EMPLOYMENT TRIBUNALS

Claimant: **Mrs J Ward**

Respondent: **Sternberg Reed LLP**

Heard at: **East London Hearing Centre (CVP)**

On: **16 August 2023**

Before: **Employment Judge A.M.S. Green**

Representation
Claimant: In person
Respondent: Mr D Tatton Brown - Counsel

RESERVED JUDGMENT ON PRELIMINARY ISSUES

1. The claimant's claim to be disabled has no reasonable prospect of success and her disability related claims are struck out under Rule 37.

2. The claimant's indirect sex discrimination/part-time workers discrimination claims having no reasonable prospect of success are struck out under Rule 37.

REASONS

Introduction

1. For ease of reference, I refer to the claimant as Mrs Ward and the respondent as Sternberg Reed.

2. Mrs Ward is a solicitor who worked at Sternberg Reed, a firm of solicitors, in their Clinical Negligence Department. In September 2022, she was dismissed. Sternberg Reed maintains that her dismissal was because her position was redundant on the premise that they decided to close down the Clinical Negligence Department. Mrs Ward does not agree with this, and

she presented several claims to the Tribunal on 27 October 2023 following a period of early conciliation which started on 25 August 2022 and ended 28 on September 2022. She alleges that her dismissal was unfair and that her dismissal was an act of direct race discrimination and that she suffered victimisation. Mrs Ward is a black British female of Caribbean descent. Mrs Ward also brought a number of disability related and part-time workers discrimination claims. She has also brought complaints regarding non-payment of historic bonuses.

3. Mrs Ward alleges that in February 2019 she was diagnosed with anxiety and depression [17]. She avers that she was again diagnosed with the same condition in March 2022 [28]. She maintains that her condition is an impairment, and that she is disabled for the purposes of the Equality Act 2010, section 6 ("EQA"). Sternberg Reed denies that Mrs Ward is disabled. Alternatively, if Mrs Ward was disabled at the relevant time, Sternberg Reed says that it did not know or could not be taken to have known that she was disabled.

4. Regarding the non-payment of her bonuses, her claims are limited to bonuses that she says should have been paid in the years 2017/18 and 2018/19. Mrs Ward does not complain about her bonus in the years 2019/20, 2020/21 or 2021/2022. Sternberg Reed maintains that these claims are significantly out of time and should be struck out.

5. This hearing was listed to consider Sternberg Reed's application to have Mrs Ward's disability and disability related claims struck out or, in the alternative, to require Mrs Ward to pay a deposit as a condition of being allowed to continue to pursue those claims.

6. Sternberg Reed maintains that the disability and disability related claims should, in summary, be struck out or be subject to a deposit order as follows:

> *The C's contention that she was disabled at the time of her dismissal/the process associated with her dismissal has no reasonable prospect of succeeding. It follows that all her disability related claims should be struck out.*
>
> *…*
>
> *Alternatively, those claims have little reasonable prospect of success. In the further alternative, if (contrary to the above) the ET is not persuaded that the C has little prospect of showing that she was disabled at the material time and is not persuaded that she has little prospect of showing that the R knew or ought to have known of her disability, nevertheless she has little prospect of establishing both those things so she ought to be required to pay a deposit as a condition of proceeding with her disability claims.*

7. Sternberg Reed maintains that the indirect sex discrimination/part-time workers discrimination claims should, in summary, be struck out will be subject to a deposit order as follows:

> *The C has no reasonable prospect of success in succeeding with her complaints regarding a bonus scheme introduced in July 2017. This is*

because the claims are manifestly out of time and she has no reasonable prospect of persuading the ET to extend time.

…

Alternatively, the C has little reasonable prospects of success in succeeding in showing that that her 2017/18 bonus was a detriment to which she was subjected on the ground that she was a part time worker or establishing that ET has jurisdiction to consider her bonus complaints and she should be required to pay a deposit as a condition of continuing with them.

8. At the hearing, we worked from a digital bundle. Given that Sternberg Reed were seeking a deposit order, I required Mrs Ward to give oral evidence as to her means and her ability to pay should I be minded making a deposit order. Although, she had not prepared a witness statement, Mr Tatton Brown did not object to Mrs Ward giving oral evidence and he cross-examined her. Mrs Ward and Mr Tatton Brown made closing submissions.

9. In reaching my decision, I have carefully considered the oral and documentary evidence, the written and the oral submissions. The fact that I have not referred to every document produced in the hearing bundle should not be taken to mean that I have not considered it.

