

EQUALITY COMMISSIONS' PANEL UPDATE TRAINING

UPDATE ON RACE DISCRIMINATION DEVELOPMENTS APRIL 2005

Burden of proof

1. *Igen Ltd and Ors v Wong; Chamberlin Solicitors and Anr v Emokpae; Brunel University v Webster and Ors* 2005 EWCA Civ 142; 2005 IRLR 258
- 1.1 This case is important reading in all areas of discrimination law. The CA approves (with amendments) the guidelines on burden of proof provided by the EAT in *Barton v Investec Henderson Crosthwaite Securities Ltd* 2003 IRLR 332 and makes clear that the guidelines apply in all types of discrimination cases. The importance of the case is emphasised by the fact that all three equality commissions intervened.
- 1.2 The case deals with the issue of burden of proof following the legislation amending the three Acts (s63A(2) SDA; s54A RRA; s17A(1C) DDA) and the 2003 Regulations on religion, belief and sexual orientation.
- 1.3 The court made a number of general observations.
- 1.4 The main guidance is the statutory language itself. There is no error in law in failing to refer to the *Barton* Guidelines
- 1.5 The correct approach is two stage. The first places the onus on the claimant to prove the existence of facts from which the tribunal could conclude, on the balance of probabilities, that the respondent has committed an unlawful act of discrimination. If the first stage is achieved, the second stage is for the respondent to prove that he did not commit the unlawful act.
- 1.6 That approach does not mean that the hearing is divided into two. Tribunals will want to hear all of the evidence, including any explanation by the employer before deciding whether the first stage is satisfied, and if so, whether the respondent has discharged the onus on it.
- 1.7 However, a tribunal must not take account of the employer's explanation at the first stage when considering what conclusions or inferences can be drawn from the primary facts. The *Barton* guidelines are amended to that extent.
- 1.8 The 2003 amendments did not codify the existing law: they changed it.
- 1.9 The tribunal is not obliged formally to construct a hypothetical comparator: although a failure to properly identify the characteristics of such a comparator might lead to error on the question of whether there has been less favourable treatment.

Direct discrimination: comparators

2. *Madden v Preferred Technical group Cha Ltd and Anr* 2005 IRLR 46

2.1 The Irish claimant was summarily dismissed by reason of his conduct. The ET decided that he was unfairly and wrongfully dismissed but rejected the discrimination claim. The EAT allowed his appeal and remitted to the ET. He lost again and appealed once more to the EAT. He lost this time and appealed to the CA. The events happened before the burden of proof amendments came into force.

2.2 As for comparators, the Wall LJ held (paragraph 87) that he did not:

“accept the argument that the hypothetical comparator in a case under RRA 1976 must be, in effect, a clone of the applicant in every respect (including personality and personal characteristics) except that he or she is or a different race. Nothing that I read in the speeches in Shamoon leads me to that conclusion, nor does the Statute.

2.3 Wall LJ went on:

“As I understood Mr. David Jones’ argument, it was to the effect that if the only permissible distinction between an applicant and a hypothetical comparator was nationality, then it followed that if a Tribunal has found that the applicant before it had been treated less favourably than a hypothetical comparator would have been, the Tribunal should go on, as a matter of logic, to find that the less favourable treatment must have been on the grounds of race. In other words, since ... the Tribunal had found less favourable treatment, it was not permissible for them – using a properly constructed hypothetical comparator - to reach any other conclusion than that the less favourable treatment was on racial grounds.

If this was the argument, I am unable to accept it. If it were right, every case of alleged race discrimination in which there was a hypothetical comparator and less favourable treatment would result in a finding in the applicant’s favour. Whilst in no sense underestimating either the importance of making such findings where appropriate or the difficulty sometimes in doing so, the reality is, as the Tribunal pointed out in paragraph 11 of its reasons in the first decision, that many employees are treated less favourably than others day in and day out without it necessarily following that the less favourable treatment is on the grounds of race or nationality.

2.4 The claimant contended that since the ET had found that he had been afforded less favourable treatment, and also found that no satisfactory explanation had been offered, the ET was obliged either to have found that there was unlawful discrimination or to have provided adequate reasons for not doing so. However, the CA held that *“Having found less favourable treatment, and an unsatisfactory reason for it, the Tribunal were not, as a matter of law, obliged to find that the less favourable treatment was on racial grounds.”* Since looking at the whole decision, it was clear that the reason for the

unfavourable treatment was not race, but a poor working relationship, that was the answer why the inference was not drawn.

