EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms L Sykes	**v**	**Nails Inc**

HEARING

Heard at: **Leeds** **On: 30-31 March 2017**

Before: **Employment Judge Lancaster**

Members: **Mr A Ali**

Mr M Brewer

Appearances

For the Claimant: **Ms K Jeram, Counsel**

For the Respondent: **Mr P Maratos, Consultant**

JUDGMENT

1. The claim of failure to make reasonable adjustments is dismissed upon withdrawal.

2. The Respondent has discriminated against the Claimant because of something arising in consequence of her disability. The claim under section 15 Equality Act 2010 succeeds.

3. The Respondent is ordered to pay compensation to the Claimant for injury to feelings in the sum of £10 000.

4. All other aspects of remedy are adjourned until 25th May 2017.

REASONS

The Issues

1. This is a claim now only under section 15 Equality Act, discrimination arising from disability. The complaints of failure to make reasonable adjustments have already been dismissed upon withdrawal. Also by way of clarification Mr Jeram for the Claimant accepts that there is no subsisting complaint that the issuing of a caution on 2 January 2016 is itself an act of unfavourable treatment because of something arising from the Claimant's disability. The

remaining complaint therefore concerns only the dismissal on 23 May 2016, a decision confirmed upon appeal shortly thereafter.

2. This case has proceeded on the basis, uncontested, that the Claimant is indeed disabled and that her dismissal was because of something arising in consequence of that disability.

3. On the evidence that is clearly correct. The Claimant has suffered from non epileptic seizures for a substantial period. She also has had intermittent episodes of suffering from anxiety and also asthma (though that is not material to any part of this claim). In relation to the non epileptic seizures their frequency has varied over time. At periods they have been managed or attempted to be managed by medication and the current position is that they are substantially alleviated by the current regime of drugs which she has been taking for the best part of a year. However when she suffers these seizures they clearly have a substantial adverse effect upon her normal day to day activities because they result as one would expect in a collapse: she may injure herself; she is incapacitated, and; following the effects of a seizure she cannot immediately continue life as normal. Those seizures may be triggered partly by stress, partly by hormonal influences or as a result of some other infection. The Claimant had until very recently been highly prone to ear infections which themselves have triggered episodes of seizure.

4. Because the Claimant, it is accepted, was dismissed on grounds of capability, namely ill health which resulted in her sickness absence, that is something arising from that disability. In particular she was dismissed following a succession of absences between January 2016 and dismissal on 23 May. From the records those all relate to her seizures or to her suffering stress. The substantial absence from January to February was said to be workplace stress. Thereafter there are a number of instances where she had repeated episodes of suffering a seizure on the sales floor or feeling unwell in anticipation of a seizure and more latterly that she succumbed again on 6 May to an ear infection and that too triggered seizures which led to subsequent absences.

5. The sole issue within this case is whether or not the Respondent can show that the treatment that is the dismissal of the Claimant is a proportionate means of achieving a legitimate aim and if it cannot show that justification necessarily the claim of discrimination must succeed.

The Law

6. Firstly the Respondent must show that the measure in question, that is the dismissal, had the objective of achieving a non discriminatory legitimate aim. That is an uncontroversial principal. If authority were needed for it that relied upon by the Respondents themselves is the decision in **Homer v Chief Constable of West Yorkshire Police** [2012] ICR 704.

7. Within that decision the Judgment in **R (Elias) v Secretary of State for Defence** [2006] 1WLR 3213 is quoted where Lord Justice Mummery said, this is paragraph 20 of the Homer decision:

> "*the objective of the measure in question must correspond to a real need and the means used must be inappropriate with a view to achieving the*

objective and be necessary to that end so it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group".

8. There are then three questions posed on the basis of the decision of **De Freitas v Secretary of Ministry of Agriculture, Fisheries, Lands and Housing** [1999] AC 69:

> "*First is the objective sufficiently important to justify limiting a fundamental right. Secondly is the measure rationally connected to the objective and thirdly are the means chosen no more than is necessary to accommodate the objective*."

