Efobi v Royal Mail Group: Much Ado About Nothing?

Jeremy Letwin* and Josephine Rendall-Neal*

Abstract: Following the Supreme Court's recent *Efobi* decision, claimants in employment tribunals must first prove a prima facie case of discrimination before the burden of proof falls on the respondent to provide a non-discriminatory explanation for the impugned conduct. The two stages are separate. Tribunals cannot draw any inferences from a respondent's explanation (or lack of explanation) when deciding whether there is a prima facie case of discrimination. We argue that, in reaching this decision, the Supreme Court failed to tackle squarely the important normative question at the heart of the dispute: whether there *should* be constraints on the evidence courts may consider when adjudicating whether there is a prima facie case of discrimination. Had the Supreme Court confronted this normative question, the outcome of the case might have been different.

Keywords: Employment law, Discrimination

INTRODUCTION

How should the burden of proof function in discrimination cases? In *Royal Mail Group Ltd v Efobi*,[1] the Supreme Court held unanimously that claimants bear the initial burden of proof to establish a prima facie case of discrimination, and thus seemed to restore the orthodoxy which had been upset by the earlier Employment Appeal Tribunal ('EAT') judgment.[2]

* Dickson Poon School of Law, King's College London.

* Associate, GQ Littler. The authors would like to thank Oliver Letwin for his comments on earlier drafts of this note, and are also grateful for the comments of the anonymous referee.

[1] [2021] UKSC 33

[2] [2018] ICR 359

Efobi appears at first sight to be a dry, technical case about the precise words of section 136 of the Equality Act 2010 ('the 2010 Act') – causing even Lord Leggat to wonder if it was 'much ado about nothing'. We argue, in contrast, that behind this bland appearance, *Efobi* really concerned the important principle of whether there should be constraints on the evidence courts may consider. We begin by explaining the facts of the case and disentangling its complex procedural history. We then argue that if the Supreme Court had recognised the true importance of the principle at stake in *Efobi*, the outcome of the case might have been different.

THE FACTS OF THE CASE AND THE LAW

The Claimant was a postal worker employed with the Respondent. The Claimant was born in Nigeria and identified as black African and Nigerian. The Claimant brought a number of claims against the Respondent, but the only relevant claim for present purposes was that the Respondent had directly discriminated against the Claimant by rejecting the Claimant's repeated job applications for management and IT roles on grounds of his race and/or nationality.

The central question in the appeals was whether the changes in language between the repealed section 54A(2) of the Race Relations Act 1976 ('the legacy provisions'), and section 136 of the Equality Act 2010 which replaced it, had changed the law.

Under section 54A(2) of the Race Relations Act 1976, where:

> … 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.

Section 136 of the 2010 Act, in contrast, reads as follows:

(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]

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

THE EMPLOYMENT TRIBUNAL

The Employment Tribunal ('ET') followed the guidelines established in *Igen Ltd v Wong*[4] ('*Igen*') and *Madarassy v Nomura International plc*[5] ('*Madarassy*') prior to the enactment of the 2010 Act. These guidelines mandated that a two-stage analysis should be applied: first, the tribunal should consider whether the claimant had proved facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an act of unlawful discrimination against the claimant; if so, then second, the tribunal should

[3] This refers to a contravention of the 2010 Act, which would include an act of unlawful discrimination or harassment on grounds of race and/or nationality.

[4] [2005] ICR 931

[5] [2007] ICR 867

determine whether the respondent had provided an adequate non-discriminatory explanation for such acts.

The ET held that the Claimant had not established a prima facie case of discrimination. Accordingly, the claim failed.

THE EMPLOYMENT APPEAL TRIBUNAL

The EAT held that the ET had erred in applying the guidelines from *Igen* and *Madarassy* as these cases were based on the legacy provisions, not on the new 2010 Act.

