EMPLOYMENT TRIBUNALS

Claimant: Mr J Olpherts-Forrester

Respondent: Costco Wholesale UK Limited

Heard at: Watford Employment Tribunal

On: 18-20 September 2023 (by CVP)

Before: Employment Judge Hussain
Tribunal Member Mrs S Laurence-Doig
Tribunal Member Ms S Morgan

Representation
Claimant: Mr Dean (non-legal representative)
Respondent: Mr Gorasia (counsel)

JUDGMENT having been given on 20 September 2023 and the written judgment having been sent to the parties on 31 October 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. The claimant was employed as a Service Assistant, by the respondent, a cash and carry warehouse membership club, from 04 August 2014 at the Hayes warehouse and remains in employment. The claimant started early conciliation with ACAS on 11 April 2021 and obtained an early conciliation certificate on 12 May 2021. He presented his claim to the Employment Tribunal on 25 May 2021. The claimant made complaints of disability discrimination.

2. A preliminary hearing by video was held on 09 November 2022 by Employment Judge (EJ) Tobin, who made recommendations to narrow the issues in line with overriding objective. The draft list of issues produced by the parties' noted complaints of discrimination arising out of disability, harassment and victimisation on the same facts. The parties were encouraged to narrow the focus of the list of issues.

3. An agreed list of issues was produced by the parties where the complaints were limited to discrimination arising out of disability.

Issues

4. The list of issues was discussed with the parties and further details obtained to clarify the dates and the conduct complained of. It was agreed that the complaints of the alleged unfavourable treatment were in relation to conduct between 23 December 2020 and 18 July 2021, namely, that during this period:

    4.1 The claimant was not permitted to work his normal duties indoors without a face covering

    4.2 The claimant was expected to work outside in isolation from his colleagues

    4.3 The claimant was designated a disease risk

5. The respondent accepted that the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 and suffered from a mental impairment during the relevant period. The respondent also accepts that that the inability to wear a mask arose from the disability.

6. The respondent confirmed that it denies knowledge or constructive knowledge of the disability during the relevant period. The respondent also contended that any unfavourable treatment was a proportionate means of achieving a legitimate aim, namely to reduce the risks associated with exposure/transmission of COVID-19 by and to its employees, complying with its duty of care to provide a safe operating environment, responding appropriately to concerns being raised by employees regarding their health and safety in the workplace, ensuring its continued and efficient operation as an essential service during the COVID-19 pandemic and ensuring the proper maintenance of staffing levels during a time of unprecedented demand.

Hearing

7. The hearing was conducted by CVP over a period of 3 days. On the first day, the claimant was not represented. He confirmed that he had received legal advice, but his legal representative was unable to attend the hearing. The claimant was asked whether he would be making an application to postpone the hearing and he confirmed that he wished for the hearing to proceed. The claimant was informed that regular breaks would be taken during the course of the hearing, and he was asked whether there was any specific adjustment the Tribunal could make to accommodate any needs. He was content that the breaks would be sufficient.

8. The respondent was represented by Mr Gorasia.

9. The Tribunal had sight of a bundle of consisting of 176 PDF pages. If we refer to pages in the bundle, the page number(s) will be in square brackets (e.g. [43]). In addition, the Tribunal also considered a chronology, schedule of loss, counter schedule of loss, the list of issues, witness statements from the claimant and 3 witnesses for the respondent. Written closing

submissions were also prepared by the claimant and the respondent, which were considered.

10. The list of issues was discussed with the parties and the parties confirmed it reflected the issues in dispute. The procedure was explained to the claimant in addition to the burden and standard of proof and the issues that the Tribunal would be making a decision on.

11. The Tribunal took some time read the key documents and the claimant commenced giving sworn evidence before the lunch break. He was warned that he must not speak to anyone about the case during the lunch break as he had not completed his evidence. When the Tribunal reconvened, the claimant, after being questioned by Mr Gorasia, confirmed that he had called his representative and left a voicemail. The respondent did not seek to submit that a fair trial was no longer possible but did ask the Tribunal to consider this when assessing the credibility of the claimant. The claimant mentioned that he had a panic attack during the lunch break but was well enough to continue. The claimant's evidence was completed. The respondent's first witness, Mr Ian Pybis (General Manager), gave evidence. The claimant was informed that if a witness' evidence is not challenged in cross-examination, the Tribunal may find that the unchallenged evidence is credible and was given some assistance to put questions to Mr Pybis before his evidence was completed.

