EMPLOYMENT TRIBUNALS

Claimant: Ms N Roberts

Respondent: Cardiff County Council

Heard at: Cardiff **On:** 5 January 2023

Before: Employment Judge S Jenkins

Representation
Claimant: In person, assisted by a friend, Mr S Newman
Respondent: Mr C Howells (Counsel)

JUDGMENT

1. The Claimant's claim of unfair dismissal was presented outside the stipulated time limit, but it was not reasonably practicable for her to have brought her claim within that time limit, and she brought her claim within a further reasonable period.

2. The Respondent's application to strike out the Claimant's unfair dismissal claim because it has no reasonable prospect of success is refused.

3. The Respondent's application for an order requiring the Claimant to pay a deposit as a condition of continuing to advance her unfair dismissal claim is refused.

REASONS

Background

1. The Claimant submitted her Claim Form on 30 March 2022, ticking only the box relating to a claim of unfair dismissal, which she pursues on a constructive unfair dismissal basis. The details of her claim however, suggested that she may also be pursuing claims relating to protected disclosures and disability. The Claimant was, and remains, a litigant in person.

2. Upon the initial vetting of the Claim Form therefore, Employment Judge Ryan questioned, in a letter sent to the Claimant on 27 April 2022, whether she had made protected disclosures and had been subject to detriments, and ultimately constructive unfair dismissal, as a result. He also questioned whether the Claimant asserted that she was disabled and had been

subjected to disability discrimination. The Claimant replied in the affirmative to both points on 2 May 2022, albeit without providing any detail, which she had not been requested to provide.

3. Confusion appears to have arisen from the Tribunal's subsequent correspondence. On the Tribunal file was a letter dated 19 May 2022 to the Claimant, copied to the Respondent, confirming that a "*claim for Public Interest Disclosure*" had been accepted. The Claimant however brought to my attention, at the start of the hearing, that she had in her possession a letter from the Tribunal dated 18 May 2022, noting, "Your claim for whistleblowing, due to the discrimination of your disability has been accepted". That letter had not been copied to the Respondent.

4. The Respondent therefore understood that it was facing a claim of unfair dismissal, and a claim in relation to protected disclosures, although it would not have been clear whether that was confined to dismissal or detriments, or involved both. The Claimant however, whilst the wording of the 18 May 2022 letter does not really make sense, was under the impression that claims relating to protected disclosures and disability discrimination had been accepted.

5. In my view, the Claimant's letter of 2 May 2022 is clear, and it confirms that the Claimant is pursuing claims arising from asserted protected disclosures and in relation to disability discrimination. The Claimant's letter should have led to the scheduling of a preliminary hearing for case management purposes, at which the Claimant's specific claims could have been discussed and clarified. I had hoped that we could do that at the end of this hearing, but there was insufficient time. A further preliminary hearing for case management purposes will therefore need to be scheduled.

6. I confirm however that it should be considered that the Claimant has brought claims of protected disclosure detriment, pursuant to section 47B of the Employment Rights Act 1996 ("ERA"), and constructive unfair dismissal by reason of protected disclosure, pursuant to section 103A, ERA, as well as an "ordinary" constructive unfair dismissal claim pursuant to section 94 ERA. She has also bought a claim of disability discrimination, the specific detail of which remains to be clarified.

7. The Respondent submitted its Response on 25 May 2022, addressing the claims that it understood the Claimant was pursuing. That included responding to, and denying, claims relating to protected disclosure detriment and disability discrimination, as well as constructive unfair dismissal, although it sought further particulars of the detriment and discrimination claims.

8. In addition to resisting the Claimant's claims substantively, the Respondent also raised concerns that the Claimant's claims had been brought out of time and should be dismissed and also that the claims had no, or alternatively little, prospect of success. Those points were raised in the Response, but had also been raised in a separate letter dated 24 May 2022.

