Case Number: 3400502/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss I Valentine	**v**	Department of Work and Pensions

Heard at: Norwich **On:** 1, 2, 3, 12 October 2018

Before: Employment Judge Postle

Members: Mrs L Gaywood and Mrs J Schiebler

Appearances
For the Claimant: Miss Ward, Solictor
For the Respondent: Mr Ruck-Keen, Council

RESERVED JUDGMENT

1. The claimant's claim under s.15 of the Equality Act 2010 is well founded.

2. The respondents failed in their duty to make reasonable adjustments under the Equality Act 2010.

RESERVED REASONS

1. The claimant brings claims of disability discrimination on the basis of her migraines, alleging discrimination arising from disability and a failure to make reasonable adjustments under the Equality Act 2010.

2. Originally the respondents did not accept the claimant had a disability, this was determined at a preliminary hearing. However, the respondents deny knowledge of the disability.

3. The claim for discrimination arising from disability, arises from the claimant's assertion that she was subjected to warnings and ultimately dismissed for sickness related absences and she was treated unfavourably for something arising in consequence of her disability.

4. In relation to the failure to make reasonable adjustments, the claimant relies upon the respondent's attendance management procedure and the respondent accepts that is a PCP within the meaning of the Equality Act 2010.

5. Originally there was a claim for holiday pay, this has in fact been resolved.

6. In this tribunal, we have heard evidence from the claimant through a prepared witness statement. For the respondents we heard evidence from:

Ms Plant, (Executive Officer Trainer);
Miss Wright, (Business Support to the Centre Manager);
Miss Locke, (Executive Officer);
Miss Ely, (Centre Manager); and
Miss Barry, (Employment and Support Allowance North West Cluster Manager).

Again, all those witnesses giving their evidence through prepared witness statements.

7. There was a bundle of documents consisting of 385 pages.

8. The tribunal also had the benefit of closing speeches in writing from the respondent consisting of 9 pages which was then amplified before the tribunal and a written closing speech on behalf of the claimant consisting of 23 pages, again amplified before the tribunal.

9. Both parties referred the tribunal to a number of authorities, particularly the claimant:

Griffiths v Secretary of State for Work and Pensions [2015] EWCA, 1265, [2017] ICR 160;

Pnaiser v NHS England and Another, (UK EAT/0137/15/LA);

Gallup v Newport City Council, [2013] EWCA 1583;

Buchanon v The Commissioner of Police et al the Metropolis (UK EAT/0112/16/RN);

Leeds Teaching Hospital v Foss (UK EAT/0552/10);

Redcar and Cleveland Primary Care Trust v Lonsdale [2013] (UK EAT/0090/12/TN.

For the respondents we were referred to:

The Griffiths case;

Secretary of State for Work and Pensions v Alam (UK EAT/242/09);

Newham Sixth Form College v Miss Sanders [2014] EWCA 734;

Mr S Noor v Foreign and Commonwealth Office (UK EAT/0470/10/SM);

Dr L Tarbuck v Sainsbury Supermarkets Ltd. (UK EAT/0136/06/LA);

Miss H Willcox v Birmingham Cab Services Ltd. (UK EAT/0293/10/DM);

Paulley v First Group [2017] UK SC4;

The Facts

10. The claimant commenced her employment with the respondents on 3 October 2016 as an apprentice Administration Officer as part of a large intake of other apprentices, (34).

11. The aim of this programme is to take people whom would not otherwise be successful in securing employment; train and educate them, and give them experience of a working environment so that they leave the respondent's after 12 months in a much better position to return to the labour market to find gainful employment, or to successfully complete a fair and open competition within the civil service, (364). The line manager's guide in relation to apprentices, (apparently not seen by the managers at the time), also stated that the individuals recruited through the programme would require a degree of nurturing to help them through their studies and qualifications. The aim was for them to obtain level 2

functional skills English and Maths and an NVQ standard by the end of their 12 month period. They were not expected to contribute to the business to the same degree as individuals recruited through fair and open competition. The guide had been created and designed to explain the apprenticeship programme, its contents and for managers to understand how the programme impacts on them, team and staff, (363 – 385).

