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New approach to burden of proof in discrimination claims (UK)

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Summary

The Employment Appeal Tribunal (EAT) has adopted a new approach to the burden of proof in discrimination cases. Up to now, the courts have held that the claimant must, in the first instance, prove sufficient facts from which (in the absence of any other explanation) an inference of discrimination can be drawn. Once the claimant has established these facts, the burden of proof shifts to the respondent to show that he or she did not breach the provisions of the Act. The EAT has now said that courts should consider all of the evidence (both the claimant's and the respondent's) when making its finding of facts, in order to determine whether or not a *prima facie* case of discrimination has been made out. It is then open to the respondent to demonstrate that there was no discrimination. This is an important development in how the burden of proof is dealt with in discrimination cases. It clarifies that it is not only the claimant's evidence which will be scrutinised in determining whether the burden of proof has shifted, but also the respondent's evidence (or lack thereof).

Note: just before this case report was sent to the printer, in a new decision, the England and Wales Court of Appeal has held that the EAT's decision in the featured case was wrong and that the position on the burden of proof remains as it was before. This decision will be printed in a future issue. Please see http://www.bailii.org/ew/cases/EWCA/Civ/2017/1913.html for this decision.

Background

UK discrimination laws are derived from the EU Directives on discrimination in employment, all of which include provisions dealing with the burden of proof. Prior to 2010, UK discrimination laws followed the burden of proof wording in the EU Directives, stating that:

> "*…where the [Claimant] proves facts from which the tribunal could, apart from this [provision] have concluded in the absence of an adequate explanation that the Respondent has committed [an act of discrimination], the tribunal must uphold that complaint unless the Respondent proves it did not commit that act*".

The two leading UK cases on the burden of proof, *Barton – v – Investec Henderson Croswaite Securities Ltd* and *Igen Ltd and others – v – Wong and other cases* were both decided under the pre-2010 legislation. Both cases emphasised that it was for the claimant to prove facts, from which a tribunal would assess whether discrimination has occurred. If the claimant does not prove such facts then his or her claim will fail.

In 2010, the Equality Act was implemented, which combined the various pieces of UK discrimination law into one act. Section 136 of the Equality Act 2010 provides as follows:

> "*…(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision [of the Equality Act] concerned, the court must hold that the contravention occurred.*
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*"

This section does not specifically state that in the first instance the *claimant* must *prove* facts. However, the Act's explanatory notes repeated the previous formulation of the burden of proof, as requiring the claimant to first prove facts from which an inference of discrimination could be drawn. Until this decision in *Efobi*, it was thought that courts would continue to adopt the approach whereby the claimant has the initial burden of proof.

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Facts

Mr Efobi ('the employee'), who is a black African and was born in Nigeria, was employed by Royal Mail Group Limited ('the employer') as a postman. He had graduate and post-graduate qualifications in information technology (including a BSc Honours degree in Information Systems) and wanted to progress into computer-based or managerial work. The employee applied for around 33 IT related jobs with the employer but was unsuccessful on each occasion. Applicants were required to complete an online form and upload a CV. External candidates were required to provide details of their town and country of birth. Internal candidates were not required to provide this information. However, the employee misunderstood the process and mistakenly applied as an external candidate. The employee also provided his CV, which was described as a 'generic CV', not tailored to the specific roles that he was applying for.

Mr Efobi's claims in the Employment Tribunal

The employee brought claims in the Employment Tribunal claiming that the employer had directly discriminated against him because of his race in rejecting his job applications. He also brought claims of harassment on grounds of his race because a request to finish his shift early to go to a wedding was refused. He further claimed that he had been victimised for bringing his discrimination claims, when he was covertly filmed by a colleague with a view to that footage being used in disciplinary proceedings.

At the Tribunal hearing, the employee did not provide evidence as to the race or national origins of the successful candidates for the jobs the employee had applied for. None of the decision-makers for those job applications gave evidence.