9 It goes on to quote the earlier Court of Appeal authority of **Hardy and Hansons Plc v Lax** [2005] ICR 1565 establishing the general principals. In particular, paragraphs 31 onwards:

> "*It is for the Employment Tribunal to weigh the real needs of the undertaking expressed without exaggeration against a discriminatory effect of the employer's proposal. The proposal must be objectively justified and proportionate."*

And in paragraph 32:

> "*The presence of the word "reasonably" reflects the presence and applicability of the principal of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal is justified objectively notwithstanding its discriminatory effect and the principal proportionality required a Tribunal to take into account the reasonable needs of the business but has to make its own Judgment upon a fair and detailed analysis of the working practices and business considerations involved. It is common ground between the parties and again now a well established law that this is an objective test. It is not to be equated with an unfair dismissal while we look at the range of reasonable responses. It is for the Tribunal on proper analysis to objectively determine whether the Respondent has satisfied the burden of proving that this dismissal was justified. "*

Conclusions

10 The first question is what was the objective to be achieved by dismissing the Claimant? The Respondent's case, following from the identification of the issues at the pre-hearing review, is that it was to maintain the performance of the business. Expressed in those general terms it is conceded by Ms Jeram that that would on the face of it amount to a legitimate aim.

11. In reality however the evidence that we have heard is that the objective in dismissing the Claimant was to remove from the business somebody who in the preceding five months had had what was deemed to an unacceptable level of absences. It was Mr Jolley who made the decision to dismiss. When asked for clarification on this point he was clear: she was dismissed because of the past unacceptable level of absence within the business. Mr Jolley applied a rule of thumb of his own which was that he would expect 95% attendance. Within that period from January to May the Claimant had significantly more levels of absenteeism. Thirty six

working days absence out of 95 working days, that is 19 weeks, is said to be a 38% absent rate.

12. At the time of dismissal it is right to observe that the Respondent did not advert to the possible issues arising from the Claimant's disability. They dismissed her because, as we have said, she had had an unacceptable level of absence. If that is right and that is the reason for dismissal then the objective to be achieved by removing the Claimant from the business was not in pursuit of any legitimate claim but was indeed to dismiss her because of something arising from her disability pure and simple.

13. Furthermore there is distinct difficulty in establishing precisely what the alleged legitimate aim of "maintaining the performance of the business" would have been in this case. The Respondent's primary contention throughout the evidence has been that they required the counter manager at Debenhams in the White Rose Centre, which was a franchise which they operated and where the Claimant was employed, to effectively be full-time. Their contention was that because of her high levels of absenteeism, occasioned by her disability related absences, she had effectively become only a part-time manager. The business did not tolerate part-time counter managers.

14. However as Ms Jeram properly observes, and has been clear from the evidence, in actual fact the Respondents did not in this instance at the White Rose Centre in Leeds require a full-time designated counter manager. That is evidenced by the fact that before her termination Mr Jolley had contemplated offering the Claimant an alternative position within the Debenhams store in the centre of Leeds as an assistant manager or a job as a nail technician split between the White Rose Centre and the Debenhams Leeds store. And in either of those instances, had she accepted that offer and had it been approved by the stores in question, Mr Jolley concedes that he would not have appointed a replacement full-time counter manager at the White Rose Centre. Similarly also at one stage there had been a proposal that the Claimant may take a role at Harvey Nichols in Leeds but the same result would have occurred. Had she moved the vacancy at the White Rose Centre would not have been filled. Mr Jolley would have remotely managed that franchise from his position as area manager and indeed that is what he did when the Claimant was dismissed and what he has done to date. There was no attempt to recruit a full-time manager once the Claimant had been dismissed and it is only within the last four or five weeks that the Respondent has actually considered appointing a new manager. To that end appears to have embarked on training one of their existing nail technicians, Amy, with a view to her stepping up at some unascertained time in the future.