In Laing J's opinion, section 136(2) of the 2010 Act had changed the law such that there was no burden on a claimant to prove facts at the first stage of the analysis. She cited a number of bases for this interpretation of section 136: (i) the removal of the reference to 'the complainant' proving facts, in favour of a neutral turn of phrase 'if there are facts', pointed to a removal of the burden of proof on the claimant; (ii) the use of the word 'facts' rather than 'evidence' showed that the analysis required by section 136 must take place at the end of the hearing when the tribunal makes its findings of fact; (iii) industrial tribunals had been discouraged from acceding to submissions of no case to answer long before the 2010 Act was enacted, and so it was not surprising that Parliament had taken the step to entirely forbid them from doing so under the new statute, by removing any burden of proof on the claimant.[6]

[6] *Efobi* (EAT) n 2 above at [78]

According to the EAT, at the first stage of the section 136 analysis, there is no burden on the claimant to prove anything, but rather the tribunal must look at the facts as a whole in order to decide if there is a prima facie case of discrimination. The tribunal must consider evidence from all sources, including any adverse inferences which the tribunal might draw from a lack of evidence.[7]

The EAT held that the ET's error in respect of the burden of proof led them to misunderstand the scope of the facts relevant to section 136. For instance, the Respondent had decided not to call as witnesses any decision-makers in relation to the Claimant's job applications. Laing J held that this was an example of a lack of evidence which might give rise to adverse inferences, and that had the ET understood section 136 correctly, it would have considered whether to draw such inferences when deciding whether a prima facie case of discrimination had been made out.

THE COURT OF APPEAL – *AYODELE*

Before *Efobi* itself came to the Court of Appeal, elements of the EAT's decision were considered in *Ayodele v Citylink Ltd,*[8] ('*Ayodele*') where the Court of Appeal held that the 2010 Act had not changed the law in respect of the burden of proof on the claimant, and that the case law under the legacy provisions was still authoritative. Singh LJ's view was that the change in wording from 'the complainant proves facts', to 'if there are facts' in the 2010 Act, was intended merely to clarify that all evidence, whether from the claimant or the respondent,

[7] *ibid* at [85]-[86]

[8] [2017] EWCA Civ 1913

should be considered at the first stage of the analysis.[9] Singh LJ provided a number of arguments to support this conclusion: (i) the requirement that a claimant discharge a burden of proof under the legacy provisions maintained a fair balance between the rights of the claimant and those of the respondent, such that respondents do not have to provide explanations against mere assertions of unlawful discrimination;[10] (ii) the burden of proof did not appear to have caused any difficulties under the legacy provisions which would have made it desirable or appropriate to alter this in the 2010 Act;[11] (iii) none of the explanatory notes to the 2010 Act, the initial consultation papers, or the academic discussions around the implementation of the 2010 Act, included any mention of difficulties with the burden of proof or proposals to change this aspect of the law;[12] (iv) there had been no discussions after the implementation of the 2010 Act about any purported changes to the law in this respect.[13]

The Court of Appeal therefore stated that *Igen* and *Madarassy* were still good law, and that 'the interpretation placed on section 136 by the appeal tribunal in *Efobi* is wrong and should not be followed.'[14]

[9] *ibid* at [103]

[10] *ibid* at [93]-[94]

[11] *ibid* at [96]

[12] *ibid* at [96]-[100]

[13] *ibid* at [100]-[102]

[14] *ibid* at [106]

THE COURT OF APPEAL – *EFOBI*

The Court of Appeal in *Efobi*[15] regarded itself as bound by *Ayodele* with respect to the correct interpretation of section 136.[16]

The Court also rejected the EAT's decision that the first instance tribunal should have considered whether to draw inferences from the Respondent's failure to provide certain evidence.

