Neutral Citation Number: [2019] EWCA Civ 18

Case No: A2/2017/2540

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
Mrs Justice Elisabeth Laing DBE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/01/2019

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE BAKER
and
SIR PATRICK ELIAS

- -

Between :

ROYAL MAIL GROUP LIMITED	**Appellant**
- and -	
MR IKE EFOBI	**Respondent**

- -
- -

Mr Simon Gorton QC and **Mr David Flood** (instructed by **Weightmans Llp**) for the **Appellant**
Mr Tom Coghlin QC and **Mr Navid Pourghazi** (instructed by **Leigh Day**) for the **Respondent**

Hearing date: 27th November 2018

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Approved Judgment

Sir Patrick Elias :

1. This is an appeal against the decision of the Employment Appeal Tribunal (Elisabeth Laing J presiding) in which it upheld an appeal from a decision of the Employment Tribunal which had rejected certain claims for direct race discrimination. We have been ably assisted by all counsel in this case. We are particularly grateful to counsel for the claimant, Mr Coghlin QC and Mr Pourghazi, and his solicitors Leigh Day, all of whom have acted pro-bono. Counsel put the claimant's case forcefully and skilfully.

The facts.

2. The claimant (as I shall call him, although he was the respondent to this appeal) is a black Nigerian and a citizen of the Republic of Ireland. He has qualifications, both graduate and post-graduate, in Information Systems, including a BSc honours degree in that subject, and qualifications in Forensic Computing. He was employed by the Royal Mail Group ("RMG") from August 2013 in the operational department of the Service as a postman, which involved sorting and delivering mail. However, he wanted to be employed in the management/IT service area. To this end he applied for many posts and was unsuccessful with respect to all of them. He considered that he had been discriminated against on the grounds of his race. He brought proceedings for both direct and indirect discrimination in relation to his failure to obtain twenty-two of these posts and also with respect to certain other matters which are not now relevant to this appeal. However, he failed to establish that there was any direct or indirect discrimination in the way in which RMG dealt with his job applications. In addition he made complaints of both harassment and victimisation discrimination. He was successful with respect to some of these allegations (which are not directly relevant to this appeal) and in that context the ET was highly critical of certain line managers to whom he was accountable.

3. He appealed only the finding that there had been no direct discrimination with respect to his job applications and the appeal was successful. The EAT held that in various ways the ET had erred in its analysis of that question, and in particular in the way it approached the burden of proof in direct discrimination cases. It remitted the case to a different employment tribunal for it to consider the issue of direct discrimination afresh. The EAT carefully prescribed the scope of the remitted hearing, indicating in some detail which findings should be preserved and directing that no fresh witnesses could be called. The rationale for this was that the judge took the view that "it would [not] be right to give the Respondent the opportunity substantially to re-shape its case". RMG now appeals against the EAT decision. Its principal case is that there was no material error by the ET in its legal analysis, but as a subsidiary issue it contends that even if the ET was in error as the EAT held, the limited scope of the remission was unjustified.

The recruitment procedures.

4. The ET heard evidence about the way in which the RMG deals with recruitment to managerial and IT roles. Most of the posts sought by the claimant were in the IT field comprising technology, information and security systems. The process of recruitment is quite complex. Applications would be made on-line. They would include the name of the applicant and there was space on the application form for the town and country of birth. External candidates were required to provide this information; the claimant, as an internal candidate, was not but he was under the misapprehension that he was and

so he provided it. A candidate would be required to upload a CV together with his application form. The relevant steps in the process were described by the ET in some detail. Essentially the Tribunal found them to be as follows:

(a) A hiring manager would provide a dedicated recruiter with a job brief which would form the basis of an advertisement. The recruiter would sift through all the applications. Typically there would be a great number of applicants in respect of nearly every job. The recruiter would produce a long list and discuss it with the hiring manager. The latter would emphasise the specific requirements and ask the recruiter to produce a shortlist of just four or five persons. The hiring managers would not want to see more CVs than those relating to the most promising candidates and typically would not be interested in the personal details on the form.

(b) Persons on the shortlist would be interviewed. Prior to the interview they would undertake a test provided by an external consultant and known as Talent Q. It provides psychometric testing called "Dimensions". The purpose is to identify information about the individual applicant which might be explored at the interview.

(c) There is a second aspect of Talent Q known as "Elements" which tests skills and abilities. This has three sections, respectively "numerical", "verbal" and "logic". This is done under time pressure. The hiring manager decides which parts will be relevant to the particular post.

(d) The hiring manager making the recruitment decision therefore has the CV, Dimensions and Elements results and shortlisting information. A candidate will only be appointed if the post is within budget and still open and if a suitable candidate is identified. Sometimes a post is cancelled or filling it is postponed. Feedback is not given routinely but usually is provided on request.

5. The ET noted that the personal information could be seen by a recruiter or manager if they actively took steps to see it, but they would not normally need to do so and typically would not wish to do so. The information was only relevant with respect to the successful applicant, when questions of security and his or her eligibility to work in the UK would arise.

The Law.

6. Section 13(1) of the Equality Act 2010 defines direct discrimination as follows:

> "(1) 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."

