Handling a discrimination case

Session 5: The Hearing

presented by John Sprack for LawWorks October 2023

Preparing the claimant (1)

- You will no doubt have attempted to prepare C well in advance for the tribunal experience
- As the final hearing approaches you need to go into more detail
- Emphasise that the central issue is discrimination not fairness
- Nor is it prejudice: so if asked in XX if someone discriminated the answer can be “yes” - even if C does not believe that they were racist, homophobic etc
- C should bring a friend for moral support
- Explain about statements being taken as read, and that XX will follow swiftly after they are called to give evidence
- Also that it is normal for the representative to prepare the statement - the crucial point is that it is what happened, they checked it and have ownership of it
- Explain to your client and any of your witnesses what will happen at the tribunal - familiarisation is acceptable, coaching is not

Preparing the Claimant (2)

Some more advice

- Make sure that C looks carefully at their statement again before giving evidence
- And tells you of anything which needs amendment
- They should keep answers in XX brief: ‘Yes’, ‘No’, ‘I can’t remember’ are the staples
- They should focus on the question posed - listen to it then answer it
- They should look at the tribunal rather than at the person asking the questions
- If unclear, ask for the question to be repeated, don’t guess what the questioner is getting at
- If they feel the need to explain further they should ask the judge if they can answer more fully
- They should remember that the cross-examiner is doing a job - it is not personal
- Tell them they can ask for a break if they need one
- Explain that, if there is a break, they must not speak to anyone about the case (lunch alone may be necessary)

The burden of proof (1)

The statutory position

- The **standard** of proof is the normal civil one: balance of probabilities or “more likely than not”
- That is something of which the ET may need to be reminded
- The initial **burden** of proof as to whether there was discrimination is on C
- EU Directives recognised that this burden is often difficult to discharge
- Hence s 136 EqA 2010 - It applies to all proceedings under the Act but is particularly relevant in direct discrimination cases
- “s 136(2) If there are facts from which the court [or ET] **could** decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court [or ET] must hold that the contravention occurred
- s 136 (3) But subsection (2) does not apply if A shows that A did not contravene the provision”

The burden of proof (2)

The statute explained

- So the burden shifts if C has a prima facie case: ET **could** conclude R **has** contravened the provision
- That conclusion may be based on inferences drawn from eg failure to comply with a relevant Code of Practice, evasive or inaccurate responses to questions
- But the mere fact of a difference in protected characteristic and a difference in treatment will not be enough: *Madarassy v Nomura International Ltd* [2007] IRLR 246 CA
- What will be enough? For example:

1. sexist/racist etc remarks, including those made on other occasions
2. better treatment of an actual comparator whose circumstances are the same eg man and woman committing the same offence, one treated more leniently
3. False explanation of the different treatment
4. Previous acts of discrimination against C (if out of time) or others

The burden of proof (3)

The employer’s explanation

- When the burden shifts ET considers any explanation for the apparently discriminatory conduct put forward by R
- R must then prove on the balance of probabilities that it did not discriminate
- It must show that the treatment was in no sense whatsoever on the grounds of sex/race etc
- So is the explanation adequate to discharge the burden of proof?
- The facts will usually be in R’s possession to back up such an explanation and the ET would normally expect cogent evidence to back it up: *Madarassy*
- Although the two stages are logically separate, the evidence relevant to the two stages is not usually heard separately

Who goes first?

Order of proceedings at full merits hearing

- For the both C and their representative it is important to get the sequence of events in the ET in mind
- So who goes first?
- If it is a “pure” discrimination case, C bears the initial burden of proof and will have to go first
- If it is also an unfair dismissal case then the initial burden of proof will be on R for that part of the case
- It will then be up to the tribunal to decide who goes first and views may be sought
- If so, think about whether this will benefit C by capturing the attention of the ET at the start
- Or whether it will be better to hear R’s witnesses first to determine lines of attack

Order of proceedings

Pattern for each witness, then closing submissions

- For each witness, the order is usually:
- Examination in chief (XiC) by their own side (statement taken as read, possible supplementaries)
- Cross-examination (XX) by the other side
- Tribunal questions (TX) by ET members
- Re-examination (RX) by their own side
- After evidence completed, closing submissions
- Party who did not start
- Party who started

The Equal Treatment Bench Book (1)