Mrs Ward's disability impact statement

10. Mrs Ward has prepared a disability impact statement [194]. I have carefully considered what she has written and do not intend to paraphrase the contents of her statement but, I note the following statement she makes concerning her alleged disability:

…

5. I suffer from a mental impairment, anxiety and depression due to work-related stress.

6. I was first diagnosed with work-related stress, anxiety and depression around February 2019. I consulted my GP, who signed me off work. I was on sick leave between February and July 2019. I was signed off work again by my GP in March 2022, due to work-related stress, anxiety and depression. I returned to work in July 2022. After I returned, I suffered a major setback, due to being unsupported and eventually being made redundant. Again, I consulted my GP for support during the period of my return to work on redundancy. He suggested signing me off again but I had only just returned to work. I wanted to build some resilience, get back to normality and I was also concerned about losing my livelihood.

7. I believe that my mental impairment is now long term, as it seems to heighten/recur when I'm exposed to high levels of stress.

Applicable law

11. Rule 53 (1) (c) of the Rules of Procedure confirms that a Tribunal has the power to consider the issue of strike at out a preliminary hearing. Rule 37 sets out the grounds on which a Tribunal can strike out a claim or response (or part). A claim or response (or part) can be struck out on a variety of grounds including that it is scandalous or vexatious or has no reasonable prospect of success (rule 37 (1) (a)).

12. In **Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL**, discrimination cases are generally fact sensitive, and any issues should usually only be decided after all the evidence has been heard. However, in that case, Lord Hope observed:

The time and resources of the employment tribunals ought not to be taken up by having to hear evidence in cases that are bound to fail

13. In **Chandhok v Tirkey [2015] ICR 527** Langstaff P cited **Anyanwu** and went on to say at paragraph 20:

This stops short of a blanket ban on strike-out applications succeeding in discrimination claims. There may still be occasions when a claim can properly be struck out—where, for instance, there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time; or where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which (per Mummery LJ in Madarassy v Nomura International plc [2007] ICR 867 , para 56):

> *"only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

Or claims may have been brought so repetitively concerning the same essential circumstances that a further claim (or response) is an abuse. There may well be other examples, too: but the general approach remains that the exercise of a discretion to strike out a claim should be sparing and cautious.

14. The Tribunal must take a view on the merits of the case and only where it is satisfied that the claim or response has no reasonable prospect of succeeding can it exercise its power to strike out.

15. In **Ahir v British Airways plc 2017 EWCA Civ 1392, CA**, the Court of Appeal asserted that tribunals should not be deterred from striking out even discrimination claims that involve disputes of fact if they are entirely satisfied that there is no reasonable prospect of the facts necessary to find liability being established, provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been

explored. The Court accepted that the test for strike-out on this ground with its reference in rule 37(1)(a) to 'no reasonable prospect of success' was lower than the test in previous versions of the strike out rule, which referred to the claim being frivolous or vexatious or having 'no prospect of success'. In this case, the Court upheld an employment judge's decision to strike out the victimisation and discrimination complaints of an employee who had been dismissed for falsifying his CV. His claims were based on allegations that six managers who had each separately considered the admitted misconduct of the employee during the disciplinary process had allowed their decisions to be tainted by the protected acts of the employee even though there was no evidence to suggest that they were aware of those protected acts. The Court concluded that the employment judge had rightly described the allegations as 'fanciful' and struck out the claims as having no reasonable prospect of success.

16. In **Kaur v Leeds Teaching Hospitals NHS Trust 2019 ICR 1, CA**, Lord Justice Underhill reiterated the sentiment he had previously expressed in **Ahir** when concluding that an employment judge had correctly struck out a constructive dismissal claim based on a final straw incident on the basis that it had no reasonable prospect of success. His Lordship observed: '

Whether [striking out] is appropriate in a particular case involves a consideration of the nature of the issues and the facts that can realistically be disputed. There were in this case, no relevant issues of primary fact. Had the matter proceeded to a full hearing the job of the tribunal would not have been to decide the rights and wrongs of the [final straw] incident of 22 April, and it would not have heard evidence directly about that question. The issue would have been whether the disciplinary processes were conducted seriously unfairly so as to constitute, or contribute to, a repudiatory breach of the Appellant's contract of employment. The evidence relevant to that question in substance consisted only of the documentary record. It is true that if there were any real grounds for asserting actual bad faith on the part of the decision-makers that could not have been resolved without oral evidence; but that was not the pleaded case, and the employment judge was entitled to conclude that there was no arguable basis for it.

