



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms S. Borozna

v

CBH Wealth UK Ltd

Heard at: London Central (CVP)

On: 29 September 2022

Before: Tribunal Judge RE Peer acting as an Employment Judge

Representation

For the Claimant: Mr Colm Kelly of Counsel

For the Respondent: Ms Judy Stone of Counsel

JUDGMENT

The claimant's claims for unfair dismissal (ordinary and by way of alleged protected disclosure), detriment by reason of alleged protected disclosure, and breach of contract (holiday pay and expenses) were presented out of time so that the tribunal has no jurisdiction to consider them and they are hereby dismissed.

REASONS

CLAIMS AND ISSUES

1. The claimant, Ms S. Borozna worked for the respondent from 1 September 2018 until 23 September 2021. The claimant was dismissed with immediate effect with pay in lieu of notice on 23 June 2021 but the respondent agreed to let the claimant work during a notice period. There is no dispute that the 'effective date of termination' is 23 September 2021. The claimant notified ACAS for the purpose of conciliation on 22 September 2021 and an early conciliation certificate was issued on 2 November 2021. The claim form was presented to the tribunal on 21 March 2022. There is no dispute that the primary time limit taking account of conciliation expired on 2 February 2022.

2. The respondent, CBH Wealth UK Ltd, is an investment management firm. The respondent contends that the presentation of the claim form 47 days outside the primary time limit laid down by statute is out of time and it was reasonably practicable for the claimant to present her claim form in time and/or if it was not reasonably practicable the claimant did not present her claim form within a further reasonable period.
3. This preliminary hearing was therefore listed to determine whether the tribunal has jurisdiction to consider the claimant's claims having regard to the applicable statutory time limits which all require the claims to be brought within a period of three months of the relevant date or if the tribunal is satisfied that it was not reasonably practicable to have presented the claim on time within such further period as the tribunal considers reasonable.
4. The claimant relies on illness and submits that she was acting on the advice of her specialist psychiatrist not to engage with legal proceedings due to her severe depressive disorder. The respondent submits that the claimant was: aware of the time limits and in communication with solicitors; met with clients and negotiated complex agreements during the primary limitation period; and resolved family law proceedings.

THE HEARING

5. The hearing was a remote hearing. The form of remote hearing was fully remote by Cloud Video Platform. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The parties agreed in advance to the hearing being held as a remote hearing. The hearing proceeded effectively as a remote hearing and neither party raised any objection.
6. The tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net.
7. There were four witness statements and I heard live evidence from each witness. For the claimant, I heard evidence from Professor Libby on oath and from the claimant herself by way of affirmation. For the respondent, I heard evidence from Mr Mark Sims and Mr Nicolas Valterio on oath.
8. There was an agreed bundle of 348 pages. The claimant and the respondent each produced skeleton arguments and authorities bundles. I also had before me a respondent's supplemental skeleton and claimant's skeleton in reply which address what I refer to as 'the disclosure issue' and deal with in more detail below.
9. The preliminary hearing was listed for one day. The parties and all participants worked together in light of the overriding objective to enable the hearing to be concluded in the time allocated. This included a pragmatic approach to the disclosure issue whereby the respondent chose not to progress applications for specific disclosure as this would inevitably have resulted in the preliminary hearing going part heard or being postponed and to instead cross-examine on certain matters as proposed by the claimant.

10. As there were no applications for me to address it is not strictly necessary for me to refer to the disclosure issue further but as the respondent contends the claimant exhibits a lack of candour, it is context of some relevance. The respondent requested disclosure related to family court proceedings, communications by the claimant with Professor Libby and communications with instructed solicitors on the basis the claimant had referred to these matters in her written statement and therefore presented as placing reliance on these matters. At the hearing before me, there was an understanding that there were restrictions on disclosure or inspection of documents relating to family court proceedings which had concluded in February 2022 and although permission/consent might be obtained from the court no particular steps had been taken. At the hearing before me, there was also the understanding that the content of communications between a client and instructed solicitors attracted privilege albeit privilege might be waived or diluted in certain circumstances such that it was deemed waived.
11. The claimant in proposing cross-examination on the engagement, progress and complexity of family court proceedings accepts the relevance of the matter to whether it was reasonably practicable for the claimant to present her claims to the tribunal in time. The claimant contends privilege is not waived by reference to the fact of communication with solicitors. There is no dispute before me in any event that the claimant was well aware of the relevant time limits and solicitors were retained and instructed throughout. The claimant submits that there is no relevant disclosure in relation to communications with Professor Libby in the time period between 6 October 2021 and 2 February 2022 and/or in relation to the scheduling of the 17 March 2022 appointment.
12. I read the evidence in the bundle to which I was referred and refer to the page numbers of key documents that I relied upon when reaching my decision below.