- ETs should make reasonable adjustments for disabled parties/witnesses
- For guidance on best practice, see *Equal Treatment Bench Book* to be found at:
- https://www.judiciary.uk/wp-content/uploads/2023/04/Equal-Treatment-Bench-Book-April-2023-revision-2.pdf
- The Presidential Guidance for Employment Tribunals on the subject also important
- https://www.judiciary.uk/wp-content/uploads/2013/08/ET-Presidential-Guidance-on-Vulnerable-Parties-and-Witnesses-22-April-2020.pdf
- See also *Rackham v NHS Professionals Ltd* (UKEAT/0110/15)
- *Habib v Dave Whelan Sports Ltd T/A DW Fitness First* [2023] EAT 113

The Equal Treatment Bench Book (2)

- For the ETBB, the best starting point is Appendix F which gives a useful overview of each chapter
- To give you a taster: Chapter 1 deals with litigants in person - they are not the problem, maintaining balance
- Chapter 2 is primarily intended for criminal justice but has a useful focus on vulnerable people and relevant adjustments
- Chapter 3 deals with physical disability on the part of witnesses and parties - the difficulties posed for them
- Chapter 4 is on mental disability and the need to adjust timing, breaks, the order of proceedings where needed
- Chapter 6 deals with gender including accommodating caring responsibilities, breastfeeding, pregnancy, menopause
- Chapter 8 is on racial matters: avoiding stereotypes, naming systems, interpreters
- Chapter 9 is about religion eg oaths and holy books, wearing the veil, religious festivals
- Chapter 12 focuses on cases involving trans people - acceptable terminology, restrictions on disclosure of gender at birth.

Interpreters

- The *Equal Treatment Bench Book* also has detailed advice on interpreters and the pitfalls involved : paras 109-145
- An interpreter may be necessary for a deaf or blind C or W
- Parties cannot bring their own interpreter (although a family member providing support may be present and should be able to communicate with them)
- The ET should provide an interpreter free of charge
- Plenty of notice is desirable especially for a signer
- Make sure that the interpreter and C or your W speak the same dialect
- The question is not whether C or W can speak or read English well, but whether they can give the best account of their evidence without an interpreter

Strategy in Discrimination Cases (1)

Some general pointers

- ET or opponent may ask questions to pin you down eg do you claim C was discriminated against because she was from Africa, or because she was black?
- Where possible (or you just cannot say) put your case in the alternative
- When the question is posed: which of the members of the promotion panel do you say discriminated?
- Your response might well be that you cannot say and that you make that allegation against all of them, which may be withdrawn in respect of individuals depending on the evidence
- Make sure that you (and C) do not make wild allegations, suggest conspiracies etc
- R’s witnesses may have acted from the best of motives and still have discriminated
- Often there is a wish on the part of management to appoint someone who will fit in
- The ET may be more willing to accept that softer version

Strategy in Discrimination Cases (2)

- If you claim that dismissal was an act of discrimination the ET will have a lingering suspicion that the claim is because of a lack of qualifying service
- Make sure that your case is based upon different treatment rather than unfair treatment
- Unfair treatment will only be relevant if it differs from the norm for that employer
- There is always the possibility of the “bastard” defence - I treat all my employees unfairly!
- What if your case claims “ordinary” unfair dismissal as well as discrimination?
- Make sure that you separate the issues

Strategy in Discrimination Cases (3)

Submission of no case to answer

- At the end of C's case, R may argue that insufficient evidence has been adduced to shift the burden of proof
- It therefore submits there is no case to answer
- Be prepared to deal with this tactic
- It is not favoured by the EAT: *Laker v Hammersmith and Fulham LBC* [1994] UKEAT 215
- ETs generally will not dismiss the case at this stage
- C should be able to question R's witnesses and hear their explanation: *Balamoody v UKCC for Nursing, Midwifery and Health Visiting* [2002] IRLR 288 CA
- More likely at this interim stage is a costs warning - if so, weigh up your chances of success

Costs

- Some anecdotal evidence that they are awarded more frequently in discrimination cases than in unfair dismissal
- And they are usually more substantial
- So ensure that there is a reasonable prospect of success before commencing the case, and at various stages
- And keep the issues under control - frequently a slimmer shorter case is more effective, and it will help to avoid the charge of unreasonable conduct
- Where your client agrees, make it clear that you are amenable to mediation at any PH
- If it comes to an argument on costs at the end of the case, point out how the employer could have averted proceedings eg by an early explanation
- C is entitled to know why they were treated in the way that they were
- There are public policy reasons why discrimination cases need to be aired in ET

Any Questions ?