Trinity Term

[2021] UKSC 33

On appeal from: [2019] EWCA Civ 18

JUDGMENT

Royal Mail Group Ltd (Respondent) v Efobi (Appellant)

before

Lord Hodge, Deputy President

Lord Briggs

Lady Arden

Lord Hamblen

Lord Leggatt

JUDGMENT GIVEN ON

23 July 2021

Heard on 27 April 2021

Appellant	Respondent
Charles Ciumei QC	David Reade QC
Benedict Tompkins	David Flood
	Georgina Leadbetter
(Instructed by Advocate (formerly known as the Bar Pro Bono Unit))	(Instructed by Weightmans LLP (Liverpool))

LORD LEGGATT: (with whom Lord Hodge, Lord Briggs, Lady Arden and Lord Hamblen agree)

Introduction

1.
The main issue raised on this appeal is whether a change in the wording of equality legislation has altered the burden of proof in employment cases where discrimination is alleged.

2.
Section 54A(2) of the Race Relations Act 1976 provided that where, on the hearing of a complaint of discrimination or harassment on grounds of race:

"… the complainant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent -

(a) has committed such an act of discrimination or harassment against the complainant,

…

the tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed, that act."

3.
This provision was one of a number of similarly worded provisions inserted in UK legislation by amendment pursuant to the European Communities Act 1972 on various dates between 2001 and 2006 in order to implement European Directives. Other such provisions included: section 63A of the Sex Discrimination Act 1975; section 17A(1C) of the Disability Discrimination Act 1995; regulation 29 of the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660); regulation 29 of the Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661); and regulation 37 of the Employment Equality (Age) Regulations 2006 (SI 2006/1031). (In two later provisions, not required by EU law, slightly different wording was used which referred to "a reasonable alternative explanation" instead of "an adequate explanation": see section 66(5) of the Equality Act 2006 and regulation 20(5) of the Equality Act (Sexual Orientation) Regulations 2007 (SI 2007/1263).)

4.
The relevant provisions of the European Directives were also in similar terms. Taking the example of discrimination on grounds of race, article 8(1) of Council Directive 2000/43/EC of 29 June 2000 required member states to take measures to ensure that:

"when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment."

See, in addition, article 4(1) of Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (extended to the UK by Council Directive 98/52/EC of 13 July 1998); and article 10(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

5.
The Equality Act 2010 (the "2010 Act") brought together into a single statute the domestic law prohibiting discrimination on grounds of all protected characteristics. Section 13(1) of the 2010 Act defines direct discrimination as follows:

"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

Section 54A(2) of the Race Relations Act 1976, along with all the other similar legislative provisions referred to at para 3 above, was repealed. They were replaced by section 136 of the 2010 Act, which states:

"**Burden of proof**

(1) This section applies to any proceedings relating to a contravention of this 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. …"

6.
The issue is whether the change of wording from "where … the complainant proves facts" to "[i]f there are facts" in section 136(2) made a substantive change in the law. The answer, in my opinion, is that it did not, for reasons that I will give after indicating how the issue has arisen in this case.

The claim in this case

7.
The claimant, Mr Efobi, was born in Nigeria and identifies as black African and Nigerian. He is a citizen of the Republic of Ireland and holds qualifications in computing from Trinity College, Dublin, and Dublin City University. From 5 October 2011, he has been employed as a postman, initially by Angard Staffing Solutions Ltd, which provides staffing services to the respondent, Royal Mail Group Ltd ("Royal Mail") and, from 27 August 2013, directly by Royal Mail.

8.
Wishing to move from his job as a postman to a management or IT role in which he could put his computing qualifications to good use, the claimant made over 30 applications for such positions within Royal Mail on various dates between 30 December 2011 and 3 February 2015. None of the applications was successful.

9.
In June 2015 Mr Efobi began proceedings against Royal Mail in the employment tribunal, complaining of indirect and direct discrimination in relation to his unsuccessful job applications and harassment on grounds of race. He later amended his claim to add a complaint that he had been victimised at work as a result of bringing his employment claim. In its decision on liability the tribunal upheld the complaint of victimisation and one of the complaints of harassment. The other claims were dismissed.

