Case No: 2500971/22

EMPLOYMENT TRIBUNALS

Claimant: Mrs S Ndzenyuy

Respondent: Sage UK Ltd

Heard at: Newcastle, by video **On:** 27th April 2023

Before: Employment Judge Reed

Representation
Claimant: Mr John Robinson
Respondent: Ms Katya Hosking

JUDGMENT

The claims for unfair dismissal and discrimination on the grounds of pregnancy and maternity were presented outside the statutory time limit. The Tribunal concluded that time should not be extended in either claim. Both claims are therefore dismissed.

REASONS

Introduction

1. Mrs Ndzenyuy was employed by Sage UK Ltd from 15th October 2018 to 31st March 2022.

2. This hearing was a public preliminary hearing to determine whether Mrs Ndzenyuy's claims for constructive dismissal and discrimination on the grounds of pregnancy and maternity were out of time.

3. For reasons given orally at the hearing, I decided that all the claims were out of time. Mr Robinson requested written reasons during the hearing.

4. The issues before me were substantially as set out in Employment Judge Arullendran's order of 11th October 2022, specifically:

a. Should the time limit for bringing Mrs Ndzenyuy's constructive dismissal claim be extended, i.e. was it reasonably practicable for the constructive unfair dismissal claim to be brought in time and, if not, was it presented within a reasonable time period thereafter?

b. Should the time limit for bringing Mrs Ndzenyuy's discrimination claims be extended on a just and equitable basis?

5. These issues were to be determined at the preliminary hearing of 13th January 2023, but were postponed by Employment Judge Aspden, for the reasons set out in the decision sent to the parties on 2nd February 2023.

6. In brief, Employment Judge Aspden concluded that basis of the claim was insufficiently clear and that it was appropriate to give Mrs Ndzenyuy the opportunity to clarify it.

7. EJ Arullendran's direction also anticipated that if it was not appropriate to decide the issues set out above, the Tribunal would consider whether to either strike out the claims on the basis that they had no reasonable prospect of success ad whether it was appropriate to make a deposit order. Since I concluded it was appropriate to address the time-limit issues and these issues the claims, it was not necessary to consider either strike out or a deposit order.

8. In addition, at the beginning of the hearing, it became apparent that it was necessary to consider whether all the allegations Mrs Ndzenyuy wished to pursue were contained in the claim currently before the tribunal or whether considering some of those allegations would require an amendment to the claim. And, if so, whether such an amendment should be granted.

9. I was provided by the respondent with a bundle of documents relevant to the hearing. Reference to page numbers in these reasons refer to that bundle. Mr Robinson has also sent a number of documents, in particular a document titled 'Claimant's late submission statement' and a number of witness statements in support of Mrs Ndzenyuy's case.

10. This judgment has taken significantly longer than anticipated to produce due to the pressure of other work and personal circumstances. I apologise to the parties for the delay.

The existing claim

11. The claim has had a relatively complex procedural history, in that there have been two preliminary hearings, both of which sought to clarify the claims brought by Mrs Ndzenyuy.

12. Therefore, before considering either the potential amendment or the issues relating to time limits, it is important to identify the extent of the current claim. This requires some consideration of its history.

Original claim form

13. Mrs Ndzenyuy lodged a claim form with the Tribunal on 18th July 2022, p1-12.

14. In that claim form she ticked the boxes indicating she wishes to bring claims for unfair dismissal (including constructive dismissal); discrimination (on grounds of pregnancy or maternity) and redundancy payment. She also ticks the box marked 'another type of claim' and identifies this as 'Unfair dismissal and constructive dismissal'.

15. The narrative section is then relatively brief (which is not unusual in the context of Employment Tribunal claims). Mrs Ndzenyuy identified the following key allegations:

    a. That, when she was pregnant with her son, she experienced 'constant harassment and bullying by my immediate supervisor who kept insisting that my work was not up to the required standard'.

    b. That, in June 2021, she returned from maternity leave, but faced the same 'harassment and constant barracking from the line manager'.

    c. That she raised these issues with other managers and colleagues who agreed the behaviour was not acceptable.

    d. That she had requested support in pursuing a CIMA qualification, which had been provided to other colleagues, but which was withheld from her.

    e. That, as a result, she was not able to continue in her role and submitted her resignation.

    f. That following her resignation her line manager responded sarcastically, saying 'about time'.

    g. That during her notice period her line manager continued to pressure her to leave.

16. The claim form also noted that the claim had been submitted '17/18 days late', because of 'ill health related to personal and familial COVID restrictions denying meeting with representative for advice and submission of claim'.

17. At the time that the claim was submitted, Mr Robinson was acting as Mrs Ndzenyuy's representative. Mr Robinson is not a lawyer but describes himself as a consultant with significant experience in employment law matters and Tribunal claims.

First preliminary hearing

18. There was a preliminary hearing on 11th October 2022. This sought to clarify the claim and identify the issues.

19. The claim for a redundancy payment was withdrawn by Mrs Ndzenyuy and dismissed on withdrawal on 11th October 2022, p24.