First, the Court held that it was for the Claimant to adduce, or to request the Respondent to produce, evidence beneficial to the Claimant's case. It was not a tribunal's place to perform an inquisitorial function. It would not be legitimate for a tribunal to draw adverse inferences against a respondent for failing to produce, of their own volition, evidence which may weaken their case.[17]

Secondly, a respondent's explanation of allegedly discriminatory acts goes only to the second stage of the section 136 analysis. Therefore, a tribunal must turn their minds to a respondent's explanation only after a claimant has discharged the initial burden of proof by establishing a prima facie case of discrimination. This means that no adverse inference can be drawn at the first stage of the analysis from the fact that a respondent has not provided such an explanation.[18]

[15] [2019] EWCA Civ 18

[16] *ibid* at [15]

[17] *ibid* at [44]

[18] *ibid* at [44]

The Court of Appeal thus restored the findings of the Employment Tribunal.

THE SUPREME COURT

The Supreme Court divided its discussion into two separate headings: first, the Court dealt with the issue of the burden of proof under section 136; second, the Court discussed whether adverse inferences could be drawn, at the first stage of the section 136 analysis, from the Respondent's failure to call witnesses.

With respect to the first issue, Lord Leggatt held that the shift in language between the legacy provisions and section 136 had not changed the law. In addition to restating the arguments made in *Ayodele*, he added that: (i) the changes of wording between section 136 of the 2010 Act and the legacy provisions were simply intended to clarify the potentially ambiguous language of those old provisions;[19] (ii) logic dictates that where facts must be proved from which a tribunal could infer unlawful discrimination has occurred, the burden of proof would necessarily lie with the claimant on the balance of probabilities;[20] (iii) Laing J had erred in holding that section 136 prohibited a submission of no case to answer at the end of the claimant's evidence. While in practice, tribunals would most often only be in a position to decide on the analysis required by section 136(2) at the end of the hearing, there is no strict legal bar on a submission of no case to answer.[21]

[19] *Efobi* (SC) n 1 above at [28]

[20] *ibid* at [29]-[30]

[21] *ibid* at [33]

Turning to the second question about the information from which inferences can be drawn, Lord Leggat held that, at the first stage of the inquiry, when establishing whether there is a prima facie case of discrimination, it is impermissible to draw adverse inferences against a respondent on the grounds of their failure to provide an explanation at the second stage. However, he held that only the explanation itself, and not any of the surrounding evidence, was inadmissible: courts should be free to draw adverse inferences against respondents from, for example, a respondent's failure to call any witnesses.[22]

THE KEY TO EFOBI: CONSTRAINTS ON THE EVIDENCE COURTS MAY CONSIDER

Underlying this tortuous jurisprudence is an important normative question: should there be any constraints on the evidence which a court can consider when deciding whether there is a prima facie case of discrimination? Although this question was never explicitly articulated in any of the relevant judgments, it is of central importance.

It is clear from the Supreme Court's judgment in *Efobi* that the Court did not think section 136 had changed the law in any way; but it is much less clear exactly what was the 'new law' made by the EAT's judgment. There are at least four possible ways of thinking about what was at stake here, only one of which is congruent with the judgments of the various courts.

First, *Efobi* could have been about the appropriate 'standard' of the burden of proof. Under the legacy provisions, it was clear that a court must be satisfied, *on the balance of probabilities,*

[22] The only thing from which courts cannot draw adverse inferences, is the respondent's very explanation itself, or lack of it; *ibid* at [40]-[42]

that there is a prima facie case of discrimination, before proceeding to the stage of the analysis where the respondent bears the burden of proof to explain those facts. One possible interpretation of section 136 is that it lowered this standard, such that a claimant might, for example, have *merely to assert* a prima facie case of discrimination in order to discharge their burden of proof, before proceeding to the stage of the analysis where the burden of proof is on the respondent to explain those facts. Though this is an interesting theoretical possibility, at no point in any of the relevant judgments is this possibility suggested, nor was it seriously proposed by counsel at any stage of the proceedings.[23] It would, in any event, be patently unfair to employers to hold that claimants merely had to assert discrimination before requiring respondents to explain their conduct – and had *Efobi* simply been about this very obvious point, it would never have reached the Supreme Court.