15. So it is not the position that the Claimant was dismissed because the objective of that dismissal was to secure a full-time counter manager at the White Rose Centre because that did not happen. Had she been dismissed and had the Respondent then immediately recruited a full-time replacement their argument would have been considerable stronger, and may even have been unanswerable but as we say, on the facts, that simply did not occur.

16. Also within the dismissal letter Mr Jolley made the argument that the Claimant's absence from January to May had had a detrimental effect upon the business and it was to alleviate that detrimental effect that it was required that she be removed from her position. The Claimant however has never been performance managed. There has been no suggestion that when she has been in attendance doing her job she has been under performing.

19. Mr Jolley refers within the dismissal letter to there having been a poor sales year, down 31% on the last year, but there has been no argument let alone evidence advanced as to how that is related to the Claimant's sickness- related-absences from the White Rose Store.

20. It is said that her persistent absences have caused high staff costs rising up to 46% but again there has been no argument let alone evidence as to how the Claimant's absence led to that. Indeed the best evidence we have as to how there has been an increase in staff costs is the Claimant's own observation that of course the national minimum wage, went up in April 2016 and whereas the nail technicians were on minimum wage that led to an increase from £6.50 to £7.20 an hour and that is the immediate increase in staff costs. The Claimant's own absence would not have increased costs. She says that she was as a manager not included within those costs in any event but as far as she was receiving sick pay there would be no increase in the total wages bill it would be the same or less. .

21 It is also said that her persistence absences had led to a loss in customers and to customer complaints. Again there is no rationale for that let alone evidence.

22. It also said that her absences led to "a reduction in the size of the counter". Aside from an acceptance that during those periods where she was not present there would be one body less on the shop floor, again that is unexplained.

23. But in any event we find that the real reason for dismissal related to the mere fact of the past absences, not to any unsubstantiated alleged consequences of those absences.

24. Mr Jolley also allegedly formed a view that it was not foreseeable that that level of absence 38% would get any better in the future. That is a wholly uninformed opinion. The Claimant pointed at the dismissal meeting that she had recently changed her medication, that she was awaiting an appointment with an ear specialist which may result in alleviation of those trigger elements of her seizures and Mr Jolley did not obtain any additional evidence. He relied only upon an occupational health report from the end of November the previous year.

25. In relation to that report the Claimant had given her consent to it being obtained on 15 July. The matter was then not progressed and was left on the manager's desk, maybe as a result of the taking over the area manager's position by Mr Jolley, until it was actioned in November. When it was actioned the appointment was not in person it was a telephone call to a nurse. A number of matters were addressed by way of possible

adjustments on the assumption the Claimant may meet the definition of disability. There was however no meeting immediately held to put in place any action plan to ensure that those adjustments, such as reducing the elements of lone working or ensuring that the Claimant was able to take regular breaks, were put in place. Certainly so far as the report recommended a specific risk assessment as to what would happen in the event of a Claimant suffering a seizure Mr Jolley accepts that no such risk assessment was ever instituted between that report and 30 November and the Claimant being dismissed some six months later. All that report indicated was that at that time there were no further suggestions as to any medical treatment or management support which would increase the likelihood of the employer providing a better level of attendance. That of course pre-dates the change in the medication regime as of the end of April. In November the author of the report, the nurse Ms Morris, was unaware that the Claimant's neurologist, whom she saw on a yearly basis, would recommend a change.

26. In the event we are satisfied on the evidence we have heard that that change in medication did effect a substantial improvement. In the 10 months since she was dismissed the Claimant says that she has suffered only six episodes of seizure whereas prior to that they were recurring on a regular often weekly basis, and that is evidenced by the Respondent's own sickness absence record.

27. Mr Jolley's opinion that there was no foreseeable improvement in the future based only upon a somewhat outdated occupational health report and absent any consideration of the up-to-date medical position is not objectively justifiable. But in any event was not the principal reason why she was dismissed. He dismissed because of a past level of absences, not directly because of he projected future attendance, when in any event he now intended to manage the franchise himself.. So it is unclear in those circumstances how maintaining the performance of the business might be rationally related to the dismissal of the Claimant.