10.
The claimant appealed against the dismissal of his direct discrimination claim to the Employment Appeal Tribunal: see [2018] ICR 359. The appeal tribunal (Elisabeth Laing J) allowed the appeal on two grounds. These were: (i) that the employment tribunal had wrongly interpreted section 136(2) of the 2010 Act (quoted at para 5 above) as imposing an initial burden of proof on the claimant; and (ii) that the employment tribunal had in any event erred in law in its assessment of the evidence. In the light of these conclusions, the appeal tribunal ordered that the claim be remitted for rehearing.

11.
Royal Mail appealed from this decision to the Court of Appeal: see [2019] EWCA Civ 18; [2019] ICR 750. In the meantime, on an appeal to the Court of Appeal in another case, the decision of the Employment Appeal Tribunal in the present case on the interpretation of section 136(2) of the 2010 Act had been overruled: see Ayodele v Citylink Ltd [2017] EWCA Civ 1913; [2018] ICR 748. When the present case was heard by the Court of Appeal, the court was therefore bound by its previous decision in Ayodele to allow Royal Mail's appeal on this issue. The Court of Appeal (Sir Patrick Elias, with whom Underhill and Baker LJJ agreed) also held that the employment tribunal had not made any error of law in its analysis of the evidence and accordingly reversed the decision of the appeal tribunal.

The issues on this appeal

12.
The claimant appeals to this court on two grounds. The first and principal ground concerns the correct interpretation of section 136(2) of the 2010 Act (the "burden of proof issue"). The second ground maintains that the employment tribunal erred in law in not drawing any adverse inference from the fact that Royal Mail adduced no evidence from anyone who actually dealt with any of the claimant's job applications (the "adverse inference issue").

The burden of proof issue

13.
I will refer to section 54A(2) of the Race Relations Act 1976 and the other similar provisions mentioned at para 3 above which were replaced by section 136 of the 2010 Act as "the old provisions". I did not understand there to be any dispute between the parties about how the old provisions were interpreted by the courts.

Effect of the old provisions

14.
The old provisions established a two-stage process for analysing complaints of discrimination. At the first stage, they placed the burden on the claimant to prove, on the balance of probabilities, facts from which the tribunal could conclude, in the absence of an adequate explanation, that an unlawful act of discrimination (or other prohibited conduct) had been committed. If that burden was not discharged, the claim failed. If such facts were proved, the burden moved to the employer to explain the reason(s) for the alleged discriminatory treatment and satisfy the tribunal that the protected characteristic played no part in those reasons. Unless the employer discharged that burden, the claim succeeded.

15.
The rationale for placing the burden on the employer at the second stage is that the relevant information about the reasons for treating the claimant less favourably than a comparator is, in its nature, in the employer's hands. A claimant can seek to draw inferences from outward conduct but cannot give any direct evidence about the employer's subjective motivation - not least since, as Lord Browne-Wilkinson observed in Glasgow City Council v Zafar [1997] 1 WLR 1659 at 1664: "those who discriminate … do not in general advertise their prejudices: indeed they may not even be aware of them." On the other hand, it would be unduly onerous to require an employer to disprove a mere assertion of discrimination. The aim of the old provisions was accordingly to strike a fair balance by requiring proof of primary facts from which, in the absence of explanation, an inference of discrimination could be drawn; but then, if that hurdle is surmounted, requiring the employer to prove that there has been no contravention of the law. As Advocate General Mengozzi said in Meister v Speech Design Carrier Systems GmbH (Case C-415/10) [2012] ICR 1006, para 22, in explaining the approach to the burden of proof taken in the European Directives which the old provisions were intended to implement:

"A measure of balance is therefore maintained, enabling the victim to claim his right to equal treatment but preventing proceedings from being brought against the respondent solely on the basis of the victim's assertions."

16.

Authoritative guidance on the effect of the old provisions was given by the Employment Appeal Tribunal in Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205 and approved (with slight adjustment) by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] ICR 931. Further guidance was given by the Employment Appeal Tribunal in Laing v Manchester City Council [2006] ICR 1519, which was approved by the Court of Appeal in Madarassy v Nomura International plc [2007] EWCA Civ 33; [2007] ICR 867.

17.
The guidance given by the Court of Appeal in Igen Ltd v Wong and Madarassy was in turn approved by the Supreme Court in Hewage v Grampian Health Board [2012] UKSC 37; [2012] ICR 1054, paras 25-32. Lord Hope of Craighead (with whom the other Justices agreed) said at para 32:

“The points made by the Court of Appeal about the effect of the statute in these two cases could not be more clearly expressed, and I see no need for any further guidance.”

