Neutral Citation Number: [2025] EAT 49

Case No: EA-2023-000267-RS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 February 2025

Before:

MARCUS PILGERSTORFER KC

DEPUTY JUDGE OF THE HIGH COURT

- -

Between:

MR RAFIQUL ISLAM

Appellant

- and -

LOOMIS UK LTD

Respondent

- -

Rad Kohanzad (**acting as Pro Bono Counsel**) for the **Appellant**
Julie Duane (instructed by **Actons Solicitors**) for the **Respondent**

Hearing date: 28 February 2025

- -

JUDGMENT

SUMMARY

Religion or Belief Discrimination: section 136 Equality Act 2010

The Claimant was selected for redundancy in phase 2 of a programme of redundancies. He was scored against an agreed matrix but did not achieve a sufficient number of points to reach the threshold applied by the respondent. He was dismissed. The Tribunal found the dismissal procedurally and substantively fair.

The Claimant maintained his selection for redundancy amounted to direct discrimination because of his Islamic faith. The Tribunal dismissed that complaint.

On appeal, the Claimant argued the Tribunal had failed to apply the burden of proof provisions contained in section 136 **Equality Act 2010** and had failed to consider whether numerical evidence about the selection exercise was sufficient to shift the burden to the Respondent.

Held, dismissing the appeal:

(i) Although the Tribunal had not referred expressly to section 136 **Equality Act 2010**, or the judicial guidance relating to it, it had in substance considered whether the Claimant had made out a *prima facie* case of discrimination and concluded he had not.

(ii) Whilst in a suitable case, appropriate statistics, either on their own or taken with other evidence, might be sufficient to shift the burden of proof, the numbers relied on by the Claimant on this appeal were not capable of doing so and had not been presented to the Tribunal as they had on appeal. No error of law was disclosed by the Tribunal not expressly considering whether they shifted the burden of proof.

MARCUS PILGERSTORFER KC, DEPUTY JUDGE OF THE HIGH COURT:

INTRODUCTION

1. The central issue in this appeal is whether the tribunal correctly applied the burden of proof provisions contained in section 136 of the **Equality Act 2010** when it dismissed the appellant's claim that he had been selected for redundancy because of his Islamic faith. I shall refer to the parties as they were before the tribunal below.

2. In a judgment sent to the parties on 20 February 2023, the Watford Employment Tribunal (Employment Judge Allen sitting with Mrs Jaffe and Ms Harris) decided that the claimant's claim of unfair dismissal was not well-founded. It also dismissed the claimant's related claim of direct religion or belief discrimination. The claimant had also brought a claim for holiday pay. In respect of that, an agreement was reached during the hearing below that the sum of £325.35 should be paid and it was ultimately marked as withdrawn, and then dismissed upon receipt of that payment.

3. When lodged, the claimant's appeal was wide-ranging. It failed to persuade Judge Keith on the sift that it disclosed reasonable grounds for bringing the appeal. At a rule 3(10) hearing the claimant sensibly utilised the services of Mr Kohanzad of counsel under the auspices of the ELAAS scheme. Mr Kohanzad refocused the appeal and persuaded John Bowers KC, Deputy High Court Judge, that a single ground concerning the tribunal's approach to the burden of proof provisions was arguable. The judge permitted that single ground to proceed to today's hearing. He dismissed the other grounds, including one put forward relating to redundancy scoring matrices.

THE FACTS AND THE JUDGMENT BELOW

4. The facts can (for the most part) be taken from the tribunal's judgment. The respondent is a nationwide cash management business providing secure cash delivery and collection services, including replenishments of automatic teller machines more commonly

known as ATMs.

5. The claimant was employed as a driver/custodian between 11 August 2014 and 31 December 2020. He was employed at the Dunstable depot (also referred to as the Dunstable branch). The respondent's business was hard hit by the Covid pandemic resulting in a dramatic downturn in demand for its services. This was because many customers moved to cashless transactions. The respondent was obliged to cut its national workforce by 48% and in 2020 embarked on a process of phased redundancies.

6. Pausing there, the claimant accepted before the tribunal that the need for redundancies was genuine and real. His case, however, was that when he was selected (in phase 2 of the process) his selection was both unfair and because of his Islamic faith.

