

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

Tom Brown

Introduction

1. The burden of proof is concerned with evidence, not with substantive law. Unlike the presentations you will hear about substantive EU anti-discrimination legal concepts, which are common throughout the EU, approaches to proving unlawful discrimination will differ among the member states, which have differing regimes for protecting the right to equal treatment as well as different legal systems more generally.
2. Substantive law provides only partial protection if those who believe that their legal rights have been violated lack an effective remedy. Rules of evidence can contribute to the effectiveness, or ineffectiveness, of enforcing rights. They regulate (and only regulate) situations where the factual basis of a legal complaint is in doubt; they determine what a judge, court or tribunal should do in the event of uncertainty or a dispute about the facts.
3. Proving unlawful discrimination presents particular problems: it is unusual to find explicit evidence of unlawful discrimination. Few employers are prepared to admit that they have discriminated, even to themselves. As the British judge Lord Browne-Wilkinson said in the case of *Glasgow City Council v Zafar*:¹ “those who discriminate on the grounds of race or gender do not in general advertise their prejudices: indeed they may not even be aware of them.”
4. In some cases, discrimination may have been based on an assumption that a person “would not have fitted in.” Occasionally, there may even be a benign reason for less favourable treatment.²
5. In practice, discrimination is often difficult to prove, because direct evidence of discrimination is only rarely available.³ Frequently any relevant evidence will be in the hands of the alleged wrongdoer.

¹ [1998] ICR 120, House of Lords.

² See the seminal UK case of *James v Eastleigh Borough Council* [1990] 3 WLR, House of Lords which concerned the provision of free access to a swimming pool for those of pensionable age. At the time, the pensionable age for men in the UK was 65 and for women it was 60. It was argued that the council's reason for giving free swimming to those of pensionable age was to give benefits to those whose resources would be likely to have been reduced by retirement. The aim was to aid the needy, whether male or female, not to give preference to one sex over the other.

³ This has been acknowledged by the courts, see *Baker v Cornwall County Council* [1990] ICR 452, [1990] IRLR 194, CA; *North West Thames Regional Health Authority v Noone* [1988] ICR 813, sub nom *Noone v North West Thames Regional Health Authority (No 2)* [1998] IRLR 530, CA; *Khanna v Ministry of Defence* [1981] ICR 653, [1981] IRLR 331, EAT; *Oxford v Department of Health and Social Security* [1977] ICR 884, [1977] IRLR 225, EAT; *Wallace v South Eastern Education and Library Board* [1980] IRLR 193, NI CA; *Chattopadhyay v Headmaster of Holloway School* [1982] ICR 132, [1981] IRLR 487, EAT; *Barking and Dagenham London Borough Council v Camara* [1988] ICR 865, [1988] IRLR 373, EAT. The affirmative evidence of discrimination

European Developments leading up to Council Directive 97/80

6. The early cases are all concerned with sex discrimination, because this was the first ground on which discrimination was prohibited.
7. In 1975, Council Directive 75/117 was enacted which was aimed at harmonising national legislation with regard to the principle of equal pay for work of equal value. Article 6 of the Directive required member states to ensure that the principle of equal pay was applied *effectively*. In practice, however, people who had been unlawfully discriminated against were having difficulty proving their cases because employers did not always adopt a transparent system of pay and all the evidence was, usually, in their hands and minds.
8. The European Commission was aware that amongst the barriers to equal treatment for men and women were the difficulties for complainants in proving that an employer had unlawfully discriminated against them.
9. This issue was addressed for the first time by the ECJ in 1989 in the *Danfoss* case. This Danish case was brought by a trade union on behalf of female workers who earned, on average, 7% less than a comparable group of male colleagues.⁴ The European Court of Justice (“ECJ”) held that if a company applies a system of pay which 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 with factors unrelated to sex.
10. The next important case is *Enderby*. In 1993, Ms Enderby, a speech therapist, complained about the pay system of her employer, the English National Health Service, because she was paid considerably less (£10,106) than a pharmacist (£14,106) and a clinical psychologist (£12,527) who were also employed by the NHS. Ms. Enderby claimed this amounted to indirect sex discrimination because the speech therapists were mostly female whereas pharmacists and clinical psychologists were mostly male. The employer argued that market forces and collective bargaining had created the pay differential and that this justified the difference. Unlike in the *Danfoss* case the employer’s pay system was considered transparent.
11. In *Enderby*⁵ the ECJ reiterated the principle that it is up to the claimant to prove discrimination but added that the burden of proof
“(…) may shift when that is necessary to avoid depriving workers *who appear to be victims of discrimination* of any effective means of enforcing the principle of equal pay (…). Accordingly, when a measure distinguishing between employees on the basis of their hours of work has in practice an adverse impact on substantially more members of one or other sex, that

normally consists of inferences to be drawn by the court or tribunal from the primary facts: *Khanna v Ministry of Defence* supra.