It requires a comparison between the claimant and either an actual or a hypothetical comparator.

7. Section 136 is central to this appeal and deals with the burden of proof. So far as is material it provides:

> "(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."

8. Prior to the enactment of this section, there were separate provisions on the burden of proof found in different discrimination statutes as a result of amendments to those statutes to give effect to provisions of EU law. They were cast in very similar terms to each other but were framed differently from section 136. For example, section 63A of the Sex Discrimination Act 1975 was as follows:

> "Where, on the hearing of the complaint, 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 an act of discrimination against the complainant which is unlawful by virtue of Part 2, or
>
> (b) is by virtue of section 41 or 42 to be treated as having committed such an act of discrimination 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."

Similar provisions were found in section 54A of the Race Relations Act 1976.

9. The way in which these earlier provisions ought to be applied has been considered in a number of cases, notably two Court of Appeal decisions, *Igen v Wong* [2005] ICR 931 and *Madarassy v Nomura International plc* [2007] ICR 867. Both concerned section 63A of the 1975 Act rather than the crisper statement of principle in section 136. However, in *Ayodele v Citylink Ltd*. [2018] ICR 748 the Court of Appeal considered and rejected a submission that these authorities could no longer be relied upon in the light of the change of wording. It is not necessary to set out in detail the careful reasoning of Singh LJ (with whose judgment Davis and Beatson LJJ agreed) which caused the court to reach that conclusion. He was satisfied that the earlier authorities gave proper effect to EU law which was the source of these provisions and there was no justification for assuming that Parliament had intended to depart from those principles in the Equality Act. The effect of *Adoyele*, therefore, is that the earlier precedents remain apposite to the construction of section 136 and are binding on this court.

10. The authorities demonstrate that there is a two-stage process. First, the burden is on the employee to establish facts from which a tribunal could conclude on the balance of probabilities, absent any explanation, that the alleged discrimination had occurred. At that stage the tribunal must leave out of account the employer's explanation for the treatment. If that burden is discharged, the onus shifts to the employer to give an explanation for the alleged discriminatory treatment and to satisfy the tribunal that it

was not tainted by a relevant proscribed characteristic. If he does not discharge that burden, the tribunal must find the case proved.

11. In *Madarassy* Lord Justice Mummery gave a fuller explanation of the principles in the following terms in a judgment with which Laws and Maurice Kay LJJ agreed (paras 56-58):

> "56. The court in *Igen v Wong*... expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. 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.
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> 57. "Could… conclude" in section 63A (2) must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.
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> 58. 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. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."

12. Later in his judgment he explained further how evidence adduced by the employer might be relevant, noting that it could even relate to the reason for any less favourable treatment (paras. 71-72):

> "71. Section 63A (2) 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.
>
> 72. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the complainant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination on the proscribed ground…."

13. Lord Justice Mummery also pointed out that it will often be appropriate for the tribunal to go straight to the second stage. An example is where the employer is asserting that whether the burden at the first stage has been discharged or not, he has a non-discriminatory explanation for the alleged discrimination. A claimant is not prejudiced by that approach since it is effectively assumed in his favour that the burden at the first stage has been discharged.

14. The rationale for this two stage approach was identified by Advocate General Mengozzi in *Meister v Speech Design Carrier Systems GmbH* (Case C-415/10) EU:C:2012:8; [2012] ICR 1006, para 22, in a passage referred to by Lord Justice Singh in *Ayodele*. He said:

> "It is also apparent from the overall scheme of those provisions that the choice made by the legislature was clearly that of maintaining a balance between the victim of discrimination and the employer, when the latter is the source of the discrimination. Indeed, with regard to the burden of proof, those three Directives opted for a mechanism making it possible to lighten, though not remove, that burden on the victim. ……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 defendant solely on the basis of the victim's assertions."

15. The principal issue in this appeal turns upon the way in which the ET dealt with the burden of proof when analysing the direct discrimination claims. The ET applied the two-stage test enunciated in the authorities and in particular assumed that the burden lay on the claimant at the first stage to establish a prima facie case. However, the EAT thought that in view of the change in wording since those authorities were decided, the law had changed and there was no longer any burden at all on the claimant at the first stage. It held that the ET had erred in law in imposing such a burden (although this was not, it seems, a point relied on by the claimant). However, as I have said the Court of

Appeal in *Ayodele* came to the contrary conclusion; it held that the different wording did not, and was not intended to, herald a change in approach. It expressly referred to the EAT decision in this case and said that it was wrong. Accordingly, it is now properly conceded that unless the Supreme Court subsequently decides otherwise, the ET did not commit the error of law attributed to it.

16. It follows that the principal ground on which the EAT upheld the appeal against the ET decision cannot stand. But that is not the end of this appeal. This is because the EAT had in its judgment gone on to hold that even if it was wrong in its construction of section 136 (as it turned out to be) and there was a burden on the claimant at the first stage, nonetheless the ET had erred in the way in which it assessed the evidence as to whether that burden had been discharged. The principal issue in this appeal is whether the EAT was right about that, and the primary focus is on the ET decision.

The case before the ET.