12. Before the second witness for the respondent could be called, the claimant began experiencing ill health. The claimant said that he was home alone and was not expecting anyone to return home until the end of the day. Attempts were made to ascertain the telephone number for the claimant's next of kin, but he was not well enough to communicate this. Emergency services were called by the Tribunal and the matter adjourned to the following day. The clerk remained with the claimant in the CVP room until paramedics arrived and assisted the claimant. The clerk also informed the representative for the claimant that the matter had been adjourned to the following day due the claimant's ill health.

13. The claimant's representative contacted the Tribunal in the evening providing an update stating that the claimant had been admitted to hospital and he wanted the hearing to continue in his absence. Mr Dean, also offered to attend the hearing and assist the Tribunal on behalf of the claimant.

14. On the second day, the claimant did not appear, and Mr Dean confirmed that he had spoken to the claimant earlier in the morning and his instructions remained the same. The application to proceed in absence was made on the basis that the claimant had already given his evidence, the respondent witnesses were there to establish their defence of objective justification and that any delay may be detrimental to the claimant's health, particularly as he has expressed there are unlikely to be any reasonable adjustments that could help him participate in the hearing. The respondent took a neutral position on the application.

15. After considering Rule 47 and Rule 2 of the Employment Tribunal (Rules of Procedure) 2013, the Tribunal decided it was in the interests of justice to proceed with the hearing. This was a proportionate way of dealing with the case as the claimant had given evidence and the respondent had an

opportunity to challenge his evidence by way of cross examination and a fair hearing was still possible. There were 2 witnesses for the respondent remaining and Mr Dean confirmed that he was familiar with the details of the case and offered to remain for the remainder of the hearing to put questions to the 2 witnesses. This would put the parties on a more equal footing. Further, the claimant did not wish to delay proceedings and if the matter had been adjourned there was uncertainty as to when and how the claimant could participate in future hearings. It was in both parties' interests that the proceedings were finalised without delay and there was certainty moving forward. The application to proceed in absence of the claimant was granted.

16. The Tribunal heard evidence from Mrs Sue Knowles (HR Director) and Mr Chrstopher Glasgow (General Manager). Mr Dean put questions to both witnesses on behalf of the claimant and the Tribunal also asked all of the respondent's witnesses some questions. In the afternoon on the second day, submissions were made by both parties.

17. We deliberated on our decision but were unable to complete notes that would have enabled us to give an oral judgement with reasons on the second day, and the parties were asked to return at 10:00am on the third day. We took some further time in the morning to consider our decision and delivered our judgment and reasons later in the morning. Mr Dean asked for written reasons to be provided. As we have not found for the claimant on any part of his claim, a remedy hearing will not be required.

The law

18. The statutory law relating to the claimant's claims of discrimination is contained in the Equality Act 2010 (EqA). The relevant section of the EqA is section 15 (discrimination arising from disability). The relevant provision is set out here:

> *"15.* ***Discrimination arising from disability***
> *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.*
> *The section 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."*

19. In *Secretary of State for Justice and anor v Dunn EAT 0234/16* the EAT identified the following four elements that must be made out in order for the claimant to succeed in a section 15 claim:

18.1 there must be unfavourable treatment

18.2 there must be something that arises in consequence of the claimant's disability

18.3 the unfavourable treatment must be because of (i.e., caused by) the something that arises in consequence of the disability, and

18.4 the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

20. In the case of *Pnaiser v NHS England [2016] IRLR 170* guidance was provided on the correct approach to section 15 cases:

> *"(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 ....*
> *(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 …, 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) … 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.*
> *…*
> *(i) … 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."*

21. If it has been established that the disabled person was treated unfavourably because of something arising from, or in consequence of, their disability, the next stage is to consider whether the treatment was a proportionate

means of achieving a legitimate aim. This requires (1) a legitimate aim and (2) an objective balance between the discriminatory effects of the condition and the reasonable needs of the party who applies the condition, see Balcombe LJ in *Hampson v Department of Education and Science* [1989] IRLR 69, [1989] ICR 179CA.

