EMPLOYMENT TRIBUNALS

Claimants: **Ms S. Harvey**

Respondents: **Iceland Foods Ltd**

Heard at: **East London Hearing Centre (by in person hearing)**

On: **28 and 29 July and (in chambers) 22 September 2022**

Before: **Employment Judge Hallen,**
Members: **Mr. B. Wakefield**
Mr. J. Webb

Representation

Claimant: In person

Respondent: Mr. R. Hignett- Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that: -

1. **The Tribunal has jurisdiction to hear the Claimant's claim under section 123 of the Equality Act 2010.**

2. **The Claimant's claim for disability discrimination under sections 13 and 26 are dismissed as the Respondent had no actual or constructive knowledge of her disability under section 15 (2) of the Equality Act 2010.**

REASONS

Background and Issues

1. The Claimant was a part time Sales Assistant working for the Respondent at the Leytonstone store in the period from 10 November 2019 until 19 September 2020. The Claimant went into self-isolation on 10 April 2020 as a consequence of the COVID pandemic after working for a period of just under five months. Within a few days of isolating, the

Claimant was advised by her primary care provider to shield for a period of 12 weeks due to a pre-existing medical condition. She did not return to work until 26 August 2020. When she returned to work, she undertook seven shifts before resigning from her employment on 13 September 2020.

2. By her Claim Form to the Employment Tribunal dated 21 October 2020, the Claimant brought claims of disability discrimination. The Claimants claims were noted to lack particularity at a preliminary hearing before Employment Judge Tobin on 4 March 2021. He ordered the Claimant to provide further and better particulars and to serve a disability impact statement. He set the case down for an open preliminary hearing to determine various issues. Prior to the further preliminary hearing ordered by the Employment Judge Tobin, the Respondent conceded that the Claimant was disabled as defined by the Equality Act as she had Crohn's disease, the Claimant submitted further and better particulars and an application was made by the Claimant to amend her claim to include a claim for race discrimination and a claim relating to a failure on the Respondent's part to make reasonable adjustments contrary to section 20 and 21 of the Equality Act. At the further preliminary hearing on 5 October 2021, Employment Judge Russell made a number of determinations. Those determinations had the effect of whittling down the issues in the case to those listed below in paragraph 3. The Claimant was not permitted to amend her claim to include race discrimination or in respect of a claim for reasonable adjustments due to her disability under the Equality Act.

3. The first issue for us was to consider the question of jurisdiction. Under section 123 of the Equality Act 2010, we had to consider whether the acts of harassment and direct disability discrimination cited by the Claimant below amounted to conduct extending over a period of time so as to be treated as done at the end of that period. We had to ask ourselves whether the acts detailed by the Claimant below were single acts or did they constitute an act extending over a period so as to bring the claim for disability discrimination and harassment within time. If we decided that the claim was within time, we had to determine whether the Respondent had actual or constructive knowledge of the Claimants disability (Crohn's disease) and if so from when pursuant to section 15(2) of the Equality Act 2010. If we determined that the Respondent did have knowledge of disability, we had to determine whether the claim of harassment pursuant to section 26 of the Equality Act was made out. The Claimant cited three examples of harassment. We had to determine whether the Respondent engaged in the following conduct: During a shift in the week of 5 April 2020, Ms Akther or Ms Dave asked the Claimant on multiple occasions to work on the checkout even after she declined (The claimant had allegedly informed the store manager Mr Thawoos that because her long-term health condition made her vulnerable to infection she should not be exposed to shoppers at the till). On 16 April 2020, when the Claimant attended this store as a customer, Ms Akhter made any of the following remarks, "you look well- actually there is nothing wrong with you is there?- are you not risking your life to be in here then since you are vulnerable?"; finally between 26 August and 18 September 2020, the duty manager Ms Kashif asked the Claimant about her health, operation and post operation recovery in front of a more junior temporary member of staff. We had to ask ourselves was the conduct cited above related to the Claimant's disability and if so did it have the purpose or effect of violating her dignity or creating a hostile intimidating working environment. With respect to direct discrimination contrary to section 15, we had to determine whether the Respondent treated the Claimant less favourably when the Claimant returned to work at the store between 26 August and 18 September 2020 when the duty manager, Ms Kashif asked the Claimant about her health, operation and post operation recovery. We had to determine that if this occurred did this amount to less favourable