17. There was some ambiguity about precisely what the original claim was intending to allege. In the original grounds the claimant alleged that as regards recruitment there had been "a systemic, subtle discriminatory bias embedded in the process" and he identified some thirty or so specific complaints, mostly relating to particular positions which he had applied for but failed to get. The original application did not make it entirely clear whether the claimant was intending to allege, in addition to the generic complaint, that he had been subjected to race discrimination with respect to each and every position for which he had applied, although by the time of the hearing it was apparent that he was so alleging. However, the claimant did not for the most part seek to distinguish between the various posts for which he applied in order to contend, for example, that he was particularly suited to a particular post because of his specific qualifications or because the nature of the job was tailor made for his skills.

18. The complaints related to some thirty or more applications (although before us the focus was on some 22 points only). They were considered by a number of individuals; at different stages some six or more recruiters were used and at least two hiring managers. The claimant was longlisted for two of the posts and interviewed for two (in one case outside the usual procedures). The relevant applications included nine where the decision not to shortlist was made by an external recruitment agency employed to assist RMG. As the Tribunal noted, it was not suggested that the recruitment staff of this organisation had discriminated against the claimant, and there was simply no evidence at all to suggest that they had. Indeed, the ET pointed out that there was no solid evidence that they would have seen the application (as opposed to the CV). As to the remaining cases, the claimant, who represented himself in the ET, concentrated in his closing submissions on only a few particular posts and these were dealt with specifically by the ET in its judgment. No specific matters were raised with respect to the other positions although the allegation of discrimination was still relied upon. These complaints were dealt with generically by the ET in its decision; it did not consider each of these posts individually. The failure to do so was one of the grounds of complaint.

19. I will first consider briefly the way in which the ET dealt with the particular points raised by the claimant with respect to specific posts. In one of the cases where he was interviewed this was because a specialist recruiter arranged that he should be given an interview bypassing the usual short and longlisting procedures. The claimant was told

that it was a speculative interview; he was subsequently told that he was not a perfect fit for the role and was not good on the administrative side.

20. In the other case where he was interviewed, the interview was changed from a face to face interview to one over the telephone. The Tribunal were told that the hiring manager considered that whilst the claimant was technically strong, he did not know the processes well enough. In the event no appointment was made. The Tribunal accepted evidence that on occasions personal interviews were changed in this way for a number of reasons and the ET held that there was no evidence to sustain the complaint that either the decision to switch to a telephone interview or the decision not to appoint had been taken for reasons related to the claimant's race.

21. Similarly, with respect to a complaint that other posts for which he applied were left unfilled, the ET said it was satisfied that this was often done for legitimate reasons such as insufficient budgets or lack of sufficient quality amongst the applicants, and it added that:

> "There is no evidence that any advertised post was "pulled" because the claimant had applied and then was as he alleges "the last man standing". We find that no advertised job was cancelled or recruitment postponed because of the claimant's colour, nationality or ethnicity".

22. Given that typically white workers would also be affected by a decision not to appoint - and generally, one might assume, in greater numbers - this is hardly a surprising conclusion. It might be otherwise only if the claimant was indeed "the last man standing", but the evidence did not sustain that assertion.

23. It will be apparent from the outline of the recruitment procedures spelt out above that the CV is an important part of the application process. The initial sift of candidates relies heavily upon an analysis of the CV. The ET made specific findings with respect to the CVs produced by the claimant. There were two versions of his standard CV with slight modifications. The ET found that they were in certain respects unsatisfactory. It said that other candidates with whom the claimant compared himself had more relevant CVs "in which they displayed actual or potential engagement or interpersonal skills for the post applied for, which was lacking in the claimant's generic CVs." It also said that some of the jobs required skills which he had not identified in his generic CVs. The ET concluded that in this sense (and only in this sense) his CV was poor.

24. The claimant asserted that he did not believe that he could change his CV to tailor it to a particular post because it would suggest that he was being fraudulent in some way. This was notwithstanding that he had been advised by a manager to work on his CV to provide precisely that kind of detail and indeed the ET found that he had also been assisted by other managers who were aware of his work ambitions.

25. The ET heard evidence from two managers who had knowledge in general terms of how appointments were made. They were John Hames, Service Team Leader, External Management Recruitment Team, and Nicola Hancock, Interim Director of Technology Business Operations. They were fully cognisant of the recruitment processes but were not, however, directly, responsible for any of the particular recruitment decisions of which the claimant complained. As the ET recognised, there was no evidence from any

of the recruiters or hiring managers who had actually rejected the claimant's applications. Mr Hames and Ms Hancock had sought to explain the reasons for the decisions affecting the claimant, drawing on their experience of the process and reaching conclusions from such paperwork as they had. But I accept that whilst they may be in a position to explain the likely reasoning processes of the recruiting managers, they could not categorically state why a particular manager had taken the recruitment decision in relation to any specific advertised post (although where the reasons had been recorded, that would provide powerful evidence of the actual reason). Having said that, given that the evidence was that most of these posts attracted a very large number of applicants to be sifted, it must be doubtful whether, at least in relation to those posts in respect of which the claimant was not longlisted, the decision maker would have had any specific recollection of the reason why at the time he or she actually rejected the application. It is likely that the recruiter could only explain why, looking at the matter retrospectively and in the light of the relevant material available to him at the time (and in particular the CV), he believes he would have done so. This is much the same exercise as was undertaken by Mr Hames and Ms Hancock.