7. Phase 1 of the redundancy process occurred in August 2020 when the respondent made 312 employees redundant. Selection occurred using criteria which had been agreed with the two recognised unions following consultation. The claimant was not selected during phase 1. His case before the tribunal was that the respondent had used phase 1 as an occasion to select seemingly problematic employees.

8. The tribunal recorded the following at paragraph 16:

> "16. The claimant implied the respondent used the redundancies to dispose of problematic members of staff because of the six staff made redundant from the Dunstable Depot in phase 1:
>
> 16.1. Five were Muslim,
>
> 16.2. All had in excess of five years' service, one in excess of 20,
>
> 16.3. The Muslim staff used work facilities for prayer during working hours, and the non-Muslim had health problems.
>
> 16.4. Two non-Muslim members of staff, each with less than two years' service were retained in that phase."

9. The tribunal assessed that position at paragraph 17 of the judgment as follows:

> "No evidence was produced on which the tribunal could conclude that the use of work facilities for prayer during work hours was considered problematic by management."

10. During today's appeal, I was told by Mr Kohanzad on behalf of the claimant that the

tribunal had misrecorded the claimant's submission and that paragraph 16 of the tribunal's reasons contained an inaccurate reflection of the claimant's true case. Mr Kohanzad told me that the claimant had not submitted that only six people were made redundant from the Dunstable depot in phase 1 and that five of those six, ie 83%, were Muslim. The claimant's position had been that he did not know how many from the Dunstable depot had been made redundant in phase 1, but that within the 'vault section' of the Dunstable depot, five out of six of those selected were Muslim.

11. My attention was drawn to the respondent's grounds of resistance at paragraph 5, and the evidence before the tribunal from the respondent's witness, that 28 individuals had been selected for redundancy at the Dunstable depot during phase 1. I was told that the claimant had not been in a position to challenge that number below. Whilst the tribunal had not referred to it in its judgment, it had been an uncontested fact that 28 people were made redundant from the depot in phase 1. There was no information recorded in the judgment, or before this appeal tribunal, as to the size or make-up of the pool from which those 28 were selected.

12. Phase 2 occurred in November 2020 when the respondent needed to reduce its workforce by a further 263 staff. All the driver/custodians at the Dunstable depot were scored by Mike Ketteringham, branch manager. In order to do the scoring Mr Ketteringham reviewed the employee records over the preceding twelve months and used the agreed scoring matrix. A 'breakpoint score' of 19 was then applied, such that those scoring below the breakpoint were selected for redundancy.

13. Mr Ketteringham also engaged in consultation with those affected: there was a group meeting on 11 November 2020 as well as subsequent individual meetings (the claimant's being on 2 December 2020). Union representatives attended those meetings. The claimant attended both the group meeting and his individual meeting. There was an issue before the

tribunal about the fact the claimant was missed off the invite to the group meeting. The tribunal found that this was unintentional and due to a typographical error. The respondent had intended to write to the claimant to invite him to the group meeting which, as I have said, he attended in any event.

14. The matrix involved Mr Ketteringham giving each driver a score for attendance, disciplinary record and job specific skills. These criteria were then weighted. The first two each contributed 20% to the overall score, and job specific skills contributed the remaining 60%. Job specific skills were in turn divided into knowledge, skills, versatility, qualifications and training and job performance.

15. At the end of the exercise, 17 of the driver/custodians did not pass the breakpoint of 19 and were selected for redundancy. The tribunal mentioned the figure of 18 at paragraph 22 of the judgment but it is common ground that this was an error. The claimant was one of the number selected. Although not a matter recorded by the tribunal in its judgment, the respondent's evidence was that the 17 were selected out of a total pool of 55 at the Dunstable depot. It does not appear that that number was challenged below.

16. The claimant's overall score was 16. Other individuals at the depot scored between 13 and 25. The claimant was dismissed with an effective date of termination of 31 December 2020.

17. Before the tribunal, the claimant complained about the criteria and his own scoring against the matrix. He argued length of service should have been granted a score but the tribunal did not agree. An issue arose in the case of one employee where length of service had been taken into account. That employee received a score at the breakpoint of 19. His short length of service had been considered but ultimately he was not made redundant because another employee volunteered for redundancy.