22. In *Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15, [2012] IRLR 601* Baroness Hale stated:

> *"It is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement … Some measures may simply be inappropriate to the aim in question … A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate …"*

23. In carrying out the relevant assessment the Tribunal '*must have regard to the business needs of the employer*' (per Singh J at para 44 *Hensman v Ministry of Defence (2014) UKEAT/0067/14, [2014] EqLR 670)* that would include having regard to the size and resources of a particular employer.

24. The first question will be whether the employer has a legitimate aim for treating the disabled person unfavourably in the way it did. If there is a legitimate aim, the next question will be whether the unfavourable treatment was a proportionate means of achieving that aim. This involves examining whether or not there were viable, less discriminatory alternative means of achieving the aim.

25. It is for the employer to prove justification. They must do so with evidence which is more than mere generalisations.

26. An employer has a defence to a claim under section 15 of the Equality Act 2010 (EqA) if it did not know or could not reasonably have been expected to know that the claimant had a disability. However, the employer cannot simply ignore evidence of disability.

27. In *A Ltd v Z UEAT/0273/18 [2019] IRLR 952* Eady J applied the following principles in determining whether the employer had requisite knowledge for section 15(2) purposes:

> *"(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 1492CA 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 (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."

28. The Equality and Human Rights Commission's Code of Practice on Employment (2011) ('the EHRC Employment Code') also makes the important point that knowledge of a disability held by an employer's agent or employee, such as an occupational health adviser, personnel officer or recruitment agent, will usually be imputed to the employer (see para 5.17).

The complaints

29. The claimant has made a claim of discrimination arising from a disability and made complaints of unfavourable treatment between 23 December 2020 and 18 July 2021, namely, that during this period:
    28.1 The claimant was not permitted to work his normal duties indoors without a face covering
    28.2 The claimant was expected to work outside in isolation from his colleagues
    28.3 The claimant was designated a disease risk

30. The respondent denies knowledge or constructive knowledge of the disability during the relevant period. The respondent also argues that any unfavourable treatment was a proportionate means of achieving a legitimate aim, namely to reduce the risks associated with exposure/transmission of COVID-19 by and to its employees, complying with its duty of care to provide a safe operating environment, responding appropriately to concerns being raised by employees regarding their health and safety in the workplace, ensuring its continued and efficient operation as an essential service during the COVID-19 pandemic and ensuring the proper maintenance of staffing levels during a time of unprecedented demand.

Finding of facts

31. All findings of fact were made on the balance of probabilities. If a matter was in dispute, we will set out the reasons why we decided to prefer one party's case over the other. If there was no dispute over a matter, we will either record that with the finding or make no comment as to the reason that a particular finding was made. We have not dealt with every single matter that was raised in evidence or the documents. We have only dealt with matters that we found relevant to the issues we have had to determine. No application was made by either side to adjourn this hearing in order to complete disclosure or obtain more documents, so we have dealt with the case on the basis of the documents produced to us and the claim as set out in the list of issues.

32. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings the Tribunal made, from which it drew its conclusions.

Undisputed Facts

33. A number of relevant facts were not disputed, not challenged or agreed by the parties. These were as follows:

    32.1 The claimant worked for the respondent from 04 August 2014 as a Service Assistant in the Hayes Warehouse and remains in employment.

    32.2 The claimant's normal working hours are from 4am till 12:30pm and he works for 38 hours per week.

    32.3 It is conceded by the respondent that the claimant was a disabled person with the meaning of section 6 of the Equality Act 2010 by

reason of his mental impairment during the relevant period, namely 23 December 2020 and 18 July 2021. It is also accepted that the claimant was unable to wear a face covering because of his mental impairment.

