EMPLOYMENT TRIBUNALS

Claimant: **Svetlana Siwek**

Respondent: **Staffline Recruitment Ltd**

Heard at: **East London Hearing Centre** **On: 20 June 2022**

Before: **Employment Judge Housego**

Representation

Claimant: Dr Alexander Siwek, the Claimant's former husband

Respondent: James Green, of Counsel, instructed by Actons Solicitors

JUDGMENT

The claims are struck out.

REASONS

1. The hearing was an open preliminary hearing to decide on the matters set out in an order of Judge Jones after an earlier preliminary hearing (in case 3205137/2021) on 12 January 2022. These matters are:

    1.1. Whether the Claimant is a disabled person as defined by S6 of the Equality Act 2010 at the date or dates of the alleged acts of disability discrimination.

    1.2. Whether the Tribunal has jurisdiction to hear a complaint of unfair dismissal. [The Claimant relies on S100(1)(c) and (d) of the Employment Rights Act 1996, and was ordered to provide further details of her claim before this hearing.]

    1.3. Whether any complaints in this claim are out of time, and if so whether the Tribunal has jurisdiction to hear it/them (and so

necessarily to consider whether it is just and equitable to extend time).

1.4. Whether any or all of the claims should be struck out as having no reasonable prospect of success; or alternatively

1.5. Whether the Claimant should be ordered to pay a deposit under an order made under Rule 39 as a condition of continuing with her claim or any aspects of it that the Tribunal considers have little reasonable prospect of success.

2. The Claimant was not in attendance. Dr Siwek said that she was unwell. At the end of the submissions I gave a short extempore judgment, of which Counsel for the Respondent made a careful note. Dr Siwek said that he wished to appeal, and I indicated that he would receive a full judgment with detailed reasons. Dr Siwek also said that Rule 37 was not appropriate and that Rule 26 should have been considered and that this would be a ground of appeal.

3. In the hearing, which lasted 2¼ hours, I first ascertained that the second claim was lodged because the Particulars of Claim had not been attached to the first claim, and the Tribunal had asked that it be resubmitted with the document attached. When this was done it was issued as a new claim. There is a difference between the two claims, as the first claim, filed on 15 July 2021 gives the end date of employment as 28 June 2021, and the second, filed on 22 August 2021 gives the date of 15 May 2021. However, Dr Siwek was clear that the only reason the second claim was filed was the absence of the Particulars of Claim in the first claim. The Particulars of Claim in the second was the one that was intended to be attached to the first claim. Accordingly, I dismissed the second claim, on withdrawal by the Claimant (or as it is not a new claim at all). The reason why the Particulars of Claim was not attached to the first claim as issued does not matter. The Claimant says it was an unidentified technical issue. There is no prejudice to either party in dismissing the second claim and taking the Particulars of Claim attached to it as the Particulars of Claim of the first claim.

4. Although there had been emails from Dr Siwek subsequent to the preliminary hearing on 22 January 2022, what the claims were about was by no means clear. Accordingly, I first discussed the claims with Dr Siwek in order to find out exactly what they were about.

<u>Effective date of termination or still employed?</u>

5. The Respondent said in its Grounds of Resistance that the Claimant was still employed and could ring up anytime and ask for a new assignment. Dr Siwek said that this was impossible as there was a total breakdown of the relationship. I asked him when he said the employment had ended, and how that had come about. The claim was of constructive automatically unfair dismissal for health and safety reasons. Dr Siwek said that the date employment ended was the date the involvement of Acas ceased. It was 28 June 2021. The claim was issued on 15 July 2021, and that clearly stated that employment had ended on that date. A claim was issued on 15 July

2021, but there was no reason to doubt that the Claimant had decided that her employment was ended and she was bringing a claim for unfair dismissal as a result of the conciliation period ending, and that it was likely that she had said so to the Acas conciliator, who would have told the Respondent. While Mr Green, for the Respondent, was not able to confirm (or deny) this he accepted that there was no prejudice to the Respondent in my so finding. Accordingly, I decided that I would accept the Claimant's submission that the Claimant's employment ended on 28 June 2021, by resignation that day. This was not a preliminary issue to be decided today, but as the Respondent did not object, and this was to accept the Claimant's version of events there can be no issue with this.