treatment compared with the treatment a hypothetical nondisabled comparator would have received on the basis that it breached the Claimant's confidentiality. If so, was the less favourable treatment because of the Claimant's disability? At the beginning of the hearing, although the Claimant specifically related the incident in a response to further and better particulars involving Ms Kashif as occurring on 26 August 2020, she argued that this was not a specific date, and she could not remember the specific date but that the incident occurred between that date and 18 September 2020. We allowed her to vary the date even though she had previously agreed that the date of the incident was 26 August 2020.

4. The Tribunal had an agreed bundle of documents in front of it made up of 221 pages. The Claimant produced a supplementary bundle of documents made up of WhatsApp messages of 7 pages. We had written closing submissions from the parties as well as a chronology and cast of characters prepared by the Respondent. The Claimant produced a witness statement made up of 30 paragraphs along with a disability impact statement made up of 15 pages. The Respondent called three live witnesses, Ms. Mamoona Kashif (Mona) (Duty Manager) who prepared a written witness statement made up of 12 paragraphs, Ms Shamima Akhter (Zara) (Supervisor) who prepared a written witness statement made up of 23 paragraphs and Mr Godwin Agbo (Deputy Store Manager) who prepared a witness statement made up of 11 paragraphs. We were also referred to a witness statement of Ms Ragini Dave (Supervisor) who could not attend to give oral evidence. Whilst we read the statement, we placed little weight on it as she did not attend to give oral evidence under oath. We noted that the Store Manager, Mr Nafraz Thawoos did not attend the hearing because he had left the Respondent and efforts to contact him by the Respondent proved unsuccessful. The Respondent was not able to provide a written statement for him. The Claimant and the Respondent's' witnesses gave oral evidence and were subject to cross examination and questions from the Tribunal. At the end of the two-day hearing, there was no time to consider the case, so we reserved our judgement and met on 22 September in chambers to reach a decision as set out in this reserved judgment.

Facts

5. In respect of the evidence that we heard at the hearing, we preferred the evidence of the Respondent over that of the Claimant especially when it came to whether the Respondent had actual or constructive knowledge of the Claimant's disability. The Respondent's case was that it did not have actual or constructive knowledge of the Claimant's disability. The Claimant gave evidence to us in oral testimony maintaining that the Respondent knew from the commencement of her employment that she was disabled with Crohn's disease. The Respondent disputed that it had actual or constructive knowledge of the Claimant's disability during the course of her employment from 10 November 2019 until 19 September 2020. After considering the evidence in the round, we noted that the bundle of documents produced for this hearing contained medical evidence related to the Claimant's disability and the operation that she had whilst she was away from work from 10 April 2020 to 26 August 2020. These documents produced by the Claimant during the discovery process made-up 36 pages of the bundle of documents. However, we noted that the Claimant disclosed none of this medical evidence to the Respondent whilst she worked for it. We noted that the Claimant was an intelligent young person undertaking a university degree. We would have expected the Claimant to have disclosed such voluminous documentation to the Respondent during her employment especially as she maintained that the Respondent was aware of her disability from the outset. We would especially have expected this at the time that the Claimant was shielding and was due to go into hospital for an operation related to her condition. However, she did not disclose any of this

documentation which was pertinent and relevant to both her disability and to the operation that she had whilst she was shielding. The fact that she did not do so, cast doubt upon the oral evidence that she gave to us of meetings that she alleged occurred with the Respondent's witnesses during which she said she had informed them of her disability. Consequently, we doubted that such meetings did occur in the way that the Claimant suggested. We make further reference to this below.

6. The Respondent is a large High Street supermarket employing 25,000 employees nationally. At the Leytonstone store, there were a total of 35 people working at the time of the Claimant's employment which included store clerks, cashier's, home delivery drivers, online pickers, and cleaners. The Claimant was a part time Sales Assistant working for the Respondent at the Leytonstone store in the period from 10 November 2019 until 19 September 2020. She resigned from her employment by letter dated 13 September 2020 by giving one weeks' notice expiring on 19 September 2020.