32.4 With effect from 27 April 2020 the respondent implemented a mandatory face covering policy [90].

32.5 The claimant complied with the face covering policies by initially wearing a mask and later wearing a visor.

32.6 The claimant reported his difficulties with wearing a face mask on 18 November 2020 [96] when he produced a letter from the GP. The GP letter stated that claimant suffered from anxiety-related issues and that wearing a face covering exacerbated this.

32.7 The claimant was exempt from wearing a face mask from 18 November 2020 after having a discussion with Mr Pybis. Although the mandatory face covering policy remained in effect, management had discretion to dispense with the requirement where staff were medically exempt, or other specific circumstances of the employee required this [4- witness statement of Mrs Knowles].

32.8 On 25 November 2020 the claimant began a period of sick absence from work until 24 December 2020 for anxiety [97-98].

32.9 On 23 December 2020 the respondent implemented a mandatory face covering policy [100] after carrying out a further risk assessment as a result of 2 further variants of Covid being identified [4- witness statement of Mrs Knowles].

32.10 When the claimant returned to work on 24 December 2020, he was told by Mr Pybis that he was not permitted to work inside the warehouse without a face covering and he returned home.

32.11 The claimant sent an email to Mr Pybis on 24 December 2020 stating that his GP had confirmed that he was unable to wear any type of face covering and that he was being discriminated against due to his mental health [113].

32.12 The claimant attended a meeting with Mr Pybis on 27 December 2020. A discussion took place where the claimant was asked to consider being allocated duties exclusively outside with strict social distancing. The claimant was also told that he would be required wear a face covering temporarily to access the toilets. The claimant declined this offer and returned home.

32.13 On 27 December 2020 the claimant sent an email from his wife's email address where he complained about the adjustments offered and raised concerns. He reiterated he was struggling with his mental health.

32.14 On 27 December 2020 Mr Pybis called the claimant to discuss the issues raised in the email and the claimant expressed that he

was being discriminated against under the Equality Act. Mr Pybis, on the same day, also advised Dominic Flanagan in an email that the claimant was declaring himself unfit due to anxiety [102].

32.15 On 30 December 2020 Mrs Knowles wrote to the claimant explaining the reasons why the policy was in place and offered adjustments. She also offered the claimant counselling to assist and overcome his concerns [106].

32.16 On 30 December 2020 the claimant responded to Mrs Knowles expressing concerns about working outside. He also sent an email to Dominic Flanagan stating that he has been signed off sick for another month, as the situation at work has caused his mental health to relapse.

32.17 On 31 December 2020 Mrs Knowles emailed the claimant responding to his concerns and offering adjustments.

32.18 On 21 January 2021 the claimant submitted a grievance complaining about disability discrimination.

32.19 The grievance was acknowledged on 25 January 2021, and the claimant was invited to a meeting with Mr Glasgow. The grievance meeting initially took place on 24 February 2021 and was reconvened on 03 March 2021. The outcome of the grievance was communicated to the claimant on 08 March 2021, dismissing the complaint.

32.20 On 13 March 2021 the claimant appealed the grievance outcome [135].

32.21 On 19 March 2021 a letter from the claimant's GP was sent to the respondent [138] which explained that the claimant was receiving support from specialist mental health services and that the wearing of a face covering provokes anxiety and panic attacks.

32.22 On 19 March 2021 a grievance appeal meeting took place and on 29 March 2021 the outcome of the grievance was communicated to the claimant, dismissing the complaint.

32.23 On 19 July 2021 the respondent revoked the mandatory face covering policy after a further risk assessment and informed the claimant that he is no longer required to wear a face covering.

