

## Group Briefing

### March 2019

# Consideration of the Burden of Proof in Direct Discrimination Cases

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This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

The Court of Appeal of England and Wales recently considered the burden of proof faced by a claimant in a discrimination claim. In *Efobi v Royal Mail Group Limited*, the Claimant, a joint Irish and Nigerian citizen and employee of the Royal Mail, brought proceedings for both direct and indirect discrimination under the UK Equality Act 2010 in relation to 22 unsuccessful applications to transfer to other divisions of the Royal Mail's operations.

### UK EMPLOYMENT TRIBUNAL'S DECISION

An UK Employment Tribunal (**ET**) found that there had been no direct discrimination with respect to the job applications. It considered the two stage test enunciated in section 136(2) and (3) of the 2010 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.*

In applying the test, the ET concluded that the Claimant had failed to adduce sufficient evidence to discharge the burden at stage one (*subsection 2*), and that, in any event, the Royal Mail had disproved any suspicion of discrimination at stage two (*subsection 3*).

### ON APPEAL TO THE UK EAT

The Claimant appealed to the UK EAT. Contrary to established authorities, the EAT held that section 136 of the Act did not require the Claimant to establish, as a preliminary step, a *prima facie* case. Rather, the EAT concluded that the tribunal was required to consider all of the evidence presented over the course of the hearing, from all sources, in order to determine whether discrimination had occurred. The EAT found that the ET had erred in law in imposing the burden of proof at stage one (*subsection 2*). It remitted the case back to another ET division in order to consider the issue of direct discrimination *de novo*.

### THE COURT OF APPEAL'S DECISION

The Royal Mail appealed the EAT's decision to the Court of Appeal of England and Wales. In its judgment, the Court of Appeal rejected the

conclusion reached by the EAT and affirmed the judgment of the ET. It found that the Claimant had neither (i) supported his claims with sufficient factual evidence nor (ii) pointed to a specific comparator against whom he could be compared.

In concluding that the ET had been manifestly entitled to reach the conclusion that it had, the Court of Appeal lamented what it deemed the EAT's "erroneous" analysis of the Act. Ultimately, the Claimant could not succeed as he had failed to adduce evidence to enable the ET to identify an appropriate comparator, and therefore to determine whether he had a prima facie case of discrimination.

### IRISH LAW

In Ireland, section 85A of the Employment Equality Acts 1998 to 2015 provides:

*(1) Where in any proceedings facts are established by or on behalf of a complainant from which it may be presumed that there has been discrimination in relation to him or her, it is for the respondent to prove the contrary.*

Thus, the claimant must establish a prima facie case of discrimination, i.e. the claimant must establish both the primary facts upon which he or she relies and that those facts are of sufficient significance to raise an inference of discrimination.

### ADVICE TO EMPLOYERS

This case provides clarity on the burden of proof that rests on complainants when bringing claims of direct discrimination. Although obviously a decision of the Courts of England and Wales, and decided by reference to

UK legislation, there are some useful learnings in an Irish context.

When recruiting for positions, whether internally or externally, employers must:

1. be cognisant of the nine grounds of discrimination set out in the Employment Equality Acts 1998 to 2015 when setting out selection criteria;
2. ensure that selection criteria can be plainly and objectively justified and are unrelated to those nine grounds; and
3. keep detailed records of decisions made (rationale/scoring sheets for short-listing/not short-listing, scoring criteria/marks at interview, interview notes, etc) during a recruitment process.

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