20. Mr Robinson, on behalf of Mrs Ndzenyuy, indicated that the constructive dismissal claim did not relate to pregnancy or maternity discrimination; it related only to allegation of bullying in the workplace. He indicated that the explanation for this claim being late was that Mrs Ndzenyuy was not aware that she could bring a claim.

21. In discussions about the pregnancy discrimination claim, the Employment Judge indicated that the pregnancy discrimination claim must relate to the 'protected period' as provided for at s18 Equality Act 2010. In broad terms, the protected period begins when a pregnancy begins and ends when a woman's statutory maternity leave ends (or, where a woman is not entitled to statutory maternity leave, two weeks after the end of the pregnancy).

22. In Mrs Ndzenyuy's case, the end of the protected period was identified as 7th June 2021, when Mrs Ndzenyuy returned to work from her maternity leave. As a result, Mr Robinson, on Mrs Ndzenyuy's behalf, appears to have proceeded on the basis that the discrimination claim could only relate to matters prior to 7th June 2021. It is possible that this also influenced his statement that the unfair dismissal claim was not related to pregnancy or maternity discrimination.

23. I note, as did EJ Aspden in the subsequent preliminary hearing, that the suggestion that s18 can only apply to the protected period is not accurate. It may be that a fuller explanation was given orally. Even if it was, however, I note that the incomplete explanation that had been reduced to writing was misleading. This is addressed in more detail below.

24. At this stage the claim remained somewhat unparticularised. Nonetheless, it was listed for a public preliminary hearing to consider whether time should be extended in both the unfair dismissal and discrimination claims.

Second preliminary hearing

25. There was a second preliminary hearing on 13th January 2023, heard by EJ Aspden. Although this had been listed to consider the substance of the time limit issues, it was converted into a case management hearing and focused on identifying the relevant issues.

26. Essentially this arose from two factors: that the claims remained too unparticularised for the time limit points to be properly determined and that the account of the law applicable to pregnancy discrimination given to Mrs Ndzenyuy had been potentially misleading.

27. In relation to the law relating to pregnancy discrimination, EJ Aspden noted two relevant factors:

28. First, that s18 pregnancy and maternity discrimination is not solely concerned with the 'protected period'.

29. S18(2), which deals with discrimination because of pregnancy or a pregnancy related illness only applies where the discrimination occurs during the protected period (subject to s18(5) which deals with decisions taken during the protected period but implemented after it).

30. Similarly, s18(3) deals with discrimination while a woman is on compulsory maternity leave. Since the protected period will always end either a) after the end of compulsory maternity leave (where, as will usually be the case, a woman takes further ordinary maternity leave after the very short period of compulsory leave) or b) end at the same time where a woman returns to work immediately at the end of the compulsory period, s18(3) discrimination will always occur within the protected period.

31. S18(4), however, which deals with discrimination arising from the right to take maternity leave, does not apply only to the protected period. It refers to unfavourable treatment because a woman is exercising, seeking to exercise or has exercised or sought to exercise the right to statutory maternity leave. Such discrimination might occur after (possibly long after) the protected period had come to an end.

32. Second, the judge noted that, where behaviour does not amount to pregnancy discrimination because of the limits on s18 arising from the protected period, it may nonetheless amount to discrimination on other grounds, in particular sex.

33. Having set all of this out EJ Aspden attempted to clarify the claims with Mr Robinson, giving him the opportunity to consult with Mrs Ndzenyuy, see p42.

34. Unfortunately, this did not succeed in further clarifying the claim, because the answers EJ Aspden received were ambiguous and equivocal. She therefore gave Mrs Ndzenyuy a further opportunity to clarify her claims, ordering the clarification be provided in writing by 20th January 2023. She set out a number of detailed questions to be answered. These were:

    a. *Is it the claimant's case that Ms Booth treated her unfavourably because of her pregnancy by doing any of the things referred to in page 7 of the claim form?*
    b. *Is it the claimant's case that Ms Booth treated her unfavourably because she took or had taken maternity leave by doing any of the things referred to in page 7 of the claim form?*
    c. *Is it the claimant's case that Ms Booth treated her less favourably than she treated or would have treated others by doing any of the things referred to in page 7 of the claim form?*
    d. *If the answer to any of those questions is 'yes' the claimant must identify:*
        i. *What Ms Booth did that was unfavourable treatment because of the claimant's pregnancy or because of illness arising from her pregnancy or because the claimant took maternity leave;*
        ii. *In each case, when Ms Booth did it.*
        iii. *Is it the claimant's case that any of those things contributed to the claimant's decision to resign?*

35. Mrs Ndzenyuy, through Mr Robinson, provided written clarification by email on the same day. Although it is clear this was sent before EJ Aspden's written order had been sent out, it is apparent that the order had been given in detail at the oral hearing, since Mr Robinson's email follows closely the questions posed by EJ Aspden.