17. In **E v X, L and Z UKEAT/0079/20 (10 December 2020, unreported)** the immediate point in this appeal was that a second Employment Judge had erred in overturning a case management decision of the first Employment Judge without these being a change in circumstances. However, of more general importance is the context, namely a striking out of a claim raising the always difficult area (on time limits) of whether the claimant can rely on the concept of 'acts extending over a period'. The judgment of Ellenbogen J in the EAT at [50] subjects this question to lengthy guidance in the light of six leading cases, namely **Sougrin v Haringey Health Authority [1992] IRLR 416**, **Robinson v Royal Surrey County Hospital NHS Foundation Trust UKEAT/0311/14 (30 July 2015, unreported)**, **Sridhar v Kingston Hospital NHS Foundation Trust UKEAT/0066/20 (21 July 2020, unreported)**, **Caterham School Ltd v Rose UKEAT/0149/19 (22 August 2019, unreported)**, **Lyfar v Brighton & Sussex University Hospitals**

NHS Trust [2006] EWCA Civ 1548, and **Aziz v FDA [2010] EWCA Civ 304**. The guidance is lengthy, but is important and is set out here in full:

a. In order to identify the substance of the acts of which complaint is made, it is necessary to look at the claim form: **Sougrin**.

b. It is appropriate to consider the way in which a claimant puts their case and, in particular, whether there is said to be a link between the acts of which complaint is made. The fact that the alleged acts in question may be framed as different species of discrimination (and harassment) is immaterial: **Robinson**.

c. Nonetheless, it is not essential that a positive assertion that the claimant is complaining of a continuing discriminatory state of affairs be explicitly stated, either in the claim form, or in the list of issues. Such a contention may become apparent from evidence or submissions made, once a time point is taken against the claimant: **Sridhar**.

d. It is important that the issues for determination by the tribunal at a preliminary hearing have been identified with clarity. That will include identification of whether the tribunal is being asked: (1) to consider whether a particular allegation or complaint should be struck out, because no prima facie case can be demonstrated; or (2) substantively to determine the limitation issue: **Caterham**.

e. When faced with a strike-out application arising from a time point, the test which a tribunal must apply is whether the claimant has established a prima facie case, in which connection it may be advisable for oral evidence to be called. It will be a finding of fact for the tribunal as to whether one act leads to another, in any particular case: **Lyfar**.

f. An alternative framing of the test to be applied on a strike-out application is whether the claimant has established a reasonably arguable basis for the contention that the various acts are so linked as to be continuing acts, or to constitute an on-going state of affairs: **Aziz; Sridhar.**

g. The fact that different individuals may have been involved in the various acts of which complaint is made is a relevant, but not conclusive, factor: **Aziz**.

h. In an appropriate case, a strike-out application in respect of some part of a claim can be approached assuming, for that purpose, the facts to be as pleaded by the claimant. In that event, no evidence will be required – the matter will be decided on the claimant's pleading: **Caterham**.

i. A tribunal hearing a strike-out application should view the claimant's case, at its highest, critically, including by considering whether any aspect of that case is innately implausible for any reason: **Robinson.**

j. If a strike-out application succeeds, on the basis that, even if all the facts were as pleaded, the complaint would have no reasonable prospect of success (whether because of a time point or on the merits), that will bring

that complaint to an end. If it fails, the claimant lives to fight another day, at the full merits hearing: **Caterham**.

k. Thus, if a tribunal considers (properly) at a preliminary hearing that there is no reasonable prospect of establishing at trial that a particular incident, complaint about which would, by itself, be out of time, formed part of such conduct together with other incidents, such as to make it in time, that complaint may be struck out: **Caterham**.

l. Definitive determination of an issue which is factually disputed requires preparation and presentation of evidence to be considered at the preliminary hearing, findings of fact and, as necessary, the application of the law to those facts, so as to reach a definitive outcome on the point, which cannot then be revisited at the full merits hearing: **Caterham**.

m. If it can be done properly, it may be sensible, and, potentially, beneficial, for a tribunal to consider a time point at a preliminary hearing, either on the basis of a strike-out application, or, in an appropriate case, substantively, so that time and resource is not taken up preparing, and considering at a full merits hearing, complaints which may properly be found to be truly stale such that they ought not to be so considered. However, caution should be exercised, having regard to the difficulty of disentangling time points relating to individual complaints from other complaints and issues in the case; the fact that there may be no appreciable saving of preparation or hearing time, in any event, if episodes that could be potentially severed as out of time are, in any case, relied upon as background to more recent complaints; the acute fact-sensitivity of discrimination claims and the high strike-out threshold; and the need for evidence to be prepared, and facts found (unless agreed), in order to make a definitive determination of such an issue: **Caterham**.