⁴ ECJ 1989, C-109/88, *Handels- og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] ECR 3199.

⁵ ECJ 27 October 1993, C-127/92, *Enderby v. Frenchay Health Authority*, ECR I-5535.

measure must be regarded as contrary to the objective pursued by Article 119 [currently Article 141]⁶ of the Treaty.” (emphasis added).

12. The ECJ further said:

“(…) if the pay of speech therapists is significantly lower than that of pharmacists and if the former are almost predominantly women while the later are predominantly men, there is a *prima facie case of sex discrimination*. (….) 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. Workers would be unable to enforce the principle of equal pay before national courts if evidence of a *prima facie* case of discrimination did not shift to the employer the onus of showing that the pay differential is not in fact discriminatory (see, by analogy, the judgment in the *Danfoss Case* (…).” (Emphasis added).

13. In *Specialarbejderforbundet i Danmark v. Dansk Industri* (C-400/93), the ECJ again considered the burden of proof in an equal pay case. It said that the burden of proof would normally be on the worker. But it might be shifted when that was necessary to avoid depriving workers who appeared to be victims of discrimination of any effective means of enforcing the principle of equal pay. It held that where a piece-work pay scheme consisted of a variable element, depending on each worker’s output and a fixed element differing according to the group of workers concerned and it is not possible to identify the factors which determined the rates or units of measurement used to calculate the variable element in the pay, the employer might have to bear the burden of proving that the differences in pay between men and women were not due to sex discrimination.

14. In summary, the case law of the ECJ, even before the introduction of legislative provisions about the burden of proof, established that where there was *prima facie* evidence of discrimination (particularly where accompanied by a non-transparent pay system), the employer had to show objective, non-discriminatory reasons for the difference in treatment.

15. Although I have observed above that the burden of proof is a rule of evidence, not of substantive law, it is worth noting, when reflecting on the above case law, the substantive *effect* that rules about the burden of proof may have. I hope it is not naïve to suggest that the burden of proof may make discrimination less common, as well as easier to prove. If an employer must be able to prove the existence of a non-discriminatory explanation for different treatment, it must be able to evidence non-discriminatory treatment. If it must evidence non-discriminatory treatment, it is perhaps more likely that it will act in a way that evidences, and is consistent with, non-discrimination. If it acts in a way that is consistent with not discriminating, it may be less likely to discriminate.

16. For example, if an employer faces a shift in the burden of proof if it operates a non-transparent pay system, it is perhaps more likely to operate a transparent pay system. And if it operates a transparent pay system, pay disparities based on gender

⁶ Under the Lisbon Treaty, Article 141 TEC is replaced by Article 157 of the Treaty on the Functioning of the European Union (TFEU).

may be easier to see. Therefore, the employer, thus exposed, either has to avoid gender pay disparities or face the prospect of complaints about unjustifiable pay disparities.

17. Therefore, shifting the burden of proof can redress the imbalance of power between the employer and the employee.
18. In 1996, the European Commission made a new proposal for strengthening the principles about the burden of proof which had already emerged in the decisions of the ECJ.⁷
19. Article 4(1) of the proposed text provided that, in a complaint of unlawful discrimination, the initial burden would be on a complainant to establish facts from which discrimination might be presumed to exist. If this was done, a respondent would have to prove that there had been no contravention of the principle of equal treatment and the complainant (not the respondent) would have the benefit of any remaining doubt. The proposed draft article also reflected the ECJ's case law what a defendant applying a system or decision that lacked transparency would have to prove that any apparent discrimination was due to objective factors unrelated to any discrimination based on sex. Lastly, the draft article proposed that a complainant would not need to prove the existence of any fault on the part of a respondent to establish an infringement of the principle of equal treatment.
20. Article 5 of the proposed text would have required member states to empower their courts and other competent authorities to give directions necessary for an effective investigation into a complaint of discrimination and to ensure that parties had all the relevant information in the possession of the other party, or which might reasonably be assumed to be in the other party's possession, which was necessary for the parties to exercise their rights (provided disclosure would not substantially damage a parties interests other than as part of the litigation.
21. The Commission's proposal involved a burden of proof that was not fixed for the duration of the legal process, but, rather, one that would shift once a complainant had done more than make a mere allegation, but had not necessarily gone as far as establishing a case to the standard of proof required to win outright. As soon as discrimination *might* be presumed, the respondent would need to establish a non-discriminatory explanation.
22. The Commission's proposal was not immediately adopted. There was particular resistance from representatives of employers, who took the view that the ECJ's case law about the burden of proof was enough to ensure effective protection of the principle of equal treatment.
23. Nonetheless, in 1997, legislation about the burden of proof was made.

