Mills and Crown Prosecution Service v. Marshall (EAT, 1998)

Employment Appeal Tribunal ruling, 1998

Foreword

The EAT upheld the decision of an industrial tribunal to hear the case of sex discrimination brought by Ms Susan Marshall against the DPP and the Crown Prosecution Service. The CPS had argued that the case should not have been heard because it was brought after the expiry of the three-month time limit for bringing such claims.

The Industrial Tribunal had found that it was "just and equitable" to extend the time allowed because Ms Marshall had been unaware that she had a right to sue until the European Court of Justice had ruled in the 1996 P-*v*-S case that it was illegal to discriminate on grounds of gender reassignment.

The EAT held that the tribunal had an unfettered right to extend the time limit in sex discrimination cases, and that it had not erred in law in taking into account the applicant's perception of her right to bring a case.

Claire McNab, December 2000

Tribunal decision

EMPLOYMENT APPEAL TRIBUNAL

Before
MR JUSTICE MORISON (PRESIDENT)

MILLS and CROWN PROSECUTION SERVICE — APPELLANTS

Ms Susan Marshall — RESPONDENT

Appearances:

For the Appellants: RICHARD McMANUS, instructed by the Treasury Solicitor

For the Respondent: SUE ASHTIANY, solicitor, Cole & Cale

Decision:

11 February 1998

1. MR JUSTICE MORISON (PRESIDENT): This appeal raises a potentially important point. The question at issue is whether it would be just and equitable to extend time for bringing a complaint of unlawful discrimination where the applicant was unaware of her right to make her complaint timeously, because she and her lawyers were reasonably unaware of the extent of her applicable rights under the Sex Discrimination Act 1975 [the Act] until after a decision of the European Court which clarified the ambit of the Equal Treatment Directive.

2. The question at issue arises in this context. Ms Marshall is a transsexual: she was born a man but has acquired a new gender. As a man, she applied for a position with the Crown Prosecution Service in 1993, and was offered a job, which she intended to take up as a woman. She explained her personal circumstances to the DPP, and subsequently the offer of appointment was withdrawn. The withdrawal of the offer was contained in a letter dated 26 May 1993, and confirmed by a letter from the DPP dated 7 June 1993. If Ms Marshall has a valid complaint, it relates to the withdrawal of the offer by reason, allegedly, of her announced intention to change gender. In other words, the time for making her complaint runs from either 26 May or 7 June 1993, [it matters not which, for present purposes].

3. Section 76(1) of the Act provides:

'An industrial tribunal shall not consider a complaint … unless it is presented to the tribunal before the end of the period of three months beginning when the act complained of was done.'

By subsection (5) of the Act, a tribunal has a discretion to extend the time limit:

'A … tribunal may nevertheless consider any such complaint … which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.'

4. On a preliminary issue as to time, the industrial tribunal was satisfied that the complaint was presented out of time, ejecting an argument, based upon the Directive, that Ms Marshall had a free-standing claim to which a six-year limit applied or to which no time limit applied until Parliament amended the Act so as to comply with the Directive. The learned chairman found as a fact that the complainant was not at fault in failing to present her complaint 'at an early date' because the letter from the director led her to believe that she had no prospect of successfully challenging the decision, and the legal advice which she received at the time confirmed her view. He was of the view that the evidence at any trial would be short, and was well documented and he did not 'believe that the respondents in this instance are prejudiced'. On the other hand, he was satisfied that on the fact of the application the applicant had lost the opportunity of being appointed a Crown Prosecutor and that she had allegedly suffered substantial harm. He concluded that it was just and equitable in all the circumstances that an industrial tribunal should hear and determine the case on the merits.

