



Neutral Citation Number: [2024] EWCA Civ 1550

Case No: CA-2024-000447

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
HHJ Katherine Tucker
EA-2021-001181-NLD

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 December 2024

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LADY JUSTICE KING
and
LADY JUSTICE ELISABETH LAING

Between:

HSBC BANK plc

**Appellant/
Respondent**

- and -

CARMEN CHEVALIER-FIRESCU

**Respondent/
Claimant**

Diya Sen Gupta KC and Zafar Ansari (instructed by Allen Overy Shearman Sterling LLP)
for the Appellant
Oliver Segal KC and Elaine Banton (instructed by Kilgannon and Partners LLP) for the
Respondent

Hearing date: 10 October 2024

Approved Judgment

This judgment was handed down remotely at 11.00 am on 11 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Elisabeth Laing:

Introduction

1. This is an appeal by HSBC Bank plc ('HSBC') from an order of the Employment Appeal Tribunal ('the EAT') allowing the appeal of Mrs Chevalier-Firescu in part and remitting two aspects of her case to the Employment Tribunal ('the ET'). Lewis LJ gave permission to appeal.
2. The question on an appeal to the EAT from the ET is whether the ET erred in law. While the formal question on an appeal from the EAT to this court is whether the EAT erred in law, the real question for this court is usually whether the ET has erred in law. If the EAT allows an appeal when the ET has not erred in law, then, self-evidently, and regardless of its reasons for allowing the appeal, the EAT has itself erred in law. I will therefore concentrate on the reasons of the ET.
3. The duty of the industrial tribunal (as it then was) to explain its decision was described by Bingham LJ (as he then was) in *Meek v Birmingham District Council* [1987] IRLR 250, in a judgment with which Sir John Donaldson MR and Peter Gibson LJ agreed. He said:
'It has on a number of occasions been made plain that the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises...'
4. On analysis, the real issue on this appeal is whether the ET properly explained its reasons for refusing to exercise its discretion to extend the time for bringing the claims in this case, and/or for striking out Mrs Chevalier-Firescu's claim for race discrimination. The ET's reasons would have been adequate if, in sum, it had described Mrs Chevalier-Firescu's claims, when she knew she had an arguable claim or claims, and what the ET made of her explanation for not having brought her claims earlier than she did. For the reasons given in this judgment, I do not consider that the ET's explanation was adequate. I would therefore dismiss R's appeal.
5. On this appeal, HSBC was represented by Ms Sen Gupta KC and Mr Ansari. Mr Segal KC and Ms Banton represented Mrs Chevalier-Firescu. I thank counsel for their written and oral submissions. Paragraph references in this judgment are to the ET's reasons, or to the EAT's judgment, as the case may be, unless I say otherwise.

The grounds of Mrs Chevalier-Firescu's complaint

6. The grounds for Mrs Chevalier-Firescu's complaint are the starting point for this appeal. Whether or not Mrs Chevalier-Firescu had professional help drafting her grounds, it is clear from their style, structure and content that they are largely her work, and not the work of professional lawyers. They are organised under 11 headings which are in bold type.

7. I will summarise those parts of the grounds which are relevant to this appeal. When she first issued her claim, she alleged that Mr Remi Bourrette, a senior manager of HSBC, and HSBC, had discriminated against her (paragraph 1). She knew him because they were both members of the board of the same charity (paragraph 5). She listed her four ET claims against her former employer, Barclays Bank, in paragraph 2. The fourth claim was also against Mr Makram Fares, her former manager at Barclays Bank. She said that those four claims were ‘protected acts’ under the whistleblowing legislation and under section 27 of the Equality Act 2010 (‘the 2010 Act’).
8. In paragraph 3 she listed her claims against HSBC: victimisation, contrary to section 27 of the 2010 Act, direct sex discrimination, contrary to section 13 of the 2010 Act, and direct race discrimination, contrary to section 13 of the 2010 Act. In paragraph 6 she said that she had been interviewed for a senior role ‘from May 2018, without being hired despite being the best candidate’.
9. Under the heading ‘Discrimination’ she said that the respondents had subjected her to sex discrimination, victimisation and race discrimination ‘in the recruitment process and by failing to offer her employment, their acts contravened section 39’ of the 2010 Act. Mr Bourrette spread false rumours about her to other managers at HSBC. HSBC was responsible for his acts (in accordance with section 109 of the 2010 Act). She alleged that, in addition to unlawful discrimination, the respondents had used ‘concealment tactics’ to mislead her, which showed that they knew they were discriminating against her. Those tactics prevented her from successfully pursuing her claims against her old employer (Barclays) and her old boss (Mr Fares). That concealment was in itself an act of victimisation. Without knowing ‘the discriminatory acts’ she could not address them.
10. In paragraph 11, she said that HSBC had ‘created an environment where sex, race discrimination and victimisation is practiced at an institutional level. Where managers are afraid to hire even “the best candidate” ...if she has complained about being discriminated in the past and even more so, where she complained against a Lebanese origin manager. Furthermore other managers who are well aware of the gravity of their discriminatory act reach out in all confidence to the senior HR Department representative to help them conceal and obfuscate’.
11. The next heading is ‘HSBC Victimisation and Sex Discrimination and Race Discrimination’. A sub-heading reads, ‘Prevented from obtaining a job at HSBC from July 2018 – continuing until today as results of Victimisation, Sex Discrimination and Race Discrimination...’. There is then another bold heading. ‘The Claimant had successful interviews at HSBC...’. She described how Barclays Bank made her redundant on 22 March 2018 immediately after her return from maternity leave after the birth of her first child. She had then looked for another job. On 17 April 2018, Ms Assayag recommended her to Mr Zaimi, who further recommended her to Mr Dutruit (both men worked for HSBC). In paragraphs 15-19, she described her interviews and positive messages about her from Mr Lemmel and Mr Delloye (both of whom also worked for HSBC). On 14 May 2018, after the interviews, ‘a redacted document discerned to be from Eric Dutruit ...to another manager’ at HSBC said, ‘we need to hire her’. In response, another manager said ‘Find the space and do it’ (paragraph 19).

12. The heading above paragraph 20 is ‘HSBC were keen to employ the Claimant’. On 15 May 2018, Mr Lemmel congratulated her on the role at HSBC, and asked her ‘not to rush to sign for other banks, as HSBC would be a bit slow in finalising the contract but they would come with an offer and they really wanted her on board’ (paragraph 20). She had a further interview with two senior managers on 16 May 2018. On 19 May, Mr Dutruit wanted to create a special senior role for her, as Head of UK Pension Fund Sales. HSBC began to prepare the final stage of the hiring process (paragraph 23) (and see paragraph 44, below). Mr Dutruit asked for feedback from clients and former employers. She described that feedback, which was very positive, in paragraphs 24. A senior manager at Barclays Bank said that it was ‘a no brainer for him...we should hire her, cannot believe that the organisation let her go’.
13. On 12 June 2018, she told Mr Bourrette by email that she was being very seriously considered for a job by HSBC. She did the Hogan test (see paragraph 44, below) on 14 June 2018. On about 15 June 2018, Mr Dutruit told her that a candidate to whom HSBC had offered a senior post had refused that offer, which made HSBC even keener to hire her. ‘These were in fact the perfect conditions for the Claimant to be hired...’. Her GCAS (see paragraph 44, below) was being processed on 15 June 2018. A redacted email of that date praised her further. There were further positive comments from HR on 19 June 2018. Mr Dutruit wrote on 30 June 2018 that he was happy to ‘put her in front of Hoss’ (that is, Mr Zaimi) ‘this coming week, so he can give you comfort around our process’.
14. On 3 July 2018, Mr Dutruit told her that her former manager from Barclays had told Mr Zaimi that she was ‘a total disaster’. He suggested that she meet Mr Zaimi. In paragraph 33, Mrs Chevalier-Firescu described two pieces of internal feedback sought by Mr Dutruit on 6 July 2018. These were mostly positive, but identified some weaknesses, too.
15. Paragraphs 34 and 35 are headed HSBC ‘knew that Claimant had previously brought the Earlier Claims against her old employer and manager’. Sometime between June and July 2018, ‘the exact date to be confirmed by Mr Bourrette’ he said it was during the hiring process, and not before, that he learned, from Mr Fares, that she had brought discrimination claims against Barclays and Mr Fares. Mr Bourrette was told by her old boss that she had created ‘serious tensions’. The feedback Mr Bourrette got from her old boss ‘raised questions’. There was enough to push Mr Bourrette to tell HSBC that they needed to ‘double check the Claimant’s past in relation to Barclays’. Mr Bourrette had information about the earlier claims from Barclays ‘even after 9 January 2019 when the claims were settled on the first day of the final hearing’.
16. The next heading is ‘The First Respondent interfered and stopped Claimant’s hiring process at the Second Respondent’. Mr Bourrette emailed Mrs Chevalier-Firescu on 10 July 2018 to ask who was interviewing her. As soon as he found out, he emailed them, saying, ‘We need to talk. I know her a little, I know her old boss at Barclays’. On 11 July 2018, Mr Bourrette met Mr Dutruit and gave him negative feedback from her old boss at Barclays. He was a senior manager and intervened in the recruitment process even though he was not part of that process. He gave the same damaging feedback to Mr Delloye. Mr Bourrette was very influential and his opinions were difficult to ignore, as he well knew.

