

Proving discrimination: A practical look at shifting the burden of proof and access to evidence

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 This training session is funded under the 'Rights, Equality and Citizenship Programme 2014-2020' of the European Commission.

**What are the evidential hurdles in
discrimination cases? Why should the burden
of proof shift?**

1. covert discrimination
2. unrecognised prejudice.
3. bulk of evidence in employer's hands
4. allows employer to demonstrate lack of discrimination
5. renders substantive rights meaningful



Principle of effectiveness

Equality rights without substance unless underpinned by rules of evidence & procedure to help individuals to enforce such rights.

Most vital rules for ensuring effectiveness:

- burden of proof
- access to evidence



Inferences: *King v Great British-China Centre* [1992] ICR 516, CA per Neill LJ:

(1) It is for the applicant who complains of ...discrimination to make out his or her case. ...if the applicant does not prove the case on the balance of probabilities he or she will fail.

(2) ... it is unusual to find direct evidence of ...discrimination. Few employers will be prepared to admit such discrimination even to themselves. In some cases the discrimination will not be illintentioned but merely based on an assumption that "he or she would not have fitted in".

(3) The outcome of the case will therefore usually depend on what inferences it is proper to draw from the primary facts found ...

Directives



- The first Directive explicitly to address the issue was the Burden of Proof Directive 97/80/EC (dealing only with sex discrimination & not requiring implementation until 1 January 2001)
- It was replaced, from 15 August 2009, by virtue of the Recast Directive



Aimed at balance between:

Effective judicial protection for community rights

vs.

General rule of national procedural autonomy

Key Recitals (17) + (18)

Key content of Burden of Proof Directive 97/80/EC

Article 10

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. [Now Recast Directive 2006/54, Art 19.

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Shifting burden of proof

And currently

-Article 8 in Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ("the Race Directive")

-Article 10(1) in Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ("the Framework Directive")

-Article 19(1) in Directive 2006/54/EC of the European Parliament & the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) ("the Recast Directive").

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Shifting burden of proof

- **Recital to Equal Treatment Directive 2006/54**
- (30) The adoption of rules on the burden of proof plays a significant role in ensuring that the principle of equal treatment can be effectively enforced. As the Court of Justice has held, provision should therefore be made to ensure that the burden of proof shifts to the respondent when there is a prima facie case of discrimination ... the appreciation of the facts from which it may be presumed that there has been ... discrimination remains a matter for the relevant national body in accordance with national law or practice ...



Shifting burden of proof

The Two Stages of the Shifting Burden of Proof: Stage 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.”

-Presumed does not mean Concluded

See Opinion of AG Kokott in C-394/11
Belov v CHEZ [2013] 2 CMLR 29

The Two Stages of the Shifting Burden of Proof:
Stage 2

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**



Court's role in shifting burden of proof

The role of the Court

- The role of the national court is to verify “that the facts alleged against the employer are established and to assess the sufficiency of the evidence which the employer adduces in support of its contentions that it has not breached the principle of equal treatment.”

(para 33, *Firma Feryn NV*. Case C-54/07)



The role of the Court in practice

- Gathering evidence: judge's role
- Orders to disclose evidence
- The drawing of inferences
 - Case C-104/10 *Kelly v National University or Ireland*
 - Case C-415/10 *Meister v Speech Design CarrierSystems GmbH*
 - *RB-v-BA* [2006] IRLR 473



What evidence will shift the burden of proof?

Stage 1: evidence

Case C-54/07 *Firma Feryn NV*:

- An employer's prior statement that it would not appoint employees of certain ethnic minority backgrounds "may constitute facts of such a nature as to give rise to a presumption of a (still existing) discriminatory recruitment policy"



What evidence will shift the burden of proof?

Stage 1 *Firma Feryn NV*

- The CJEU confirmed that such statements may constitute facts of such a nature as to give rise to a presumption of a discriminatory recruitment policy, thus shifting the burden of proof. On the facts of the case, this may be thought unsurprising: the discriminatory remarks had been made only a little over a year earlier, and there were no current employees of Moroccan origin.

Evidence to shift the burden of proof

Stage 1 Case C-81/12 *ACCEPT* [2013] 3 CMLR 26

- Shareholder in Steaua Bucuresti football club made statements that would not hire a player who was homosexual.
- Did not matter statement was made by someone who could not bind employer in relation to any recruitment decisions
- Court could take account of employer's failure to distance self from homophobic statement

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What evidence needed at stage 2?

Stage 2: respondent to show by evidence no discrimination

- *Firma Feryn NV*: It is for the employer to “adduce evidence that it has not breached the principle of equal treatment”
- In *ACCEPT* this meant rather than having to show had actually previously employed gay staff, that its recruitment policy contained no discrimination on homophobic grounds.

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What evidence needed at stage 2?

