

PROVING AND DISPROVING DISCRIMINATION

Introduction

1. Picture the scene: an ET1 pleads allegations of unreasonable conduct, asserts a protected characteristic and relies upon a hypothetical comparator. Sound familiar? It does not take much to recognise that such a claim commences with an uphill struggle. This perhaps provides a partial explanation for why so few discrimination claims are successful. Typically, fewer than 25% of discrimination claims make it to a final hearing and - of the total claims filed - fewer than 5% result in a judgment in favour of the Claimant. In the final quarter of 2016, the lowest was 1% (for sex discrimination) and the highest was 7% (for sexual orientation discrimination).¹ Moreover, of those claims that make it to trial, the overwhelming majority fail. The most successful form of discrimination was sex discrimination (at 33%). That however, has to be viewed in the context of only 3% of such claims making it to a final judgment. The relative success rates for each form of discrimination were approximately as follows:

a) Sex:	33.0%
b) Sexual Orientation:	30.4%
c) Disability:	29.4%
d) Religion or belief:	18.5%
e) Race:	10.8%
2. It is of note a similar picture emerges for comparable causes of action, such as protected disclosure claims. In the same period only 19% of such claims made it to trial, of which only 21% were successful (4% of the total claims). Whilst far more research and analysis would be required to understand the reasons behind this ratio, the figures are nonetheless stark.
3. In this this seminar, we will consider what steps can be taken to prove and disprove discrimination. In the case of the latter, for the most part, this will involve exploiting any failure on the part of the Claimant to take the necessary steps to present the claim in the best way possible. To fully understand how to go about proving or disproving discrimination, a fundamental step is to understand what must be proved and by who. This understanding underpins the entire strategic approach to case preparation.
4. We will accordingly consider the following key areas:
 - a) The burden of proof;
 - b) What must be proved;
 - c) Indirect evidence; and
 - d) Tactical tips.

¹ Ministry of Justice, Main Tables

Burden of Proof

5. The headline good news for Claimants is that by virtue of a recent decision of the Employment Appeal Tribunal, the Claimant no longer has any burden of proof. But before we get to that, it is useful to take a little trip down memory lane.
6. The question of who must prove discrimination has surprisingly proved to be a vexing issue, spanning many decades of jurisprudence. Prior to the burden of proof provisions, the leading authority was ***King v Great British-China Centre***.² The Court of Appeal held that the Tribunal had been entitled to draw an inference of discrimination as the Respondent's explanation for its treatment of the Claimant had been inadequate and unsatisfactory. This was however, not characterised as a reversal of the burden of proof. Instead, it was considered that this involved a balancing of all the relevant factors. Neil LJ identified 5 key factors to consider. It is worth setting these out in full³:

"(1) It is for the applicant who complains of racial discrimination to make out his or her case. Thus if the applicant does not prove the case on the balance of probabilities he or she will fail.

(2) It is important to bear in mind that it is unusual to find direct evidence of racial discrimination. Few employers will be prepared to admit such discrimination even to themselves. In some cases the discrimination will not be ill-intentioned but merely based on an assumption that "he or she would not have fitted in".

(3) The outcome of the case will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 65(2)(b) of the Act of 1976 from an evasive or equivocal reply to a questionnaire.

*(4) Though there will be some cases where, for example, the non-selection of the applicant for a post or for promotion is clearly not on racial grounds, a finding of discrimination and a finding of a difference in race will often point to the possibility of racial discrimination. In such circumstances the tribunal will look to the employer for an explanation. If no explanation is then put forward or if the tribunal considers the explanation to be inadequate or unsatisfactory it will be legitimate for the tribunal to infer that the discrimination was on racial grounds. This is not a matter of law but, as May LJ put it in *North West Thames Regional Health Authority v Noone* [1988] ICR 813, [1988] IRLR 195, "almost common sense".*

(5) It is unnecessary and unhelpful to introduce the concept of a shifting evidential burden of proof. At the conclusion of all the evidence the tribunal should make findings as to the primary facts and draw such inferences as they consider proper from those facts. They should then reach a conclusion on the balance of probabilities, bearing in mind both the difficulties which face a person who complains of unlawful discrimination and the fact that it is for the complainant to prove his or her case."