18.
Two points established by this guidance are significant for present purposes.

19.
First, although the old provisions required the tribunal to adopt a two-stage process of analysis, they did not require the tribunal to divide hearings into two parts to correspond to those analytical stages and tribunals were discouraged from doing so: see eg Igen Ltd v Wong, para 19. As Mummery LJ said in Madarassy at para 70:

“… the tribunal does not in practice hear the evidence and the argument in two stages. The employment tribunal will have heard all the evidence in the case before it embarks on the two-stage analysis in order to decide, first, whether the burden of proof has moved to the respondent and, if so, secondly, whether the respondent has discharged the burden of proof.”

20.
Second, although the language of the old provisions referred to the complainant having to prove facts, and there was no mention of evidence from the respondent, the courts held that the tribunal was not prevented from taking account at the first stage of evidence adduced by the respondent in so far as it was relevant in deciding whether the burden of proof had moved to the respondent.

21.
Thus, the Court of Appeal in Igen Ltd v Wong, at para 24, made it clear that the employment tribunal could take account of evidence from the respondent which assisted the tribunal to conclude that, in the absence of an adequate explanation, discrimination by the respondent on a proscribed ground would have been established. In Laing v Manchester City Council [2006] ICR 1519, para 56, it was argued that such evidence was the only evidence from the respondent which the employment tribunal was permitted to take into account at the first stage, and that it was not permissible at that stage to take account of any evidence from the respondent pointing the other way, that is, tending to undermine the claimant’s case. The appeal tribunal rejected that argument. The judgment of the appeal tribunal was given by Elias J (President), who said at para 59:

“In our view the reference to ‘the complainant proves facts’ in section 54A(2) does not mean that it is only the facts adduced by him (plus supporting facts adduced by the respondent) that can be considered; it is merely indicating that at that stage the burden rests on the complainant to satisfy the

tribunal, after a consideration of all the facts, that a prima facie case exists sufficient to require an explanation."

22.
Elias J emphasised in this context the distinction between "facts" and "explanation". In Igen Ltd v Wong the Court of Appeal had made it clear that, in considering at the first stage of the analysis what inferences or conclusions can be drawn from the primary facts, the tribunal must ignore any explanation for those facts given by the respondent and assume that there is no adequate explanation for them: see paras 21-22 and also para (6) of the guidance annexed to the judgment. That assumption is required by the statutory wording and is necessary to ensure that the claimant does not end up having to disprove an explanation advanced by the respondent at the first stage, which would defeat the object of the split burden of proof. In Laing, however, Elias J said (at para 60):

"… the obligation for the employer to provide an explanation once the prima facie case has been established, strongly suggests that he is expected to provide a reason for the treatment. An explanation is just that; the employer must explain. Why has he done what could be considered to be a racially discriminatory act? It is not the language one would expect to describe facts that he may have adduced to counter or put into context the evidence adduced by the claimant." (Emphasis in original)

Thus, in Laing it was held that the employment tribunal had been entitled to rely at the first stage on evidence adduced by the employer that the manager whose conduct was complained of had indiscriminately treated all subordinates in an abrupt fashion, irrespective of their race (see para 57).

23.
In Madarassy the Court of Appeal endorsed this approach. Mummery LJ (with whose judgment Laws and Maurice Kay LJJ agreed) said at para 71:

"Section 63A(2) [of the Sex Discrimination Act 1975] does not expressly or impliedly prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the complainant's evidence of discrimination. The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situations with which comparisons are made are not truly like the complainant or the situation of the complainant; or that, even if there has been less favourable treatment of the complainant, it was not on the ground of her sex or pregnancy."

I comment in passing that the last of the possibilities mentioned in this passage must refer to facts which indicate that, even if there has been less favourable treatment of the complainant, this was not on the ground of her sex or pregnancy. It should not be read as diluting the rule that evidence of the reason for any such less favourable treatment cannot be taken into account at the first stage.

Has the law changed?

