The ‘shifting’ burden and the drawing of adverse inferences

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New SC Judgment: Royal Mail Group Ltd v Efobi [2021] UKSC 33 - on appeal from: [2019] EWCA Civ 18

The Supreme Court has unanimously dismissed this appeal concerning two questions of law:

(i) whether a change in the wording of equality legislation has altered the burden of proof in employment discrimination cases, and

(ii) when a tribunal may draw adverse inferences from the absence of a potential witness.

The Appellant, Mr Efobi, worked as a postman for the Respondent, Royal Mail. He was born in Nigeria and identifies as a black African and Nigerian. He has qualifications in computing and wished to obtain a managerial or technical role within Royal Mail. Between December 2011 and February 2015 he applied unsuccessfully for over 30 such jobs. In June 2015, Mr Efobi brought a claim against Royal Mail in the employment tribunal alleging that the rejection of his applications was the result of direct or indirect discrimination because of his race. He also made allegations of racial harassment and victimisation.

The employment tribunal dismissed Mr Efobi’s discrimination claims. An appeal to the Employment Appeal Tribunal succeeded on the grounds that the employment tribunal had wrongly interpreted section 136(2) of the Equality Act 2010 (the “2010 Act”), which deals with the burden of proof in discrimination cases, and had made errors of law in assessing the evidence.

The Court of Appeal reversed that decision. Permission to appeal to the Supreme Court was granted on the two questions stated above.

The Supreme Court unanimously dismissed the appeal, Lord Leggatt giving the sole judgment.

Burden of proof

The Race Relations Act 1976 and other legislation which was repealed and replaced by the 2010 Act imposed a two-stage test in discrimination cases. At the first stage, the claimant had the burden of proving facts from which the tribunal could conclude, in the absence of an adequate explanation, that an unlawful act of discrimination had been committed. If the claimant did not prove such facts, the claim failed. If the claimant proved such facts, the burden shifted to the employer to explain the reason(s) for its treatment of the claimant and to satisfy the tribunal that race (or another protected characteristic) played no part in those reasons. Unless the employer satisfied this burden, the claim succeeded.

In section 136(2) of the 2010 Act the relevant wording relating to the first stage was changed from "where … the complainant *proves* facts" to "*if there are* facts from which the court could decide" (emphasis added). Mr Efobi argued that the change in wording changed the law so that there is no longer any burden on a claimant to prove anything at the first stage. Instead, a tribunal would be required to consider all the evidence placed before it neutrally.

The Supreme Court rejected Mr Efobi's contention. It held that there has been no substantive change in the law. Already under the old statutory provisions, as they had been interpreted, tribunals were required at the first stage to consider evidence from all sources including evidence adduced by an employer to rebut or undermine a claimant's case. The only matter to be ignored at this stage was any explanation given by the employer for the treatment complained of. The change in wording makes clear that all the evidence, from whatever source it comes, and not only the evidence adduced by the claimant, should be considered at the first stage.

As is discussed at paras 20-23 of the judgment, it had been authoritatively decided that, although the language of the old provisions referred to the complainant having to prove facts and did not mention evidence from the respondent, the tribunal was not limited at the first stage to considering evidence adduced by the claimant; nor indeed was the tribunal limited when considering the respondent's evidence to taking account of matters which assisted the claimant. The tribunal was also entitled to take into account evidence adduced by the respondent which went to rebut or undermine the claimant's case. That approach had been established in *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] ICR 1205 and approved (with slight adjustment) by the Court of Appeal in *Igen Ltd v Wong* [2005] EWCA Civ 142; [2005] ICR 931. Further guidance was given by the Employment Appeal Tribunal in *Laing v Manchester City Council* [2006] ICR 1519, which was approved by the Court of Appeal in *Madarassy v Nomura International plc* [2007] EWCA Civ 33; [2007] ICR 867. The guidance

given by the Court of Appeal in *Igen Ltd v Wong* and *Madarassy* was in turn approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] UKSC 37; [2012] ICR 1054, paras 25-32.

Two points established by that guidance on the old provisions were deemed significant. First, although the old provisions required the tribunal to adopt a two-stage process of analysis, they did not require the tribunal to divide hearings into two parts to correspond to those analytical stages and tribunals were discouraged from doing so. Second, although the language of the old provisions referred to the complainant having to prove facts, and there was no mention of evidence from the respondent, the courts held that the tribunal was not prevented from taking account at the first stage of evidence adduced by the respondent in so far as it was relevant in deciding whether the burden of proof had moved to the respondent.

Section 136(2) of the 2010 Act requires the employment tribunal to consider all the evidence from all sources, not just the claimant's evidence, so as to decide whether or not "there are facts etc". In that sense, the Supreme Court held the law had not changed and the reason for the change in wording was to make clear on the face of the legislation how the predecessor provisions had been clarified in the case law which Parliament could be taken to have known when it enacted section 136.