7. For our purposes, the first point is of critical note. This not only held that Claimants must prove their cases but this decision was reached in the absence of any statutory provision as to the burden of proof. It was based on the general rule of evidence that *he who asserts must prove*.
8. Subsequent to ***King***, the question became the subject of EU law in the form of ***The Burden of Proof Directive (1997/80/EC)***. This in turn led to various domestic legislative amendments. The first was in the form of ***Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001, SI 2001/2660***. Similar provisions for other forms of discrimination followed thereafter.

² [1991] IRLR 513, [1992] ICR 516

³ At page 528

9. The position was then authoritatively addressed in the combined appeal of *Igen Ltd v Wong; Chamberlin Solicitors v Emokpae; Brunel University v Webster*⁴. The Court of Appeal in *Igen* approved the test (with a minor amendment) established in *Barton v Investec Securities Ltd*⁵. Harvey's summarises the extant approach as follows (applicable to all forms of discrimination):

"(1) Pursuant to s 63A of the SDA 1975, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s 41 or s 42 of the SDA 1975 is to be treated as having been committed against the claimant. These are referred to below as "such facts".

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word "could" in SDA 1975 s 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s 74(2)(b) of the SDA 1975 from an evasive or equivocal reply to a questionnaire or any other questions that fall within s 74(2) of the SDA 1975.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s 56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

⁴ [2005] EWCA Civ 142, [2005] IRLR 258, [2005] ICR 931, [2005] 3 All ER 812

⁵ [2003] IRLR 332, [2003] ICR 1205

(12) *That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.*

(13) *Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."*

10. This again recognised that the initial burden sat with the Claimant. Following *Igen* discrimination law underwent a fundamental recodification in the form of the Equality Act 2010. This adopted a unified approach to the burden of proof in the form of s. 136. This provides:

(1) *This section applies to any proceedings relating to a contravention of this Act.*

(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 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.*

(4) *The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.*

(5) *This section does not apply to proceedings for an offence under this Act.*

..."

11. Subsequent to the Equality Act 2010 coming into force on 1st October 2010, the Supreme Court was called upon to consider the burden of proof provisions, in the case of *Hewage v Grampion Health Board*⁶. This expressly endorsed the two-stage test which had been laid down in *Igen*⁷, namely:

- a) The first stage requires the complainant to prove facts from which the tribunal could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant; and
- b) The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld.'

12. As at 2012, the position was clear. There was a *prima facie* burden on the Claimant to prove facts from which a discrimination could be inferred, after which the burden shifted to the Respondent to prove they had not contravened the act. Importantly, however, despite post-dating the Equality Act 2010, *Hewage* related to the burden of proof provisions under s.63A of the Sex Discrimination Act 1975 and s.54A of the Race Relations Act 1976, a point to which we shall shortly return.

13. The matter has however, recently been revisited by the Employment Appeal Tribunal in *Efobi v Royal Mail Group UKEAT/0203/16/DA*: The key facts can be easily summarised as follows:

- a) The Claimant was a black African who was born in Nigeria;
- b) He worked for the Respondent as a postman;