24.
As Singh LJ observed in Ayodele at para 100, for seven years after the enactment of the 2010 Act the legal community proceeded on the assumption that no change of substance was made by section 136. That was evidently the government's view when the 2010 Act was enacted, as is clear from the Explanatory Notes which accompanied the Bill during its passage through Parliament. There was no material change between the first and final version of the Explanatory Notes in the explanation given

of what became section 136 of the Act. The final version, published with the Act, explains the effect of this section (at para 443) as follows:

“This section provides that, in any claim where a person alleges discrimination, harassment or victimisation under the Act, the burden of proving his or her case starts with the claimant. Once the claimant has established sufficient facts, which in the absence of any other explanation point to a breach having occurred, the burden shifts to the respondent to show that he or she did not breach the provisions of the Act.”

Another example of the general understanding of the effect of section 136 is the Employment Statutory Code of Practice, published by the Equality and Human Rights Commission in 2015, para 15.32, which states:

“A claimant alleging that they have experienced an unlawful act must prove facts from which an employment tribunal could decide or draw an inference that such an act has occurred.”

25.
The claimant submits that this understanding fails to take account of how the relevant wording has changed. Section 136(2) no longer uses the words “[w]here … the complainant proves facts”. Instead, it adopts a neutral formulation: “[i]f there are facts …”. The meaning of this provision must be discerned from the language used, and not from the language of the old provisions which were repealed by the 2010 Act. The claimant argues that the appeal tribunal was right to hold that the language used in section 136(2) has brought about a substantive change in the law. As it was put by the appeal tribunal (at para 78):

“Section 136(2) does not put any burden on a claimant. It requires the tribunal, instead, to consider all the evidence, from all sources, at the end of the hearing, so as to decide whether or not ‘there are facts etc’... Its effect is that if there are such facts, and no explanation from A, the tribunal must find the contravention proved. If, on the other hand, there are such facts, but A shows he did not contravene the provision, the tribunal cannot find the contravention proved. Long before section 136 was enacted, industrial tribunals were discouraged from acceding to submissions of no case to answer at the end of an applicant’s evidence in a discrimination claim. Section 136 prohibits a submission of no case to answer, because it requires the tribunal to consider all the evidence, not just the claimant’s, and because it is explicit in not placing any initial burden on a claimant. The word ‘facts’ in section 136(2) rather than ‘evidence’ shows, in my judgment, that Parliament requires the tribunal to apply section 136 at the end of the hearing, when making its findings of fact. It may therefore be misleading to refer to a shifting of the burden of proof, as this implies, contrary to the language of section 136(2), that Parliament has required a claimant to prove something. It does not appear to me that it has done.”

26.
The central point made in this passage is that section 136(2) requires the employment tribunal to consider all the evidence from all sources, not just the claimant’s evidence, so as to decide whether or not “there are facts etc”. I agree that this is what section 136(2) requires. I do not, however, accept that this has made a substantive change in the law. The reason is that this was already what the old provisions required as they had been interpreted by the courts. As discussed at paras 20-23 above, it had been authoritatively decided that, although the language of the old provisions referred to the complainant having to prove facts and did not mention evidence from the respondent, the tribunal was not limited at the first stage to considering evidence adduced by the claimant; nor indeed was the tribunal limited when considering the respondent’s evidence to taking account of matters which

assisted the claimant. The tribunal was also entitled to take into account evidence adduced by the respondent which went to rebut or undermine the claimant's case.

27.
The desirability of making this clear explains why the relevant wording has been changed. I would adopt what Singh LJ said in Ayodele at para 103:

"What then is to be made of the fact that the wording of section 136 is different from the predecessor provisions? It seems to me that the answer lies in the fact that the previous wording was not entirely clear that what should be considered at the first stage was all the evidence, from whatever source it had come, and not only the evidence adduced by the claimant. Its express wording was apt to mislead in that regard, as it referred only to the complainant. This had been clarified in the case law on the predecessor provisions, in particular by the appeal tribunal in Laing [2006] ICR 1519, which was approved by this court in Madarassy [2007] ICR 867. Parliament can be taken to have known of that case law when it enacted section 136. The provision can sensibly be read as making that point clear on the face of the legislation." (Emphasis in original)

28.
The aspect of section 136(2) which is the focus of this appeal is not the only respect in which the opportunity was taken to alter the wording of the old provisions so as more clearly to reflect the way in which they had been interpreted by the courts. The old provisions referred to "an adequate explanation" (or "a reasonable alternative explanation"). Those phrases were also apt to mislead in that they could have given the impression that the explanation had to be one which showed that the employer had acted for a reason which satisfied some objective standard of reasonableness or acceptability. It was, however, established that it did not matter if the employer had acted for an unfair or discreditable reason provided that the reason had nothing to do with the protected characteristic: see eg Glasgow City Council v Zafar [1997] 1 WLR 1659, 1663; Bahl v The Law Society [2004] EWCA Civ 1070; [2004] IRLR 799; Laing v Manchester City Council, para 51. It seems likely that the change of wording to refer to "any other explanation" was intended to make this clearer.