18. The claimant also argued that he should have received a higher score and therefore

should not have been selected in phase 2 at all. The tribunal scrutinised the score sheets of the claimant and various comparators he relied on. At paragraph 32 of the reasons the tribunal found that Mr Ketteringham had been consistent in how he applied the versatility score with one exception. That exception was for one employee who did not receive a versatility score who should have done. Mr Ketteringham's evidence was that this was a mistake and ultimately the tribunal decided that this individual could be distinguished from the claimant because he had accumulated enough points to pass the breakpoint even without the additional score for versatility.

19. The claimant complained he was not awarded any points (i) under the versatility heading or, (ii) under the skills heading for particular experience he had with work known as 'CViT retail collection' and 'vault' work. The tribunal considered these points and found as follows.

a. Whilst the claimant had done CViT work in the past, Mr Ketteringham explained that points were only awarded if this work had been done in the last twelve months and the tribunal found (against the claimant) on the evidence that he had not done such work in the preceding twelve months. The tribunal concluded he was not therefore entitled to a CViT score.

b. In relation to the vault work, whilst the claimant had performed some vault tasks, the work required security clearances and the claimant had not done the necessary training or been signed off.

c. In relation to the versatility score, the tribunal found on the evidence that those who were multi-skilled with additional qualifications would receive the versatility score. The tribunal scrutinised Mr Ketteringham's evidence as to how he had scored under this criterion and concluded he was consistent in his approach. Individuals needed three skills to get a versatility score. The tribunal

concluded that the claimant was not entitled to one.

20. The claimant also compared himself with a number of other comparators. He asserted they had the same skills as him but were not made redundant. The tribunal considered the score sheets and examined Mr Ketteringham's evidence and at paragraph 40 concluded:

> "We are satisfied that the matrix was applied consistently and do not agree with the claimant's argument that these employees should have received the same scores as him."

The tribunal reviewed the claimant's score sheet together with the comparators he had identified and concluded overall that the procedure and process followed was fair. It rejected a submission that the respondent failed to offer alternative employment because there were few, if any, alternatives to offer. Where there were roles, they were advertised so that a large group of redundant employees could apply. Although he saw the roles, the claimant chose not to apply. The tribunal considered this and the claimant's subsequent appeal and found them to be fair.

21. The tribunal also considered the claimant's case that his application to reduce hours had not been considered by the respondent. It found that this was simply overlooked due to the workload of the HR department at the time but, in any event, there was no detriment to the claimant because the rota had been amended to ensure the claimant was free to attend a relevant course and because there was no evidence to suggest he could not support his mother at medical appointments. At paragraph 58.5 the tribunal found the respondent's failure to respond had no impact on the claimant's eventual redundancy.

22. The claimant also argued that because his surname was Islam, it ought to have been obvious to the respondent that he was Muslim. The tribunal dealt with this at paragraph 35 of its judgment as follows:

> "35. The claimant asserted that because his surname was Islam it ought to have been obvious to the respondent that he was Muslim. Applying that logic to the 18 employees in the selection pool for redundancy one other had a name typically recognised as Muslim; a third, not selected for redundancy in that

> phase also had such a name. The Respondent did not collect data on its employees' religions."

23. The reference there to 18 employees in the selection pool should be a reference to the 17 employees selected for redundancy. Under a heading of "any other unfavourable treatment" and between paragraphs 53 and 55 the tribunal then said this:

> "**Any other unfavourable treatment?**
> 53. The claimant gave evidence that KS promised another employee that she would train him and make him full time. Incidentally this employee has a name which applying the claimant's own logic is typically associated with the Muslim faith. The claimant gave evidence he asked MK for this training but it was never provided. MK gave evidence he did not recall being asked. This was not included in the claimant's statement or claim form but offered by him during his oral testimony. This assertion is unsupported by evidence and we cannot conclude this is evidence of discrimination on the basis of religion.
>
> 54. The claimant first raised his concerns about religious discrimination on 10 December 2020 although he conceded during his appeal that this was based on his feeling and could not point to specific evidence. In the circumstances the only avenue open to the respondent was to review the process to see if there was any evidence of inconsistency of approach to Muslim staff members. This was done and no inconsistency or unfairness identified at all.
>
> 55. MK was made redundant in phase 3 and we cannot see any advantage to him in using the process to jettison 'problematic' employees as suggested by the claimant. We heard no evidence on which we could conclude the respondent found the claimant or any other employee 'problematic'."