⁶ [2012] UKSC 37, [2012] IRLR 870

⁷ Paragraph 17

- c) He had degrees (including a BSc) and diplomas in Information Systems, (graduate and post-graduate) and qualifications in forensic computing;
 - d) He made 33 or so unsuccessful applications for IT-related jobs with the Respondent;
 - e) The selection process involved a CV shortlisting criteria and a pass or fail test called Talent Q (involving a psychometric and skills based component).
14. The Tribunal upheld claims of harassment and victimisation in relation to certain matters, but rejected his other claims, including a claim of direct discrimination in relation to his job applications. The Claimant appealed against the latter finding only.
15. The Tribunal made findings as to the Respondent's procedure, which involved a detailed exercise in which hundreds of applications were shortlisted. The candidates then sat the Talent Q test. The Tribunal accepted the Claimant's CV lacked detail, an approach with which he persisted, despite feedback. They also concluded he had failed the Talent Q test. This was a significant conclusion given the Claimant alleged he had not taken the test and that the Respondent had altered documents and evidence (including some within the bundle). No evidence was adduced about the race of successful candidates or those who had been short or longlisted. The Tribunal accordingly concluded the Claimant had failed to prove facts from which an inference of discrimination could be drawn.
16. The Employment Appeal Tribunal however, allowed an appeal. Most fundamentally, at paragraph 78, Laing J stated:
- “Section 136(2) does not put any burden on a Claimant. It requires the ET, instead, to consider all the evidence, from all sources, at the end of the hearing, so as to decide whether or not “there are facts etc” (cf paragraph 65 of **Madarassy**). Its effect is that if there are such facts, and no explanation from A, the ET must find the contravention proved. If, on the other hand, there are such facts, but A shows he did not contravene the provision, the ET cannot find the contravention proved.”*
17. This is a ground-breaking conclusion. It is the first time a Claimant has been found to have no burden whatsoever in pursuing a claim of this kind. It goes against the long line of jurisprudence emanating from **Barton**, **Igen** and most recently the Supreme Court in **Hewage**. The Employment Appeal Tribunal did not however, shy away from the far-reaching approach it had adopted. First, Laing J acknowledged that the conclusion was inconsistent with the Explanatory Notes to the Act. She however, concluded that whilst this could be an aid to construction, it cannot be treated as reflecting the will of Parliament, which must be derived from the language of the statute objectively ascertained (as per **Westminster City Council v NASS**⁸). Moreover, Laing J expressly recognised that her decision departed from the historic approach adopted at appellate level, including by the Supreme Court. In grappling with this point, Laing J observed that those decisions were based on different legislative provisions and had not been attended to following the implementation of the Equality Act 2010. In essence, she concluded those decisions were no longer binding. Finally, Laing J acknowledged that this analysis to s.136 resulted in a position which was more favourable to Claimant's than required by EU law. However, since EU law did not prevent a more favourable approach, this was no bar to the interpretation reached.
18. As the EAT was unsure whether the Tribunal had required the Claimant to prove certain facts, it remitted the matter to a freshly constituted tribunal.
19. Respectfully, there are four fundamental problems with this analysis:
- a) Section 136 deals with when the burden will shift to the Respondent. It does not address at all who has the burden of proof prior to this test being satisfied. It is an exception to the general rule that he who asserts must prove;

⁸ [2002] UKHL 38; [2002] 1 WLR 2956

- b) Prior to the various legislative provisions, the burden of proof was equally held to rest with the Claimant, reflecting the general common law approach. Given (a), this must be the default position; and
 - c) Prior to the Equality Act 2010, the *prima facie* burden unequivocally sat with the Claimant. There is nothing within or without the Equality Act 2010 to suggest Parliament intended to reverse this position; and
 - d) Whilst the starting point to statutory interpretation must be the objective words of the legislation, Explanatory Notes can be used to cast light on the mischief to which the Act is addressed and is accordingly admissible. Furthermore, it is unnecessary to first establish an ambiguity in the legislation before the Explanatory Notes can be considered. This was made clear by Lord Steyn in **Westminster City Council v NASS**.
20. It is accordingly, at least arguable that **Efobi** has been wrongly decided. Unsurprisingly this has been appealed and is currently awaiting permission. Until the appeal has been resolved, a Tribunal will need to hear all the evidence in the round and then decide. Whilst this is the approach broadly taken by tribunals in any event, there is an important distinction: even where the evidence is striking (as was the case in **Efobi**) the Respondent cannot sit back and expect the claim to fall at the first hurdle. There simply is no hurdle for the Claimant to jump. However, as a word of caution to Claimants, as **Efobi** is currently under appeal, it will be sensible to proceed as if there remains a requirement to prove a *prima facie* case. Claimants will certainly suffer nothing for this assumption.