29.
Unfortunately, as this case has shown, replacing "[w]here … the complainant proves facts" by "[i]f there are facts" created the possibility for a different misunderstanding that there is no longer any burden of proof on a claimant. There is nothing in the background to the 2010 Act which provides any support for a suggestion that this was or might have been a goal of the legislation: see Ayodele, paras 96-100. Indeed, the Explanatory Notes, quoted at para 24 above, positively suggest otherwise. Furthermore, there was no need to state in section 136(2) that the burden of proving facts from which the requisite inference can be drawn lies on the claimant because that is the effect of the general law. Any court or tribunal which is required to make findings of fact may face a situation in which it is unclear from the evidence whether something is a fact or not. To enable a court or tribunal to know how to proceed in such a situation, the law has developed rules about the burden and standard of proof. In civil cases (including employment disputes) the general rule is that a court or tribunal must find that something asserted by a party is a fact if, and only if, its truth is shown by sufficient evidence to be more probable than not.

30.
As counsel for the claimant properly accepted when questioned on this point, it follows from the application of this basic rule of evidence that an employment tribunal may only find that "there are facts" for the purpose of section 136(2) of the 2010 Act if the tribunal concludes that it is more likely

than not that the relevant assertions are true. This means that the claimant has the burden of proving, on the balance of probabilities, those matters which he or she wishes the tribunal to find as facts from which the inference could properly be drawn (in the absence of any other explanation) that an unlawful act was committed. This is not the whole picture since, as discussed, along with those facts which the claimant proves, the tribunal must also take account of any facts proved by the respondent which would prevent the necessary inference from being drawn. But that does not alter the position that, under section 136(2) of the 2010 Act just as under the old provisions, the initial burden of proof is on the claimant to prove facts which are sufficient to shift the burden of proof to the respondent.

31.
Counsel for the claimant sought to support the submission that the burden on the claimant to prove facts at the first stage of the analysis has been replaced by a "neutral burden" by drawing an analogy with the law of unfair dismissal. In unfair dismissal cases the burden lies on the claimant to prove that he or she was dismissed from employment and then on the employer to show what the reason for the dismissal was and that it was a potentially fair reason. Whether the dismissal was fair or unfair depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating the reason established by the employer as a sufficient reason for dismissing the employee: see section 98(4)(a) of the Employment Rights Act 1996. At this final stage there is no burden on either party. The determination is simply one for the tribunal to make "in accordance with equity and the substantial merits of the case": see section 98(4)(b).

32.
I do not think that this comparison assists the claimant. Deciding whether a dismissal was fair or unfair is not a fact-finding exercise. It is a purely evaluative assessment made after all the relevant facts have been found. If there is an analogy with section 136(2) of the 2010 Act, it is with the determination which the tribunal is required to make as to whether or not it can conclude from the facts found that, in the absence of any other explanation, an unlawful act was committed. That determination involves an exercise of evaluation which - like section 98(4) of the Employment Rights Act 1996 - is neutral in that the legislation does not impose on either party a burden of satisfying the tribunal that one or other conclusion should be drawn. Section 136(2) of the 2010 Act is no different in this respect, however, from the old provisions, which also did not impose any such burden of persuasion on either party.