9. Following the vetting of the Respondent's Response, Employment Judge

Webb directed that a preliminary hearing should be listed to consider the matters before me today. That was initially listed to take place on 21 November 2022, but was postponed due to uncertainty over whether the parties had reached a concluded settlement of their dispute via ACAS in March 2022, which I discuss further in my Findings below. Following confirmation from ACAS that no binding agreement had been reached, the hearing was rescheduled for 5 January 2023.

Issues

10. The hearing was listed to consider the following matters:

    (i) Whether to strike out the claim because it has no reasonable prospect of success.

    (ii) Whether to order the Claimant to pay a deposit (not exceeding £1000) as a condition of continuing to advance any specific allegation or argument in the claim if the Tribunal considers that allegation argument has little reasonable prospect of success.

    (iii) Was the unfair dismissal complaint presented outside the time limits in sections 111(2)(a) & (b) of the Employment Rights Act 1996 and if so should it be dismissed on the basis that the Tribunal has no jurisdiction to hear it? Further or alternatively, because of those time limits (and not for any other reason), should the unfair dismissal complaint be struck out under rule 37 on the basis that it has no reasonable prospects of success and/or should a deposit order be made under rule 39 on the basis of little reasonable prospects of success? Dealing with these issues may involve consideration of subsidiary issues including: whether it was "not reasonably practicable" for the unfair dismissal complaint to be presented within the primary time limit; what the effective date of termination was.

11. I indicated at the outset of the hearing that it would be appropriate to consider the time limit issue first, as if I concluded that the claim had been brought out of time, there would then be no need to consider the relative prospects of the Claimant's claims.

Law

<u>Time limits</u>

12. The notice of hearing confirmed that the time limit issue to be considered related to the unfair dismissal complaint. In that regard, section 111(2)(a) and (b) ERA provides as follows:

    "*(2) … an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—*

    (a) before the end of the period of three months beginning with the effective date of termination, or

    (b) within such further period as the tribunal considers reasonable in a case

where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

13. Section 111 ERA therefore provides that an employment tribunal should not consider a complaint of unfair dismissal unless it has been presented before the end of the period of three months beginning with the effective date of termination, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to have been presented before the end of the three month period. The three month period is to be extended, pursuant to section 207B ERA, by virtue of any time spent pursuing early conciliation with ACAS. That essentially means that a claimant must make contact with ACAS for the purposes of early conciliation during the initial three month period.

14. There has been a considerable amount of case law on this point over the years, and one point that has been made clear is that it is a strict test. It is for a claimant to justify the conclusion that the claim was not able to be reasonably practicably brought within time, and that then it was brought within a reasonable time thereafter.

15. The cases have made clear that a number of reasons for delay can arise in assessing the reasonable practicability question, including whether the claimant was aware of the right to pursue matters before the Tribunal, and the impact of a claimant's health, both of which, to a greater or lesser degree, arose in this case.

16. The issue of reasonable practicability includes an assessment of the claimant's ignorance of rights, but any ignorance must be reasonable. Scarman LJ (as he then was), in ***Dedman -v- British Building Engineering Appliances Limited*** **[1974] 1 WLR 171**, noted that a Tribunal must ask the questions of, "*What were [the claimant's] opportunities for finding out that [they] had rights? Did [they] take them? If not, why not?*"

17. I also noted that the Court of Appeal, in ***Porter -v- Bandridge Limited*** **[1978] ICR 943**, recorded that the test was not whether the claimant knew of his or her rights, but whether he or she ought to have known of them.

18. With regard to illness, a debilitating illness may prevent a claimant from submitting a claim in time, but usually this will only constitute a valid reason for extending time if supported by medical evidence which demonstrates not only the illness, but the fact that the illness prevented the claimant from submitting the claim in time. Although equally the appellate authorities confirm that medical evidence is not absolutely essential.