28. On that basis the Respondent, and this is the short answer to this case, fails at the first hurdle. They have not proved that the dismissal of the Claimant in these circumstances was with the objective of meeting a potential legitimate aim. It was simply to remove from the business somebody who had a perceived unacceptable level of absences. And those absences were of course directly related to her disability even if that disability was not adverted to or acknowledged in the making of that decision.

29. So that answers the first two questions as posed in the light of **De Freitas**. There is not an identified objective sufficiently important to justify limiting the fundamental right not to be discriminated against because of a protected characteristic disability. And secondly there is no rational connection between the measure taken, the dismissal of the Claimant, and any purported legitimate objective.

30. For the avoidance of doubt we also consider the third question, whether the dismissal of the Claimant would have been proportionate to accomplish any objective. Again we find the Respondent have not or

would not have proved that.

31. There are distinct procedural flaws in this process. Had this been an unfair dismissal claim we have no doubt that we would have found in the Claimant's favour but we were helpfully reminded, in fact by Ms Jeram, that in the context of a section 15 claim applying **HM Prison Services v Johnson** [2007] IRLR 951 it is irrelevant that the Appellant's consideration of the issue may have been inadequate or procedurally flawed. The question of justification is always simply the objective one – was the decision to dismiss a proportionate means of achieving a legitimate aim even if the way it was gone about was incorrect?

32 But those procedural failings are still an important and material part of the he background to this case. The Claimant belatedly attended a telephone appointment with occupational health at the end of November. There were certainly no formal meetings then put in place to institute any plan to make adjustments or to discuss those with her. However on 24 December 2015 she was called into an informal meeting with Mr Jolley. She was given no warning of that meeting. It took place in the coffee shop at Debenhams in the White Rose Centre and Mr Jolley was at pains to record his notes at that meeting as being an "informal absence meeting". For the first time then there was some discussion about the occupational health report that had been in existence for the best part of a month. That was a meeting held the day before Christmas. Unusually the Claimant was also going on leave from Boxing Day until 2 January. Ordinarily employees in retail, particularly at this store, would not be allowed to take leave over the busy Christmas and New Year period but the Claimant had had personal issues which the Respondent acknowledged meant it was sensible to afford her compassionate or extraordinary leave at this time.

33. So she was called into an informal meeting without any warning shortly before the Respondents knew full well she was to take a period of exceptional leave because of her own personal circumstances. We are quite satisfied that nothing whatsoever was said in the actual course of that meeting to indicate that any action would follow in relation to the Claimant's absence record.

34. However on 2 January following a template provided the HR advisors Mr Jolley sent a letter to the Claimant and the informal absence meeting that both he and the Claimant understood took place on 24th had now been transformed into a medical capability meeting. The conclusion was that this letter should be treated as a "caution" and the following was required:

"*If you cannot display a sustained substantial improvement in your attendance then we may need to consider medical capability procedure which could potentially result in dismissal. However we hope it does not come to this".*

35. That "caution" does not fit readily within the Respondent's own capability procedure. The procedure is not specifically geared to ill health absence but it covers that in addition to performance issues. There is provision within the procedure for concerns regarding capability being discussed in an informal manner and the employee being given time to improve, and as

we say on the face of it the meeting on 24 December was such an informal meeting. There is however nothing within that procedure to allow for a "caution" to be issued at that stage.

36. The procedure then provides for a more formal capability assessment process which would result in specific needs for improvement over a prescribed period subject to a warning and then a final warning before the possibility of dismissal. It seems so far as it fits into the procedure at all the letter of 2 January, when it refers to the possible consideration of a medical capability procedure, would appear to be in contemplation of that formal process of warning and final written warning prior to dismissal process. Instead what happened is that the Claimant was invited to a final and only meeting under the formal capability process. That was the meeting on 19 May following which, by letter on 23rd, she was dismissed.