5. It was Ms Marshall's case that until the European Court's decision in *P v S and Cornwall County Council* [1996] IRLR 347, she was reasonably entitled to believe that the Sex Discrimination Act did not apply so as to make unlawful discrimination against a person on the grounds that he or she is or was proposing to undergo gender reassignment. In that case, the European Court held that the scope of the European Directive, which conferred rights on P by virtue of her employment by an emanation of the state, was such as to apply to a claim of discrimination arising from the gender reassignment of the person concerned. Ms Marshall presented her complaint to an industrial tribunal within three months of the European Court's judgment. Her complaint is brought against an 'emanation of the state', namely the Crown Prosecution Service, and also against an individual (the DPP). In relation to the latter respondent, her claim could only be brought under the Act, but she correctly anticipated that the Act would be construed purposively and consistently with the purpose of the Directive: see *Marleasing SA v La Comercial International de Alimentacion SA* [1990] ECR 1-4135. In *Chessington World of Adventures v Reed* [1997] IRLR 556, the EAT, presided over by Judge Peter Clark, held that an industrial tribunal was correct to construe the Act to cover a complaint brought by a transsexual. For the purpose of this appeal, it was accepted, and averred by the appellants [the respondents to the complaint] that Ms Marshall has always had a justifiable claim against them in respect to her non-appointment.

The parties' submissions

6. In a cogent argument presented with care and economy of language, Mr McManus, on the appellants' behalf, argued that the question for the court is the extent to which it is ever appropriate to extend time if, to do so, will infringe principles of legal certainty. He submitted that the industrial tribunal erred in law either because it was never appropriate to extend time if the principle of legal certainty is undermined, or because the industrial tribunal failed to tales into account the principle of legal certainty when exercising its discretion.

7. The starting point for his arguments is the case of *Biggs v Somerset County Council* [1996] IRLR 203. There, a part-time teacher alleged that until the House of Lords' judgment in *R v Secretary of State for Employment ex parte Equal Opportunities Commission* [1994] IRLR 176, which was given on 3 March 1994, she did not know that she had a viable complaint of unfair dismissal. The statutory provision in force at the relevant time excluded her from eligibility to make such a complaint. She then presented a complaint of unfair dismissal on 1 September 1994 in relation to her dismissal in 1976. The industrial tribunal and the EAT held that it was reasonably practicable for her to have presented her complaint within the statutory three month time limit. In giving judgment in the EAT, Mummery J said:

'It was recognised in the *EOC* case … that the claim in that case made by the individual, Mrs Day, would fall within the jurisdiction of the industrial tribunal which would have power to disapply the qualifying conditions which offended against Article 119 so that effect could have been given to her claim. The applicant relies on the declaration in the *EOC* case as having retrospective effect, enabling her to complain of a dismissal before 3 March 1994. It is implicit in that retrospectivity that she could have brought her case when she was dismissed or within three months. She did not.'

8. After considering a number of submissions which are not directly in point on this appeal, Neill LJ, at 207, 22, said:

'In the and however, I have been driven to the conclusion that, if the words "reasonably practicable" are properly construed in their contest, Mummery J was correct in concluding that it was reasonably practicable for Mrs Biggs to have presented her claim within the time prescribed. Her mistake as to what her rights were was, as has now been made clear, a mistake of law. It was not a mistake of fact.

The decision in the *EOC* case … was declaratory of what the law has always been ever since the supremacy of Community law was established by s.2 of the European Communities Act 1972. Indeed, as Mummery J pointed out, Mrs Biggs relies on the retrospective effect of the *EOC* decision. Accordingly, since 1 January 1993 and certainly since the decision of the European Court of Justice in *Defrenne v Sabena* [1976] ICR 547, there was no legal impediment preventing someone who claimed that he had been unfairly dismissed from presenting a claim and arguing that the restriction on claims by part-time workers was indirectly discriminatory.