7. The letter of resignation from the Claimant was relatively short and simply gave the requisite notice of one week's termination of employment. There was no reference made by the Claimant to disability discrimination or harassment due to disability which was the subject matter of the claim that the Claimant was currently making to this Tribunal. As we have said, above, the Claimant was an articulate and intelligent person who had recently undergone university education. We would have expected her to reference the subject matter of the disability discrimination that she now said occurred to her in her letter of resignation. However, there was no such reference. We find that the likely reason for the lack of any reference to disability discrimination was that the Claimant had obtained alternative employment with another employer that was more preferential for her in the fashion/merchandising industry, and this was the reason for her departure rather than any disability discrimination that she is now saying she was subject to from the Respondent. We noted that her alternative employment started almost immediately after her employment with the Respondent ended as was evident from her schedule of loss which was limited to two weeks loss of wages from 19 September 2020 to 3 October 2020. The salary in the new job was evidently higher than what she was earning with the Respondent as she is not claiming any ongoing loss of wages. It was also clear from her disclosure of documents that she was looking for another job in merchandising/fashion from as early as January 2020. Furthermore, the Claimant spoke to Ms Kashif sometime in early April 2020, when she said did not want to work for the Respondent anymore because she had a 'better job' to go to.

8. The Claimant did lodge a grievance letter dated 13 October 2020 referencing some of the issues raised in her subsequent claim to the Employment Tribunal. However, this was a month after her resignation and as we state above, we found that the real reason for her resignation was that she had a better job to go to.

9. The Respondent runs an online human resource system called 'Nexus' to record sickness absence at its stores. The only individuals who have access to the HR Nexus records for each member of staff were the Store Managers and Senior Supervisors. If an employee had a disability such as Crohn's disease, that information would be uploaded onto the Respondent's HR Nexus system via the Store Manager or Deputy Store Manager. The Respondent's human resources department would become aware of the disability and advise the managers as to how they should deal with a particular employee's disability both in terms of reasonable adjustments and sickness absences.

10. The Respondent gave evidence to the Tribunal which was accepted that the Claimant did not make the Store Manager (Mr. Thawoos) or Deputy Store Manager (Mr. Agbo) aware of her Crohn's disease so that it could be uploaded to the HR Nexus system. One particular example of this was when the Claimant provided her shielding letter dated 10 April 2020 to the Respondent which was passed onto Mr Agbo, the Deputy Store Manager, when he arrived on shift. He said that there was no reference to the Claimant's Crohn's disease. The letter simply stated that she was required to 'shield' during the Covid 19 pandemic. He gave evidence, which was accepted that during the pandemic, whenever the store had to deal with employees who had to 'shield', it was normal practise not to make detailed inquiries as to the reason for the shielding if an employee said they were required to 'shield' due to an underlying medical condition. This was accepted at face value and any medical evidence provided which was usually limited to the shielding letter would be uploaded to the Respondent's Nexus system. If the employee volunteered that they had a disability, an additional note would be made to the Nexus system for guidance to be provided to the manager in question so that HR advice could be obtained. Mr Agbo gave evidence which the Tribunal accepted that the Claimant did not tell him or Mr Thawoos, the Store Manager at any time during her employment that she was disabled. He had close contact with Mr Thawoos and would have expected him to have mentioned this to him. Furthermore, if she had done so, he would have sought particular and detailed advice from the Respondent's human resources department as to how to proceed and what adjustments to make.

11. As we have said in paragraph 1, the Respondent denied that between 10 November 2019 and 18 September 2020, it had actual or constructive knowledge of the Claimants disability. All three of the Respondents live witnesses gave evidence that the Claimant did not at any stage during the course of her employment inform them of her disability. The Claimant, to the contrary, gave evidence that the Respondent was well aware of her condition as she had reported it to them as the reason for her absence on 15 December 2019. We were left with a direct conflict of evidence on whether the Respondent had actual knowledge of the Claimant's disability during the course of her employment with them. To inform us of whether the Claimant had told the Respondent of her disability, we considered the documents that she actually provided to the Respondent during the course of her employment. We have already commented above her failure to provide the Respondent with specific medical documents that were in her possession at the relevant time and were only disclosed in the discovery process of these proceedings in paragraph 1 so we will not repeat ourselves here. However, the Claimant stated in her evidence that the Respondent was well aware of her disability as she had as she reported it to them firstly as the reason for her absence on 15 December 2019.