FINDINGS OF FACT

13. Having considered all the evidence, I found the following facts on a balance of probabilities.
14. The parties will note that not all the matters that they told me about are recorded in my findings of fact. That is because I have limited them to points that are relevant to the legal issues.

Background and procedural steps taken

15. The respondent is an investment management firm. The claimant worked for the respondent from 1 September 2018.
16. The claimant accepted in evidence that in her employment with the respondent she had to apply complex rules and policies, prepare complex documents, and communicate with others. The claimant said she had a senior management function and had to adhere to FCA rules and ethics.

The FCA or Financial Conduct Authority is the regulatory body for the type of work the claimant did. The claimant said she had to oversee compliance but she did not accept that she had any personal or individual responsibility for compliance. The claimant had 15 years' experience in the sector and during that time had worked with clients of various nationalities and she did not accept her client base was primarily Russian.

17. The claimant instructed her solicitors in relation to a matter regarding salary reduction which was agreed in February 2021.
18. On 23 June 2021, the claimant was notified that she was dismissed with immediate effect and would be paid in lieu of notice in accordance with her contract. The claimant requested to work her notice rather than be paid in lieu. The respondent agreed.
19. On 22 September 2021, the claimant's solicitors contacted ACAS and ACAS conciliation commenced. The claimant must have given solicitors sufficient instructions and basic factual details to enable contact with conciliators and for conciliation to cover the scope of the claims brought.
20. On 23 September 2021, the claimant's employment terminated and her dismissal took effect.
21. ACAS conciliation concluded on 2 November 2021.
22. On 2 February 2022, the primary time limitation period of 3 months subject to extension for ACAS conciliation expired.
23. On 21 March 2022, the claimant presented her claims to the tribunal. The claims were presented 6 and a half weeks or 47 days late.

Chronology

24. A letter from Professor Bowden-Jones records that the claimant was treated with Citalopram during 2020.
25. The claimant was prescribed Sertraline by her GP on 18 September 2020.
26. The claimant recalled that she stopped taking Sertraline around May 2021.
27. The claimant said she thought it was semantics when it was put to her that pay in lieu of notice was not an 'offer'; she said offer/told and as in the letter there was 3 months' notice. The claimant said that the reason she wanted to work her notice was to ensure there was a handover for her clients as she didn't want to disappear abruptly. She didn't want not to work and it was good to keep going. She considered herself able to do her job but she was not well and she was struggling and trying for her son.
28. On 7 September 2021, a BUPA assessment took place. The assessment records concerns about low mood and anxiety, sleep, and an ankle issue. The claimant was referred to a psychologist for the 'low mood and anxiety'.

29. The claimant said that she instructed solicitors to contact ACAS on 22 September 2021 and that they were the same solicitors representing her today and who had assisted her with the salary reduction matter. She said there was no instruction to log a claim but she was planning to do this as she felt it was unfair but then her condition deteriorated.
30. The claimant said that she did not recall when work on the claim form started. The claimant gave evidence that she did most of the drafting herself and that there was discussion about the sequence of events and her recollection of events. The claimant recalled that drafting and writing took a number of days and although she did not remember exactly when this work started, she referred to April/May. When the claimant was asked whether she was referring to April/May 2021, she said that the evidence she had just given related to preparation of her witness statement.
31. The claimant was again referred to the claim form and asked when work was done on the claim form and if her evidence was that she wrote it herself. The claimant said that it was a collaboration, she did the typing 'myself' and had discussions. She said the solicitors helped but they did not know the intricate detail or sequence of events and she did the majority of the work herself. She said she did not remember when they started. She said it was discussed and started some time ago and the majority of work was done in March.
32. Until 23 September 2021, the claimant continued to work for the respondent. The claimant took annual leave between 2 and 6 August 2021. In evidence before me, the claimant suggested there were days she was sick, lying on the couch and she told her colleagues this. She also said she was not working effectively or efficiently during this period. Mr Sims said in evidence that he did not recall any call from the claimant to the effect that she was feeling ill and would not be working. The claimant's timesheets (112-114) do not record any days taken as sick leave.
33. On 22 September 2021, Nicolas Valterio of the respondent emailed the claimant (168) stating 'herewith various documentation needed to start the opening your business introducer relation at CBH.'
34. On 22 September 2021, the claimant set up a call with a contact for 23 September 2021 to discuss a matter concerning the set-up of a trust (117-120).
35. The claimant accepted that she could ask solicitors to do things for her on 23 September 2021. I find that on 23 September 2021 the claimant was capable of instructing solicitors.
36. The claimant said that emails between her and Nicolas Valterio in September and October were of very limited content and mainly forwards. An email from the claimant of 1 October 2021 to Nicolas Valterio refers to the structure of a pension fund (167).