37. The Claimant's primary contention as to why her dismissal from the post of counter manager was not proportionate was that the Respondent has not established that there were not other non-discriminatory means of achieving any aim of ensuring her improved performance in the role of counter manager and therefore safeguarding the continued viability of the business. The first of those non-discriminatory measures would, of course, simply have been to allow proper time for monitoring of her attendance subject to confirmation of whether the new medical regime in fact had the desired effect (which in the event it did). That monitoring subject to her being on proper warning and knowing what was expected of her is what ought to have happened under the policy in any case.

38. We are quite satisfied that that measure or the alternative measures of allowing her, albeit exceptionally, as a manager to go down to reduced hours or allowing her to work as a nail technician at the White Rose Centre would in fact in the circumstances of this business have been perfectly viable given that Mr Jolley was always prepared to manage remotely. So there were alternative less discriminatory measures which could have been taken to achieve any purported legitimate aim of maintaining performance of the business. These measures would have ensured the Claimant's continued presence in a post where there was no substantive criticism of her performance. This would have been either as an on site manager, on whatever hours subject to supervision and intervention as necessary by Mr Jolley acting remotely, or as technician upon her being demoted with no increase in the head count and Mr Jolley assuming all management responsibilities.

39. The Respondent asserts that the necessary store approval for any such a change in duties was not forthcoming. The evidence on this is wholly unsatisfactory from the Respondents In particular at the dismissal meeting the Claimant was on the face of it offered a 16 hour nail technicians post "here" - which must mean the White Rose Centre - and she indicated in clear terms that she would prepare to consider such a reduced position; and that is still her contention.

40. It is now stated by Mr Jolley that, contrary to the expressed purpose of that meeting which was on the face of it to consider any alternative employment which was actually available, he had not sought any prior indication from Debenhams that that move would be possible. Any

reference to that 16 hour position at Debenhams was wholly omitted from the dismissal letter. Its exclusion from that letter formed the substantial ground of the appeal because the Claimant quite understandably objected that that alternative which she said in terms she was prepared to accept had not been duly considered before her employment was terminated. The Respondent's now contend that in fact Mr Jolley did approach the floor manager at Debenhams before he wrote the dismissal letter and ascertained that the position was not in fact available, though of course he omitted to make any reference of that in his letter. Similarly on appeal when the matter came up for express consideration by Ms Gunnion she made no reference to having had any conversations with Mr Jolley to the effect this had already been turned down by the store. She in fact purported to re-investigate the position though her purported re-investigation was not personal but simply re-assigning Mr Jolley to make the alleged enquiries.

41. We have no evidence corroborating the Respondent's suggestion that the store would not have contemplated the Claimant being demoted from counter manager to technician and Mr Jolley remotely managing. Ms Gunnion says that she took steps to have the earlier position allegedly reported verbally to Mr Jolley put in writing once it had been confirmed after the appeal hearing but no such email has ever been produced from the store management. It may be the case that the store (who under the franchise arrangement shared the wages bill with the Respondent) would not have countenanced the appointment of a replacement counter manager and the Claimant then taking on a nail technician's post , which would have been an additional position adding to the total staffing level, but that was never in contemplation by the Respondents. They had never contemplated replacing her like for like with a new counter manager or at least not until some four weeks ago where it became a possibility. There is no obvious reason why Debenhams would not have approved the potential alternative measures actually contemplated. Indeed in other situations, on the evidence of Ms Gunnion, staffing changes have effectively been presented by the Respondent to Debenhams as a fait accompli and have been readily acquiesced to

42. On the Respondent's own evidence of how they were able to manage this business with Mr Jolley as a remote manager we are quite satisfied that there were alternatives to dismissing the Claimant outright. We do not, in this instance need to make any more detailed analysis of the working practices, the position is perfectly clear.

