LAW PUNDITS

Burden of Proof in Equality Claims

Burden of proof in equality claims

(This is the law that is followed in England and Wales)

NB: THIS PRACTICE NOTE COVERS THE LAW WHICH APPLIES ON OR AFTER 1 OCTOBER 2010 (EQUALITY ACT 2010)

For information on the law which applied before 1 October 2010, refer to Burden of proof in discrimination instead.

The statutory burden of proof test

The Equality Act 2010 prescribes a two-stage process for dealing with the burden of proof. It applies to any proceedings relating to a contravention of the Act, including a breach of an equality clause or rule.

The process does not apply to proceedings for any criminal offence under the Act.

Overview of the two-stage test

Stage 1 -- the tribunal must consider if there are facts from which it could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned.

Stage 2 -- if stage 1 is satisfied, the tribunal **must** hold that the contravention occurred, unless A shows that A did not contravene the provision.

The Explanatory Notes to the Act states that, in any claim where a person alleges discrimination, harassment or victimisation under the Act, the burden of proving his or her case starts with the claimant. Once the claimant has established sufficient facts, which in the absence of any other explanation point to a breach having occurred, the burden shifts to the respondent to show that he or she did not breach the provisions of the Act.

However, the actual wording of the Act would appear to be neutral as to stage 1. This may be intended to reflect case law in relation to the discrimination legislation that preceded the Act, which stated that, in deciding that at stage 1, whether a *prima facie* case has been made out, the tribunal should take into account *all* the material facts. That included factual evidence adduced by both the claimant and the respondent, despite the earlier legislation explicitly stating that, at stage 1, it was for the claimant to prove the requisite facts.

Stage 1

'Could decide' means that a reasonable tribunal could properly reach the conclusion, from all the evidence before it, that the respondent *did* commit (or is otherwise liable for) such an act. It does **not** mean merely that the tribunal could decide that the respondent *could have* committed such an act.
References: Madarassy v Nomura International [2007] IRLR 246, paras 54-58

The tribunal will therefore have to decide whether there are facts which do more than simply prove:
References: University of Huddersfield v Wolff [2004] IRLR 534

- that the claimant has been treated differently from a comparator and
- that the comparator is of a different gender, race, religion etc

The tribunal will need to decide whether there is a *prima facie* case that the claimant has been less favourably treated because of one of the protected characteristics. For instance, a female claimant seeking to make out a prima facie case of direct sex discrimination in a case involving a failure to promote would have to do more than show that a male comparator had been promoted to the post she applied for. In view of the 'like for like' requirement that the relevant circumstances in the claimant's case be the same or not

materially different in the case of the comparator, the claimant would also have to show not only that she met the stated qualifications for promotion to the post but also that she was at least as well qualified as the successful candidate.

Dresdner Kleinwort Wasserstein v Adebayo [2005] IRLR 514

In many cases, whether or not a *prima facie* case has been made out will depend on whether discrimination should be inferred from the primary facts. Although, at stage 1, the statutory formula requires the tribunal to assume the absence of any other explanation for the conduct complained of, even on that assumption, it may or may not be legitimate at stage 1 to draw such an inference.

Madarassy v Nomura International [2007] IRLR 246, para 77

Where there is conduct by a respondent which is merely shown to be unreasonable or unfair, tribunals should exercise caution before too readily inferring discrimination, if there is no evidence of other discriminatory behaviour because of the same alleged protected characteristic.
References: Igen v Wong [2005] IRLR 258, para 51

Where, even in the absence of an adequate explanation for the conduct, it would not be reasonable for a tribunal to infer that there has been a contravention of the Act, stage 1 will not have been satisfied and the claim will fail (ie the burden of proof will not shift to the respondent and stage 2 will not apply).

Stage 2

If the tribunal is satisfied that there is a *prima facie* case of discrimination at stage 1, it is then for the respondent to prove, at stage 2, that it did not contravene the provision.

At stage 2, the respondent cannot simply assert that it did not contravene the provision; it must prove it with evidence, either:

- by showing that there is an explanation which is entirely innocuous and does not involve any discrimination, or
- by showing that there is an explanation which puts the employer in a bad light but nonetheless does not in fact involve any discrimination (eg where the employer brings evidence to show that they always treated everyone that badly and, hence, that their treatment of the claimant had nothing to do with gender, race, religion etc)

The respondent must prove, on the balance of probabilities, that the treatment was in no sense whatsoever (ie consciously, subconsciously or unconsciously) done because of the relevant protected characteristic.
References: Igen v Wong [2005] IRLR 258, Annex (para 11 revised Barton guidance)

The respondent will fail at stage 2, and a finding will be made against it, if the tribunal concludes that it has failed to prove this.

In order for a respondent to fail at stage 2, it is sufficient for a tribunal to conclude that it was not persuaded by the explanation proffered; it is not necessary for the tribunal explicitly to reject that explanation in its findings. Discriminatory motivation may well be subconscious -- something notoriously difficult to prove or disprove -- and a tribunal may reasonably prefer to go no further than saying that the burden of proof has not been discharged. However, wherever possible, it is preferable for a tribunal to make positive findings one way or the other.

References: Pothecary Witham Weld v Bullimore and Sebastians Solicitors [2010] IRLR 572

However, even if a tribunal rejects the reason put forward by the respondent for its conduct, the tribunal's own findings of fact may identify an obvious non-discriminatory reason for the treatment in issue, which can provide a sound basis for concluding that there had been no discrimination.
References: Khan v The Home Office [2008] EWCA Civ 578

Bahl v Law Society [2004] IRLR 799

It does not follow that, because the respondent was guilty of unlawful discrimination in the past, that it is also guilty in relation to other more recent matters. This is so even if the more recent behaviour is unreasonable and/or unfair. An employer does not have to establish that it acted reasonably or fairly in order to avoid a finding of discrimination, it has only to establish that the true reason was not discriminatory.
References: Khan v The Home Office [2008] EWCA Civ 578

Network Rail Infrastructure v Griffiths-Henry [2006] IRLR 865, at paragraph 22