A whole hog approach to the burden of proof? The dangers of 'salami slicing' a judgment

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Parmar v Leicester City Council [2024] EAT 85

1. When considering an appeal against the application of the shifting burden of proof, the Employment Appeal Tribunal ('EAT') in **Parmar v Leicester City Council** reaffirmed the importance of looking at the conclusions of the Employment Tribunal as a whole; not '*salami slicing*' the judgment into multiple components. This case provides a useful summary of the principles applicable when considering the shifting burden of proof in discrimination cases under s136 Equality Act 2010 ('EqA') and some tips to remember when bringing an appeal.

Overview of the decision

2. The Claimant was a long-standing employee of the Respondent who had never been subject of any disciplinary proceedings or performance measures.

3. There were poor relations between the Claimant's service area and another service area within the same division of the Respondent. Ms Lake, the Director of Adult Social Care and Safeguarding ('the Director'), had to deal with this conflict.

4. A number of incidents occurred, and complaints were raised, in this context. In brief, it was found that whilst the Director only took informal action against some white British employees, the Claimant (who described herself as being a British national of Indian origin) was subjected to a formal disciplinary investigation. The allegations against her were vague, such as '*failing to behave in accordance with agreed management/leadership standards*'. The Claimant was also temporarily transferred from her role as Head of Service.

5. The Claimant claimed that she was subjected to direct race discrimination in respect of the allegations made against her, the disciplinary investigation process and the transfer of her role.

6. The Employment Tribunal considered and cited the well-known cases of **Igen Ltd (Formerly Leeds Careers Guidance) and Others v Wong [2005] EWCA Civ 142**, and **Madarassy v Nomura International plc [2007] EWCA Civ 33**, and decided that the burden of proof had passed to the Respondent. The primary reason given was the disparity in treatment between the Claimant and other white employees who were only dealt with informally. The Tribunal cited examples where the Director had only pursued informal solutions against white employees, for example when they had admitted to swearing, sent an email which had led to a collective grievance and where strong allegations were made by another employee. This was compared to the formal action against the Claimant.

7. The Tribunal also specifically found that the only employees that the Director had ever disciplined were of Asian ethnicity.

8. It further concluded that the Claimant had not understood what she was supposed to have done wrong, and that there was nothing of substance to start a disciplinary investigation.

9. The Tribunal also drew an adverse inference from the failure of the Respondent to disclose relevant evidence.

10. It finally considered the 'non-discriminatory motives' put forward by the Respondent and concluded that the Respondent had failed to discharge the burden of proof.

11. In summarising its own findings on the 'disparity' of treatment it set out the following;

    We conclude on the evidence that when it came to assessing the merits of behaviour allegations against white employees such as HM, AE and JR, Ms Lake was slow to move to formal measures. In the case of the Claimant she moved fairly speedily to investigation and suspension for something which was either at the same or lower level of alleged misconduct. We are satisfied that race played a part in her decisions. There is no other credible explanation.

12. Based on this analysis, the Tribunal upheld the majority of the Claimant's claims for direct race discrimination.

13. The Respondent appealed the judgment on 11 grounds. These grounds effectively argued that the Tribunal had misapplied the law when considering the burden of proof, and that its findings in respect of the burden of proof were perverse.

14. The appeal was dismissed on all grounds, with the EAT finding that the Tribunal had provided adequate reasoning and had not misapplied the law. The judgment of the EAT provides useful reminders of the application of the burden of proof, and I cover these key points below.

Analysis

Does the burden of proof need to be considered separately for each allegation?

15. Not always. The EAT concluded that the case of **Essex County Council v Jarrett [2015] UKEAT 0045/15/041** was not authority for the proposition that in every case in which there are a number of allegations the Employment Tribunal will err in law if the burden of proof under s136 EqA is not considered separately for each allegation. The EAT distinguished between the circumstances in **Jarrett** where a 'blanket approach' was not appropriate, where there were multiple allegations against a number or different individuals that were not apparently linked, and the instant case where the allegations were against one individual and related to the same '*initiating and progressing an unwanted formal disciplinary investigation'* (para 60).

16. The EAT also referred to the case of **Commissioner of Police of the Metropolis v Maxwell [2013] EqLR 680.** This was a case involving 120 allegations of discrimination where the EAT specifically concluded that there was no obligation on the tribunal to refer to the two-stage process in relation to each and every complaint, if it considered it inappropriate.

17. Ultimately the EAT clarified at paragraph 59;

    There may be some circumstances in which a blanket approach is inappropriate, but others in which it is permissible. All depends on the facts of the case, including the nature and number of allegations and whether there are a number of alleged perpetrators. Save in the clearest of cases the EAT should be slow to decide that the Employment Tribunal, that was best placed to make that assessment, got it wrong.