17. Under the heading, 'HSBC...stops the ...hiring process upon the false, derogatory discrimination and victimising feedback from' Mr Bourrette, paragraphs 44-49 described what happened next. She had no contact with Mr Dutruit after 11 July 2018 until much later in 2019. A document dated 29 September 2020 showed that HSBC decided not to hire her after the feedback from Mr Bourrette. Paragraph 46 described negative comments made to the relevant hiring managers. The source of those comments is said to be documents dated 29 September 2020 and 26 August 2020. Those comments were false. The comments were unlawful discrimination against her on grounds of sex, because 'these terms are sex-based stereotypes...against the Claimant as a successful and assertive woman'. The information was also unlawful victimisation because Mr Bourrette 'spread such information because the Claimant had brought protective acts against her previous employer and her previous boss'.
18. The next heading is 'The Second Respondent was also aware that the Claimant brought discrimination claims against her old employer and her old boss, and because of that they withdrew the job offer of the Claimant'. In this section, she said that between 16 July 2018 and 8 February 2019, Mr Dutruit ignored her messages. On 23 July 2018, Ms Assayag commented to her in a text message that they could not change things for women and believe any old biased feedback. On 6 August 2018 Mr Dutruit is said to have told Ms Assayag that if the Claimant had been a man, she would have been seen as a 'superstar', and that he was frustrated that he could not hire her at HSBC. Between September 2018 and January 2019, Ms Assayag tried to understand why the Claimant had not been hired when everyone had been so positive about her. She concluded her internal research on 5 January 2019. She still had faith in HSBC. She thought that interviews had gone well, but that the guys had been twitchy 'because they hear the feedback and because there are proceedings going on. It's a classic, but once the proceedings passes...'
19. In paragraph 55, in bold type, the Claimant said HSBC had failed to disclose all the documents she had asked for, in breach of the Data Protection Act 1998, which hindered her 'chances to have a successful claim against her former boss and employer'. She had made a first data subject access request ('DSAR') on 10 October 2018. She received some documents from HSBC in response in November 2018. Significantly, she alleged, 'documents that would have shown she was being discriminated against were not disclosed by HSBC'. She withdrew her ET claims against Barclays and Mr Fares, her old boss, on 9 January 2019.
20. In paragraphs 59-67 she described her contacts with various of HSBC's employees between 8 March 2019 and November 2019.
21. She had an interview with Mr Dutruit and Mr Larrue on 25 November 2019. It went well until the latter told her that he had been told by Barclays that she was 'aggressive', 'cheated on the sales credit', 'did not work well with others', and 'had stolen clients from colleagues'. On the same day, Mr Dutruit asked her if she knew Mr Bourrette. She was happy to say that she did, 'having no knowledge of [his] previous concealed discriminatory/victimising acts' (paragraph 67).
22. She was told of further bad feedback from Barclays by Mr Lemmel on 28 January 2020. On 30 April 2020, she brought a victimisation claim against Barclays and Mr Fares.

She made further DSARs of HSBC between 1 and 22 May 2020 in order to understand more about the feedback.

23. 'Notably', on 17 June 2020, she received the documents she should have received in November 2018. HSBC's General Data Protection Regulation ('GDPR') team apologised for the fact that '...some of the emails attached were not located in your original search which was carried out in 2018' (paragraph 73). In paragraph 74, the Claimant said that she read the documents in August 2020. She realised then that 'unbeknownst to her [Mr Bourrette]...spoke about her with the hiring managers at [HSBC] during the 2018 hiring process in an ominous and damaging tone'.
24. On 26 August 2020 she called Mr Bourrette to understand what had happened and why. She then understood that he knew about her earlier claims against Barclays Bank and Mr Fares, had interfered in the hiring process in a negative way and had 'scuppered' her chances of a job with HSBC, had hidden what he had done from her and was still doing so during the call, was still in contact with Mr Fares, and continued to have information about her earlier claims, including the settlement (paragraph 76). She wrote to him the same day asking him to write to the people to whom he had given damaging feedback, to say that it was baseless, so as to limit the damage. Instead, he doubled down by contacting the HR Department at HSBC.
25. HSBC's HR Department then investigated, without the Claimant's consent. A document dated 21 September 2020 shows that the HR Department knew that the Claimant had brought a discrimination claim against Barclays. Mr Bourrette had a meeting with the HR Department on 29 September 2020. He told them about the feedback he had had from Mr Fares. The Claimant was 'difficult' and 'difficult to manage'. He complained that she had pressed him during the call on 26 August 2020. He had 'said nothing' because he was 'loyal to HSBC' (paragraph 80).
26. She met Mr Dutruit on 29 September 2020. He confirmed that the reason she had not been hired was the feedback from her old boss at Barclays. Mr Dutruit said he had had comments from Mr Bourrette. When talking about whether they could work together in the future, he said he was worried that the Equity Derivatives Team at HSBC included several people who had a Lebanese background who were in direct and easy contact with Mr Fares, her old boss, who was also of Lebanese background, and 'this situation would make it more difficult to hire her in the future' (paragraph 82). Mr Dutruit also said that the feedback had come from 'one person' at Barclays (paragraph 83).
27. Between 10 September and 7 October 2020 Ms Craven of HSBC investigated the hiring process to see whether unofficial feedback from Barclays had influenced it (paragraph 84). Mrs Chevalier-Firescu's case was that the investigation was a sham. Ms Craven said she would not investigate if there was no email. The investigation did not consider messages between Mr Bourrette and Mr Fares as 'they are private communications on personal devices'. The Claimant's case is that the HR Department showed no interest unless there was something in writing. Mr Bourrette had given bad feedback about her to the hiring manager over 'beer not email'. The HR investigation was a cover-up and a further act of victimisation. The HR Department did not investigate whether rumours were being spread, if so, by whom, and whether they were accurate.

28. In paragraph 90 she quoted an email dated 1 October 2020 in support of that theory. On 7 October 2020 the HR Department found that it had no concerns. That conclusion was based on a ‘defensive, cursory process’ and was a further act of victimisation. Only Mr Bourrette had been interviewed. On 7 October 2020 the HR Department refused to disclose information to her about the investigation. On 17 October 2020, after complaining, the Claimant received handwritten notes of meetings between the HR Department and her, and Mr Bourrette.
29. She still had had no response to her request to see text messages between Mr Bourrette and her old boss, and other material (the unredacted name of her old boss, the recording of the call between Mr Bourrette and the HR representative, and ‘the GCAR research’) [sic: perhaps ‘GCAS’ is intended; see paragraph 44, below], documents relating to Mr Larrue’s ‘due diligence’ on her before November 2019, the feedback from Barclays Bank, and how that was shared with other managers in HSBC (see paragraph 96).
30. The next section is headed ‘Jurisdiction’. She said that she had brought her claims when ‘she learned of these victimising and discriminatory acts taking place and when the knowledge of the claims are said to have crystallised’. Those acts were continuing acts (paragraph 97).
31. If the Respondents argued that any part of her claims were out of time, ‘which is denied’, her claims were in time and ‘by way of continuing act’. She referred to section 123(3)(a) of the 2010 Act. In the alternative, it would be ‘just and equitable and extend time, section 123(1)(b)...in view of the very serious nature of the Claimant’s claims, their invidious impact upon her career and the concealment of the Respondents’.
32. She added that ‘The information about the willingness of HSBC to hire the Claimant, the very positive feedback from managers at [HSBC], from the Claimant’s clients and the information about [Mr Bourrette] thwarting the hiring process only came into the Claimant’s possession on 17 June 2020. This was at a time when the Claimant was stranded outside of the country for 5 weeks as she had to travel outside the country on 6 of June for her grandmother’s funeral’. When she got back to London, her ‘entire house’ had been destroyed in a flood. She had to deal with that while also caring for a young child and a baby.
33. She only had sight of the documents sent by HSBC’s GDPR Department in August 2020.

The ET procedure

34. Mrs Chevalier-Firescu had presented her first claim against HSBC on 1 November 2020 and the second claim on 14 May 2021. An open preliminary hearing was listed in the first claim for 22 June 2021. Mrs Chevalier-Firescu was represented by Ms Aly of counsel at that hearing. The hearing did not finish that day. It was relisted for 7 September 2021. Mrs Chevalier-Firescu represented herself at that hearing. The parties had not agreed a list of issues. As appears from its structure and content, a second draft list of issues was prepared by lawyers on behalf of Mrs Chevalier-Firescu on 4 June 2021. The ET said that ‘In the absence of confirmed agreement’ it had used that draft to ‘identify the relevant claims and issues’ (paragraph 5 of the ET’s reasons).