18. EQA, section 6 defines a 'disabled person' as a person who has a 'disability'. A person has a disability if he or she has 'a physical or mental impairment' which has a 'substantial and long-term adverse effect on [his or her] ability to carry out normal day-to-day activities.' The burden of proof is on Mrs Ward to show that she meets this definition.

19. In **J v DLA Piper UK [2010] ICR 1052**, the EAT was concerned with the question whether conditions described as "depression" will amount to impairments. Underhill P said:

> *42. The first point concerns the legitimacy in principle of the kind of distinction made by the tribunal, as summarised at para 33 (3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness-or, if you prefer, a mental condition-which is conveniently referred to as "clinical depression" and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but*

> *simply as a reaction to adverse circumstances (such as problems at work) or-if the jargon may be forgiven- "adverse life events". We daresay that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians-it is implicit or explicit in the evidence of each of Dr Brener, Dr MacLeod and Dr Gill in this case-and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most lay people, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress". Fortunately, however, we would not expect those difficulties often cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para 40 (2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical" depression rather than simply a reaction to adverse circumstances: it is a commonsense observation that such reactions are not normally long-lived.*

20. Underhill P's statement above was referred to and approved by the EAT in **Herry v Dudley Metropolitan Council UKEAT/0101/16**. It went on to say:

> *56. Although reactions to adverse circumstances are indeed not normally long-lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers little or no apparent adverse effect normal day-to-day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress and as anxiety or depression. An Employment Tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with the decision or a colleague, a tendency to nurse grievances, or a refusal to compromise (if these or similar findings are made by and Employment Tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of the diagnosis of mental impairment must of course be considered by an Employment Tribunal with great care; so must any evidence of adverse effect over and above and unwillingness to return to work until an issue is resolved to the employee's satisfaction; but in the end the question whether there is a mental impairment is one for the Employment Tribunal to assess.*

21. EQA, section 123(1) legislates for time limits in bringing discrimination claims. It provides that proceedings of this nature 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.

22. EQA, section 123 and its legislative equivalents do not specify any list of factors to which a tribunal is instructed to have regard in exercising the discretion whether to extend time for 'just and equitable' reasons. Accordingly, there has been some debate in the courts as to what factors may be relevant to consider.

23. To establish whether a complaint of discrimination has been presented in time it is necessary to determine the date of the act complained of, as this sets the time limit running. Where the act complained of is a single act of discrimination, this will not usually give rise to any problems. A dismissal, for example, is considered to be a single act and the relevant date is the date on which the employee's contract of employment is terminated. Where dismissal is with notice, the EAT has held that the act of discrimination takes place when the notice expires, not when it is given (**Lupetti v Wrens Old House Ltd 1984 ICR 348, EAT**). Rejection for promotion is also usually considered a single act. In this case, the date on which another person is promoted in place of the complainant is the date on which the alleged discrimination is said to have taken place (**Amies v Inner London Education Authority 1977 ICR 308, EAT**).

Steenberg Reed's submissions

24. Mr Tatton Brown provided the Tribunal with a 15-page skeleton argument which he adopted and expanded upon when he made his oral submissions. I do not propose paraphrasing the skeleton argument, but it is referred to and incorporated herein for the sake of brevity.

25. Mr Tatton Brown made the following key submissions on the facts relating to Mrs Ward's claim to be disabled because of anxiety and depression:

a. Mrs Ward's case is that she suffers from a mental impairment of sufficient severity to satisfy the definition of disability as set out in EQA, section 6. She relies upon her claim that she suffers from anxiety and depression having been diagnosed with that condition twice, first in February 2019 and secondly in March 2022. Mrs Ward claims that this impairment is long-term and substantial. Steenberg Reed maintains that this claimed disability has no reasonable prospect of success because Mrs Ward has not provided any evidence to the Tribunal that she was suffering from anxiety and depression. Mr Tatton Brown acknowledged that Mrs Ward had provided considerable evidence to the Tribunal of her dealings with her GP [164-188]. These records run to 25 or 26 pages although the original records indicate that there were 46 pages in total. The Tribunal did not have all 46 pages. Furthermore, many of the records were redacted.