19. If the decision is that it was not reasonably practicable for the claim to have been brought in time then the Employment Appeal Tribunal ("EAT") confirmed, in ***Cullinan -v- Balfour Beatty*** **(UKEAT/0537/20)**, that consideration of whether the claim is brought within a further reasonable period will require an objective consideration of the relevant factors causing the delay and what period should reasonably be allowed in the circumstances, having regard to the strong public interest in claims being brought in time.

Strike out

20. Various appellate decisions, notably the House of Lords decision of ***Anyanwu and anor v South Bank Student Union and anor*** **[2001] ICR 391**, the Court of Appeal decision of ***Ahir v British Airways plc*** **[2017] EWCA Civ 1392**, and the EAT decision of ***Abertawe Bro Morgannwg University Health Board v Ferguson*** **[2013] ICR 1108**, have made clear that a strike out order should not be made in discrimination cases, except in the most obvious of cases, as they are generally fact sensitive and require a full examination of the evidence in order to make a proper determination.

21. I also took into consideration the EAT decision of ***Balls v Downham Market High School and College*** **[2011] IRLR 217**, where Lady Smuth noted, in relation to a claim of unfair dismissal, that, "*…the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects*".

22. However, I noted the comment of Underhill LJ in ***Ahir*** that, "*Employment Tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context*".

Deposit Order

23. In relation to deposit orders, the EAT, in ***Van Rensburg v The Royal Borough of Kingston upon Thames*** **(UKEAT/0096/07)**, noted that the "little reasonable prospect" test is not as rigorous as the "no reasonable prospect" test, noting that a Tribunal has a greater leeway when considering whether or not to order a deposit. Also, the Court of Appeal in ***Ezsias v North Glamorgan NHS Trust*** **[2007] ICR 1126**, noted that it was not wrong for a Tribunal to make a provisional assessment of the credibility of a party's case when deciding whether to make a deposit order.

24. However, in ***Hemdan v Ishmael*** **[2017] ICR 486**, the EAT noted, in relation to applications for deposit orders that "*a mini trial of the facts is to be avoided*", and that "*if there is a core factual conflict, it should properly be resolved at a full merits hearing where evidence is heard and tested*".

Background circumstances

25. Whilst I set out my findings below relevant to the issues I had to decide in

relation to the time limit application, it is appropriate for me to set out some of the background circumstances to the claim. I make it clear that nothing I say with regard to the events which occurred prior to the termination of the Claimant's employment should be taken as firm findings, which would bind any Tribunal which considers the merits of the Claimant's claims. They are, as I have noted, descriptions of the background circumstances to my decision, and are not specific findings of fact.

26. The Claimant was employed by the Respondent from February 2007 onwards, until she resigned with immediate effect on 4 November 2021. At that point, she was a social worker in the Respondent's Emergency Duty Team ("EDT").

27. The issue which appears to have started events moving forward to the Claimant's ultimate resignation was the Respondent's decision to allow one of her colleagues to return to work, notwithstanding his conviction for a drink-driving offence, which the Claimant contends occurred whilst on duty. The Claimant, together it seems, with a colleague, raised concerns about that in December 2020, which she contends, involved the making of a protected disclosure. A meeting to discuss those concerns took place between the Claimant, two of her colleagues, and two of the Respondent's Mental Health Team's managers, on 15 December 2020. The Claimant was then absent due to sickness from 17 December 2020 to 27 July 2021.

28. The Claimant submitted a grievance (under the Respondent's "Resolution" policy) on 5 March 2021, which, in addition to raising concerns about her colleague's return, also raised concerns about that employee's treatment in comparison with the Claimant, reference being made to the Claimant contending that terms and conditions within the EDT appeared to have been changed, in that she had understood that a current driving licence and access to a car was an essential requirement. The Claimant complained that adjustments appeared to have been made to facilitate her colleague's return, which had not been permitted in her case when she had previously asked for adjustments to her role.