24. After setting out section 98 and section 139 of the **Employment Rights Act 1996**, the tribunal then explained its conclusions from paragraph 56 onwards. The tribunal dealt with unfair dismissal and direct discrimination together. The tribunal concluded that the principal reason for the claimant's dismissal was redundancy and it found the dismissal for that reason to be fair. When it came to scoring, it found there was no basis on which it could conclude that the claimant had been unfairly scored. It found that Mr Ketteringham had adopted a consistent approach (see paragraph 58.2). Whilst it had not been error-free, the tribunal was satisfied the errors would not have changed the outcome for the claimant and did not undermine the process as a whole (see paragraph 58.6). The tribunal also expressly agreed with the appeal manager's conclusion that there were no grounds to support unfairness in the

selection process (see paragraph 58.7).

25. Relevant to the claimant's claim of discriminatory selection, the tribunal found as follows at paragraphs 58.3 and paragraph 58.8:

> "58.3. The claimant alleged that the respondent failed to properly investigate his feeling that the reason he was selected for redundancy was based on religion. The courts recognise that such discrimination can be difficult to spot. The respondent reviewed the application of the matrix and concluded the claimant's selection was consistent with his colleagues. On that basis we do not find that the respondent failed to investigate.
> …
> 58.8. The claimant's argument was that he was unfairly selected for redundancy on the grounds of his religion. The respondent gave evidence that at that time it did not ask employees to declare their faith. The claimant argued that his name alone should have made it obvious he was Muslim. Applying his logic across the piece we noted two other employees where the same could be said. One was made redundant and one wasn't. In the circumstances we are satisfied there were no grounds on which we could conclude racial discrimination played any part in the redundancy selection."

26. There is an obvious typographical error at the end of paragraph 58.8. The reference to "racial discrimination" should, consistently with the opening sentence of the paragraph, be a reference to "discrimination on grounds of religion". Finally at paragraphs 59 to 60 the tribunal concluded as follows:

> "59. We have found no evidence to suggest the claimant was unfairly selected for redundancy at all. Whilst the claimant argues he was the only Muslim left in his department and therefore the decision to make him redundant had to be discriminatory it does not stand up to scrutiny. MK made all the redundancy decisions at the Dunstable Depot and we heard no evidence that pointed to an inconsistency of approach.
>
> 60. We conclude the claimant has failed to discharge his burden of proof."

THE GROUND OF APPEAL

27. The scope of this appeal is narrow. The single ground of appeal is that the tribunal erred by failing to apply the burden of proof provisions contained in the **Equality Act 2010**. It is said that the claimant proffered evidence to show that Muslim employees were disproportionately made redundant in his part of the business through the two redundancy

phases and those statistics amounted to the 'something more' required to shift the burden of proof. The error of law was said to be that the tribunal failed to consider whether the statistics were significant and sufficient to shift the burden of proof.

28. Whilst there was no freestanding attack on the unfair dismissal finding, discriminatory selection had formed one of the allegations of unfairness in this case. Accordingly, the appellant submitted success on the appeal would reopen the tribunal's conclusions on unfair dismissal to that extent.

THE LAW

29. There was no dispute before me about the applicable law. Section 136 of the **Equality Act 2010** provides (so far as relevant) as follows:

> "**136 Burden of proof**
>
> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (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.
>
> …
>
> (6) A reference to the court includes a reference to—
> (a) an employment tribunal…"

30. The Explanatory Notes accompanying that section of the statute explain as follows, at paragraph 443:

> "This section provides that, in any claim where a person alleges discrimination, harassment or victimisation under the Act, the burden of proving his or her case starts with the claimant. Once the claimant has established sufficient facts, which in the absence of any other explanation point to a breach having occurred, the burden shifts to the respondent to show that he or she did not breach the provisions of the Act. The exception to this rule is if the proceedings relate to a criminal offence under this Act."

31. Many cases have now explained the effect of that provision and that of its statutory

predecessors. In **Igen v Wong** [2005] IRLR 258 the Court of Appeal revised and approved the 13 point guidance, referred to as the '*Barton guidance*' after **Barton v Investec Henderson Crosthwaite Securities Ltd** [2003] IRLR 332, setting it out in an annex to its judgment at paragraph 76:

> "**Annex**
> (1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.
>
> (2) If the claimant does not prove such facts he or she will fail.
>
> (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.
>
> (4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
>
> (5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
>
> (6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
>
> (7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.
>
> (8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

> (9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
>
> (10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
>
> (11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.
>
> (12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not aground for the treatment in question.
>
> (13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to dis-charge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

32. Following that guidance, in **Laing v Manchester City Council** [2006] ICR 1519 Mr Justice Elias, President, emphasised that it would:

> "Usually be desirable for a tribunal to go through the two stages suggested in **Igen**." [But that]: "It is not necessarily an error of law to fail to do so."

