

Direct Discrimination – Burden of Proof Guidance

When employment tribunals and the higher courts determine a complaint of direct discrimination – whether it be an allegation of unlawful discrimination concerning sex, race, disability, sexual orientation, age, religion or belief – guidance is available to them that is known as the ‘Barton guidance.’ In 2005 this guidance was revised and approved by the Court of Appeal in three conjoined cases in which the Court of Appeal set out revised guidance on the burden of proof in discrimination cases, the three cases being: *Wong v Igen Ltd*; *Emokpae v Chamberlain Solicitors*; *Webster v Brunel University* (2005) ICR 931; (2005) EWCA 142; (2005) 149 SJ 265.

The source of the guidance was the case of *Barton v Investec Securities Ltd* (2003) ICR 1205 wherein, during the course of his judgment, His Honour Judge Ansell reviewed this area of the law by considering the effect of the insertion of s.63A into the Sex Discrimination Act 1975. In practical terms, the guidance consists of procedural steps which employment tribunals should follow when determining a complaint of direct discrimination.

Under the new provisions, if a claimant can show that he or she has been treated less favourably than others in circumstances which are consistent with that treatment because of her or his sex, race, disability, sexual orientation, age, religion or belief, a tribunal can draw an inference that such treatment was discriminatory unless the respondent can satisfy the tribunal that there is a legitimate explanation.

The section in question, s.63A(2) of the Sex Discrimination Act 1975, sets out the two-stage test under which a claimant bringing a sex discrimination claim must prove primary facts from which an inference of discrimination could be drawn (Stage 1) – otherwise the claim will fail. If the claimant succeeds at the first stage, the burden shifts to the employer to provide a non-discriminatory explanation for the treatment in question (Stage 2). If the employer fails in that task, the claim will succeed.

Hence, the procedural steps consist of two stages:-

- **Stage one –**
- **the claimant must prove –**
- **on the balance of probabilities –**
- **facts from which the tribunal can conclude –**
- **in the absence of an adequate explanation from the employer –**
- **that the employer has committed an act of unlawful discrimination against the claimant;**

- **Stage two –**
- **if the claimant is able to prove ‘such facts’ –**

- **it is then for the employer to prove that it did not commit (or is not to be treated as having committed) that act, and –**
- **in order to discharge that burden, the employer must prove –**
- **on the balance of probabilities –**
- **that the treatment was in no sense whatsoever for a reason based on the grounds of sex, race, disability, sexual orientation, age, religion or belief.**

It is insufficient for a claimant to merely: (i) prove a difference in sex and (ii) a difference in treatment. A claimant must prove facts from which a tribunal could conclude that the respondent had committed an act of unlawful discrimination.

The two-stage test is judicial guidance and not statute law. That being so, a failure by a tribunal to follow it explicitly is not an error of law.

In a claim of age discrimination, a shifting two-stage burden of proof test also applies. Discrimination may be (i) direct or (ii) indirect.

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