Mrs Chevalier-Firescu's unagreed list of issues

35. Mrs Chevalier-Firescu's unagreed list of issues was Schedule A to the ET's judgment. The list cross-referred to the grounds of her complaint in several places.
36. Paragraph 2.1 recorded the parties' agreement that she had done four protected acts: issuing ET1s against Barclays and Mr Fares on 14 December 2017, 22 February 2018, 14 June 2018, and on 12 November 2018. HSBC admitted it knew about the protected acts that she 'has been discriminated against during her maternity period' (paragraph 4.7 of HSBC's grounds of resistance is referred to).
37. One issue is said to be when HSBC knew about the protected acts. Six possible answers are listed in paragraph 2.2. The next issue was whether HSBC had subjected her to various detriments (paragraph 2.3.) because she had done protected acts or because it believed that she had done or might do one. All the detriments listed in the following paragraphs (2.3.3-2.3.14) are alleged to have been committed up to or including July 2018. Paragraph 2.3.2 listed failures of transparency about the obstruction of the Claimant's hiring process from 12 June 2018, including four examples between June and October 2020. It is said that Mr Bourrette actively involved himself in her recruitment process from 12 June 2018 in order to have a negative impact, despite not being a formal decision-maker (paragraph 2.3.5) (see also paragraphs 2.3.8, 2.3.10 and 2.3.13). In paragraph 2.3.19 Mr Dutruit is said not to have disclosed Mr Bourrette's negative role to her on 25 November 2019.
38. In paragraph 2.3.22 it is said that Mr Bourrette told her, on 26 August 2020, that he had interfered negatively in her hiring process, 'by providing derogatory feedback on her, and concealing that fact from her, and admitting that he was aware of her protected acts and settlement with Barclays, and that he had remained in touch with her manager at Barclays'. Paragraph 2.3.26 alleges that Mr Dutruit told her on 29 September 2020 that the reason she had not been hired was the negative feedback from 'her old boss at Barclays, and referencing the senior managers (all Lebanese male managers) at [HSBC] for whom (Mr Dutruit said) their Lebanese connection with the old boss would make it more difficult for [HSBC] to hire the Claimant in the future'. Mr Dutruit did not tell her about Mr Bourrette's negative influence between 10 July 2018 and 29 September 2020 (paragraph 2.3.27). Paragraph 3.3.28 complained of the HR Department's 'sham' investigation (10 September-7 October 2020). Paragraph 2.3.31 complained of HSBC's failure to tell her, from July 2018 until the date of the ET1, that it would not offer her a job in the future, that is, that she had been 'blacklisted'. Paragraph 2.3.32 complained that between 12 June 2018 and the date of the ET1, Mr Bourrette and HSBC kept information from her about the hiring process. Paragraph 2.3.33 complained of the inadequate DSAR responses from 10 November 2018 onwards, and partly remedied on 17 June 2020, with the intention of hiding facts from her. Paragraph 2.3.34 alleged that, during the relevant period, HSBC had created 'a hostile recruitment environment where sex discrimination and victimisation are practised at an institutional level...'
39. Paragraph 3 asked whether Mrs Chevalier-Firescu was treated less favourably on grounds of sex and was a complaint of direct sex discrimination by reference to the detriments alleged in paragraphs 2.3.1-2.3.34. Paragraph 4, under the heading 'Direct Race Discrimination' asked whether she had been treated less favourably 'because of an offensive racist remark made by Mr Dutruit to her about the conduct of Lebanese managers towards her contrary to section 13 [the 2010 Act] as set out below'. Paragraph

4.1 gave an account of a conversation on 29 September 2020 in which Mr Dutruit told her ‘that the reason she had not been hired thus far was the negative feedback from her “old boss at Barclays”’. He is also said to have given ‘as the reason for that career obstruction the fact that senior managers (all Lebanese male managers) had a Lebanese connection with her old boss which would operate to make it more difficult for [HSBC] to hire the Claimant in the future’. Paragraphs 81-83 of the grounds of claim were referred to. ‘The remark was offensive, racist and put forward to disguise his involvement in her blacklisting as well as the main reasons for her blacklisting which were her protected act and her gender’.

The ET’s judgment

40. I summarise, first, the terms of the formal judgment at the start of the ET’s decision. The judgment and the reasons which explain it are set out in separately numbered paragraphs of the decision. The judgment records that Mrs Chevalier-Firescu was being considered for a specific vacancy between May and July 2018. She was not appointed to it and her ‘claim in this regard’ was presented out of time (paragraph 1). ‘This specific role GCB3 role was not part of a continuing act of alleged continuing recruitment arrangements and non-appointment of the Claimant’. It was not just and equitable to extend time, so the ET did not have jurisdiction to consider it under section 123 of the 2010 Act (paragraph 2).
41. Her claims ‘in respect of alleged actions, events, comments, discussions, lunches, meetings texts, emails, and correspondence with or by specified employees of [HSBC] between February 2019 to March 2021, were not arrangements for deciding who to offer employment and were not refusals to offer employment to her (paragraph 3). Paragraph 4 added that for the purposes of section 39 of the 2010 Act, and ‘in respect of [her] allegations...between February 2019 to March 2021’ there was ‘no authorised employment or opportunity to offer for the arrangements to attach to’, and ‘[t]here was not authorised employment or opportunity to offer’.
42. The ET therefore had no jurisdiction ‘to adjudicate on what [HSBC]’s individual employees are alleged to have done or failed to do between February 2019 and March 2021. Consequently her ‘claims in this regard have no reasonable prospects of success and are struck out pursuant to rule 37 of the Employment Tribunal Rules (paragraph 5). All of her claims were therefore dismissed’.

The facts as found by the ET in the reasons for its judgment

43. Mrs Chevalier-Firescu was described by the ET as ‘an intelligent and tenacious individual. She is an experienced investment banker with a unique set of skills in both sales and structuring’. Her claims were based on her attempts ‘to secure employment with’ HSBC (paragraph 21). The ET commented (paragraph 7) that she had prepared a long witness statement ‘permeated with arguments, her opinions and her conclusions drawn from the documents she had reviewed following her numerous [DSARs] and the snippets of covert telephone recording she had made with unwitting individuals’. She was ‘deeply suspicious’ that HSBC had withheld documents ...that may have helped her to establish the basis for her claims (paragraph 7).
44. HSBC is ‘the trading entity within a corporate group which is a global banking and financial services organisation’. It has several different divisions. They include a Global

Markets business ('GBM'). The GBM also has various divisions. They include a global equities business. Jobs are divided into nine Global Career Bands (GCBs'). GCB8 is the lowest and GCB0 the highest. HSBC is regulated by the Financial Conduct Authority. It is therefore obliged to ensure that its employees are 'fit and proper' persons. This has led HSBC to 'enhance' its 'recruitment processes' (paragraph 31). The ET listed the six steps in that process in paragraph 33. The fourth stage is the Hogan test. The fifth stage is '[f]inal approval to hire (GCAS)'. GCAS stands for 'Global Compensation Approval System' (paragraph 36). The sixth stage is a formal job offer. The ET somewhat expanded that description in paragraphs 34-36.

45. In paragraphs 8-17 it summarised evidence from two witnesses about HSBC's recruitment practices and made relevant findings. In paragraph 19 it recorded that hearing bundle was 1225 pages long and that there was a supplementary bundle of 99 pages. The ET had only considered the documents referred to in evidence and submissions.
46. Between May and July 2018, the ET held (judgment, paragraph 1), HSBC was considering Mrs Chevalier-Firescu for 'a specific GCB3 vacancy', but did not appoint her to it. In paragraphs 37-58 the ET made detailed findings about that period. It is not necessary to summarise those in any detail.
47. On 18 April 2018, Mrs Chevalier-Firescu 'speculatively' sent her CV to Ms Hanna Assayag, who was a friend and also a director of HSBC. Ms Assayag forwarded the CV to the Head of Global Equities, Mr Hossein ('Hoss') Zaimi. On 25 April 2018, Mr Zaimi emailed Mr Dutruit, who was recruiting for a GCB3 role which had been advertised. Mr Dutruit was also keen to hire an extra person for the Equity Derivatives Sales Team, although no confirmed vacancy had been advertised. Mr Zaimi asked Mr Dutruit to interview Mrs Chevalier-Firescu. On 11 May 2018, Mrs Chevalier-Firescu had interviews with four different managers, including Mr Dutruit. On 14 May 2018, Mr Dutruit emailed Mr Zaimi, saying, 'We need to hire' Mrs Chevalier-Firescu. On 15 May 2018, Mr Zaimi replied, 'Find the space and do it'.
48. Mrs Chevalier-Firescu met Mr Dutruit for a coffee. He made positive noises about hiring her. She told him that she was in a dispute with her former employer. The ET recorded that Mr Dutruit asked for feedback from Mrs Chevalier-Firescu's former clients and colleagues. In paragraph 43, it recorded 'The DSAR disclosed an email dated 12 June 2018 that said:
'Off that's [sic] [if Mrs Chevalier-Firescu is the best] candidate happy to support but we know that some of the feedback has been very negative too'.
49. The ET continued, 'By email dated 5 July 2018 [Mrs Chevalier-Firescu] provided further positive references to seek to address the negative feedback or observations that she was aware had been provided about her during May/June 2018'. It was also clear to the ET that, despite the negative feedback, Mr Dutruit 'was actively progressing' her candidacy, and she was being considered against other potential candidates.
50. The ET described further steps in the process in paragraphs 45-58. Mrs Chevalier-Firescu was asked to take the Hogan test on 13 June 2018. The ET held that Mr Lacour was mistaken in saying, in an email dated 15 June 2018, in which he compared her with Andre von Riekhoff that '...common GCAS is being progressed as per Hoss request'.

The ET held that the GCAS had not been signed off. Mr Lacour's suggestion to the contrary was his 'expectation' only (see also paragraph 53).