What must be proved

21. Whilst the case of **Efobi** is no doubt of significance, it does not impact upon what must be proved (whether by the Claimant or adopting some neutral burden of proof). The test remains that of the *prima facie* case: facts from which a Tribunal could decide, in the absence of any other explanation, that the Respondent has contravened the provision concerned.
22. What this requires has been considered on several occasions, most notably in **Madarassy v Nomura International plc**.⁹ In that case the Court of Appeal concluded that the phrase “*could conclude*” meant “*a reasonable tribunal could properly conclude’ from all the evidence before it.*” Thus, the reference to the word *could* had some qualification. However, most importantly, the Court of Appeal held:
- “I am unable to agree ...that the burden of proof shifts to Nomura simply on Ms Madarassy establishing the facts of a difference in status and a difference in the treatment of her. This analysis is not supported by Igen Ltd v Wong [2005] ICR 931 nor by any of the later cases in this court and in the Employment Appeal Tribunal.”*
23. This has become known as the “*something more*” test, namely the Claimant had to prove a difference of status, a difference of treatment and something more before the burden shifted to the Respondent. In light of **Efobi** this requirement may not rest upon the Claimant, but it must nonetheless be shown. Whether or not **Efobi** stands, Claimants will tactically want to present evidence to ensure this stage is overcome.
24. It is worth noting that in **Hussain v Vision Security Ltd and Mitie Security Group Ltd**¹⁰ the Employment Appeal Tribunal warned that this must not be given the status of being a rule of law. It has however, been consistently applied. For example, in **London Borough of Camden v Miah**¹¹ the EAT approved the approach in **Madarassy** in the context of a claim of detrimental treatment based upon a hypothetical comparator. The Claimant spoke with heavily accented English. There was no evidence from which it could be shown that a hypothetical comparator (who had another accent which was difficult to understand at times) would have been treated any differently. The detrimental treatment and difference in race was accordingly insufficient to reverse the burden.

⁹ [2007] IRLR 246, [2007] ICR 867

¹⁰ UKEAT/0439/10

¹¹ UKEAT/0031/08

Whether ***Madarassy*** has the status of a rule of law, it is nevertheless likely to be informative in every discrimination case. Indeed, it is a ubiquitous part of submissions and judgments alike.

25. It is not uncommon for Claimants to seek to overcome ***Madarassy*** by reference to a series of allegations of unreasonable conduct. Take for example the promotion scenario. A Claimant might seek to demonstrate discrimination by reference to their difference of treatment and by challenging the decision not to promote as lacking merit. It is however, well established that conduct which is unreasonable or unfair is insufficient. This was the conclusion of the Employment Appeal Tribunal in ***Bahl v Law Society***¹² as approved by the Court of Appeal.¹³ This analysis was further repeated by the Employment Appeal Tribunal in ***Eagle Place Services Ltd v Rudd***.¹⁴ It was however, observed that this was weaker in cases where the comparator relied upon was hypothetical, in which case there maybe sufficient for the burden of proof to shift. The rationale is that where there was an actual comparator, it could be readily ascertained whether the Respondent had behaved unreasonably irrespective of the protected characteristic. In the case of a hypothetical comparator, it could be assumed the employer would not have behaved unreasonably. It was further held in ***Anya v University of Oxford***¹⁵ that whilst unreasonable behaviour was insufficient to found discrimination, if the Respondent contended it treated (or presumably would treat) others badly, it shall be for them to prove this is the case.
26. Should the burden of proof transfer, the Respondent will be required to show it has not contravened the act. This however, only requires the Respondent to demonstrate a non-discriminatory reason. It is not required to demonstrated that it acted reasonably or fairly. (see ***Griffiths-Henry v Network Rail Infrastructure Ltd***¹⁶). That said, a Tribunal must not merely consider whether the explanation provided by Respondent is a credible one. It must also go on to consider that explanation to a reasoned conclusion, (see ***Anya***). This is logical given that an individual may genuinely believe that the reasons are non-discriminatory and accordingly give credible evidence to that effect. That however, does not take account of the possibility of subconscious discrimination.