At paragraph 76 he explained:

> "There is no purpose in compelling Tribunals in every case to go through each stage. They are not answering an examination question, and nor should the purpose of the law be to set hurdles designed to trip them up. The reason for the two stage approach is that there may be circumstances where it would be to the detriment of the employee if there were a prima facie case and no burden was placed on the employer, because they may be imposing a burden on the employee which he cannot fairly be expected to have discharged and which should evidentially have shifted to the Employer. But where the Tribunal has effectively acted at least on the assumption that the burden may have shifted, and has considered the explanation put forward by the employer, then there is no prejudice to the employee whatsoever."

He went on to explain it is not the employee who is disadvantaged where the tribunal focuses only on the second stage (see paragraph 77 of his judgment).

33. The **Igen** guidance was then considered by the Court of Appeal in **Madarassy v**

Nomura International [2007] ICR 867. In the course of his judgment, Lord Justice Mummery emphasised that **Igen** had not decided that judicial guidance was a substitute for the statutory wording, paragraph 9:

> "…On the contrary, the Court of Appeal went out of its way to say that its guidance was not a substitute for the statute: paragraph 16. Courts do not supplant statutes. Judicial guidance is only guidance."

Lord Justice Mummery also emphasised that **Igen** did not decide that an error of law will be committed by omitting to repeat the guidance or by failing to work through the guidance paragraph by paragraph (see paragraph 10). In an important section of his judgment, at paragraphs 56 to 58, Lord Justice Mummery explained as follows:

> "56 The court in **Igen Ltd v Wong** [2005] ICR 931 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.
>
> 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.
>
> 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."

34. In **Martin v Devonshires Solicitors** [2011] ICR 352 Mr Justice Underhill, President, was faced with a submission that a tribunal had failed to deal properly with the burden of proof provisions, and had failed to have due regard to the guidance in **Igen v Wong**. In that appeal the tribunal had not anywhere in its reasons referred explicitly to the statutory provision or the judicial guidance that had been generated. At paragraph 39 of his judgment Underhill P said this:

> "39 This submission betrays a misconception which has become all too common about the role of the burden of proof provisions in discrimination cases. Those provisions are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination - generally, that is, facts about the respondent's motivation (in the sense defined above) because of the notorious difficulty of knowing what goes on inside someone else's head – "the devil himself knoweth not the mind of man" (per Brian CJ, YB Pas 17 Edw IV f1, pl 2). But they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law. In the present case, once the tribunal had found that the reasons given by Mr Hudson and Mr Buckland in their letters reflected their genuine motivation, the issue was indeed how that was to be characterised and the burden of proof did not come into the equation. (Cf our observations in **Hartlepool Borough Council v Llewellyn** [2009] ICR 1426, 1448C, para 55.)"

35. In **Hewage v Grampian Health Board** [2012] ICR 1054 the Supreme Court approved these authorities. Lord Hope, giving a judgment with which the entire court agreed, said this at paragraph 32:

> "32 The points made by the Court of Appeal about the effect of the statute in these two cases [**Igen** and **Madarassy**] could not be more clearly expressed, and I see no need for any further guidance. Furthermore, as Underhill J (President) pointed out in **Martin v Devonshires Solicitors** [2011] ICR 352, para 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing too offer where the tribunal is in a position to make positive findings on the evidence one way or the other. That was the position that the tribunal found itself in in this case. It is regrettable that a final resolution of this case has been so long delayed by arguments about onus of proof which, on a fair reading of the judgment of the employment tribunal, were in the end of no real importance."

