

## EAT holds that reversed burden of proof does not apply to victimisation under Race Relations Act

In a ground breaking judgment delivered on 13 June 2007 the Employment Appeal Tribunal (Wilkie J presiding) has held that the reversal of the burden of proof, applied by Tribunals up and down the land as a matter of course in discrimination cases since 2003, does *not* apply to claims of victimisation under s.2 of the Race Relations Act 1976. The Claimant was a social worker of Chilean origin. Her line manager, who had an alleged track record of passing her over for promotion, appointed one of her colleagues to an acting Group Leader position, notwithstanding that the colleague in question was ostensibly less qualified than the Claimant. The Claimant, who had brought and abandoned earlier Employment Tribunal proceedings claiming discrimination against the same employers, maintained that by appointing her colleague to the relevant post in preference to the Claimant, the Claimant's line manager had victimised her within the meaning of s.2 of the 1976 Act. In closing submissions, Counsel disagreed as to how the Tribunal should approach the burden of proof in relation to the victimisation complaint, Counsel for the Claimant arguing that the reversal applied, and Counsel for the Respondent contending to the contrary. In upholding that complaint the Tribunal gave no indication as to how it had approached the question of the burden of proof. The Respondent challenged this finding by way of cross-appeal to the EAT. In response to questions from the EAT the Tribunal clarified that it had applied the reversed burden under s.54A of the 1976 Act. On appeal the employers argued that this approach was wrong. The EAT agreed, holding that whilst its intuitive approach was to conclude that the "new" provisions in relation to the burden of proof applied, as a matter of pure construction of the domestic legislation and EC Directive 43 of 2000 the reversed burden could not be said to apply, however illogical such a conclusion might appear to be when considering the general tenor and ambit of anti-discrimination law from both a domestic and European perspective. Paul Gilroy QC successfully argued the point on behalf of the employers.

The ramifications of this decision are potentially enormous. Commentators may say that this case exposes a serious lacuna in the legislation prohibiting race discrimination, and that it effectively introduces a two tier approach to the enforcement of claims made under that legislation.

A full report will appear on the Cases and Articles Section of the Old Square Chambers website when the EAT delivers its written judgment.

***Oyarce v. Cheshire County Council, EAT Wednesday 13 June 2007 (Wilkie J, Mr P Gammon MBE and Dr S R Corby).***

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