the claimant by the respondent generally did exacerbate his GAD but there was nothing specifically about the failure to take medical advice in itself having that effect. The closest that we came to seeing that was in Dr Kimber-Rogal's report where she said:

> 'He describes a negative, highly critical culture and a complete failure to even attempt to obtain a basic understanding of his condition.

> On several occasions his employers arrived at these meetings with significant decisions already made, that had not previously been discussed with him and came as a complete surprise.'
>
> and
>
> 'In summary, elements of the workplace, including lack of direct communication and appropriate adjustments, given Mr Brackstone's condition, have not only maintained but elevated his high anxiety.'
>
> and
>
> 'This appeared to be exacerbated by lack of communication and awareness of his condition in the workplace. He believed that better management could have improved his situation at work, thereby diminishing symptoms of GAD (and indeed OCD) and enhancing his well-being overall.'

but this is not specific enough to show what is being argued.

22. Accordingly we conclude that the adjustment sought at paragraph 5.3(iii) would have been part of the process of establishing what might be a reasonable adjustment and cannot itself be one. The part of our Judgment therefore that it was a reasonable adjustment, is revoked.

23. Turning to the proposed adjustment at paragraph 5.3(i), Mr Lewis's first argument is that it is in fact no different to 5.3(iii) and therefore as (iii) is invalid (i) must also be. We do not agree. On its face what appears at (i) is different to (iii) and also is not obviously of the type of adjustment that would be part of the process described above. Training and raising awareness are potentially deliberate steps that in themselves could ameliorate the substantial disadvantage caused by the management style at the respondent. Admittedly on reflection and having considered 5.3(i) in the light of the Tarbuck authorities, it could be better defined and that is an issue that will have to be addressed at remedy (whilst not straying from Miss Meredith's assurance that the claimant will not be seeking additional adjustments at that stage).

24. Mr Lewis further says that because of the way we dealt with that potential adjustment at paragraph 108 in the Judgment we limited it to not seeking either legal or medical advice and for that reason it falls foul of Tarbuck. That is not an unreasonable submission given the drafting but again having reconsidered that wording in light of the relevant legal principles, we conclude that that paragraph requires improved drafting and accordingly paragraphs 108-111 of the original reasons are varied by replacing them as follows (both parties having made submissions on all relevant issues):

> *108. The claimed substantial disadvantages are all made out on the facts (although there can have been no breach of the reasonable adjustment duty in respect of the issuing of the formal warning, as that was done before the respondent had the necessary knowledge of his disability).*
>
> *109. As to whether the proved PCPs put the claimant to those substantial disadvantages in comparison with persons who are not disabled, it is clear*

from both the claimant's own evidence and that of Dr Kimber-Rogal that they did insofar as subjecting him to the same management style did exacerbate his GAD. We also find that the failure to apply the capability policy did set off a chain of events that resulted in the demotion, reduction in salary and dismissal.

110. In those circumstances, it would have been a reasonable adjustment for the respondent to have provided training and/or raising awareness for managers to adjust their management style for the claimant after 17 April 2018 (5.3(i)). The adjustment sought at 5.3(ii) would not have had the necessary effect however as there was insufficient evidence to show that the claimant not having enough time to complete work was part of the problem. Indeed, if anything, having more time would have simply allowed him to obsess over detail. The adjustment sought at 5.3(iii) however would have been part of the process of establishing what might be a reasonable adjustment and cannot itself be one.

111. The breach of the duty to make reasonable adjustments claim is therefore made out in part (the respondent's failure to provide training and/or raising awareness for managers to adjust their management style for the claimant after 17 April 2018 which resulted in an exacerbation of the claimant's GAD).

25. The matter is listed for a remedy hearing on 25, 27 & 28 May 2021 in respect of which separate directions are given.

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Employment Judge K Andrews
Date: 9 March 2021