Court of Appeal clarifies when employees “know enough” to bring discrimination claims

In a recent Court of Appeal judgment, an Employment Tribunal was found to have erred in deciding that an employee had all the facts she needed to bring her discrimination claims. This case clarifies that being unaware of a discriminatory motive can justify a late claim.

What happened in this case?

The Claimant lost her job at Barclays soon after returning from maternity leave. She brought sex discrimination proceedings against Barclays. In 2018, she applied for a senior role at HSBC. Early feedback at HSBC was very positive, with managers indicating that they were keen to hire her.

However, by July 2018, HSBC told the Claimant that it would not be offering her the job. At that time, she knew someone at Barclays had given HSBC a bad reference about her. Suspecting that Barclays’ negative input was linked to her previous discrimination claims, she pursued further claims against Barclays. She did not bring a claim against HSBC.

Two years later, in 2020, the Claimant received new documents from HSBC following her repeated data subject access requests.

These revealed that a senior HSBC manager had, in fact, been told about her earlier sex discrimination proceedings against Barclays and had passed on disparaging comments before the decision not to hire her was finalised. She also learned about potential race-related remarks, including references to "Lebanese connections" which were said to make her hiring more difficult.

Relying on the newly disclosed information, the Claimant brought discrimination and victimisation claims against HSBC in November 2020 and May 2021, over two years out of time. An Employment Tribunal decided that the claims against HSBC could not proceed because of limitation. It concluded that the Claimant's application process ended in July 2018 and that she should have known enough by then to bring her discrimination claims. The Tribunal also treated later events in 2020 as irrelevant, finding that they did not add to the basic facts.

The Claimant appealed successfully to the Employment Appeal Tribunal (the **EAT**). The EAT held that the Tribunal had failed to consider properly whether the Claimant had the relevant knowledge in 2018 to bring a claim against HSBC, as opposed to just suspecting that her ex-employer Barclays was behind it. HSBC appealed to the Court of Appeal.

What was decided?

The Court of Appeal upheld the EAT's ruling and dismissed HSBC's appeal.

The Court of Appeal emphasised that under the standard set out in *Meek v Birmingham District Council*, Tribunals must explain

their decisions adequately. It found that the Tribunal had not made the necessary findings about the precise moment that the Claimant had gained enough information to know that HSBC (rather than Barclays) might have discriminated or victimised her.

The Court of Appeal agreed that the EAT was right to criticise the original decision for failing to explain how they had concluded that the Claimant knew enough in July 2018 to pursue a discrimination claim, despite new facts arising in 2020. It emphasised that a Tribunal deciding whether to extend time must carefully consider what a claimant knew, and when, before concluding the claimant had enough information to bring a claim.

The Court of Appeal criticised the Tribunal for failing to address the Claimant's race discrimination claim, which arose from comments about "Lebanese connections" in 2020 and, therefore, needed its own separate time-limit analysis.

In line with the principle in *Barnes v Metropolitan Police Commissioner,* the Court of Appeal noted that Tribunals should consider both what a claimant suspected and whether any delay in bringing proceedings was reasonable.

As a result, the Court of Appeal remitted the case to a new Tribunal to decide whether it was just and equitable to allow the claims to proceed outside the usual three-month limit.

What does this mean for employers?

This decision highlights the following key points for employers:

- **Understanding the true reason for a decision:** even if a candidate knows that a decision had been made to turn down their application, the ordinary time limit to bring a claim may be extended if they later uncover evidence suggesting a discriminatory or victimising motive.

- **Risk of victimisation claims:** a candidate who has previously raised discrimination complaints remains protected against victimisation – whether from a previous employer or a prospective employer treating them unfavourably as a result of their protected acts.

- **Take a cautious approach to references and subsequent internal discussions:** managers and HR teams must handle references carefully, ensuring no unlawful bias or "protected act" knowledge improperly influences hiring decisions. Feedback should be factual rather than speculative and there ought to robust protocols in place to avoid unconscious bias.

- **Responding promptly to data subject access requests:** delayed disclosures (or failing to disclose key documents when first asked) can undermine an employer's arguments that a claim is "too late." If important new evidence is only provided by an organisation long after the event, a Tribunal is more likely to extend time.

Check your DSAR handling procedures to ensure completeness and timeliness.

HSBC Bank plc v Chevalier-Firescu

BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues relating to the content of this article, please contact Yulia Chizh (YuliaChizh@bdbf.co.uk), Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.