It was unfortunate that replacing "[w]here … the complainant proves facts" by "[i]f there are facts" created the possibility for a different misunderstanding that there is no longer any burden of proof on a claimant. There is nothing in the background to the 2010 Act which provides any support for a suggestion that this was or might have been a goal of the legislation. Under the general law, a court or tribunal may only find that something is a fact if it is admitted or shown by evidence to be more likely than not to be true. It is still the law, therefore, that the burden does not shift to the employer to explain the reasons for its treatment of the claimant unless the claimant is able to prove, on the balance of probabilities, those matters which he or she wishes the tribunal to find as facts from which (in the absence of any other explanation) an unlawful act of discrimination can be inferred. The Supreme Court found that in adopting this approach to the evidence, the employment tribunal did not make any error of law.

Drawing adverse inferences

At the hearing in the employment tribunal, Royal Mail did not call as witnesses any of the many individuals who had actually dealt with Mr Efobi's unsuccessful job applications. Instead, it relied on evidence given by two managers who were familiar with the recruitment processes and how, in general terms, appointments were made. The claimant's second ground of appeal

was that the tribunal should have drawn adverse inferences from the failure to call the actual decision-makers.

Whether such inferences were permissible at the first stage of the analysis required by the tribunal was given careful consideration by the Supreme Court. In the Court of Appeal, Sir Patrick Elias said at para 44:

> "If the employer fails to call the actual decision-makers, he is at risk of failing to discharge the burden which arises at the second stage, but no adverse inference can be drawn at the first stage from the fact that he has not provided an explanation as Mummery LJ said in terms in para 58 of *Madarassy* …"

What Mummery LJ said in para 58 of *Madarassy* was:

> "The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. ..."

The Supreme Court advised caution in interpreting these statements. At the first stage the tribunal must consider what inferences can be drawn in the absence of any explanation for the treatment complained of. That is what the legislation requires. Whether the employer has in fact offered an explanation and, if so, what that explanation is must therefore be left out of account. It follows that, as Mummery LJ and Sir Patrick Elias said in the passages quoted above, no adverse inference can be drawn at the first stage from the fact that the employer has not provided an explanation. In so far as the Court of Appeal in *Igen Ltd v Wong* at paras 21-22 can be read as suggesting otherwise, that suggestion must be mistaken[1]. It does not follow, however, that no adverse inference of any kind can ever be drawn at the first stage from the fact that the employer has failed to call the actual decision-makers. It is quite possible

[1] [21] Mr. Antony White Q.C., appearing for the employee in Wong, takes issue with Miss Slade on this point. He submits, and is supported by Mr. Allen in that submission, that in considering what inferences or conclusions can be drawn from the primary facts, the ET must assume that there is no adequate explanation for those facts. Mr. White accepts that that does not prevent the ET from taking into account at the first stage the fact that the respondent has given an inadequate explanation, but he argues that that is in no way inconsistent with the assumption which the words "in the absence of an adequate explanation" require to be made.

[22] We agree with Mr. White. The words "in the absence of an adequate explanation", followed by "could", indicate that the ET is required to make an assumption at the first stage which may be contrary to reality, the plain purpose being to shift the burden of proof at the second stage so that unless the respondent provides an adequate explanation, the complainant will succeed. It would be inconsistent with that assumption to take account of an adequate explanation by the respondent at the first stage. We think that Miss Slade seeks to extract more significance from the words used by Burton J. in Wolff than they can reasonably have. It is of course possible that the facts found relevant to the first stage may also relate to the explanation of the respondent.

that, in particular circumstances, one or more adverse inferences could properly be drawn from that fact.

The particular adverse inferences which Mr Efobi submitted should have been drawn were: (i) that the successful candidates were of a different race or ethnicity from him, and (ii) that the recruiters who rejected his applications (in all but two cases on paper without short-listing him for an interview) were aware of his race when they did so.

The Supreme Court emphasised that tribunals should be free to draw, or decline to draw, inferences in the case before them using their common sense. In deciding whether to draw an adverse inference from the absence of a witness, relevant considerations will naturally include whether the witness was available to give evidence, what evidence the witness could have given, what other evidence there was bearing on the points on which the witness could have given evidence and the significance of those points in the context of the case as a whole. How such matters should be assessed cannot be encapsulated in a set of legal rules.

There was nothing in the reasons given by the employment tribunal for its decision in this case, which suggested that the tribunal thought that it was precluded as a matter of law from drawing any adverse inference from the fact that Royal Mail did not call as witnesses any of the actual decision-makers who rejected the claimant's many job applications. The position is simply that the tribunal did not draw any adverse inference from that fact. To succeed in an appeal on this ground, the claimant would accordingly need to show that, on the facts of this case, no reasonable tribunal could have omitted to draw such an inference. That is, in its very nature, an extremely hard test to satisfy.

The Supreme Court held that the employment tribunal in the present case could not be faulted as a matter of law for not drawing the adverse inferences (that Mr Efobi argued for) from the fact that none of the actual decision-makers gave evidence. In any case, even if those inferences had been drawn, the facts that the recruiter had been aware of Mr Efobi's race and that the successful candidate was of a different race from him would not, without more, have enabled the employment tribunal to conclude that, in the absence of any other explanation, that there had been discrimination. Hence the burden of proof did not shift to Royal Mail to explain its decisions and the tribunal was entitled to dismiss the claim. As Mummery LJ stated in *Madarassy* at para 56:

> "The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a

tribunal 'could conclude' that … the respondent had committed an unlawful act of discrimination."

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