Disability

6. I asked Dr Siwek what disabilities it was said the Claimant had, from when he said she had them, and when he said the Respondent knew, or should have known, of them.

    6.1. Dr Siwek said that the Claimant had stress anxiety and depression. I pointed out that stress was not a disability, though it could be the cause of disability. Dr Siwek said that the Claimant had long standing anxiety and depression. It was present the whole time she worked for the Respondent. He said they should have known of it in mid-December 2019 when her probation period ended. He said that she took Citalopram daily and occasionally diazepam if her symptoms were really bad.

    6.2. Dr Siwek said that the Claimant had keratoconus. This is an eye problem causing disturbance to vision. He said that the Respondent should have known of this from the same time, mid-December 2019, as she had problems with visual interpretation of equipment.

    6.3. Dr Siwek said that the Claimant had sustained a disabling back injury in December 2019 and was also disabled for that reason (low back pain and sciatica) from then on, and that the Respondent knew, or should have known that it was disabling.

7. Dr Siwek said there was claim arising from these disabilities of failure to provide reasonable adjustments. I asked what adjustments he said should have been made. He said that this was a failure to reduce performance targets to a realistic level. Self-evidently this was before the Claimant ceased to attend work.

8. I asked whether the claim under S100 was that all three conditions were made worse by the (alleged) failure of the Respondent to make the reasonable adjustment of reduction of targets, causing her to resign. Dr Siwek said that was the claim made, and her manager, Dave Winton, had promised (on 09 April 2020) to investigate her grievance about the way she said she had been treated, but had not done so.

Sex discrimination

9. I asked how Ms Siwek's gender was said to be related to the matters of which Ms Siwek complained. Dr Siwek said that no one else was treated like Ms Siwek. I asked if the workforce was all male, save her, or whether there were other women. There was a gender mix in the workforce. I asked if the other women were treated as the Claimant said she was treated. They were not. It seemed, then, that she was treated differently from other women as well as men. Dr Siwek said that was so. I asked why it was said to be connected with gender. Dr Siwek said this was because the allegation was that she was told by her superviser that she would have to find a man to help her out with the more physical side of the work, in return for giving him "favours" and this was innuendo. This was one of the reasons she had resigned, Dr Siwek said.

Race discrimination

10. Dr Siwek said that Ms Siwek was Armenian. I asked why it was said that any allegation was related to race/nationality. Dr Siwek said that Armenians are gentle and subservient and so were easy targets for egregious behaviour. I wondered whether this might be a somewhat stereotypical submission. Dr Siwek said that the Claimant had a history of anxiety and depression, and had a soft gentle personality. I enquired again why it was said that treatment was connected with Ms Siwek being Armenian. It was because she was the only Armenian and so must be connected. (This does not seem to be correct as there is reference to the Claimant's son working there, but perhaps he has other nationality or race through his father.) I asked the last date when it was alleged that Ms Siwek was treated badly at work. It was the last day she was at work, which was 20 March 2020. I observed that the Claimant had been away sick until 30 August 2020. Dr Siwek explained that Ms Siwek had been in receipt of sick pay until then. I asked if there had been any contact at all between then and the filing of the first claim. There had not. She had been waiting for her regional manager to contact her. She had become housebound, almost comatose and under GP and specialist care. I asked about the specialist care. It was physiotherapy for her back and cognitive counselling.

11. I asked if there was any medical evidence beyond the one-page letter of 17 February 2022 which was in the bundle of documents. There was not. Dr Siwek said they had asked for more, but the doctors had said they were too busy. I asked again whether there was any other medical evidence for me to consider. Dr Siwek said that was all for the moment, but that they would have specialist witnesses. I asked why this evidence had not been obtained for this hearing, which was specifically called, in part, to determine the issue of disability. Dr Siwek said that it was a preliminary hearing and they did not have to give their complete case. I pointed out that the preliminary hearing was to decide this point. Dr Siwek again said that it was not a final hearing. I asked if there was any reason why there was no medical evidence other than the one letter from the GP. Dr Siwek said that they were under the impression that the regional mamager would get back to her with proposals, but it appeared that he had been "usurped", and then they had gone off to Acas.