32.24 The claimant remained off work with ill health.

32.25 On 29 September 2021 a report prepared by Occupational Health was completed and issued.

32.26 The claimant returned to work in August 2023.

Findings and reasons for disputed facts and issues

34. We have focused our attention on the facts in dispute that relate to the issues in the case. In considering the facts in dispute we have considered the representations made by the respondent's representative and the claimant's representative with respect to the credibility of the claimant. The claimant failed to comply with the Tribunals direction to not discuss the case with anyone during the lunch break. He initially said he had text his representative and then accepted sending a voicemail. It later transpired that he had in fact also spoken to Mr Dean. When questioned, the claimant said that he had a panic attack during the lunch break and was "jittery remembering things". Mr Dean confirmed that the claimant was distressed when he spoke to him and stated that the claimant felt that he was under pressure. We have taken into take to account the claimant's mental health difficulties and accept that he called Mr Dean in distress to receive support, rather than to deliberately breach the direction of the Tribunal. We also accept, that he was not forthcoming about this conversation as he was anxious after having suffered a panic attack during the lunch break. It also became apparent that the claimant was anxious when his health deteriorated later in the day. For these reasons, we have not considered the failure to comply with the direction, when assessing the credibility of the claimant.

Knowledge

35. Where someone does not know and could not reasonably have been expected to know that the person they treated unfavourably has a disability, that treatment will not amount to actionable discrimination.

36. In considering whether the respondent had knowledge or constructive knowledge of the disability we considered the Employment Statutory Code of Practice, which states that, 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.

37. When the face covering policy was made mandatory in April 2020, the claimant wore a face covering. Initially he wore a mask and then a visor for several months. The claimant, in his oral evidence, asserted that he informed a colleague by the name of Adam Cowell, more than once, that he was experiencing difficulties with wearing a face covering.

38. This evidence was not contained in the claim form or in his witness statement. The respondent could not fairly challenge this assertion as it had not gathered evidence from Adam Cowell, however, it is noted in the witness statement of Mr Pybis that when the claimant's records were checked in December 2020, there was no reference to anxiety and his absence record did not indicate any issues. Mrs Knowles in her oral evidence also confirmed that when she checked the records, she could see that the first time he mentioned his anxiety state was on 24 December 2020 and it was understood this was anxiety related to wearing a mask. Based on this evidence we are satisfied that respondent did not have knowledge of the disability prior to this point.

39. We find that the respondent had constructive knowledge from 30 December 2020 and our reasons are as follows:

50.1 On 18 November 2020 a letter from the claimant's GP [96] was given to Mr Pybis which explained that the claimant suffered from anxiety related issues that were exacerbated by the wearing of a mask. It is clear from this letter that the anxiety suffered was an issue separate from the issue of wearing a mask, but became worse when wearing a mask. On the same day, Mr Pybis agreed that the claimant did not need to wear a mask at work. Because the claimant did not need to wear a mask at this time, any anxiety suffered could not have been caused by this issue.

50.2 On 25 November 2020 the claimant was off sick due to "anxiety state". Mr Pybis and Mrs Knowles gave evidence that they understood that the anxiety was related to wear a mask, however, this does not follow as despite there being a mandatory face covering policy in place during the period of the sick note (25 November 2020 till 09 December 2020) the claimant had been told that he did not need to wear a mask on 18 November 2020. However, no enquiries were made by the respondent to clarify the reason for anxiety, despite the anxiety interfering with his ability to carry out day to day activities, namely, to attend to work.

50.3 On 27 December 2020 an email was sent from the claimant to the respondent explaining that he was struggling with his mental health and on the 30 December 2020 the claimant sent 2 further emails to Mr Flanagan explaining that he had been signed off sick for a further month due a relapse in his mental health. On the 30 December 2020 the claimant sent an email to Mrs Knowles [109] informing her that he had been having a panic attack, was receiving therapy and that he had received advice from ACAS who advised him that his condition was covered by the Equality Act. At this point, we find that it would have been reasonable for the respondent to make further inquiries.

50.4 Taking these communications together with the sick absences and reference to a disability, we find that the respondent had sufficient information to make further inquiries and was on notice that the claimant may have been suffering from a disability from 30 December 2020.

