THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Mitchell	**v**	**Marks & Spencer plc**

Heard at: London Central **On**: 23 & 24 October 2017

Before: Employment Judge Segal

Members: Miss J Killick
Ms S Boyce

Representation:

Claimant: In person
Respondent: Mr K Balmer, Counsel

JUDGMENT

The Judgment of the Tribunal is as follows:

The Tribunal finds by a majority that the Respondent failed to comply with the duty to make a reasonable adjustment pursuant to Sections 20 and 21 of the Equality Act 2010.

We (unanimously) award the Claimant the sum of £1,000 compensation in respect of injury to feelings caused by that failure.

REASONS

1. The Claimant represented himself. The Respondent was represented by Ms Balmer of Counsel. I am grateful to both for their assisting us in helping to resolve this matter expeditiously.

Evidence

2. The Tribunal had a bundle of 315 pages; we note in passing that we referred to two or three pages of that bundle during the hearing. We heard oral evidence from the Claimant on his own behalf; and on behalf of the Respondent from Mr James Provost Lines, the Section Manager at the time of the Respondent's Covent Garden store, and Mr Warren Reid, the Stores Operations Section Manager.

Issues

3. The issues were clarified at a Preliminary Hearing in front of Employment Judge Grewal on 3 July 2017, some of which have since been agreed.

4. The Claimant is accepted to have been and to be disabled by reason of a reduced bladder, a condition the Claimant has suffered from for about 10 years, as a result of which he needs to go to the lavatory much more frequently than the average person, typically once or twice an hour but on occasions rather more frequently than that, perhaps as frequently as every 10 minutes.

5. The Respondent applied, it is accepted, a provision, criterion or practice (PCP) that in order to access the store's staff toilets on the second floor, employees had to use, in the material period 19 to 28 November 2016, either the goods lift, the stairs, or a combination of an escalator between the ground and first floor and then stairs between the first and second floor.

6. It is disputed whether that PCP put the Claimant at a substantial disadvantage in comparison with persons who are not disabled; and it is disputed that the Respondent knew or ought reasonably to have known that the PCP did put the Claimant at such a substantial disadvantage if it did so.

7. Finally, it is disputed whether the Respondent acted reasonably in procuring such reasonable adjustment as was appropriate within a reasonable timeframe to alleviate any such disadvantage; the issue in that regard is how quickly the Respondent procured for the Claimant a key to the customer lift – the customer lift was primarily for the use of customers going between the ground and first floors but was available for use by staff who had an appropriate key to go to either the basement or second floors also.

Facts

8. The Claimant was employed by the Respondent at its Covent Garden Store as a fixed term Customer Assistant between 24 July 2016 and 7 January 2017. He worked five 4 hour shifts between 11 in the morning and 3 in the afternoon with Thursdays and Sundays off; he also worked some extra-contractual shifts. The Claimant was initially employed via Remploy and during the initial month of employment, he was not paid by the Respondent but was entitled to continue claiming income support benefits. Thereafter he was paid by the Respondent.

9. The Respondent prides itself on being a good equal opportunities employer, it has well constructed written procedures, its staff are trained on those procedures, it makes efforts to have an inclusive workforce and that includes employing those with disabilities for whom it makes reasonable adjustments where it appreciates those to be appropriate.

10. As I have said, the Claimant is disabled; the only issue in that regard is that when the Claimant made his disability clear to the Respondent on recruitment (which it is accepted he did), the Claimant says that he made it clear that his need to urinate much more frequently than the average person

meant not only the additional frequency of visits to the toilet but also that on such occasions there was a degree of urgency; the Respondent says it does not recall that additional factor being made clear to it. We are not sure that much turns on that; obviously if a person does need to use the toilet very frequently the implication is that they have no choice and the need to do so is to an extent pressing when it arises.

11. In August 2016, the Claimant had an operation to remove a haemorrhoid or haemorrhoids and following the operation there was significant additional discomfort caused when the Claimant needed to walk or use stairs, and in particular when he needed to get to a toilet when his bladder was full during the time it took him to make his way there.

12. The Claimant worked on the ground floor by and large. In the Respondent's premises the ground and first floors were the sole areas open to the public. There was also a basement and a second floor which were open to staff only, used for storage, baking and on the second floor for staff canteen and staff toilets. Those were the only staff toilets on the premises. There were customer toilets on the first floor, but staff were strongly discouraged from using those, they were often engaged by customers, and as a rule staff did not use them.

