



Proving discrimination: the shift of the burden of proof and access to evidence

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Burden of proof

- Procedural, not substantive, concept.
- Procedures for resolving complaints differ between member states.
- Differing approaches to evidence in different member states.



Problems

- Unusual to find clear evidence of discrimination:
- "... those who discriminate ... do not in general advertise their prejudices: indeed they may not even be aware of them." (Lord Browne-Wilkinson, *Zafar*)



European developments

Danfoss: C-109/88

- Female workers earned 7% less than male co-workers.
- ECJ: If pay system is totally lacking in transparency and statistical evidence reveals a difference in pay between male and female workers the burden of proof shifts to the employer to account for the pay difference by factors unrelated to sex.



Enderby v Frenchay Health Authority: C-127/92

“... if the pay of speech therapists is significantly lower than that of pharmacists, and if the former are exclusively women while the latter are predominantly men, there is a *prima facie* case of sex discrimination”



Enderby ctd.

- “Where there is a *prima facie* case of discrimination, it is for the employer to show that there are objective and non-discriminatory reasons for the difference in pay.”



Royal Copenhagen
C-400/93

- Burden of proof normally on worker.
- May be shifted where necessary to avoid depriving workers of effective means of enforcing equal pay (equality) principle.



Social Charter

“... action should be *intensified* to ensure the implementation of the principle of equality for men and women as regards, in particular, access to employment, remuneration, working conditions, social protection, education, vocational training and career development.”



Council Directive 97/80/EC

- Employees could be deprived of any effective means of enforcing the principle of equal treatment before national courts if the effect of introducing evidence of an apparent discrimination were not to *impose* upon the employer the burden of proving that his practice is not in fact discriminatory.



Article 1

‘The aim of this Directive shall be to ensure that the measures taken by the Member States to implement the principle of equal treatment *are made more effective*, in order to enable all persons who consider themselves wronged because the principle of equal treatment has not been applied to them to have their rights asserted by judicial process after possible recourse to other competent bodies.’



Article 4(1)

“Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, *it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.*”



- Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 8(1).
- Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (protecting religion, belief, disability, age and sexual orientation), Article 10(1).



- Council Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (known as the 'Recast Directive') (Article 19(1)).
- Repeals directives 75/117/EEC, 76/207/EEC, 86/378/EEC and 97/80/EC from 15 August 2009 (Article 34).



Shifting burden need not apply to proceedings in which a court/competent body investigates the facts itself (i.e. *inquisitorial* rather than *adversarial* proceedings):

- Art. 4(3) of Directive 97/80;
- Art. 8(5) of Directive 2000/43;
- Art. 10(5) of Directive 2000/78; and
- Art. 19(3) of Directive 2006/54.



Brunnhofer
C-381/99

- Direct discrimination.
- Fact that comparators are in same job category is insufficient.
- Therefore the burden did not shift:
 - C must establish lower pay and that she does like work or work of equal value;
 - Once there is a *prima facie* case, R must prove that the jobs are not comparable or justify the pay differential.



Feryn
C-54/07

- Public statements may establish a presumption of discrimination.
- Employer must then prove that its actual recruitment practice did not reflect the public statements made.



Kelly
C-104/10

- No right for an applicant for vocational training to receive information about other candidates to establish facts from which discrimination might be presumed.



Meister
C-415/10

- No duty to disclose information about successful candidate.
- But all the evidence (including failure to provide information) relevant in considering whether a *prima facie* case is established.



ACCEPT
C-81/12

- Employer cannot deny fact of discriminatory statements by someone unable to legally bind it (a majority shareholder).
- Employer's failure to distance itself from such statements is relevant to establishing a presumption of discrimination.



ACCEPT
C-81/12

- An employer could rebut the presumption by evidence...
- ...that it had distanced itself from discriminatory statements; and
- ...of express provisions in a recruitment policy aimed at ensuring equal treatment.



Indirect discrimination

- Where an apparently neutral provision, criterion or practice puts a group at a particular disadvantage compared with other persons that provision, criterion or practice must be objectively justified by a legitimate aim and the means of achieving that aim must be both appropriate and necessary: Art. 2(2)(b) of Directive 2000/43, Art. 2(2)(b) of Directive 2000/78 and Art. 2(1)(b) of Directive 2006/54.



15th recital to 2000/43 and 2000/78:

“The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of *statistical evidence*.”



Indirect discrimination

- It is for the national court to say whether the statistics cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena and whether, in general, they appear to be significant.
- ***R v Secretary Of State For Employment, ex parte Nicole Seymour-Smith & Laura Perez (C-167/97)***
- Disparate impact shown by a minor but persistent and relatively constant disparity over a long period.



Questionnaires

- Questions set out on a prescribed form but otherwise a complainant may ask the respondent *any* question relevant to the alleged discrimination.
- Common to ask questions about the make-up of the workforce ('Please give the race, ethnic and national origin of all employees employed at a particular place or in a particular grade').
- Questions admissible in evidence; a court or tribunal may draw an adverse inference from a failure to reply or from an evasive or equivocal reply, including an inference that the respondent has behaved unlawfully.



Standard court / tribunal procedures:

- 'Additional information' about a case;
- Written answers to questions; and
- Disclosure of documents.



Data protection legislation:

- Art. 12, Data Protection Directive 95/46/EC: data subject's right of access to data;
- Art. 8: limitations on processing data revealing racial or ethnic origin, political opinion, religious or philosophical belief, trade union membership, health, sex life.
- Art. 8(2)(b): processing necessary for employment law rights and obligations.



How to use evidence

- Lack of equal opportunities policies or training;
- Failure to follow own procedures (e.g. disciplinary or grievance procedures);
- Failures to follow Codes of Practice / good industrial practice;
- Previous instances of discrimination or patterns of conduct.



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