51. The respondent, in submissions, referred to the case of Gallacher v Abellio Scotrail Limited UKEATS/0027/19/SS. The facts of that case can be distinguished from the case before us. In the Gallacher case, the claimant underreported her symptoms, did not provide enough detail as to the effects on her day-to-day activities or consider herself to be under any disadvantage in light of the arrangements that had been put in place. In the Gallacher case, the EAT found that due to the claimant underreporting her symptoms and not considering herself to be under a disadvantage by the arrangements, and OH referral would have been unlikely to change the state of knowledge on the part of the respondent. In this case, the claimant had a period of sick absence related to his anxiety and suffered panic attacks when wearing a mask, which affected this day-to day activities. He reported this to the respondent several times and provided medical evidence to support this. He also described himself as disabled and disadvantaged by the arrangements offered. If the respondent had obtained

a report from Occupational Health promptly, the claimant would have fully reported his symptoms, as he did do when assessed in September 2021, and the respondent would have been aware of the extent of the disability sooner.

Complaint: The claimant was expected to work outside in isolation from his colleagues

40. When considering whether there has been unfavourable treatment the facts of the allegations must be proved by the claimant on the balance of probabilities. We find that the claimant has not discharged this burden in respect of this complaint.

41. In his evidence, the explained that at the meeting on 27 December 2020 he was informed by Mr Pybis that as an alternative to working in the warehouse with a face covering the respondent could offer a position where he could complete duties outside the warehouse. However, he would still be required to wear a mask when accessing the toilet. Mr Pybis could not recall telling the claimant that he would still need to wear a mask when accessing the toilet, however, we are satisfied that this was the position as Mrs Knowles, in her evidence, confirmed that the claimant would be required to wear a face covering for a short distance of 10 meters, or short duration of 30 seconds to access the toilet.
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42. We find the claimant was offered an alternative to this by way of a portaloo. The claimant confirmed this in his evidence and the grievance meeting notes reflect the same [125]. In evidence, the claimant expressed that this would further isolate him and that the isolation from colleagues would exacerbate his anxiety.

43. We find that, although the claimant understood the position to be that he would be isolated, this was not in fact what was communicated to him before or during the grievance process.

44. In her email to the claimant dated 31 December 2020, Mrs Knowles, gave an indication of actions that would be supported by management which included giving the claimant a radio when he was working outside so that he can stay in touch with colleagues inside the warehouse. He was advised that he should speak to Mr Pybis about any concerns and discuss options with him [108].

45. The grievance outcome letter sent to the claimant on 29 March 2021 [143-145] stated that the claimant could work near the warehouse, which employees would regularly be going in and out of and where there would be a lot of activity. The claimant was also offered a radio so that he could contact other colleagues. Mr Glasgow, in his evidence, said that the consideration would also have been given to assigning a colleague to work with the claimant at all times, however, it was felt that the claimant was not open to any suggestions. We find the evidence given by Mr Glasgow corroborates the offer of working with others, as detailed in the grievance outcome letter.

46. Whilst the claimant was expected to work outside, we find he was not expected to work in isolation from his colleagues. We do not find that

working outside would have amounted to unfavourable treatment as the claimant confirmed that he had previously completed duties outside in accordance with the terms of his employment contract and he did not previously have an issue with this. He chose not to work outside on this occasion because, mistakenly, he believed that he would be working in isolation from colleagues.

47. For these reasons, we find that this complaint is not well founded and is dismissed.

Complaint- The claimant was designated a disease risk

48. In his evidence, the claimant explained that by being offered duties outside of the warehouse, he was being treated as a "leper" and being considered "a disease risk". When considering whether there has been unfavourable treatment the facts of the allegations must be proved by the claimant on the balance of probabilities.

49. We find that the facts have not been proved. This is an assertion that has been made by the claimant that is not supported by evidence. The claimant does not allege that anyone in particular referred to him as "a disease risk" and further, does not contend that this has been recorded in any document. He simply states that by being offered duties outside he was treated as leper. This was expressed to Mr Pybis, when Mr Pybis first made an offer of working outside the warehouse on 27 December 2020 (paragraph 12 of Mr Pybis' witness statement).

50. In his witness statement at paragraph 42 the claimant said, "I also felt my employer was intimating that I was a disease risk". He confirmed, in cross examination, that he felt that the respondent was intimating that he was a disease risk explaining that he was told that he could potentially infect someone, and this means that he is a disease risk.