29. Parts of the Claimant's grievance were upheld, but she lodged an appeal against the outcome. That was considered by Jean Thomas, the Respondent's Director of Adults, Housing and Communities, with the appeal outcome being provided on 19 August 2021. That appeared again to partly uphold the Claimant's concerns.

30. The Claimant's desired outcome from her appeal was that she wished to transfer to a different team. Ms Thomas explained that there were two possible options relating to that under the Respondent's procedures. One was a temporary redeployment, seemingly under the Respondent's sickness absence procedure, for up to three months as part of a return to work following sickness absence; the Claimant could then apply for other posts during that period.

31. The other was a more permanent redeployment under the Respondent's redeployment policy, seemingly applicable in the context of redundancies. It seemed that, in order to be considered under that policy, a dismissal from the existing role would need to be effected before the Claimant could be

redeployed. Ms Thomas confirmed to the Claimant that it was very likely that the Claimant could be redeployed into a vacant post within the Respondent's Mental Health Services. Older People ("MHSOP") team, but that that could not be guaranteed.

32. The Claimant and Mr Thomas met on 27 August 2021 to discuss the options. It seems that the Claimant was very reluctant to proceed with the redeployment option, as that would involve a dismissal. She preferred a temporary move to MHSOP as a temporary adjustment under the Respondent's sickness policy.

33. Ms Thomas then wrote to the Claimant, on 1 September 2021, noting that she sympathised with the Claimant's concerns about having to be dismissed in order to be redeployed under the Respondent's redundancy policy. She went on to say:

"*As a compromise I will arrange for you to undertake your trial period in the new post before you go through the redeployment, reversing the normal process. This will allow your new post to be confirmed prior to your dismissal from your current post. I hope you accept that this is a reasonable compromise under the circumstances.*"

34. The Claimant commenced a phased return into that new post on 6 September 2021. It was proposed that she gradually increase from 25% of her contracted hours up to 100% over a 13 week period.

35. From 1 October 2021 however, the Claimant was absent from work due to sickness, and she did not return. She then emailed Ms Thomas, on 4 November 2021, noting that:

"*Further to the Resolution procedure I now feel that I have no choice but to tender my resignation. The "temporary redeployment" that you offered as a resolution to my concerns has not been successful. The management in MHSOP have been supportive but I now have absolutely no confidence remaining in Cardiff Social Services: you have acknowledged that I have raised legitimate safety concerns, that policies have not been followed and that I have been treated unfairly. Through the Resolution process I have been provided with self contradictory and misleading information by various managers about the terms and conditions of my contract. I have been left feeling extremely unsafe and am again off work with severe anxiety and stress caused by working in an organisation I cannot trust.*

"Given that your stated intention was to apply redeployment – i.e. dismissal against my wishes – this month I hope you will forgo a period of notice and accept my resignation with immediate effect, particularly as I have 57 hours TOIL owing in addition to annual leave."

36. Ms Thomas replied shortly afterwards, noting that she was sorry that the placement with MHSOP had not worked out for the Claimant and agreeing in the circumstances to accept the Claimant's resignation and to waive the notice period.

37. Subsequent to the Claimant's dismissal, on 15 November 2021, the

Claimant emailed one of the Respondent's managers, noting that she was looking to undertake sessional adult mental health practitioner work (AMHP). It appears that someone undertaking that work must be "warranted", or authorised, by a specific local authority, and the Claimant referred in her email to have had having had discussions with the lead for AMHP in another authority who had asked the Claimant to seek clarification as to whether the Respondent would agree to her undertaking sessional work for the other authority under its warrant. There was no evidence of the Respondent's response to that email, or how the matter was subsequently taken forward.

38. The Claimant contended that the primary purpose behind her email had been to facilitate work for the other local authority. She further contended that, even if her email had led to the prospect of working for the Respondent, the work of an AMHP was much less involved than her previous work, and more akin to a consultancy-type arrangement, where the Claimant would have been largely working on her own, without much contact with the Respondent's employees.