It seems to me that in the context of s.67 of the Act of 1978 the words "reasonably practicable" are directed to difficulties faced by an individual claimant. Illness provides an obvious example. In the case of illness, the claimant may well be able successfully to assert that it was not "reasonably practicable" to present a claim within three months. But the words "reasonably practicable", when read in conjunction with a "reasonable" period thereafter, point to some temporary impediment or hindrance. It is to be noted that in the *EOC* case, at p.325, Lord Keith expressed the view that Mrs Day, who was an individual party to the proceedings, could bring her private law claim for a redundancy payment before an industrial tribunal and argue that there the restrictions imposed on part-time workers were not objectively justifiable and should be disapplied. Mrs Biggs could have taken a similar course in 1976.

I have found this to be an anxious point because Mrs Bigg's employment came to an end in 1976. At that time it had been the generally accepted doctrine for centuries that courts and tribunals were required to apply the law as passed by Parliament. The fact that after 1 January 1973 Acts of Parliament and other United Kingdom legislation might have to yield to provisions determined by a different and superior system of law was, I suspect, fully appreciated only by a comparatively small number of people. But in my view *it would be contrary to the principle of legal certainty* [our emphasis] to allow past transactions to be reopened and limitation periods to be circumvented became the *existing law* at the relevant time had not yet been explained or had not been fully understood.

If this analysis is correct, it follows that the fact that it was not until 3 March 1994 that the House of Lords declared that the threshold provisions in the Act of 1978 were indirectly discriminatory, unless objectively justified, cannot be taken into account as a ground for arguing that it was not "reasonably practicable" before that date to present a claim within the time limit.'

9. Mr McManus also referred to the case, more conveniently referred to as the *Rewe* case [1976] ECR 1989, where the European Court considered the applicability of domestic time limits in relation to rights directly conferred by Community law upon their citizens. In the course of their judgment, the European Court said:

'The laying down of such time limits with regard to actions of a fiscal nature is an application of the fundamental principle of legal certainty protecting both the taxpayer and the administration concerned.'

10. He submitted that in the absence of some specific statutory provision, a general discretion to extend time did not permit as a reason for doing so a changed perception of a person's legal rights following a change in the law or a clarification of the law. If Parliament intended that tribunals should have regard to a party's misperception of his or her rights, it would have said so, as it did in s.33(3)(f) of the 1980 Limitation Act. He referred to the case of *Preston* [1997] IRLR 233 at paragraphs 25 and 35. *Preston* is a case concerned with discrimination, based on sex, in relation to access to an occupational pension scheme. It was asserted by the applicant that the effect of the six-month time limit for bringing claims under the Equal Pay Act made it impossible in practice for claimant to have an effective remedy because claimants did not honour until after decisions of the European court that access to an occupational pension scheme fell within Article 119 of the Treaty, and by that date the six-month time period had expired. In giving the judgment of the court, Schiemann LJ observed that:

'The principle of legal certainty requires that there be rules which lay down limitation periods etc.'

and that some of the time limits in the employment field incorporate a certain degree of flexibility whilst others such as that in the Equal Pay Act, do not. At paragraphs 34 and 35 of the judgment, he said this:

'34. The appellants' argument in this regard is essentially that there was not until relatively recently widespread appreciation of the fact that Community law gives a right not to be discriminated against in respect of pension schemes such as those presently in issue. That, as a broad proposition, I am content to accept for present purposes. They submit that as a result

it was impossible in practice to start proceedings within the six-month period. This I reject: the conclusion does not follow from the premise. It is a common feature of law that there are points of uncertainty and that from time to time a case demonstrates that the courts have given effect to a claim which it was generally felt before that time would, as a matter of law, not succeed. Whether one calls this process judicial law "making" or judicial law "declaring" is perhaps a matter of personal preference. It is of no present importance. Such "law making" is the ineluctable result of the fact that from time to time novel claims are made and judges must reach a decision on the cases that come before them. That such judicial activity goes on is true of domestic law and of Community law. The very fact that the innovative litigant has persuaded the innovative court to find in his favour shows that doing so is not impossible in practice.