Second, *Efobi* could have been about whether a court can take into account evidence from both the claimant and the respondent when deciding whether there is a prima facie case of discrimination. Because the legacy provisions stated that 'the complainant' must prove facts, it might be thought that only evidence from the claimant, not from the respondent, was relevant. Section 136, in contrast, refers only to whether or not 'there are facts', and so implies that evidence from both the claimant and the respondent are relevant. However, as the Supreme Court noted, the judicial interpretation of the legacy provisions made it clear that those provisions allowed for evidence from both the claimant and the respondent to be taken into account.[24] Both under the old legislation and the new legislation, it is clear that evidence from both the parties can be taken into account.

[23] Though some commentators have misinterpreted *Efobi* as being concerned with the standard of the burden of proof, eg see the comments in 'Burden of proof clarified', (2021) 171(7943) *New Law Journal* 5

[24] *Efobi* (SC) n 1 above at [26]-[27]

Third, *Efobi* could have been about with whom the burden lay of persuading the court that there was a prima facie case of discrimination. Under the old legislation, the burden seemed to lie explicitly with the claimant, whereas under the new legislation the burden is 'neutral'. Indeed, this was largely the interpretation advanced by counsel for the claimant in the Supreme Court. However, as Lord Briggs pointed out in the course of oral argument, the practical reality under both the old and new legislation is that it must ultimately be the claimant's job to persuade the court. Even if the precise intensional meaning of the law had changed, the new and the old law are clearly extensionally equivalent in this respect.[25]

The fourth possibility – and the only one consistent with the jurisprudence – is that *Efobi* was really about how bright the line ought to be between the 'first stage' at which the court must be satisfied that there is a prima facie case of discrimination, and the 'second stage' at which the court must be satisfied that there is no non-discriminatory explanation for the impugned conduct. The brighter the line between the stages, the more evidence relevant to the second stage is excluded from the first stage.

We can differentiate four possible degrees of brightness:

(P1) The first and second stages are entirely distinct. Neither the respondent's explanation, nor any other evidence at all concerning the second stage, can be taken into account at the first stage.

[25] As the Supreme Court essentially confirmed – *ibid* at [32]; See also, M Fitting, 'Intensional Logic', (2020) *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta (ed) <https://plato.stanford.edu/archives/spr2020/entries/logic-intensional/>

(P2) The first and second stages are distinct, and the respondent's explanation (or lack of explanation) cannot be taken into account at the first stage. (Although, inferences may be drawn at the first stage from any other surrounding evidence including evidence relevant to the explanation.)

(P3) The first and second stages are distinct, but there is no restriction at all on evidence which can be taken into account at either stage.

(P4) There are no distinct 'stages'. Instead, there are two individually necessary and collectively sufficient conditions: that there is a prima facie case of discrimination, and that there is no non-discriminatory explanation available. There is no restriction on the evidence which can be taken into account in relation to either of the necessary conditions.

Under the legacy provisions, all relevant jurisprudence accepted either P1 or P2. In the EAT judgment, by contrast, Laing J opined that:

> 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'… It may therefore be misleading to refer to a shifting of the burden of proof.[26]

[26] *Efobi* (EAT) n 2 above at [78]

Here, Laing J seems to have in mind P4 – it is not appropriate for courts to think in terms of 'stages' or in terms of a 'shifting of the burden of proof'. Similarly, later in her judgment, Laing J stated:

> [The ET] decided that the claimant had not 'got to first base'. Had they appreciated that the claimant did not have to get to first base, but that they had to consider all the evidence in the round, they might have concluded that section 136(2) was satisfied.[27]

Again, this section of the judgment implies that there is no 'first stage' and 'second stage', but rather, two necessary conditions which must be satisfied, taking into account all the relevant evidence.