- Stage 2 –
- Employers' evidence – it's unacceptable to rely as an answer upon:
 - The employer's reasons or motive, *R v Immigration Officer at Prague Airport and anor* [2005] 2AC, HL, per Baroness Hale
 - Stereotypical assumptions relating to a protected characteristic, C-83/14 *CHEZ*, CJEU



Procedure at stage 2

PROCEDURE – see *Kelly* at [34]

... although Article 4(1) of that Directive 97/80 does not specifically entitle persons who consider themselves wronged because the principle of equal treatment has not been correctly applied to them to information in order that they may establish 'facts from which it may be presumed that there has been direct or indirect discrimination' in accordance with that provision, it is not however inconceivable that a refusal of disclosure by the defendant, in the context of establishing such facts, is liable to compromise the achievement of the objective pursued by that directive and, in particular to deprive that provision of its effectiveness.

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C-415/2010 Meister

“... in the context of establishing the facts from which it may be presumed that there has been direct or indirect discrimination, it must be ensured that a refusal of disclosure by the defendant is not liable to compromise the achievement of the objectives pursued by Directives 2000/43, 2000/78 and 2006/54.”

“... a defendant's refusal to grant any access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination. It is for the referring court to determine whether that is the case in the main proceedings, taking into account all the circumstances of the case before it.”

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Direct Discrimination -The First Stage

(1) Find primary facts

These include

- The facts central to the complaint.
- Facts from background and circumstantial evidence.
- Relevant statistical evidence.
- Use of accepted facts
- [Any comparison must be someone whose circumstances are the same or not materially different to the claimant. (*MacDonald v Advocate General for Scotland* [2003] IRLR 512)] or prejudice might suffice

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Direct Discrimination -The First Stage

(2) Draw any appropriate inferences

- Platform of (neutral) facts/background
- Looked at in their totality and in context
- Reversing the burden
- *Belov* reminds us Presumed ≠ Concluded –
- And important to remember that negative treatment + protected characteristic alone ≠ burden shifted says *CHEZ*; however *CHEZ* also says evidence suggesting a practice based on stereotype

Summary as to what evidence at Stage 1 is needed to shift the burden of proof?

- Comparability: *Brunhoffer*
- Lack of transparency: *Danfoss*
- Segregation: *Enderby*
- Conduct of connected / influential parties: *ACCEPT*
- Historic discrimination: *Firma Feryn NV*

Direct Discrimination -The Second Stage

... it shall be for the respondent to prove that there has been no breach of the principle of equal treatment

Indirect Discrimination

occurs: "...where an apparently neutral provision, criterion or practice would put persons [with the protected characteristic] at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."

Directive 2000/43, Article 2(2)(b); Directive 2000/78, Article 2(2)(b); Directive 2006/54, Article 2(1)(b)



Indirect Discrimination – stage 1

- claimant must establish facts from which it may be presumed that there is an apparently neutral PCP which places persons with a protected characteristic at a particular disadvantage compared with other persons.
- most difficult hurdle for claimants alleging indirect discrimination in shifting the burden of proof is this requirement of showing a “particular disadvantage”.
 - Eg through statistics & common understandings: Rinke



Summary of Indirect Discrim 1st stage - Has E'ee established pf case of PCP or practice which puts those possessing protected characteristic at partic disadvantage & which causes her detriment?

- Yes? Move to Second Stage.
- No? Claim fails.

Summary of Indirect Discrim 2nd stage- Has E'r shown cogent evi disproving existence of any of elements of complaint?

- Yes? Claim fails.
- No? Justification.

Summary of Indirect Discrim Justification stage- Can E'r justify PCP?

- No? Claim succeeds.
- Yes Claim fails.

Establishing facts using statistics:

- Workplace statistics can show wide range of data from who is disciplined by age gender etc to status and existence of glass ceiling

Common knowledge:

- Courts take judicial notice of accepted facts eg childcare, language and nationality, religious observance and weekend working

Information in hands of employer: existing methods of obtaining it in UK courts and tribunals:

- Disclosure / information requests
- Freedom of information requests
- Data subject access requests under the Data Protection Act 1998
- Previous statutory questionnaire process (abolished 2014) did not have EU source



Member states can go further!

Article 8.1 of Dir 2000/43 informed pre EqA legislation which put initial burden of proof on e'ees.

Article 8.2 of Dir 2000/43 permits Member States to introduce rules of evidence which are more favourable to e'ees/claimants

S136 EqA puts no burden on claimant to prove anything at stage 1: see *Efobi v Royal Mail* UKEAT August 2017

-s136 EqA effectively prohibits a NCTA submission

NCA31



Brexit implications for shifting burden of proof:

- if *Efobi* remains good law, may remain easier for UK claimants to establish discrimination.
- However on a pessimistic note, post Brexit, nothing would stop s136 EqA being repealed and Directive 2000/43 could no longer be relied upon.

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CLOISTERS

Closing thoughts

- Shifting burden of proof is a powerful tool
- Extent to which national rules relating to matters like disclosure will be influenced by the CJEU is less clear
- Potential for interesting future legal developments

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