12. Prior to the claimant's commencement in the scheme, she completed a health declaration form, (142), and although not stating she was a disabled person, she nevertheless declared she was on anti-depressant and migraine blockers. That clearly suggests migraine was more than minor, or a trivial complaint. The claimant was not aware when she completed the declaration form that her migraine could be seen as a disability. Indeed, on a day to day basis, in the absence of migraine, the claimant could function without any of the matters listed in the declaration form at 143, as affecting her.

13. The claimant's contract of employment, amongst other conditions, refers to the need at 6.2 (150), to maintain adequate attendance.

14. It would appear that the apprentices' sickness management absence was governed by the respondent's procedures for employees whom were within their six month probation period, (283). At page 288 it deals with short term absences; four or more sick days triggers the process. That would give the manager a discretion to consider a written warning, the

manager should take into account special circumstances listed in the attendance management procedure in deciding if a written warning is appropriate. For example, (298 – 300), potential impact of disability has to be considered and a number of other reasons defining special circumstances involving also the referral to occupational health. If a written warning was not appropriate, the manager should give the probationer a 'no further action' letter explaining why and that any further absences may result in a written warning and dismissal due to failing the probation.

15. The policy goes on to say, if there are further sick absences during the probation period after a written warning and none of the special circumstances apply, dismissal may be considered by the decision maker. It is not absolute. It should be noted under the attendance management procedure, (299), absences related to disability or to gender reassignment are not to be counted in the trigger days.

16. On 11 October the claimant had a migraine and needed to take a day off, the claimant's self-certificate confirms that she had suffered from a bad migraine, prescribed medication of sumatriptan 50g, had bad migraine, laid in a dark room all day, (166). On her return to work, what is known as a 'welcome back' meeting was conducted by Miss S Wright, the Business Support for Miss Ely, (not the claimant's line manager), at which the claimant confirmed she had suffered a migraine and that she had suffered an allergic reaction to her medication, (161). At that point the respondents

would have been aware that migraine was a problem for the claimant and it might have been prudent at that stage, given what the claimant had told Miss Wright, particularly that she suffered severe migraines and described how they affected her, to make a referral, or at least to consider, whether a referral should be made. Then on 26 – 28 October, three days, the claimant was absent, this time not related to her migraine. On the claimant's return to work, Miss Locke, now the claimant's line manager, conducted a 'welcome back' interview and unfortunately, Miss Locke, without considering any special circumstances or exercising any discretion at all, went straight to a referral to an attendance management meeting as the trigger point had been reached of four days. This was despite the claimant stating at the meeting that her illness was caused by stress at work and being worried about trigger points, (165). As confirmed also by the claimant's self-certification, at (167), re: her nerves.

17. On 1 November the claimant received an invite to the attendance management meeting to take place on 7 November, (164). That letter describes the attendance meeting procedure being designed to,

"help bring your attendance up to the expected standard and I will give you an opportunity at the meeting to discuss any problems which may be affecting your attendance… I will also explain what help and support is available, however, following our meeting I will decide whether or not you shall be given a first written warning…"

18. The meeting goes ahead on 7 November, Miss Locke's notes on that meeting, (168), are disputed, particularly the claimant making it clear she suffered from migraine and had done so for some time and as an example in the last year, had suffered one attack lasting four days, the claimant making it clear that she suffered migraines on a regular basis. It would appear that although Miss Locke records this, subsequently Miss Locke only records an attack once in the last year lasting four days. She fails to mention that the claimant suffered from them on a regular basis. Miss Locke also fails to acknowledge that there clearly was a pattern to these migraines as the claimant was explaining they were regular though unpredictable. Medication did not always ward them off. Miss Locke, at this stage, further failed to realise there was a problem with the claimant's migraines and make a referral to occupational health before issuing a written warning which was the outcome of that meeting. Clearly Miss Locke could have exercised her discretion at this stage and given a 'no further action' letter. Given that the original letter inviting the claimant to this meeting also advises about the possibility of occupational referrals. Miss Locke's notes, rather oddly, suggest the claimant would only receive a referral to occupational health if she was able to get through her probation period which seems frankly perverse. Clearly the claimant had again, (168), made it clear migraines were a problem and a health condition which was likely to recur.