b. The current problems that Mrs Ward suffers from are listed on the first page of the GP records. In the section headed “Significant Past”, running from 29 December 1977 until 6 July 2022, there were no significant past problems identified by the GP to suggest a mental impairment relevant to the claim of disability.

c. The section in the GP records entitled “Minor Past” has entries running from 14 September 2006 until 8 September 2022. There were two records relating to stress at work. The first is on 4 March 2022 and the second is on 8 September 2022.

d. The medical records indicated that Mrs Ward took time off work through illness based on work-related stress in 2019. Indeed, Mrs Ward has pled this. Similarly, the records show that she took time off work through illness based on work-related stress in 2022. Mrs Ward relies on these two absences in support of her contention that she was disabled in 2022. Mr Tatton Brown submitted that Mrs Ward’s claimed diagnosis of anxiety and depression was not referred to as a past minor problem.

e. The medical records are detailed, and Mr Tatton Brown did not propose going through them exhaustively. However, the critical point that he made was that nowhere in the 46 pages was any reference made to depression. In his submission it was a source of concern to Steenberg Reed for Mrs Ward to claim that she had been diagnosed with anxiety and depression twice. Mr Tatton Brown acknowledged that there was an entry in the GP records for 11 January 2019 [185] where it was commented that Mrs Ward may have had an anxiety and panic attack. This related to the first period of absence from work in 2019. I was then taken to the entry for 8 February 2019 [185] where the GP identifies the problem as work-related stress.

f. Mr Tatton Brown submitted that there was no reference to anxiety in the GP records relating to Mrs Ward’s absence from work in 2022. During that period, Mrs Ward regularly attended her GP as evidenced by the contemporaneous notes. It appeared that she had visited her GP for various reasons. Nowhere in those notes was there any reference to depression. Any references made to anxiety were fleeting and limited to 2019.

g. In view of the foregoing, Mrs Ward had no reasonable prospect of establishing that she had been diagnosed with anxiety and depression and was unable to meet the statutory definition set out in EQA, section 6.

h. I was then taken to an occupational health report dated 21 May 2019 [190]. Mrs Ward had a face-to-face meeting with Mr Jonathan Crabtree. The reason for the referral was work-related stress and not depression. Paragraph 3 of the report records that Mrs Ward had been absent from work since 7 February 2019. The main cause for this absence is reportedly linked to a breakdown in relations between Mrs Ward and her manager. Mr Crabtree also recorded that Mrs Ward was generally fit and well and had not declared any health issues that were likely to impact

on her ability to undertake a job role. Mr Crabtree records that Mrs Ward was not taking any medications that were likely to impact on her ability to undertake a job role. He noted that Mrs Ward had sought appropriate advice from her GP during her period of absence and that she is regularly reviewed. Mr Crabtree then states [192]:

> *Johanne has not declared any health conditions that are likely to come under the terms of the Equality Act (2010) however this is a legal rather than a medical decision.*

i. In Mr Tatton Brown's submission, the absence of evidence undermined Mrs Ward's case to establish that she is disabled. Furthermore, the periods of absence from work did not meet the 12-month threshold required to meet the statutory definition of disability.

j. I was then taken to Mrs Ward's response to the application to strike out her claims. She had referred to her counselling records [127] which had a manuscript note "reactive low" against a line entry entitled "Depression". This related to a meeting between Mrs Ward and her counsellor in April 2019. Mrs Ward's counsellor was a psychotherapist and not a medical doctor [128]. The records show that Mrs Ward was suffering difficulties at work, and she had been signed off by her GP for work-related stress. Her GP had recommended counselling. Mrs Ward had not been diagnosed or signed off with anxiety and depression. Her anxiety was linked to her work and relationship problems with her manager. There was also reference to issues that Mrs Ward had with her relationship with her husband. Mr Tatton Brown acknowledged the entry identifying low reactive depression. However, in his submission low level depression was reactive to events at work and did not come close to establishing a diagnosis of anxiety and depression. In any event, these are related to 2019.