33.
I should also mention that the Employment Appeal Tribunal was in my view wrong to suggest that section 136(2) has changed the law so as to prohibit a respondent from submitting at the conclusion of the claimant's evidence that there is no case to answer. It is certainly true that, as noted earlier, employment tribunals have long been encouraged to hear all the evidence in the case before reaching any conclusions and that to do so is good practice. As mentioned at para 21 above, it was also clear that, in order to discharge the burden of proof on the claimant under the old provisions, a claimant could rely on evidence from the respondent - for example, answers elicited in cross-examining the respondent's witnesses - which assisted his or her case. There is, however, nothing in section 136(2), any more than there was in the old provisions, which prohibits the tribunal as a matter of law from dismissing the claim after hearing the evidence adduced by the claimant if it is clear at that point that the claim is entirely hopeless. If it is plain from the evidence adduced by the claimant that there is simply no basis for alleging discrimination, the tribunal is not legally obliged to hear evidence from the respondent just in case the respondent comes to the claimant's rescue and makes a case against

itself. Nor can I see that the use of the word “facts” rather than “evidence” in section 136(2) - the same word as was used in the old provisions - carries such an implication. It will seldom be safe to conclude that there are no facts from which the tribunal could decide that the test in section 136(2) is satisfied until the end of hearing. But there is nothing in section 136(2) which excludes that possibility as a matter of law.

34.
Accordingly, in agreement with the Court of Appeal in Ayodele, I conclude that the change in the language used in section 136(2) of the 2010 Act has not made any substantive change in the law.

Application to this case

35.
The employment tribunal in this case summarised the law as regards the burden of proof as follows:

“It was for the claimant to prove facts from which the tribunal could conclude that there was discrimination. Subject to that it would fall for the respondent to prove that there was no unlawful discrimination. In the event that the claimant satisfied the burden of proof upon him, then absent an innocent explanation which was accepted by the tribunal his claim(s) would succeed.”

36.
It cannot be said that this was a very satisfactory summary of the law. In particular, it did not make clear that any explanation given by the respondent must be ignored at the first stage. It is safe to assume that the tribunal was well aware of that point, however, not least because it was spelt out in the respondent’s written submissions to the tribunal. The summary also followed the language of the old provisions in stating that it was “for the claimant to prove facts”, and thus did not reflect the point that it is also open to the respondent to prove facts at the first stage. Again, however, the tribunal may be taken to have understood the correct position, not least as Laing and Madarassy were cited by the respondent. In any case, the incompleteness of the tribunal’s statement could not have prejudiced the claimant, as there is no suggestion that the tribunal wrongly ignored facts proved by the respondent which assisted the claimant’s case.

37.
The critical point for present purposes is that, in placing upon the claimant the burden of proving facts from which the tribunal could conclude (in the absence of any other explanation) that there was discrimination, the tribunal did not make an error of law. The claimant’s first and principal ground of appeal therefore fails.

38.
Before leaving this issue, it is worth repeating Lord Hope’s reminder in Hewage v Grampian Health Board that it is important not to make too much of the role of the burden of proof provisions. As he said at para 32:

“They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.”

The adverse inference issue

39.

At the hearing in the employment tribunal Royal Mail did not adduce evidence from anyone who had actually been responsible for rejecting any of the claimant's job applications. Instead, they called as witnesses two managers who were familiar with the recruitment processes and how in general terms appointments were made. Those witnesses sought to explain the likely reasoning processes of the recruiters but they could not say what the actual reasons for the relevant decisions were. The claimant's second ground of appeal is that the tribunal should have drawn adverse inferences from the failure to call the actual decision-makers. Counsel for the claimant further submits that the Court of Appeal wrongly held that drawing any such adverse inference was impermissible, when Sir Patrick Elias said at para 44:

"If the employer fails to call the actual decision-makers, he is at risk of failing to discharge the burden which arises at the second stage, but no adverse inference can be drawn at the first stage from the fact that he has not provided an explanation as Mummery LJ said in terms in para 58 of Madarassy …"

What Mummery LJ said in para 58 of Madarassy was:

"The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. …"

40.
I think that care is needed in interpreting these statements. At the first stage the tribunal must consider what inferences can be drawn in the absence of any explanation for the treatment complained of. That is what the legislation requires. Whether the employer has in fact offered an explanation and, if so, what that explanation is must therefore be left out of account. It follows that, as Mummery LJ and Sir Patrick Elias said in the passages quoted above, no adverse inference can be drawn at the first stage from the fact that the employer has not provided an explanation. In so far as the Court of Appeal in Igen Ltd v Wong at paras 21-22 can be read as suggesting otherwise, that suggestion must in my view be mistaken. It does not follow, however, that no adverse inference of any kind can ever be drawn at the first stage from the fact that the employer has failed to call the actual decision-makers. It is quite possible that, in particular circumstances, one or more adverse inferences could properly be drawn from that fact.