37. On 6 October 2021, the claimant attended Professor Libby, Consultant Psychiatrist, for a consultation.
38. In evidence to me, Professor Libby said he thought he was aware on 6 October 2021 that the claimant had instructed solicitors in relation to employment proceedings. He said that he did not know in detail what needed to be done with employment tribunal proceedings but he was very concerned for the claimant's welfare, she had difficulties concentrating and he did not want her to engage in complex legal proceedings. He did not recall being aware that the claimant had been seeing a different psychiatrist since July 2020.
39. Professor Libby made notes of his consultations with the claimant. The notes were handwritten. Professor Libby did not recall if he had been asked to produce typed notes. The notes are difficult to decipher. The notes for the consultation on 6 October 2021 (285) contain reference said to be to 'lost enjoyment' and then to 'lost employment'. There is a reference to 'losing job' and 'unfair dismissal'. I find that Professor Libby was aware that the claimant had lost her job and considered her dismissal was unfair on 6 October 2021.
40. Professor Libby could not see any reference in his notes for 6 October 2021 to having told the claimant not to engage with solicitors. He explained to me that he would have advised her not to make any major decisions. He said this was a person he had seen 10 years ago who was again ill and he wanted to look after her and protect her and his view was that she had cognitive difficulties.
41. A single page letter dated 7 October 2021 from Professor Libby is headed 'Medical Report' (281). The letter refers to the consultation on 6 October 2021 as following a full BUPA check-up. The letter states:
- "I have previously known this patient 10 years ago when she presented with anxiety and depressive symptoms. She recovered composure at that time and I had not seen her meanwhile.*
- I find her distressed with poor sleep, poor concentration, severe anxiety symptoms and as such I judge her mental health to be compromised.*
- I do not think she is currently fit to take part effectively in litigation."*
42. Professor Libby's written statement sets out that on 7 October 2021, he 'further advised that she was not fit to take part effectively in litigation without causing further damage to her mental health and I recommended that she be excused from participating in her family court directions.' In cross-examination, it was put to Professor Libby that the letter does not set out that participation in litigation would cause damage to the claimant's mental health or that the claimant be excused from court directions. Professor Libby said that he wanted to prevent the claimant from being involved in things she was not capable of doing. I fully accept that Professor Libby's focus was to protect and care for his patient and in particular given her presentation with severe anxiety symptoms. There is however no documentary evidence

nor was there any detail from Professor Libby to explain the claimant's capabilities at this point in time and what she might or might not be able to do in relation to litigation including with any safeguards. There is no detail as to what was understood to be involved in 'litigation'. There is no clear or express opinion or advice that the claimant could not engage with or instruct lawyers.

43. On 7 October 2021 @ 2024, the claimant emailed Nicolas Valterio (168) to ask 'Did you manage to amend the agreement? Do I still need to fill in a business introducer profile that you sent previously?' A sample business introducer agreement was in the bundle (317-326). The claimant said she was told it was non-negotiable. The agreement was to introduce clients and she would get a percentage of the revenue and nothing else. This was the only thing negotiated. The claimant also forwarded Nicolas Valterio a link to her FCA registration and a separate email with a further link referred to as 'specifically says that I can deal with clients' on 7 October 2021. Asked about this in cross-examination, the claimant said this was not a statement she was able to deal with clients, he wanted the wording on the FCA register for her title.
44. If Professor Libby had advised the claimant not to make major decisions the previous day, the claimant clearly did not consider this advice related to progressing a client introducer agreement with the respondent that she thought had unfairly dismissed her. The claimant's oral evidence that she was not making a statement she was able to deal with clients presents as inconsistent with the action to email Nicolas Valterio to provide him with a link on the basis that it 'specifically says that I can deal with clients'. This was one of several instances of the claimant's oral evidence contradicting what was written on documents.
45. On 12 October 2021, the claimant attended the respondent's offices where she had arranged to meet a potential client. The claimant said that to open the private bank account there had to be a face to face meeting to see the passport. The claimant agreed in oral evidence that she was well enough to go and meet with a client. The claimant clearly felt she was well enough to perform identity checks in the context of the financial services sector although she said this didn't require work or substantial analysis. The claimant accepted that an email from the respondent (181) about remaining on their premises after the meeting and using a desk was accurate. She did not deny she was in the offices; she said she was alone at home.
46. The claimant met Professor Libby again on 14 October 2021. She was prescribed Mirtazapine 15mg.
47. The notes of 14 October 2021 record the phrase 'temporary loss of capacity' (290-291). In cross-examination, Professor Libby was asked if this language came from lawyers and he was being asked to say the claimant had a temporary loss of capacity so could not take steps in the family proceedings. Professor Libby said the language probably came from the lawyer or claimant. He said he was clearly concerned about the claimant's capacity to deal with matters at that time. He was asked about a phrase which appeared