Indirect Evidence

27. It is uncontentionous to assert that the best way to satisfy the “*something more*” requirement is to adduce direct evidence. This may take many forms including express admissions or discrimination or flagrantly discriminatory remarks. Such direct evidence is vanishingly rare in the modern world of employment litigation. The *something more* will often therefore need to be found using indirect evidence. Whilst this can also take many forms, we will consider here five discrete examples:
- a) Statistical evidence;
 - b) Record keeping;
 - c) Disclosure;
 - d) Inconsistent explanations; and
 - e) Unreasonable behaviour.

Statistics

28. Statistical evidence has played a valuable part in Tribunal claims for some time, especially in claims of indirect discrimination to demonstrate disparate impact (a point which in some cases can scarcely be demonstrated any other way). The use of statistics in direct discrimination is however, far less common, yet it can serve an equally important role.

¹² [2003] IRLR 640

¹³ [2004] IRLR 799

¹⁴ [2010] IRLR 486

¹⁵ [2001] IRLR 377, [2001] ICR 847

¹⁶ [2006] IRLR 865

29. ***Efobi*** aside, what is important to identify is that the Claimant need only demonstrate facts from which a Tribunal *could* conclude discrimination, not *would* conclude. Whilst this requires *something more* than a difference in status and treatment, the Employment Appeal Tribunal acknowledged in ***The Home Office (UK Visas & Immigration) v Kuranchie***¹⁷ that statistics could satisfy the first stage. In reaching this conclusion, Judge Peter Clark state:

“We accept, first, that Tribunals must be alive to the possibility of unconscious (or subconscious) discrimination as well as overt discrimination; see the observations of Kerr J in Geller v Yeshurun Hebrew Congregation UKEAT/0190/15, 23 March 2016, paras 49 and 52. Secondly, that “statistical” evidence that may tend to show a discernible pattern of treatment by the employer to the Claimant’s racial group from which a Tribunal might infer unlawful discrimination may be relevant to the complaint; see the disclosure case of West Midlands Passenger Transport Executive v Singh [1988] 1 WLR 730 CA. For an example of a case of direct racial discrimination in which racial statistics were held to be a relevant consideration by the Employment Tribunal see Rihal v London Borough of Ealing [2004] IRLR 642 CA, particularly at paras 52 and 53, per Sedley LJ.”

30. The case of ***Rihal*** concerned promotion opportunities afforded to the Claimant, who was born in India but had lived in the UK for some time. The Tribunal concluded there was a “*glass ceiling*” in the Respondent’s housing department which made it very difficult for non-white individuals to attain senior management posts. The Employment Appeal Tribunal and Court of Appeal rejected the local authority’s appeal. Of particular note, at paragraph 52, the Sedly LJ stated:

“The ethnic audit figures produced by Ealing for the tribunal hearing and summarised in paragraph 43 of the employment tribunal’s reasons are disturbing. (It might have been better if this paragraph had been placed much earlier in the reasons.) In the housing department of the local authority of a multi-racial borough they portray an almost complete racial divide between upper management and the remainder of the staff. With the single exception of Ms Gomer (whose elevation the tribunal found explicable without negating their general finding) the entire managerial team was white: this in a borough 40% of whose population is from ethnic minorities, and in a local authority whose other departmental senior management teams typically contain about 25% from ethnic minorities. These figures in themselves rightly put the tribunal on inquiry, because they suggested a clear possibility that there was a culture of white elitism in the upper echelon of the housing department. Such a culture, as the tribunal will have been well aware, can exercise a potent influence on individual decision-makers, of which they themselves may be aware faintly or not at all.”