43. It is correct that the Claimant was specifically offered the 30 hour post at Debenhams Leeds, especially so after the dismissal of her appeal, but she has always stated why she was unwilling or unable to move to a city centre location. That again was related to her disability, the anxiety of travelling on public transport to a strange location. The Claimant although she had only worked for this Respondent for shortly under two years had effectively worked at the same site, the White Rose Centre, with some breaks for 16 years. Particularly since the onset of her seizures those working around her at the Debenhams store, whether for Debenhams itself or for any other franchises, were well known to the Claimant and

were familiar with her condition and knew how to assist if she did - as unfortunately it was sometimes the case - suffer a seizure on the shop floor. The refusal of this offer of alternative employment (assuming it had been approved by the store) would not, in the circumstances, have made the dismissal from her substantive post proportionate.

44. On all three elements the Respondent's defence fails. They did not establish an objective legitimate aim that was to be achieved by dismissing the Claimant. They had not established a sufficient rational connection between the dismissal of the Claimant and any such objective. And, if it arose for consideration, they would not be able to establish that this was proportionate. So for those reasons we find unanimously that the Claimant was discriminated against because of something arising in consequence of her disability.

Remedy

45. We have determined that we should decide by way of remedy at this stage only the issue of the appropriate award of injury to feelings. We have heard evidence from the Claimant and submissions. It is common ground that the appropriate level of award should fall within the middle band of Vento. The issue is to whether it should be at the very bottom of that band or whether as Ms Jeram argues it should be not towards the top end but an award she puts at the range of £10,000 to 12,000 as she has referred as to analogous case cited in Harvey on Industrial Relations.

46. The relevant considerations are as follows. The Claimant was subjected to unfavourable treatment by being dismissed: that was the loss of congenial employment. As she says it had been "her life" to have worked at the White Rose Centre. More particularly on the Claimant's case it was the loss of employment at a place where she felt safe by reason of her disability. She had developed the proclivity to seizures whilst working at the White Rose Centre, those who worked alongside her had been supportive and were familiar with her condition and knew how to cope if she collapsed on the shop floor.

47. Also she has expressed in the course of evidence in the principal part of this hearing her level of anxiety, which we accept to be entirely genuine, on going into alternative situations. That, she has always expressed, is why she was loath to consider a move to the Debenhams store in the centre of Leeds. Even if she knew some of the personnel she was fearful of having to use public transport and going to a place where she had lacked the support mechanisms and groups that she had been familiar with at the White Rose Centre. So that anticipated upset at a change in location which was likely to follow from the dismissal is significant.

48. At the point of her dismissal it is also clear from the documents that the Claimant sustained a very real sense that it was unfair. In particular as evidenced in her grounds of appeal she was concerned at the apparent lack of attention to her current medical condition and the refusal to accept any further enquiries or await the outcome of her continuing treatment.

49. Once she had been dismissed the Claimant, both in evidence on remedy

and earlier in these proceedings, has described herself as having felt "devastated". In her witness statement she describes a lack of confidence. Allowing for an element of linguistic inflation we accept the genuineness of the Claimant's emotions. This must have been a very distressing situation. Also we remind ourselves that the Claimant had earlier told us that although she has now obtained new employment unfortunately she has not dared to disclose her disability to her current employers. To our mind that is significant. The Claimant carries with her the memories of having been dismissed for a reason arising in consequence of her disability to the extent that she feels apprehensive about being honest about herself and her condition in going to a new environment.

50. We also ought to say the Claimant has a history of suffering from anxiety and we accept her evidence that in that context she has temporarily had to undergo an increase in her medication. Again that is entirely consistent with a level of upset and injury to feelings in consequence of this act of discrimination.

51. So for those reasons we agree that it is certainly not at the very lower end of the middle band of Vento and taking the matter in the round (so allowing for any increases in the Vento guidelines or adjustments to the level awards) we simply assess a global figure of what in its entirety we consider to be the appropriate award. That is the sum of £10,000.

Employment Judge Lancaster

Date: 12 April 2017