51. There were exchanges in June about whether or not the GCB3 role should be converted, as Mrs Chevalier-Firescu wanted, into a more senior role. She had not been a director before. That led to an impasse, the ET found, because HSBC had a policy of not promoting people when they were hired. Mr Dutruit told her on 29 June 2018 that HSBC could not offer her a GCB3 position, for that reason. He nevertheless continued to try to make her appointment a possibility, despite the negative feedback 'having been received by this time'. Mr Dutruit was still interested in her skills, but took no steps to convert that interest into a position for her. 'The process...ceased in or around mid-July 2018.' Nothing came of the GCB3 role. Mr von Rieckoff was hired instead. His appointment was announced on 17 August 2018. The ET found that HSBC did not tell Mrs Chevalier-Firescu that no hybrid role would be created for her. Nevertheless 'she had been fully aware that the GCB3 role she was in the running for had been filled' (paragraph 56). That general finding is separated by 51 paragraphs from the somewhat more specific finding that she knew this 'by September 2018' (see paragraph 57, below).
52. The ET made detailed findings about the period between February 2019 and March 2021 in paragraphs 59-77. It is not necessary to summarise those in any detail, either. Mr Dutruit had no contact with Mrs Chevalier-Firescu between 16 July 2018 and 8 February 2019 (paragraph 59). Mrs Chevalier-Firescu initiated contact with Mr Dutruit on 20 September 2018 (unsuccessfully) and again on 8 February 2019. She met Mr Samir Assaf of HSBC on 8 March 2019, and Mr Marc Lemmel on 9 May and 22 August 2019. She again had contact with Mr Dutruit on 10 September 2019. She had a further meeting with him and Mr Tristan Larrue on 25 November 2019.
53. She had other contact with Mr Dutruit in July, August and September 2020 (see further paragraph 60, below). She met Mr Bourrette on 26 August 2020 to discuss the feedback he had given in July 2018. She covertly recorded that conversation. After that, and further communications between them, HSBC's HR Department investigated her complaints about his feedback. On 7 October 2020, they told her that they had found nothing untoward.

Mrs Chevalier-Firescu's other litigation and her knowledge of employment tribunal procedures

54. In paragraph 22, the ET listed five employment tribunal claims which Mrs Chevalier-Firescu had brought against her former employer, Barclays Bank, between 14 December 2017 and 30 April 2020. The ET recorded that she accepted in cross-examination that she knew about the time limits for bringing claims in the ET and their importance. It referred to paragraph 21 of a witness statement she had produced in December 2018 in a tribunal claim against Barclays Bank. This referred to the three-month time limit and to its potential relaxation. The ET also said that Mrs Chevalier-Firescu had 'access to specialist employment lawyers'.

The Data Subject Access Requests

55. In paragraph 24, the ET listed the dates, between 10 October 2018 and 15 March 2021, of eight different DSARs which Mrs Chevalier-Firescu made of HSBC. In paragraph

25, it found that HSBC ‘responded to each DSAR within a six week period’. That finding is apt to mislead unless it is read with the ET’s later references to the DSARs. In paragraph 43, the ET referred to a disclosure in ‘the DSAR’. That DSAR is not dated or otherwise identified in paragraph 43 (see further, paragraph 48, above). In paragraph 44, it acknowledged that Mrs Chevalier-Firescu ‘discovered some of the detail of the feedback that was being sought on her when she received the DSAR response in 2020’. The ‘DSAR response’ is, again, not dated or otherwise identified. In paragraph 70, the ET recorded that Mrs Chevalier-Firescu ‘received DSAR response to her third and fourth responses [sic] on 17 June 2020’. The ET recorded her criticism of HSBC for ‘withholding documentation that should have been sent to her following her first DSAR in October 2018’.

The ET’s findings about what Mrs Chevalier-Firescu knew, and when

56. In paragraph 27, the ET quoted paragraph 450 of Mrs Chevalier-Firescu’s December 2018 witness statement (see paragraph 54 above). She had described how well her application to HSBC was going until ‘...all that positiveness was brutally and suddenly stopped short by unofficial feedback from Barclays’ and how Mr Dutruit had told her that ‘unofficial feedback’ had been given by Barclays to HSBC. That referred to a ‘comment passed’ to Hossein Zaimi (HSBC’s Global Head of Equities) which was attributed to her ex-boss, ‘ie Makram’. She added that ‘this was reconfirmed by a female employee of HSBC in August 2018, who initially introduced me to HSBC’. The ‘female employee’ is a reference to Ms Hanna Assayag. The feedback, said Mrs Chevalier-Firescu, was that she was ‘a total disaster’. Mr Dutruit had wanted to hire her, but the appointment had been blocked by someone more senior. She added that Makram had a connection with HSBC and had recently been interviewed for a job by HSBC.
57. In paragraph 107 the ET found that she was ‘fully aware that her process had ended by September 2018 despite not being specifically informed of this. To use modern parlance, she was ghosted’.
58. In paragraph 44, having referred in paragraph 43 to the email of 12 June 2018 (see paragraph 48, above), but not to the date when Mrs Chevalier-Firescu received it, the ET said ‘Whilst [Mrs Chevalier-Firescu] discovered some of the detail of the feedback that was being sought on her when she received the DSAR response in 2020, the content of the feedback was not inconsistent with her knowledge and understanding that she had at the relevant time when her appointment was not progressed in 2018.’ The ET added that, by an email dated 5 July 2018, she had provided ‘further positive references to seek to address the negative feedback or observations that she was aware had been provided about during May and June 2018. It was also clear that despite the negative feedback Mr Dutruit was actively progressing [her] candidacy which was being considered against other potential candidates’.
59. Paragraph 70 (see paragraph 55, above) is potentially relevant to Mrs Chevalier-Firescu’s knowledge. The ET does not, however, explain what, on her case, HSBC had withheld in 2018, and not disclosed until 2020.
60. Mrs Chevalier-Firescu learnt that Mr Zaimi had left HSBC. When she heard that, she contacted Mr Dutruit again, on 20 July 2020, to see if she could join HSBC. She tried

to arrange a meeting without success despite emails on 4 August and 3 September 2020. They finally met on 29 September 2020. She covertly recorded the meeting. ‘Mr Dutruit is alleged to have made a comment about Lebanese connections which forms the basis of’ Mrs Chevalier-Firescu’s ‘race discrimination complaint’ (paragraph 73). That is the only express reference in the ET’s reasons to her complaint of race discrimination.

61. The ET found that Mrs Chevalier-Firescu met Mr Bourrette on 26 August 2020 to discuss the feedback he had provided in July 2018, and that she had recorded that conversation. It made no findings about what, if anything, she learnt from that conversation (paragraph 75). It recorded that HSBC’s HR Department investigated her ‘complaints about Mr Bourrette’s feedback’, without describing those complaints. It also found that the HR Department had told her that the investigation uncovered ‘no breaches of process’ (paragraphs 76 and 77).

Other relevant findings

62. In paragraph 72 the ET held that ‘At times during 2020’ Mrs Chevalier-Firescu ‘had difficult personal circumstances, dealing with the Covid lockdown travel restrictions, having to look after two young children, organising her maternal grandmother’s healthcare arrangements and subsequent funeral outside the UK; and flooding at her UK house which she discovered on her return’.

Section 39 of the 2010 Act

63. In paragraphs 79-90 the ET considered the law which applied to Mrs Chevalier-Firescu’s claims under section 39 of the 2010 Act. In paragraph 105 it concluded that she was only an applicant for employment in 2018. In paragraphs 106-110 it considered and dismissed her claim that she was in a continuous recruitment process after 2018. That claim was ‘contrived and contrary to her contemporaneous expressions’ (paragraph 106). The ET only had jurisdiction to consider Mrs Chevalier-Firescu’s non-appointment to a role in July 2018. Her allegations after July 2018, and her second claim were not within the ET’s jurisdiction. The ET therefore struck them out under rule 37 of the Employment Tribunal Rules because they had no reasonable prospects of success (paragraph 110).

Extension of time

64. The ET considered the relevant law, including section 123 of the 2010 Act, in paragraphs 91-99. First, it considered whether the claim had been brought in time. The burden was on Mrs Chevalier-Firescu to show that it had been. She was an applicant for employment ‘up [sc until] July 2018 only’ (paragraph 112). Matters after that date were not part of conduct extending over a period. She had no continuing relationship with HSBC ‘once her candidacy for a role in June 2018 ended’. She could not be ‘protected against a policy of “*continuing discrimination*” (original emphasis) extending beyond July 2018’. Her extensive allegations after the recruitment process ended were not within section 39. The policy alleged did not amount to a continuing act (paragraph 113). The ET had jurisdiction in relation to acts ‘pre-dating August 2018’. Mrs Chevalier-Firescu should have contacted ACAS by the end of October 2018 ‘and brought her claim within the prescribed period thereafter’. She had not in fact brought her claim until 1 November 2020. Her complaint was therefore out of time.