31. At paragraph 53 the Sedley LJ went on to state:

“The sharp ethnic imbalance revealed by Ealing’s own figures was enough to entitle – indeed arguably to require – the tribunal to look for a convincing non-racial reason.”

32. There will be many cases where statistical evidence is of relevance, particularly in appointment, promotion and access to certain benefits or working practices (such as flexible working requests). If the employer is large enough, they may also be relevant in other cases such as disciplinary sanction, grievance delays and findings. However, what is important is to establish not simple numbers, but correlation. For example, there is little value in showing in any given year that only 1 female was promoted to a senior management position. This only tells part of the picture. What should be considered is the correlation with other data, such as the total number of employees within each gender and number of promotions by gender. If, for example, that was the only promotion that year, the picture becomes very different.

33. In every case, Claimant should accordingly be considering whether statistical information could assist the claim and help move the case beyond ***Igen*** stage 1. This is profoundly important as the conclusions at the stage 1 stage will inform what explanation the Respondent will have to provide.

¹⁷ UKEAT/0202/16

It would be insufficient for the Respondent to simply adduce credible evidence of why it believed the reason was non-discriminatory, (see *Anya*). If the statistics paint a striking picture, the inference of discrimination would encompass this primary fact, which the Respondent will need to address. This will likely be a far more difficult task.

34. It should not however, be thought that statistics are a tool only for Claimants. Indeed, in many cases, the statistics may be disprobative. To cite a very recent first instance decision: in *Mardell v Interserve* the Tribunal granted an application to strike out an age discrimination claim relating to a refusal to grant a flexible working request to a 65 year old employee. The evidence demonstrated that the Respondent had granted something in the order of 98% of flexible working requests, including to employees aged from their 30s to their 70s. Of the requests made, only 3 had been refused: the Claimant and 2 employees in their 30s. The statistics overwhelmingly demonstrated age was not a factor. Respondent's also have a distinct advantage in that they may have a sense of the picture before ascertaining the statistics.

Record Keeping

35. Good recording keeping is a sensible step for all employers as it can assist in the process of defending any subsequent claims. This is underscored by paragraph 16.44 of the statutory Code of Practice on the Equality Act 2010, issued by the Equalities and Human Rights Commission. Not only does this emphasis that employers "should" keep records to "justify each decision" it goes on to state:

"If the employer does not keep records of their decisions, in some circumstances, it could result in an Employment Tribunal drawing an adverse inference of discrimination."

36. This point was expressly identified by the Bristol Employment Tribunal in *Ryglewicz v Hanson Quarry Products Europe Ltd.*¹⁸ The Tribunal concluded that it was remarkable the Respondent had no notes of the interviews, as they had been destroyed. The Tribunal expressly referred to the ECHR Code of Practice and concluded that an inference could be drawn.
37. Claimants would therefore be wise to seek the notes of any decision making and Respondents would be wise to ensure such records are kept to support the decision making process.

Disclosure

38. Allied to the value of record keeping, failures in the disclosure process may also justify the drawing of inferences. This point is neatly illustrated in the case of *EB v BA*.¹⁹ The Claimant sought detailed information as to the allocation of work to support her claim. The Respondent refused on the basis it was for the Claimant to prove her case. The Court of Appeal however, held this refusal was sufficient to reverse the burden. Most importantly, Ward LJ stated: "Employers should not be permitted to escape the provisions of s 63A by leaving it to the employee to prove her case." This conclusion will of course be underscored by the case of *Efobi* as the Claimant no longer carries a burden of proof (at least for the time being).

