23 July 2021

PRESS SUMMARY

Royal Mail Group Ltd (Respondent) v Efobi (Appellant)
[2021] UKSC 33
On appeal from [2019] EWCA Civ 18

JUSTICES: Lord Hodge (Deputy President), Lord Briggs, Lady Arden, Lord Hamblen, Lord Leggatt

BACKGROUND TO THE APPEAL

This appeal raises two questions of law: (i) whether a change in the wording of equality legislation has altered the burden of proof in employment discrimination cases and (ii) when a tribunal may draw adverse inferences from the absence of a potential witness.

The Appellant, Mr Efobi, worked as a postman for the Respondent, Royal Mail. He was born in Nigeria and identifies as a black African and Nigerian. He has qualifications in computing and wished to obtain a managerial or technical role within Royal Mail. Between December 2011 and February 2015 he applied unsuccessfully for over 30 such jobs **[8]**. In June 2015, Mr Efobi brought a claim against Royal Mail in the employment tribunal alleging that the rejection of his applications was the result of direct or indirect discrimination because of his race. He also made allegations of racial harassment and victimisation **[9]**.

The employment tribunal dismissed Mr Efobi's discrimination claims. An appeal to the Employment Appeal Tribunal succeeded on the grounds that the employment tribunal had wrongly interpreted section 136(2) of the Equality Act 2010 (the "**2010 Act**"), which deals with the burden of proof in discrimination cases, and had made errors of law in assessing the evidence **[10]**. The Court of Appeal reversed that decision **[11]**. Permission to appeal to the Supreme Court was granted on the two questions stated above.

JUDGMENT

The Supreme Court unanimously dismisses Mr Efobi's appeal. Lord Leggatt gives the sole judgment.

REASONS FOR THE JUDGMENT

Burden of proof. The Race Relations Act 1976 and other legislation which was repealed and replaced by the 2010 Act imposed a two-stage test in discrimination cases. At the first stage, the claimant had the burden of proving facts from which the tribunal could conclude, in the absence of an adequate explanation, that an unlawful act of discrimination had been committed. If the claimant did not prove such facts, the claim failed. If the claimant proved such facts, the burden shifted to the employer to explain the reason(s) for its treatment of the claimant and to satisfy the tribunal that race (or another protected characteristic) played no part in those reasons. Unless the employer satisfied this burden, the claim succeeded **[14 - 15]**.

In section 136(2) of the 2010 Act the relevant wording relating to the first stage was changed from "where … the complainant proves facts" to "if there are facts from which the court could decide" (emphasis added). Mr Efobi argued that the change in wording changed the law so that there is no

longer any burden on a claimant to prove anything at the first stage. Instead, a tribunal would be required to consider all the evidence placed before it neutrally.

The Supreme Court rejects Mr Efobi's contention. It holds that there has been no substantive change in the law. Already under the old statutory provisions, as they had been interpreted **[16]**, tribunals were required at the first stage to consider evidence from all sources including evidence adduced by an employer to rebut or undermine a claimant's case. The only matter to be ignored at this stage was any explanation given by the employer for the treatment complained of **[18 - 23]**. The change in wording makes clear that *all* the evidence, from whatever source it comes, and not only the evidence adduced by the claimant, should be considered at the first stage **[26]**. However, under the general law, a court or tribunal may only find that something is a fact if it is admitted or shown by evidence to be more likely than not to be true **[29]**. It is still the law, therefore, that the burden does not shift to the employer to explain the reasons for its treatment of the claimant unless the claimant is able to prove, on the balance of probabilities, those matters which he or she wishes the tribunal to find as facts from which (in the absence of any other explanation) an unlawful act of discrimination can be inferred **[33 - 34]**.

The Supreme Court therefore finds that, in adopting this approach to the evidence, the employment tribunal did not make any error of law **[36 - 37]**.

Drawing adverse inferences. At the hearing in the employment tribunal, Royal Mail did not call as witnesses any of the many individuals who had actually dealt with Mr Efobi's unsuccessful job applications. Instead it relied on evidence given by two managers who were familiar with the recruitment processes and how, in general terms, appointments were made **[39]**. Mr Efobi argued that the employment tribunal should have drawn inferences adverse to Royal Mail from the fact that none of the actual decision-makers gave evidence. The particular adverse inferences which Mr Efobi submitted should have been drawn were: (i) that the successful candidates were of a different race or ethnicity from him, and (ii) that the recruiters who rejected his applications (in all but two cases on paper without short-listing him for an interview) were aware of his race when they did so **[39, 43]**.

The Supreme Court emphasises that tribunals should be free to draw, or decline to draw, inferences in the case before them using their common sense. In deciding whether to draw an adverse inference from the absence of a witness, relevant considerations will naturally include whether the witness was available to give evidence, what evidence the witness could have given, what other evidence there was bearing on the points on which the witness could have given evidence and the significance of those points in the context of the case as whole. How such matters should be assessed cannot be encapsulated in a set of legal rules **[41]**.

The Supreme Court holds that the employment tribunal in the present case cannot be faulted as a matter of law for not drawing the adverse inferences (that Mr Efobi argued for) from the fact that none of the actual decision-makers gave evidence. In any case, even if those inferences had been drawn, the facts that the recruiter had been aware of Mr Efobi's race and that the successful candidate was of a different race from him would not, without more, have enabled the employment tribunal to conclude that, in the absence of any other explanation, that there had been discrimination **[44 - 47]**. Hence the burden of proof did not shift to Royal Mail to explain its decisions and the tribunal was entitled to dismiss the claim **[48]**.

References in square brackets are to paragraphs in the judgment