Council Directive 97/80: legislating about the burden of proof

⁷ 17 July 1996, COM(96) 340 final.

24. On 15 December 1997 the Council of the European Union adopted Directive 97/80 on the burden of proof in cases of discrimination based on sex. This Directive codified the case law of the ECJ on the reversal of the burden of proof. It also gave effect to paragraph 16 of the Community Charter of the Fundamental Social Rights of Workers 1989 which provides that:

“(…) 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”

25. It was recognised in the 17th recital to Directive 97/80 that 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.

26. The 18th and 19th recitals record the fact that the ECJ had held that the rules on the burden of proof ought to be adapted when there is a *prima facie* case of discrimination and that, for the principle of equal treatment to be applied effectively, the burden of proof had to shift back to the employer when evidence of such discrimination was brought; but that the aim of adequately adapting such rules had not been achieved satisfactorily in all member states.

27. Article 1 of Directive 97/80 thus provided that:

“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.”

28. And Article 4(1) states:

“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.” (Emphasis added)

29. Provisions identical to Art. 4(1) can be found in subsequently-enacted Art. 8(1) of Council Directive 2000/43 (the Racial Equality Directive)⁸ implementing the

⁸ The Racial Equality Directive protects persons irrespective of racial or ethnic origin in a wide scope of social activities: employment, self-employment, social security, health care, education, housing and the supply of goods and services.

principle of equal treatment between persons irrespective of racial or ethnic origin, Art. 10(1) of Council Directive 2000/78 (the Framework Directive)⁹ establishing a general framework for equal treatment in employment and occupation (covering discrimination on grounds of religion or belief, disability, age or sexual orientation) and Art. 19(1) of 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 (also known as the Recast Directive)¹⁰.

30. However, Member States do not need to apply the shifting of the burden of proof to proceedings that are inquisitorial rather than adversarial.¹¹
31. It has been suggested that the shifting of the burden of proof imposes an obligation on the respondent to prove a negative i.e. to prove that it has not discriminated unlawfully. However, a better view is that what the respondent is required to prove is simply a *non-discriminatory* explanation for its conduct (see for example the 17th recital to Council Directive 97/80, set out above). It is only in the absence of an 'innocent' explanation that a court or tribunal is now compelled to make a finding of unlawful discrimination.
32. Thus the burden on the respondent is to provide an explanation which is adequate to discharge the burden of proving that a prohibited ground (e.g., race) was not any part of the reasons for the treatment in question; not an adequate explanation for its conduct *per se*.
33. It follows from this that if a claimant establishes a *prima facie* case of discrimination, that is to say, establishes facts which give rise to a presumption of discrimination, the burden of proof shifts to the respondent who then has to prove that the actions or omissions complained of were not discriminatory.
34. For example, a black employee may contend that he has been discriminated when compared with a white colleague who has shorter service and less relevant experience but who was nonetheless promoted instead of him. Once he establishes a *prima facie* case of race discrimination the burden shifts to the employer who then has to provide a non-discriminatory explanation for its decision to promote the white colleague instead.

Implementation

35. The Directives must be implemented in accordance with each Member State's national judicial system. This implies that the circumstances under which the burden of proof is shifted may vary according in Member States and therefore the way in which the provision on shifting the burden of proof is applied be different

⁹ The Framework Directive is limited to employment.

¹⁰ This Directive repeals Directives 75/117/EEC, 76/207/EEC, 86/378/EEC and 97/80/EC from 15 August 2009 (Article 34).

¹¹ There is an exception for inquisitorial proceedings in 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.

from country to country. Recital 30 of the preamble to Directive 2006/54 make this clear:

“It is however necessary to clarify that the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination remains a matter for the relevant national body in accordance with national law or practice.”

