

# **THE BURDEN OF PROOF AND ACCESS TO JUSTICE IN DISCRIMINATION CASES**

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## **1. Purpose of the Paper**

It is not the role of this paper to provide an academic analysis of the Burden of Proof provisions. Rather, I hope to set out a practical guide to the application of the provisions from the perspective of an Employment Tribunal Judge with the hope that it will be of some assistance to colleagues from other jurisdictions attending this conference.

## **2. The Role of the Court or Tribunal**

In the UK and indeed, as far as I can discern, most, if not all of the other member states of the EU, the principal means of enforcing equal treatment in the workplace is litigation. Many member states have equality bodies or NGOs (or both) whose aim it is to combat discrimination at a structural level. However the anti-discrimination provisions at EU and national level (certainly in the UK) place an emphasis on an individual's right not to be discriminated against and require individuals to enforce their rights through legal processes.

## **3. The Burden of Proof**

The idea that there should be a burden of proof at all is central to our notion of fairness. It seems inherently right that a complainant be required to prove his or her case. The alternative would be to unfairly privilege the mere act of accusation and to encourage frivolous or vexatious claims. However, the problem with this approach is obvious. Proving discrimination is difficult. It has been observed by the UK courts that it is inherently unlikely that an employer who discriminates will overtly express prejudices which may, in any case, be unconscious.<sup>1</sup> Where a person is complaining of, for example, harassment because of sexual orientation, it may be that he or she is alleging explicit behaviour or language. It may on the other hand be that the conduct is not, on its face, connected to sexuality (for example constant unwarranted criticism of work or exclusion from training or other opportunities). In such a case, even if the fact of the criticism or exclusion is established, there is still the very serious problem of proving that it is because of that worker's sexual orientation.

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<sup>1</sup> E.g *King v Great Britain China Centre* [1991] IRLR 513

The orthodoxy that it is for the complainant to prove their case has operated in European legal systems for a very long time and that, perhaps, explains why, certainly in the United Kingdom, a more nuanced and subtle burden of proof, designed to address the historic difficulty of establishing discrimination in a court of law, has caused our courts considerable difficulty.

#### **4. The Directives**

In the civil (as opposed to criminal) systems of law that pertain in Europe (and this is certainly so in the United Kingdom) the normal approach to the burden of proof is that the task of proving the facts upon which a claim is based rests upon the claimant. At least in theory, at no point in a case does the defendant ever need to prove anything.

However, by as early as the late 1980s this was recognised by the European Court of Justice (ECJ) as an inadequate approach in the difficult area of discrimination. In two cases, **Danfoss**<sup>2</sup> and **Enderby**<sup>3</sup> the court began to develop a jurisprudence that found room for what might be described as a ***shifting burden of proof***.

In certain circumstances, the court recognised, it was simply not right to expect to claimant to continue to bear the burden of proving the case. In **Danfoss**, an equal pay case, the court held that where the employer's systems of pay were so opaque that it was impossible for a woman to understand why she was being paid less than a man doing the same job, it was for the employer to prove that

“his practice in the matter of wages is not in fact discriminatory” (para13)

**Enderby**, like **Danfoss** is an equal pay case and the Court there was operating from an understandable standpoint; that on the whole employees are poorly placed, in terms of their access to the evidence, to prove those matters which they would need to show in establishing that they are being paid less than comparable men because of their sex.

In December of 1997, the EC adopted **COUNCIL DIRECTIVE 97/80** on the burden of proof in cases of discrimination based on sex.

1. Member States shall take such measures as are necessary, in accordance with their national

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<sup>2</sup> Case 109/88, **Danfoss** [1989] ECR 3199

<sup>3</sup> Case C-127/92 **Enderby** [1983] ECR I-5535

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.

As the Court of Justice made clear in **Vasiliki Nikoloudi v Organismos Tilepikoinonion Ellados AE. Case C-196/02<sup>4</sup>**, the burden of proof provision is a codification and extension of the previous case law in **Enderby** and **Danfoss**, which itself is founded in the very longstanding principle of effective judicial protection for community rights. It is also a significant exception to the general rule of national procedural autonomy.