35. The appellants point to the undoubted fact that in the interests of legal certainty and in order to avoid chaos the ECJ at times limits the retrospective effect of its judgments. However, contrary to the appellants' contentions it does not follow from this that it is appropriate to disapply periods of limitation during times of uncertainty as to the law. On the contrary, the major function of limitation periods is the protection of legal certainty. To disapply them takes away from legal certainty. It should only be done when in truth they are so short as to male it practically impossible to enforce one's rights. That is not this case. It is beyond argument that the applicants were always in a position in which they were possessed of the relevant rights and could have asserted them. As a matter of English law the courts would have to give precedence to any directly effective Community right and disregard any provision of domestic law purporting to exclude or limit that Community right: see *Biggs v Somerset County Council* [l996] IRLR 203 at pp.207-208.'

11. Mr McManus submitted that the EAT should not follow two of its previous decisions: *Foster v South Glamorgan Health Authority* [1988] IRLR 277 and *British Coal Corporation v Keeble and others* [1997] IRLR 336.

12. In *Foster*, the complainant had been forced to retire at 60 because she was a woman; had she been a man, she could have continued working until she was 65. Until the decision of the Court of Justice in February 1986 in the case of *Marshall (No.1)*, the complainant did not believe that she had a good claim because the UK legislation exempted from its provisions 'provision in relation to death or retirement'. The European Court ruled that Ms Marshall had a right to make such a complaint under Community law. Ms Foster presented her complaint in August 1986 and the EAT allowed her appeal against the industrial tribunal's refusal to entertain her complaint because it was presented out of time, and remitted the matter back to them for further consideration. The essence of this court's decision was that the industrial tribunal had disabled itself from considering the particular facts of Ms Foster's case for an extension of time by accepting the employers' argument that because other women had, in the past, presented similar complaints within time but had them rejected because of an apparent misperception of the true state of the law, Ms Foster should not be in any better position than them. To which the EAT effectively said that the past injustice to one group of women claimants did not suggest that Ms Foster should be treated with equal injustice.

13. In the *British Coal* case, Mrs Keeble and Mrs Watkinson both lost their jobs in the context of a voluntary redundancy scheme based on retirement ages which discriminated between men and women. They were made redundant in August 1989; Mrs Keeble presented her complaint 22 months after her dismissal; Mrs Watkinson's complaint was presented

rather later. On a preliminary point being taken as to time, the industrial tribunal, without hearing evidence, held that it was just and equitable to extend time. The EAT initially referred the matter back to the industrial tribunal for a full hearing on the issue and suggested that in approaching their task the industrial tribunal would be assisted by looking at the factors mentioned in the 1980 Limitation Act. The industrial tribunal then held that it was just and equitable to extend time, and took into account, amongst other matters, the fact that the applicants had received erroneous legal advice as to their rights. On the second appeal to the EAT, the employers' counsel argued that Neill LJ's dicta in *Biggs* were of general application and were unaffected by the difference in language in the limitation provisions relating to unfair dismissal and those relating to unlawful discrimination. Counsel was forced to accept that his submissions involved the proposition that any mistake as to the state of the law [domestic or Community] could not be a relevant factor for an industrial tribunal to take into account in deciding whether it would be just and equitable to extend the time limit. Counsel also accepted that the discretion conferred by s.67 of the Act was very wide and much wider than that conferred in relation to unfair dismissal under what was then the 1978 Act:

'He accepted that it [the discretion] is as wide as the discretion conferred by s.33 of the Limitation Act 1980. He accepted that there many reported cases under that Act in which a mistake of law or inaccurate advice given by a lawyer has been taken into account in the exercise of the discretion to disapply the limitation period. If Neill LJ's words are of general application, cases such as *Halford v Brookes* [1991] 1 WLR 429 CA must have been overruled.