to read 'I need to calm down' and then possibly 'continue litigation'. Professor Libby was frank that he was not sure exactly what was recorded. I accept that Professor Libby was concerned that the claimant's mental health would be compromised if she continued to engage in what he understood to be complex matters and that given concentration and cognitive difficulties she was not best placed to deal with these matters at that time. I find that is different from recording a professional medical opinion that the claimant lacked capacity. Professor Libby did not at any point record in writing an opinion that the claimant formally lacked capacity temporarily or otherwise.

48. On 19 October 2021, Professor Owen Bowden-Jones, Consultant Psychiatrist, wrote 'To whom it may concern' that he had been looking after the claimant since July 2020 and that the claimant 'suffers from symptoms of anxiety and depression'. The letter (297) outlines successful treatment with Citalopram in 2020 and that 'today, we have agreed to re-commence the Citalopram building up to its previous dose ...and should commence talking therapy'. The final paragraph of the single page letter reads:

"I understand that Lana is currently due to appear in Court and I am very concerned that, given her current depressive symptoms, she will not be able to engage fully with the legal process. I ask that you consider this in terms of the timings of Court proceedings particularly as she made a very good recovery after a few months of medication."

49. The claimant said in evidence that she wanted a second opinion but that she preferred to stay with Professor Libby. She said she had seen Professor Bowden-Jones previously when she had Covid. The claimant said that she did not agree the Citalopram medication as recorded in the letter as it did not work. The claimant said that she did not recall the exact conversation.
50. The claimant met Professor Libby on 26 October 2021. She was prescribed Mirtazapine 30mg.
51. Professor Libby's written statement sets out that during the meeting on 26 October 2021, the claimant was specifically advised that she should not engage with lawyers and that if she continued recovery would have been impossible. There was no record of any such specific advice identified in the notes (291-292). The written statement also sets out that whilst this advice was primarily in relation to the family proceedings, the Professor was aware of the potential employment tribunal claim and the advice related to instructing any lawyers. In oral evidence, Professor Libby said, 'I was saying matter of overload.'
52. On 26 October 2021, Professor Libby provided a medical report of two pages setting out that the claimant was referred to him following a BUPA check-up (282-283). There had been a referral in the past in 2011 as she had presented with acute depression from which she had made a full recovery. The letter sets out that there were consultations on 6, 14 and 26 October 2021:

“to confirm the diagnosis of depressive disorder presenting with anxiety, panic attacks, physical symptoms but in particular sleep disturbance and cognitive difficulties. These cognitive difficulties of concentration, attention are constituted part of the affective disorder described as anxiety depression.

This condition is treatable with medications which have now been started.

I am concerned that her concentration, attention and cognitive difficulties with other symptoms will prevent her from participating, providing and considering the comprehensive information necessary to comply with directions required.

It is my opinion that she is temporarily unfit to participate in or prepare for the court hearing on the 12th of November.

Having seen her now on three occasions and initiated treatment there are indications that recovery will and should be apparent within the next three months.”

53. I observe that Professor Bowden-Jones’ briefly stated opinion about the claimant in his letter of 19 October 2021 is consistent with that of Professor Libby: there was a concern that she might not be able to engage fully with proceedings at that time. I find that the professional view was not that she lacked capacity in a formal sense or was unfit to deal with all legal matters but that given her current symptoms she was not best placed to deal with matters including a court hearing or the family court directions at that time. The request ‘to whom it may concern’ was to preferably allow her some time whatever the legal mechanism. As Professor Libby explained, when asked whether he was writing specifically in relation to having the family court proceedings adjourned, he wanted to protect his patient and if ‘not participating’ was ‘adjourning’ that was a legal matter.
54. I find that during October 2021, the claimant was suffering from depression and anxiety and her symptoms included difficulties with concentration, attention and cognition. The medical opinion at this point was that these difficulties impacted on her ability to comply with family court directions. There was no live employment litigation nor any tribunal directions at this point. The impact was that her symptoms prevented her from providing and considering comprehensive information necessary to comply with directions. Professor Libby was asked whether he was aware of the forms that needed to be completed for the family proceedings and he said that he was not aware of the specific form but that they would be complex and highly detailed and that the claimant would be required to complete them properly. A sample copy of Form E1 is in the bundle (302-316). I find that whilst Professor Libby may have been aware of employment litigation, the opinion was clearly provided and directed at the family court proceedings and in particular at a forthcoming hearing and a requirement to complete a full financial statement form. I find that Professor Libby did not have detailed information or understanding as to what might be necessary to prepare and

present a claim form in employment tribunal proceedings and the medical advice was not provided in light of any such specific understanding.

