EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
	AND
MAGDELENA KASPER	**TESCO STORES LIMITED**

RESERVED JUDGMENT

OF THE EMPLOYMENT TRIBUNAL

HELD AT: Birmingham via CVP

ON: 28-30 September,
1 October 2021 &
4 October 2021
(In Chambers)

EMPLOYMENT JUDGE Algazy QC

Panel Members: Mr D. McIntosh
Mr C. Ledbury

Representation

For the Claimant: Mr M. Gordon - Counsel

For the Respondent: Ms L. Quigley - Counsel

J U D G M E N T

The claims set out below are not well founded and are dismissed:

- Discrimination arising from disability (section 15 Equality Act 2010)
- Indirect discrimination-disability (section 19 Equality Act 2010)
- Direct race discrimination (section 12 Equality Act 2010)
- Harassment (section 26 Equality Act 2010)
- Failure to provide written statement of particulars (section 38 Employment Act 2002)
- Failure to allow claimant to be accompanied (section 10 Employment Relations Act 1999)

R E A S O N S

1. **INTRODUCTION**

1.1. The Claimant was employed by the respondent as a Customer Assistant – Nights on a temporary maternity cover contract for a 14 week period at its Cradley Heath store. The claimant commenced on 18 August 2018 and her employment was terminated on 1 weeks' notice on 27 September 2018.

1.2. The claimant brings claims of race and disability discrimination as well as additional claims in respect of a failure to provide her statutory contractual terms and a failure to allow her to be accompanied at a disciplinary/ capability hearing.

1.3. The respondent denies all the claims but concedes that she had a relevant disability, namely anxiety and depression at all material times.

1.4. The claimant was represented by Mr M Gordon of counsel and she gave evidence on her own behalf. She called no other witnesses. Ms L Quigley appeared for the respondent and called three witnesses: Ms Amanda Smith, Administrative Assistant, Mr Michael Walsh, Lead Night Manager and Ms Samantha Nutting, Lead Trade Manager.

1.5. There was an agreed bundle of documents and numbers in square brackets in these reasons refer to that bundle. Both sides produced written submissions and relevant authorities.

The claimant had indicated that she was having difficulties with the Tribunal process and giving evidence. The Tribunal sought to alleviate the claimant's concerns in this regard by a number of measures. Breaks were taken hourly, and the claimant was advised repeatedly that she could have additional breaks as she might require. The Tribunal reformulated questions that she appeared to have difficulty in understanding. The claimant was reminded that she should not answer a question until she was sure that she understood what was being asked and to seek clarification where necessary.

2. THE ISSUES

The issues that the Tribunal had to determine were set out in an agreed List of Issues ("LOI") although some aspects of the way the case was put on behalf of the claimant were not pursued in oral submissions. The list is set out in full in the Annex to this judgment.

3. THE FACTS

3.1. On the evidence presented to the Tribunal, We found the following facts and such additional facts as are contained in the conclusion section set out below.

CREDIT

3.2. We address firstly the issue of credibility. There are head on conflicts of evidence between the accounts given by the parties on important matters which require resolution by the Tribunal.

3.3. The Tribunal was urged to consider the claimant as a witness who presented as candid and frank. The following submission was made on the claimant's behalf in written submissions:

"*The Tribunal also noted at various times the Claimant had some difficulty in her evidence, particularly when trying to understand the question put to her. During cross examination the Claimant explained the impact stress has on her and the problems she has with understanding what people say due to her disability, and the stress of 'court'. It is also noted that English is not the Claimant's first language. It is respectfully averred these factors should be considered when assessing her evidence."*

3.4. The Tribunal did take those matters into account and gave them the fullest appropriate weight in assessing the claimant's credibility and reliability as a historian of events. However the respondent, in its written submissions, points to a number of what it alleges are unsatisfactory aspects of her evidence as follows:

" *It is further submitted that the Claimant was generally an unreliable witness whose credibility was repeatedly undermined in cross-examination. This is exemplified by the following matters:*

- *The Claimant maintained that her witness statement was written herself despite it being an exact replica of the ET1 save for the fact it has been changed from the third person to the first person. Paragraph 11 remains in the third person;*

- *The Claimant would not accept the obvious reality that her statement had been written for her;*

- *The Claimant accepted that her statement was her full recollection of events only to then later agree that large sections of MW evidence in respect of the key conversation on the 20th of September were correct, accepted she had omitted aspects (fact that she had been told by colleagues that there was no 3.5 aisle rule) as well as adding repeatedly to her evidence to improve her case in cross-examination;*

- *the Claimant originally maintained that she was not aware her role was temporary and stated "not any specified period , 100% sure not specified period or maternity cover and thought could work as 1 year or be transferred to regular worker" only to then later accept she was in fact aware it was a temporary 14 week post when page 138 was brought to her attention*

- *The Claimant initially denied that she was allocated a buddy on the 3rd of August only to later accept that she was;*

- *The Claimant denied having access to the intranet during employment despite having previously accepted she did and then corrected her evidence;*

- *The Claimant denied having training (para 17) only to accept that she had in fact received health and safety training*

- *the Claimant's memory of the 18th of August was clearly lacking as she could not remember watching the training DVDs despite this being the mode of training;*

- *The Claimant gave contradictory evidence as to whether there p8 and p10 were one conversation or in fact two. It required several attempts including prompting from the Tribunal to clarify that it was 2 conversations. This demonstrated the Claimant's poor recall of events*

- *The Claimant gave evidence that MW had described her as "rubbish" only then to accept that he never used such a word;*

- *In respect of p10 and the fact the Claimant told MW she was "fine" the Claimant then sought to suggest this was a lie when the apparent contradiction was pointed out;*

- *The Claimant agreed with MW evidence that in fact he had said "you need to pick up the pace";*

- *The Claimant sought to maintain that MW was deficient on the 30th by failing to investigated notwithstanding the fact that his observation was fair and the Claimant had given him a plausible explanation. This was indicative of the unfair criticisms the Claimant was prepared to levy at MW*

- *The Claimant admitted her recollection of the 30th of August was impaired*

- *In p14 the Claimant maintained that MW had said she was Incapable due to poor fitness and health condition. This was not retracted in evidence in chief and was only admitted to be false in cross-examination. This contention was a feature of the Claimant's case since page 149. The Claimant had no*

explanation for advancing this falsehood and merely apologised when pressed by the Judge."