Article 8 Directive 2000/43 (the Race Directive) and Article 10 Directive 2000/78 (the Framework Directive) are identically worded.

The recitals to the Burden of Proof Directive acknowledge the effect of the provisions on the legal systems of the member states by reassuring those states that the traditional national autonomy in matters of procedure is being respected.

(13) Whereas the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with national law or practice;

and

(15) Whereas it is necessary to take account of the specific features of certain Member States' legal systems, inter alia where an inference of discrimination is drawn if the respondent fails to produce evidence that satisfies the court or other competent authority that there has been no breach of the principle of equal treatment;

Nevertheless, they go on to state,

(17) Whereas plaintiffs could be deprived of any effective means of enforcing the principle of equal treatment before the national courts if the effect of introducing evidence of an apparent discrimination

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<sup>4</sup> See paragraph 69

were not to impose upon the respondent the burden of proving that his practice is not in fact discriminatory;

(18) Whereas the Court of Justice of the European Communities has therefore held that the rules on the burden of proof must 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 must shift back to the respondent when evidence of such discrimination is brought;

The following recital appears in the Framework Directive

(31) The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought. However, it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation.

It is thus clear, in principle, what the law requires and why it is required. Discrimination is different to other civil wrongs and must be approached in a different way by the courts. As is evident from the confusion in the UK courts that I mentioned above, it may be less clear what that means in practice for an individual case. Below I will try to set out what I consider to be a sustainable approach for both direct and indirect discrimination cases.

## **5. A Sustainable Approach**

### **5.1 Direct Discrimination**

It is worth starting with the observation that it is possible to make too much of the burden of proof provisions. They repay careful attention when there is room for doubt as to the facts necessary to establish discrimination, but often cases stand or fall on positive findings by the court or tribunal about matters of fact. A finding that an employer made unwanted sexual advances to an employee will resolve a complaint of harassment in favour of the claimant without the reversed burden ever being engaged. A finding that no such thing happened will have the opposite effect. However, where matters are more nuanced and the evidence for discrimination more subtle, the burden of proof has a vital role to play.

The wording of the directive clearly contemplates two distinct stages; what has become known as the **two stage test**.

In his opinion in Case C-415/10 Galina Meister v Speech Design Carrier Systems GmbH, later adopted by the Court in its judgement,<sup>5</sup> AG Mengozzi described the effect of the Article as follows:

"...The mechanism consists of two stages. First of all, the victim must sufficiently establish the facts from which it may be presumed that there has been discrimination. In other words, the victim must establish a *prima facie* case of discrimination. Next, if that presumption is established, the burden of proof thereafter lies on the defendant. Central to the provisions referred to in the first question...is therefore the *burden* of proof that, although somewhat reduced nevertheless falls on the victim. A measure of balance is therefore maintained, enabling the victim to claim his right to equal treatment but preventing proceedings from being brought against the defendant solely on the basis of the victim's assertions."<sup>6</sup>

Accordingly, it is not surprising to find that the UK courts have developed a "two stage approach". What may be slightly more surprising is that in the leading case on the point, **Igen v Wong [2005]**<sup>7</sup> the UK Court of Appeal found it necessary to set out guidelines which amplify those two stages to 13!<sup>8</sup> This is, in fact, really no more than an acknowledgement that we are dealing with issues which are often of extreme forensic difficulty.

There have been relatively few European-level cases which offer any assistance on this matter. In **Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV. Case C-54/07**, the Belgian Labour Court referred a number of questions to the Court on the application of the burden of proof. The facts were that an employer had, in 2005, publicly stated a policy of not employing certain ethnic minorities. The question was to what extent this earlier stated policy was capable of being a fact which would place the burden upon the employer to disprove the discriminatory nature of its recruitment policy at a later period. A further question was how strict the national court must be in assessing evidence in rebuttal of the presumption.