Drawing inferences

3. *Rihal v London Borough of Ealing* 2004 IRLR 642

3.1 The claimant was a Sikh, Indian born and a surveyor in the Council's housing department. For a period of 7 years, equally or more poorly qualified white colleagues were promoted to senior posts over his head. All the new senior management posts in the housing department were held by white people, while 25% of senior management in other departments were non-white (in a borough comprising 40% non-white). A formal grievance was not answered for 14 months. He complained of a continuing policy of discrimination and that there was a 'glass ceiling' in place preventing him and others from promotion.

3.2 The tribunal agreed as did the EAT and the CA. The ET concluded that there was a 'a force in existence throughout that prevented [senior management] from picturing a turban-wearing Sikh with a pronounced accent in the managerial roles which a person of [the claimant's] qualification and experience could easily have achieved". That "force" was a racial ground. The CA agreed with the general approach of the ET which was to examine the whole picture and not to take the individual elements in isolation. Had it done so, that would have overlooked the relevance which the wider picture may have had to the decisions reached on individual complaints. The CA also held that the ET was entitled to take into account the 'glass ceiling' in determining whether the decisions not to promote were based on racial grounds.

4. *Bahl v Law Society of England and Wales* 2004 IRLR 799 (CA)

4.1 This well-known case reached the CA last summer.

4.2 After winning before the ET, at the EAT, the claimant lost. The EAT held that the tribunal had erred in law: in inferring discrimination from the mere fact of the unreasonable behaviour of the president and secretary-general of the Law Society; in failing to consider properly the possibility that the reason for the unreasonable behaviour towards the claimant was genuine antagonism, unrelated to race or sex; in finding that the general-secretary's use of certain language [Belsen, lebensraum, 'girlish charming chatter'] inferred discrimination; and in failing to distinguish between the sex and race discrimination elements.

4.3 The CA refused the appeal. Unreasonable treatment is insufficient in itself to prove unlawful discrimination: *Zafar v GCC* 1998 ICR 198.

4.4 As far as drawing inferences from unreasonable conduct, the EAT had said:

"The inference may also be rebutted – and indeed this will, we suspect, be far more common – by the employer leading evidence of a genuine reason which is not discriminatory and which was the ground of his conduct. Employers will often have unjustified albeit genuine reasons for acting as they have. If these are accepted and show no discrimination, there is generally no basis for the inference of unlawful discrimination to be made. Even if they are not accepted, the tribunal's own findings of fact may identify an obvious reason for the treatment in issue, other than a discriminatory reason." The CA commented at paragraph 101:

We entirely agree with that impressive analysis. As we shall see, it resonates in this appeal."

- 4.5 The ET had failed to explain why it concluded that the language used by the secretary-general justified drawing an inference of sexism or racism.
- 4.6 Inadequacies in reasoning in a tribunal's decision can only in a limited category of cases be made good by reference to the party's submissions
- 4.7 The ET had failed to distinguish, as it ought to have done, the sex and the race discrimination elements.

Jurisdiction: employment status

- 5. *Mingeley v Pennock and Anr t/a Amber Cars* 2004 EWCA Civ 328; Times 4 March 2004
 - 5.1 The claimant was a taxi driver had a contract with mini cab firm. The contract was terminated. He claimed discrimination. The case turned on section 78 RRA: whether he was employed "personally do any work or labour".
 - 5.2 The CA upheld the decision of the ET and EAT, and dismissed the application. The tribunal had no jurisdiction. He was under no obligation under the contract to personally do any work; there was no mutuality of obligation. Even if he was, the claim would still fail since, following *Mirror Group Newspapers Ltd v Gunning* 1986 IRLR 27 (CA), such an obligation was not the dominant purpose of the contract.
- 6. *Patterson v Legal Services Commission* [2004] ICR 312
 - 6.1 The claimant was a solicitor who did legal aid work in England. For that, she needed a franchise from the respondent and eventually got one. She complained that she had been over-monitored and audited by the commission in relation to her application and that adverse terms had been imposed; and she made a complaint to an employment tribunal that the Commission had discriminated against her on the ground of race.
 - 6.2 The CA, applying *Gunning*, held as follows. Although under the franchise agreement the applicant was responsible legally for the work performed, no obligation was imposed on her personally to carry out the work; that,

further, even if the applicant was so obliged, the dominant purpose of the contract was to enable the applicant to provide publicly funded legal services and not to ensure that the person who signed the contract personally carried out the work; and that, accordingly, the employment tribunal had no jurisdiction to entertain the applicant's claim under section 4 of the Race Relations Act 1976, since she was not in the "employment" of the Commission as defined in section 78.