26. The Tribunal was not impressed with the claimant's evidence in relation to his job applications. It summarised its assessment of his own evidence in the following way:

> "The claimant said that he did not believe that he could ever change the CV save to update it because to do so would give rise to the suspicion that he was lying and being fraudulent, hence his repeated use of the failed model; that he never sat Talent Q (despite the respondent producing documents proving otherwise); that his CV and other documents were manipulated, changed by someone for or on behalf of the respondent. He maintained that there was a company conspiracy against him that involved deceit and fraudulent changes to documents up to and including the preparation of the trial bundle for this hearing. These allegations were uncorroborated, implausible, lacked cogency and credibility and was disbelieved by the tribunal. At best the claimant was mistaken in these respects. In his evidence in chief and both under cross examination and questioning from the Tribunal he lacked awareness and an ability to analyse objectively. The Tribunal accepted a large part of the claimant's credible evidence in respect of some of his claims but in respect of the claims relating to unsuccessful job applications his evidence was unconvincing."

27. A particularly significant problem facing the ET in this case was that there was no evidence about the identity or qualifications of any of the other candidates, including the shortlisted or successful ones, in relation to any of the posts. Virtually nothing was known, therefore, of the relevant comparator with whom he was comparing himself. As the Tribunal observed, it did not have enough evidence to establish whether the successful candidates were appropriate comparators. Moreover, in relation to many of these posts, even the race of the successful candidate was unknown. The claimant did not seek discovery and he did not identify an actual comparator with respect to any of the posts. Nor did he prove facts from which the Tribunal could infer that his colour or country of origin was actually known to any particular hiring manager or recruiter

(although it was conceded that they could have obtained that information had they wished to do so). The ET concluded (para. 2.22) that:

> "The claimant has not proved facts from which the tribunal could conclude that the respondent's recruiters or hiring managers knew of his colour, nationality or ethnicity, or that those factors (or any of them) were relevant or influenced their decisions not to long-list, shortlist, interview or appoint the claimant in respect of any of his many application for jobs. There is ample evidence to conclude that there were other sound reasons untainted by unlawful discrimination for the rejection of his applications at various stages of the applicable procedures. Despite the large number of the claimant's job applications that were rejected by the respondent and the claimant's academic qualifications, such was the credible evidence that the tribunal does not have to draw any inferences such as that the race played a part or that the recruitment decisions were tainted by unlawful discrimination."

28. The reference to "does not have to draw any inferences" of discrimination is unfortunate because the question is not whether the Tribunal has to draw the inference but rather whether it would be a legitimate inference on the balance of probabilities. Nevertheless, the Tribunal properly directed itself later in its judgment at para. 3.14 in a section of the judgment where it set out the relevant law and I am satisfied that it understood well enough what the first stage involved.

29. It was perhaps odd that the Tribunal should have reached this conclusion in para. 2.22 before it had addressed the law and before it summarised its conclusions in a section of the judgment headed "Application of the Law to Facts." However, reading the judgment fairly, in my judgment there can be no doubt that it concluded at para. 2.22 that the claimant had not discharged the burden at the first stage in the light of all the relevant evidence.

30. This finding was repeated in the summary of its conclusions at para. 4.2 when the Tribunal said this:

> "Under the heading of direct discrimination and the respondent's recruitment process there are several issues listed and our response to each… is the same in that the claimant has not proved facts from which we could conclude that there was any discrimination and in any event the respondent has disproved any suspicion of discrimination. The tribunal did not find facts from which it could adjudge that the claimant was treated less favourably than a real or hypothetical comparator. The tribunal asked itself, repeatedly, whether the claimant's respective failures to be appointed to posts for which he applied was because of his race; was race the reason? As a finding of fact the tribunal concluded that it was not. The claimant did not satisfy the conscientious requirements of the respondent's recruiters and hiring managers as he failed to demonstrate that he was a suitable, or the best, applicant, notwithstanding his academic achievements."

31. This paragraph appears to reject the claim on two grounds, both because the claimant failed to discharge the burden at stage one, and because in any event the respondent had disproved any suspicion of discrimination at stage two. The Tribunal was clearly of the view that the claimant simply failed to show that race had any impact at all on the recruitment decisions. It made a similar observation at para. 4.4 when it observed that it did not have enough evidence to establish the appropriate comparators and added:

> "In any event there was evidence to establish that the respondent had good reasons, untainted by discrimination, to prefer their CVs to that of the claimant, they were better candidates."

The decision of the EAT.