36. Finally, I was referred to a more recent analysis in **Field v Steve Pye & Co. Ltd** [2022] IRLR 948. Whilst that judgment expressly explained it does not cut new legal ground concerning the burden of proof (see paragraph 32), after reviewing the authorities, His Honour Judge Tayler offered the following helpful analysis between paragraphs 41 and 45:

> "41. It is important that employment tribunals do not only focus on the proposition that the burden of proof provisions have nothing to offer if the employment tribunal is in a position to make positive findings on the evidence one way or the other. If there is evidence that could realistically suggest that there was discrimination it is not appropriate to just add that evidence into the balance and then conduct an overall assessment, on the balance of probabilities, and make a positive finding that there was a non-discriminatory reason for the treatment. To do so ignores the prior sentence in **Hewage** that the burden of proof requires careful consideration if there is room for doubt.
>
> 42. Where there is significant evidence that could establish that there has been discrimination it cannot be ignored. In such a case, if the employment tribunal moves directly to the reason why question, it should generally explain why it has done so and why the evidence that was suggestive of discrimination was not considered at the first stage in an **Igen** analysis. Where there is evidence that suggests there could have been discrimination, should an employment tribunal move straight to the reason why question it could only do so on the basis that it assumed that the claimant had passed the stage one **Igen** threshold so that in answering the reason why question the respondent would have to prove that the treatment was in no sense whatsoever discriminatory, which would generally require cogent evidence. In such a case the employment tribunal would, in effect, be moving directly to paragraphs 10-13 of the **Igen** guidelines.
>
> 43. Although it is legitimate to move straight to the second stage, there is something to be said for an employment tribunal considering why it is choosing that option. If at the end of the hearing, having considered all of the evidence, the tribunal concludes that there is nothing that could suggest that discrimination has occurred and the employer has established a non-discriminatory reason for the impugned treatment, there would be no error of law in just answering the "reason why" question, but it is hard to see what would be gained by doing so, when the tribunal has already concluded that there is no evidence that could establish discrimination, which would result in the claim failing at the first stage . There is much to be said for making that finding and then going on to say that, in addition, the respondent's non-discriminatory reason for the treatment was accepted.
>
> 44. If having heard all of the evidence, the tribunal concludes that there is some evidence that could indicate discrimination but, nonetheless, is fully convinced that the impugned treatment was in no sense whatsoever because of the protected characteristic, it is permissible for the employment tribunal to

> reach its conclusion at the second stage only. But again it is hard to see what the advantage is. Where there is evidence that could indicate discrimination there is much to be said for properly grappling with the evidence and deciding whether it is, or is not, sufficient to switch the burden of proof. That will avoid a claimant feeling that the evidence has been swept under the carpet. It is hard to see the disadvantage of stating that there was evidence that was sufficient to shift the burden of proof but that, despite the burden having been shifted, a non-discriminatory reason for the treatment has been made out.
>
> 45. Particular care should be taken if the reason for moving to the second stage is to avoid the effort of analysing evidence that could be relevant to whether the burden of proof should have shifted at the first stage. This could involve treating the two stages as if hermetically sealed from each other, whereas evidence is not generally like that. It also runs the risk that a claimant will feel that their claim that they have been subject to unlawful discrimination has not received the attention that it merits."

DISCUSSION AND CONCLUSIONS

Did the Employment Tribunal apply the approach required by section 136?

37. The tribunal analysed the claimant's case of unfair dismissal and direct discrimination together. That is perhaps unfortunate. It is also rather surprising because following a carefully conducted case management hearing before Employment Judge McNeill QC on 12 November 2021, a list of issues was prepared which identified the questions that arose on the discrimination complaint separately from those that arose under the unfair dismissal complaint. In relation to the discrimination claim, the issues were put in this way:

> "*EqA, section 13: direct discrimination because of religion*
>
> (iii) The Claimant is a Muslim. He alleges that he was selected for redundancy and dismissed because of his religion. His complaint is about both the selection process and the decision itself. His complaints about the selection process are the same as those that he relies on in his unfair dismissal claim. It is not in dispute that he was selected for redundancy and dismissed.
>
> (iv) In relation to the treatment that is either admitted by the Respondent or proven by the Claimant, was that treatment "less favourable treatment", in that the Respondent treated the Claimant less favourably than it treated comparators in not materially different circumstances from the Claimant who were not Muslims? The Claimant relies on the following comparators: Andi Williams, Nathan, Tracey, Tony Waddock, Ryan Smith, Sanjay Kumar, Adam Hacklett, Christina, Marty, Tom, Adrian Birch, Dave Price, Mark Silver, Carl Watts and Ryan Inns.

(v) If so, was this because of the Claimant's religion?"