k. Mrs Ward had responded to clarify that the main reason that she had consulted her GP was because she was suffering stress at work. In Mr Tatton Brown's submission this was not a medical condition but a state of affairs causing stress and anxiety. The key point was that as Mrs Ward was no longer at work after September 2022 that state of affairs could not have continued thereafter. I was taken to the GP records and, in particular, the entry for 14 December 2022 where the GP recorded, during a mental health review, that Mrs Ward was doing alright and felt better as she does not have to communicate with her work. She is recorded as having more good days than bad days and her sleep was better. She is recorded as having spoken to her counsellor and she did not have suicidal thoughts. This did not indicate that Mrs Ward was suffering from a continuing impairment.

l. Mr Tatton Brown submitted that Mrs Ward was advancing a case that she was disabled as of September 2022. Such a claim had no reasonable prospect of success. Mr Tatton Brown acknowledged that the Tribunal should approach a strike out application cautiously given this was a discrimination case. However, he distinguished this case from others on the basis that Mrs Ward had to prove that she was disabled.

She had not done that on the evidence. She had been given ample opportunity to provide the evidence and had failed to do so.

m. By way of completeness, Mrs Ward had provided a letter from her GP Dr Hameed dated 28 July 2023 [323]. This referred to Mrs Ward first consulting Dr Hameed on 4 March 2022 because of work-related stress. He then narrates the history of further consultations during 2022 and 2023. The reference for December 2022 (after her employment ended) indicated that Mrs Ward was feeling mentally well because she did not have to communicate with her workplace. In Mr Tatton Brown's submission, this proved that her stress ended when her employment ended and was not continuing. This was another adminicle of evidence showing that the statutory definition of disability could not be met. Further on in the letter, reference was made to Mrs Ward suffering from stress, but this is connected to life events such as the Tribunal claim. Finally, Dr Hameed summarised his conclusion as follows:

> *In summary, Mrs Ward has had two episodes of work-related stress but was affecting her mental health that led to anxiety and low mood. These episodes affected her so badly that she had to take time off work and she experienced anxiety, palpitations, dizzy spells, sleep disturbances, low mood and low in confidence.*

26. Mr Tatton Brown then addressed me on the alternative argument that on the hypothesis that Mrs Ward was disabled, Steenberg Reed did not know or could not reasonably have known of her disability at the relevant time. In particular, he submitted:

a. Mrs Ward had claimed that the basis of Steenberg Reed's knowledge was derived from the fact of her long-term absence from work. Mr Tatton Brown submitted that both periods of absence were nowhere near close enough to 12 months. The absences consisted of Mrs Ward being signed off at two weekly intervals for stress at work. Cumulatively, both periods amounted to 6 months after which Mrs Ward was able to return to work. The specified reason for absence was stress at work which was insufficient to impute knowledge on Steenberg Reed that Mrs Ward was suffering from anxiety and depression.

b. I was taken to paragraph 31 of the skeleton argument where Mr Tatton Brown summarised the documents relied upon by Mrs Ward to establish Steenberg Reed's knowledge (actual or constructive). None of these documents established that Steenberg Reed knew or ought to have known about the claim disability. At its highest, the formal grievance raised by Mrs Ward in an email dated 12 July 2022 [307] referred to the possibility that Mrs Ward was disabled. Steenberg Reed accepted what was written in that email, but it did not constitute information upon which it could be said that it knew or ought to have known that Mrs Ward was disabled. Mrs Ward could say that in the light of her assertion that she was disabled, Steenberg Reed ought to have commissioned an occupational health report to investigate that assertion. That was accepted as a factual issue that would have to be resolved by the Tribunal. There was no evidence that Mrs Ward had been seen by

occupational health and that a hypothetical person would have produced a report that concluded that she was disabled. The mere fact that suggested that an occupational health consultation should take place did not mean that Steenberg Reed ought to have known that Mrs Ward was disabled. Mr Tatton Brown submitted that this was a "Micawber" and impermissible approach to imputing knowledge on the premise that "something might turn up" if there had been a referral to occupational health. There was no real prospect of Mrs Ward establishing that Steenberg Reed new or ought to have known that she was disabled.

c. If I was not with Mr Tatton Brown on the application to strike out the disability claim, I was invited to make a deposit order.