19. The warning letter of 7 November, (172), from Miss Locke seems to misrepresent the true condition the claimant had spoken about to Miss

Locke by referring only to the claimant of having had one attack in the last year lasting four days, as against several and indeed the claimant requested the letter be amended to reflect the fact that in addition the claimant suffered on a regular, or several basis. The letter also misrepresents the tenure of the meeting by suggestion that discussions took place about support from OHS, particularly if there is a pattern with regard to her migraine. Clearly, there was a history of migraine, severe at times and unpredictable in their nature and Miss Locke failed to take on board this fact and consider a referral to occupational health to see what could be done by way of adjustment and whether this was a disability that should be discounted in the trigger period.

20. The suggestion that the claimant should make a referral to occupational health herself is perverse.

21. On 9 November the claimant was again absent through to 11 November with migraine and the first day of absence the call record kept by the respondents clearly states reason for absence: migraine, taking medication, (174).

22. On the first day of the claimant's absence, namely 9 November, (176), Miss Locke makes a referral to what is called a 'decision maker', Miss Ely, the Centre Manager, that the claimant should be dismissed and attaches details of the claimant's absences. At this stage, one day migraine, three days sickness, although no mention of the fact nerves might be relevant,

fifth day, being 9 November, one day sickness/migraine; together with details of the actions taken as a result of the absences. The referral letter does not suggest any other consideration, and once again misrepresents the situation regarding the claimant's migraines by suggesting the claimant had only had one major migraine attack in the last 12 months which was clearly incorrect. The referral letter goes on to say that OHS had not been consulted as there was no pattern or trend identified. Clearly that is incorrect as migraine is a pattern of illness and unpredictable which the claimant had clearly identified on a number of occasions, particularly the health declaration and at a meeting with Miss Wright and in her meetings with Miss Locke, which indeed had been noted in the minutes of the meeting on 7 November.

23. So, on the fifth day of absence the claimant is being recommended for dismissal despite clear information being provided by her, she had a health problem suffering with migraine on frequent occasions. That referral was being made before the claimant had returned to work and been given an opportunity to discuss with her line manager, Miss Locke, the problems with her migraine. Miss Locke clearly had a discretion not to refer to a decision maker and with knowledge of the migraine attacks and nerves, should have been in her mind to make a referral to occupational health, or at least consider that as a possibility and any other special circumstances. There was no evidence that Miss Locke addressed her mind to these possibilities as she confirmed, she appears to have slavishly followed the policy in a blinkered manner.

24. The claimant returned to work on Monday 14 November, at which point Miss Locke conducted a return to work meeting, (although a referral to a decision maker had already been made), (181). At the meeting the claimant confirmed the sickness absence was due to migraine but she had been prescribed new medication by her GP. The claimant was then informed at this meeting that because of her level of absence, (5 days), the matter had now been referred to a decision maker.

25. The claimant receives the letter inviting her to the attendance management meeting which was to be conducted by the Centre Manager Miss Ely. The letter refers to the purpose of the meeting being,

"…consider and discuss your work performance, attendance and conduct".

The fact that the meeting may result in the claimant's dismissal. Miss Ely's own evidence as confirmed in the transcript of a telephone call to HR, (189), was that she had already decided to dismiss the claimant regardless of what the claimant may wish to raise. In fact, Miss Ely, when she called HR prior to the meeting discussed advice about payments that would be due to the claimant, she sought no advise about other options available to her and confirmed she was 99% certain she was going to dismiss. In effect, Miss Ely had a closed mind and was not going to consider other options and was not going to look at the reasons for absence or discuss them in an appropriate and proactive manner with the

claimant. This was particularly surprising given the fact that Miss Ely, although not having read the manager's guidelines regarding apprentices, did know that the group of apprentices were part of a programme put forward by the work coaches and that the respondents were to take this group and support them through to qualification. Miss Ely's own evidence acknowledged that it became clear very quickly that this was a group of people who needed a lot of support as they were not used to the working environment and needed support to help them cope.