32. Much of the EAT's reasoning was taken up with its erroneous analysis of section 136 and the question whether that provision had altered the established approach to the burden of proof. This significantly affected its analysis of the evidence. For example, it noted that on many occasions the ET had observed that the claimant had to prove facts from which a prima facie case of direct discrimination could be inferred, and as a consequence the EAT "could not be confident that the ET did not require the claimant to prove things that he was neither required, or able, to prove". Earlier in the judgment the EAT had referred to a submission made on behalf of the claimant in which it was suggested that the ET ought to have drawn adverse inferences against the employer because of its failure to adduce evidence relating to the recruitment processes and its failure to call the actual decision makers who alone could explain the reason why the claimant had not been appointed to the various posts. A number of cases in support of this submission were referred to, some of which were considered by the Court of Appeal in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324. In that case Brooke LJ laid down certain principles as to when drawing an adverse inference might be appropriate against a party who could call a potentially relevant witness but fails to do so. Essentially an adverse inference can be drawn where there was a case to answer; the witness could have been expected to give material evidence; and there was no credible evidence given for not calling him. The EAT did not in terms say whether or not it agreed with that submission but it appears to have done so, at least in circumstances where (as it found to be the case) there was no burden on the claimant at the first stage. After referring to the failure of the respondent to produce any actual decision maker to give evidence, Mrs Justice Elisabeth Laing said this:

> "The respondent's decision about the presentation of its case, however, was not tactically astute, given the effect of section 136, and given the availability to the tribunal of inferences. At the first stage of the analysis required by section 136, there is no burden on a claimant to prove anything (although if his case is manifestly frivolous, a respondent can apply to have it struck out). What the tribunal has to do is to look at the "facts" as a whole. If a respondent chooses, without explanation, not to adduce evidence about matters which are within its own knowledge, it runs the risk that an employment tribunal will draw inferences, in deciding whether or not section 136(2) has been satisfied, which are adverse to it on the relevant areas of the case. Those inferences will then be part of the "facts" for the purposes of section 136(2)."

33. Whether the EAT would have adopted the same approach where there is a burden on the claimant at the first stage is not clear. I am minded to think not, but the claimant submits in this appeal that the principle still applies and so I deal with it below.

34. The EAT also had doubts "in the light of the misdirections about burden of proof" whether the ET had imposed a sufficiently rigorous standard of proof on the Respondent.

35. Such conclusions as are related to the EAT's erroneous analysis of the burden of proof are no longer relevant (although for reasons just given, it is not entirely straightforward to determine what they are). But the EAT also concluded that even under the *Igen* and *Madarassy* principles, and assuming that the claimant bore the burden of proof at the first stage, the ET had erred in the way in which it had applied the relevant principles. The EAT dealt with this briefly in only three paragraphs (paras. 95-97). I confess that I do not find it entirely clear from this discussion what errors are being identified, but I think they fall into three categories.

36. First, the EAT held that the ET was in error "to the extent that the ET thought that they could only look at the evidence adduced by the Claimant at the first stage". It did not assert that the ET had made that mistake but seems to have left the point open.

37. Second, the judge was not satisfied that there had been a sufficiently rigorous scrutiny of all the relevant factors and concluded that there might have been facts from which the Tribunal might have concluded that the burden had been discharged at the first stage. This was presumably a reference to an earlier passage in the judgment where the EAT had identified certain matters which it said might be capable of establishing a prima facie case of discrimination so as to discharge the initial burden:

> "88. I will give some examples of the evidence before the Tribunal which might, on analysis, and when weighed with other material, have supported a decision that section 136(2) was satisfied."
>
> (i) The claimant was very highly qualified.
>
> (ii) He was a black African of Nigerian origin.
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> (iii) His name strongly suggests that he is of foreign origin, and to those who know about African names, that he is of African, or of Nigerian origin. His name was known to all recruiters.
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> (iv) Information about his town and country of origin was accessible to any recruiter who chose to look.
>
> (v) He was longlisted for two jobs.
>
> (vi) The respondent chose, with a very few exceptions, not to disclose the race or country of origin of any of the successful candidates. Such disclosure as there was showed that no black African or person of Nigerian origin had been appointed. In that situation, an employment tribunal ought at

least to consider whether to draw an inference adverse to the respondent about the race of the successful candidates.

(vii) The Tribunal accepted the claimant's evidence about the role which cronyism played in recruitment; evidence which the respondent did not, apparently, try to counter, or even to deny.

(vii) The Tribunal accepted the claimant's evidence about his harassment and victimisation claims, and, more importantly, did not believe the evidence of three of the respondent's witnesses about those claims.

(ix) The protected act on which the victimisation claims were based was the bringing of the very claim for discrimination which the Tribunal was hearing.

(x) The Tribunal made very strong findings about those claims, which I have already summarised. It held that Mr Veets victimised the claimant in order to curry favour with managers (his brother-in-law was a manager) and that his action was vindictive and malicious.

(xi) The Tribunal held that it was no coincidence that the claimant's driving rights were reinstated shortly after he was given leave to amend his ET1 to include the victimisation claims.

89. I accept that the evidence about the harassment and victimisation claims, and the evidence about the job applications concerned different parts of the respondent's business. It would be for an employment tribunal to decide whether the very strong findings about what happened in Ellesmere Port might indicate a wider problem with discriminatory attitudes in the respondent's organisation as a whole."

38. The third ground of criticism is somewhat opaque; the EAT appears to be saying that the ET was arguably wrong to conclude that the employers had discharged the burden at the second stage. They had failed to call any of the witnesses who made the actual decision to reject the application or to decide not to appoint anyone, as the case may be.