36. In relation to the first three questions, Mr Robinson wrote 'Yes'. There then followed details of the unfavourable treatment relied upon by Mrs Ndzenyuy as follows:

    a. That in December 2019 Mrs Ndzenyuy had been absent from work for two days because of ill health. She had attended hospital for a few hours. She alleged that Ms Booth had demanded that she provide a discharge note from the hospital to prove she had been there. She also alleged that Ms Booth had pressured her to provide the discharge note or a sick note, saying that she would otherwise not be paid for these days.

    b. That in 2020, while working from home, Ms Booth had required her to provide evidence of work she had undertaken, including screenshots of casework, call logs etc. She said that this had not been required of other staff.

    c. That throughout her pregnancy, Ms Booth had pulled her aside to have her work assessed and checked by more junior staff.

    d. That in March 2020, while the respondent provided IT equipment and software to allow staff to work from home, Ms Booth suggested that Mrs Ndzenyuy did not need this, because she was going on maternity leave shortly. This notwithstanding the fact that Mrs Ndzenyuy's maternity leave was not due to start until July 2020.

    e. That while Mrs Ndzenyuy was working from home she was micromanaged by Ms Booth. This included suggesting that Mrs Ndzenyuy was lying about the work she had completed.

    f. That in April 2020, when a laptop charger failed, preventing Mrs Ndzenyuy from working, Ms Booth suggested that this absence should be booked as annual leave, since Mrs Ndzenyuy was unable to continue her work. And that Ms Booth did record the full day as annual leave.

37. Finally, Mr Robinson wrote 'yes' in response to whether those matters contributed to Mrs Ndzenyuy decision to resign.

38. Since the written clarification was provided shortly after the hearing, it was available to EJ Aspden at the point she was drafting her order. She therefore commented on its content in a postscript to her order.

39. In particular, she noted that the clarification set out that all the acts of discrimination occurred during Mrs Ndzenyuy's pregnancy, with the caveat that she might be asserting that the discriminatory matters sufficiently influenced the overall repudiatory breach of her contract of employment such to render the constructive dismissal discriminatory.

40. She therefore noted that the next preliminary hearing would need to consider:

    a. Whether the claim form contains a complaint that the claimant's constructive dismissal was an act of discrimination;

b. If so, whether the claimant was prevented from pursuing such a claim by virtue of what Mr Robinson said at the first case management hearing;

c. If the claim form did not include such a complaint, whether an amendment should be permitted.

Third preliminary hearing (postponed)

41. EJ Aspden also listed a further public preliminary hearing in March 2023. This is described in her order as the 'the public preliminary hearing directed … by EJ Arullendran'. She also set out a series of case management orders.

42. Although there appears to have been some effort to comply with these orders, Mrs Ndzenyuy did not fully comply with them. In particular, she did not provide a witness statement addressing the time limit issues. The hearing was therefore postponed by EJ Loy on 7th March 2023, with further orders and a further detailed explanation of what was required.

43. It is also appropriate to record that Mr Robinson says that some of his delay in providing documents has been as a result of his ill health. He says that, shortly after the 2nd case management hearing on the 13th January he fell ill and was unable to materially progress the claim until the 27th March. At that stage, he says, he was able to take instructions from Mrs Ndzenyuy and produce her witness statement.

44. In response to that order, Mr Robinson filed a document title 'Claimant's late submission statement'. This was sent to the Tribunal on 28th March 2023. That statement was not a witness statement from Mrs Ndzenyuy, but rather a submission from Mr Robinson. Notably, it repeats the answers to EJ Aspden's questions that had been given in the written clarification on 13th January 2023. There is no suggestion, within that document, that there has been any change to the case Mrs Ndzenyuy wished to put forward.

45. Mr Robinson persisted in his reliance on that statement as setting out the response to EJ Aspden's questions as late as 26th April 2023, when he emailed the Tribunal and the respondent's solicitors, indicating that it had not been included in the bundle.

46. Also on 28th March 2023, Mr Robinson sent a witness statement from Mrs Ndzenyuy to the Tribunal. The witness statement should have dealt with the issues relating to the time limits and in particular, why the claim was not made sooner, as set out in EJ Aspden's order of 2nd February 2023 and EJ Loy's order of 7th March 2023. Instead, it dealt with the substance of the claim.

47. In addition, it went significantly beyond the allegations set out the written clarification of the claim. In particular it set out a series of allegations relating to events after Mrs Ndzenyuy returned to work in June 2021 following her maternity leave.

48. In summary these were:

a. That following her return to work Ms Booth was unsympathetic to Mrs Ndzenyuy's need to care with her son, suggesting that she should 'stop using working from home as childcare'

b. In September 2021, returning Mrs Ndzenyuy to a performance improvement plan she had left prior to her maternity leave.

c. That Ms Booth set Mrs Ndzenyuy's performance bonus at only 25%, the lowest in her team.

d. That Ms Booth continued to put pressure on Mrs Ndzenyuy by deliberately presenting work in a way that encouraged mistakes and by unreasonably scrutinising her work.

e. That Ms Booth assigned to Mrs Ndzenyuy alone the task of processing month end transactions for November 2020, when this was an excessive workload.

f. That, when Mrs Ndzenyuy worked late to complete this work Mrs Booth thanked a colleague for completing it, refusing to acknowledge Mrs Ndzenyuy's work, even when that colleague explained it was Mrs Ndzenyuy work, not hers.

g. That Ms Booth refused to hold a review of the performance improvement plan until it was five weeks after the plan was scheduled to end and only did so once Mrs Ndzenyuy had made a minor mistake that could be used to justify claiming that she had not passed the performance improvement plan.