12. When we considered the documentary evidence of this as the reason for her absence in the bundle of documents, we noted that the Claimant did not tell the Respondent of her disability as the reason for her absence as she said she did. Rather, the entries that the Respondent had for the Claimant's absence on 15, 16 and 18 December 2019 were described as unauthorised absence. Furthermore, the WhatsApp message to Mr Thawoos from the Claimant on 15 December 2020 confirmed that she apologised for her absence on 15 December as she had to visit accident and emergency at the hospital for a medical emergency.

13. We also noted that prior to commencement of her employment, the Claimant submitted detailed applications for employment made-up of nine pages [she applied for three different posts]. In these application forms, we noted that there was no record of the

Claimant needing any reasonable adjustments with regard to her disability for her employment with the Respondent and none were recorded on her personnel file.

14. With regard to the Claimant's three-day absence commencing on 15 March 2020, the reason stated and recorded by the Respondent on its records was cold/flu as shown in the bundle of documents. With regard to her self-isolation due to the Covid pandemic from 7 April to 26 August 2020, the Respondent's absence records showed that the Claimant was self-isolating with an existing medical condition and there was no reference to her disability. In relation to the document submitted by the Claimant from her General Practitioner dated 10 April 2020 in which she was identified as at risk from severe illness if she caught coronavirus, there was no reference to her disability. The document simply stated that she needed to self-isolate.

15. The documents in the bundle that consisted of a selection of WhatsApp messages from January to February 2020 mainly related to the rotas that the Claimant could work. There was no reference in these messages of the Claimant's disability. To the contrary and contradicting the evidence of the Claimant, these messages showed that the Respondent was flexible in adjusting her shifts taking into account her existing commitments as a university student. With regard to her sickness absence from 15 March for three days, the Claimant referenced being called for a hospital examination so that the absence should not be described as unauthorised, but she did not make any reference to her disability. The WhatsApp message of 28 March 2020 to Mr Thawoos (which was 10 days before she was required to self-isolate from 10 April), confirmed that she was happy to work on stock rather than the cash tills on her next shift and that she had underlying health issues which made her vulnerable to Covid. However, she did not reference her disability in this message.

16. The Claimant submitted two sickness certificates to Mr Agbo on 9 and 15 July 2020. These certificates supported her continued absence whilst self-isolating and referred to post op and ileo-caecal resection, but they made no reference to the Claimant's disability. The Tribunal accepted the evidence of Mr Agbo that he did not know the specific reason for the Claimant's absence and had no idea what ileo-caecal resection meant.

17. The Claimant in her evidence referenced that Mr Thawoos treated her badly due to her disability-related absence in March 2020 and she made a complaint to the Respondent's human resource's department. The Tribunal carefully considered the note of this complaint in the bundle. Although the Claimant suggested that the Respondent was aware of her disability at this time, the note of the discussion that the Claimant had with the human resources professional on 16 March 2020 made no reference to the Claimant's disability. Although the note referred to Mr Thawoos and Ms Akhter and others at the store ignoring her and criticising the clothes that she wore at the store whilst on shift as well as her not receiving her contractual hours and marking down certain hours as unauthorised absence, she did not mention disability discrimination or harassment. Rather, she stated that she felt that she was not undertaking the job that she applied for and that she would like to transfer to another store. The advisor in the note recommended that she sat down with her manager to discuss how she felt and if she was unable to resolve the issues to escalate the matter by way of the Respondent's grievance procedure. The Claimant did not subsequently escalate her concerns during the course of her service with the Respondent by way of the grievance procedure.

18. In the absence of any reference to her disability in the contemporaneous documents, we treated what the Claimant said that she orally told the Respondent's witnesses with

circumspection. For example, she testified that she had an agreement with Mr. Thawoos that she would not work on checkouts or in any customer-facing roles in the middle of March 2020. We saw no evidence of this agreement. Rather, we saw evidence of the Respondent working flexibly with the Claimant due to her university commitments and the part-time nature of her role. The Claimant asserted that Ms Kashif and Ms Akhter often commented on the bulge under her shirt where she had placed a hot water bottle to help with her symptoms and poked fun at her which she said they found funny. Both of these witnesses denied having seen any bulge under the Claimant's shirt or poking fun of her. The Tribunal preferred the evidence of Ms Kashif and Ms Akhter.