51. The documentary evidence does not refer to the claimant being a disease risk and any offers made to the claimant of alternative working arrangements were made with the purpose of not only reducing the risk of Covid being spread by staff but also to protect staff from contracting Covid. This is in the context that 2 variants of COVID had been identified that were symptomless. This is supported by the evidence given by Mrs Knowles at the hearing and in her email to the claimant dated 30 December 2020. We find that the claimant was not designated a disease risk by the respondent when he was informed that he was subject to the mandatory face covering policy or when being offered duties outside as an adjustment. Therefore, this could not have amounted to unfavourable treatment.

52. For these reasons, we find that this complaint is not well founded, and is dismissed.

Complaint- The claimant was not permitted to work his normal duties indoors without a face covering

53. It is conceded by the respondent that claimant was not permitted to work indoors without a face covering for the duration that the mandatory face covering policy was in effect. It is also conceded that this amounts to

unfavourable treatment. We find that the claimant was subjected to unfavourable treatment because of his inability to wear a face mask which arose from his anxiety.

54. However, the respondent argues, in the first instance, that it did not have knowledge or constructive knowledge of the disability or that the unfavourable treatment is a proportionate means for achieving a legitimate aim. The Tribunal has found that the respondent had knowledge of disability and reasons for this decision have been given above.

55. We consider the matter of objective justification.

Legitimate Aims

52. The respondent implemented a mandatory mask wearing policy to reduce the risks associated with exposure/transmission of COVID-19 by and to its employees; comply with its duty of care to provide a safe operating environment; respond appropriately to concerns being raised by employees regarding their health and safety in the workplace, ensuring its continued and efficient operation as an essential service during the COVID-19 pandemic and ensure the proper maintenance of staffing levels during a time of unprecedented demand.

53. It is not in dispute that these aims were legitimate and we find that these aims were legitimate particularly at time when, as confirmed by Mrs Knowles in her evidence, that the data concerning methods of COVID transmission and the risks of infection was changing rapidly the respondent had experienced the death of at least 2 members of staff and hospitalisation of at least 11 staff, there was an increase in demand and high level of staff absence of approximately 3000 staff across the business and 2 further variants of COVID had been identified which were asymptomatic.

54. Mrs Knowles also gave evidence that the policy was put in place to keep staff and members as safe as possible, and we are satisfied this supports the assertion that the aims were legitimate.

Proportionality of treatment

55. The claimant's position is that he was entitled to an exemption from wearing a mask under The Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place) (England) Regulations 2020. These regulations placed a requirement on people to wear masks in public and criminalised the failure to comply, for the purpose of maintaining public health and public order. However, if a person was exempt by reason of a mental health impairment, then that would amount to a defence if prosecuted. The regulations were aimed at individual citizens rather than businesses. Where a disability is relied upon, the Equality Act applies, and the Equality Act permits unfavourable treatment where it is a proportionate means of achieving a legitimate aim.

56. We find that the unfavourable treatment is capable of achieving the legitimate aims of the respondent. At the time in question, knowledge about the pandemic was not the same as it is now and there was uncertainty as

to how the virus was transmitted and how things were going to progress. However, if an employee, who did not wear a mask, was unaware they were carrying an asymptomatic strain of the virus, it is likely that the risk of transmission would increase. Therefore, if there was a no mask no entry policy, then this is capable to reducing the risk of exposure to staff and members.

57. We then considered whether the treatment is no more than necessary to achieve the aims or whether there were less discriminatory means of achieving the aims.

58. We note that the claimant had been offered duties outside, where he would be working with other members of staff and still have access to toilet facilities without wearing a mask, if a portaloo was provided. This offer was declined by the claimant. This would have amounted to a less discriminatory alternative if the claimant had accepted the proposition.