65. The ET recorded, in paragraph 115, Mrs Chevalier-Firescu's argument that the three-month time limit is onerous and that the discretion to extend time should be exercised 'liberally'.
66. The ET accepted that it had a wide discretion to extend time 'but such discretion must be judiciously exercised'. There is little express analysis in the relevant part of the reasons, and it does not have a logical structure. I have gathered, from my reading of the reasons, that the ET had in mind the following points.
1. The ET 'therefore' considered the balance of prejudice (paragraphs 116).
 2. Mrs Chevalier-Firescu had brought claims against Barclays which were in time (paragraph 117).
 3. She was 'fully aware of' the time limits and their importance. She had access to 'specialist employment lawyers and previous experience of tribunal litigation' (paragraph 118).
 4. She submitted DSARs to HSBC on '10 October 2018' and ET claims 'against Barclays in June and November 2018 in respect of her non-appointment to [HSBC] in July 2018' (paragraph 119).
 5. She relied on 'the flagrant breach of' the EHRC Code 'in respect of references which would form the basis for inference of unlawful discrimination' (paragraph 120).
 6. She contended that her claims against HSBC 'only crystallised' after 26 August 2020 or by 16 October 2020 when she received the outcome of the HR investigation and the following DSAR Reply which included the handwritten notes from the investigation. 'I do not accept this, the Claimant's contemporaneous expressions and actions wholly undermine her contentions in this regard. The Claimant was fully aware of the elements of her claim for non-appointment to the role in July 2018 due to *a* bad reference from Barclays, at the time [my emphasis]. She proceeded with the claims against Barclays but strategically opted not to pursue a claim against [HSBC] in the hope of securing employment with them...in the future' (paragraph 121).
 7. The ET did not accept that the delay in bringing her claims was caused or contributed to by 'the deliberate concealment and misleading tactics and concealing relevant documentation... The basis for the Claimant's claim was apparent from an early stage and the Claimant chose not to bring a complaint against [HSBC] at the time' (paragraph 122).
 8. The late disclosure (on 17 June 2020, on her case) did not change what the Claimant was already aware of in 2018, 'namely that *a* negative reference had been given which she sought to address in her email of 5 July 2018' (paragraph 123) (my emphasis).
 9. There was 'no ongoing relationship' between her and HSBC for 'the *Afolabi* reasoning to apply for late knowledge as she contends' (paragraph 125).
 10. The ET described her reliance on 'her very difficult personal circumstances' which it had described in paragraph 72 (see

- paragraph 62, above). The ET did not apparently consider that they were relevant: ‘However, these difficulties occurred nearly 2 years after the acts complained of’ (paragraph 126).
11. The ET was unimpressed by her reasons for not bringing a claim against HSBC sooner. ‘Much time has elapsed, there has not been a contemporaneous grievance or review of the complaints to refer to and a number of relevant witnesses no longer work for [HSBC]. The cogency of the evidence will inevitably be adversely affected’ (paragraph 127).
 12. She had always been able to get legal advice to bring a claim but did not do so timeously (paragraph 128).
 13. She had brought and settled claims against Barclays Bank arising from the same facts. There was a potential for ‘reopening of matters that Barclay’s witnesses could have reasonably expected to have been closed. This is undesirable’ (paragraph 129).
 14. Her claims were very serious and public policy dictated that they should be heard. ‘However a cursory review of the evidence does not indicate that the reason for her non-appointment was necessarily the negative *references*, whatever the reason for the negative *references* may have been. The emails I have been referred to indicated that the Claimant was being objectively assessed against Andre von Riekhoff, the successful candidate in 2018 in spite of the *references*’ (paragraph 130) (my emphases).
 15. It was evident that she relied on ‘piecemeal responses to DSAR requests’ and ‘covert recordings made with unwitting individuals discussing matters out of context. The Claimant has also been consistent in her wide ranging, onerous specific disclosure applications seeking to expand the scope of her claim’ (paragraph 131).
 16. Having considered all the factors, the ET concluded that ‘the balance of prejudice favours’ HSBC in refusing to exercise my discretion to extend time’. Mrs Chevalier-Firescu had not convinced the ET that it was just and equitable to extend time’ (paragraph 132).

The judgment of the EAT

67. As I said in paragraph 4, above, the main issue on this appeal is whether the ET adequately explained its decision. It is not necessary, therefore, for me to summarise the EAT’s judgment at any length. Mrs Chevalier-Firescu appealed to the EAT on four grounds. The EAT allowed the appeal on each of the four grounds.
1. The ET erred in striking out claim 2.
 2. The ET erred in the exercise of its discretion to extend time.
 3. The ET erred in not adjudicating separately on the claim for race discrimination ‘which was brought in time’.
 4. The ET erred in confusing Mrs Chevalier-Firescu’s claims against Barclays Bank (which concerned post-termination victimisation) with the information relevant to bringing claim against HSBC in relation to HSBC’s acts (‘re-cast ground 6(1)’).

68. There is no appeal against the EAT's decision to allow the appeal on ground 1.
69. The EAT allowed the appeal on ground 2, in effect, because the ET had taken into account irrelevant considerations and had failed to take into account relevant considerations. The significant reasoning is in paragraph 124.d. The EAT considered that the ET had failed to 'take proper account of the fact that it was only in August, September and October 2020, following late disclosure/release of information by' HSBC that Mrs Chevalier-Firescu knew that she had been considered to be a very strong candidate, that Mr Bourrette had known about her previous discrimination proceedings (rather than she was simply in dispute with Barclays as she described to him); and that that had played a part in the decision not to progress her candidacy' (original emphasis). The ET's conclusion that the late disclosure 'did not change' what she knew in 2018 'was properly described as perverse'. In the summer of 2018 she knew that 'a negative reference had been received. She provided further references to counter it. By the date of her December 2018 witness statement she knew that Barclays had provided informal references about her. She did not appear, however, to have any information about Mr Bourrette's role within [HSBC] as revealed by the documents she saw in June 2020, nor that he had passed potentially victimising information about her to the relevant recruiting manager. On her case, she received significant information on 29 September 2020 about race being a factor'. The information she received in 2020 'changed [her] knowledge about potential unlawful action within [HSBC] as opposed to action taken by Barclays, and which was directly relevant to her claims against [HSBC]'. The EAT added that knowledge that she had not been appointed was 'self-evidently different' from knowledge about why that decision was made, and whether the decision-maker knew about her protected act and acted so as to influence the decision not to appoint her.
70. The EAT further added, in paragraph 124.f., that the DSARs had not all been responded to promptly, contrary to the ET's apparent view, that significant information was missing and was only disclosed in June 2020, and, even then, information was missing. It also said, in paragraph 124.h., that the ET had not engaged with how Mrs Chevalier-Firescu's personal circumstances had affected her after she got the further information in June, August and October 2020.
71. The EAT held that for some of the reasons it had given in relation to grounds 1 and 2, the ET had erred in not separately making a decision on the race claim (paragraph 126). Mrs Chevalier-Firescu's first claim was issued within three months of the meeting on 29 September 2020 when she was given relevant information. That fact 'was highly relevant to' the question whether time should be extended for bringing the race case, particularly having regard to *Afolabi*.

The grounds of appeal

72. There are four grounds of appeal to this court for which Lewis LJ gave permission.
1. The EAT's decision about the race discrimination claim was perverse. The EAT decided that that claim had been dismissed because it was presented out of time. There was no dispute about that. It was dismissed because Mrs Chevalier-Firescu was not an 'applicant' within section 39 of the 2010 Act in September 2020 when the act of discrimination was alleged to have happened.

2. The EAT's decision to extend time was perverse and interfered impermissibly with the exercise by the ET of its discretion.
3. The EAT was unduly critical of the ET's refusal to extend time.
4. The EAT's approach to the ET's findings of fact was impermissible or perverse.

Discussion

Grounds 2-4

73. I consider the arguments about extending time first. Section 123(1) prevents the bringing of a discrimination claim '(a) after the end of the period of 3 months starting the date of the act to which the complaint relates' or '(b) such other period as the employment tribunal thinks just and equitable'. For the purposes of section 123, '(a) conduct extending over a period is to be treated as done at the end of the period' (section 123(3)(a)).
74. Section 123(1)(b), by implication, gives the ET a wide power to extend the time for bringing a claim beyond that three-month time limit. It is trite that no power, however widely expressed, confers an unfettered discretion on a decision-maker. The ET was clearly right to say that this discretion must be exercised judicially (or 'judiciously'). It was, I think, common ground in this court that this discretion must be exercised on the basis of considerations which are legally relevant, and that legally irrelevant considerations must be ignored. The width of the discretion does not mean, however, that every fact about a case and its background will be legally relevant, nor that the same factors are automatically relevant in every case, so that the exercise of the discretion amounts to ticking boxes. The judicial exercise of this discretion requires a judgment about which factor or factors are most relevant in the particular case, so that the ET can assess it or them in order to decide what if any 'further period' it is just and equitable to allow for the bringing of the claim.
75. In *Southwark London Borough Council v Afolabi* [2003] EWCA Civ 15; [2003] ICR 800 the ET extended the time for bringing a discrimination claim by about nine years, until three months after the employee knew that he had 'an arguable case'. That approach was upheld by the EAT and by this court. The description 'arguable case' is not a rule of law, but it is a useful benchmark. It is clear in this case that Mrs Chevalier-Firescu was telling the ET that she did not know, before the summer of 2020, that she had an arguable discrimination or victimisation claim about her non-appointment in 2018, and that that was why she could not bring the proceedings earlier. She was therefore asking the ET to extend the time for bringing her claims until three months after the date when she knew she had an arguable case. She was also saying that even once she had the necessary knowledge, difficult personal circumstances meant that she still did not bring the claims in time. I have some sympathy for the ET, because the way in which Mrs Chevalier-Firescu described her case in her grounds of claim and in her unagreed list of issues was discursive and somewhat hard to follow. But the arguments she was clearly relying on made it essential for the ET to make findings about what Mrs Chevalier-Firescu knew about her claims, and when she had that knowledge, and to make findings about the further argument based on her personal circumstances.
76. It is clear from paragraphs 121-123 that the ET understood the outlines of her argument. I do not consider, however, that the ET adequately explained its conclusion, variously

expressed, that Mrs Chevalier-Firescu ‘was fully aware of the elements of her claim to non-appointment to a role in July 2018 due to a bad reference from Barclays, at the time’ (or ‘the basis of her claim was apparent from an early stage’; or ‘the late disclosure did not change what the Claimant was already aware of in 2018, namely that negative references had been given which she sought to address in her email of 5 July’).