3.5. The Tribunal finds considerable force in those submissions and finds that the claimant was not a witness in whose evidence the Tribunal could repose confidence.

3.6. In contrast, whilst not entirely free from criticism, we found that the evidence of the respondent's witnesses was not noticeably shaken in cross-examination. On balance, whilst we addressed each conflict of evidence individually, the Tribunal approached the evidence of the claimant with caution. Some instances of where the respondent's evidence was found wanting are referred to at paragraphs 3.22 and 3.35 below. Other examples are contained in the claimant's written submissions such as the apparent discrepancies between Mr Walsh's evidence to the Tribunal and the account he gave in the respondent's internal investigation.

KEY EVENTS

3.7. The material events took place within a relatively short compass. The claimant commenced employment on 18 August 2018 on a temporary contract to cover maternity leave [99] for a period of 14 weeks [109 &138].

3.8. The claimant maintains that she thought she was applying for a permanent post however she accepted in cross- examination that the nature of the post was clear from the contemporary documentation. The claimants application did not disclose any health condition or disability. A new starter pack was sent to the claimant at the commencement of her employment [115-199]

which included a health declaration. The claimant's personnel file contains a checklist at [142-144] and notes "N/A" against "Disability records".

3.9. The role of Customer Assistant Nights was essentially to re-stock the supermarket shelves and to prepare it in readiness for the next day's shopping.

3.10. The respondent maintains that she was provided with support, coaching, training and guidance at the beginning of her employment in accordance with its usual policies and processes. This is supported by the claimant's training record signed by her at pages 111 – 113. The claimant disputed that she had been given adequate training for the role. It is also disputed that the claimant was provided with a "buddy" to assist her but In light of our findings explained below, we did not consider this to be a material dispute.

3.11. The claimant underwent an induction conducted by Amanda Smith on 18 August 2018. The role carried out by Ms Smith was that of an Administration Assistant. It is denied by Ms Smith that she introduced herself as the "People Manager" as is alleged by the claimant. We prefer the evidence of Ms Smith on this issue. None of the documentation produced to the tribunal supported the claimant's contention in this regard.

3.12. A further significant conflict in relation to the induction arises in respect of a telephone number given to the attendees as a contact number for attendance, lateness and general issues. It is the claimant's assertion that the number distributed by Ms Smith Is the one that she used to send a text on 30 August 2018 to the respondent and which appears at page 141 of the bundle (referred to for convenience below as the "141 number"). It is further asserted by the claimant that the number was written up on a whiteboard for the attendees to note down.

3.13. This account substantially emerged, and was elaborated on, in the claimant's oral evidence. This was surprising for what was clearly such an important matter. It was dealt with in her witness statement at §3 thus:

" *3. When I first started my employment with the Respondent, I was unsure about how exactly I should formally notify the Respondent of the medical conditions that I suffered with. I therefore sent a text message to Amanda Smith (who was the People's Manager of the Respondent at the time) on my company mobile phone on the 30th August 2018. In this text message I detailed that I was suffering from the following conditions: depression, anxiety, high blood pressure and coeliac disease (page 141 of the joint hearing bundle)."*

3.14. The claimant accepted that her reference to "my company phone" was clearly an error as she had no such device issued to her by the respondent.

3.15. The account given by Ms Smith was very different. Firstly, she denied using a whiteboard in the induction and therefore writing any number up for the attendees to note. She told the tribunal that she gave the duty manage'rs number to the attendees orally. the number she distributed was not the one used by the claimants in the text at page 141 of the bundle and that she had no knowledge of that number in any event. Further it was the respondent's case that the induction was carried out by the use of DVDs. The claimant was unable to recall that DVDs were used at the induction when asked about that matter in cross – examination.

3.16. Again, we prefer the evidence of the respondent on this matter. We have found that that Ms Smith did not introduce herself as the peoples manager and we further find that she did not communicate the number used by the claimant at page 141 by writing it up on a whiteboard.

3.17. Subsequent inquiries by the respondent in respect of the number used by the claimant on 30 August 2018 revealed that the number used by the claimant (07718 524 747) and entered into her phone as “Amanda Tesco” was assigned to a mobile phone that belonged to an old compliance manager based at the Cradley Heath store who was made redundant in March 2018. The device was kept in the office but not used regularly at the time. Ms Smith’s evidence was that the phone was sometimes used by her and other colleagues to make external phone calls when there was a problem with connectivity of the landline phones. She said that she might use it to call an applicant in relation to their interview arrangements or their induction and suspects that that this might have been the case in relation to the claimant although she didn't specifically remember calling the claimant about anything.

3.18. When the phone was located as part of the respondent's inquiries, it had to be charged and switched on. It was noted that the claimant’s message was sent as an MMS message [141A] with a link to open the message which the respondent was unable to do. Ms Smith’s evidence, which we accept, was that she did not see either the message at page [141] or [141A] at any material time and not prior to the claimant’s dismissal. It seems that nobody at the respondent had seen either message before this inquiry made after the claimant’s dismissal.

3.19. The message sent by the claimant at 141 contains these words:

“Hello Amanda,
I hope you are fine
It's Maggie /Magdalena Kasper, the
night shift replenishment team.
I just want to let Tesco know about
my disability to ensure H&S
compliance. I suffer from the

following conditions: depression, anxiety, high blood pressure, ceoliacs. I am happy to provide more information if you need it."

3.20. The message was never followed up by the claimant with anyone at the respondent. Ms Smith makes the point that she was not responsible for the phone and that it was not used regularly, not assigned to any particular colleague or manager and that it was not used for any particular purpose.

3.21. The claimant started working in her role on 22 August 2018 and was initially assigned duties which were considered to be amongst the easiest such as crisps and cereals with the expectation that this would expand to more difficult stock replenishment.

3.22. Mr Walsh explained that the exact nature and amount of work required on the night operation varied from night to night and season to season. However, a typical shift would involve the receipt of between 180 and 300 cages of product which needed to be put on the shelves. The store contains some 20 aisles and staff are expected to work flexibly across the aisles and products and complete replenishment of a couple of aisles within an eight or nine hour shift. Different staff members would do more or less depending on the products. Mr Walsh did not accept that he had told the claimant she needed to complete 3 1/2 aisles during a night shift. The Tribunal noted some discrepancies between his witness statement and what he had told the investigation conducted by Sam Nutting described below. However, we accepted the general thrust of his evidence as contained in his witness statement at paragraph 3 in respect of the expected work rate.