13. There were stairs to all floors, there was an escalator between the ground and the first floor and there was goods/cargo lift to all floors which was used to transport produce, particularly in the early morning, but at times throughout the day also.

14. There was a customer lift, as I say, which was primarily for the use of customers between the ground and first floors, but could with the appropriate key go to the basement or second floor and was regularly used for that purpose both by those working in the bakery, by some other operations staff and by those few additional staff to whom the Respondent had provided keys on the basis of their having mobility issues.

15. Between June and October, the mechanism in the customer lift was partly broken so that staff even without that key could use the customer lift to get to the basement or second floor and throughout that period the Claimant did use the customer lift as his main or perhaps only way of getting from the ground to the second floor to use the toilets.

16. On 4 November, the customer lift broke and remained out of use until 19 November. Workers were engaged to repair it, it was known that it would be repaired by about that time. Between the 4th and 17th November, the Claimant, being unable to use the customer lift, used the stairs when he needed to go to the second floor staff toilets. He said that he had no particular problem doing so at that time because he had no mobility issue as such and there was no particular discomfort in using the stairs at that time.

17. The Claimant had an operation scheduled on 18 November to remove certain non-malignant cancerous cells from around his anus and anal passage. He foresaw that after that operation he would suffer similar problems as he had done after the August operation. The Claimant says that he raised that matter with Mr Reid in the week before the operation because he wanted to be sure that when he returned to work he would be able to use the customer lift which he anticipated would by then be repaired and assumed that he would need a key to be given to him to enable that to happen. Mr Reid denies those conversations took place, the Claimant says there were perhaps three such conversations. We as the Tribunal cannot be sure whether the conversations took place; on the balance of probabilities we find that perhaps at least one conversation did take place, we say so for these reasons.

18. First, the Claimant, we find, was the sort of person who was likely to raise such an issue; and **t**he Claimant had, the Respondent accepts, raised the fact that he was having the operation with his immediate manager Mr Provost Lines.

19. Secondly, On 28 November, in a context which we shall detail a little more shortly, the Claimant sent an email to the Store Manager, that is to say Mr Reid's Manager, Mr Chris Evison, which reads as follows:-

"Morning Chris

Re Copy of the Lift Key

I am emailing you with regard to the above noted matter. I had spoken in excess of three times with Warren [Reid] pre operation and approximately the same amount of times after the operation, which was conducted on the afternoon of Friday 18 November 2016 to remove non magninent cancer cells … I was continually fobbed off, I therefore had no option but to speak with you briefly regarding this matter on Wednesday (23 November 2016), can you please reinstate [sic; he meant restate] the reasons why this cannot be? I look forward to hearing back from you in due course."

That email was copied to Mr Reid.

20. We find it unlikely that the email, in the paragraph referring to the conversations with Mr Reid before the operation, was fabricated – if for no other reason than that the Claimant would have put himself at risk of dismissal for gross misconduct at a time when he hoped to continue working for the Respondent if Mr Reid had challenged the truth of what he had said about that.

21. On the other hand, we do note that if the Claimant had raised with Mr Reid as he says he did, and we find on the balance of probabilities that he did, the issue of needing a key after the operation, it may be that Mr Reid or the Respondent might have been more proactive in procuring a key than in the event it was. However, we bear in mind that as far as Mr Reid was concerned, as we explain later, he actually believed that the Claimant would be getting a key a day or so after the return to work.

22. On the balance of probabilities therefore, as we say, the Claimant did raise that matter before the operation; but perhaps it is not determinative in all events of this case.

23. The Claimant returned to work on the 19th, the customer lift was working, only three new keys had been provided: two of which were given to bakery staff and one to a manager; also some of the staff had existing keys which still worked, including as we understand it some of the staff with mobility issues. The Claimant was not given a key. However, soon after his return to work, perhaps on about the 20th, the Claimant and Mr Reid met on the stairs and Mr Reid noticed the Claimant struggling to get up the stairs to the toilet and enquired if he was ok. The Claimant said he was having difficulty because of the operation; Mr Reid denies the Claimant mentioned the operation; we find on the balance of probabilities that the Claimant did mention that – he is fairly forthright about such matters and he would have had no reason not to mention it. In all events it is agreed that the Claimant said that he would be much better off if he had a key to the customer lift. Mr Reid replied along the lines that keys were in the process of being cut, and he explained to us that he expected the Claimant would get one within a day or so and he told the Claimant that in the meantime he could use the goods lift.