Findings

39. I make the following findings of fact relevant to the time limit issue. In that regard, I heard evidence from the Claimant, via a written witness statement and in answers to oral questions from Mr Howells on behalf of the Respondent, and from me. Whilst I appreciated that the Respondent was not able to particularly challenge the Claimant's evidence or to adduce its own evidence in opposition, I was satisfied that the Claimant gave evidence from her genuine recollection and could therefore be believed.

40. I also considered a small number of documents within a bundle of some 350 pages to which my attention was drawn.

41. As I have noted, the effective date of termination of the Claimant's employment was 4 November 2021. The expiry of the primary time limit for the purposes of section 111 ERA was therefore 3 February 2022. The Claimant was therefore required to make contact with ACAS for the purposes of early conciliation prior to that date, and she did so, on 13 January 2022, which was Day A for the purposes of section 207B ERA.

42. The early conciliation certificate was then issued by ACAS on 23 February 2022, which was Day B for the purposes of section 207B.

43. Section 207B(4) provides as follows:

"*If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.*"

44. The time limit was therefore extended to 23 March 2022, a Wednesday. However, the Claim Form was not submitted until 30 March 2022, the following Wednesday. On the face of it, the Claim Form was therefore submitted outside the stipulated time.

45. In her evidence, the Claimant referred to having suffered with symptoms of stress from December 2020 onwards, and she had been off sick for the last month or so of her employment. Indeed, she had been examined by the Respondent's Occupational Health department on three occasions, initially in March 2019, then on 17 February 2021, and finally, on 28 October 2021. On that occasion the adviser noted that the Claimant was unfit for any type of work, and was "*experiencing significant symptoms of psychological ill health and is waiting for counselling to begin*".

46. The Claimant confirmed that her health had an impact on her ability to process matters following her resignation on 4 November 2021, and also that it took some time for her to access advice as she was struggling to obtain alternative employment and was in financial difficulty. She secured agency work in December 2021, but withdrew after seven days due to a recurrence of her ill health. She then secured a permanent, albeit casual, contract with another local authority in January 2022.

47. It does not appear however, that the Claimant's ill health prevented her from progressing matters insofar as a tribunal claim was concerned. As I have noted, she did contact ACAS for the purposes of early conciliation comfortably within the stipulated period.

48. Under cross-examination, the Claimant indicated that she had no real understanding of employment tribunals or time limits, and only became aware of the employment tribunal time limits on 20 December 2021, having been told about that by her union. The Claimant indicated that she had been dissatisfied with the advice provided by her union, both during the internal processes with the Respondent and subsequently.

49. Again, notwithstanding that the Claimant may not have been immediately aware of her ability to pursue claims before the tribunal, and the time limits for doing so, it did not appear that any lack of knowledge materially impacted on her ability to pursue her claims. She knew, shortly before Christmas 2021, that she had to progress matters prior to 3 February 2022. She also confirmed that she became aware of the need to go through early conciliation with ACAS from a discussion she had with Citizens Advice. She then contacted ACAS on 13 January 2022, three weeks before the final date on which she needed to do so.

50. Notwithstanding the issue of the early conciliation certificate on 23 February 2022, which I observed was just prior to the expiry of the maximum six-week, period of time that could be spent on early conciliation, negotiations continued between the Claimant and the Respondent, via ACAS, to resolve the dispute.

51. I observe that section 18(7) of the Employment Tribunals Act 1996 provides that anything communicated to a conciliation officer in negotiations is not admissible in evidence in any proceedings before a tribunal except with the consent of the person who communicated it to that officer. In this case, both parties had freely made reference to the fact of discussions with ACAS, and the fact that they appeared to have nearly reached fruition, but no discussion took place about the terms of those discussions, save to the extent set out below. Both parties discussed their negotiations within

correspondence and during this hearing, and I therefore took it that both consented to the disclosure of those discussions with ACAS to the extent described.