3.23. From observations of the claimant's work, Mr Walsh noticed that she was not completing replenishment of the crisps aisle during the whole shift despite crisps being one of the easier items to restock. He was having to ask other colleagues to finish the replenishment in order to ensure the shop was ready for the next day. Mr Walsh raised this with the claimant on a couple of occasions. The claimant raises issues with the manner in which the issue was addressed by him as matters of complaint under S15 EqA in that he was being threatening, intimidating and bullying. In cross - examination, the claimant accepted a number of propositions put to her about these exchanges being those of a manager asking ordinary questions of an employee on doing his usual rounds. We accept the evidence of Mr Walsh that his approach in the conversations that he had with the claimant was to the effect of him outlining that she wasn't working quickly enough but in a supportive tone and with a view to understanding why that was the case and what help she might need.

3.24. The Claimant asserts that she suffered less favourable treatment on grounds of race in that she was told on 20th or 21st September 2018 by Mr Walsh that if she had worked in retail in Poland before, it must have been a tiny shop even if it was Netto and that Poland is 'only good for stag nights'. Mr Walsh denies the remarks attributed to him but accepts that there was a conversation in which Netto was mentioned by the claimant and that he said he had been on a "stag do' in Poland and that it was good. We accept that evidence. To put the matter beyond doubt, Mr Walsh's account was put to her in cross examination and the claimant replied "yes , that's what he said".

3.25. On the 20/21 September 2018 shift, a conversation took place between the claimant and Mr Walsh before the Netto/Stag do exchange referred to above. He asked the claimant why she was not able to complete replenishment of the crisps, for example.

The claimant said that there was too much work to do. He asked her if she meant too much work for her specifically, or that there was too much work generally. The claimant stated that there was too much work for everybody.

3.26. The claimant was cross examined on this exchange and she accepted a number of propositions put to her from which the following facts emerged:

(i) Michael Walsh was doing his usual walk around and asked her to pick up the pace.

(ii) On that shift, she was behind in her work as accurately observed by him

(iii) Michael Walsh probably did not know about her disability at that point

(iv) He did not say as she had suggested that she was not performing because of poor fitness;

(v) The suggestion that he had linked her performance to her health condition was not accurate; she apologised for its inclusion in her witness statement

(vi) Mr Walsh explained that, as a team, there was a certain amount of work to do and if it wasn't being done he might have to consider if a person was capable of doing their job; she agreed that that was a fair observation

(vii) It was only after the last exchange that she raised that she had a disability

(viii) Mr Walsh said he didn't know about that and asked if anyone had been told or whether the claimant had put it in her application form

(ix) The claimant told Mr Walsh that she had told management about her disability but wasn't able to remember who she had told specifically in answer to Mr Walsh's question except that she did recall saying that she had informed Amanda Smith

(x) The claimant did not tell Mr Walsh what her disability was or how it affected her in this exchange

(xi) The claimant asked to see the company procedures.

3.27. The claimant was then asked questions about paragraph 16 of her witness statement and subsequent exchanges between her and Mr Walsh. The claimant was unable to recall whether this further conversation took place during the same shift or the subsequent shift as was the respondent's case. She accepted that it was possibly the next shift. We find that it was a second conversation and it took place on the following shift and the matters referred to below were discussed.

3.28. In that second conversation, Mr Walker said that he had spoken to the relevant mangers (Gavin Pike - Store manager, Simon Watkins – Days Lead Manager, Samantha Nutting and Amanda Smith) and that none of them knew about the claimant's disability. The claimant accepted that he might have said that. There was also a discussion about a possible move to the checkout team.

3.29. There was no further discussion between the claimant and Mr Walsh until he came to talk to her about her Notice of Termination on 27 September 2018.

3.30. Prior to 27 September 2018, Mr Walsh spoke to Mr Pike, Store manager, which produced the note at [146] . The note informed Mr Walsh that Mr Pike had checked the situation and, given the claimant's status, her employment could be terminated.

3.31. On the 27 September 2018 Mr Walsh met with the claimant and gave her the Notice of Termination [146]. He explained that she was being given one week's notice and that she did not have to work her notice. The claimant opted to continue working until 5 am and then asked if she could leave and still be paid. No discussion about the claimant's disability took place on this occasion.

3.32. The claimant subsequently raised an anonymous complaint via the respondent's concerns reporting line called. "Protector Line" on 2 October 2018 [149-152].

3.33. Gavin Pike, after appropriate triage, asked Samantha Nutting to investigate the complaint. It soon became clear that the complaint was one issued by the claimant. At the conclusion of the investigation, Ms Nutting concluded that there was nothing in the complaints that required further action to be taken against Mr Walsh or anyone specifically.

3.34. As the complaint was made anonymously via Protector Llne, there was no formal obligation to report back to the claimant. Nonetheless Ms Nutting felt that there were some lessons to be learnt and she fed this back to the Colleague Relations team with her findings at [182-184].

3.35. No specific claims are made in respect of the investigation by the respondent and its outcome before this Tribunal. However, a number of complaints are made about the process by the claimant including the fact that there was insufficient investigation into the text message [141] issue. The claimant also draws attention to apparent discrepancies between answers given by Mr Walsh at the investigation and his evidence before the tribunal. Those matters have been taken into account in assessing the credibility of the witnesses.

3.36. The claimant issued proceedings on 18 February 2018

4. THE LAW

The Parties submitted detailed Closing Skeleton Arguments which contained reference to legislation and authorities which we did not need to consider in light of our findings and conclusions. We, of course, carefully considered the written submissions in the course of our deliberations and no discourtesy is intended to the industry of Counsel by not specifically referencing every submission made, or authority relied on, by the parties.

Jurisdiction

4.1 The relevant provisions of the Equality Act 2010 are:

"123 Time limits

(1) Subject to [section 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable

…

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it"

"Continuing Act"

4.2 The claimant relied on **Lyfar v Brighton and Sussex University Hospitals Trust** [2006] EWCA Civ 1548, CA and **Commissioner of Police of the Metropolis v Hendricks** [2003] ICR 530, CA in respect of the correct approach to continuing acts. The Tribunal should look at the substance of the complaints in question — as opposed to the existence of a policy or regime — and determine whether they can be said to be part of one continuing act by the employer.