55. The claimant met Professor Libby on 10 November. She was prescribed Mirtazapine 45mg.
56. Professor Libby set out in his written statement that 'I gradually increased her medication as her condition deteriorated'. However, in oral evidence, Professor Libby explained that the reason dosage was increased was to get to the therapeutic level tolerated by the patient. He accepted that his notes of 26 October 2021 recorded the claimant reporting that she felt better at that time and he accepted that by 10 November the claimant was better than she was before and was improving.
57. The notes relating to 10 November 2021 (292) refer to a two month postponement. Professor Libby accepted the notes for 10 November 2021 did not expressly record advising the claimant not to engage with solicitors or she won't get better. He didn't recall whether there was any discussion about employment tribunal proceedings and accepted there was no reference to any such discussion in the notes.
58. The claimant said that an invoice for legal work done in November 2021 of £4680 was for the work done on the salary reduction matter. That was the matter which concluded in February 2021.
59. Mr Valterio agreed that there were no emails between him and the claimant during the period 22 October 2021 to 22 November 2021. Mr Valterio said that he knew the claimant was continuing to contact her clients and working during this period even though there was only one email so it was correct to say as he set out in his written statement that she was 'continually involved in business activities and pursuits'. Mr Valterio agreed that there were no emails either in December 2021 or in January 2021 but said in oral evidence that as the claimant came to Switzerland and liaised with and introduced clients to the respondent during that time, there must have been WhatsApp messages and calls to make arrangements even if they weren't printed in the bundle.
60. There is no dispute that the claimant travelled to Geneva between 6 to 8 December 2021. The claimant's written statement refers to this as a trip with a client and a prospect to meet a CBH relationship manager and a shareholder. I find that the claimant was clearly engaging in client and business related activity during this time. The claimant said they were not discussing the introducer agreement or content or terms. She said in oral evidence that she did not know when she signed the agreement although the claimant's written statement refers to the agreement being signed in or around December 2021.
61. The claimant met Professor Libby on 15 December 2021. She was prescribed Mirtazapine 30mg. The dosage was therefore decreased as of 15 December 2021.

62. The notes for 15 December 2021 (293) record the claimant reporting to Professor Libby that she is better now and can deal with lawyers and papers and that she is setting up a business. The claimant accepted she was feeling better at this time but she said that the reference to lawyers and papers was to be understood as her being able to look at papers and documents not to litigation. The claimant's own evidence therefore was that at this time she felt capable of considering papers and documents and working with lawyers. The claimant was clearly capable of doing work with her lawyers to prepare and present the claim form at this point.
63. The claimant said that she was not entirely sure what an invoice for legal work done between 11 November and 23 December 2021 of £7,200 was for. She said she owed money for way back. I did not find this an entirely satisfactory explanation given the invoices for two different sums and the date range both of which were being said to be attributable to work which had concluded in February 2021. The claimant had different solicitors instructed for the family court proceedings. ACAS conciliation ended on 2 November 2021. The claimant said that she did not do work on the claim in December and she had mentioned that the work on the claim form was done in March. She accepted that she was aware that the deadline was 2 February 2022.
64. On 31 December 2021, the claimant travelled to Verbier for a skiing trip with her son staying with friends.
65. On 10 January 2022, the claimant received an email from the contact she had been in touch with on 23 September 2021 about a trust. The contact asked if the claimant had 'started your company yet?'. The claimant's email in reply on 11 January 2022 sets out '*We have started the company with my ex colleagues. Still in the process of a website building but working with a number of banks already.*' In oral evidence, the claimant said that on 23 September 2021 she was thinking she might be starting a company with a friend. She said she never joined a company and 'my colleague started the company'. The claimant did not accept that the statement 'we have started the company' made on 11 January 2022 was therefore inaccurate. She said she had discussions with ex-colleagues and that 'we' is ex-colleague and I don't say 'I'. I found the claimant's explanation that stating 'we have started the company' when asked whether she had started 'your company' did not communicate information confirming that she had started a company extraordinary.
66. After 15 December 2021, the claimant did not see Professor Libby until 17 March 2022. The claimant relies on Professor Libby's advice to the effect, as set out in her written statement, that she had been told not to engage with her lawyer or issue any further claims. As set out above, there is no record of advice given specifically to that effect and the claimant had engaged with lawyers in relation to the family court proceedings.
67. Professor Libby sets out in his written statement that: 'I do not believe that she had the full capacity to engage in complex litigation until 17 March 2022.' The notes for 17 March 2022 record a reference to 'now ...the employment