12. I asked if there was any documentation about the regional manager (Dave Winton). Dr Siwek had brought along to the hearing an email (added to the bundle of documents as 112/113) of 09 April 2020 in which he said he would investigate. (The email says that he will look into matters raised.) There had been desultory telephone conversations after that, but nothing after the end of August 2020. There had been a telephone conversation in April 2021 in which Ms Siwek said she had been verbally abused. This was when she was acting as a representative for her son, who has also worked there, and who was also bringing a claim.

13. I asked why nothing had been done from August 2020 until she went to Acas on 24 May 2021. Dr Siwek said that Ms Siwek had been in "an induced psychological coma at the time, and battling other demons and situations". I asked if there was an impact statement about the effect of her claimed disabilities on her, or a witness statement. There was not, but there was a 3 page email (pages 73-75). This was dated 15 April 2020. I said that it did not appear that Ms Siwek was in a comatose state then. Dr Siwek said he had assisted her with it. I asked if he meant that he was in effect its author. Dr Siwek said that was not the case. I observed that it appeared that Ms Siwek was functioning at that point. He said she had written this email in a "lucid interval". I asked why she had not lodged her claim in one of these intervals. Dr Siwek said it was too upsetting to think about. She had "brain fog". She had the same problem with another past employer. She had been to the Employment Tribunal about that issue, but it had been resolved "extra judicially". It was almost like she had a phobia about starting another claim, and she had other problems like housing and benefits. Also, although she had been in the UK since 2005 she struggled with the English language.

14. I asked when Dr Siwek had started to help his ex-wife (in case everything done was in fact by him and not by her). Dr Siwek said that he did not see the relevance of the question and objected to it. I explained the point of the question. Dr Siwek repeated that he did not see the point, and that the Claimant had ongoing help from her GP, and he had kept in touch, and was concerned about her welfare notwithstanding their separation.

15. It was accepted that Dr Siwek was involved at 09 April 2020 as he was part of the email exchange (at 112/113).

16. Having ascertained what the case was about, and what the Claimant's position was on the out of time issue I asked Counsel for the Respondent to make his submissions. There was a skeleton argument (or written submission) which I do not repeat or summarise. It can be read by a higher Court if the appeal Dr Siwek said he would lodge is permitted to proceed to a hearing. I made a full typed record of proceedings so that the submissions can also be read in full if required by that Court.

17. The Respondent's submissions were, in brief:

    17.1. There was a parlous lack of medical or other evidence before the Tribunal. It was for the Claimant to satisfy the Tribunal that she was disabled as claimed. There was but one letter from a GP, and that

was very short. It could not simply be assumed that from a statement that the Claimant was prescribed anti-depressants that she was disabled. The case management orders had clearly envisaged the obtaining of GP records. It could not be a difficulty with time, as the last hearing was in January, so six months ago. Nor was there a witness statement or impact statement. It was for the Claimant to satisfy the Tribunal that she was disabled as claimed and there was insufficient material – the one letter – so to find.

17.2. Even if the Claimant was disabled, there was no evidence (only a submission) that the Respondent knew or should have known of each of the claimed disabilities.

17.3. Each of the discrimination claims were a long way out of time. The constructive dismissal claim was not out of time, given the now fixed effective date of termination, but this had no reasonable prospect of success because even if everything the Claimant said was true the delay was far too long to found a constructive dismissal claim. There was the further point of affirmation of the contract – the Claimant said that she had wanted her Regional Manager, Dave Winton, to investigate and resolve her grievances, which were the same as her allegations in this case. That was in April 2000, and she said she had pursued this until her sick pay ran out in August.

17.4. There was no act or omission alleged after August 2020. The skeleton argument referred to the factors in Keeble v Coal Board. I said that I would be guided by paragraph 37 of Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23 (15 January 2021) in this regard and in particular look at the length of the delay and the reasons for it. Counsel said that was what paragraph 16 of the skeleton argument was inviting: the Claimant was clear nothing happened (and there was no omission after) August 2020, but the claim was not filed until 15 July 2021. Even with 3 months from August 2020, the last possible date on the Claimant's own account and with the Acas early conciliation period the claim was at least 8½ months out of time. In reality it was far longer.