49. At the beginning of the hearing, Ms Hosking noted that the witness statement went significantly beyond the claims set out in the previous clarification documents. Mr Robinson said that Mrs Ndzenyuy did wish to rely on these allegations as part of her discrimination claim. He suggested that there was no need for any amendment, because the witness statement simply provided more detail to the claim set out in the ET1.

50. Mrs Hosking argued that, if the claimant wished to go beyond the discrimination claim as set out in the written clarification an amendment was necessary and that the respondent resisted any such amendment. She further argued that this needed to be resolved before considering the time limit issues, since the content of the claim was likely to be relevant to those matters.

51. Mr Robinson maintained his position that an amendment was not necessary, but argued that if it was necessary it should be granted. He agreed that, if an amendment was needed, the substance of what he was seeking was to allow Mrs Ndzenyuy to rely on the allegations as set out in her witness statement paragraphs 11 to 17, which are summarised above.

52. I agreed that it was important to clearly identify the claim as it currently stood and to deal with any application to amend before considering the time limit issues. I therefore heard submissions from both Mr Robinson and Ms Hosking on both whether an amendment was necessary and whether it should be granted.

Is an amendment necessary?

53. I have concluded that an amendment is necessary. The ET1 does contain some reference to events after Mrs Ndzenyuy's return from maternity leave. The broad assertion that, at that point in time, she had been discriminated against in some manner connected with her pregnancy was set out.

54. The ET1 does not, however, set out the factual basis of this claim and does not contain the fully allegations that Mrs Ndzenyuy now relies upon. For example, there is no reference at all to Ms Booth placing her on a performance improvement plan which is now said to form a key part of the claim.

55. This is the sort of clarification that occurs routinely at an initial case management hearing. An application at either the first or second preliminary hearing for such an amendment would almost certainly have been granted. Indeed, that sort of clarification of the claim is a key reason that a case management hearing is routinely set following the receipt of the claim in discrimination claims.

56. It is also clear that the sort of further clarification set out in Mrs Ndzenyuy's witness statement was exactly what EJ Aspden was seeking to elicit both in that hearing and in her order for written answers.

Decision on amendment

57. I am not, however, considering the ET1 from the same position that EJ Aspden and EJ Arullendran were in the two previous hearings. I am considering the claim in light of the events of those hearings, the document submitted by Mr Robinson in clarification of the claim and the current position of the litigation.

58. In considering the application to amend, I had regard to the guidance laid out in *Selkent Bus Co Ltd v Moore* [1996] IRLR. In particular, I must take into account all the relevant circumstances in order to balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. *Selkent* also identifies three categories of circumstance that are likely to be of particular relevance: the nature of the amendment and, in particular, whether it is minor or a substantial alteration, the applicability of time limits and the timing and manner of the application.

59. I have also born in mind, however, the observations in *Vaugham v Modality Partnership* [2021] IRLR 97, which remind me that the decisive question must remain the balance of hardship. The factors identified in *Selkent* are tools to assist me in answering that question, rather than a decisive or complete checklist.

60. I have also had regard to the guidance given by then President Langstaff in regard to concessions in *Segor v Goodrich Actuation Systems Ltd* (UKEAT/0145/11). As noted by then President Langstaff a concession or withdrawal by a party in relation to any part of their case 'cannot properly be accepted unless it is clear, unequivocal and unambiguous'.

61. I start by considering to what extent any application to amend is limited or effected by either by Mr Robinson's statement to EJ Arullendran that Mrs Ndzenyuy's claim for constructive dismissal did not relate to pregnancy or maternity discrimination or by the written clarification of the claim.

62. Formally, I do not think these should be approached as concessions. It was not the case that there was a clear claim that was being withdrawn or a line of argument that was being conceded. Rather the Tribunal was seeking to clarify the relatively amorphous claim that had been presented. Nonetheless, the guidance in relation to concessions is useful, in particular because it illustrates the need to be cautious when some part of a potential claim might be being abandoned.

63. In relation to Mr Robinson's statement to EJ Arullendran that Mrs Ndzenyuy's claim for constructive dismissal did not relate to pregnancy or maternity discrimination, I have concluded I should give it no weight when considering amendment.

64. It is recorded as a clear, unequivocal and unambiguous statement of Mrs Ndzenyuy's case. But I have concluded that there is a real risk that it might have been made within the context of a misunderstanding of the law, prompted by an inaccurate, or at least incomplete, summary of s18 of the Equality Act during the hearing. In those circumstances I do not think it could sensibly be relied upon. I note that in the written clarification following the 2nd case management hearing it is clearly stated that Mrs Ndzenyuy does say that the discriminatory acts she relies upon contributed to her decision to resign.

65. In relation to the written clarification, I give this much greater weight. Any confusion about the law had been clarified by EJ Aspden during the preliminary hearing. Clear and specific questions had been set out by EJ Aspden. Mrs Ndzenyuy and Mr Robinson were given the opportunity to reflect and provide an explanation of the claim in writing. They were given two weeks to do so. I note that this was, in fact, a second opportunity to clarify the claim, because Mr Robinson had been unable to do so at the hearing.