situation'. The notes do not record expressly that the claimant was advised she was now fit to engage in proceedings. Professor Libby accepted that the claimant was much better from mid-December 2021 and that she was on an upwards trajectory. Professor Libby also accepted in cross-examination that he could not say to the tribunal that she was incapable of issuing proceedings in mid-January 2022; he assumed she was progressing well during this period.

68. The claimant's written statement sets out that family litigation resolved on 18 February 2022 with a consent order on 29 March 2022 on terms the same as those offered in August 2021 before her mental health began to deteriorate. The claimant said in oral evidence that preparation had been done before and information collected to fill in the forms for the family court proceedings before October 2021. In cross-examination, it was put to the claimant that it made no sense to postpone a November hearing if things were already agreed and the work done. The claimant said she could not remember when she signed the form.
69. The claimant said that Professor Libby had told her on 15 December 2021 to come and see him in 2-3 months when you feel better. She said the reason she didn't see Professor Libby before March 2022 was because her ex-partner had taken her off the insurance and she did not want to pay. The claimant accepts that she was aware of the 2 February 2022 time limit. Her written statement says she did not reply to emails from her solicitors about limitation. In oral evidence, the claimant said that she could not recall the dates of those emails.
70. When the claimant was asked why she took no steps to progress her tribunal claim, she said it was not possible and she was not capable of doing this. The claimant said that telling Professor Libby about lawyers and papers on 15 December 2021 was about a different agreement already logged with the court where much of the work had been done previously. She said it was nothing like what she was doing at the moment and she would have collapsed with the witness statement and questions at that time.
71. The necessary work to prepare and present a claim form is clearly different from the work to prepare a witness statement and far from the experience of being subject to cross-examination in a formal court/tribunal setting. These are different activities. The work to complete the tribunal claim form itself is not demonstrably more complex in terms of the factual content necessary than the financial statement for family court proceedings which the claimant was felt able to work on from mid-December 2021 even if much work had been done previously. The claimant's solicitors would have basic details of the employment law claims and facts given the early conciliation stage. I accept preparation of detailed pleadings require more detailed instructions and more complex consideration and drafting. The claimant gave evidence that her witness statement took a number of days. The claimant did not give clear evidence at any point about how or when precisely the work to complete the claim form was done or when she instructed her solicitors to proceed other than by reference to the work being done in March. On the claimant's evidence, if she was given the green light

by Professor Libby on 17 March 2022, the work sufficient to prepare and lodge the claim was done by 21 March 2022 when the claim was presented and thus in the matter of a few days.

72. On 17 March 2022, the claimant was prescribed Duloxetine 30mg. This is confirmed in an email of 3 August 2022 from Professor Libby's practice manager (296).
73. On 14 June 2022, Professor Libby wrote a single page 'To whom it may concern' letter which includes the following:

"She presented with symptoms of anxiety and depression together with severe physical symptoms following Covid and a diagnosis of long Covid. I started treatment in October 2021 at a time when she had severe symptoms for several months preceding this. This long Covid diagnosis together with depression and panic disorder combined with the breakdown of her marriage and precipitated severe depressive symptoms: Svetlana was unable to sleep, had panic attacks with poor concentration and consequent cognitive difficulties. She had become indecisive and negative which is a change from her usual characteristics. I advised that she should not make decisions or instruct Lawyers at this time in view of her deteriorated mental state. Day-to-day activities were limited but possible and as such outpatient treatment was indicated.

She continued under my care with pharmacologic and cognitive-behavioural treatment. After some months her condition improved enabling her to instruct Lawyers with my support.

Svetlana continues under my supervision in view of the potential recurrent nature of her psychiatric condition."