59. The respondent was offering furlough to employees, however, this was not offered to the claimant. The respondent contends that it made employees aware of the furlough policy and, where medical evidence could be provided, furlough was offered. The claimant gave evidence that he did not ask for furlough on the basis that he wished to work his normal duties and wanted to "work for his money". The claimant, in evidence stated that he would have accepted furlough, however, this is not borne out by the evidence, and this would not have achieved his aim of returning to his normal duties and may have been regarded as unfavourable treatment in the context of the case. Mrs Knowles gave evidence that information was supplied to all colleagues about the availability of furlough and the respondent could be approached with a request at any time. The claimant, in his statement, made no mention of considering furlough or that he communicated his intention to accept furlough, if offered. We find that, if this was an option that he was considering, he would have communicated this to the respondent, particularly as he repeatedly communicated that he wanted to return to his normal duties, in accordance with the advice of his GP [124, 135, 140, 141, 142]. In view of this, we find that furlough was not an option that the claimant was prepared to consider at the time as it would not have achieved his objective of returning to his normal duties and "working for his money".

60. We have taken in to account the submissions of the respondent as set out in paragraph 22 a-i, and find that they provide important context of the circumstances within which the respondent was operating:

"a. Two new variants of COVID-19 had been discovered in mid-December 2020 which were more likely to be symptomless and thus spreading faster than previous variants [IP/10] [SK/16];

b. Infection rates as well as fatalities related to COVID-19 were beginning to climb rapidly in December 2020 which was leading to greater staff absence and concerns about working for the Respondent during this period [IP/10] [SK/16];

c. In the early period of 2020 there had been fatalities within the Respondent business due to COVID-19 as well as hospitalisations [SK/9];

d. Given the warehouse environment and volume of members there was a heightened risk of contracting/transmitting COVID-19 during December 2020 – July 2021, given the new variants along with staff being concerned about working with anyone without a face covering [SK/17];

e. The mandatory face covering policy was also extended to all members and guests at the material time alongside staff [SK/17];

f. The business was balancing providing a safe operating environment by minimising the risks of COVID-19 exposure/transmission, responding to concerns by staff who were key workers during this period and maintaining staffing during a period of high demand [SK/18];

g. There were a number of fatalities amongst staff (9) as well employees who became serious ill or suffered other lasting effects [SK/29];

h. As the vaccine roll-out progressed, there was a decrease in COVID-19 related deaths/hospitalisations and staff anxiety about contracting COVID-19 decreased, the Respondent was able to remove the mandatory face covering policy in July 2021, which also coincided with the removal of most social contact restrictions in England; and

i. The Claimant was offered alternative duties in line with his contract [64] on a temporary basis to accommodate his inability to wear a face covering [CG/6] [IP/12] [108] which he refused."

61. We find that if there was a breakout of COVID-19 within the warehouse, that would have had a serious impact on its ability to operate and provide essential goods to members of the public where many other retailers were closed. To adopt a lesser policy would have jeopardised the respondent's ability to trade as an essential retailer given the nature of the variants that were spreading rapidly at the time.

62. The Tribunal was mindful of the impact of the measure upon the claimant but had to balance that with the impact upon the respondent and its staff and members. Having assessed the impact of the measure, the Tribunal found that the respondent had shown that the aim in question was legitimate and the measure in question was proportionate having balanced the effect of the policy with the impact of the treatment upon the respondent. There were no alternatives, other than the claimant working outside, which would ensure safety was preserved in light of the prevailing knowledge. The claimant was not able to wear a face covering at all. He was not prepared to explore the other options that were presented to him to seek to minimise the impact upon his health. The respondent did seek to explore alternatives but on the facts of this case there were no alternatives which would have allowed the claimant to return to work indoors. There were no lesser forms of the measure which would serve the legitimate aim on the facts of this case, the respondent having explored the alternatives.

63. For these reasons, we are satisfied on a balance of probabilities that the unfavourable treatment of requiring the claimant to wear a mask when in the warehouse was a proportionate means of achieving a legitimate aim.

64. The claimant's claims are dismissed.

Employment Judge Hussain

Date 4 October 2023

REASONS SENT TO THE PARTIES ON

.1 November 2023.....

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FOR THE TRIBUNAL OFFICE