66. The written clarification then does set out a detailed account of the allegations relied upon. There is reference to specific dates and events; comparisons are made between the treatment of the claimant and her colleagues. There is nothing on the face of the document to suggest that it is not intended to form complete factual account of the claimant's case, which is what had been ordered by the Tribunal.

67. It is important that, where parties are given the opportunity to clarify their claim, that clarification can be relied upon by the Tribunal and by the other party. This is particularly the case where, as is common within the Employment Tribunal, the original claim form is broadly drafted and contains very general allegations.

68. This means that, where there has been the opportunity to clarify the claim and this had been done, that will normally be a significant factor against permitting any further amendment that goes beyond that clarification. It does not, however, automatically prevent a further amendment. Any application must be

considered on the basis of all the circumstances and on the basis of the balance of hardship between the parties.

69. The strongest factor in favour of allowing an amendment is that there will be significant hardship to the claimant if she is not permitted to present the claim that she has set out in her witness statement.

70. First, the proposed amendment relates to substantial allegations that, in any circumstances, would form a significant element of her claim. This is not a situation in which the amendment sought relates to peripheral or unimportant matters. These are very serious allegations and of central importance to the underlying dispute between the parties.

71. Further it is obvious that if Mrs Ndzenyuy is prevented from relying on these allegations to will significantly weaken her existing claims. In the context of seeking to pursue a discriminatory constructive dismissal, being unable to rely on a substantial number of allegations that occurred close to the date of resignation, will almost inevitably weaken the claim. That is even more the case where Mrs Ndzenyuy has now made clear statements that she resigned, to a significant degree, in response to those allegations. It raises challenges for her claim both in establishing liability and in arguments relating to remedy.

72. The impact in this claim is also made more serious by the time limit issues. If the more recent acts are not part of the claim, that will inevitably have an impact on decisions about the just and equitable extension applicable to the discrimination claims.

73. The main factor against allowing the amendment is the significant hardship caused to the respondent by the timing of this amendment. It was not made until the issue of whether an amendment was required was raised by the respondent at the beginning of this hearing.

74. In short it is made very late and after Mrs Ndzenyuy has had multiple opportunities to clarify the claim. I have born in mind that neither Mrs Ndzenyuy or Mr Robinson are qualified lawyers and it would be unfair to expect them to conduct the litigation in the same manner as a solicitor or barrister. At the same time, Mr Robinson has taken on the task of representing Mrs Ndzenyuy and indicated that he has significant experience in such matters.

75. Further, I do not think the issue of clarifying the claim, at least at a basic level, was one calling for particular legal knowledge or skill. What was required, as had clearly been directed by EJ Aspden, was a factual account of the unfavourable treatment Mrs Ndzenyuy was said to have experienced because of her pregnancy or because of having taken maternity leave. That is not something that requires close legal reasoning or complex analysis of the relevant law. Mr Robinson and Mrs Ndzenyuy were able to set out that sort of information, because they did so in preparing the written clarification in relation to behaviour.

76. I have not received any explanation as to why, if Mrs Ndzenyuy wished to rely on later events, these were not included in the written clarification. Mr Robinson’s ill health does not provide an explanation, since he was not unwell at the time that the clarification was produced. There was also no attempt to

add to the clarification or to apply for an amendment after 27th March 2023, when Mr Robinson tells me he was 'back in action'. Indeed, Mr Robinson repeated his reliance on the information in the written clarification, when it was repeated in his late submission statement on 28th March 2023.

77. Although the witness statement now sets out the claim with greater clarity in my view further clarification would still be required, in particular to establish the full factual basis of the claims and how these were said to amount to discrimination. The clarification does not engage with the limitations of s18(2) (unfavourable treatment because of the pregnancy or a pregnancy related illness) to the protected period. It also does not set out which allegations are are said to be discrimination because of pregnancy and which are said to be discrimination arising from maternity leave. The clarification document simply answers 'yes' that the factual allegations as a whole are said to amount to both forms of discrimination.

78. This is not to criticise either Mr Robinson or Mrs Ndzenyuy. As noted above neither are legally qualified. It is not at all unreasonable that some further clarification is required, since these are matters of some legal complexity.

79. Nonetheless, it would not have been possible to resolve both these matters and the question of time limits today, meaning that there would need to be a further preliminary hearing. That is relevant to the balance of prejudice.

80. Ms Hosking has also sought to persuade me that there is forensic prejudice to the respondent if I allow an amendment at this stage. She argues that the respondent will be disadvantaged because of the delay in securing evidence and because the recollection of witnesses will be poorer given the passage of time. I did not accept this. I note that earlier events are already in consideration (subject to the time limits). There has not been such significant delay that it is likely to have any substantial impact on either witness recollection or the availability of documentary evidence. Ms Hosking has not identified any specific evidential prejudice (such as particular documents that are no longer available or a particular witness who cannot be called).

81. Taking all of this together, I consider that the balance of hardship should be resolved against permitting an amendment. I accept that this causes significant hardship to the claimant, but I have concluded that greater hardship would result from allowing the amendment. In particular I have had regard to the opportunity given to Mrs Ndzenyuy to clarify the claim and the lack of any proper explanation as to why, if she sought to rely on other matters, these were not included in the clarification.