77. Mrs Chevalier-Firescu did know, in July 2018, that a negative reference or references had been given, and she did address that or those. There is a great deal more, however, which, on her case, she did not know in July 2018, but learnt in 2020, and which was relevant to her knowledge of whether she had arguable claims for sex and race discrimination and for victimisation.
78. Mr Segal summarised those points in paragraph 13 of his skeleton argument.
1. HSBC’s relevant managers were very keen to hire Mrs Chevalier-Firescu but were put off by information given to them, indirectly, by Barclays and by a Lebanese employee who might have been Mr Fares. Mrs Chevalier-Firescu did not know who the Lebanese employee was, so references in his skeleton argument to ‘Mr Fares’ were to be understood as references to Mr Fares (or if the Lebanese employee was not Mr Fares, to that different person).
 2. Barclays and/or Mr Fares told Mr Bourrette that she had brought claims against Barclays/himself.
 3. Mr Bourrette (who, to her knowledge, had no relevant role in the decision by HSBC whether to hire her) had given information to HSBC’s hiring managers based on what Barclays Bank/Mr Fares had told him.
 4. The terms in which Mr Bourrette described her to the relevant managers (as disclosed in a document on 29 September 2020) were discriminatory on the grounds of sex and amounted to unlawful victimisation.
 5. There was an issue relating to the views of Lebanese managers in the Equity Derivatives Team being influenced by the fact that Mr Fares was Lebanese.
79. I accept his further submission that it was clear that Mrs Chevalier-Firescu’s case was that she only discovered these things in 2020. He relies on paragraphs 74, 76, 81, 82 and 177 of her grounds of claim. His summary is that it was only clear to her in 2020 that she might have a good claim for victimisation and discrimination against HSBC (as opposed to having claims against Barclays).
80. I accept Ms Sen Gupta’s submissions that many of the criticisms which the EAT made of the ET were unwarranted. It is not necessary for me to examine those points. Nor is it necessary for me to consider all her detailed grounds of appeal against the EAT’s decision on extending time. None of those points or arguments matters if the EAT rightly identified an error of principle in the ET’s approach. In my judgment, with one qualification, the EAT did so, in paragraph 124 d., f., and h.
81. The qualification concerns the EAT’s finding of perversity. It may be (and I put it no higher than that) that the ET could lawfully have exercised its discretion so as not to

extend the time for bringing Mrs Chevalier-Firescu's claims. I have in mind a point made by Ms Sen Gupta in her oral submissions, based in part on paragraphs 50-54 of the grounds of claim (see paragraph 18, above). She sought perhaps to amplify that argument after the hearing (illegitimately, in Mr Segal's submission) by referring to some contemporaneous messages between Mrs Chevalier-Firescu and Ms Assayag. The difficulty is that, against the background of Mrs Chevalier-Firescu's detailed case about what she knew and when, the ET did not sufficiently explain its conclusions that she knew all she needed to know in 2018.

82. My unease about the ET's reasons is compounded by five further factors.

1. The ET did not make a clear sequence of findings on her case about what she knew in relation to the elements of her claim and when she knew those things.
2. It is not clear whether the ET found that there was one, or that there were more than one, significant and negative reference or references which influenced Barclays' decision not to hire Mrs Chevalier-Firescu. The ET's findings oscillate between one significant reference, and more than one (see paragraphs 66.6, 66.8 and 66.14).
3. It is not clear what weight the ET gave to its somewhat vague finding that it was not until some time in September 2018 that she knew that she had not been appointed. It did not find that she knew she had not been appointed in July 2018 (see paragraphs 51 and 57, above).
4. I do not understand the ET's suggestion (see paragraph 66.4, above) that she submitted a claim against Barclays in 'June' 2018 in respect of her non-appointment by HSBC. Even if the reference to 'June' is a mistake, and 'July' was intended, on the ET's findings, she did not know that she had not been appointed until some time in September 2018.
5. There is an apparent contradiction between the assertion that HSBC responded to all the DSARs within 6 weeks, and its finding that some information which should have been disclosed in 2018 was not disclosed until 2020. The ET did not make clear findings about what was disclosed in the DSARs and when it was disclosed (see paragraph 55, above).

83. Two further factors undermine the ET's approach.

1. Apart from the balance of prejudice, the 16 points, which, on my reading, the ET had in mind (see paragraph 66, above) were either completely irrelevant to an assessment of Mrs Chevalier-Firescu's case for extending time, or, at best, marginally relevant.
2. The ET also understood that Mrs Chevalier-Firescu was relying on her personal circumstances, after she had the relevant knowledge, as a reason for extending time for bringing the claim beyond the date when she knew she had an arguable case. The ET set out that case in its reasons in two places, but made no decision about it. No decision was necessary if its reasoning

about knowledge was correct, but, if it was not, then a decision and explanation were necessary.

Ground 1

84. There are two different ways of understanding Mrs Chevalier-Firescu's race claim. Perhaps unsurprisingly, the parties adopted those two different interpretations. A broad interpretation, for which Mr Segal argued, supported by a reading of the grounds of claim, is that race was a factor in the decision not to hire her in 2018, which she only became aware of when she had her conversation with Mr Dutruit on 29 September 2020. A narrow interpretation, supported by Ms Sen Gupta and, to some extent, by paragraph 4 of the unagreed list of issues, is that Mr Dutruit's remark was an isolated and 'offensive' act of race discrimination on 29 September 2020. I say 'to some extent' because the quoted remark is said to explain both the difficulty of hiring her in the future and a reason why she had not been hired 'thus far'.
85. The problem with the ET's reasons is that, apart from the description of the conversation with Mr Dutruit in paragraph 73 (see paragraph 60, above) none of the ET's reasons deal with the race discrimination claim. That claim is swept up, by inference, in paragraph 6 of the judgment. The reader does not know which of the two available interpretations of the race claim the ET adopted, and, therefore, whether the ET concluded that the claim was out of time and that it was not just and equitable to extend the time for bringing that claim, or whether it was a putative act of discrimination which was not in the scope of section 39.
86. I have considered whether it would be right to allow the appeal on this ground because the narrow interpretation of the race claim is the right interpretation of the unagreed list of issues, and the ET was entitled to rely on that list rather than on Mrs Chevalier-Firescu's pleaded claim. I have concluded that that is not the right approach. First, the parties would, rightly, expect that if there was an agreed list of issues, the ET would rely on it, and that they would be given short shrift if they complained that the ET had relied on an agreed list of issues instead of combing through the pleadings. But there was no agreed list here. Second, Mrs Chevalier-Firescu was not represented on the second day of the hearing. I consider that if the ET was going to rely only on her unagreed list and not on the grounds of claim, and on the narrow interpretation of that claim, it should have made that clear to her and asked for her comments. Third, I consider that paragraphs 2.3.26 and 4 of that list are at best ambiguous about the temporal effect of the Lebanese connection, as the parties' divergent views about the nature of the race claim suggest. The basic difficulty, of course, is that the ET did not explain its approach at all.

Conclusion

87. For those reasons, I would dismiss this appeal. Subject to the parties' further written submissions on relief, my provisional view is that Mrs Chevalier-Firescu's claims should be remitted to a different ET to consider whether or not it should exercise its discretion to extend the time for bringing any of them.

Lady Justice King:

88. I agree with Elisabeth Laing LJ and the Vice President that the appeal must be dismissed. I would only add my respectful endorsement to the Vice President's view that the essential error, was that the judge had failed to make findings which explain the basis on which he concluded that the Claimant knew in July 2018 "the essential elements" of her claim against HSBC and/or that he proceeded on the basis that if she knew enough to bring proceedings against Barclays then it followed that she also knew enough to bring them against HSBC. On the evidence and information before them however the EAT were not in a position to go so far as to characterise the ET's reasoning as "perverse".