He accepted too that, if his submission were correct, the statutory words of s.76(5) would in effect be amended so that the court could not take into account all the circumstances of the case, but all the circumstances save for one. It seems to us that if the only reason for a long delay is a wholly understandable misapprehension of the law, that must have been a matter which Parliament intended the tribunal to take into account when considering "all the circumstances of the case". Yet, if Mr Napier's submission is right, and the tribunal is forbidden to consider the reason for the delay, the effect would be that there could be no excuse for the delay. The almost inevitable consequence, unless the delay were very short, would be for the tribunal to refuse to extend time. Thus an applicant who had delayed, say for a year, through excusable ignorance of his rights would be in no better position than one who had simply not stirred himself to present his claim for the same period of time.

For all these reasons, we are quite satisfied that Lord Justice Neill intended his ruling to apply only in the context of s.67(2) of the 1978 Act and the consideration of whether it was reasonably practicable for the applicant to present her complaint in time.

In our judgment this tribunal was quite right when they said that the principles of the *Biggs* case should "only apply if at all in the context of 'just and equitable'". What they meant by that, we think, was that it was right for them to bear in mind the need for legal certainty and finality in litigation, but that was only one factor to take into account when they had to consider what was just and equitable in all the circumstances.'

14. Mr McManus said that the 'concession' made by counsel that the discretion under s.33 of the 1980 Act was as wide as that conferred by s.76(5) of the Act was wrong: the former was wider than the latter because Parliament had expressly required the court to have regard to the nature of any legal advice received. Further, *Halford*'s case was not concerned with a

'charge in the law' or a new perception of what the law had always been as a result of some judicial decision.

15. His second main submission was that the industrial tribunal erred in law in the way they exercised their discretion because, primarily, the tribunal took no account of the importance of legal certainty in arriving at its decision. Further, the applicant did not make her application as promptly as she reasonably could have done.

16. On behalf of Ms Marshall, in a very capable submission, Ms Ashtiany argued that the industrial tribunal had correctly weighed all the relevant factors, including the applicant's delay in presenting her complaint, the reasons for it, the length of time that had elapsed between the lodging of the complaint and the matters giving rise to it, and the relative injustices to the parties if the case were allowed to go ahead or not. It acquitted the applicant of any fault: she reasonably did not believe that she could take the matter further within the civil service procedures in the light of the director's letter, or at law, following legal advice. The elimination of discrimination based on sex is one of the fundamental rights of Community law and the court should be slow to interfere with a decision which permitted a claim of this nature to be tried.

The decision

17. The proposition that to allow Ms Marshall to present her complaint offends against the principle of legal certainty begs the question: what is the nature and extent of the principle?

18. There are, as seems to us, a number of general factors which suggest that every mature legal system should adopt limitation provisions, of which legal certainty is but one. The state has an interest in avoiding trials of actions which are so stale that justice cannot be seen to have been done. If all the evidence is so stale that it is inherently unreliable, then the parties' rights cannot be judicially determined. Further, the citizens of the state have an interest in not being troubled by proceedings brought long after the event. People are entitled to arrange their affairs on the basis that what happened in the past is, after a defined period, over ant done with. But, equally, citizens are to be allowed a reasonable opportunity to bring their legitimate grievances to the court.

19. The balancing of these competing interests may require that the limitation periods vary, according to the nature of the rights being asserted. This is reflected in the many different limitation provisions which apply in English Law. For example, in relation to actions for damages for personal injuries for negligence [but not deliberate damage] the limitation period starts from the date of knowledge of the facts necessary to bring an action. Lack of knowledge of the law is irrelevant; however, the period may be extended [disapplied] for a number of reasons including 'the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages' and the court will have regard to 'the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received'. There are other examples of discretionary powers to disapply or extend periods of limitation, such as certain claims under the Social Security Regulations, or claims under the inheritance legislation or under the jurisdiction governing applications for nullity decrees. Some of the discretionary powers are couched in general terms as in the Sex Discrimination Act, or are otherwise confined, such as claims under the Riot Damages Act 1886 or under the Solicitors Act 1974.