Inconsistent Explanations

39. As made clear, in *Igen* and other authorities, when considering whether a *prima facie* case has been established, the Tribunal are required to exclude from its consideration the Respondent's explanation. If applied rigidly, this could of course operate to the Claimant's detriment as he may seek to rely upon inconsistent explanations to establish the *something more*. Indeed, if a Respondent has been unclear in their reason, why ought that to be excluded from the stage 1 process? This issue was considered in *Veolia Environmental Services UK v Gumbs*²⁰. The Employment Appeal Tribunal expressly rejected the Respondent's contention that it ought not to

¹⁸ [2013] EqLR 432

¹⁹ [2006] IRLR 471

²⁰ UKEAT/0487/12/BA

have been called upon to provide an explanation as the Claimant had failed to establish a *prima facie* case. In reaching this conclusion, HHJ Hand QC held:²¹

“...the fact of inconsistent accounts as to why something has happened have for many years, if not centuries, been regarded as a basis from which inferences can be drawn by tribunals of first instance. The statutory provisions as to the reversal of the burden of proof and the jurisprudence, which has grown up around them, exclude actual consideration of the substance of the explanation but if the fact that there have been a number of inconsistent explanations or reasons put forward is to be excluded from consideration as to whether the burden of providing a non-discriminatory explanation should pass to the Employer (and the Claimant's case, therefore, fail at that stage) then the Employment Tribunal has been put into a strange position in contrast to other courts and tribunals that have to make factual findings. We can see no basis for excluding from consideration the fact that there have been a number of differing and inconsistent reasons advanced for particular behaviour. Therefore, in this appeal we do not accept that the Employment Tribunal erred by taking into account that there had been differing and inconsistent explanations advanced by the Employer when deciding that the burden of proof had been reversed. It is the fact of the inconsistency that is being included not the explanations themselves.”

40. Claimant's will accordingly, wish to draw attention to any inconsistency. As discussed below, questionnaires can be particularly valuable to achieve this. For Respondents, clear record keeping and consistent and cogent evidence supporting the rationale of any decision will prove to be vital.

Unreasonable Behaviour

41. Lastly, we say a brief word about unreasonable conduct. Whilst the case of ***Bahl***, undoubtedly limits the ability to rely upon unreasonable conduct to found a claim of discrimination (unreasonable conduct is not enough) this does not preclude unreasonable conduct forming part of a *prima facie* case. This much was made clear by the Court of Appeal in ***Anya***. This will always depend on the precise circumstances of case. Claimants will be wise to make this a *part* of their case but not its sole strength. Conversely, Respondents will need to undergo some soul-searching where unreasonable conduct is relied upon by the Claimant. They will need to decide whether to resist the claim on the basis the conduct was not unreasonable or that it was unreasonable but non-discriminatory. Whilst possible to advance both in the alternative, this will require careful consideration to ensure the prospects of the fall-back defence are not jeopardised.

Tactical Tips

42. As we have seen, whilst direct evidence will always be preferable, many cases will depend upon indirect evidence, certainly at ***Igen*** stage 1. Both Claimants and Respondents will therefore want to shape the case to their best advantage. How this will evolve in any case will depend upon how the claim and response has been framed. Whilst there are many tools at the disposal of the parties, it is worth returning to basics as 4 core tools will naturally form the pillars of good case preparation:
- a) Questionnaires;
 - b) Pleadings;
 - c) Requests for Additional Information; and
 - d) Disclosure exercise.

²¹ At paragraph 57

Questionnaires

43. Whilst the prescriptive statutory regime has been repealed, questionnaires nonetheless continue to play an important role. Claimants can use them to require the Respondent to set out their reason for any difference of treatment. It is often the case that the more occasions on which a person states their position, the greater the chance of an inconsistency presenting itself. Moreover, Claimants can use this as an opportunity to seek statistics at an early stage. Respondents should be careful to answer questionnaires timeously, fully and accurately.