The ECJ was not expansive and its answers are to be found at paragraphs 29 to 34 of the judgment. Perhaps to no one's great surprise, the Court concluded that a statement in 2005 by an employer that it would not appoint employees of certain ethnic minority backgrounds "**may constitute facts of such a nature as**

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<sup>5</sup> 19 April 2012

<sup>6</sup> Paragraph 22

<sup>7</sup> 3 All ER

<sup>8</sup> See appendix

***to give rise to a presumption of a (still existing) discriminatory recruitment policy”.***

The next paragraph in the judgment proceeds on the basis that, in fact, the burden is shifted because the court went on to say that it was for the employer to ***“adduce evidence that it has not breached the principle of equal treatment”*** and went on to give an example of what the employer might rely on in this case. Further examples were given in the very recent decision in the **Accept** case (**C-81/12**), to which I shall return in another context.

To the national court is left the task of verifying ***“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.

### **5.1.1 Comparators**

Although not strictly of relevance to the question of the burden of proof, it is worth mentioning the question of comparators. In all cases except those which relate to pregnancy, a worker will have to show that she or he has been treated less favourably than a comparable worker who does not share the protected characteristic. This is certainly the approach of the relevant legislation in the UK and is implied by the formal equality demanded by the Directive.

The comparison must be like with like. The comparator must be someone whose circumstances are the same, or not materially different, to the claimant’s<sup>9</sup>.

Where an actual comparator can be identified, the task of considering whether there has been difference of treatment is comparatively straightforward, requiring only findings of fact as to the treatment of the claimant, the treatment of the comparator and a comparison between the two. In the working example I set out below, this is the case.

A difficulty arises however where there is no actual comparator and the Court or Tribunal has to consider what would have been the case had there been a suitable comparator. In other words, a hypothetical comparator must be constructed. In such cases, the UK courts have said, it can be permissible to focus immediately on the question of why what occurred did occur, what is known as the “reason why” question. This entails examining all of the evidence and attempting to reach conclusions not only as to what happened

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<sup>9</sup> **MacDonald v Advocate General for Scotland [2003] IRLR 512**

but why. Such an approach, at worst, disadvantages only the respondent.

### **5.1.2 The First Stage**

As is often remarked, discrimination is frequently subtle. Certainly in the UK it is rare, now, to try cases where the behaviour complained of, if proved, is obviously related to the prohibited ground. Employers are unlikely now to leave an email trace directly linking a worker's dismissal say to his sexual orientation. Furthermore, even if discriminatory behaviour is not deliberate, it may be unconscious, perhaps based on an unquestioned stereotype.

This latter point has been emphasised by the UK House of Lords in **R v Immigration Officer at Prague Airport and another**  
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"If the difference is on racial grounds the reasons or motive behind it are irrelevant...The whole point of the law is to require suppliers to treat each person as an individual, not as a member of a group. The individual should not be assumed to hold the characteristics which the supplier associates with the group, whether or not most members of the group do indeed have such characteristics"

#### **A working example**

Let us at this point posit an example to which we can return for the purposes of illustration.

*The court is dealing with a claim by a black man of African origins, who is a Muslim, and who alleges that he applied for a promoted post within her employer's organisation but was unsuccessful. The successful candidate was a white European male. The claimant and the successful candidate are equally well qualified and of similar experience. The claimant complains that his non-promotion was because of his race and/or because of his religion.*

#### **What evidence is sufficient to shift the burden?**

As the CJEU has repeatedly pointed out, it is the job of the National Court or Tribunal to decide whether the claimant has done enough to shift the burden. Advocate General Kokott's opinion, in a reference from Bulgaria which the Court did not rule on because it was declared inadmissible, is very clear (see **Belov**).<sup>11</sup> It appears that the relevant

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<sup>10</sup> [2005]2 AC. Per Baroness Hale

<sup>11</sup> Opinion of AG Kokott in **Case C-394/11 Belov**

implementing legislation in Bulgaria required that the claimant show facts from which a court could “conclude” that there had been discrimination, before there was any requirement on the defendant to provide an explanation. A-G Kokott described that as demanding too high a degree of certainty and having the effect of frustrating the purpose of the provision. The Directive required *presumption* rather than *conclusion* and she points to recital 21 of the Race Directive<sup>12</sup> which talks only of a reversal of the burden at the point where the claimant has established a “prima facie case of discrimination.”