The applicability of a mere difference in treatment

18. The Respondent relied upon the well cited statement in **Madarassy** that *'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination'.*

19. In considering the Respondent's argument that the Tribunal had wrongly established a shift of the burden of proof based either on a mere difference in status or treatment, or mere unreasonable treatment, the EAT emphasised that '*comparing the treatment of a claimant with that of another person is a subtle business*' and is '*highly context specific'* (para 66). The EAT referred in detail to the recent analysis carried out Cavanagh **J Martin v St Francis Xavier Sixth Form College Board of Governors [2024] EAT 22** at 54-68, which is helpful to read in full when considering this issue.

20. The EAT went on to state at paragraph 66 that "*Where such a comparison is made, as part of an analysis of a range of relevant factors, it is not valid to pick apart small components of the comparative analysis, and to trot out the well-worn phrase that there is nothing more than a mere difference of status and treatment, <u>while ignoring all of the other relevant findings of the tribunal that contributed to the overall analysis</u>*". Similarly, this should not be done when focusing on '*mere unfairness'*. The EAT reaffirmed that the well-cited case of **Glasgow City Council v Zafar [1997] 1 W.L.R. 1659** deals with circumstances "*in which <u>the only evidence is of unfair treatment, not to where there is unfair treatment of a person with one protected characteristic but not of a person with a different protected characteristic or, indeed, where there is reason to believe that the employer would normally act reasonably</u>*" (para 68).

21. In summary, the EAT provided helpful guidance on when the mere difference from treatment argument is unlikely to apply, namely "*if there are <u>multiple examples of different treatment</u> between those of different status, and of unfair treatment, it is unlikely to be a case where it can be said that there is mere difference of status and treatment and/or mere unfair treatment*" (para 71). In the instant case they found that the core reasoning of the Employment Tribunal was the opposite of a mere difference in status and difference of treatment;

> *A number of employees of different race to the claimant have not been subject of formal disciplinary proceedings in circumstances similar to those in which the*

claimant was. The similarity of the circumstances, and the fact that a number of employees of different race have been treated more favourably, obviously establishes more than a mere difference of treatment and status. If what the Employment Tribunal found is not evidence that could support a claim of race discrimination it is hard to imagine what is. It was the totality of the evidence that resulted in the shift. (para 73)

22. The approach of the Respondent of 'salami slicing' the judgment and conducting an individual assessment of mere difference in treatment, was therefore found to be inappropriate.

How should comparators be approached?

23. The EAT clarified that the case **The Chief Constable of Cambridgeshire Constabulary v McLachlan [2003] EAT/0562/02/RN** did not set out a general principle that in every case in which there is not an actual comparator the Employment Tribunal must set out the characteristics of a hypothetical comparator in elaborate detail.

Inference of discrimination from disclosure failures

24. The EAT further did not find that there had been an erroneous approach to drawing an adverse inference from a failure to disclosure relevant evidence. Whilst it accepted the approach in **D'Silva v NATFHE [2008] IRLR 412**, that the failure in supplying documentation should not automatically raise a presumption of discrimination, it found that this had not occurred in this case. The inference was "*a minor factor, amongst many other, that resulted in the burden shifting"* (para 94).

General lessons for bringing appeals

25. In delivering his judgment, HHJ Tayler made a number of critical remarks in respect of the number of grounds of appeal, reminding the parties that Section 3.8.1 of the EAT Practice Direction 2023 provides: *An error of law should be easy to identify in a few words. The experience of the Judges of the EAT over many years is that short and focussed grounds of appeal are usually more persuasive than a long one and, in general, the more grounds raised the more it suggests that none is a good one.*

26. HHJ Tayler may it clear that "*multiple grounds of appeal, inevitably with a myriad of sub-grounds, are an invitation not to see the wood for the trees" (*para 55*)*. This is a helpful reminder for parties to step back and consider the judgment as a whole before drafting

precise appeal grounds, as this is the approach the EAT will take (see **DPP Law Ltd v Greenberg [2021] ICR 1016** at paras 57-58).

27. It is also noteworthy that HHJ Tayler considered that the length of the grounds of appeal somewhat undermined the Respondent's arguments that there had been a lack of reasoning by the Tribunal; "*Were the reasons of the Employment Tribunal so lacking, it is hard to understand how the respondent managed to find 11 grounds of appeal to challenge them"* (para 83). This is another helpful warning of the risks of over-pleading your case.

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