"Just and equitable"

4.3 The tribunal has the discretion to extend the time limit for a discrimination claim to be presented by such further period as it considers just and equitable (section 123(1)(b), EqA 2010).
A tribunal has a wide discretion when considering whether it is just and equitable to extend time, and an appeal against a tribunal's decision should only be allowed if it had made an error of law or its decision was perverse.

4.4 In addition to the authorities referred to by the claimant, the Tribunal also had regard to the case of **Adedeji v University Hospital Birmingham NHS Foundation Trust** [2021] EWCA Civ 23 reinforced the caution against over-reliance on the Keeble factors at § 37:

"37. The first concerns the continuing influence in this field of the decision in Keeble. This originated in a short concluding observation at the end of Holland J's judgment in the first of the two Keeble appeals, in which the limitation issue was remitted to the industrial tribunal. He said, at para. 10:

> **"We add observations with respect to the discretion that is yet to be exercised. Such requires findings of fact which must be based on evidence. The task of the Tribunal may be illuminated by perusal of Section 33 Limitation Act 1980 wherein a check list is provided (specifically not exclusive) for the exercise of a not dissimilar discretion by common law courts which starts by inviting consideration of all the circumstances including the length of, and the reasons for, the delay. Here is, we suggest, a prompt as to the crucial findings of fact upon which the discretion is exercised."**

The industrial tribunal followed that suggestion and, as we have seen, when there was a further appeal Smith J as part of her analysis of its reasoning helpfully summarised the requirements of section 33 (so far as applicable). It will be seen, therefore, that Keeble did no more than suggest that a comparison with the requirements of section 33 might help "illuminate" the task of the tribunal by setting out a checklist of potentially relevant factors. It certainly did not say that that list should be used as a framework for any decision. However, that is how it has too often been read, and "the Keeble factors" and "the Keeble principles" still regularly feature as the starting-point for tribunals' approach to decisions under section 123 (1) (b). I do not regard this as healthy. Of course the two discretions are, in Holland J's phrase, "not dissimilar", so it is unsurprising that most of the factors mentioned in section 33 may be relevant also, though to varying degrees, in the context of a discrimination claim; and I do not doubt that many tribunals over the years have found Keeble helpful. But rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may also occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language (as occurred in the present case – see para. 31 above). The best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble,

well and good; but I would not recommend taking it as the framework for its thinking."

4.5 **Adedji** also serves a reminder that time limits are applied strictly in ETs at § 24:

"24. At para. 35 she says that there is a public interest in the enforcement of time limits and that they are applied strictly in employment tribunals. The former point is unexceptionable. The latter reflects a statement made by Auld LJ at para. 25 of his judgment in Robertson. That statement was the subject of some discussion in the later decision of this Court in Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298, [2010] IRLR 327 (per Wall LJ at paras. 24-25 and Sedley LJ at para. 31), but it is not a ground of appeal that the Judge's reference to that statement constituted a misdirection, and in any event I do not think that it did."

Discrimination arising from disability

4.6 Section 15 of the EqA 2010 provides:

" **(1) A person (A) discriminates against a 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.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

4.7 No comparator is required. Section 15 discrimination requires only that the disabled person shoes that they have experienced

unfavourable treatment because of something connected with a disability.

4.8 The EAT in **Pnaiser v NHS England and another** [2016] IRLR 170 summarised the correct approach

> **(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.**
>
> **(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.**
>
> **(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her skeleton).**
>
> **(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases**

where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton* UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that 'a subjective approach infects the whole of section 15' by virtue of the requirement of knowledge in s.15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26–34 of *Weerasinghe* as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of

the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.

(i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of the claimant's disability'. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

4.9 As regards unfavourable treatment, §5.7 of the Equality and Human Rights Commission's Code of Practice on Employment states that it means that the disabled person '**must have been put at a disadvantage'.**

4.10 The claimant also relies on §§5.20 and 5.21 of the EHRC code as follows:

"**5.20 Employers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments (see Chapter 6).**

5.21 If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified. …"

"Actual and constructive knowledge of Disability"

4.11 A respondent must know 3 things for actual knowledge, firstly the nature of the impairment; secondly that the impairment has a

substantial adverse effect on day-to-day activities; and thirdly it is long-term or likely to be long-term.

4.12 The EHRC Code provides guidance on the issue of knowledge:

§6.21
"If an employer's agent or employee … knows, in that capacity, of a worker's disability, the employer will not usually be able to claim that they do not know of the disability."

See also §5.14 and §5.15 reproduced in the extract from **Av Z Ltd [2019] IRLR 952 below.**

4.13 The Supreme Court in **A v Z** laid down the following guidance, per Lady Hale:

'23. In determining whether the employer had requisite knowledge for s 15(2) purposes, the following principles are uncontroversial between the parties in this appeal:

(1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment, see… [2018] ICR 1492 CA at para 39.

(2) The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of s 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long-term effect, see *Donelien v Liberata UK Ltd* (2014) UKEAT/0297/14, [2014] All ER (D) 253 (Dec) at para 5, per Langstaff P, and also see *Pnaiser v NHS England* (2016) UKEAT/0137/15/LA, [2016] IRLR 170 EAT at para 69 per Simler J.

(3) The question of reasonableness is one of fact and evaluation, see [2018] EWCA Civ 129, [2018] IRLR 535 CA at para [27]; nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.

(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for EqA purposes (see *Herry v Dudley Metropolitan Council* [2017 ICR 1610 per His Honour Judge Richardson, citing *J v DLA Piper UK LLP* … [2010] ICR 1052, and (ii) because, without knowing the likely cause of a given impairment, "it becomes much more difficult to know whether it may well last for more than 12 months, if it is not [already done so]", per Langstaff P in Donelien EAT at para 31.

(5) The approach adopted to answering the question thus posed by s 15(2) is to be informed by the Code, which (relevantly) provides as follows:

" 5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.

5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making inquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

(6) It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so (*Ridout v T C Group*… [1998 IRLR] 628; *Alam v Secretary of State for the Department for Work and Pensions*…. [2010] ICR 665.