6.3 However, in granting a franchise, and thus the right to display the commission's logo and to do publicly funded work on behalf of clients, the commission was conferring an authorisation on the applicant which facilitated her engagement in the solicitor's profession, and the employment tribunal had jurisdiction to entertain her claim under section 12.

7. *North Essex Health Authority v David-John* [2004] ICR 112.

7.1 The applicant was a general practitioner who provided medical services to the respondent health authority in accordance with the National Health Service (General Medical Services) Regulations 1992, which governed the terms of service between general practitioners and local health authorities. Following a dispute with the respondent authority, the applicant resigned. He made complaints against the authority of unfair dismissal and unlawful race discrimination.

7.2 The EAT held that the obligations imposed on a general practitioner by the terms of service set out in the 1992 Regulations were statutory, not contractual. Accordingly, there was no contract governing the relationship between the parties, either of employment for the purposes of section 230(1) of the Employment Rights Act 1996 or section 78(1) of the Race Relations Act 1976, or as contract worker for the purposes of section 7 of the 1976 Act, and the employment tribunal had no jurisdiction to hear the applicant's complaints

Jurisdiction: qualifying body

8. *Medical Protection Society and Ors v Sadek* [2004] ICR 1263

8.1 The claimant was a doctor and member of the MPS. The claimant commenced proceedings against the MPS alleging racial discrimination and claiming that the MPS was a body covered by the provisions of section 11 of the 1976 Act (Discrimination by other bodies; Trades Unions etc.).

8.2 The CA decided that the approach of both the EAT and the ET was erroneous (although the ET did get the right result). It held as follows. The first category, an "organisation of workers", did not exclude an organisation the majority of whose members practised a profession, since

"profession" as defined in section 78(1) included "any vocation or occupation" and, accordingly, a person could be a member of a profession and a "worker"; that, whether independent contractors or engaged under contracts of employment, medical and dental practitioners could be described as "workers"; and that it followed that the respondent society was a "organisation of workers" for the purposes of section 11

Jurisdiction: place of employment

9. *Saggar v Ministry of Defence; Lucas v MoD; MoD v Gandiya* [2004] UKEAT 385_01_1006

9.1 These three conjoined cases concerned the jurisdiction of English ET to deal with claims of sex or race discrimination abroad. Section 8 RRA provided that employees who work "wholly outside" GB are excluded from RRA. (Now, the revised section 8 extends RRA in respect of race or national or ethnic origin discrimination to employees who work wholly outside GB if they are essentially British based workers who happen to be posted abroad.)

9.2 Test is whether, by reference to the period of time when the discrimination occurred, (*Carver Saudi Arabian Airlines* 1999 ICR 991 interpreted and applied), applicant did his or her work wholly abroad. *De minimis* principle applies so that fleeting or minimal presence in England during relevant period does not found jurisdiction.

9.3 There were three relevant issues. First, the period during which it must be determined that the applicant works wholly outside GB. Answer: when the alleged discrimination took place. Next, what is work. Answer: look at the content, whether obliged, duration, regularity. Training could be work. Third, is one day's work in GB sufficient? Answer: no.

Jurisdiction: illegal employment

10. *V v Addey and Stanhope School* 2004 EWCA Civ 1065; (decision of the EAT at [2004] ICR 279).

10.1 Where a claimant complained of race discrimination in employment but his complaints were so inextricably bound up with the illegality of conduct in obtaining and continuing that employment with the employer that, if he were to be permitted to recover compensation for discrimination, the tribunal would appear to condone his illegal conduct, then the employer was entitled to rely upon the defence of illegality.

10.2 The Court of Appeal so held when dismissing the appeal by the claimant, a Croatian asylum-seeker, against a decision of the Employment Appeal Tribunal [2004] ICR 279 dismissing his appeal against a decision of an employment tribunal that he was not entitled on grounds of illegality

to proceed with his claim of race discrimination and victimisation against the defendant school. The claimant had, illegally, obtained paid employment at the school as a teacher and had continued in post for 8 months. On his appeal to the Court of Appeal he claimed that the appeal tribunal had erred in finding that the employer could rely on the defence of illegality.

10.3 Mummery LJ (the rest of the court concurring) said that it was difficult to formulate a test for illegality which worked satisfactorily for all torts; and, as appeared from the sex discrimination case of *Hall v Woolston Hall Leisure Ltd* [2001] ICR 99, the precise basis and exact boundaries of the defence were problematical. However, the test enunciated in *Hall* had the advantage of being flexible, and it also applied to race claims such as the present. Thus, applying the test and inquiring whether the claim was so closely connected or inextricably bound up or linked with the claimant's illegal conduct that the defendant should be permitted to rely on the defence of illegality, the proper conclusion was that the defendant should be so permitted.