The Employment Tribunal upheld the employee's claims of harassment and victimisation as outlined above but rejected all of his other claims. In particular, in relation to the claim of direct discrimination regarding the job applications, the Tribunal noted that it was for the employee to prove facts from which the Tribunal could conclude that there had been discrimination. If the employee discharged the burden of proof then, '*absent an innocent explanation which was accepted by the [ET] his claim would succeed*'. The Tribunal went on to conclude that the employee had not proved facts from which it could conclude that there was discrimination, and in any event the employer had disproved any suspicion of discrimination. The Tribunal concluded that the employee's failure to be appointed to posts was not because of his race. The employee did not meet the requirements of the employer's recruiters and hiring managers "*…as he failed to demonstrate that he was a suitable, or the best, applicant, notwithstanding his academic qualifications*".

The employee appealed to the EAT against the dismissal of his direct discrimination claims in relation to the rejection of his job applications.

Judgment

The EAT Judge noted that section 136 of the Equality Act, 'the burden of proof provision', was at the heart of the Tribunal's reasoning. She went on to find that section 136(2) does not put any burden on the claimant. Instead, the Tribunal should consider all evidence, from all sources, at the end of the hearing, to consider whether "*…there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision…concerned*." If there are such facts, and no explanation from the respondent, then the contravention is proved. If however, there are such facts, but the respondent shows that he or she did not contravene the provision, then the Tribunal cannot find the contravention proved. Section 136 means that it is not possible for the respondent to make a submission of 'no case to answer', because it requires the Tribunal to consider all of the evidence, not just the claimant's, and because it is explicit in not placing any initial burden on the claimant. The Judge noted that it may therefore be misleading to refer to a shifting of the burden of proof as this implies that the claimant is required to prove something and there is no specific burden of proof placed on the claimant.

The Judge acknowledged that her understanding of the burden of proof was a departure from the leading cases, including Igen v Wong. However, she noted that these cases did not consider section 136 but instead considered the predecessor discrimination laws which did explicitly place the initial burden of proof on the claimant. The Judge also recognised that her interpretation of the burden of proof provisions went further than the EU Directives required. However, Member States are expressly permitted to introduce rules of evidence which are more favourable to claimants. The Judge also commented that there have not been many cases in which the effect of section 136 of the Equality Act 2010, rather than its predecessor provisions, had been directly considered.

In relation to the case at hand, the Judge referred to six examples where, in its judgment the Tribunal had misdirected itself by specifically referencing the employee's failure to prove facts sufficient to satisfy the first limb of the burden of proof provision.

The Judge also noted that the employer's decision not to adduce evidence about the race or national origins of the

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successful applicants and not to call any of the decision-makers '*…was not tactically astute, given the effect of section 136'*. Pursuant to section 136, the Tribunal must look at the "facts" as a whole and if the respondent's evidence is lacking, it is open to the Tribunal to draw inferences, which will then form part of the "facts" for the purposes of section 136(2).

The Tribunal, because of its misdirection with regard to the burden of proof, had determined that the employee '*had not got to first base'* in respect of his claim. However, if the Tribunal had appreciated that the employee did not have to get to first base, but that instead it had to consider all of the evidence in the round it might have concluded that section 136(2) had been satisfied. Indeed, the Judge listed eleven examples of evidence which might, on analysis, have supported a decision that section 136(2) was satisfied. Had the Tribunal concluded that section 136(2) was satisfied, the respondent's evidence might then have been subject to closer scrutiny.

The Judge finally noted that, even if her interpretation of section 136 was wrong, she would still have allowed the employee's appeal on the basis that the Tribunal had still misdirected itself and failed to adequately scrutinised employer's evidence.

The case was therefore remitted to a differently constituted Tribunal to consider the direct discrimination claims concerning the Respondent's rejection of the employee's job applications.

Commentary

Whilst the case at hand considered a claim of direct race discrimination, section 136 applies to all types of discrimination claims. Accordingly, this re-interpretation of the burden of proof test will be wide reaching and will likely impact how all UK discrimination cases are considered in the future.

