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No statutory reverse burden of proof under the Race Relations Act 1976 where discrimination is by way of victimisation

Despite the title of the Act from which the unlawfulness derives, to be found to have discriminated against another under the Race Relations Act 1976 ("RRA 1976") does not necessarily mean to have directly discriminated on "racial grounds" (as defined under s3(1) of the RRA 1976), contrary to s1(1)(a) of the RRA 1976, or indirectly discriminated by applying a requirement or condition affecting a "racial group" (as defined under s3(1) and (2) of the RRA 1976), contrary to s1(1)(b) of the RRA 1976.

In other words, which may appear peculiar on the face of it, a finding against a discriminator under the RRA 1976 may have little or nothing to do, directly, with 'racial discrimination'; the heading under which s1 of the RRA 1976 falls. It might seem alarming therefore that of the 4,103 complaints accepted by employment tribunals in 2005/6 alleging racial discrimination with compensatory awards averaging £30,361 and of a maximum of £984,465, some may not in fact have been based on acts of racial discrimination at all.

A person ("the discriminator") discriminates against another person ("the person victimised") in any circumstances relevant for the purposes of any provision of the RRA 1976 if it treats the person victimised less favourably than in those circumstances it treats or would treat other persons, and does so by reason that the person victimised has done a 'protected act': **s2 of the RRA 1976** Therefore, findings arising out of a case where a party alleges both racial discrimination and discrimination by way of victimisation could, for example, be negative on the former but positive on the latter (or, course, vice versa). This is not uncommon.

s54A of the RRA 1976 (the statutory reverse burden of proof)

However, as can be seen from a recent appeal before the Employment Appeal Tribunal ("EAT") the distinction has wider consequences. In **Oyarce v Cheshire County Council UKEAT/0557/06/DA** the claimant had succeeded in one of her complaints of discrimination by way of victimisation contrary to s2(1)(d) of the RRA 1976. In arriving at its decision the tribunal applied s54A of the RRA 1976 (the statutory reverse burden of proof), which states, among other things, where a complaint is presented to a tribunal under s54 of the RRA 1976 (which was the case in **Oyarce**) and the complaint, alleged to be unlawful by virtue of Part 2 of the RRA 1976 (discrimination in the employment field), is that the respondent has committed an act of discrimination, on grounds of race or ethnic or national origins, which is unlawful by virtue of s1(1B)(a) of the RRA 1976 where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent (a) has committed such an act of discrimination against the complainant, or (b) is by virtue of s32 (liability of employers and principals) or s33 (aiding unlawful acts) to be treated as having committed such an act of discrimination against the complainant, the tribunal shall uphold the complaint unless the respondent proves that it did not commit or, as the case may be, is not to be treated as having committed, that act.

Common law approach

Prior to 19 July 2003, when s54A of the RRA 1976 came into force, the common law approach in cases of discrimination under the RRA 1976 was that, where there is *prima facie* discrimination that calls for an explanation from the respondent, in the absence of an explanation the tribunal is entitled, though not necessarily bound, to draw an adverse inference against the respondent.

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Oyarce v Cheshire County Council

In **Oyarce**, applying s54A of the RRA 1976 (the statutory reverse burden of proof), and not the common law approach, the tribunal found, was bound to find ("…the tribunal shall uphold…"), that the claimant had been discriminated against by way of victimisation due to her proving facts against which the respondent had failed to provide an adequate explanation. In its cross appeal, the council argued that the tribunal erred in law in its applying the statutory reverse burden of proof to this part of the claimant's complaint. It argued, among other things, that the RRA 1976 revealed a distinction between on the one hand, '*racial discrimination',* whether direct or indirect, which attracts a reverse burden of proof, and '*discrimination'* in the form of victimisation that does not.

Importantly, reference was made to s3(3) of the RRA 1976, which states, among other things, (a) references to discrimination refer to any discrimination falling within s1 of the RRA 1976 (racial discrimination) or s2 of the RRA 1976 (discrimination by way of victimisation) and (b) references to racial discrimination refer to any discrimination falling within s1 of the RRA 1976, and, consequently, related expressions shall be construed accordingly.

According to the council, the crucial words of s54A(1) of the RRA 1976, in which cases the statutory reverse burden of proof are applicable, are the requirement that the complaint is that the respondent, "has committed an act of discrimination on the grounds of race or or ethnic or national origins". The significance of this is the tribunal applied s54A of the RRA 1976 when determining whether the claimant had been victimised contrary to s2(1)(d) of the RRA 1976. However, the argument is the discriminatory act is not one based on race etc but on one's having done a protected

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act under s2 of the RRA 1976, which, if correct, the tribunal was not *bound* to find against the council but, applying the common law, was entitled, only, to draw an *adverse inference* against the council.

Appeal allowed, "with some degree of hesitation and disquiet"

The EAT agreed with the council. However, it allowed the appeal, "with some degree of hesitation and disquiet". It found that the tribunal did err in law in deciding the issue of victimisation on the basis of the statutory reverse burden of proof rather than applying the common law approach. The EAT's decision means that the matter will be remitted to the same tribunal to consider the said issue of victimisation in accordance with the proper burden of proof. It now remains to be seen whether the common law approach to be taken by the same tribunal would yield the same or different result.

Ryan Clement is Head of Conference Chambers and specialises in general civil, employment and immigration law. He is able to receive instructions directly from members of the general public under the Bar Council Public Access Scheme.

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