27. Mr Tatton Brown then addressed me on the bonus claim. In summary, he said as follows:

a. The claim was years out of time and had no reasonable prospect of success.

b. The burden was on Mrs Ward to persuade the Tribunal to exercise discretion to extend time.

c. The statutory limitation period was three months. The bonus claims related to payments that should have been made in 2017/18 and 2018/19. In subsequent years, there have been bonuses declared. Mrs Ward had not complained about those. In Mr Tatton Brown's submission, this established that bonuses were declared annually and could not be seen as a continuing series of acts. On that analysis, Mrs Ward's complaints related to one-off acts in each of the years 2017/18 and 2018/19. This was an obvious point. I was referred to Mrs Ward's email to Kelly Rotherham dated 19 January 2022 [336] where Mrs Ward had made a proposal regarding her bonus for the year 2021/22. Mrs Rotherham rejected that proposal on behalf of the partners in an email to Mrs Ward on 8 February 2022 [336]. In Mr Tatton Brown's submission, this was evidence that decisions regarding the payment of the bonus were not only discretionary but made on an annual basis and were self-contained. Every year, there would be a discussion about the payment of a bonus and eligibility thereto. This was further evidence against any suggestion that the exercise of discretion regarding bonuses constituted a continuing series of acts.

d. On the premise that the decisions regarding the payment of bonuses in 2017/18 and 2018/19 was stand-alone and not continuing acts, then the burden would fall on Mrs Ward to persuade the Tribunal to exercise discretion to extend time on the basis that it would be just and equitable to do so. Mrs Ward had not offered any basis to enable the Tribunal to extend time.

e. Mr Tatton Brown also submitted that Mrs Ward had not complained about these bonuses at the time. Although she was a litigant in person, she is a solicitor albeit not an employment lawyer. However, she was quite capable of complaining and only did so when she raised a formal

grievance in 2022. Given her background in practicing clinical negligence and personal injury cases, she would have been well aware and familiar with the importance of time limits, and she would or ought to have known where to find details of the time limits that were applicable.

f. Given the foregoing, there was no justification to extend time in respect of what was an unmeritorious case. If time were to be extended, the Tribunal would have to hear a completely new body of evidence about decisions that were taken many years ago. Mrs Ward had made no attempt to explain why it was just and equitable to extend time and it was not appropriate for the Tribunal to wait and see if something turned up as part of disclosure. I was invited to strike out the claim or, to make a deposit order.

g. Mrs Ward had other claims which are proceeding to the seven-day final hearing that had already been listed. If I did not strike out the claim as identified in the application or grant the deposit order, the effect would be greatly to complicate matters, requiring further time for the final hearing which would, in turn increase the cost in defending claims that were years out of date.

Mrs Ward's submissions

28. Mrs Ward prepared a 10-page response to the application dated 4 August 2023 [228] which she adopted and expanded upon when she made her oral submissions. I do not propose paraphrasing the response, but it is referred to and incorporated herein for the sake of brevity.

29. Mrs Ward submitted that most discrimination cases are fact sensitive and require the evidence to be tested at a final hearing. Consequently, Steenberg Reed's application to strike out some of her claims was premature. Furthermore, the application predated disclosure which was due to happen next month. Even though Mrs Ward had provided some documentary evidence, she said a lot more was still to come. Consequently, the Tribunal only had a snapshot of the evidence before it and, by implication, not the complete picture.

30. Regarding her GP notes, I was referred to the entry for 11 January 2019 which referred to Mrs Ward suffering from anxiety and panic attacks [185]. I was referred to numerous entries in the GP records for the following dates: 4 April 2019, 15 May 2019, 3 & 24 June 2019, 11 October 2019, 8 November 2019, 9 December 2019.

31. I was referred to Dr Gormley's referral letter of 13 February 2019 [296] referring to Mrs Ward suffering with fairly significant workplace stress and with what sounded to them like anxiety and significant panic attacks.

32. Mrs Ward said that she had a diagnosis of anxiety and depression, but she accepted that the word depression was not referred to in her GP records. She said that she had been prescribed sertraline and had been referred to

counselling because of mental impairment. She said that her stress at work had been accompanied by anxiety and depression.

33. Mrs Ward referred to her length of absence and the fact that she had to return to work on a phased basis which had taken longer than she had expected [297-301]. She had returned to work in July 2022 but had encountered further issues with the way that she was treated as set out in her return-to-work interview record [311-313].

34. Mrs Ward maintained that she suffered from anxiety and depression and there was sufficient evidence before the Tribunal to support that conclusion. It would be unjust and premature to strike out her disability claims or to issue a deposit order. She also believed that referral to occupational health would have caused Steenberg Reed to conclude that she was disabled.

35. I was also referred to the GP records the 2022 as further evidence of her disability.

36. Turning to the application to strike out her indirect discrimination and bonus claims, Mrs Ward repeated her contention that these were fact sensitive and to strike them out before disclosure would not only be premature but also unjust.