Lord Justice Underhill:

89. I agree with Elisabeth Laing LJ that this appeal must be dismissed. As regards ground 1, which concerns the Claimant's race discrimination claim, I have nothing to add to her reasoning. As regards grounds 2-4, which concern the claims of sex discrimination and victimisation, I have not found the case entirely straightforward, and I will state my reasons in my own words. However, I do not believe that they differ significantly from Elisabeth Laing LJ's, and I can do so fairly briefly in view of the ground which she has already covered.
90. I start with the facts giving rise to the claim: they can of course be found in Elisabeth Laing LJ's judgment, but it is useful to summarise them in (very) bare outline for ease of reading. In early 2018 HSBC was seeking to recruit a Director in its Institutional Flow Sales team. The hiring manager was Mr Eric Dutruit. The Claimant applied for the role. She had previously been employed by Barclays but had been made redundant during maternity leave. She had brought ET claims against Barclays, raising various claims including sex discrimination. She was interviewed, and at a meeting on 18 May Mr Dutruit told her that he wanted to appoint her. On 29 June, however, he told her that she could not be appointed to the role; and although there were some further discussions the appointment did not proceed. The Claimant was concerned. She had heard that there had previously been a negative reference from someone at Barclays, but she had supplied further positive references and she had understood that Mr Dutruit remained keen for the appointment to proceed. On 10 October 2018 she made a Data Subject Access Request ("DSAR") in respect of data held by HSBC relating to her appointment. She received a response within six weeks but it showed nothing of significance. She began further proceedings against Barclays claiming that it had obstructed her appointment to HSBC, but at that stage she took no action against HSBC itself. She remained in contact with Mr Dutruit in the hope that another opportunity would emerge.
91. The ET claims with which we are concerned was presented on 1 November 2020. In it the Claimant complains that her non-appointment constituted sex discrimination and/or victimisation. The victimisation claim is on the basis that the decision not to appoint her was the result of negative input, at a late stage in the process, from Mr Remi Bourrette, a senior HSBC manager, based on what he had been told by a friend at Barclays, thought to be (though this is not definitively established) the Claimant's previous manager there, Mr Fares: one of the things that he learnt was that she had

brought discrimination proceedings against Barclays, which would constitute a protected act within the meaning of section 27 of the Equality Act 2010. The sex discrimination claim is on the basis that the feedback from Mr Fares repeated by Mr Bourrette was based on sex-based adverse stereotypes of the claimant as a successful and assertive woman.

92. It is not now in dispute that, in so far as the act or omission of which the Claimant complains is her non-appointment, that is to be treated as having definitively occurred no later than July 2018, and her complaint is accordingly out of time by some two years unless extended in accordance with section 123 (1) (b) of the 2010 Act. In her grounds of claim the Claimant advanced various reasons why it would be just and equitable to extend time, but a central element in her case was that she only became aware of the facts on which she based her claim as a result of receiving further material in the period from June to October 2020. The information in question came from three sources:

- (1) On 17 June 2020 she was sent by HSBC a number of internal emails dated between May and July 2018 relating to the recruitment process. HSBC acknowledged that these should have been sent in October or November 2018 in response to “DSAR” made by her in October but it said that they had not been located at that time. The Claimant did not read the emails until August because of difficult personal circumstances, including absence abroad during the COVID pandemic, the death of her grandmother and a flood at her home. She says that they show that there was strong support for her appointment up to the middle of July 2018 (notwithstanding some earlier negative feedback from Barclays) but that Mr Bourrette had volunteered on 11 July that he knew “her former boss at Barclays”, and it can be inferred from the context (and is anyway confirmed by the document at (3) below) that he thereafter contacted that person for information.
- (2) On 29 September 2020 she had a meeting with Mr Dutruit. She recorded the conversation covertly and there is a transcript. It appears from the transcript that Mr Dutruit accepted that part of the reason for her non-appointment was negative (and, it may be inferred, late) feedback from Barclays. The Claimant in fact pleads (see below) that Mr Dutruit described the feedback as coming via Mr Bourrette from her “old boss at Barclays”: I cannot see that on the transcript which we have, though parts are marked “inaudible”; but the point is fortunately not central because of the information at (1) and (3).
- (3) On 16 October 2020 HSBC sent her, in pursuance of a further DSAR request, the notes of a meeting by a member of its HR staff with Mr Bourrette as part of an investigation into the circumstances of her non-appointment. He referred to having spoken to “friend who was at Barclays”, who had made various disparaging comments about her: some of the comments are said by the Claimant to reflect sexist stereotypes. He is recorded as saying “decided not to hire at that point”. The note also includes the phrase “discrimination claim against Barclays”: the Claimant says that that refers to information provided to Mr Bourrette by his Barclays source, though it is disputed whether that is a correct reading.

The Claimant says that those materials provide a firm basis for her pleaded case as summarised at para. 91 above.

93. It was the Claimant's case, pleaded at paras. 74, 76 and 80-81 of her grounds of claim, that it was only when she read those materials that she appreciated that it was Mr Bourrette's conversation with (as she infers) Mr Fares that had been decisive in preventing her appointment proceeding and that she had potential claims for sex discrimination and victimisation. That point is deployed specifically in connection with her case for an extension at paras. 99-106.
94. It is clear that the Claimant's case on late discovery of material facts formed an important part of her claim at the preliminary hearing for an extension of time. Paras. 98-106 of the grounds are the sole basis on which the case for an extension is advanced at para. 1.3.4 of the List of Issues, and paras. 74, 76 and 80-81 of the grounds are also referred to there, albeit in a different context (see paras. 2.3.22-23 and 2.3.26). Para. 152 of the Claimant's witness statement reads:

“My main reason for not issuing the claim [sc. earlier] was my lack of knowledge of either the detriment done to me and/or who was responsible for that detriment; a lack of sufficient or sufficient factual evidence on which to base a claim, which was due to the deliberate default and obfuscation by the Respondent.”

The documents referred to at para. 92 above were all in the bundle before the Tribunal.

95. The paragraphs in the Tribunal's Reasons dealing with this aspect of the Claimant's case read as follows (I have italicised the key passages):

“121. The Claimant contends that her claims against HSBC only crystallised after 26 August 2020 or by 16 October 2020 when the Claimant received the outcome of the HR investigation and the following DSAR reply which included the handwritten HR notes from the investigation. I do not accept this, the Claimant's contemporaneous expressions and actions wholly undermine her contentions in this regard. *The Claimant was fully aware of the elements of her claim for non-appointment to a role in July 2018, due to bad reference from Barclays at the time. She proceeded with claims against Barclays but strategically opted not to pursue a claim against the Respondent in the hope of securing employment with them if another opportunity arose in future.*

122. The claimant contends that the delay in bringing her claims has been caused and/or contributed by the deliberate concealment and misleading tactics and concealing relevant documentation. I do not accept this. *The basis for the Claimant's claim was apparent from an early stage and the Claimant chose not to bring a complaint against the respondent at the time.*

123. The Claimant criticises the Respondent's piecemeal disclosure of documentation under the DSAR, that she refers to as having received on 17 June 2020. The Claimant relies on her late knowledge of the true facts and the fact that her delayed knowledge was caused by the deliberate obfuscation and misrepresentation by the

Respondent and refers to the case of Southwark London Borough v Afolabi [2003] IRLR 220 for just and equitable extension. However, *I conclude that the late disclosure did not change what the Claimant was already aware of in 2018, namely that negative references had been given which she sought to address in her email of 5 July 2018.*”

The Judge also said, at the beginning of para. 127, that he was “unimpressed with the Claimant’s reasons for not bringing a claim against the Respondent sooner”; but that is a general conclusion based on what he had said in the previous paragraphs.

96. The essence of the Claimant’s challenge in the EAT to the Judge’s reasoning in this respect was that “there was nothing in the ET’s recitation of facts that would suggest C knew of such matters required for a claim of victimisation against the R itself [sc. as opposed to Barclays]”: see her recast ground 2. Eady J, when allowing the appeal on this basis to proceed under the sift, observed:

“Ground 2 raises a reasonably arguable question as to whether the [ET] erred in thinking that, by late 2018, the claimant was sufficiently aware of the facts she relies on in her victimisation claim against the respondent. As the ET recorded, the claimant was aware that her former employer, Barclays, had provided negative references to the respondent, and believed that these had led to her job application not being pursued further, such that she was able to commence proceedings against Barclays arising from these facts in late 2018. At that stage, however, she says that she had no reason to consider that the respondent itself had done anything other than acting good faith on the basis of what it had been told by Barclays. It is the claimant’s case that it was not until she received further documentation from the respondent, pursuant to her DSAR, in August and October 2020, virtually appreciated that Mr Bourrette, Senior Manager of the respondent, was aware of her previous discrimination proceedings against Barclays and had played a part in the decision not to progress her candidacy and that there was evidence to suggest that he had thereby victimised her. On the findings recorded by the ET, I consider it is reasonably arguable that it erred in concluding that the fact of the claimant's post-termination victimisation claim against Barclays meant that she also had sufficient information to bring proceedings against the respondent at that time.”

97. The EAT, in essence, held that the argument thus summarised by Eady J was correct. Para. 124 (d) of the judgment of HH Judge Katherine Tucker reads as follows:

“I consider that the Judge failed to take proper account of the fact that it was only in August, September and October 2020, following late disclosure/release of information by the Respondent she had requested through a DSAR, that the Claimant knew that, she had been considered to be a very strong candidate; that Mr Bourrette had known about her previous discrimination proceedings (rather than she was simply in a dispute with Barclays as she described to him); and that that had played a part in the decision not to progress her candidacy. In my judgment,

the Judge’s conclusion that belated disclosure/release of information pursuant to her DSAR in August 2020, ‘did not change’ that which the Claimant was already aware of in 2018 was properly described as perverse. In the summer of 2018 she knew that a negative reference had been received. She provided further references to counter it. By the date of her December 2018 witness statement she knew that Barclays had provided informal references about her. She did not, however, appear to have any information about Mr Bourrette’s role within the Respondent as revealed by the documents she saw in June 2020, nor that he had passed on potentially victimising information about her to relevant recruiting manager. On her case, she received significant information on 29 September 2020 about race being a factor. It is evident that the information the Claimant was provided with in 2020 changed the Claimant’s knowledge about potential unlawful action within the Respondent, as opposed to action taken by Barclays, and which was directly relevant to her claims against the Respondent. Further, knowledge of the refusal to appoint the Claimant is self-evidently different to knowledge about why that decision was taken whether the decision maker/victimiser knew of her protected act and acted in such a way to influence the decision not to appoint her.”