19. The Claimant suggested that on 6 April 2020, she was asked to work on the cash tills five times by Ms Dave and Ms Akhter despite her alleged agreement with Mr. Thawoos that she would not be required to work on tills due to her disability. We did not accept the Claimant's evidence. Rather, we noted that the Respondent as a food store was open during the pandemic and all of the Respondent's staff were required to be flexible and undertake a variety of roles. On 5 and 6 April, Ms Akhter gave evidence which we accepted that the Claimant undertook most of her shifts in non-customer facing duties such as on-line picking. We noted that the Claimant did undertake a variety of roles including client-facing roles on the cash tills as well as internet picking roles which did not involve contact with members of the public. We noted that this would have been usual during the early days of the pandemic for businesses such as the Respondents that were exempt from closure due to the pandemic and which were open to the general public. We accepted the Respondent's evidence that that most of its staff working in the store at this time would have been expected to be flexible in the roles they undertook.

20. The Claimant stated that she visited the store on 15 April 2020 to do some shopping whilst she had been self-isolating and not required to work. At this time, she alleged that she was taunted by Ms Akhter who was working on the cash till. The Claimant said that Ms Akhter had said, 'there is nothing wrong with you is there'? She also said that Ms Akhter said during this conversation 'are you not risking your life to be here then, since you are vulnerable'? The Claimant stated that she was a vulnerable person and that Ms Akhter's conduct was degrading, rude and dismissive and related to her disability. She also found this to be belittling of her health. Ms Akhter stated that she did not say any of this and indeed was not working on the till on that day. If she said anything to the Claimant, it was to sympathise with her as she had recently suffered from COVID herself. The Tribunal accepted the evidence of Ms Akhter in this regard and accepted that her statement to the Claimant was to the effect that she should be resting if she was self-isolating due to Covid as she herself had suffered from COVID-19 and was aware that the Claimant was self-isolating. The Tribunal accepted Ms Akhter's evidence that she was not aware of the Claimant's disability as she was not told about it at all.

21. Upon the Claimant's return to work on 26 August, she stated that Ms Kashif, the duty manager had discussed openly and in public her health condition, her operation and her post operation recovery in front of a more junior member of staff. She cited this as an example of harassment and direct discrimination being a breach of confidentiality. Ms Kashif's evidence to the Tribunal was that on 26 August she was on holiday so could not have had any such discussion with the Claimant. We were referred to her timesheet in the bundle which showed that she was indeed on holiday on that date. Ms Kashif denied ever having such a conversation with the Claimant as not only was she on holiday on 26 August she had no further contact with the Claimant before she resigned. The Tribunal noted that the Claimant undertook only seven shifts from when she returned to work on 26 August

before she resigned on 13 September 2020. The Tribunal therefore found that the conversation between Ms Kashif and the Claimant did not take place. The Claimant in her disability impact statement also referenced having a conversation with Ms Kashif in April before she self-isolated telling Ms Kashif that she was disabled and had Crohn's disease. Ms Kashif gave evidence that she had absolutely no recollection of this conversation. We preferred the evidence of Ms Kashif that she did not speak to the Claimant about her disability. We accepted the evidence of Ms Kashif that she had no knowledge of the Claimant's disability because the Claimant did not tell her. Ms Kashif also testified, and we accepted her evidence that she was not aware of any other discussions which took place between staff at the Store regarding the Claimant's absence from 7 April to 26 August regarding her absence or the reasons for it. She was only aware that the Claimant was self-isolating as a vulnerable person at risk from Covid.

Law

Time Limits

22. Section 123 of the EQA, which specifies time limits for bringing employment discrimination claims, provides so far as relevant that:"(1) … proceedings on a complaint … 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." The language used ("such other period as the employment tribunal thinks just and equitable") gives the employment tribunal wide discretion.