(7) Reasonableness, for the purposes of s 15(2), must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code"

4.14 The claimant seeks to distinguish **A v Z** on the facts. In that case, a finding of constructive knowledge was over-turned on the basis that

further inquiries would have been unlikely to reveal the relevant information to fix the employer with constructive knowledge. It is to be noted that the respondent there was made aware of GP notes referring to the employee's condition

4.15 The claimant also prays in aid a passage in the EAT decision in **A v Z** (§28) quoting the ET decision in respect of what steps were incumbent on the respondent to consider:

> **"They run a sophisticated business, have significant resources at their disposal and benefit from a well-educated and well-informed leadership. The Claimant's silence on her mental health could not be taken as conclusive. It is notorious that mental health problems very often carry a stigma which discourages people from disclosing such matters, even to family or close friends. In the circumstances, we conclude that, by the time of the dismissal, it was incumbent upon the Respondents to enquire into the Claimant' mental well-being and that their failure to do so precludes them from denying that they ought to have known that she had the disability"**

4.16 The Tribunal was also taken to the case of **Department for Work and Pensions v Hall EAT 0012/05** by the claimant. The respondent there was held to have had constructive knowledge of the claimant's psychiatric condition. On the facts, reliance was placed on the unusual behaviour of the claimant as well as the fact that the respondent had been aware that she had made claim for disabled persons tax credit. Reliance was also placed on **Cox v Essex County Fire and Rescue Service UKEAT/0162/13/SM** support the proposition that the tribunal should consider whether the respondent had **'asked all the right questions".**

4.17 Legitimate aim and proportionality are considered below under "Indirect Discrimination".

Reasonable adjustments

4.18 Section 20 EqA 2010 provides insofar as is material:

> **"Duty to make adjustments**
> **(1)Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
> **…**
> **(3)The first requirement is a requirement, where a provision, criterion or practice of A's 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.**

Paragraph 20 of Schedule 8 of the EqA 2010 provides**:**

> **"20(1)A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—**
> **(a)in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;**
> **(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."**

4.19 According to Section 212(1) EqA 'substantial' means more than trivial. and. This is a question of fact to be assessed on an objective basis and is not a high threshold to satisfy

4.20 The Claimant is required to establish a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred, in the absence of an explanation, that the duty has not been complied with.

4.21 As summarised in the claimant's submission, an employer has a defence to a claim for breach of the statutory duty (and, in fact, is relieved of any legal obligation to make reasonable adjustments) if it does not know and could not reasonably be expected to know that the disabled person is disabled and is likely to be placed at a substantial disadvantage by the PCP.

4.22 That proposition has to considered against the backdrop of §6.19 of the EHRC Employment Code:

> **"For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment."**

Indirect Discrimination

4.23 Section 19 EqA provides insofar as is material:

> **(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.**
> **(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—**
> **(a) A applies, or would apply, it to persons with whom B does not share the characteristic,**

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are—

- **disability;**

4.24 The EHRC Code gives guidance on the meaning of disadvantage:

> **"§4.9. ….something that a reasonable person would complain about — so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker can reasonably say that they would have preferred to be treated differently"**

Objective Justification/Legitimate aim/Proportionality

4.25 The test for objective justification is is unlike the band of reasonable responses test - **Hardy & Hansons plc v Lax** [2005] EWCA Civ 846, [2005] IRLR 726.

4.26 The EHRC code provides:

> **§4.28**
> "**The concept of 'legitimate aim' is taken from European Union (EU) law and relevant decisions of the Court of Justice of the European Union (CJEU) – formerly the European Court of Justice (ECJ). However, it is not defined by the Act. The aim of the provision, criterion or practice should be legal, should not be discriminatory in itself, and must represent a real, objective**

consideration. The health, welfare and safety of individuals may qualify as legitimate aims provided that risks are clearly specified and supported by evidence."

§4.29
"Although not defined by the Act, the term 'proportionate' is taken from EU Directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an 'appropriate and necessary' means of achieving a legitimate aim. But 'necessary' does not mean that the provision, criterion or practice is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means."

§4.30
"Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer's reasons for applying it, taking into account all the relevant facts'

4.27 Whilst the burden is on the respondent to adduce evidence in respect of the legitimate aim it advances, that is subject to this caveat:

"It is an error to think that concrete evidence is always necessary to establish justification… Justification may be established in an appropriate case by reasoned and rational judgement. What is impermissible is a justification based simply on subjective impression or stereotyped assumptions."

Per **Chief Constable of West Yorkshire Police and anor v Homer [**2009] ICR 223, EAT

4.28 **Hampson v Department of Education and Science** [1989] ICR 179 identifies 3 elements that a respondent must establish, namely

i. the policy alleged to be discriminatory corresponds to a real need on the part of the employer;

ii. that the policy is appropriate with a view to achieving the employer's objective; and

iii. that the policy is 'necessary' for this purpose.

4.29 The respondent who successfully negotiates the "Hampson" test must also objectively justify the legitimate aim and show that the reasons for its imposition are sufficient to overcome any indirectly discriminatory impact. Is the PCP a proportionate means of achieving a legitimate aim.

4.30 In **MacCulloch v ICI [2008] IRLR 846**,the EAT set out he position as follows:

"(1) The burden of proof is on the respondent to establish justification: see Starmer v British Airways [2005] IRLR 862 at [31].

(2) The classic test was set out in Bilka-Kaufhaus GmbH v Weber Von Hartz (case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end" (paragraph 36). This involves the application of the proportionality principle, which is the language used in reg. 3 itself. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see Rainey v Greater Glasgow Health Board (HL) [1987] IRLR 26 per Lord Keith of Kinkel at pp.30–31

(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardys & Hansons plc v Lax [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60].

(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no "range of reasonable response" test in this context: Hardys & Hansons plc v Lax [2005] IRLR 726, CA."

Direct Race Discrimination/ Harassment

4.31 The claimant relies on the same conduct in respect of both claims which are advanced in the alternative, namely remarks alleged to have been Made by Michel Walsh on 20/21 September 2018.

4.32 Section13 of the EqA provides:

" **A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."**

4.33 The interpretation provision in the EqA at 212(1) provides:

" 'detriment' does not include conduct …...which amounts to harassment"

4.34 Section 26 of the EqA defines harassment:

" (1)A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

4.35 The Tribunal was also referred to and considered, insofar as was necessary, S23(1) EqA relating to comparators and the correct approach to the burden of proof in **Igen V Wong** [2005] IRLR 258.