26. The meeting took place on 22 November, notes are at 184 – 187. The meeting appears to have lasted little more than 10 to 15 minutes and by this stage, as we know, Miss Ely had already made up her mind, nothing was going to change from her predetermined decision to dismiss. Once again, a manager was blinkered despite the claimant trying to explain her migraine history and the fact that this had been known to Miss Locke and to Miss Wright and fully explained. Indeed, some of the discussion at this meeting appears to have been irrelevant for the purposes of the stated purpose of the meeting, for example Miss Ely asking the claimant,

"Do you not think you may have caused some of this yourself? You failed to ring in when you were supposed to."

And discussions about the claimant running out of medication. The claimant was duly dismissed by letter of 28 November, (209), and that letter contained the claimant's right of appeal.

27. The claimant did exercise her right of appeal by letter of 8 December, (215 – 261), and once again explained her migraine and its effects.

28. The appeal was conducted by Miss Barry, from another office, it was conducted by video conferencing with the claimant's approval. However, looking at the decision, it appears again to be no more than a tick box exercise following the respondent's procedures. There appears to have been no account taken of what the claimant had previously informed managers about her migraines, there frequency which the claimant again clarified at the appeal meeting, (225 – 228). The appeal was not upheld.

29. What is surprising, is that none of the managers, whether Miss Locke or Miss Ely, appeared to have noted or compared the claimant's treatment at the time with that of other apprentices during the same period. From the information now produced by the respondent, it appears out of 34 apprentices, 17 exceeded the four day trigger, 12 were kept on, 3 were dismissed. No adequate explanation has been provided as to why there was this difference in treatment. Particularly, others were not given any warnings when they exceeded the four day trigger point, clearly a substantial amount of leeway and discretion was used by other managers with apprentices and their absences. Furthermore, Miss Barry who conducted the appeal, appears to have not checked with the centre as to how other apprentices were dealt with during their probation period, certainly there was no evidence produced before this tribunal.

30. To conclude, by the time Miss Ely took the decision to dismiss on 22 November, clearly her mind was made up at that stage. The claimant had had seven days absence, four of those were for migraines. By the time of the appeal there had been a total of nine and a half days absence; six and a half of those were for migraines. Clearly there was a pattern which would and should have been noticed and taken on board by the respondent which would have, at the very least, suggested an occupational health referral, or alternatively that the claimant was suffering from a disability and therefore the trigger days in relation to migraine would not be counted.

The Law

31. Discrimination arising from disability s.15

"*A person (A) discriminates against the disabled person (B) if:*

(a) (A) treats (B) unfavourably because of something arising in consequence of (B's) disability; and

(b) (A) cannot show that the treatment is a proportionate means of achieving a legitimate aim."

32. In essence, the section provides that it would be unlawful for an employer or other person to treat the disabled person unfavourably, not because of that person's disability itself, (which would amount to direct discrimination under s.13), but because of something arising from, or in consequence of the person's disability.

33. Therefore, in order to succeed with the claim of discrimination arising from disability, the claimant must establish the following:

33.1 that he or she has suffered unfavourable treatment;

33.2 that the treatment is because of something arising in consequence of his or her disability.

34. Clearly, if the claimant can establish the above, the employer will be liable unless it can show:

34.1 that the unfavourable treatment is a proportionate means of achieving a legitimate aim, and / or

34.2 that it had no knowledge of the claimant's disability.