52. The Claimant confirmed that she was unclear as to why the ACAS certificate had been issued when it was as negotiations with the Respondent continued. As I have observed, the reason must have been that the maximum amount of time that could be spent on early conciliation was about to expire. The Claimant commented under cross-examination that the issue of the certificate did not make a material difference to the discussions.

53. Those discussions appear to have got to the point of a concluded agreement on Monday 21 or Tuesday 22 March 2022. Whilst the entirety of the communications with the ACAS conciliator was not in the bundle, there was reference to draft settlement terms, in the form of a COT3 document, having been sent to the Claimant, which I presumed had been drafted by the Respondent. The Claimant also confirmed in her witness statement that, in a telephone conversation with the ACAS conciliator on 21 March 2022, she agreed to settle her claims on the terms set out in the draft COT3, having been told by the conciliator that if she accepted those terms, either by phone or email, they would become legally binding.

54. Despite that indication, which accords with my understanding of the way ACAS generally conciliate between parties, the conciliator does not appear to have accepted the Claimant's verbal acceptance over the phone. He wrote to the Claimant, at 9:07am on 22 March 2022, asking the Claimant, as they had discussed, to reply to him to tell him that she was "*happy with the draft terms*".

55. The Claimant replied on 22 March 2022 at 9:21am, and I set out her email in full:

"*I am not happy with the draft terms as I understood that I was negotiating on the issue of unfair dismissal and the local authority is now expecting me to waive any potential claim for the injury they have inflicted on me over the last 2 years. However given the pressure time limits I have decided to accept the terms offered and would be grateful if you could proceed.*"

56. The Claimant's comments indicate that the COT3 wording was not limited to the settlement of her tribunal claim, but, as is often the case, went further and sought to conclude a full and final settlement between the parties, i.e. covering all possible claims, including a civil claim for personal injury. Whilst the Claimant was clearly not "*happy*" with that state of affairs, replying in her first sentence literally to the question being asked by the conciliator, in my view she clearly indicated, in her second sentence, her willingness to accept the proposed terms. At that point therefore, she reasonably understood that the settlement was in existence.

57. For reasons which are not completely clear however, the ACAS conciliator was not prepared to confirm that a binding settlement was in existence. My impression is that the conciliator was concerned by the Claimant's reference to a potential claim for personal injury.

58. The Claimant confirmed that the conciliator indicated to her, later on 22 March 2022, that he was not willing to confirm that a binding settlement was in existence. The conciliator and the Claimant spoke further that afternoon, and the Claimant noted in her witness statement that the conciliator had asked her what injury she perceived she had sustained as a result of her employment with the Respondent. The Claimant confirmed that the discussion which followed triggered flashbacks for her and a "*severe negative emotional response*". She confirmed that she became distressed, and that the conciliator advised and encouraged her to seek support from a third party to continue the negotiations. No discussions appear to have taken place between the Claimant and the conciliator about the proximity of the end of the tribunal time limit, i.e. the following day.

59. The Claimant then contacted Mr Newman, who was also present at this hearing to assist her, to continue those negotiations. She forwarded her email exchange with the conciliator to Mr Newman at 11:24pm on 22 March 2022.

60. Mr Newman, whilst present to assist the Claimant, did not give evidence before me as to the discussions he then had with the conciliator. The Claimant did however give evidence about her discussions with Mr Newman about his discussions with the conciliator, which, although indirect and "hearsay", I accepted.

61. Mr Newman was not able to speak to the conciliator until Thursday 24 March 2022, i.e. after the tribunal time limit had expired. No evidence was provided about the content of those discussions, but the Claimant confirmed that there were a "couple of days", when there were ongoing negotiations, which I took to encompass 24 March itself and Friday, 25 March 2022. The Claimant then concluded that she did not think that there was a prospect of reaching a settlement and so decided to submit her claim form as soon as she could.