Failure to Provide Written Statement of Particulars

4.36 Section 1 of the Employment Rights Act 1996 ("ERA") provides for certain particulars to be given to an employee. Section 38 of the Employment Act 2002 ("EA") provides for the appropriate remedy where an employee has successfully brought a substantive claim listed in Schedule 5 to the EA which includes claims brought under Section 120 of the EqA.

Failure to Allow to be Accompanied

4.37 Section 10 ERA 1999 provides:

"(1) This section applies where a worker-

(a) Is required or invited by his employer to attend a disciplinary or grievance hearing, and

(b) Reasonably requests to be accompanied at the hearing.

5. CONCLUSIONS

5.1 The Tribunal addresses the issues identified in the LOI annexed hereto which are not reproduced in full in this section.

Issues 1.1 – 1.3: Jurisdiction

5.2 lt is common ground that the allegations of S.15 EqA contained in 1.2.4(a) of the LOI in respect of the conduct of Mr Walsh pre – dating 20 September 2018 were not submitted in time.

5.3 There was also the possibility that time jurisdictional issues arose in respect of the S.20 EqA claim. In light of our findings, this was not considered further.

5.4 We are satisfied that the claims made against Mr Walsh in respect of the criticisms alleged to have been made on 6 - 8 and 13 - 15 September 2018 fall to be considered as a chain of continuous conduct culminating with the conduct complained of on 20 - 22 September 2018. The latter claims have been brought timeously. We so conclude having regard to the guidance in **Hendricks** and **Lyfar (**op cit).

5.5 Had we not so concluded, we do not find that it would have been just and equitable to extend time. The claimant simply did not adduce any substantial or persuasive evidence that explained the delay such that the strict time limits ought not to apply. Some brief evidence was adduced in her oral testimony in chief. The claimant's witness statement was notably lacking in evidence to support a just and equitable extension. The impact statement [42-48] did not, unsurprisingly, directly address the issue and was of little assistance. Further the claimant accepted in cross -

examination that she was able to and could access relevant information at material times.

Issue 1.2.1: Knowledge of Disability

5.6 We resolved the dispute of fact as regards the 141 number by accepting that the respondent's account was to be preferred and that it was not communicated to the claimant by writing it up on a whiteboard at the claimant's induction by Amanda Smith. It follows that we reject the suggestion that the claimant was told to use the number to contact the respondent in respect of lateness, absence or other significant matters. We accepted the respondent's case that it became aware of the text only after the claimant's dismissal as set out above.

5.7 The consequence of that finding of fact is that the respondent did not have actual knowledge of the claimant's disability as at 30 August 2018.

5.8 It is not for the Tribunal to speculate as to how the claimant acquired the 141 number and came to enter it in her phone as "Amanda Tesco" . A number of possibilities were canvassed in the evidence. The Tribunal does not need to determine that issue and neither is it necessary for us to do so given our findings.

5.9 The Tribunal further concludes that the respondent was not fixed with constructive knowledge of the claimant's disability by virtue of the text sent on 30 August 2018. On the facts as we have found them, there was no reason for the respondent to have been monitoring the telephone.

5.10 Insofar as it is argued that the respondent should have been on notice as a result of the claimant's general conduct at work, that

is addressed below when considering the discussion between the claimant and Mr Walsh that took place on the 20- 21 September 2018 shift, to which we now turn.

5.11 From the written submissions and the way that the case was advanced by Mr Gordon in oral submissions, no case of actual knowledge was advanced. For the avoidance of doubt, we would have found that the respondent did not have actual knowledge in consequence of the 20 - 21 September 2018 exchange. The respondent did not know at that stage:

1. the nature of the impairment
2. that it had a substantial adverse effect on day-to-day activities; and that
3. it was long-term or likely to be long-term.

5. 12 The claimant's case is that that discussion should have provoked what are alleged to be reasonable inquiries relative to the size and resources available of the respondent – see **A V Z** (op cit) and that the respondent failed to ask the right questions or take necessary reasonable steps to better inform itself of the claimant's condition and disability. Thus it is said that the respondent could be, or could have been, expected to know of the claimant's disability.

5.13 We reject that submission. We do so for the following reasons taken individually and cumulatively:

(i) **Department for Work and Pensions v Hall** (op cit) is distinguishable on the facts. In **Hall,** the DWP were aware of a deal of unusual behaviour by the employee and it was aware of a claim for a disabled person's tax credit. The

high point for the claimant here is that she adduced some evidence, not developed or particularised, as follows:

"I cried throughout three shifts, and no managers took an interest in what was going on with me, despite this all happening in front of the other staff members and customers."

When considered with the claimant's contemporaneous explanations about her inability to complete her assigned replenishment during a shift which were unrelated to disability, the respondent was not put on notice in the manner suggested by the claimant. The remark by the claimant about a disability which was affecting her work at the end of the conversation on 2- 21 September has to be viewed in context.

(ii) Additionally to (i), no reluctance to discuss matters with Mr Walsh was expressed at the time;

(iii) In the case of **A v Z**, a finding of constructive knowledge was overturned even though the employer was aware of at least 2 GP certificates indicating mental health issues. The EAT found that further inquiries would have been unlikely to elicit further information on the facts of that case. Notwithstanding there was no such warning signal as a medical certificate in the claimant's case;

(iv) We accept the respondent's submission that merely stating "I have a disability" provides no indication of a mental health impairment. As argued by the respondent, that was merely one of a vast array of disabilities being referred to. This matter was expressly referred to in exchanges between the tribunal and Mr Gordon. The Tribunal does not agree that the communication of two

bare assertions, namely a disability and a related difficulty with completing her assigned tasks should have triggered the invocation of the respondent's procedures and policies relating to mental health;

(v) The claimant gave a number of exculpatory explanations regarding her work rate to Mr Walsh at the time which were unrelated to her disability;

(vi) On the facts we have found them, we consider it to be a counsel of perfection to require more of the respondent to have done more than Mr Walsh did. He made inquiries of all the relevant managers and no further information was forthcoming;

(vii) Whilst it was the claimant's right not to reveal details of her disability to Mr Walsh, we do not accept that the respondent failed to ask all the right questions.