20. Assuming that such statutory limitation provisions cannot be said to offend the principle of legal certainty, it can be seen that the principle itself says nothing about how any statutory provision is to be construed. In other words, legal certainty does not require that a person's perception of his rights to bring a valid complaint cannot be taken into account in every case. It would be possible to construct a limitation system which pursued the legal fiction that everyone is deemed to know the law to the extreme, thus preventing a badly advised injured plaintiff from recovering damages from the tortfeasor. Giving the court power to disapply a period of limitation inevitably leads to some uncertainty for the parties, and there are grounds for saying that it would be better if the court did not have that discretion. But this is a policy question, under debate at the present time. Legal certainty does not, as a principle, demand any particular result and nor does it impinge on the proper construction of a statutory discretion which is given to the court. The submission made that, in the absence of express statutory words, a court cannot take account of a party's awareness of their right to bring proceedings, is, we conclude, pure assertion without foundation. Some discretionary provisions will permit the court to take that factor into account; some will not. It is a question of construction of the words used which determines the answer.

21. In this legislation, the Sex Discrimination act, the court's power to extend time is on the basis of what is just and equitable. These words could not be wider or more general. The question is whether it would be just or equitable to deny a person the right to bring proceedings when they were reasonably unaware of the fact that they had the right to bring them until shortly before the complaint was filed. That unawareness might stem from a failure by the lawyers to appreciate that such a claim lay, or because the law 'changed' or was differently perceived after a particular decision of another court. The answer is that in some cases it will be fair to extend time and in others it will not. The industrial tribunal must balance all the factors which are relevant, including, importantly and perhaps crucially, whether it is now possible to have a fair trial of the issues raised by the complaint. Reasonable awareness of the right to sue is but one factor.

22. It is of significance that the Law Commission's first proposal is that that factor is one which is relevant to the question as to when time starts to run; in the present case, time starts to run after the dismissal, or other act complained of. The limitation period is short (three months) but may be extended. The short period is a reflection of the desirability of evidence being heard as close to the events in question as is reasonable. Often, after any appreciable delay, a fair trial may become impossible (for example, the relevant witnesses can no longer be traced). In this case, a fair trial is possible, as the chairman has found. If a fair trial is possible despite the delay, on what basis can it be said that it would be unjust or inequitable to extend time to permit such a trial?

23. It seems to us that the decision of the Court of Appeal in Biggs reflects the difference in language between the limitation provisions in the unfair dismissal legislation and that in question in this appeal. We can well understand that Parliament was concerned to ensure that the operation of the limitation provision in this field did not deny anyone an effective remedy, where a trial was justly possible.

24. In our view, the principle of legal certainty does not found by pertinent legal argument and the industrial tribunal was right not to refer to it in the reasons the chairman gave for his decision. As a matter of statutory language, the discretion which is given by the Act to extend time is unfettered and may include a consideration of the date from which the complainant could reasonably have become aware of her right to present a worthwhile

complaint. The decision in *Biggs* was based upon a different statutory regime and does not bear on the question at issue. The decision of the EAT, in a division presided over by Janet Smith J. in the *British Coal* case was right for the reasons given. That case was not based upon 'a concession' by counsel which should not have been made.

25. The primary submission of Mr McManus must be rejected. We do not consider that his second submission has any validity, in the light of our analysis of the principle of legal certainty and we do not consider it arguable that the Tribunal erred in law in not holding that Ms Marshall failed to present her complaint within a reasonable time after she acquired the relevant knowledge. That last matter was a pure question of fact for the industrial tribunal.

26. Accordingly, the appeal should be dismissed. We would add that whilst we can understand an argument to the effect that a change in the law or a change in the perception of the law should never be a factor to be taken into account, that is a policy decision for Parliament. Further, there may well be cases similar to the present one where a tribunal holds that the applicant should have been aware of her rights earlier than she asserted.

27. Leave to appeal to the Court of Appeal.

» by Claire McNab