Time limits

82. This means that I must consider the time limit issues by reference to the claim without the amendment sought by the claimant.

83. It follows from this that I am considering a claim for unfair dismissal and a claim for pregnancy discrimination, based on events between December 2019 and July 2020. Mrs Ndzenyuy also alleges that the discriminatory acts contributed to her decision to resign, giving notice on 31st December 2021.

84. The law relating to time limits for unfair dismissal and discrimination claims, in particular the approach to potential extensions of time, differs. I have therefore dealt with each claim separately.

Time limits: Unfair dismissal

Relevant law

85. The time limit for bringing a claim for unfair dismissal is set out at s111(2) of the Employment Rights Act 1996. This requires that any claim is brought within three months of the effective date of termination.

86. Section s207B ERA 1996 provides for an extension to the time limit in relation to ACAS Early Conciliation.

87. Extensions of time to bring a claim are possible in accordance with s111(2)(b) if a) it was not reasonably practicable to bring the claim within the normal time limit and b) it was presented within a reasonable period thereafter.

88. The definition of and approach to the concept of 'reasonably practicable' and extensions of time has been the subject of extensive appellate comment. I have considered, in particular, the guidance laid down in *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119, which concluded that the concept of 'not reasonably practicable' fell between the extremes of what is physically possible to achieve on the one hand and a simple question of what was reasonable on the other. Rather, I must consider broadly whether it was reasonably feasible to present the claim to the Tribunal within the time limit.

89. Since Mrs Ndzenyuy relies in particular on her lack of knowledge of her rights and the Tribunal process, I have considered the approach to such questions required by the Court of Appeal in *Wall's Meat Co Ltd v Khan* [1978] IRLR 499. Ignorance of a right to bring a claim, how to present a claim to the Tribunal or the relevant deadlines may all mean that it was not reasonably practicable to present a claim in time. In everyday language, it is not reasonably practicable to do something, such as present a claim, if you do not know of the option to do so, do not know how it is done or are unaware that there are strict time-limits involved.

90. But for any lack of knowledge to make it not reasonably practicable to present a claim, that lack of knowledge must be reasonable. When deciding whether lack of knowledge is reasonable, I must consider whether a claimant has acted reasonably in making enquiries as to her rights and how they may be enforced. A claimant cannot rely on reasonable ignorance if that lack of knowledge has become unreasonable because they have failed to take reasonable steps to find out where they stood.

Decision

91. Both parties agree that the effective date of termination in Mrs Ndzenyuy's case was the end of her notice period, 31st March 2021. It follows that the time limit on presenting a claim for unfair dismissal was 30th June 2022.

92. Mrs Ndzenyuy made an ACAS Early Conciliation notification on 17th July 2022 and an Early Conciliation Certificate was issued on 18th July 2022. Since the conciliation period began after the time limit had expired, there was no extension under s207B.

93. The claim was submitted to the Tribunal on 18th July 2022. As Mr Robinson accepts, it was therefore out of time.

94. As noted above, Mrs Ndzenyuy had not provided a witness statement in support of her application to extend time. She confirmed, however, that she agreed with the account set out by Mr Robinson. She then gave evidence and was cross-examined by Ms Hosking.

95. Mrs Ndzenyuy said that she had been under significant stress while working for the respondent. After she resigned she said that she remained very stressed and anxious. In addition to the difficulties that had led to her leaving the respondent, she was a new mother and her husband was serving in the armed forces. She describes herself as struggling at the time. She said that she was having nightmares about her work and didn't have the self-confidence to talk about it.

96. Mrs Ndzenyuy also also started a new job on 14th March 2022. She had applied for the new job following her resignation, towards the end of her employment with the respondent. Mrs Ndzenyuy accepted that, although she was stressed she was well enough to apply for and start a new job, although she described herself as struggling while she was there.

97. Mrs Ndzenyuy said that she had not visited her GP in relation to her mental health. She described herself as being in denial about her mental health and said that she dealt with it by seeing her pastor and through prayer, rather than by seeking medical help.

98. In relation to her knowledge of employment law Mrs Ndzenyuy agreed that she was, in general terms, aware that there were laws about how businesses treated their employees. She was also aware that, in general terms, that discrimination was not permitted in the workplace. She had a degree in banking and finance. She had also studied for qualifications with the Charted Institute of Management Accountants. She denied that this meant she was familiar with the law of how businesses operated, although she accepted she understood that a business had to operate within the law.

99. Mrs Ndzenyuy also agreed that she was computer literate and comfortable using computers.

100. Mrs Ndzenyuy said that she had not been aware of the possibility of bringing a claim, until Mr Robinson, who was family friend, visited socially. There was then a discussion of her work, in the course of which she told him about what had happened and he advised her of the possibility of bringing a claim. The claim was then submitted a few days later.

101. I accept that Mrs Ndzenyuy was under considerable stress both during her employment and after she resigned. In my view it is not particularly helpful to seek to reduce this to a formal diagnosis in the absence of medical evidence. I accept, however, that the was under a great deal of stress, which went beyond might be considered usual in the workplace. I accept that she experienced nightmares and that she found it somewhat distressing to speak about her experience. Whatever the formal diagnosis, she was experiencing the symptoms of depression and anxiety from the point she left the respondent until after the claim was submitted.

