Employment

Lightening the load? Discrimination and the burden of proof in Efobi v Royal Mail Group Ltd

Posted on 13 October, 2017 by | Katya Hosking

In *Efobi v Royal Mail Group Ltd UKEAT/023/16*, the EAT considered the proper interpretation of the burden of proof provision in section 136 of the Equality Act 2010 (EqA 2010).

The burden of proof provision

The difficulties of proving discrimination are well known, and tribunals must often decide cases on the basis of inference from primary facts. Those inferences are governed by section136 of the EqA 2010:

- At the first stage, a tribunal must consider whether there are "facts from which the court could decide, in the absence of any explanation, that a person (A) contravened the provision [of the EqA 2010] concerned." If there are such facts, "the court must hold that the contravention occurred." (*Section136(2)*).
- At the second stage, that conclusion may be displaced "if A shows that A did not contravene the provision" (*section136(3)*). The burden therefore shifts to the respondent, who will have to show that there is a wholly non-discriminatory explanation.

The shift in the burden of proof

The EAT in *Efobi* held that the ET had misdirected itself on the burden of proof. The wording of section 136 imposed no requirement at the first stage that the relevant facts be proved on the basis of the claimant's evidence in particular. Rather, a tribunal is to "look at the 'facts' as a whole", including facts supported by the respondent's evidence. These facts may also include inferences from a respondent's failure to adduce evidence (*at [86]*).

The ET had concluded that Mr Efobi had not "got to first base". This conclusion was unsafe, because the ET had not properly considered whether it ought to draw inferences adverse to the respondent from its failures to adduce or explain evidence. Had it done so, the facts available at the first stage might, in the absence of an adequate explanation, have supported a finding of discrimination.

Comment

On the face of it, the judgment is a straightforward rejection of the guidance in *Igen v Wong* that it is for the claimant to prove a prima facie case before the burden shifts to the respondent. The EAT emphasised that the wording of section136 of the EqA 2010 differs from its predecessor provisions, which all stated explicitly that it was for the complainant to prove the relevant facts.

However, even before the EqA 2010 it was clear that the respondent's evidence was to be considered at the first stage, as well as the claimant's evidence. In *St Christopher's Fellowship v Walters-Ennis* Mummery LJ held that "[t]he important words 'could conclude' mean that 'a reasonable ET could properly conclude' from all the evidence before them

…That includes all the evidence given by the respondent, as well as by the claimant" (*[2010] EWCA Civ 921, at [16]*: note that "could conclude" is replaced by "could decide" in section 136 of the EqA 2010).

The case of *EB v BA*, in particular, bears some striking similarities to *Efobi*. The respondent also failed to adduce relevant evidence in its control, taking a "you prove it" stance. Allowing the claimant's appeal, Hooper LJ warned that this stance "may well render the reverse burden of proof provisions of little or no use to a claimant … It is important … that tribunals bear in mind the objectives of [the burden of proof provisions] … Employers should not be permitted to escape the provisions … by leaving it to the employee to prove her case." (*[2006] EWCA Civ 132, at [52]*).

Lessons learned

- Focus on the purpose of the burden of proof provision as well as its statutory language.
- Ensure the possible consequences of the shift in the burden of proof are considered at the case management stage, a point that was emphasised in *EB v BA* (*at [65]*).
- Respondents should ensure that the particulars of discrimination are clarified and that they adduce evidence relevant to the first stage.
- Claimants should take care to consider all the evidence and the inferences that might properly be drawn from it.

In *Hewage v Grampian Health Board*, the Supreme Court approved the guidance in *Igen v Wong* but observed that:

"It is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other." (*[2012] UKSC 37, Lord Hope at [32]*)

That may be helpful guidance for tribunals considering the evidence after it has been presented, but at the stage when parties are preparing their cases it is unlikely to be clear whether that will be the position. *Efobi* shows it is risky for parties to adopt a strategy on this basis.

A previous version of this blog was published on 12 October 2017 by Practical Law Company. This can be viewed here

Katya Hosking is rapidly developing her employment practice and has experience in unfair dismissal, discrimination, harassment and victimisation, whistleblowing, employee status and unlawful deduction of wages. Having worked as a university equality officer before coming to the Bar, she retains a particular interest in discrimination and disability, and recently drafted pleadings in a complex reasonable adjustments claim against a university.