74. The letter dated 14 June 2022 is the first time that Professor Libby records in writing the precise detail that 'at this time' the claimant had been advised not to make decisions or instruct lawyers. The 'time' is October 2021 when treatment started. The timeline is that care continued for 'some months'. Although the claimant continued to take medication prescribed by Professor Libby, there is no evidence of any meeting at which any CBT could have taken place after 15 December 2021. The letter records that 'after' the 'some months', 'her condition improved enabling her to instruct Lawyers'. The opinions set out in writing previously referred to difficulties which would impact on the claimant's ability to process comprehensive information or participate in court hearings. Professor Libby explained that he was conveying that with his support her condition improved not that he gave her support to deal with lawyers. He said she was instructing lawyers and he wasn't advising her not to but was very cautious just as I am doing today to support her.
75. In cross-examination, it was suggested that the claimant hadn't given a complete and candid picture of events and no picture of in fact what she was up to during January and February 2022. The claimant said that she had given a clear picture of what was happening and what she was doing and

her statement was truthful. The claimant was clearly instructing and engaging with lawyers in relation to the family court matter which concluded in February 2022 although says medical advice prevented her from starting her employment claim.

LAW

Time limits

76. A claim for unfair dismissal whether it is ordinary unfair dismissal or dismissal due to the making of a protected disclosure must be brought within the time limit laid down by statute in order for the tribunal to have jurisdiction to consider the claim. Section 111(2) of the Employment Rights Act 1996 (“the Act”) provides:

“Subject to the following provisions of this section, 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.”*

77. Section 48(3) of the Act provides that for claims of detriment on the grounds of protected disclosure:

“(3) An [employment tribunal]¹ shall not consider a complaint under this section unless it is presented—

- (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, 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.”*

78. Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order SI 1994/1623 (“the Order”) provides as relevant that for breach of contract claims:

“...an employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented-

- (a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or*

...

- (c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.”*

79. These time limits are subject to extensions for early conciliation set out in the Act at section 207B and the Order at article 8B. These provide that the day a claimant contacts ACAS (Day A) and the day the certificate is received (Day B) are not counted. Further, if the ordinary 3 month time limit would but for extension expire during the period beginning with Day A and one month after Day B, the time limit is extended to expire at the end of that period. The

tribunal is required to treat the time limit as expiring at the end of any extension.

80. In **Marks and Spencer plc v Williams-Ryan [2005] EWCA Civ 470, CA**, the Court of Appeal affirmed older case law back to **Dedman v British Building & Engineering Appliances Ltd [1974] ICR 53** that the test should be given a “*liberal interpretation in favour of the employee*”.
81. In **Porter v Bandridge [1978] ICR 943, CA**, the Court of Appeal ruled that the claimant has the burden of showing precisely why it was that it was not reasonably practicable to present their claims in time. The court also noted that whilst ‘judicial glosses’ on the statutory test were designed to assist the first instance tribunal they must not become substitutes for the statutory test.
82. In **Wall’s Meat Co Ltd v Khan [1979] ICR 52, CA**, the Court of Appeal described the test as “*empirical and involves no legal concept. Practical common sense is the keynote and legalistic footnotes may have no better result than to introduce a lawyer’s complications into what should be a layman’s pristine province.*” The Court of Appeal was considering circumstances of ignorance as to the existence or expiry of the time limit and held that the question was whether any such ignorance was reasonable including taking account of enquiries which should have been made.
83. In **Palmer v Southend-on-Sea Borough Council [1984] ICR 372, CA**, the Court of Appeal explained the scope of the test as follows:

“...we think that one can say that to construe the words “reasonably practicable” as the equivalent of “reasonable” is to take a view too favourable to the employee. On the other hand “reasonably practicable” means more than merely what is reasonably capable physically of being done – different, for instance, from its construction in the context of the legislation relating to factories: compare *Marshall v Gotham Co Ltd [1954] AC 360*. In the context in which the words are used in the *Employment Protection (Consolidation) Act 1978*, however ineptly as we think they mean something between these two. Perhaps to read the word “practicable” as the equivalent of “feasible” as Sir John Brightman did in *Singh’s case [1973] ICR 437* and to ask colloquially and untrammelled by too much legal logic – “was it reasonably feasible to present the complaint to the industrial tribunal within the relevant three months?” – is the best approach to the correct application of the relevant subsection.”
84. In **Schultz v Esso Petroleum Company [1999] ICR 1202, CA**, the Court of Appeal set out that where illness is relied upon as to why it was not reasonably practicable to present the complaint in time, the tribunal must “*bear in mind and assess its effects in relation to the overall limitation period*” but “*Plainly the approach should vary according to whether it falls in the earlier weeks or the far more critical later weeks leading up to the expiry of the period of limitation. Put in terms of the test to be applied, it may make all the difference between practicability and reasonable practicability in relation to the period as a whole.*”