In short, the Judge had failed to distinguish between, on the one hand, the fact that the Claimant knew that she had not been appointed and that there had been negative feedback from Barclays and, on the other, the much more specific information of which she became aware in August-October 2020.

98. Ms Sen Gupta submitted that the question whether the Claimant had a sufficient basis to bring a claim against it for victimisation or sex discrimination depended not just on what she knew but on what she reasonably suspected, or should have suspected. She referred to the recent decision of the EAT in *Jones v Secretary of State for Health and Social Care* [2024] EAT 2, [2024] IRLR 275. That concerned a claim of race discrimination in which the claim had been brought out of time and the claimant sought an extension on the basis that he had only recently identified a comparator. At para. 38 of his judgment HH Judge Tayler quoted the following passage from the judgment of HH Judge Richardson in *Barnes v Metropolitan Police Commissioner* UKEAT/0474/05 (the italics are mine):

“18. ... Knowledge of the existence of a comparator ... may be relevant to the discretion to extend time. In *Clarke v Hampshire Electroplating* [1991] UKEAT 605/89/2409, the Appeal Tribunal said:

‘Under section 68(6) the approach of the tribunal should be to consider whether it was reasonable for the Applicant not to realise he had the cause of action or, although realising it, to think that it was unlikely that he would succeed in establishing a sufficient prima facie case without evidence of comparison.’

19. It follows that a tribunal will be entitled to ask questions about a Claimant’s prior knowledge: when did he first know *or suspect* that

he had a valid claim for race discrimination? Was it reasonable for him not to know *or suspect* it earlier? If he did know *or suspect* that he had a valid claim for race discrimination prior to the time he presented his complaint, why did he not present his complaint earlier and was he acting reasonably in delaying? These, of course, are far from being the only questions which the tribunal may ask in order to decide whether it was just and equitable to consider the complaint. The tribunal has to consider all the circumstances. ...”

99. Applying that test, Ms Sen Gupta submitted that the material before the Judge fully justified his conclusion that the Claimant knew enough in July 2018 to have brought a claim at that time, and that the EAT was wrong to find that that conclusion was perverse. It was undisputed that the Claimant knew that someone at Barclays had given her a bad reference. She knew, obviously, that she had brought proceedings against it for sex discrimination, and she should at least have suspected that that reference was motivated, at least in part, by that fact. As for HSBC’s knowledge, it was, again, undisputed that the Claimant had told Mr Dutruit that she was in dispute with Barclays: Ms Sen Gupta acknowledged that she could point to no finding by the Judge that she had told anyone at HSBC that the dispute involved allegations of sex discrimination, but she submitted that Mr Dutruit must have known that it arose from her dismissal while on maternity leave. She submitted that that was enough. She also emphasised that the discretion under section 123 (1) (b) is very wide and reminded us of the very limited basis on which an appellate tribunal should interfere with a decision taken in the exercise of that discretion (see, for example, *Chief Constable of Lincolnshire Police v Caston* [2009] EWCA Civ 1298, [2009] IRLR 327).
100. I can deal with the last point first. The discretion under section 123 (1) (b) is indeed very wide, but where a claimant is asking for an extension of time on the basis that the 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. The EAT’s criticism of the Judge’s reasoning in this case relates to his factual findings on that question rather than to his exercise of any discretion based on them.
101. As to whether suspicion, as opposed to knowledge, of the facts which would found a valid claim is sufficient when considering whether a claimant reasonably could or should have brought proceedings sooner, I do not think that this can be a black-or-white question. There is a broad spectrum between certain knowledge, which is obviously sufficient, and mere speculation, which is obviously not; and “suspicion” is an imprecise term which may connote a point anywhere on that spectrum. Clearly it will often be reasonable to expect a person to bring proceedings where their knowledge of the facts material to the prospects of success, or of the availability of the evidence necessary to prove those facts, is less than certain. Whether that is so in any given case depends on the particular circumstances, including, but not limited to, the degree of the uncertainty in question.
102. I would add – though the point is not central to the issue before us – that I agree with Judge Richardson at para. 19 of his judgment in *Barnes* (see para. 98 above) that, while the question of whether the claimant knew/suspected that they had a valid claim is always relevant, that is only the starting-point of the enquiry. As he says, it may also

be relevant to consider whether, if they did not know or suspect it, they should have done; and, if they did, whether it was nevertheless reasonable of them to delay bringing proceedings. And, as he also says, those may not be the only questions relevant to the overall assessment of what justice and equity require.

103. Turning to the point of substance, I do not believe that the findings identified by Ms Sen Gupta, as summarised above, are capable of justifying the Judge's conclusion that the Claimant was "fully aware of the elements of her claim for non-appointment to a role in July 2018". It is clear, in particular from what he says in para. 121, that he regarded the fact that the Claimant brought proceedings against Barclays as demonstrating that she knew enough to bring proceedings against HSBC. But that does not follow. It was not sufficient to justify a claim against HSBC that she knew that Barclays had given her a bad reference, or indeed that she knew or suspected that it had done so because she had brought discrimination proceedings against it and/or because she was a woman. Such a claim would only be justified if she knew or had sufficient reason to believe that *HSBC itself* was motivated by considerations which were discriminatory or based on her having done a protected act.
104. I have not in reaching that conclusion overlooked the Judge's statement at the end of para. 121 that the Claimant "strategically opted not to pursue a claim against the Respondent [in 2018] in the hope of securing employment with them if another opportunity arose in future". However, read in context, that appears to be no more than an inference from, or gloss on, his prior finding that she was at that time already aware of the elements of her claim. Although his factual findings refer to communications from the Claimant to HSBC after July 2018 which certainly appear to show that she had a continuing interest in joining HSBC if opportunity arose, he makes no distinct finding that it was for that reason that she did not pursue what she believed to be a valid claim. Ms Sen Gupta did not in fact place weight on this particular statement, and she was right not to do so.
105. I have thus far referred only to the findings made by the Judge. In her oral submissions Ms Sen Gupta referred to the passage in the Claimant's grounds of claim summarised by Elisabeth Laing LJ at para. 18 above, which pleads a series of text messages from Ms Assayag (a Director at HSBC) to the Claimant between July 2018 and January 2019 in which Ms Assayag suggests that the Claimant's non-appointment was the result of "biased feedback" and the fact that "there are proceedings going on". Those messages are not relied on, or indeed referred to, by the Judge. Ms Sen Gupta was asked whether they had been the subject of cross-examination at the hearing. She could not confirm the position at that point but volunteered to supply a note following the hearing. In that note she confirmed that the Claimant had not been cross-examined on those messages. In those circumstances I need say no more about them. Ms Sen Gupta's note went on to say that the Claimant had been cross-examined on a different WhatsApp exchange which arguably supported the case that she knew in July 2018 about the basis for a victimisation claim: she attached a transcript of the exchange (translated) and a note of the cross-examination. As Elisabeth Laing LJ notes at para. 81, Mr Segal objected that the Court's request had been limited to the single question whether the messages to which Ms Sen Gupta had referred before us had been the subject of cross-examination, and that it was illegitimate to seek now to rely on any further material: not only had that material not been referred to in HSBC's skeleton argument or Ms Sen Gupta's oral submissions, nor had it been referred to in the Judge's Reasons or relied on in the EAT.

Those objections are in my view unanswerable, and I have paid no regard to this material.

106. I agree with Elisabeth Laing LJ that Judge Katherine Tucker's description of the relevant reasoning in the Judge's Reasons as "perverse" needs some glossing. The Judge's essential error, as I would hold, is that he failed to make findings which explain the basis on which he concluded that the Claimant knew in July 2018 "the essential elements" of her claim against HSBC and/or that he proceeded on the basis that if she knew enough to bring proceedings against Barclays she also knew enough to bring them against HSBC. That could be characterised as irrationality but, as is often the case, it could also be described as a failure to give proper reasons. But it is not necessarily "perverse" in the usual sense that there was no material before him that might have justified a finding that she had sufficient knowledge. That is something that the EAT was not in a position to say, since it had neither any record of any relevant oral evidence (in practice, the Claimant's cross-examination) nor the full bundle of documents that was available in the ET; and nor do we. That issue will accordingly be open to the ET on remittal.
107. That is a sufficient basis for my agreement with Elisabeth Laing LJ. I need express no views on the further criticisms that she makes of the Judge's Reasons at para. 82 above. I should, however, say that I have some sympathy with him. He had to deal with a factually complicated case in which the grounds of complaint were not professionally pleaded and where the Claimant was only represented for the first day of the hearing. In advance of the hearing the Claimant's lawyers did provide an (unagreed) list of issues; but I have to say that it is very dense and allusive. He was also faced, as he explains, with 49 pages of written closing submissions from the Claimant to which HSBC chose not to respond. He made a conscientious attempt to grapple with the issues in his carefully structured Reasons, and I do not think that all the criticisms made of his reasoning by the EAT are well-founded.
108. It is extremely regrettable that the preliminary issues in this claim will have to be reheard, with all the consequent delay and expense in a case relating to events which occurred over six years ago; but there is no alternative. Nothing that we have said in our judgments should be interpreted as expressing any view on what should be the outcome either on those issues or, if they are determined in the Claimant's favour, on her substantive claims.