36. This does not, however prevent member states from introducing more favourable rules of evidence for complainants.

Case law since the introduction of EU legislation on the burden of proof

37. In *Brunnhofer* (C-381/99), a woman compared herself to a male colleague in a complaint about equal treatment. Both the complainant and her comparator had been classified in the same job category of a collective agreement. They received the same salary and overtime pay. But the monthly pay supplement which they each received was different (the man's was higher). The ECJ observed that the pay system did not lack transparency (and so the burden of proof did not shift on that long-standing basis). Therefore, it was for the complainant to establish work of equal value and a difference in pay. The fact that both employees were within the same job category was insufficient proof that the two employees work was of equal value. If the complainant established work of equal value and difference in pay, the employer would have to prove that the difference in pay was not based on sex.

38. *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn* (C-54/07) was a preliminary ruling of the ECJ about the Race Directive 2000/43. An employer whose company installed safety doors had publicly stated that it would not recruit people of Moroccan national origin because some of its customers would be uneasy about people of Moroccan national origin installing safety doors. The ECJ found that—even though no people of Moroccan national origin had applied for jobs—in proceedings brought by the Belgian equality body, there had been direct discrimination. And, of significance in our consideration of the burden of proof, the ECJ said that public statements by which an employer lets it be known that, under its recruitment policy, it will not recruit any employees sharing a particular protected characteristic (in this case a national origin; but it could equally apply to a particular gender), are sufficient for the presumption of the existence of a recruitment policy which is directly discriminatory. Therefore, the burden shifts to the employer to prove that there has been no breach of the principle of equal treatment. It could do so by showing that the undertaking's actual recruitment practice did not correspond to its public statements. The ECJ said that it was for the national court to verify that the facts alleged are established and to assess the sufficiency of the evidence submitted in support of the employer's contention that it had not breached the principle of equal treatment.

39. In *Kelly v National University of Ireland (University College, Dublin)* (C-104/10), the CJEU held that there is no right for an applicant for vocational training, who believes that there has been an infringement of the principle of equal treatment, to receive information held by the course provider on the qualifications of other applicants to

establish facts from which discrimination may be presumed. The assessment of facts from which it might be presumed that there had been direct or indirect discrimination was a matter for national judicial or other competent bodies, in accordance with national law or practice.

40. However, the Court said, at paragraph 34 of *Kelly*, that it was not inconceivable that a refusal of disclosure by a defendant, in the context of a claimant's attempt to establish a *prima facie* case of unlawful discrimination, was liable to compromise the achievement of the objective pursued by the equality directives and, in particular to deprive those provisions of their effectiveness.

41. In *Galina Meister v Speech Design Carrier Systems GmbH* (C-415/10), the German Bundesarbeitsgericht referred two questions to the CJEU for a preliminary ruling:

- a. Where a worker shows that s/he meets the requirements for a post advertised by an employer, does s/he have the right vis-a-vis that employer, if s/he does not obtain the post, to information about whether the employer has engaged another applicant and, if so, about the criteria on the basis of which the appointment was made?
- b. If so, where the employer does not disclose the requested information, does that fact give rise to a presumption that there was unlawful discrimination against the worker?

42. Ms Meister twice applied for a job with a company and was rejected. She complained of unlawful discrimination. She requested the company to produce the file for the person who had been engaged in response to the advertisements. The court of first instance and the court of appeal held that Ms Meister had not submitted sufficient evidence to support a presumption of discrimination and dismissed the claim.

43. Ms Meister sought a review before the Bundesarbeitsgericht. The court acknowledged that Ms Meister had suffered less favourable treatment than people in a comparable situation since she was not called for an interview and others were. But the court noted that Ms Meister had not been able to establish that the reason was a protected characteristic. German law requires a complainant to establish the facts and produce evidence, not just make allegations. It was not enough to point to a difference in treatment and a difference in sex. Whilst Ms Meister was required, therefore, under German law to provide evidence in support of her case, the failure of the employer to provide information deprived her of the ability to produce evidence.

44. The Advocate General noted that the Commission had tabled proposals for a right to information but no such proposal had been adopted. Its exclusion must therefore be considered intentional. If a right to information for victims were to be recognised, this would affect the rights of third parties referred to in the information.