23. An act will be regarded as extending over a period if an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant. The concepts of "policy, rule, practice, scheme or regime" should not be applied too literally, particularly in the context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period, **Hendricks v Metropolitan Police Commissioner 2003 IRLR 96,** see paragraphs 51-52. Where there are numerous allegations of discriminatory acts or omissions, the complainant must prove that (a), the incidents are linked to each other, and (b) that they are evidence of a "continuing discriminatory state of affairs". The focus should be on the substance of the complaints to determine whether there was an ongoing situation or continuing state of affairs as distinct from a succession of unconnected or isolated specific acts.

Knowledge of Disability

24. Whether an employer has actual or constructive knowledge of disability is determined (like the issue of disability itself) as at the material time in question – i.e. the date of the alleged discriminatory treatment (between 10 November 2019 until 19 September 2020).

25. It is not simply a question as to actual knowledge, but rather also whether the employer 'could not reasonably have been expected to know that the Claimant was disabled' whether for a claim of reasonable adjustments and / or arising from disability (s.15(2) EqA 2010 / Para 20, Sch8 EqA 2010). This is an objective question for the tribunal in light of the evidence before R at the material time.

26. An employer has a defence to a claim under S.15 EqA if it did not know that the claimant had a disability — S.15(2). This stipulates that subsection (1) does not apply if the

employer shows that it 'did not know, and could not reasonably have been expected to know' of the employee's disability.

27. The Tribunal found assistance in guidance provided by the EHRC Employment Code (i.e. COP 2011) and particular reference to the following points is made: 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"' — **para 5.14.** An employer must do 'all it can reasonably be expected to do to find out whether a person has a disability' - **Para 5.15 / 6.19** (together with the examples referenced under those Paras). Where information about a disabled people may come through different channels employers need to ensure that there is a means…for bringing that information together to make it easier for the employer to fulfil their duties under the Act – **Para 5.18.**

28. The Tribunal was assisted by the case of **A Ltd (appellant) v Z (respondent) - [2019] IRLR 952**. In paragraph 23 it is stated:-

' 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 ***City of York Council v Grosset*** **[2018] EWCA Civ 1105, [2018] IRLR 746, [2018] ICR 1492 CA** at para 39.
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> (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.
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> (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.
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> (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*** **(2016) UKEAT/0100/16, [2017] ICR 610, per His Honour Judge Richardson, citing *J v DLA Piper UK LLP* (2010) UKEAT/0263/09, [2010] IRLR 936, [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 enquiries 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) EAT/137/97, [1998] IRLR 628; *Alam v Secretary of State for the Department for Work and Pensions* (2009) UKEAT/0242/09, [2010] IRLR 283, [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

29. In **A-v- Z,** the EAT held that Section 15(2) of the Equality Act is directed at the question of the employer's knowledge: where the employer does not have actual knowledge, the question is what might it reasonably have been expected to have known. The test is not what more might have been required of the employer. The Tribunal had sought to answer the question of constructive knowledge in terms of what the employer might reasonably have been expected to do: that was, to have understood that mental health problems often carried a stigma, which discouraged people from disclosing such matters and, therefore, to have made enquiries into the Claimant's mental wellbeing. That did not answer the question as to what the employer might reasonably have been expected to know, after having made those enquiries. The Tribunal had already found as a fact that the actual knowledge of the employer fell short of knowing anything more than that the Claimant had faced a number of difficult personal circumstances and had sometimes experienced stress as a consequence. Of itself, that did nothing more than suggest that she had suffered symptoms that could be seen as unremarkable and unsurprising reactions to life events. As the Tribunal found, allowing for the difficulties that arose in relation to the disclosure of mental health problems, it might well have been better had the employer made further enquiries of the Claimant. That, however, was not the same as a finding that the employer could reasonably have been expected to know of the Claimant's disability. In light of the Tribunal's finding that the Claimant would have continued to suppress information concerning her mental health problems, the complete answer to the s 15(2) question was that even if the employer could reasonably have been expected to do more, it could not reasonably have been expected to have known of the Claimant's disability.