24. The Claimant denies that he was told he could use the goods lift in the meantime; on the balance of probabilities we believe Mr Reid did refer to the goods lift; again we see no reason why he would not do so in the circumstances and it is clear that he considered that, albeit not a perfect alternative, it was the best alternative available.

25. Mr Reid and the Claimant encountered each other at least once more in the following days, the Claimant still did not have a key but nothing more or nothing material more was said on those occasions. For some reason, the wrong keys were in fact cut and that situation was not remedied for, as it turned out, almost two weeks and certainly not by the end of the Claimant's shift on Saturday 26th November. In the meantime on 23rd November, the

Claimant had approached the Store Manager, Mr Evison to ask him why a key had not be provided to him; the Claimant says Mr Evison was dismissive, Mr Evison did not give evidence before us so we had no basis on which to discredit that; but in any event Mr Evison did nothing on that day or in the days following to ameliorate the situation.

26. On Sunday 27th, the Claimant, not being at work, wrote the email which we have quoted earlier. That did cause the Respondent to be very proactive in response and on the morning of Monday 28th before the Claimant had arrived at work, Mr Reid had spoken to Mr Evison, and Mr Evison had procured a key from another manager for the customer lift for the Claimant's use until further keys were cut. As I say, eventually additional keys were cut and provided staff who needed them on about 6th December, the Claimant retaining a key in the interim between the 28th November and that time.

27. Part of the Respondent's case is that there is not much difference in terms of speed and convenience between the Claimant having to use the goods lift by comparison with the customer lift in order to get to the toilets. Clearly if the Claimant is in no particular discomfort in walking or using the stairs, it appears by consent to be the position that he would not have been put at a substantial disadvantage by not being able to use the customer lift (as had happened earlier in November). However, we need to make a finding in relation to that contention in the specific circumstances that pertained between the 19th and 28th November.

28. The Claimant's case is that the goods lift was not unlikely to be unavailable, although he accepts it might be available at times during his working shift, because it was being used either on the ground floor or on another floor to load or unload produce and also because he says in the area in front of the goods lift it would sometimes (though not for the majority of the time) be so cluttered with rubbish (which was properly placed there before being taken elsewhere) as to make the goods lift not easily accessible.

29. We need to make a finding of fact as to whether the use of the goods lift was significantly less fast, reliable or convenient than the customer lift, in order to adjudicate in due course the issue of substantial disadvantage. We find by a majority (though the matter is not entirely obvious to any of us) that the use of the goods lift was materially less fast, reliable or convenient – though, as we indicate, not by an obviously large margin.

30. We take into account the following matters. First, we note the Claimant's actions between the 19th and 27th November in using the stairs, despite the obvious discomfort caused in order to access the staff toilets. It is accepted by everybody that the Claimant had used the goods lift at times during his period of work with the Respondent to transport goods, in particular soft drinks, from the basement to the ground floor and it is accepted he often worked in the vicinity of the goods lift in the Ambient section and that he would, in using the stairs which are close by to the goods lift, be able to observe in a general sense the use of the goods lift and the amount of clutter in the area. We find it unlikely that the Claimant would have chosen to expose himself to the discomfort of using the stairs if he had believed that the goods lift was a better alternative. The Respondent accepts that, but says that the Claimant simply did not realise that the goods lift presented a better alternative than he realised and better than the stairs. As we have explained, we feel that the Claimant had sufficient understanding and use of the goods lift to be able to make a reasonable judgment in that regard.

31. Secondly, the Respondent did provide staff with mobility issues with a key to the customer lift because they clearly felt that it did confer an advantage in terms of speed or convenience for them; and of course they provided the Claimant with a key on the 28th November for the same reason.

32. Finally, on that side of the equation, we bear in mind some of the evidence given very helpfully and candidly by Mr Reid: he accepted in an answer to a question from the Tribunal that if the Respondent and he had known about the effects of the operation on the Claimant, it would not have been reasonable to expect the Claimant to wait for a week or more before getting

a key to the customer lift; and he said later on in his evidence that if he had known about the operation and the discomfort that it caused, he would have attempted to get a key sooner than one had been obtained; and in general he seemed content to accept that it was materially advantageous particularly for the Claimant, if not also for other staff suffering with mobility problems, to have the use of the customer lift.