102. I do not accept, however, that this reached the point that she was unable to present a claim. I note that she was able to discuss what had happened with her pastor and with Mr Robinson. Once Mr Robinson advised her of the possibility of bringing a claim she was able to do so, with his assistance, very shortly after. There is no suggestion that she was unable, at that stage, to provide instructions to Mr Robinson or to discuss the claim with him. She was also able to apply for, obtain and begin a new job.

103. I accept that Mrs Ndzenyuy was not aware of the Employment Tribunal or the time limit for presenting a claim. She had no past experience of the Employment Tribunal and I would not expect either her degree or her other qualifications to deal with UK employment law at that level of detail.

104. I do not accept, however, that this ignorance meant that it was not reasonably practicable to present a claim within the statutory time limit. This is because Mrs Ndzenyuy was aware, in general terms, that discrimination was unlawful and that UK businesses needed to operate within the law. I further conclude that she would have been aware, again in general terms, of the possibility of challenging a dismissal.

105. Given this, it was reasonable to expect Mrs Ndzenyuy to make some enquiries about her potential rights. It is not difficult for someone with a reasonable grasp of basic computer skills to find guidance on the basics of employment law, including unfair dismissal and the three-month time limit. Information is available from the government website, from ACAS and from Citizen Advice. All can be found with a straightforward Google search.

106. Mrs Ndzenyuy had all the necessary skills and ability to make such enquiries but did not do so. If she had done so she would have become aware of the possibility of a claim for unfair dismissal and of the relevant time-limit. I accept that the stress and anxiety she was experiencing would have made enquiries slightly harder than it might otherwise have been. Her mental health was not, however, so poor that she was not able to make such enquiries or that she should not be reasonably expected to do so.

107. I therefore conclude that the time limit to present a claim for unfair dismissal should not be extended and that claim should be dismissed.

108. If I had accepted that Mrs Ndzenyuy's ignorance of the relevant law and procedure was such as to mean that it was not reasonably practicable to present the claim within the statutory time limit, I would have accepted that it was presented within a reasonable period thereafter. The claim was presented

quite shortly after the time limit expired and quickly upon receiving advice from Mr Robinson.

Time limit: Discrimination

Relevant law

109. The time limit for a claim concerning work-related discrimination under the Equality Act 2010 is set out at s123. It is generally three months, beginning with the act of alleged discrimination.

110. For these purposes any conduct extending over a period is treated as having been done at the end of that period, see 123(3)(a). Failure to do something is to be treated as done when the person involved decided not to do it (which, if there is no evidence to the contrary is taken to be when that person does an act inconsistent with deciding to do something, or in the absence of an inconsistent act, at the end of the period they might have reasonably been expected to do it, see s123(3)(b) and 123(4).

111. As with unfair dismissal this time limit it subject to extensions of time in relation to ACAS Early Conciliation (see s140B).

112. Time to present a discrimination claim may be extended where it is just and equitable to do so, see 123(1)(b). This is a fundamentally different approach to the reasonably practicable test in unfair dismissal.

113. The question of whether it is just and equitable to extend time is a broad discretion, which should include consideration of all relevant circumstances, see *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194. This will generally include consideration of the length and reasons for the delay and the extent to which delay has caused prejudice to the respondent.

114. There is not presumption that time should be extended. It is for the claimant to persuade the Tribunal that it is just and equitable to extend time, see *Bexley Community Centre (t/a Leisure Link) v Robertson* [2003] IRLR 434.

115. A tribunal may, in an appropriate case, consider the merits of the claim, but this must be done carefully, see *Kumari v Greater Manchester Mental Trust* [2022] EAT 132. Until there is a full hearing of a claim, the Tribunal will always be proceedings on partial evidence. It is not possible, in the context of the consideration of a time extension at a preliminary hearing, to conduct a mini-trial. Merits should only therefore be considered where there are readily apparent features of the claim that point to potential weakness or obstacles, such that these can be safely regarded as having some bearing on the merits.

Decision

116. Ms Hosking argues that since the discrimination claim now concerns only allegations of discrimination that occurred prior to Mrs Ndzenyuy's maternity leave which began in July 2020, the time limit to present these claims must

have expired – at the latest – in October 2020, three months after those events. It would follow from this that the claim is very far out of time.

117. At the time of the hearing and giving my oral judgment, I accepted that submission.

118. But, in the course of writing these reasons I have concluded that I was wrong to do so. This is because, Mrs Ndzenyuy, in addition to relying on the events set out in her clarification documents as acts of discrimination, also argues that they amount to a discriminatory constructive dismissal.

119. The Employment Appeal Tribunal in *De Lacey v Wechseln Ltd t/a The Andrew Hill Salon* [2021] IRLR 547 concluded that, in a case of a discriminatory constructive unfair dismissal time runs from the employee's resignation, not from the date or date of the discriminatory acts, see ¶72.