39. The EAT did not, however, accept a submission from the claimant's counsel that given in particular the failure to call the relevant decision makers, the only proper conclusion open to the ET was that the burden at the second stage had not been discharged. Mrs Justice Elisabeth Laing said that it would be for the fresh ET to consider any explanation given for not calling these witnesses, applying the principles summarised by Brooke LJ in the *Wisniewski* case (see para. 32 above) and to consider any explanation in the light of all the evidence in the round.

The appeal

40. The contesting submissions can broadly be summarised as follows. The appellant submits that there was manifestly sufficient evidence to justify the ET's conclusion and that the alleged errors in its approach were not in fact errors at all. The EAT was seeking to place an improper burden on the employer to adduce evidence. In so far as

it was suggesting that the ET had regard only to the evidence adduced by the claimant, that was erroneous. It had considered the evidence in the round and formed the very clear view that there were innocent, non-race reasons for the failure to appoint to these posts. It was not incumbent on the appellant to produce the witnesses who actually made the decision to explain why the claimant had not been chosen. There was evidence about the process from two witnesses experienced in the recruitment process and the Tribunal was entitled to have regard to that evidence.

41. Even if the claimant had discharged the burden at the first stage, it was open to the ET to hold that there had been a proper explanation by the employer which had discharged any burden which had transferred to them to show that the explanation was free of any taint of race.

42. The claimant understandably sought before us to rely upon the EAT decision and the reasoning of Mrs Justice Elisabeth Laing. In addition he relied on submissions which were advanced before the EAT and recited by the judge, but not ultimately relied upon in the decision. Mr. Coghlin submitted that claimant had done his best as a litigant in person but he should not have been expected to understand the niceties of procedure and to require the employer to provide relevant documents in their possession. It was obvious that the successful candidate was white, or at least not black African, and that was an inference which should have been made. Even if the recruiters had not investigated the claimant's background, they knew his name and it would have been obvious that he was of African origin. Given his qualifications and the other matters referred to by the EAT in the passage reproduced above (para. 37), there was at the very least a powerful case for saying that the claimant had discharged the burden at the first stage. As to the finding that even if the burden shifted, the employer had shown that the reasons were not tainted by race, it was not possible for the ET to reach that conclusion without hearing from the decision makers themselves. Although some may have left the company, the Tribunal was in error in suggesting that they had all done so. In any event, even had they left, it would not necessarily explain why they were not called. Furthermore, the ET was in error in failing to consider each complaint separately; it was inappropriate to treat them in a generic way.

Discussion.

43. The first question is whether the ET was entitled to find that the claimant had failed to discharge the burden placed upon him at the first stage to establish a prima facie case which needed rebutting. In my judgment it manifestly did have enough evidence to warrant that conclusion. I reject a submission that the ET only focused on the evidence adduced by the claimant. That is wholly unsustainable given that it placed heavy reliance on the appellant's evidence about the suitability of the claimant's CV in particular, as well as evidence of the role played by external recruiters. It was not seriously suggested that those recruiters had discriminated and yet the posts for which they were responsible were typical of the kind of posts for which the claimant was applying. There was no evidential basis for inferring that the reasons why his applications failed when internal decision makers were involved was for race related reasons when that was not seriously advanced as the reason with respect to the posts where external recruitment officers were involved, even though they were carrying out essentially the same exercise.

44. The onus of proof at stage one was upon the claimant so it was for the claimant to adduce the information which he was alleging supported his case. In so far as this was in the hands of the employer, the claimant could have identified the information required and requested that it be provided voluntarily or, if that was refused, by obtaining an order from the Tribunal. He did neither. It was only on the first day of the trial that he made an application for certain witness orders when he had not even approached the witnesses to seek their attendance voluntarily. It is not surprising that at that stage of the proceedings the ET rejected the application, and no complaint has been made about that decision. It is not for the employer to do the work for the claimant and to provide such information as it thinks might advance his case. There is no doubt, as the ET recognised in this case, that pursuing litigation can be daunting for a litigant in person. Frequently tribunals seek to assist such litigants to mitigate the disadvantages under which they operate, but this has to be done with sensitivity and care lest the Tribunal is perceived to be losing its impartiality and favouring one side. Tribunals are not exercising an inquisitorial function. The Court of Appeal has said on a number of occasions that it is for tribunals to determine in each case how far they can properly assist litigants in this way, but it is not an error of law to fail to do so: see *Mensah v East Hertfordshire NHS Trust* [1998] EWCA Civ 954; [1998] IRLR esp. paras. 14-22 per Peter Gibson LJ; and *Muschett v HM Prison Service* [2010] IRLR 451, para. 31 per Rimer LJ. Even less is the employer, as the other party to the litigation, obliged voluntarily to take steps to ameliorate the problems facing the individual litigant and to assist his case possibly to their own detriment. It is not legitimate for a Tribunal to draw adverse inferences against an employer who fails to do so. 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 Lord Justice Mummery said in terms in para. 58 of *Madarassy* (see para. 11 above.)

45. The EAT relied upon cases in private law, and in particular the *Wisniewski* case to support the proposition that a court will sometimes draw adverse inferences against a party who fails to produce information or a relevant witness as the case may be. But these cases have no relevance where the legislation lays a clear burden on the claimant to establish a prima facie case.