Conclusion and Findings

Time limits

30. As the question of time limits was one of jurisdiction, we considered it first. We reminded ourselves of the guidance in section 123 and in **Hendricks**. An act will be regarded as extending over a period if an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant. The concepts of "policy, rule, practice, scheme or regime" should not be applied too literally, particularly in the context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period. Where there are numerous allegations of discriminatory acts or omissions, the complainant must prove that (a), the incidents are linked to each other, and (b) that they are evidence of a "continuing discriminatory state of affairs". The focus should be on the substance of the complaints to determine whether there was an ongoing situation or continuing state of affairs as distinct from a succession of unconnected or isolated specific acts.

31. The Claimant submitted that the three potential acts of harassment before the Tribunal in the week of 5 April 2020, 16 April 2020 and between 26 August and 19 September 2020 were all examples of a culture of gossip amongst the management team and employees with regard to her health. The latter incident it was submitted was an example of harassment and also direct discrimination. The Respondent on the other hand submitted that the alleged conduct in respect of these incidents were discrete acts by different individuals and that there was a gap of about four months between the April allegations and the single in time allegation on 26 August 2020.

32. After considering the evidence presented at the hearing, we agreed with the Claimant that the incidents that she described as having happened to her on or around 5 April, 16 April and between 26 August and 19 September 2020, did if we found them to be proven, support her contention that there was a culture of gossip amongst the management team with regard to her health. We reminded ourselves that we should not look at the question in a literal way but consider the evidence in the round. As a consequence, we did not find that they were discrete acts as asserted by the Respondent. Therefore, we found that there was conduct which was part of a course of conduct and/or a series of similar acts which amounted to a course of conduct which bought the Claimant's claim within time pursuant to section 123 of the Equality Act. Pursuant to **Hendricks**, we found that if proven, these incidents amounted to 'a continuing discriminatory state of affairs'. Accordingly, we decided that we did have jurisdiction to hear the Claimant's claims.

Knowledge

33. We do not find that the Respondent had actual knowledge of the Claimant's disability during the course of her employment from 10 November 2019 until 19 September 2020. We did not accept the Claimant's evidence that she told the Respondent of her disability either verbally or in writing. Although the Claimant asserted that the Respondent was aware of her disability as she had explained this to the Respondent as being the reason for her sickness absence on 15 December 2019, we found no evidence in the contemporaneous documents that we reviewed that confirmed this. To the contrary, the documents that we were referred to in the bundle which were actual notes and records of the Claimant's absences taken by the Respondent in December 2019 and March 2020 did not disclose the reason for the

sickness absence. There was no suggestion made by the Claimant that these notes were fabricated by the Respondent. We were also surprised that the Claimant who had voluminous medical records dating from this period did not disclose any of these to the Respondent during the course of her employment and in particular when she was due to self-isolate in April 2020. She is an educated young person who has been dealing with her disability for a long period of time. If what she said was true, we would have expected her to disclose such medical evidence to the Respondent. She initially argued that reasonable adjustments should have been made for her which application for an amendment was refused by the tribunal at earlier interlocutory proceedings. However, we noted from her application form that she made for employment with the Respondent, that there was no reference to any reasonable adjustments that she needed for her longstanding disability.

34. We also noted that the Claimant made a complaint to the Respondent's human resource's department on 16 March 2020 complaining about unfair treatment. However, even though she said in evidence that she had by this time suffered discrimination due to her disability, the contemporaneous notes of that meeting made no reference to disability discrimination or harassment. If the Claimant was disabled and was suffering from harassment due to her disability, we would have expected to see a reference to her disability in the contemporaneous note of her discussion with the human resources department. We saw no such reference and must surmise that the Claimant did not disclose her disability to the Respondent at this stage even though she told us that by this stage she had suffered disability discrimination.

35. We accepted the evidence of the Respondent's witnesses that they were not aware of the Claimant's disability as she had not told them of it. We noted, in particular, Mr Agbo's evidence that if he or the Store Manager, Mr Thawoos had been told of the disability by the Claimant, they would have logged it on the Respondent's Nexus online system in order to seek further guidance and help from the Respondent's human resource's department on how to deal with the disability. We accepted Mr Agbo's evidence that no such log was made on the Respondent's Nexus system of the Claimant's disability. The Tribunal also noted that the Claimant was classified as a vulnerable person and was recommended to self-isolate from 10 April 2020 to 26 August 2020. She produced a letter from her General Practitioner dated 10 April 2020 which confirmed that she was someone at risk of severe illness from Covid. However, the Claimant did not tell the Respondent of her disability at this time. We noted that the Claimant was in possession of medical evidence which she subsequently disclosed as part of the discovery process. However, she voluntarily chose not to disclose such evidence to the Respondent at this time even though she was in possession of it.