38. Of course, these issues overlapped with the determination of the unfair dismissal complaint because one of the allegations of unfair dismissal, at issue (ii)(g) in the list set out by Employment Judge McNeill, was "Selecting the claimant for redundancy and dismissing him because of his religion".

39. Notwithstanding the lack of separation of the legal bases for the claimant's claim in the judgment, I was rightly reminded by Ms Duane on behalf of the respondent that the correct approach to analysing the tribunal's reasons is, to use Lord Hope's formulation in **Hewage** at paragraph 26, that one must not take too technical a view of the way it expresses itself. One should give the reasoning a generous interpretation and one ought not to subject the reasons to an unduly critical analysis. In short, I must put away my nit comb and focus on whether as a matter of substance the tribunal erred when analysing the claimant's discrimination claim.

40. Mr Kohanzad submitted forcefully that the tribunal failed to apply the burden of proof provisions at all. He observed that there is no reference to section 136 or, indeed, the **Equality Act 2010**, anywhere in the reasons. It is clear from the authorities, however, that a lack of express reference to section 136, the **Igen** guidelines, or the subsequent authorities does not on its own amount to an error of law. What is important is whether in substance the tribunal determined the discrimination claim correctly.

41. In this case, I have concluded that, read fairly, the tribunal's reasons disclose that the correct approach was taken:

a. First, as its starting point, the tribunal recognised that in direct discrimination cases overt evidence of discrimination can be difficult to find (see the reference at paragraph 58.3 to courts recognising that such discrimination can be difficult to spot).

b. Secondly, the tribunal referenced the claimant's burden of proof at paragraph 60 when saying that it concluded he had failed to discharge it. Read fairly and in context, that is a recognition by the tribunal that the claimant had the burden to prove a *prima facie* case of discrimination, or to use the words of the statute, "facts from which the court could decide in the absence of any other explanation that" the respondent directly discriminated against him.

c. Third, I am reinforced in my view that the reference at paragraph 60 is to the burden of proof under section 136 **Equality Act 2010** because of the language used by the tribunal at various points in its judgment. At paragraph 58.8, when the tribunal squarely addressed the discrimination complaint, it said it was satisfied that there were no grounds on which it "could conclude" discrimination played any part in the selection. That clearly invokes the statutory language and involved the tribunal reaching a decision that a *prima facie* case was not made out.

d. A similar approach is evident in paragraphs 53 to 55 in which the tribunal examined other evidence under the heading "any other unfavourable treatment". It concluded in respect of all matters traversed that they did not suggest that religion was part of the reason for the claimant's selection. I note again the echoes of section 136 in the language used in the final sentence of paragraph 55: "We heard no evidence on which we could conclude the respondent found the claimant or any other employee 'problematic'."

42. Accordingly, I conclude that as a matter of substance the tribunal was, in fact, applying the approach required by section 136 when reaching its conclusions. It found there was no evidence before it from which it could conclude that there had been discriminatory selection.

Statistics

43. That is not, however, the end of the case. Mr Kohanzad submitted that the tribunal erred in this case by failing to consider whether the burden shifted under section 136 because of what he described as the statistics the claimant had put before the tribunal. On this topic, I was taken to the judgment of Her Honour Judge Eady QC, as she then was, in **Fennell v Foot Anstey LLP** UKEAT/0290/15. The judge referred to the authorities on the burden of proof and, after observing that the wording of the statute remains the touchstone (see paragraph 38), she turned to the issue of statistics. At paragraph 48 she said this:

> "Statistics can help in establishing a *prima facie* case of discrimination, but the ET was entitled to question their significance in this case: because it was not convinced by the selection of age ranges… but, more substantively, because it was not satisfied that it could infer discrimination simply from the statistical picture alone."

44. Mr Kohanzad submitted that statistics can amount to the 'something more' in the **Madarassy** sense. He went on to submit that unlike in **Foot Anstey**, in this case the tribunal simply did not consider the statistics and therefore erred in law.

45. I agree that in a suitable case, appropriate statistics, either on their own or taken with other evidence, might be sufficient to shift the burden of proof. However, caution needs to be applied and this is evident from the judgment in **Foot Anstey LLP**. The evidence must give rise to a *prima facie* case of discrimination and this includes in relation to the causative connection between the protected characteristic and the treatment in question (see **Madarassy** at paragraph 56). Statistical techniques are often concerned with associations rather than causation. Further, care must be taken to consider what can be drawn from any data or statistics contained in the evidence, particularly where the numbers involved, such as the numbers selected for redundancy or in pools for selection, are small, and where little is known about the statistical significance of the numbers produced. Finally where statistical tests are employed, the assumptions on which they rest must be carefully scrutinised.