46. Mr Coghlin relied upon the case of *EB v BA* [2006] IRLR 471, which involved discrimination against a transgender person, to support his contention that inferences could be drawn from the failure to adduce evidence. But that was a case where the employment tribunal found that the burden had transferred to the employer. It was in that context that the Court of Appeal held that it was for the employer to adduce evidence and discharge the burden at the second stage and that inferences could be drawn against him if he failed to do so. That was a classic application of the *Igen* and *Madarassy* principles and does not assist the claimant.

47. In my judgment the claimant's case could not succeed given that he had not adduced evidence which enabled the ET to identify the characteristics of the appropriate comparator. I can understand the claimant feeling disappointed and possibly aggrieved that as a well-qualified man he was unable to obtain these more specialised jobs. But without any information about those who were appointed, such as their skills and experience, it was not possible for the ET to infer a prima facie case of discrimination by any particular individual. This was particularly important where there was a large

pool of candidates. Moreover, he was rejected by external recruiters without any discrimination. It is not as if it must have been self-evident that he was suited to these posts.

48. I do not accept that the factors identified by the EAT and relied upon in this appeal by the claimant (see para. 37 above) take the case any further. They do not overcome the problem of the lack of evidence about relevant comparators or in my view demonstrate any error by the ET. It is not disputed that the claimant was highly qualified, but as I have said, that establishes nothing in the abstract without relating it to the comparator's knowledge and experience. It is true, as points (iii) and (iv) suggest, that the recruiters and hiring managers could have been aware that the claimant was black and of African origin, both because of his name and because he had (unnecessarily as it happens) provided information about his place of birth. But the Tribunal was certainly entitled to find, for the reasons it gave, that typically the decision makers would not take the trouble to discover it. Although strictly the burden is on the applicant, I would accept that in a case like this the ET could realistically infer that the appointed candidate (where one was appointed) would in all probability not have been a black African. (There was in fact information available before the ET relating to about seven of the posts showing that six white persons and one Indian had been appointed, although whether it was specifically drawn to the ET's attention is not clear). But this merely establishes at best the bare bones that the claimant was black (possibly to the knowledge of the decisions makers but possibly not) and had not been appointed whereas a white person – or at least someone neither black nor African - had been appointed. That comes nowhere near establishing a prima facie case of discrimination as Lord Justice Mummery pointed out in *Madarassy* para. 56 (para. 11 above).

49. Nor do I think that the findings with respect to the victimisation and harassment claims (to which paras (vii) to (xi) relate), were matters which the ET was obliged to take into account. I would accept that in a case where there is positive evidence of a culture of discrimination within an organisation this may be material and carry some weight, although even then the evidence is likely to be of very limited value. In *Chief Constable of Greater Manchester v Paul Bailey* [2017] EWCA Civ 425, para. 99, Underhill LJ made these observations with respect to a similar argument advanced in that case:

> "Authoritative material showing that discriminatory conduct or attitudes are widespread in the institution may, depending on the case, make it more likely that the alleged conduct occurred, or that the alleged motivations were operative. Or there may be some more specific relevance: in the present case, for example, it is not implausible that the fact that the GMP had been the subject of two recent reports of racist conduct or attitudes by its members might have served to increase the sensitivity or embarrassment which the tribunal found had influenced ACC Sheard's thinking. But such material must always be used with care, and the tribunal must in any case identify with specificity the particular reason why it considers the material in question to have probative value as regards the motivation of the alleged discriminator(s) in any particular case: as Elisabeth Laing J put it, there is no "doctrine of transferred malice". It is clear that the Tribunal's reasoning does not pass that test."

50. In this case not only was there no evidence of widespread discrimination but the ET specifically dismissed, and in robust terms, the claimant's contention that there had been what he termed "systemic discrimination" in the recruitment process. Nor was there alleged to be any link between the managers who were found to have harassed and victimised the claimant and the recruiters and line managers who considered his applications; they were in an entirely different department. The fact that the victimisation was a consequence of his complaining to the Tribunal was nothing to the point. In my judgment in these circumstances it would have been wrong for the ET to have given weight to the fact that others in the organisation discriminated against him. Certainly the Tribunal cannot be criticised for failing to do so.

51. Paragraph (vii) refers to the evidence, not rebutted and apparently accepted by the ET, that there was a pattern of cronyism within the organisation whereby preference was given to the family and friends of existing employees. Even if that is true, I do not see how that assists the claimant with respect to his direct discrimination claims. (I can see that it might do in indirect discrimination claims assuming – as is no doubt the case - that the workforce is predominantly white. But these claims are no longer pursued.) The fact, if it be a fact, that someone was appointed to a post for which the claimant applied because he or she was a friend or relative of another employee does not sit easily with a claimant's contention that he was rejected on grounds of race. He would be rejected because he did not have the relevant contacts. He may justifiably feel aggrieved, but no more than a white candidate rejected for the same reason. Mr. Coghlin suggested that in a general way it shows a lack of concern for fair and transparent appointments. That may be so, but it does not lend any weight to these particular allegations of direct race discrimination.