41.
The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in Wisniewski v Central Manchester Health Authority [1998] PIQR P324 is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-

related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules.

42.
There is nothing in the reasons given by the employment tribunal for its decision in this case which suggests that the tribunal thought that it was precluded as a matter of law from drawing any adverse inference from the fact that Royal Mail did not call as witnesses any of the actual decision-makers who rejected the claimant's many job applications. The position is simply that the tribunal did not draw any adverse inference from that fact. To succeed in an appeal on this ground, the claimant would accordingly need to show that, on the facts of this case, no reasonable tribunal could have omitted to draw such an inference. That is, in its very nature, an extremely hard test to satisfy.

43.
Where it is said that an adverse inference ought to have been drawn from a particular matter - here the absence of evidence from the decision-makers - the first step must be to identify the precise inference(s) which allegedly should have been drawn. In their written case on this appeal counsel for the claimant identified two such inferences: (i) that the successful applicants for the jobs for which the claimant unsuccessfully applied were of a different race or ethnic origin from the claimant; and (ii) that the recruiters who rejected the claimant's applications (in all but two cases on paper without selecting him for an interview) were aware of his race when doing so.

44.
On the first point, the tribunal stated in its decision that no evidence was adduced as to the race of the successful candidates and that the tribunal could not make any findings of fact about this. The tribunal did not mention that there was evidence that seven candidates who were hired were born in the UK and one in India. But I do not think that the tribunal can reasonably be criticised for not drawing any inference about the racial profile of any of the successful applicants from the fact that the decision-makers were not called as witnesses. There can be no reasonable expectation that a respondent will call someone as a witness in case that person is able to recall information that could potentially advance the claimant's case; and I can see no reason why the tribunal should have inferred that, by not calling as witnesses any of the numerous individuals involved in making the various recruitment decisions, the respondent was seeking to withhold information about the race of successful candidates.

45.
On the second point, at the time when the claimant's applications were made, the online application form which candidates were required to complete included fields for town and country of birth. Only external applicants were in fact required to complete those fields, but the tribunal found that the claimant mistakenly believed that he was still required to do so after he became directly employed by Royal Mail and therefore continued to provide this information. The tribunal found that Royal Mail receives thousands of applications when jobs are advertised, which the recruiters have to sift through, and that there was no reason to believe "that the information given by the claimant as to his town and country of birth was searched for, viewed and taken into account at any stage of the processing of the claimant's applications for jobs with the respondent". If the recruiters (some of whom worked for a specialist external recruitment agency) had given evidence, it is of course possible that any of them might have said that they did in fact look at this information. But I can see no warrant for drawing an inference to that effect from the fact that they were not called as witnesses; still less can it seriously be argued that no reasonable tribunal could have declined to draw such an inference.

46.
As Sir Patrick Elias pointed out in the judgment of the Court of Appeal (at para 48), even if the recruiters believed that the claimant was black and of African origin - as they might have inferred from his name whether or not they looked at the fields on his application forms stating his place of birth - that would in any event hardly have got the claimant's case off the ground. Even if, in addition, it had been established (or the tribunal had been willing to infer as a matter of probability) that the person appointed to any particular post was white - or at any rate neither black nor African - that would still have come nowhere near establishing a prima facie case of discrimination. As Mummery LJ stated in Madarassy at para 56:

"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 … the respondent had committed an unlawful act of discrimination."

That remains the case under section 136(2).

47.
In the circumstances the employment tribunal cannot be faulted for not drawing the adverse inferences contended for from the fact that no evidence was adduced from the actual decision-makers. Furthermore, even if those inferences had been drawn, they would not have enabled the tribunal properly to conclude that the burden of proof had shifted to Royal Mail. I agree with the Court of Appeal that, if the claimant had surmounted that hurdle, the absence of evidence from the decision-makers may have placed Royal Mail in difficulty in proving that there was no racial discrimination. I also, however, agree with the Court of Appeal's conclusion (at para 59 of the judgment) that there was plenty of evidence to support the employment tribunal's finding that there was no prima facie case of discrimination and that the tribunal was manifestly entitled to dismiss the claim on that basis.

Conclusion

48.
For these reasons, I would dismiss the appeal.