At other points in its judgment, however, the EAT seems to have something closer to P3 in mind.[28]

In any event, whether one thinks that the EAT adopts P3 or P4, the judgment clearly envisages a shift away from P1 or P2, and thus an important shift away from the legacy provisions. It is this proposed change – from P1/P2 to P3/P4 – which is what was really at stake in *Efobi.*

The Court of Appeal rejects the shift to P3/P4. True, it does not explicitly hold that both the respondent's explanation (or lack of it), and all the other surrounding evidence (or lack of it) relevant to the respondent's explanation are excluded from consideration at the first stage. But position P1 nonetheless seems to be the most natural way of reading the judgment, since the

[27] *ibid* at [90]

[28] Eg at [86] where Laing J suggests there are still 'two stages' to the inquiry.

Court of Appeal does specifically exclude not merely the nature of the respondent's explanation, but also any adverse inferences being drawn at the first stage from the respondent's failure to call witnesses:

> 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.[29]

The Supreme Court similarly, but slightly differently, adopts the view that *only* the bare explanation, or lack of it, is excluded from consideration at the first stage, not any of the surrounding evidence – ie it adopts P2 rather than P1:

> At the first stage the tribunal must consider what inferences can be drawn in the absence of any explanation for the treatment complained of…It follows that…no adverse inference can be drawn at the first stage from the fact that the employer has not provided an explanation…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 decisionmakers. It is quite possible that, in particular circumstances, one or more adverse inferences could properly be drawn from that fact.[30]

The problem in *Efobi*, is that the Supreme Court, in adopting P2 (and thereby siding with the Court of Appeal and the ET, rather than the EAT) made its choice between positions P1-P4 tacitly. At no stage did the Supreme Court clearly differentiate the possible degrees of brightness in the line between the first and second stage.

---

[29] *Eofbi* (CA) n 15 above at [44]

[30] *Efobi* (SC) n 1 above at [40]

Indeed, by artificially separating the case into two distinct issues – 'the burden of proof issue', and 'the adverse inference issue' – the Supreme Court denied itself the ability to acknowledge that these two issues are both part of a broader overarching question about whether there ought to be a 'first stage' and a 'second stage', and if so, how bright the line between these stages ought to be.

In relation to the burden of proof issue, the Court was presented with an argument that it ought to change the law, but it was never given clear guidance about what that change entailed. The Court was given the choice between two options: (a) to keep the idea of two 'stages', or (b) to eliminate the idea of two 'stages' – ie a choice between (a) adopting positions P1, P2 or P3, and (b) adopting position P4. However, because of the artificial separation made between the burden of proof issue and the adverse inference issue, the choice between these options seemed robbed of any normative significance. It was never put to the Court that the value of eliminating the metaphor of two 'stages' and replacing it with the concept of two 'necessary conditions', lay in the effect that this change would have on the extent to which the courts are constrained in the evidence they may consider when deciding whether there is a prima facie case of discrimination. For the Court, the change appeared to be purely linguistic, lacking any real substance, and to be 'much ado about nothing'.

The fact that by the time the Court came to the adverse inference issue, it had already decided that there ought to be two stages to the inquiry, led it naturally to suspend disbelief in an artificial way, pretending not to know things that might be relevant to establishing a prima facie case of discrimination. So, although the choice was technically still open to the Court to choose

P3 rather than P1 or P2, position P3 no doubt seemed incongruent with the metaphor of stages, and was never seriously considered.

If, unlike the Supreme Court in *Efobi*, one looks at the issue squarely, and asks whether P3/P4 are normatively superior to P1/P2, one can see that there are in fact good reasons *not* to adopt restrictions on the evidence courts can consider when establishing whether there is a prima facie case of discrimination.