46. Returning to the present case, in his submissions Mr Kohanzad identified the numerical evidence which he said should have caused the tribunal to consider whether the burden of proof had shifted:

a. First, he relied on the observation at paragraph 16 of the judgment that five out of six of the staff made redundant at the depot during phase 1 were Muslim. No reliance was placed on the reference to length of service issues identified in paragraph 16. As I have mentioned, it transpired during this appeal hearing that this was not a proper reflection of the numbers in question. In fact 28 individuals had been made redundant in phase 1 from the depot and the figure of five out of six related to a subgroup of the 28, namely those who worked in the vault section. Thus, the evidential picture was that five of the 28 people selected for redundancy at phase 1 were known by the claimant to be Muslim. That equates to around 18%.

b. Secondly, Mr Kohanzad relied on the fact that at phase 2 the claimant was the only Muslim in the department and he was one of the 17 selected.

47. With characteristic realism, Mr Kohanzad accepted that the second matter, taken in isolation, was not capable of shifting the burden of proof. I agree with that concession. It does not amount to any evidence at all that the reason for the claimant's selection was his faith. Mr Kohanzad, however, relied on it in conjunction with the evidence in relation to phase 1. However, I do not consider that it adds anything even when taken in conjunction with those other numbers. It simply is not evidence linking the claimant's faith to the reason for his selection.

48. Returning to the first matter (the numbers relating to phase 1), in my judgment the evidence was not such that it required specific separate consideration by the tribunal as to whether the burden of proof shifted to the respondent. That is because the numbers are not

capable of providing a *prima facie* basis to suggest that Muslim faith was part of the reason why some of those selected had been chosen. All the numbers showed was that 18% of those selected in phase 1 were Muslim. There was no data concerning the religious makeup of the pool from which the 28 were selected so that this could be compared and the statistical significance of any difference assessed in light of the sample size of 28. The reason for that was the subject of a finding by the tribunal. The tribunal found that the respondent did not collect data concerning the faith of its employees and thus it did not know (see paragraph 35 of the judgment). There was no suggestion that information had not been properly disclosed in this case.

49. I do not accept Mr Kohanzad's submission that an error of law is established simply by the tribunal not considering the numbers and that the question of what (if anything) the numbers show only arises when this tribunal considers the issue of disposal pursuant to **Jafri v Lincoln College** [2015] QB 781 and **Burrell v Micheldever Tyre Services Ltd** [2014] ICR 935. In order for the tribunal to err in law, the matter that has not been considered must be material. In the course of submissions Mr Kohanzad modified his position to accept that where statistics are meaningless it is not an error of law for the tribunal not to deal with them. I agree.

50. There is a further reason that supports my conclusions. I am entirely satisfied that the numbers were not presented to the tribunal below in the way that I have described. The submission being made to the tribunal was that phase 1 was used as a way to select problematic employees and that, of different groups of problematic employees, those of Islamic faith were problematic because they used work facilities for prayer. The reference to five Muslim employees in the vault department being selected was used to exemplify this submission. The tribunal rejected it. Using language echoing section 136 of the **Equality Act 2010,** at paragraph 17 the tribunal held that there was no evidence from which it could

conclude that the use of work facilities for prayer was considered problematic.

51. It follows that I do not consider that this tribunal erred in law by failing specifically to consider whether the numbers before it were sufficient to shift the burden of proof. That is not how they were presented to it (even making full allowances for the fact the claimant appeared below in person) and in any event the numbers were not capable of having that effect.

CONCLUSION

52. Standing back, in my view the tribunal had proper regard to the discrimination case put before it. It was satisfied that the selection criteria were applied consistently and that the claimant's scoring had been undertaken fairly and genuinely. It considered but rejected the submissions that the claimant made that there was evidence to suggest he had been discriminated against. Read fairly, it expressed itself as a matter of substance on the basis that no *prima facie* case of discrimination was established. In those circumstances, there is no error of law disclosed in the decision and I therefore dismiss this appeal.