62. The Claimant then confirmed in her witness evidence that she found putting the claim form together difficult, due to her mental health issues. She contended that submitting the claim form on 30 March 2022, the following Wednesday, was the earliest she could have submitted it.

63. No evidence was adduced as to the Claimant's mental health at that time, and the Claimant confirmed that she had not sought medical assistance at that time. She noted that, as a mental health professional, she was used to dealing with her condition by alternative methods and without seeking medical advice.

Conclusions

64. Applying my findings to the issues I had to address, my conclusions were as follows.

Time limits

65. Despite not having prior knowledge of tribunal procedure, and in particular

time limits, I was satisfied that, by approximately the middle of January 2022, the Claimant was aware of the steps involved in pursuing a tribunal claim, i.e. that contact with ACAS needed to be made, that a certificate would then need to be issued, and then a claim form could be submitted.

66. I did not consider that the Claimant had specific clear knowledge of the time limit within which such a claim form had to be submitted, as she did not appear to have appreciated the importance of the issue of the early conciliation certificate, i.e. that time then started to run, and, in circumstances where her contact with ACAS had been in the last month of the three-month primary time limit, would expire one month later, on 23 March 2022. The Claimant confirmed in discussions with ACAS that references were made to a period of “six weeks” and “at least a month”, but without her having a full understanding of what, it seemed to me, had been references to the early conciliation period itself, being for a maximum of six weeks, and then the time after the issue of the certificate within which the claim form needed to be submitted.

67. The extent of the Claimant's knowledge of the precise date on which the extended time limit would expire was not however immediately relevant, as discussions via ACAS ensued, which, certainly in the Claimant's mind, reached a concluded agreement on 21 or 22 March 2022, i.e. prior to the expiry of the extended time limit. Whilst the Claimant could have submitted a claim form at any point from 23 February 2022 onwards, I did not consider that she could reasonably have been expected to do so whilst discussions on settlement were ongoing.

68. The Claimant was then under the impression, from the call with the ACAS conciliator on 21 March 2022, and then from her exchange of emails with him on 22 March 2022, that settlement had been reached. It would not therefore have been expected of her that she would have had any need to submit a claim form by that time.

69. That state of affairs changed on the afternoon of 22 March 2022, when the Claimant became aware that the conciliator was not prepared to sign off on the settlement. However, at that stage the Claimant suffered a recurrence of her mental ill health. Whilst no medical evidence confirming her state of health at that time was produced to me, the Claimant's state of mind certainly seems to have led to the ACAS conciliator forming a view that the Claimant was not capable of consenting to the terms of settlement at that stage. In my view, that meant that, equally, she was not in a state of mind to address the, then urgent, need to submit her Claim Form.

70. Mr Newman was not however able to speak to the conciliator until 24 March 2022, i.e. after the extended time limit had expired, and discussions then ensued, at least over Thursday 24 March and Friday 25 March 2022.

71. In my view, the ongoing negotiations with the Respondent via ACAS, and the seemingly concluded agreement on 22 March 2022, meant that it was not reasonably practicable for the Claimant to have submitted her Claim Form before that point. The Claimant was then unwell, which, in my view, also meant that it was not reasonably practicable for her to have submitted her Claim Form prior to the expiry of the extended time limit on 23 March

2022.

72. I then moved to consider whether the Claimant had submitted her Claim Form within a further reasonable period, as required by section 111 ERA. The appellate courts have confirmed over the years that there is no hard and fast rule about what is or is not reasonable. The EAT confirmed, in ***Marley (U.K.) Ltd v Anderson*** **[1994] ICR 295**, that the tribunal in that case had been wrong to conclude from an earlier Court of Appeal case, that of ***James W. Cook (Wivenhoe) Ltd v Tipper*** **[1990] ICR 716**, that there had been a strong indication that a tribunal should not regard a delay of more than about two weeks as being reasonable, except in cases with very exceptional facts. The EAT in ***Marley*** confirmed that the Court of Appeal in ***Tipper*** had not gone beyond the established position that what is a reasonable period depends on the circumstances of the case.