10.4 The claimant was in any event not entitled to rely on the Race Discrimination Framework Directive, which contained a provision requiring Member States to ensure that judicial procedures '*for the enforcement of obligations under the Directive are available to all those who consider themselves wronged by the failure to apply the principle of equal treatment*' (Article 7) because the Directive post-dated the commencement of proceedings and did not have retrospective effect.

Compensation

11. *Lisk-Carew v Birmingham City Council and Anr* 2004 EWCA Civ 565

11.1 The claimant had had a difficult employment relationship with the Council. Finally he was dismissed. He raised proceedings alleging unfair dismissal, race discrimination and victimisation.

11.2 The ET held that the dismissal was fair and there was no direct discrimination. However, the allegations, it held, must have had an effect, even if subconscious, on the decision to dismiss. There was therefore victimisation. The tribunal awarded £5,000 for injury to feelings but nothing for the loss of wages since the predominant cause of the loss of employment was the (fair) dismissal, and not the victimisation. The EAT agreed as did the CA.

12. *Essa v Laing Ltd* [2004] EWCA Civ 02; 2004 IRLR 313

12.1 The claimant was a Welshman of Somali origin who was employed as a labourer on a building site. A site foreman of the employer made a racially abusive comment about him causing him immense distress. The

applicant left the site soon after, suffered severe depression, lost interest in boxing and finding other work, and fell into debt.

- 12.2 A majority of the court held as follows (Pill LJ and Clarke LJ, Rix LJ dissenting). A test of simple causation meets the statutory intention in this case. It was sufficient if the damage flowed directly and naturally from the wrong. Reliance on the good sense of tribunals in finding facts and reaching conclusions on them was a sufficient control mechanism to prevent multiplicity of claims and frivolous claims. The present facts were akin to the “torts of assault and battery” in that there was deliberate conduct towards and in the presence of the victim, though the abuse was verbal and not physical. All that needed to be established was the causal link between the racial abuse and the psychiatric illness.
- 12.3 Where the discrimination took other forms, it was possible that different considerations would apply.
- 12.4 While there was a difference between injury to health or personal injury and injury to feelings, the two were not different kinds of damage: they were not inconsistent, might overlap and the injury to feelings might contribute to injury to health.

13. *British Telecommunications plc and Anr v Reid* 2004 IRLR 327 (CA)

- 13.1 The claimant was an engineer who was racially insulted by a colleague, Edwards. He complained to his superiors who began grievance procedures against him and Edwards. It took 14 months for his complaint to go through the whole procedure before it was dismissed. Meanwhile, Edwards was promoted.
- 13.2 The ET held that Edwards had racially discriminated against the claimant and that BT were liable. It awarded £6,000 for injury to feelings. Further, the tribunal considered “*that a sum of £2,000 aggravated damages is appropriate, given that the transgressor, the second respondent, was not punished, remained in his post and achieved promotion to a position higher than the grade of the applicant*”.
- 13.3 The first respondent appealed against *inter alia*, the award of aggravated damages to the EATR, and thence to the CA.
- 13.4 Ward LJ said (at paragraph 28) “*The tribunal were, in my view, entitled to take account of the fact that the transgressor was, as a matter of fact, not punished and remained in post. The striking fact is that Mr Edwards was promoted even though the charges against him had not been determined. I am far from laying down any principle that an employer cannot promote an employee whilst disciplinary proceedings are hanging over his or her head, but it can, in the particular facts and circumstances of a particular case, be a material factor demonstrating the high-handedness of the employer.*” The rest of the court agreed.

14. *British Medical Association v Chaudhary* [2004] UKEAT 1351-01-2403

14.1 The claimant claimed that the BMA had discriminated against him.

14.2 The tribunal found that the claimant had been indirectly discriminated against, and victimised, on racial grounds and made an award of £814,877.41 in compensation including interest and costs. That was the largest single award for racial discrimination ever. The BMA appealed against both decisions.