Pleadings

44. Many claims have two features which a Respondent can expose:
- a) Vague allegations; and
 - b) No provision pointing to the “*something more*”.
45. Whilst Claimants are entitled to base their case on disclosure, a claim will be greatly improved if it clearly identifies (a) what has happened and (b) what *something* suggests this was because of discrimination. Filing a questionnaire before pleading a case can be invaluable in helping to formulate such a case.
46. Respondents will want to be alive to the prospect of inconsistent explanations. The time limit for filing a response is very small. Using the early conciliation process to investigate an impending claim would be time well spent.

Requests for Additional Information

47. Whereas Claimants have at their disposal the questionnaire to identify weakness in the Respondent’s case, Requests for Additional Information provide a similarly effective tool for Respondents. It enables questions to be posed to the other party to elicit information. This is typically a response to the party’s pleaded case, but is not necessarily limited to such documents. It is particularly effective where one party has failed to plead its case clearly and fully.
48. Whether this tool is used by Claimants or Respondents, it should be done strategically and consciously. It may be of greater advantage for a poorly pleaded case to remain that way. There are however, many occasions when a carefully constructed RAI can be used to strengthen a case or weaken the other sides case. First and foremost, where one party is unsure of the case it must meet, an RAI is the vehicle to seek that clarity. It may however, be used to expose weaknesses, particularly where a party has adopted a nonsensical or misconceived position. The RAI may serve to expose the weakness, especially where the party fails to provide an adequate response. Equally, relying on inconsistency is not just in the gift of the Claimant. It is often the case that an exposed weakness results in a case shift. This will likely yield a material inconsistency which can be relied upon later.

Disclosure exercise

49. If the parties have used the other 3 tools effectively, they will be best placed to use the disclosure exercise to their advantage. A Claimant who has obtained valuable information from a questionnaire will be able to clearly and effectively plead their case, informing what information the Respondent must disclose to them. A Claimant will want to capitalise on any failure to disclose documents, particularly records of decisions and press that advantage accordingly. A Respondent who has pleaded its response effectively and/ or used RAIs to poke holes in the claim may achieve a narrowing of the issues and thus limit the scope of disclosure which would necessarily apply.

Conclusion

50. Understanding how to prove or disprove discrimination must naturally start with an appreciation of the burden of proof and what is required. Following a line of authorities culminating in *Igen* (as approved by *Hewage*) the burden involved a two-stage, the first requiring the Claimant to prove a *prima facie* case from which discrimination can be inferred. The second stage being for the Respondent to disprove discrimination. For the time being, that line of authorities is in question with the EAT in *Efobi* concluding that s.136 places no burden on the Claimant at all. That case is currently under appeal. Claimants would be sensible to assume it will be reversed.
51. In either case, the two-stage test remains (regardless of who must prove the first stage). What is particularly important is that a difference in treatment and difference in status is insufficient to satisfy that first stage (see *Madarassy*). Moreover, unreasonableness or bad conduct is not sufficient to found a claim for discrimination (see *Bahl*), although in some cases it may be sufficient to establish a *prima facie* case, especially where the Claimant relies upon a hypothetical comparator.
52. It will always be preferential to rely on direct evidence, but this will seldom be available. Most cases will be based upon indirect evidence. Whilst this can take many forms, the following will invariably be of use:
- a) Statistical evidence: showing a correlation between a decision and status;
 - b) Record keeping: showing the rationale for a decision (or absence thereof);
 - c) Disclosure: failures in this exercise can establish a *prima facie* case;
 - d) Inconsistency: An inconsistent reason by R can also establish a *prima facie* case; and
 - e) Unreasonableness: Insufficient to prove discrimination, but *may* be sufficient for a *prima facie* case.
53. The ability to secure such indirect evidence will often depend upon how a case is constructed. The parties accordingly have the following tools available to help frame the issues and expose the other side's weaknesses:
- a) Questionnaires;
 - b) Pleadings;
 - c) Requests for Additional Information; and
 - d) Disclosure exercise.

Allan Roberts
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