EMC HR Bulletin – In Deep with Darren

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Burden of Proof in Discrimination Cases

My heart sinks whenever I see a discrimination case that turns on the question of the burden of proof – because the way in which the Equality Act deals with this issue is frankly a mess.

Generally, in legal cases the person who is asserting something is the one who has to prove it. So if you sue someone for breach of contract, you have to persuade the court that the party you are suing did in fact break the contract. In other words, you bear the burden of proof. In employment law, things are not always so straightforward. In an unfair dismissal claim, for example, the employee must prove that they were dismissed and the employer must then prove the reason for the dismissal. As to the question of fairness, the burden is neutral – the Tribunal just has to decide whether or not it thinks the employer has acted reasonably.

In discrimination law the key question is often why the employer did a particular thing. For example, a dismissal will amount to unlawful discrimination if the employer would not have dismissed a comparable employee who was of a different sex or race than the employee who is alleging discrimination. But the evidence as to why the employer chose to dismiss a particular employee may simply be in the mind of the person who conducted the disciplinary hearing. They are unlikely to explain their discriminatory reasoning in the dismissal letter. How could an employee be expected to prove that they were dismissed for a discriminatory reason?

The solution the Equality Act comes up with is often referred to as the 'reverse burden of proof' – though it is nowhere near as straightforward as that phrase makes out. Essentially, there is a two-stage process. If the employee comes up with evidence that is capable of giving rise to an inference that discrimination has taken place, then the burden of proof is placed on the employer to show that there was in fact no discrimination.

I have heard this referred to as 'guilty until proven innocent' but that is unfair. The Tribunal does not start out requiring the employer to prove it did not discriminate. That stage is only reached if the employee first proves facts from which discrimination could be inferred in the absence of an explanation from the employer.

In very broad terms, the employee must show that it looks as though discrimination might have occurred and only then does the employer bear the burden of proving that it didn't.

The big question of course is when can it be said that the employee has proved facts from which discrimination could be inferred? That issue forms the basis of much of the highly complex case law that has developed in this field.

One of the things that makes it difficult is that the Equality Act describes a two-stage process – but this is not reflected in the way in which cases are heard. The Tribunal does not listen to the claimant's evidence, announce that the burden of proof has now shifted and then invite the employer to present its evidence showing that there was no discrimination. Instead, the Tribunal hears all of the evidence and then applies the two-stage burden of proof test when reaching its decision. Sometimes it bypasses the process together because it feels that the evidence is clear enough for it to reach a conclusion as to whether or not discrimination occurred without thinking in those terms. It can all get very complicated.

The Court of Appeal has just looked at this issue in the case of Leicester City Council v Parmer. Ms Parmer was a senior social worker who was subjected to a disciplinary investigation as a result of a complaint raised by a manager in a different department of being vindictive and unprofessional in the way in which she handled a disagreement between their respective departments. The complaints against her were never fully particularised and the investigation concluded that there was no case to answer. Ms Parmer claimed that the launching of the formal investigation was an act of race discrimination on the part of the manager who had authorised it. The Tribunal found that the burden of proof had shifted to the employer to prove that there was no discrimination. Finding that the employer had failed to prove a non-discriminatory reason for the treatment, the Tribunal upheld the claim.

The question that reached the Court of Appeal was whether the Tribunal was entitled to find that the burden of proof had shifted to the employer. The key reason for that finding was that the manager in question had only ever instigated formal proceedings against managers from an Asian background. However, incidents of similar level of seriousness involving white managers had been dealt with informally.

The employer argued that the Tribunal had not properly considered the differences between the various cases that were being relied upon, and insisted that the allegations made against Ms Parmer clearly justified a formal investigation. However, the Court of Appeal held that this was not the point. The question was whether a formal investigation would have taken place if Ms Parmer was white. There was no suggestion that the other managers were directly comparable with Ms Parmer – their circumstances were not identical. The fact that they were treated more favorably than her was not enough to prove that there was discrimination. But the Tribunal was entitled to find that the difference in the way in which the white managers were treated - despite facing allegations that were actually more serious than those made against Ms Parmer – was sufficient evidence to justify an inference of discrimination in the absence of an explanation from the employer. Given the fact that the employer had never really been able to explain exactly what Ms Parmer was accused of in the first place, it was no surprise that the Tribunal had upheld the claim and the employer's appeal was dismissed.

The fact that the Council took the case to the Court of Appeal indicates how strongly they felt that the accusation of race discrimination was unwarranted. But Tribunals have to work with the evidence that is before them and if employers cannot provide convincing explanations for their actions, then in some cases that will mean that inferences of discrimination will be drawn.

The best protection against a finding of discrimination is for an employer to show that all employees have been treated reasonably and consistently. If they can do that then the question of where the burden of proof lies hardly matters.