14.3 The EAT held that the BMA had not discharged the burden on them (under section 57(3)) of proving a state of non-intention to treat the claimant unfavourably on racial grounds: *“A discriminator cannot rely on section 57(3) to prevent a complainant receiving compensation by closing his mind and deliberately refusing to contemplate or recognise the impact and consequences of his indirectly discriminatory conduct. We would regard this as contrary to the proper and purposive construction of the legislation.”* [per Mummery LJ at paragraph 23,25]

14.4 As regards the assessment of 50% chance, the EAT put the matter as follows:

“In considering all these issues we take the view that there are essentially two questions for us to decide. Firstly, was it legitimate for the Tribunal on the facts of this case to adopt a broad brush approach to assessment of loss of a chance rather than a more scientific analysis and assessment in relation to each fact. Secondly, if so, were the Tribunal entitled, given their primary and secondary findings of fact in both the Liability and the Remedies Decisions, to conclude that the loss of the chance was in this case to be assessed at 50 per cent and did they adequately explain their reasons for so finding” [paragraph 40].

14.5 The answer to the first question was *“In our judgment on the facts and findings in this case the Tribunal were not required to make a separate finding on every one of the myriad of points now raised before us. So long as they demonstrate that they have approached the task correctly by considering the evidence and their primary findings of fact, any relevant authorities and the competing contentions of the parties, and so long as they have not adopted a wrong principle of assessment, we take the view that the assessment of the loss of the chance here was a matter for them”*. [paragraph 42]

14.6 As regards the second question, the EAT concluded that the tribunal had done all that they were obliged to do and had made a decision that it was entitled to reach and did so adequately.

14.7 As regards the tribunals assessment of total loss of earnings of £1.25M (before 50% deduction), the biggest single head of claim, the EAT remarked, perhaps rather mildly, that it was surprising that the BMA did not lead any evidence from accountants or experts etc. to counter the claimant’s evidence of loss. Unsurprisingly then, the EAT refused to disturb the tribunal’s assessment of loss under this head.

Indirect discrimination: pool for comparison

15. *Spicer v Government of Spain* 2004 EWCA Civ 1046

15.1 The claimant was employed at a Spanish School in London as a teacher. There were three groups. First Spanish civil servants seconded. Second, British teachers (including the claimant). Third, Spanish nationals living in London. Those in the third group were paid less than those in the second group. Those in the second group received a higher basic pay than those in the first group. Those in the first group also received relocation allowances however, the effect of which was to give them the highest pay. The claimant claimed indirect discrimination. Although the tribunal agreed that there was a condition which had a disparate impact (need to be Spanish recruited in Spain), perversely, it concluded there was no detriment as the claimant's basic pay was higher. (The respondents was barred from pleading objective justification through failure to comply with a tribunal order).

15.2 The EAT agreed that the detriment question had been decided perversely. However it upheld the decision of the ET on the basis that there could be no valid comparison between the Spanish and British teachers at the school. Since the relocation allowance was paid only to those Spanish civil servants recruited in Spain, there was no comparable element in the pay of the British teachers and therefore the like with like comparison required by section 3 could not be made.

15.3 The CA put matters to rights. As a matter of logic (applying *Allonby v Accrington and Rossendale College* 2001 ICR 1189) there could be only one pool to assess disparate impact: all the teachers in the school. The relevant circumstances of all the teachers were the same. The section 3 requirement was met. In effect, the employer was trying to rely on the very thing that led to the difference in treatment (the relocation allowances) as preventing the comparison demonstrating the unequal treatment.

Other developments

16. In May 2004, the CRE published a new draft Statutory Code of Practice on Racial Equality in Employment. It is intended to replace the current version which was published in 1984. The new draft takes account of the Race Relations (Amendment) Act 2000, the Race Relations Act 1976 (Amendments) Regulations 2003 and developments in case law. It is far longer than its predecessor and contains a wealth of practical examples and guidance. The consultation period ended in August 2004. The CRE is still considering the final version which is not yet published.

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APPENDIX

The revised Barton guidance:

Igen Ltd and Ors v Wong; Chamberlin Solicitors and Anr v Emokpae; Brunel University v Webster and Ors 2005 EWCA Civ 142; 2005 IRLR 258; paragraph 76.

"76. As this is the first time that the Barton guidance has been considered by this court, it may be helpful for us to set it out again in the form in which we approve it. In Webster Burton J. refers to criticisms made of its prolixity. Tempting though it is to rewrite the guidance in a shorter form, we think it better to resist that temptation in view of the fact that in practice the guidance appears to be offering practical help in a way which most ETs and EATs find acceptable. What is set out in the annex to this judgment incorporates the amendments to which we have referred and other minor corrections. We have also omitted references to authorities. For example, the unreported case referred to in para. (6) of the guidance may be difficult for ETs to obtain. We repeat the warning that the guidance is only that and is not a substitute for the statutory language.

Annex

(1) Pursuant to section 63A of the SDA, 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 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 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 section 74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the SDA.

(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 section 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.

(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."