120. It follows that, at least so far as the discriminatory constructive dismissal element of the claim is concerned, the time-limit in respect of the discrimination claim was 30th June 2022. This means that rather than being nearly two years late, the claim was in fact only slightly over two weeks late.

121. The date of the alleged acts of discrimination that form part of the claim was a significant factor in my consideration of the just and equitable question. I have therefore given very careful consideration to whether, in these circumstances, I should reconsider my judgment pursuant to rule 70 of the Employment Tribunal Rules of procedure. I have also considered whether I should seek submissions from the parties.

122. In relation to the possibility of seeking submissions, I have concluded that this is not appropriate. I am satisfied that the point, once *De Lacey* is considered, is a straightforward one. It is not therefore a matter upon which any submission from the respondent is likely to alter my view.

123. Mr Robinson, although he did not refer to *De Lacey* or suggest that the constructive dismissal element of the claim had any bearing on the time limit, nonetheless made his submissions on the basis that the time-limit should run from the date of dismissal. I am therefore, in practice, accepting his implicit submission.

124. In relation to the possibility of reconsideration, I have concluded that I should not reconsider the on my own initiative, because while, the initial impression of the change in time-limit is a dramatic one, I have concluded that it makes little significant difference to my consideration of the just and equitable point.

125. This is because the claim remains out of time and remains concerned, in substance, with allegations of discrimination that occurred prior to July 2020, long before the claim was submitted. I should therefore take account, both of the fact that the claim was brought only slightly over two weeks late (which is a comparatively short delay) and that the allegations of discrimatory acts relate to events nearly two years before the claim was presented.

126. The other factors that I have considered in relation to the just and equitable extension are as follows.

127. As set out above in relation to consideration of the unfair dismissal claim, I have concluded that the reason the claim was presented late was Mrs Ndzenyuy's lack of knowledge about the Tribunal system and her ability to present a claim. I have not accepted that this was a good reason for the delay, because I have also concluded that this ignorance was not reasonable. This, however, is a factor to be considered, among other relevant factors, in deciding whether it is just and equitable to extend time. The lack of a good reason for delay does not mean that it is a foregone conclusion that time should not be extended. I have also considered that, in the circumstances, the failure was not an unusually serious or culpable one and produced a relatively short period of delay. Nonetheless the lack of a good reason for the claim being late is a significant factor against extending time.

128. I have also concluded that it is right to take account of Mrs Ndzenyuy's mental health, in particular that stress and anxiety she was experiencing. Although I have concluded that this did not prevent her presenting a claim and did not mean that there was a good reason for delay, it did make it more difficult for her to progress her claim and is therefore a factor I should consider in favour of extending time.

129. I have concluded that this is an appropriate case to consider the merits of the claim. For a constructive dismissal claim to succeed, a claimant must establish that:

    a. There has been a repudiatory (i.e. serious) breach of contract;
    b. That the claimant has resigned in response to that breach;
    c. Without affirming the contract (that is by their behaviour, whether express or implied, indicating that they intend for the contract to continue notwithstanding the breach)

130. Even taking Mrs Ndzenyuy's claim at its highest, I conclude that relying on discriminatory acts that occurred so long before the resignation is likely to present a formidable obstacle to succeeding in her claim. This is because it is likely to be difficult both to establish that she resigned in response to those matters and because it is likely to be difficult to persuade a Tribunal that she had not affirmed the contract before resigning.

131. I appreciate that this analysis and conclusion is likely to appear harsh to Mrs Ndzenyuy. These are not inherent weaknesses arising from the factual allegations she wishes to make against the respondent, but stem from my earlier decision that it was not just and equitable to allow her amendment that would have allowed her to rely on the more recent acts of alleged discrimination. Had that application been granted, the issue of the just and equitable extension would be very different.

132. I am satisfied, however, that the decision not to allow the amendment was correct, for the reasons that I have set out above. In those circumstances, it is inevitable that the claim be considered in its unamended form. In my view, there are readily apparent difficulties in that claim which mean that it is unlikely to succeed. That is a significant factor against extending time.

133. Ms Hosking has argued that there will be a forensic prejudice to the respondent if time is extended. She suggested that, given the passage of time, it is inevitable that contemporaneous documentation will have been lost and memories will have faded. She describes this as considerable forensic prejudice. She argues that the fact that the respondent has been able to respond to the claim and produce some documentation does not mean that there is no prejudice.

134. I have concluded that this is a factor that I should consider, but I do not accept that the prejudice is as great at Ms Hosking suggests. The respondent has not identified any specific evidential difficult that causes prejudice. It is therefore a general reliance the fact that the passage of time is likely to create evidential difficulties. So far as that goes, I accept that general proposition. But it does not go far. To a great extent, Mrs Ndzenyuy's case consists of clear cut allegations of relatively memorable events. Both she and Ms Booth are available to give evidence. I accept that there is some slight prejudice, but it is only a weak factor against extending time.

135. Standing back to balance all of these matters together, I have concluded that it is not just and equitable to extend time to present the discrimination complaints. In particular, I have concluded that there was no good reason for the claim being presented late and the claim, as it currently exists, is unlikely to succeed. There is no factor of equivalent weight in favour of extending time.

Employment Judge Reed

18th July 2023