52. Finally, para. (v) of the EAT's list notes that the claimant was longlisted for two jobs. I cannot see how that assists either way. It was not suggested, for example, that he was so hopeless that he could never expect an appointment in the IT field. Nor does the fact that he was longlisted for two posts support any inference that he ought to have been longlisted for more, or that he was an obvious candidate to be appointed to any particular post.

53. For these reasons I do not accept that the observations about the possible matters which might have assisted the claimant take the case any further. In my judgment, without more, they would be insufficient to establish a prima facie case. But in any event it is not enough simply to identify those facts favourable to the claimant's case. The judge has to have regard to all the facts which have been adduced before the ET and there were a number of critical matters which were relied upon by the ET and which the judge did not mention. Quite apart from the claimant's failure to adduce any evidence about the other candidates so that no appropriate comparators could be identified, these include the fact that in some of the posts he was rejected by external recruiters who were plainly not discriminating; that he had used inadequate CVs, being generic in nature and not focused upon the particular requirements for the job; that the successful candidates had longer managerial experience or other relevant experience; and that he had been a wholly unimpressive witness on this part of his case. All these factors provide, as the Tribunal said, ample justification for its conclusion that the burden on the claimant had not been discharged.

54. Mr. Coghlin submitted that the ET could not properly say that the CV was inadequate and take that into consideration because the critical issue would be how a particular

manager might view it, and some managers might consider it to be appropriate. I do not agree that this makes the factor irrelevant. The ET was not expressing a view as to whether the CV does or does not fit a particular job, nor was it suggesting that it would inevitably lead to his rejection for any post for which he applied. Rather it found as a fact, as in my judgment it was entitled to do, that the claimant's CV was not as focused as the CVs of most other candidates on the particular post for which the claimant was applying. Being generic in nature, it lacked relevance and detail and this would be likely adversely to affect its reception by whoever made the initial sift. It is not an explanation in any particular case but it is was part of the context in which recruitment decisions were made and was relevant in any comparator assessment.

55. Mr Coghlin also submitted that the ET was obliged to consider each claim individually. Whatever the merits of that argument with respect to the position at the second stage, in my judgment it has no merit when the first stage is under consideration. The claimant was not for the most part making particular points about specific posts (and where he did these were considered). There were no materially different considerations which could have justified a finding that the claimant had discharged the burden in relation to some posts but not others. In these circumstances it was wholly unnecessary for the ET to analyse each case individually.

56. In my view, therefore, the appeal must succeed. Strictly, the third ground of criticism advanced by the EAT, namely that the employer had not satisfactorily discharged the burden at the second stage, or at least had not clearly demonstrated that he had done so, is not relevant. In a loose sense when a claimant fails to establish a prima facie case, the necessary inference is that there is in all probability an innocent non-discriminatory explanation for what occurred. The claim is then little more than assertion and the employer should not then be required to provide any further explanation.

57. It is a somewhat artificial exercise to consider stage two as though a prima facie case had been established when in fact it has not. However, where the burden on the claimant has been discharged with respect to any particular post, the explanation given by the employer at the second stage must be an explanation of why the claimant was rejected. It is well established that the reason must be that of the actual decision maker: see e.g. *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11; [2003] ICR 337 para. 7 per Lord Nicholls. I see force in the claimant's argument that had there been sufficient facts to enable the claimant to discharge the burden at the first stage, the generalised evidence adduced by the employers as to what must have happened with respect to each of these applications may well have been too unspecific to discharge the burden at stage two. It cannot, however, be the case that the actual party making the decision must always be called if the employer is to discharge the burden. That may be impossible such as where the person has died or is not traceable, and in any event other evidence, such as notes of the decision, or discussions between managers when the reasons were discussed, may well, depending upon the circumstances, provide a sufficient evidential basis on which a Tribunal can rely to conclude that the burden has been discharged. Whether that was in fact the case with respect to any or all of these decisions is not clear.

58. It follows that I do not accept the submission advanced by the appellant before the EAT, and also trailed before us, that this was one of those cases where strictly it was unnecessary even to focus on the first stage because the employer has discharged the burden at the second stage. The fact that he had less impressive CVs than most other

candidates would not, in my view, suffice to show why the claimant had been rejected from any particular post (absent evidence which might justify the Tribunal in concluding in a particular case that this was in fact the decision maker's reason). But the ET had made a sufficiently clear finding that there was no prima facie case of discrimination, and therefore the need for an explanation did not arise.

59. In substance, this was a case where the allegations of discrimination were mere assertion and the claimant had not backed up his claims with the necessary factual foundation. He fell at the first stage by failing to enable the ET to identify a particular comparator with whom he could be compared. Quite independently of that, there was plenty of evidence to support the ET's decision. In my judgment it was manifestly entitled to reach the conclusion that it did.

60. It follows that the issue relating to the scope of the remission to a fresh employment tribunal does not arise.

Disposal

61. I would allow the appeal and restore the finding of the ET that there was no direct discrimination against the claimant with respect to recruitment to any of the relevant posts.

Lord Justice Baker:

62. I agree.

Lord Justice Underhill:

63. I also agree.