33. In the Claimant's evidence, he said that in order to get to the staff toilets during that particular period when he was suffering the after-effects of the operation: using the stairs would take him between 4 and 5 minutes; whereas using the customer lift less than a minute. That may be an exaggerated comparison, but certainly using the customer lift was significantly quicker and much less discomforting than using the stairs.

The Law

34. Section 20 of the Equality Act 2010 provides insofar as is material as follows. *(3) the first requirement is a requirement where a provision, criterion or practice of [the employers] puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

35. Section 212(1) contains a definition of "substantial" which reads as follows. "*Substantial means more than minor or trivial"*.

36. We are aware of and have taken into account the leading authorities in relation to reasonable adjustments, none of which was in dispute or indeed referred to. The Respondent referred us to an Employment Tribunal decision in relation to an airline pilot for the proposition that, on very different facts, a period of delay by an employer in making a reasonable adjustment might not be unreasonable; as a general proposition we agree with that.

Submissions

37. Both parties addressed us on the disputed matters of fact; we see no need to rehearse those submissions.

38. In addition the Respondent made the following submissions. It was inherently unlikely that the Respondent, being a good equal opportunities employer, would disregard any need for a reasonable adjustment. The option of the goods lift, and (though it relied far less on this) the option of the escalator for part of the way, meant that the disadvantage suffered by the Claimant in not having the use of the customer lift was not a substantial one. It relied on the disputed factual evidence that in any event the Respondent was unaware that any substantial disadvantage was being or would be suffered. As to the delay in getting a key to the Claimant, the Respondent's submission was that it had acted reasonably in all the circumstances focusing in particular on Mr Reid's genuine belief that a key was going to be cut and provided to the Claimant within a day or two.

Decision

39. The Tribunal finds by a majority that there was a substantial disadvantage sustained by the Claimant in not being able to use the customer lift for the relevant period, by comparison with those who were not disabled; primarily for the reasons given at the conclusion of the factual findings as to the level of difference – in the particular circumstances of the Claimant's disability at that time – in terms of speed, reliability and convenience.

40. We reiterate, it was not a decision we have made easily and it is a decision made by a majority of two of us in that one regard.

41. We do find that the Respondent knew that the Claimant was likely to suffer such a disadvantage before the operation, and anyway certainly within a day or so of the operation. We note that even on the agreed evidence Mr Reid knew that the Claimant was in his words, "suffering" climbing the stairs to the

toilets and wanted a key to the customer lift; and we note that Mr Evison had been approached by the Claimant to get him a key some days before the email finally produced that result.

42. Clearly there was a reasonable adjustment that could have been made and that was made on 28th in that regard, to alleviate the disadvantage: namely the provision of a key for the customer lift. We accept Mr Reid's evidence that he thought he had put in process the cutting of the key within a short timeframe; however, Mr Reid is not synonymous with the Respondent and in all truth there can be little excuse or explanation for the Respondent as an organisation, in the circumstances, not providing the Claimant with a key for 10 days when there were keys available and when the cost of cutting a further key was agreed to be £3.

43. In summary therefore, the Claimant was exposed to a substantial disadvantage within the meaning of Section 20 for a period of about 10 days during which he worked for 7 four hour shifts and during that period the Respondent failed to make the reasonable adjustment that everyone accepts it could and should have made and that of course it did make on the 28th November.

Remedy

44. Both parties agreed there was no need for further evidence on remedy.

45. There was no financial loss; we are concerned only with injury to feelings.

46. The Claimant did suffer physical and emotional discomfort, regularly, during the 7 shifts he worked during the relevant period.

47. The Claimant, candidly conceding that he did not know how he should approach the quantum of the award, had done a calculation based on a multiplication of the number of occasions he had had to use the stairs to get to the staff toilets by a notional sum for the discomfort on each occasion, amounting to some £16,000.

48. The Respondent contended that we ought obviously to make an award at the lower end of the lowest Vento band (as updated – being £800 to £8,400), given the short duration of the period of the failure to make the reasonable adjustment, the lack of malice or deliberate conduct by the Respondent in that regard, and the relatively minor character of the injury to feelings.

49. We broadly agree with those latter submissions. We make an award of £1,000.

_____
Employment Judge Segal
1 November 2017