17.5. When an explanation was looked for, there was none that was convincing. The assertion that the Claimant was "comatose" was plainly not correct, not only for want of medical evidence but also from Dr Siwek's own submissions.

17.6. The Claimant had not resigned in the face of what she said were fundamental breaches of contract for some 15 months. This was far too long, as resignation had to be in good time. Alternatively, there was an affirmation of the contract.

17.7. There was great prejudice to the Respondent in allowing these claims to proceed. They were for the most part based on allegations of things said to have been said and conduct taking place in the workplace in 2019, now 3 years ago.

17.8. While it was not necessary to evaluate the strength or otherwise of the claims (and not to have a trial within a trial), given the delays and prejudice to the Respondent, these did not look like strong claims being defeated by a technicality. However, reliance was placed – and this was the submission – that the delays in the discrimination claims were such, and with no good reason shown, that it could not be just and equitable to extend time. An employee cannot sit on a repudiatory breach of contract for over 8 months and then be able to resign and claim unfair dismissal.

18. I offered Dr Siwek a break to consider what he wished to say in response. He declined the opportunity, and made his submissions in reply. Again, I made a full note of (most of) what he said (omitting nothing of significance). His points were:

18.1. He was not sure what Counsel was proposing. All the Respondent had done was give a blanket denial. They had not engaged with the allegations at all.

18.2. The Court of Public Opinion required there to be a substantive reply made. There was no evidence submission or witness statement about the allegations. In Scots law (Dr Siwek is resident in Scotland) every allegation had to have a denial. As Mandy Rice-Davies had it, they would say that wouldn't they?

18.3. He agreed that the medical evidence was "a little skeletal" but Ms Siwek had no money to pay a GP's fees. Even the one letter cost £50, and all she had was universal credit with a disability element to it.

18.4. In matters were justice and equity were in play, clear statements had to be made in rebuttal of the averments (a defence to an allegation had to be pleaded). This made a mockery of the litigation – Judge Jones had ordered the Claimant to provide more information and she had done so, but the Respondent had not provided other than a paucity of information. In Scots law it would not be possible to strike out a case like this. I pointed out that while Scots law was in many ways different to that in England and Wales, particularly in terminology, employment law was the same north and south of the border.

18.5. The Respondent had said that Ms Siwek was still employed. He was lost for words. Their case was fragmented. They had not looked at the ethics. There was only a bare denial. They must be taken to proof. These were serious allegations about health and safety and egregious behaviour, and these allegations needed to go to proof, not be determined on Counsel's submissions.

18.6. Surely the Tribunal was not going to find for the Respondent on no more than a bare denial? Was that what was proposed? I said that the matters to be decided were clearly set out in the last case

management order, in January 2022, and that meant that striking out the claims was a matter for decision.

18.7. Dr Siwek said that there had been no submissions about the Rule relied on. This was not a vexatious claim, nor scandalous nor was there no reasonable prospect of success. It would require evidence to conclude that there was no reasonable prospect of success, and the Respondent had not entered any denial to the claims. Rule 37 dealt with strike out. Nor was this a case not being actively pursued. It was not a case where it was not possible to have a fair hearing.

18.8. There should be a hearing with witnesses in person with all claims challenged on the basis of evidence. The Respondent said there was a lack of evidence but had produced not a scrap of evidence itself.

18.9. A strike out was draconian.

18.10. It was not fair to think of a deposit order for a Claimant dependent on universal credit. In Scotland this was "location"(?) used only for bankrupts, and was not an everyday event. The Respondent must engage with Rule 37. Had I read the Claimant's objections? I indicated that I had arrived at the Tribunal some 2 hours before the hearing started at 10:00am and had read the whole file. Dr Siwek said the condescendants and averments must be considered. I said I was not familiar with the former term, but understood "averments" and took it that Dr Siwek was saying that the merits of the allegations had to be considered by the Tribunal and this was not going to happen if the claims were struck out without the Respondent saying what their defence was, and they should have to, and it be adjudicated upon. This was Dr Siwek's submission. He said that the entire matter "needed to go to proof".

19. I asked if Dr Siwek had understood that there were gateway provisions to be satisfied before a Tribunal would consider a claim. It was not that a claimant could set out a series of allegations and have a Tribunal adjudicate on them as of right: a claimant had to fall within the rules about who could bring a claim, and show that the claim was one the Tribunal had jurisdiction to hear. One example was that claims had to be brought within certain time limits. That was what this hearing was about.