5.14 Accordingly, we are satisfied that the respondent did not have constructive knowledge of the claimants condition sufficient to satisfy the requirements of section 15(2) EqA, namely that the claimant:

(i) suffered an impediment to her physical or mental health, or

(ii) that that impairment had a substantial; and

(c) long-term effect.

see **Donelien v Liberata UK Ltd** (2014) UKEAT/0297/14 and **Pnaiser v NHS England** [2016] IRLR 170 EAT

Issues 1.2.2 – 1.2.8

5.15 It follows from our conclusion that these issues no longer require to be determined by the Tribunal.

5.16 We have already decided that the factual basis of the allegations in respect of Issue 1.2.4 have not been made out on the evidence.

5.17 We go on to conclude that the evidence adduced before us has not established a link between the claimant's disability and her ability to carry out her assigned role or her work rate. This would have been relevant as to whether the instances of "Something arising" particularised at § 1.2.3 of the LOI relating to work rate and ability to complete tasks timeously did in fact arise from the claimant's disability.

Issues 1.3 .1- 1.3.6: Reasonable adjustments

5.18 The claimant withdrew reliance on the PCPs set out at §1.3.3 (a), (c) and (d) in closing submissions and advanced this claim only on (b), a policy of expecting and requiring employees acting as customer assistants to complete a certain amount of work in a particular time period.

5.19 Our determination in respect of the issue of knowledge of the respondent is sufficient to dispose of this claim.

5.20 If we had needed to determine the issue of substantial disadvantage identified at § 1.3.4 (b), we have already indicated that we do not accept that an evidential link between the claimant's disability and work rate has been established.

5.21 Nor do we accept that the respondent had knowledge or ought to have had knowledge of any substantial disadvantage if such had been established (§1.3.5 of the LOI)

Issues 1.4.1 – 1.4.6: Indirect Discrimination

5.22 The respondent did apply the PCP at § 1.3.3(b) of the LOI so that the question posed on the LOI at § 1.4.1 is answered in the affirmative.

5.23 As above indicated, we do not accept that that PCP put the claimant at a particular disadvantage in comparison to others so that the answer to the questions at §§ 1.4.2 and 1.4.3 of the LOI is no.

5.24 The remaining issues under Issue 1.4 fall away accordingly.

Issues 1.5 and 1.6: Harassment/Direct discrimination

5.25 These claims fail on the facts as the respondent's account has been accepted in respect of the matters alleged under these claims.

Issue 3 : Failure to provide written statement particulars

5.26 This claim also fails as the claimant has not succeeded in any of her discrimination claims.

Issue 4: Failure to allow claimant to be accompanied

5.27 This was a novel claim advanced on the claimant's behalf. The novelty arising from the fact that the meeting/ occasion on which the claimant was handed her notice of termination did not seem to fit into the category of what is normally understood to be a disciplinary or capability hearing.

5.28 Mr Gordon candidly accepted that he could find no authority or statutory assistance on the definition of a "disciplinary hearing". Instead he drew comfort from passages in the ACAS code on disciplinary grievance procedures.

5.29 Ultimately, we were not persuaded that the occasion on 27 September 2018 at which the claim was handed her notice

termination was a disciplinary hearing within the meaning of section 10 of the employment relations act 1999.

5.30 Accordingly, the claims all fail and are dismissed.

Employment Judge Algazy QC
29 October 2021

ANNEX

1. **DISCRIMINATION**

1.1 **Jurisdiction**

1.1.1 Was the claim form submitted more than 3 months after some of the conduct complained of (taking into account any 'stop the clock days' as a result of ACAS Early Conciliation)?

1.1.2 If so, did that conduct form part of a chain of continuous conduct which ended within 3 months of the claim form being submitted?

1.1.3 If not, would it be just and equitable for the Tribunal to hear that part of the claim which relates to the conduct which occurred more than 3 months before the claim was submitted?

1.2 **Discrimination arising from disability (section 15 Equality Act 2010)**

1.2.1 Did the Respondent know/Should the Respondent reasonably have been expected to know that the Claimant had a disability? If yes. when ought the Respondent to have been aware of the Claimant's disability?

1.2.2 Was the Claimant treated unfavourably because of something arising as a consequence of their disability?

1.2.3 The Claimant relies on the following as the 'something arising':

(a) Being embarrassed when the Claimant's difficulties as a result of her disability are raised including becoming anxious when challenged;

(b) The Claimant's impaired or limited performance resulting in disciplinary action, and/or a negative view of the Claimant's capability;

(c) The Claimant's inability to work at the speed/rate expected by the Respondent particularly with reference to stacking shelves;

(d) The Claimant's sensitivity to criticism;

(e) The Claimant's severe stress, particularly when subject to disciplinary action or when criticised;

(f) The Claimant's lack of motivation, and slow performance at work;

(g) The Claimant struggling to deal with day to day life, being depressed and upset, being overwhelmed and anxious, lack of confidence, inability to cope emotionally, feeling intimidated.

1.2.4 What is the unfavourable treatment alleged? Did it take place? The unfavourable treatment relied on by the Claimant is:

(a) Mick Walsh criticising the Claimant on 6-8th, 13-15th and 20th-22nd September 2018, including complaining loudly in the presence of other team members and customers that she was doing things wrong;

(b) On 20th-21st September 2018, Mick Walsh criticising the Claimant, including calling the Claimant to one side and saying that he could no longer tolerate the Claimant failing to meet his expectations and telling her that he deemed her incapable of doing the work;

(c) On 27 September 2018, Mick Walsh calling the Claimant into his office and handing her a letter giving her notice that her contract would finish on 4 October 2018;

(d) The Respondent's decision to dismiss the Claimant;

1.2.5 If so, what was the reason for that treatment?

1.2.6 In treating the Claimant in that way what aim was the Respondent seeking to achieve? The Respondent asserts that its legitimate aim was ensuring all colleagues are able to meet expected performance standards in order to deliver an efficient and effective customer shopping experience.

1.2.7 Was that aim legitimate?

1.2.8 Was the treatment a proportionate means of achieving that aim or was there a less discriminatory way of achieving it?

1.3 **Reasonable adjustments (sections 20 and 21 Equality Act 2010)**

1.3.1 Did the Respondent know/should the Respondent reasonably have been expected to know that the Claimant had a disability? If yes, when ought the Respondent to have been aware of the Claimant's disability?

