HSBC Bank PLC v Chevalier-Firescu: was the claimant entitled to a time extension?

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***HSBC Bank PLC v Chevalier-Firescu* [2024] EWCA Civ 1550**

In this case an Employment Tribunal ('ET') refused to extend time in respect of Equality Act 2010 complaints which were more than two years out of time. It is well established that ETs have a very wide discretion when deciding whether it is 'just and equitable' to extend time under s.123 Equality Act 2010. Therefore, given the passage of time between the acts complained of and the presentation of the claims, it might have been thought that there would be little prospect of the Employment Appeal Tribunal ('EAT') or the Court of Appeal interfering with the ET's conclusion. However, on appeal, the EAT and the Court of Appeal held that the ET's judgment could not stand.

Before considering the facts of the case, it is worth highlighting that, as the Court of Appeal made clear, the breadth of the ET's discretion in relation to time limits does not detract from the requirements to consider all relevant factors and, equally, exclude irrelevant matters from consideration (Elisabeth Laing LJ at §74). Of course, this does not mean that every fact about a case is legally relevant nor that the same factors are relevant in every case.

The facts of this case emphasise that the explanation advanced by a Claimant for the delay in presenting their claim is central to a proper determination of an application for an extension of time under s.123 Equality Act 2010.

Very briefly the facts were as follows:

1. The Claimant had previously been employed by Barclays but she was made redundant during her maternity leave.

2. The Claimant subsequently brought a discrimination claim against Barclays.

3. The Claimant applied for a role with HSBC in early 2018. The hiring manager was Mr Dutruit.

4. The Claimant was interviewed by Mr Dutruit and, on 18 May 2018, he told the Claimant that he wanted to appoint her.

5. On 29 June 2018, Mr Dutruit told the Claimant that she could not be appointed.

6. The Claimant was aware that Barclays had given a negative reference to HSBC about her.

7. In/around October 2018, the Claimant began new proceedings against Barclays on the ground that it had obstructed her appointment at HSBC. But the Claimant did not bring proceedings against HSBC at this time.

8. The Claimant made a data subject access request (DSAR) of HSBC on 10 October 2018 but the original response from HSBC did not include anything of significance.

9. On 17 June 2020 HSBC sent further documents to the Claimant, including email exchanges dated between May and July 2018. HSBC acknowledged that these documents should have been sent to the Claimant previously. The Claimant did not read the emails until August 2020 because of difficult personal circumstances including being overseas during the COVID-19 pandemic, the death of her grandmother and a flood at her home.

A central element of the Claimant's case was that she only became aware of the facts on which she based her claim as a result of receiving further material from HSBC in the period from June to October 2020 (Underhill LJ at §92).

In light of the above, Underhill LJ held that, notwithstanding the breadth of the discretion under s.123 Equality Act 2010, 'where a claimant is asking for an extension of time on the basis that the [sic] they were unaware of important facts material to the viability of their claim it is necessary for the tribunal to consider what the extent of their knowledge (or grounds for suspicion) was, in order to be able to assess what justice and equity require' (§100).

The Claimant's case was that the material she had sight of for the first time in August 2020 showed that there was strong support for her appointment after the initial negative reference from Barclays.

The Claimant subsequently met with Mr Dutruit and obtained further documents from HSBC indicating that a senior HSBC manager (Mr Bourrette) had spoken with 'a friend who was at Barclays' (§92(3)). The feedback from the friend included disparaging comments and the phrase 'discrimination claim against Barclays'.

In refusing to extend time the ET had held that the Claimant was fully aware of the elements of her claim against Barclays in July 2018. The ET thought the fact that the Claimant had brought a claim against Barclays demonstrated that she knew enough to bring a claim against HSBC. However, that does not follow; the fact that HSBC did not appoint the Claimant following a bad reference from Barclays was not sufficient to justify a claim that HSBC discriminated against or victimised the Claimant (§103). Such a claim would require HSBC to be motivated by a protected characteristic or protected act.

The Court of Appeal was not persuaded by HSBC's argument that the Claimant had a sufficient basis to reasonably suspect discrimination or victimisation (§98). It will often be reasonable to expect a person to commence proceedings where their knowledge of the facts (or the availability of evidence) is less than certain but whether or not that is so depends on the particular circumstances of the case (§101). The question of whether a Claimant knew or suspected that they had a valid claim will always be relevant but that is only the starting point; it may be relevant to ask whether a Claimant should have known or suspected that they had a valid claim and, if so, whether it was nevertheless reasonable for them to delay bringing proceedings. But those are not the only questions relevant to the overall assessment of what justice and equity require (§102). Indeed, it is suggested that the ET's discretion is wide enough to allow it to extend time even where it concludes a claimant did know or suspect that they had a valid claim long before proceedings were commenced, depending on all the circumstances of the case.

In short, the ET's error was to fail to make findings which explain the basis on which it concluded that the Claimant knew the essential elements of her claim against HSBC in July 2018 or otherwise that the ET was wrong to conclude that the Claimant had the requisite knowledge because she knew enough to bring a claim against Barclays (§106). Underhill LJ thought this error could be characterised as irrationality or a failure to give proper reasons but the Court was not satisfied that the conclusion was necessarily perverse.

The Court of Appeal held that the preliminary question of whether time should be extended needed to be reheard (§108).

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