20. Dr Siwek said that the Respondent said that Ms Siwek was still employed so how could there be a time issue? I said that was not relevant for the discrimination issues in the claim. Dr Siwek said that Ms Siwek was still being discriminated against. I pointed out that I had accepted his submission about the employment being ended on 28 June 2021: Dr Siwek repeated that the matter "requires to go to proof, and this was just a blanket denial with spurious points of law".

21. The very words "preliminary hearing" were predicated, he said, on there being a subsequent final hearing when there would be evidence about the allegations made. Dr Siwek concluded that the Claimant "founds on the

entirety of her case" (meaning he said that the merits of the allegations should go to a full hearing).

The law

22. The claim for unfair dismissal is not out of time, as it was brought within 3 months of the date of claimed constructive dismissal.

23. Claims can be struck out as having no reasonable prospect of success. This is in Rule 37 (and there are other provisions in Rule 26). The other reasons that appear in Rule 37 for striking out do not fall for consideration in this hearing.

24. The claims for discrimination are a long way out of time. The time limit is 3 months plus any Acas early conciliation period. The last time the Claimant had any interaction of any sort was before her sick pay ran out, on 30 August 2020. She was off work from 20 March 2020, and so that is the last possible date for any workplace incident.

25. The Claimant says that her manager, Dave Winton, promised to investigate but did not. That is not tied to any discrimination allegation, but in any event it was in April 2020.

26. Time can be extended if it is just and equitable to do so. In Wells Cathedral School Ltd v Stringer, Souter and Leishman Case No: EA- 2020-000801-JOJ (Previously UKEATPA/0836/20/JOJ). HHJ Auerbach set out the principles at paragraphs 28 onwards. I do not cite them in full, but have applied the guidance therein contained.

27. The case law was most recently set out in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23 (15 January 2021). Paragraph 37 advises Tribunals that:

"The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble[1], well and good; but I would not recommend taking it as the framework for its thinking."

Conclusions

Disability

28. I conclude that the Claimant has not shown that she is disabled within the definition in the Equality Act 2010. She has to show that she has a condition that is long term, and (without medication) would have more than a minor or trivial effect on her ability to carry out day to day activities, and which has,

[1] British Coal Corporation v Keeble & Ors [1995] UKEAT 413_94_0607 (6 July 1995)

or was likely to last 12 months. There is insufficient evidence that this is the case.

Anxiety and depression

29. The only evidence provided is a letter dated 17 February 2022 from the Claimant's GP, and four sick notes. The GP letter states that since May 2018 the Claimant has anxiety and depression, and is treated with Citalopram 40mg daily, and occasional diazepam. Anxiety and depression can be disabling, and the condition is long term. The issue is whether the simple statement from the GP is sufficient evidence to found a decision that the condition is disabling. I conclude not: there is no impact statement, and no evidence as to the effect on Ms Siwek of anxiety and depression. Submissions from her former husband are not evidence. The sick note of 13 December 2019 refers to back pain, not anxiety and depression. By 05 March 2020 it is both back pain and depression. On 20 March 2020 "stress at work" and the same on 09 April 2020. Stress at work as a reason for absence from work is not evidence of disability. Nor was there any reference to an eye problem at all, and no reference to back pain in the latter two certificates.

Keratoconus

30. The GP letter says that the Claimant has bilateral moderate to advanced keratoconus, which causes some disturbances to her vision, and she has to use special contact lenses. Other than that it is an eye condition, which appears to be permanent no information was provided about what this condition is, what effect it has on a person with it, and why it is disabling. The one sentence in the GP letter cannot lead to a finding that it is a disabling condition.

Low back pain

31. The GP letter says this started in January 2020, with a mention of left handed sciatica in July 2020. She has co-codomol 30/500 tablets for the pain. The effect on the Claimant is not evidenced. The Claimant has not shown that at any material time, even if back pain was of disabling effect, this was likely to be long term issue. He representative said that it started in December 2019. The Claimant was away from work from 20 March 2020. While she was at work there is no evidence of any effect on her of back pain affecting her.

