Discrimination: Burden of Proof

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The facts

Mr Efobi, a black Nigerian, was employed by the Royal Mail Group as a postman. Having unsuccessfully applied for many posts in the management/IT service area, he brought direct and indirect race discrimination claims in the employment tribunal in relation to his unsuccessful applications for some of them. His tribunal claims were unsuccessful, and he appealed in the EAT against the finding that there had been no direct discrimination.

The EAT held that the employment tribunal's approach to the burden of proof had been wrong. Before the Equality Act 2010 was introduced, case law had made clear that there was a two stage test for the burden of proof in discrimination claims. First, the burden was on the employee to establish facts from which a tribunal could conclude, on the balance of probabilities, absent any explanation, that the alleged discrimination had occurred. If the employee did establish these facts (and the tribunal had found that Mr Efobi had not established these facts), the burden would then shift to the employer to explain the treatment, and to try to satisfy the tribunal that the treatment was not tainted by discrimination. If the employer did not manage to do so, the tribunal would make a finding of direct discrimination. However, when the Equality Act 2010 was introduced, replacing previous discrimination legislation, the wording had changed. The EAT considered that, in view of the change of wording, the law had changed and there was no longer any burden of proof on the claimant at the first stage, and the tribunal had erred in imposing this burden. The EAT therefore held that the tribunal had been wrong in the applying the two stage test.

On appeal, following an earlier Court of Appeal case on the same point, the Court of Appeal held that the two stage approach to the burden of proof for discrimination claims should still be followed. So, the employment tribunal had applied the correct test.

The Court of Appeal looked at the factual analysis of evidence which had been carried out by the employment tribunal. It decided that the tribunal had enough evidence to warrant its conclusion that Mr Efobi had not discharged the burden of proof at the first stage of the test. It was up to Mr Efobi to provide evidence to support his case at the first stage and he had not done so. He had not provided any relevant information about the identity or qualifications of any of the other candidates, including the shortlisted or successful ones, nor had he shown that his colour or country of origin was actually known to any particular hiring manager or recruiter.

What does this mean for employers?

The Court of Appeal decision is good news for employers: the EAT decision had cast doubt on the correct test for the burden of proof, and the consequences of this for employers was unhelpful . This decision, confirming another recent Court of Appeal decision, reinstates the long standing test, meaning that claims that do not have a sound factual base and merely make assertions of discrimination may not, as was the case with Mr Efobi, get past the first hurdle.

Royal Mail Group Ltd v Efobi

Authors

Zoë Wigan
London - Walbrook
zwigan@dacbeachcroft.com

Ceri Fuller
London - Walbrook
cfuller@dacbeachcroft.com