35. Under this claim there is no need for a comparator in order to show unfavourable treatment.

Failure to make reasonable adjustments, s.20

36. This sets out the general scope of the duty on employers to make adjustments. It comprises of three elements and relevant for the purposes of this claim is sub-section (3):

"A requirement where a provision criterion of practice, (PCP), puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons whom are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

37. The tribunal have also had regard to the Equality and Human Rights Commission Statutory Code of Practice on Employment 2010.

38. The basic question is, has the employer taken such steps as is reasonable to take in all the circumstances in order to avoid, or prevent the provision criterion or practice having the disadvantageous effect?

Conclusions

39. There is no doubt in this case that the claimant is disabled. That disability is migraine and those migraines can be seriously and physically debilitating. Medication is not always helpful in either warding them off or resolving them in a short period of time.

40. It is also patently clear from the evidence of the claimant's health declaration that the claimant at least suffered migraines although, the claimant with all due respect to her, does not see that as a disability at the time and with medication the matters referred to on the health declaration form do not always affect her. It is clear, in discussion originally with Miss Wright she made it clear she suffered migraines and that they were a problem for her. That was reiterated at a further return to work meeting on 7 November, with Miss Locke, where it is again clear the claimant said she suffered migraines on a regular basis. Therefore, for the respondents to suggest namely by this stage they had no knowledge of the claimant's migraine and disability, is frankly disingenuous. If there was any doubt, then at the very least, Miss Locke, in early November, should have made a referral to Occupational Health. That was never contemplated.

41. Dealing with the failure to make reasonable adjustments, the tribunal repeats, the basic question is, has the employer taken such steps as is reasonable to take in all circumstances in order to avoid or prevent provision, criterion or practice having the disadvantageous effect. The respondents accept that their attendance management procedure is capable of being a PCP within the meaning of the Equality Act 2010. That policy deals with short term absences, four or more sick days will trigger the process. At that stage the manager has a discretion to consider a written warning, and take into account special circumstances listed in the attendance management procedure. If deciding if a written warning is

appropriate, a referral to Occupational Health. If they decide no written warning is appropriate they will give the employee a 'No further action' letter. Given that the claimant was suffering from migraines in the past and had four episodes by the time of her dismissal, and three days not related to migraine, it does beg the question, why, in those circumstances, given also the nature of why the claimant was put on the course, to try and get her back into the workplace, the respondent did not make reasonable adjustments, in disregarding migraine absences, or indeed, simply taking no further action, as other managers appeared to have done with employees taken on in the same capacity as the claimant. No explanation has been given as to what adjustments could be made for other employees on the course who had triggered the process, (attendance management), but no action was taken against them, but not for the claimant who clearly was suffering from a disability. In those circumstances the tribunal unanimously concluded the respondents failed to make reasonable adjustments.

42. Turning to the section 15 claim, clearly, on the facts, the claimant has suffered unfavourable treatment and she had a disability. The respondents failed to take that into account in deciding whether or not to dismiss her and lesson the trigger points and that dismissal was clearly because of something arising in consequence of the claimant's dismissal.

43. The respondents now have to show the unfavourable treatment was a proportionate means of achieving a legitimate aim and / or that it had

knowledge of the claimant's disability. The question of knowledge has already been dealt with earlier in these conclusions. One accepts the respondent's management attendance policy triggers the process, however, given the claimant's disability, and given the fact the respondents had clear knowledge that the claimant had suffered in the past, with migraines and balancing the needs of the business and the requirement for reasonable attendance it is difficult to see how the respondents can advance the unfavourable treatment was a proportionate means of achieving a legitimate aim. This is particularly so given the fact that out of 34 apprentices, 17 exceeded the four day trigger, 12 were kept on and only 3 were dismissed. In the absence of any adequate explanation being provided, clearly the respondents cannot claim that the unfavourable treatment was a proportionate means of achieving a legitimate aim in those circumstances.

44. A date for remedy will be sent to the parties in due course. In the meantime, if the parties can provide availability for the months of April, May and June that would be helpful in listing.

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Employment Judge Postle

Date: ……07 January 2019…

Sent to the parties on: 07 January 2019

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For the Tribunal Office