The case also highlights the need for a respondent to be extremely cautious if there are gaps in its evidence. In the case at hand, the employer sought to 'cut to the chase' and provide a blanket explanation for why the employee had been rejected for the roles, without providing evidence as to what might have been in the minds of the specific decision-makers who rejected each application. Whilst this approach worked in the Tribunal, on appeal it was clear that the lack of scrutiny of the employer's explanation was critical in demonstrating that the Tribunal had not properly applied the burden of proof provision and had not looked at all of the evidence, from all of the sources, in order to determine if section 136(2) had been satisfied.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes, BarentsKrans): The EAT Judge recognised that her interpretation of the burden of proof provisions went further than the EU Directives required. The Directives, in this case Directive 2000/43 on racial discrimination, require the claimant to "establish" facts from which it may be presumed…Section 136(2) of the Equality Act applies if "there are" facts from which the court could decide… The wording of the Dutch laws seems to come somewhere in the middle. The burden of proof shifts where the claimant has "stated" facts from which… Had Mr Efobi brought his claim in a Dutch court, he would probably have included in his statement the fact that his employer had not provided information on the successful candidates. That might have been sufficient to shift the burden of proof.

Denmark (Christian K. Clasen, Norrbom Vinding): In Denmark, the understanding of the burden of proof in discrimination cases has been in line with this decision from the EAT since the shared burden of proof regime was incorporated into Danish law in 2004. In the explanatory notes to the provision in the Danish Act on Equal Treatment of Men and Women, it is stated that the courts are to use a standard assessment of the rules on proof when deciding the validity of the facts presented by the plaintiff and also to determine the standard of proof to be required from the employee and the employer when deciding if a *prima facie* case of discrimination has been demonstrated.

A decision by the Danish Supreme Court in December 2015 also shows that the facts presented by the defendant are also taken into careful consideration when the courts assess whether a plaintiff has established a prima facie case of discrimination. The case concerned a redundancy situation where a number of employees made redundant brought a discrimination claim based on the fact that statistical information suggested an overrepresentation of older employees among those made redundant. The defendant presented evidence that among the employees not made redundant there were several employees older than the plaintiffs. On this basis, the Supreme Court found that no *prima facie* case of discrimination had been shown.

As the EAT judge noted in the case at hand, this approach can be said to go further than required by the Directive since the very wording of the Directive puts the initial burden of proof on the plaintiff. As far as we know, whether the courts can or should take the defendant's evidence into consideration has never been disputed or given rise to controversy in Denmark. However, it is also clear that a defendant can make a submission of "no case to answer", and that the courts can take this

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into account when assessing whether a *prima facie* case of discrimination has been established.

Hungary (György Bálint and Gabriella Ormai, CMS Legal): As regards discrimination claims, the Hungarian Equal Treatment Act 2003 generally follows Directive 2000/78. Discrimination claims may be lodged at the courts (employment or civil law) and an administrative procedure may also be initiated (under equal treatment) to determine liability for unlawful discrimination.

The procedures used in discrimination claims follow a specific step plan. First, the claimant must adduce evidence to indicate that:

a. he or she has such a protected characteristic (e.g. colour, race or gender) at the time of the harmful event, which trigger the equal treatment provisions; and
b. he or she was injured or threatened by an injury concerning the protected characteristic.

If the claimant makes out a *prima facie* case, the burden of proof shifts to the respondent to prove that:

a. the circumstances set out by the claimant did not exist; or
b. the respondent complied with the requirements of equal treatment or did not have to comply with them, having regard to the nature of relationship (e.g. the employment was in a political or religious job or was an advocacy position).

Therefore, a claim may only succeed if the claimant makes a *prima facie* case and the respondent fails to meet the burden of proof.

The burden of proof rules do not mean, however, that the parties may not submit evidence at the commencement of the procedure and the courts must also take evidence into account throughout the process.

Recent Hungarian court practice has focused mainly on the assessment of protected characteristics and the analysis of equal treatment requirements. In its recent decision, the Supreme Court of Hungary ruled that in a case about the mass redundancy procedure, there was no breach of the equal treatment rules where a claimant returning from maternity leave was dismissed before her co-employees, based on the fact that the other employees were still involved in ongoing projects. In another recent decision, Supreme Court confirmed that the withdrawal of pay from a public servant based on a decision by the employer did not in itself serve as grounds for a discrimination claim in the absence of comparable other employees who had been treated more favourably.

Subject: Discrimination, burden of proof

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