37. Mrs Ward submitted that whilst the bonus claims went back to 2017, she only became aware of various discrepancies in Steenberg Reed's records on her billing and previous bonus payments made to her over a number of years when she obtained information from them in July/August 2022. She had not raised anything before because she was unaware of the situation.

38. In response to Mr Tatton Brown's contention that the setting of bonuses was a discrete act, if that was the case, Mrs Ward questioned why she had not been informed on an annual basis what her bonus target was after 2019. Mrs Ward had asked for an explanation back in 2022 which was only provided in March 2023, and which still made no sense to her. She submitted that without proper disclosure from Steenberg Reed, she could not work out what bonuses she was entitled to receive. The basis upon which it would be just and equitable to extend time for these claims was set out in paragraph 58 of her response.

39. Regarding the bonus for 2019/2020, Mrs Ward submitted that she could not complain if she did not have verifiable information. The information that had been provided to her did not make sense.

<u>Steenburg Reid's rebuttal</u>

40. Regarding the disability claim, Mr Tatton Brown said that Mrs Ward had taken the Tribunal to a large number of documents upon which she relies but there was no evidence that there was a diagnosis of depression and anxiety. This continued to be a cause of concern because she was asserting that there was such a diagnosis at specific points in time. The headline point was that the GP notes were very extensive, they recorded conversations that took place between Mrs Ward and her GP. The further letter of support

issued by Dr Hameed did not support Mrs Ward's case at all. Mrs Ward had not identified a diagnosis of anxiety and depression.

41. On the question regarding whether it would be just and equitable to extend time because there were historic complaints about bonuses, Mrs Ward had argued that this discretion should be exercised in her favour on the basis that she had only recently received relevant information last year. Mr Tatton Brown submitted that this was a hopeless submission and did not provide a basis upon which time should be extended. He reminded the Tribunal that this related to an indirect sex discrimination claim and my attention was drawn to paragraphs 63 and 65 of the amended particulars of claim [74 & 75] which allege that Mrs Ward's bonus targets should have been adjusted to reflect her part-time status and that more women than men work part-time. The failure to make that adjustment acted to Mrs Ward's detriment. Steenberg Reed did not accept this but, that argument did not depend on identifying some sort of comparator when Mrs Ward said she had made her claim late and could not bring it any earlier because she had learned that other employees had been given a bonus. Such a line of argument would be relevant to a claim of direct discrimination. However, Mrs Ward was making a claim of indirect sex discrimination. Her claim was confused and should be struck out.

Discussion and conclusions

The disability related claims

42. I find that the disability related claims have no reasonable prospect of success and are struck out for the following reasons:

    a. Mrs Ward, contrary to what she states in her disability impact statement, and in her particulars of claim, has never received a diagnosis of anxiety and depression from a GP or other medically qualified doctor.

    b. Mrs Ward has suffered from anxiety in 2019 and in 2022. This was connected to work-related stress. She had two periods of sickness absence. However, both periods were substantially less than 12 months.

    c. Since leaving her employment, she has not suffered from work-related stress, although she has experienced some stress arising from these Tribunal proceedings. Her health appears to have improved. I accept that her psychotherapist expressed the opinion that Mrs Ward had low-level reactive depression in April 2019, but this was clearly linked to problems that she was having at work.

    Mrs Ward's stress was caused by her difficulties at work, which in itself does not amount to a disability.

    The indirect sex discrimination/part-time workers discrimination claims

43. I find that the indirect sex discrimination/part-time workers discrimination claim should be struck out as having no reasonable prospect of success for the following reason.

44. Steenberg Reed operates a bonus policy. Bonuses are declared annually and are subject to the exercise of discretion each year that they are awarded. They are discrete stand-alone exercises. They are not part of a continuing series of acts. Mrs Ward's claims in respect of the 2017/2018 and the 2018/2019 bonuses are significantly out of time. I do not accept her argument that she was only able to advance these claims after being provided with information from Steenberg Reed last year. If she was unhappy about the fact that she was not paid a bonus in those years, she could have raised a grievance at the time. As an experienced litigation solicitor she would have been well aware of the importance of time limits for issuing proceedings. It is telling that she has not taken exception to bonuses that were declared after 2018/2019. There are no just and equitable grounds to extend time to allow these claims to be heard by the Tribunal.

Employment Judge A Green

22 August 2023