85. In **Chouafi v London United Busways Ltd [2006] EWCA Civ 689, CA**, the Court of Appeal upheld a tribunal's conclusion that it would have been reasonably practicable to present the complaint in time on the basis that a doctor's opinion was assessed in light of all available evidence including actions of the claimant writing rational letters.
86. In **University Hospitals Bristol NHS Foundation Trust v Williams EAT/0291/12/JOJ**, the EAT upheld a tribunal's conclusion that the claimant's actions in coping with essential tasks related to domestic responsibilities despite her mental health problems did not mean it was reasonably practicable for her to also cope with putting in a tribunal claim.
87. In **Cygnnet Behavioural Health Ltd v Britton [2022] UKEAT 108**, the EAT overturned a tribunal's conclusion that depression, dyslexia and ignorance of the time limit meant it was not reasonably practicable to present a claim in time as perverse. The EAT observed that despite his conditions, the claimant had engaged in actions such as contacting ACAS, working as a locum physiotherapist, moving house and responding to a regulatory investigation.
88. In **Cullinane v Balfour Beatty Engineering Services Ltd and anor EAT/0537/10**, in referring to the test as to whether the claim was presented within a further reasonable period of time after the expiry of the time limit the EAT said the assessment required *"an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted – having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months"*.

ANALYSIS AND CONCLUSIONS

89. I turn now to the application of the law to the facts I have found in this case.
90. I am required to apply the statutory test namely whether it was reasonably practicable for the claimant to present her complaints in time and by 2021. I am to apply this test on the basis of common sense rather than lawyer's complexities. I have taken full account of the case law as relevant and to which I was directed.
91. The claimant has not precisely explained what prevented her from presenting her complaints to the tribunal on time and in particular has given no real explanation as to her actions or inability to act from mid-December 2021 and during January 2022 in the weeks immediately prior to the expiry of the primary time limit on 2 February 2022. The claimant relies on her illness as the reason why it was not reasonably practicable to present her complaints on time and in particular that she was advised by her psychiatrist not to engage with legal proceedings. The medical evidence relied upon does not set out with any specificity how she was impacted due to her depression and anxiety during the entirety of the primary limitation period. I have concluded that the medical evidence was presented primarily for the purpose of family court proceedings which were live until resolved late

February 2022. Further, the medical evidence was initially to support the claimant in securing postponement of a hearing scheduled in November 2021 and to explain that the impact of her depression particularly during October 2021 and early November 2021 created difficulties for her concentration and ability to process information and thus comply with directions made in the family court proceedings. The understanding was that there were complex financial settlement forms to be completed. The written medical evidence at no point refers to explicit advice not to engage with legal proceedings at all.

92. The claimant was not hospitalised at any point. She continued to manage day to day activities including looking after her son. She also continued to explore income-generating opportunities in relation to an introducer agreement with the respondent and took steps to liaise with potential clients and introduce them to the respondent. This activity included email communications with the respondent and a client meeting at the respondent's offices in October 2021. There were client introductions and liaison with clients in early December 2021. The claimant considered herself fit to instruct solicitors on 23 September 2021, fit to work with clients including on 12 October 2021 and act as introducer of those clients to private banks including in December 2021 in a regulated sector. The claimant's psychiatrist assumed she was progressing well after he last saw her on 15 December 2021 and could not say she was incapable of issuing proceedings in mid-January 2021 a number of weeks before expiry of the primary time limit.
93. In all the circumstances and given all my findings above, I have concluded that it was reasonably practicable for the claimant to have presented her complaints on time. There is no clear evidence that the claimant lacked capacity at any point or detailed evidence that she could not instruct solicitors at all. Even if work had been done in relation to completion of forms for financial settlement in the family proceedings, the claimant progressed those proceedings to completion which necessitated making decisions and instructing solicitors during January and February 2022. The claimant was evasive as to when she started and completed work on her tribunal claim other than by referring to March. The claimant was then able on her evidence to start and complete work within a few days. My findings are that the claimant was capable of considering papers and dealing with lawyers in December 2021 and capable of the necessary work to prepare and present her claim form from that point. It was reasonably practicable for her to do the work necessary to present her complaint at some point prior to the expiry of the time limit on 2 February 2022.
94. I have concluded that it was reasonably practicable for the claimant to have presented her claims within the primary time limit. Accordingly, it is not necessary for me to consider whether they were presented within such further period as I consider reasonable.
95. The claimant's claims were therefore presented out of time so that the tribunal has no jurisdiction to consider them and they are hereby dismissed.

Case Number: 2201353/2022

**EJ Peer
26th Oct 2022**

Sent to the parties on:
26/10/2022

For the Tribunals Office