36. The Claimant disclosed numerous examples of WhatsApp conversations that she had with Mr Thawoos, the store manager and Ms Akhter. However, none of these WhatsApp messages disclosed the Claimant's disability. They simply referred to absences due to hospital appointments and provided no further details. There was only one WhatsApp message that the claimant had relating to a conversation she had had with Mr Thawoos that indicated that she was vulnerable due to an underlying health condition. However, this did not disclose the nature of the Claimant's disability. For all of the above reasons, we did not find that the Respondent had actual knowledge of the Claimant's disability as she did not tell the Respondent of it.

37. As to the question of constructive knowledge, we did not find that the absences that the Claimant had prior to her self-isolation on 10 April amounted to an unusual number of absences to alert the Respondent of any underlying issue. As we have said in the facts

section of the judgement, three days absence in December were unauthorised and unexplained and three days absences in March where down to flu/cold. Although the Claimant did submit a coronavirus self-isolation letter on 10 April 2020, it merely defined her as a vulnerable person at risk of severe illness if she caught coronavirus. It did not identify her disability. Furthermore, at this time, the Tribunal was aware that coronavirus was a relatively new illness and many employees received such letters requiring them to self isolate due to risks from severe illness. The fact that they received such letters did not put the Respondent on notice to investigate any further. Pursuant to the guidance in **A-v- Z,** we find that even if the Respondent had asked the Claimant for further information, it was unlikely that the Claimant would have cooperated in the disclosure of such information relating to her disability. We find that she had extensive opportunities to disclose information about her disability but chose not to do so. We find that the likely reason for this was that the Claimant saw the part-time role with the Respondent as merely a temporary role whilst she found something better. As she told Ms Kashif, she was looking for a better job and had indeed started her search for one in January 2020. Indeed, she started such a role within two weeks of resigning from the Respondent's service. Therefore, we find that it was most likely that she would not have disclosed such information even if she had been asked by the Respondent for such information. We find that what information that the Respondent did have at the relevant time was not sufficient in our view as to amount to constructive knowledge of the Claimant's disability. This evidence simply showed that the Claimant had some small level of sickness absence which was unexplained and the details for which the Claimant did not provide to the Respondent. The reason for this was likely to have been the Claimant's desire to keep the information confidential as at the time she was looking for alternative employment and did not expect to remain working for the Respondent for a long period of time.

38. Therefore, we find that the respondent did not have constructive knowledge of the Claimant's disability such that to the respondent was aware that she was a disabled person. Her claim for disability discrimination has to be dismissed.

39. For the sake of completeness albeit we were not required to deal with the substantive aspects of the Claimant's claim under the act, we find that there was no agreement between the Store Manager and the Claimant only to work on non-customer-facing roles from the middle of March 2020. Therefore, we find that the Claimant was not harassed on 5 or 6 April 2020 by being repeatedly asked to work on the tills (if indeed she was asked to do so) because these would have been reasonable management requests. We find that the Claimant like other frontline staff working for the Respondent would have been required to be flexible and would have worked in a variety of duties during this period of time. In relation to the alleged incident on 16 April 2020 between the Claimant and Ms Akhter, we find that the Claimant was not spoken to in a derogatory or demeaning manner due to her disability. Rather, Ms Akhter as a matter of kindness asked her how she was feeling and whether she should be isolating at home rather than visiting the store to shop. The alleged incident that the Claimant stated occurred between herself and Ms Kashif from 26 August to 18 September 2020 at which Ms Kashif asked her about her health, operation and post operation recovery in front of the more junior member of staff, did not happen at all. This was because Ms Kashif was on holiday on 26 August 2020 and had no further contact with the Claimant before she resigned from her employment on 19 September 2020.

40. Accordingly, the Tribunal dismissed the Claimant's claims under the Equality Act 2010 in their entirety.

Employment Judge Hallen
Date: 3 October 2022