The most obvious reason against adopting such restrictions is that courts are perfectly capable of deciding on their own what inferences it is logical for them to draw in any given situation. If it is rational for a court, at the stage of deciding whether there is a prima facie case of discrimination, to draw either positive or negative inferences from a respondent's explanation (or lack of it) for their alleged conduct, then the court ought to be left to draw such inferences. Unless there is some reason to think that it will always be irrational for a court to draw such inferences, or some reason to think that courts will often act irrationally if left to their own devices, then it is desirable in principle to allow for maximal discretion so that courts can do justice to each case before them.[31]

It seems bizarre to assume that the courts would in fact draw such inferences in circumstances where it would be irrational to do so. And there could certainly be instances in which such inferences would be rational. To take an extreme example, if a respondent says by way of explanation, 'we weren't just racist to the claimant, we were racist to everyone', clearly it

[31] Indeed, courts are often left to make considerably more difficult judgements than this. See, eg, J Gardner, 'The Many Faces of the Reasonable Person' (2015) 131 *LQR* 563

would be rational, and fair to the respondent, for the court to take this explanation into account when deciding whether there was a prima facie case of discrimination.

True, as the Supreme Court put it, it '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'.[32] There is, however, again no reason to think that a court would allow this to occur. If a respondent's explanation contains evidence which is detrimental to the claimant's prima facie case of discrimination, then it would be rational and fair for a court to take this into account; if, on the other hand, a respondent's explanation is just a convincing explanation, then it is rational to regard this as pertinent only to the explanation itself, rather than being an extra thing which the claimant must disprove in order to establish a prima facie case of discrimination. There is, of course, always a risk that courts might take something into account when assessing the prima facie case for discrimination which is prejudicial to claimants – but there is an equal, if not greater risk, that restrictions on the evidence a court can consider might turn out to be prejudicial to claimants. At least if the matter is left to discretion, then prejudicial conclusions can be corrected on appeal.

We turn, finally, to the question of whether the normative arguments are defeated by the plain words of the statute. Does the new legislation require restrictions on the evidence courts can consider when establishing whether there is a prima facie case of discrimination?

Section 136(2) states that:

[32] *Efobi* (SC) n 1 above at [22]

> 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.[33]

The Supreme Court took the view that this subsection implied that the respondent's explanation ought to be disregarded when establishing whether there is a prima facie case of discrimination:

> 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.[34]

However, this is, we argue, an unnatural way of understanding section 136(2). A more natural reading would take the subsection to mean that the court is simply being asked to decide whether discrimination would have occurred, were there not an explanation for it. This does not imply that the court is required to exclude consideration of information which is disclosed as part of the explanation and which is relevant to the question of whether discrimination would have occurred, were there no explanation for it.

The naturalness of this reading comes out clearly when one considers how the passage would have to be read if the phrase 'in the absence of any other explanation' were to appear at the very end of section 136(2), or at the very beginning, rather than as a sub-clause placed after the word 'decide'. In either of these cases, there would be no ambiguity, and our proposed meaning would clearly be correct. The movement of this phrase from the end of the section to the middle,

[33] (Emphasis added)

[34] *Efobi* (SC) n 1 above at [40] (emphasis added)

(though it may reflect Parliamentary Counsel's penchant for a Euclidian style of drafting) should surely not, in itself, be taken to change the natural meaning of the subsection.

When one adds to the normative considerations, the natural meaning of the statute itself, it seems clear that the Supreme Court missed an opportunity to remove unnecessary restrictions on the scope of the evidence that can be considered when assessing a prima facie case of discrimination.

CONCLUSION AND PRACTICAL CONSEQUENCES

As a result of not making the distinctions made in this article, the Supreme Court has generated an unfair advantage for employers. The Court has effectively barred any explanation given by a respondent – even if highly unconvincing or prejudicial to their case – from being taken into account when assessing whether there is a prima facie case of discrimination.

The chief merit of the judgment is that it does not go quite as far as some other courts have done – the Court thankfully adopted position P2 rather than the more radical P1. Even though the judgment is still somewhat favourable to employers, it does not, at least, allow them always safely to pursue the kind of strategy adopted by the Respondents in *Efobi* – a respondent's failure to call witnesses can now lead to courts drawing adverse inferences against them when assessing whether there is a prima facie case of discrimination.