73. In this case, the Claimant submitted her Claim Form on the third working day after it became apparent to her that negotiations with ACAS were not, contrary to her understanding and expectation, going to lead to a concluded settlement. Whilst it may have been possible for a claimant, or indeed this Claimant, to have submitted the form more quickly, I noted that she had suffered a recurrence of mental ill-health at that point. Overall therefore, I did not consider that the Claimant had delayed unreasonably in submitting her claim form at that point, and therefore I considered that it had been submitted within a reasonable period. It was not therefore appropriate to strike out the Claimant's unfair dismissal claim on the basis that it had not been submitted within the required time period.

Strike out

74. I was only looking at the strike out question from the perspective of the Claimant's "ordinary" unfair dismissal claim, and therefore the particular directions given by the appellate courts in ***Anyanwu*** and other cases regarding discrimination and whistleblowing cases did not directly apply. I nevertheless noted the guidance provided in the ***Balls***, case, and also recent guidance given by the EAT in ***Cox v Adecco*** **[2021] ICR 1307**, which, whilst dealing with protected disclosures, has broader application. In that case, the EAT noted that if the assessment of prospects turns on factual issues that are in dispute then it is highly unlikely that strike out will be appropriate.

75. In this case, whilst I can see the Respondent's argument that the intention behind Ms Thomas's email of 1 September 2022 had been to provide the Claimant with an outcome she was content with, I did not consider that it was necessarily sufficiently clear that that was indeed the case. I also noted that the Claimant, whilst having in mind that Ms Thomas' email was part of her rationale for deciding to resign, appeared to consider it only as part of a course of treatment, going back to December 2020, and indeed continuing beyond 1 September 2021.

76. I also noted the Respondent's potential argument over the impact of the Claimant's email of 15 November 2021, and whether that could be said to have involved a waiver or affirmation of any breach of contract by the Respondent. However, I also noted that the Claimant contended that that

discussion involved, in part, the prospect of undertaking work for a different local authority, and that, even if it had led to work for the Respondent, would have been on a much more “arm’s length”, consultancy basis than her previous work, not requiring her to work closely with her former colleagues.

77. It was clear to me therefore, that there is a dispute over the facts, or certainly the interpretation of them, covering a range of events, and it did not therefore seem to me that strike out would be appropriate.

Deposit order

78. I noted that the test for a deposit order, focusing on "little" reasonable prospects as opposed to "no" reasonable prospects, is plainly not as rigorous, and that a tribunal has greater leeway when considering whether to order a deposit. However, as the EAT made clear in ***Van Rensburg***, I must still have a proper basis for doubting the likelihood of the Claimant being able to establish the facts essential to the claim or response. I also noted the guidance provided in ***Hemdan*** that a mini-trial of the facts is to be avoided, and also that, if there is a core factual conflict, it should properly be resolved at a full merits hearing where evidence is heard and tested.

79. Notwithstanding the less rigorous approach than that applied in relation to strike out applications, I still considered that there remains a core factual conflict between the parties, and also then a core of conflict over how facts are to be interpreted, which lie at the centre of the Claimant's constructive unfair dismissal claim. I was also of the view therefore that it would be inappropriate to order a deposit to be paid by the Claimant as a condition of continuing with her constructive unfair dismissal claim, as a proper consideration and testing of evidence is required.

80. I stress that my refusal of the strike out and deposit order applications should not be taken by the Claimant as an indication that her claim necessarily has good prospects of success, as the test I had to apply does not require me to go that far. I only record that I could not say, in the circumstances when I did not hear full, tested evidence, that the claim had little or no reasonable prospects of success.

Employment Judge S Jenkins

Date: 25 January 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON 26 January 2023

FOR THE TRIBUNAL OFFICE Mr N Roche