32. The later two sick notes do not mention back pain.

33. Dr Siwek said that the Claimant had universal credit with a disability element to it. It would not have been difficult to provide a DWP assessment to show disability. I do not accept that finance is any reason why there is almost no evidence of disability.

34. As the Claimant has not provided evidence sufficient to show that she is disabled, her claim for disability discrimination must be dismissed. It would

have been dismissed as being out of time, had I decided that she had shown that she was disabled, as set out below.

Jurisdiction to hear unfair dismissal claim based on S100(c) and (d)

35. The claim being put forward in the emails from Dr Siwek in response to the order of Judge Jones to provide further and better particulars of the claim (69-72 in the bundle of documents) is incomprehensible. The explanation commences:

> *"…following a total collapse of trust and confidence, the Claimant was required to actuate the profound action of constructive unfair dismissal. Notwithstanding the 2 year rule the Claimant accepted the statutory invitation to treat offered by the Employment Rights Act 1996, Chapter 18, and in particular sections 108 and 100. i.e. AUTOMATOC UNFAIR DISMISSAL. For the avoidance of doubt, the Claimant FOUNDS on her exemption from the 2 year rule by reason of the aforementioned section 100, as she engages with subsection 1 c i and ii, d and e. The Claimant will found on, and put to proof any evidence provided by the Respondent that factually demonstrates, in the contract between the parties, that at all times the Respondent did obtemper (sic) it's fundamental duties to exhibit and ensure the rights of the Claimant to her fundamental health and safety at work."*

It continued:

> *"The advent of the unjust behaviour of the Respondent towards the Claimant commenced at or around the end of the third week of the probation period by comments repeatedly made by DIEGO GHERMAN, the Dagenham warehouse supervisor, directly to the Claimant …… Come on you…..faster, faster, get a move on, your work is no good. It culminated by him saying directly to the Claimant and in the earshot of others…you are really quite useless and it looks like you are not going to get a contract. These prodromal (sic) signs of egregious treatment endured generally."*

There are several more paragraphs in like vein. Nowhere is the substance of the health and safety reason set out.

36. Insofar as this Judge can ascertain any meaning from what the Claimant's representative wrote and said on this topic, it is that the Claimant asserts that she was bullied to the point where she went off sick (connected with the anxiety and depression disability discrimination claim) and eventually (many months later) resigned when her manager promised to do something but did not.

37. This is not a claim to which S100 can attach. It has no reasonable prospect of success. S100 reads:

> "100 Health and safety cases.
>
> (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

> (a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,
>
> (b) being a representative of workers on matters of health and safety at work or member of a safety committee—
>
> (i) in accordance with arrangements established under or by virtue of any enactment, or
>
> (ii) by reason of being acknowledged as such by the employer,
>
> the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,
>
> (c) being an employee at a place where—
>
> (i) there was no such representative or safety committee, or
>
> (ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,
>
> he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,
>
> (d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or
>
> (e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger."

38. Dr Siwek relied on (c), (d) and (e). None can lead to a successful claim.

    38.1. Presumably the reference to (c) is that the Claimant complained to her manager about bullying and resigned when nothing was done about it. That will not found a claim under S100.

    38.2. The reference to (d) is presumably that because she was bullied she left work, as she became ill and ultimately resigned for that reason. This is not what S100 is about.

    38.3. The reference to (e) is presumably something similar, and is similarly incapable of founding a claim under S100.

39. There are other problems with the claim for unfair dismissal. A constructive dismissal relies on ascertaining that the fundamental breach of contract was the reason for dismissal, and that the resignation was in good time, and without any intervening affirmation of the contract.

40. The lapse of time means that there is no reasonable prospect of success. The Claimant was last at work on 20 March 2020 and says that her employment ended on 28 June 2021, 1¼ years later. That is far too long a period for a constructive dismissal claim to have any chance of success, and so I strike it out as having no reasonable prospect of success.

41. There is also the engagement with Dave Winton, which was likely to be found to be an affirmation of the contract.

42. As the effective date of termination is 28 June 2021, and the start date 09 September 2019, there is not a two-year period on the Claimant's own case, and so even if Dave Winton failed to engage with the grievance and if that was a fundamental breach of contract (or last straw) there still can be no claim.