45. The Court concluded that it was for the referring court to ensure that the refusal of disclosure by Speech Design, in the context of establishing facts from which it might be presumed that there had been unlawful discrimination against Ms Meister, did not compromise the achievement of the equality directives' objectives: the referring court was required in particular to take account of all the circumstances of the main proceedings in order to determine whether there was sufficient evidence for a finding that the facts from which it might be presumed that there had been discrimination had been established.
46. The Court noted that indirect discrimination could be established by means including statistical evidence.
47. The Court said that the fact that the employer had refused Ms Meister access to the information she sought could be taken into account. Also, in the Court's view, account could be taken of the fact that Speech Design did not dispute that Ms Meister's level of skill and expertise matched that in the job advertisement and that, notwithstanding this, the employer did not invite Ms Meister to interview.
48. The Court concluded that it could not be ruled out that a defendant's refusal to grant access to information might be one of the factors to take into account in the context of establishing facts from which it might be presumed that there had been unlawful discrimination. It was for the referring court to determine whether that was the case in the main proceedings, taking into account all the circumstances of the case before it.
49. In *Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării* (C-81/12), the CJEU returned to the question it had considered in *Feryn* about the relevance of public discriminatory statements in establishing a *prima facie* case of discrimination.
50. Accept complained about statements made by Gigi Becali, the majority shareholder of the Romanian football club FC Steaua, that he would prefer to hire a player from a junior team than a footballer who was homosexual. The club had not distanced themselves from Mr Becali's statements; it had endorsed them.
51. The Romanian Court of Appeal referred to the CJEU the question whether discriminatory statements from a person who could not bind a company but who might exert a decisive influence could establish a *prima facie* case of unlawful discrimination.
52. The CJEU concluded that the mere fact that statements had not emanated directly from the employer was not necessarily a bar to a complainant establishing facts from which discrimination might be presumed. A defendant employer could not deny the existence of facts merely by asserting that homophobic statements had come from a person who was not legally capable of binding the club in recruitment decisions. Moreover, the club's failure to distance itself from the statements could itself be taken into account.

53. If a *prima facie* case of discrimination was established, the defendant might refute the existence of such a breach by establishing by any legally permissible means that its recruitment policy was not discriminatory. That did not require proof that it had previously recruited gay footballers. Rebutting the non-conclusive presumption of discrimination might be done, for example, by evidence that the club had distanced itself from any discriminatory statements, and by evidence of express provisions in a recruitment policy aimed at ensuring compliance with the principle of equal treatment.

Indirect discrimination and statistics

54. Indirect discrimination poses its own particular problems. It exists where an apparently neutral provision, criterion or practice puts a group at a particular disadvantage compared with other persons unless the provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.¹²

55. How is a complainant meant to raise even a *prima facie* case that an apparently neutral provision, criterion or practice has a disparate impact? In some cases such impact is obvious, or at least it is more readily assumed. In the UK, for example, women are (currently at least) more likely to take responsibility for childcare than men so that a provision in a contract of employment requiring full time rather than part time working is more likely to impact on women than men. It is generally thought that evidence of 'social customs' may be particularly important in establishing disparate impact in cases of discrimination on the ground of religion or belief. In many cases, however, disparate impact is far from obvious.

56. The 15th recital to both Directives 2000/43 and 2000/78 therefore provides that:
"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."

57. The *Enderby* case, above, is a good example of an indirect discrimination case where the burden of proof did shift. The ECJ held, at paragraph 16:

"(...) 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 (...)"

58. The ECJ also indicated that it was for the national court to assess whether the statistics concerning the situation of the workforce are valid and can be taken into account, that is to say, whether they cover enough individuals, whether they

¹² See Art. 2(2)(b) of Directive 2000/43 and Art. 2(2)(b) of Directive 2000/78.

illustrate purely fortuitous or short-term phenomena, and whether, in general, they appear to be significant.

59. *Enderby*-type indirect discrimination is of course somewhat different from the more common form of indirect discrimination, what is sometimes termed 'barrier' discrimination, where a provision, criterion or practice prevents the disadvantaged group from enjoying a particular benefit. In *Enderby* there was no question of a barrier operating to prevent women becoming pharmacists or clinical psychologists. It just happened that there were significantly fewer women in the former professions than the latter. However, there can be no doubt that both *Enderby*-type discrimination and barrier-type discrimination fall within the broad definition of indirect discrimination in the various Directives.

60. In another UK case, *Home Office v Bailey*¹³, an equal pay case, Lord Justice Peter Gibson expressed the view that the test for establishing disparate impact ought to be the same, whichever type of indirect discrimination was in issue.