1.3.2 Did the Respondent apply a provision, criterion, or practice?

1.3.3 The Claimant asserts the Respondent applied the following provision, condition or practice ("PCP"):

(a) The Respondent's capability policy;

(b) A policy of expecting and requiring employees acting as customer assistants to complete a certain amount of work in a particular time period;

(c) The Respondent's disciplinary policy;

(d) A policy of requiring customer assistants to work normal working hours.

1.3.4 If so, did that PCP place the Claimant at a substantial disadvantage in comparison to employees who were not disabled? The Claimant asserts that she was put to the following substantial disadvantages:

(a) As to 1.3.4(a) and 1.3.4(c) those with anxiety and depression are placed at a disadvantage by not being able to comply with the capability and disciplinary policy and subject to disciplinary proceedings and/or dismissed. The Claimant was placed at said disadvantages when she was not able to perform to the capability standard of R and criticised, disciplined, and dismissed for the same;

(b) As to 1.3.4(b) it would likely put individuals with anxiety and depression at a particular disadvantage in that the expectation to complete a certain amount of work within a particular time period would mean disabled staff would be more likely to be assessed negatively or their performance impaired and be more likely to be subject to disciplinary action and/or dismissed. The Claimant was placed at this particular disadvantage in that her inability to comply with the PCP led to the Respondent to assess the Claimant's capability negatively, to criticise the Claimant for the same and to dismiss the Claimant;

(c) As to 1.3.4(d) it would put individuals with anxiety and depression at a particular disadvantage in that the need to have flexible hours and/or time to recover when their symptoms flared up would mean they would be unable to fulfil their working hour requirements, or to work effectively working fixed hours. Compliance with the PCP would make it more likely that their performance would be impaired and their capability viewed negatively and thus be more likely to be dismissed. Similarly, any failure to comply with the

PCP would likely lead to disciplinary action and/or dismissal. The Claimant was placed at this particular disadvantage in that her inability to work reduced hours, or flexible hours led to the Respondent assessing her capability negatively and the Claimant's dismissal with effect from 4 October 2018.

1.3.5 If so, did the Respondent have knowledge of the substantial disadvantage/ ought the Respondent to have known about the substantial disadvantage?

1.3.6 Did the Respondent fail to make reasonable adjustments such as the following:

(a) Deferring an assessment of the Claimant's capability and/or any decision to discipline/dismiss the Claimant until the Claimant could be assessed by Occupational Health and/or a medical professional and any adjustments could be implemented;

(b) Adjust the Claimant's working hours in the terms recommended by Occupational Health and/or a qualified medical professional;

(c) Introduce stress risk assessments and regular welfare meetings with the Claimant prior to taking any decision to dismiss the Claimant;

(d) Ensure the Claimant had the opportunity to work with additional support from line managers or a buddy before making decisions to dismiss the Claimant;

(e) Changing break times or more frequent breaks;

(f) Giving the Claimant more praise or positive feedback;

(g) Encouraging resilience training;

(h) On the job support – such as a support worker;

(i) Permission to take time out if the Claimant became distressed;

(j) Ensure the Claimant had the opportunity to work with the adjustments recommended by Occupation Health and/or a medical professional before making decisions to dismiss the Claimant;

(k) Move the Claimant to a different role such as the Checkout Team and/or adjust the Claimant's role in the night replenishment team instead of taking the decision to dismiss the Claimant.

1.4 **Indirect discrimination-disability (section 19 Equality Act 2010)**

1.4.1 Did the Respondent impose a PCP? The PCPs relied on by the Claimant are those set out above.

1.4.2 Did the PCP(s) put the Claimant at a particular disadvantage in comparison to others?

1.4.3 Was the Claimant disadvantaged by the PCP(s) as set out above.

1.4.4 What was the reason for imposing the PCP?

1.4.5 Was the aim of the PCP legitimate?

1.4.6 Was the PCP a proportionate means of achieving that aim or was there a less discriminatory way of achieving it?

1.5 **Direct race discrimination**

1.5.1 The Claimant's comparator is a hypothetical white British woman working as a customer assistant.

1.5.2 Was the Claimant treated less favourably than the comparator was or would have been? The Claimant asserts that the less favourable treatment was that she was told on 20th or 21st September 2018 by Mick Walsh that if the Claimant had worked in retail in Poland before, it must have been a tiny shop even if it was Netto and that Poland is 'only good for stag nights'.

1.5.3 If so, was the reason for the treatment the Claimant's race, colour, nationality or ethnic origin or perceived race, colour, nationality or ethnic origin?

1.6 **Harassment**

1.6.1 Was there unwanted conduct related to race? The unwanted conduct relied on is the Claimant being told on 20th or 21st September 2018 by Mick Walsh that if the Claimant had worked in retail in Poland before, it must have been a tiny shop even if it was Netto and that Poland is 'only good for stag nights'.

1.6.2 Did that conduct have the purpose or effect of:

(a) violating the Claimant's dignity, or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

2. **REMEDY- DISCRIMINATION**

2.1 If the Claimant is successful, what is the appropriate remedy to award, on a just and equitable basis?

3. **FAILURE TO PROVIDE WRITTEN STATEMENT OF PARTICULARS (section 38 Employment Act 2002)**

3.1 Did the Claimant work for the Respondent for one month or more?

3.2 If so, did the Respondent provide the Claimant, within 2 months of her employment commencing, with a written statement of particulars containing the information required in section 1 of the Employment Rights Act 1996?

3.3 Has the Claimant brought a claim listed in Schedule 5 of the Employment Act 2002?

3.4 Has the Tribunal found in favour of the Claimant in respect of such a claim but made no award, or made an award in respect of such a claim and when the proceedings were begun the Respondent was in breach of its duty under section 1 ERA 1996 to provide a written statement?

3.5 If so, are there any exception circumstances which would make issuing an award unjust or inequitable?

3.6 If not, in addition to the 2 weeks' capped pay to which the Claimant is entitled by way of an award/the enhancement to an existing award, should the Tribunal make an award of a further 2 weeks' capped pay on the basis that it is just and equitable to do so?

4. **FAILURE TO ALLOW CLAIMANT TO BE ACCOMPANIED (SECTION 10 EMPLOYMENT RELATIONS ACT 1999)**

4.1 Did the Respondent fail to allow the Claimant to be accompanied to a disciplinary and/or capability hearing.

4.2 If so, what remedy is appropriate?