Out of time – whether just and equitable to extend time

43. Race discrimination and sex discrimination claims can be discerned from Dr Siwek's submissions. He says that Ms Siwek was badly treated by reason of being an Armenian woman. Both protected characteristics were reasons, he says, for her being treated badly. Asked to point to a causative link, it was that no one else was so treated, so that there must be a link. He says that what was said was sexual harassment. I would take the claims at their strongest in considering whether to strike it out on its merits, or lack of them (and these do not seem like strong claims), but this was not the application made by Counsel for the Respondent. He limited his submissions to the issue of whether it was just and equitable to extend time for the claims were filed out of time.

44. I record that Dr Siwek did assert that any of the discrimination claims were out of time.

45. It is not said that Dave Winton was motivated by discrimination related to a protected characteristic when he did not investigate as he promised. Dr Siwek said that Dave Winton was "usurped" from that role, by managers unknown. He did not say that they had done that for discriminatory reasons. All that was, in any event, before 30 August 2020.

46. Accordingly, nothing relevant to any of the discrimination claims (including the disability discrimination claim) could have happened after 30 August 2020, when the Claimant's sick pay ran out, and all contact ceased, save one occasion when the Claimant acted as representative for her son (also an employee of the Respondent at some time).

47. The 1st claim was filed on 15 July 2021. The Acas early conciliation period was 24 May 2021 – 28 June 2021.

48. Accordingly, nothing was done from 30 August 2020 to 24 May 2021, nearly 9 months. After the Acas early conciliation period ended a further 2½ weeks passed before the claim was filed.

49. I explored with Dr Siwek the reasons why he said it was just and equitable to extend time, and in particular the reason it was not filed, and that discussion is set out above. There is no evidence to support what he said, either from the Claimant herself, or any medical evidence. The sick notes and the GP letter do not address that issue at all.

50. There are various matters indicating that the Claimant was able to file a claim if she wished to do so:

50.1. The Claimant wrote a lengthy email setting out her allegations, on 15 April 2000.

50.2. Dr Siwek accepted that (even on his own account) Ms Siwek had what he called “lucid intervals” during which she could have filed her claim.

50.3. The Claimant was able to act as representative for her son in April 2021, yet did not file her own claim until July 2021.

50.4. During this period she was dealing with benefit and housing problems.

51. The Acas early conciliation period ended on 28 June 2021, but the claim was not filed until 15 July 2021.

52. The Claimant was not in receipt of sick pay after August 2020: it was not that resigning would cause her financial loss.

53. There was no explanation as to how it was that she was able to file the claim when she did, when she was unable to do so before.

54. Looking at the length of the delay, the (lack of) reasons for that delay and the difficulty for the Respondent in defending allegations now so old all arising from alleged conduct in the workplace I find that it would not be just and equitable to extend time.

55. I was expressly asked by Counsel for the Respondent not to rely on any weakness in the claims as a factor in my judgment on whether it was just and equitable to extend time (doubtless as this is a frequent reason for appealing) and so (while expressing no opinion) I take all 3 discrimination claims at their highest and do not take any weakness in the claims as a factor in assessing whether it is just and equitable to extend time. The claims do not present as strong, and so that is not a factor in the Claimant’s favour when assessing relative prejudice.

56. However, the sole reason for striking out the discrimination claims (which would have included the disability discrimination claim had the Claimant satisfied me that she was disabled as claimed) is the length of the delay, and the absence of good (or any) evidenced reason for that delay, and as an additional factor the prejudice to the Respondent in having to defend a claim reliant on oral evidence where the allegations are so long in the past.

57. I record that the Claimant has had ample opportunity to deal with the applications to strike out the claims, and the reference to Rule 26, or Rule 27 is misplaced.

58. In case it is relevant, the Respondent’s application to strike out the discrimination claims as having no reasonable prospect of success is not decided by this judgment, and may, should the out of time reason for dismissing the claims be overturned on appeal, be renewed.

59. There is nothing from the Claimant at all. Should this matter go further it would be advisable for the Claimant to confirm to the Tribunal, or the Employment Appeal Tribunal, that she authorises Dr Siwek to represent her, or a subsequent Tribunal may decline to hear him.

Employment Judge Housego
Dated: 27 June 2022