61. In *R v Secretary Of State For Employment, ex parte Nicole Seymour-Smith & Laura Perez*,¹⁴ a female claimant challenged a provision in UK law (since amended)¹⁵ which required her to have two years' continuous employment in order to claim compensation for 'unfair dismissal'. She alleged that fewer women than men could comply with this requirement as women were more likely to take career breaks to have and to care for children. The ECJ held that the best approach to the comparison of statistics was to consider, on the one hand, the respective proportions of men in the workforce able to satisfy the requirement of two years' employment and of those unable to do so, and, on the other, to compare those proportions as regards women in the workforce. The ECJ held that it was not sufficient to consider simply the *number* of persons affected, since that would depend on the number of working people in the Member State as a whole as well as the percentages of men and women employed in that State.

62. Importantly the ECJ said that disparate impact could be demonstrated even in cases where the statistical evidence revealed a minor but persistent and relatively constant disparity over a long period between men and women who satisfy the requirement of two years' employment, leaving it to the national court to determine the conclusions to be drawn from such statistics.

Obtaining evidence

63. Specific procedures have been developed to assist a claimant in deciding whether to start proceedings and to assist the presentation of the claim in the most effective way, although practice varies between Member States.

¹³ [2005] EWCA Civ 327, [2005] IRLR 757.

¹⁴ [1999] ECR I-623

¹⁵ The United Kingdom consultation on reforming access to the employment tribunal system, 'Resolving workplace disputes', has just been published. The Government proposals include increasing the minimum qualifying period for unfair dismissal claims to two years thus reversing the decision in *Seymour-Smith*.

64. In the United Kingdom, historically, the primary method used to obtain information has been a statutory questionnaire. Questions were set out on a prescribed form but otherwise a complainant might ask the respondent any question relevant to the alleged discrimination. The questions and replies were admissible in proceedings under the Equality Act 2010.¹⁶ However, the current UK government abolished the questionnaire procedure in 2013 as part of its policy to reduce regulation of British businesses.
65. Questionnaires were particularly useful in indirect discrimination claims because they were a way to obtain the necessary statistical data to support an assertion that a particular provision, criterion or practice had a discriminatory effect on a particular group. In the United Kingdom it was common to ask questions about the make-up of the workforce (for example a question might read 'Please give the race, ethnic and national origin of all employees employed at a particular place or in a particular grade'). There were time limits set for the respondent to reply (21 days for cases in the employment tribunal). Although not bound to answer the questionnaire, the questions asked were admissible in evidence and a court or tribunal could draw an adverse inference from a failure to reply or from an evasive or equivocal reply, including an inference that the respondent had behaved unlawfully.
66. Furthermore information might be obtained using standard court and tribunal procedures such as a request for additional information, for written answers to questions or disclosure of documents.¹⁷
67. Data protection legislation may contain useful tools for obtaining information. In the UK, for example, individuals have the right to request copies of all "personal data" held about them which, under s. 1(1) includes "... any expression of opinion about an individual and any indication of the intentions of anyone in respect of the individual."
68. A respondent can of course argue that the statistics or other evidence that establishes the prima facie case of discrimination should be interpreted otherwise. If this fails, a respondent can still rely (in indirect discrimination cases, and in cases of direct discrimination because of age) on objective justification.
69. The criteria for objective justification of indirect discrimination were developed in the ECJ case of *Bilka-Kaufhaus* and subsequent cases¹⁸ but this falls outside the scope of this paper. In summary, the requirements entail that the provision, criterion or practice can be objectively justified on grounds other than the relevant

¹⁶ The Equality Act (Obtaining Information) Order 2010, SI 2010/2194 came into force on 1 October 2010. It prescribes forms on which a person who thinks that he or she may have been subject to a contravention of the Equality Act 2010 may ask questions of a person who he or she thinks was responsible for the contravention or breach, and also prescribes forms on which that person may reply: Harvey on Industrial Relations and Employment Law at L:74.02.

¹⁷ See for example, in England, the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

¹⁸ Case 170/84 *Bilka-Kaufhaus* [1986] 2 CMLR 701, [1987] ICR 110 and consequently developed in later case law, such as in Case C-381/99 *Susanna Brunnhofer v. Bank der Österreichischen Postsparkasse AG* [2001] ECR I-04961.

discrimination ground, that the measure corresponds to a real need on the part of the employer, is appropriate with a view to meeting that need, and is necessary to meet that need.

Tom Brown,¹⁹ Cloisters, January 2014

¹⁹ I am grateful to Rachel Crasnow, Jason Galbraith-Marten, and to my late colleague Yvette Budé, for having allowed me to see previous papers on this topic, on which I have relied.