On the other hand, A-G Kokott’s opinion, in **CHEZ**<sup>13</sup> and also in **Belov** is that the mere fact that a gas supply company has adopted a policy of locating its meters too high up to be read by consumers, but only in an area predominantly inhabited by Roma, is insufficient to shift the burden in a claim of direct discrimination on grounds of race. The evidence showed that non-Roma people were affected and that Roma people living in different parts of the city were not. A-G Kokott’s view is that the evidence did not establish a sufficiently close connection between the practice and the protected characteristic of race. Of course, what A-G Kokott has to say is not binding but it is a useful indicator of the correct approach. The Court’s judgment reiterated that whether the evidence before the court was sufficient to shift the burden was a matter for the court but went on to give considerable guidance as to what matters could be taken in to account by the court.<sup>14</sup> We shall return to that guidance later.

### **The importance of primary facts**

It will be seen from the wording of the Directive that the Court has as its primary obligation to assess the evidence and find facts.

The focus is on what are thought of as **primary facts**: what happened; who said what; how many people from ethnic minorities does this firm employ in the promoted echelons; has this company got an equal opportunities policy; etc? From those primary facts, a court may draw inferences. The combination of primary facts and inferences is then the material

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<sup>12</sup> Council Directive 2000/43

<sup>13</sup> C-83/14 a case closely connected to the **Belov** case, judgment on 16 July 2015.

<sup>14</sup> See paragraphs 80-84

upon which the Court can assess whether the claimant has discharged the burden on him.

*In our working example, the primary facts established so far would be*

- 1) *The racial origin and religion of the claimant*
- 2) *The racial origin and religion of the successful candidate*
- 3) *The claimant and the successful candidate are equally well qualified and of similar experience.*
- 4) *The claimant was not promoted and his white non-muslim colleague was.*

### **Background and context**

In providing material from which the court may draw an inference, the claimant may wish to rely on evidence which might, at first sight, be considered irrelevant. The worker may wish to call evidence about the treatment of others in the workplace or of events which are not now the subject of the complaint, for example matters which occurred some time ago. This, of course, presents a case management challenge to the court or tribunal. On the one hand, there must be some legitimate and reasonable limit to the scope of the current enquiry. On the other hand, the claimant must be permitted to adduce evidence which is relevant to the claim and from which, if established as fact, a court could draw inferences.

In the UK, this principle was established by the Court of Appeal in a race discrimination case, **Anya v University of Oxford** [2001] IRLR 377. In that case, once again, the observation is made that very little discrimination is overt (or perhaps, even deliberate). **Anya**, like the example we have chosen to consider throughout this presentation, was an appointment case.

Dr Anya applied, unsuccessfully, for a research post. The successful candidate was white. Dr Anya is a black Nigerian. The tribunal heard from a witness for the university who explained that Dr Anya had not been selected for reasons related entirely to his qualities as a scientist. They found that witness truthful and dismissed the claim. Dr Anya had called evidence about five events prior to his rejection which he said indicated bias against him. He did not seek to make these instances part of his claim but relied on them to establish that his rejection for the post was on the grounds of his race. The tribunal failed to make findings of fact on any of those matters, let alone indicate whether they could draw any inferences from them. This was despite the fact that they noted, in the evidence on those

matters, inconsistencies between the University's witnesses and also inconsistencies between their evidence and the documents.

The Court of Appeal remarked that in obvious and straightforward cases it might be possible to reject a complaint without a detailed consideration of the background evidence. However, here, when a choice lay between two well qualified candidates and the decision depended on judgments which are notoriously capable of being influenced by idiosyncratic factors, that was not possible. If any of the factors influencing the decision were racial factors, that would generally only emerge from the surrounding circumstances and previous history.

*To return to the example; the claimant may wish to show that he has applied for promoted posts in the past and has, on each occasion, lost out to a white person. Or he may wish to show that the last 5 promoted posts in the factory have all gone to people of white European origin, despite the fact that there have been candidates of African, Eastern or Roma origin. These matters are not complaints before the court but are matters which may allow the court, if decided in favour of the claimant, to draw an inference in this case.*

### **The importance of inferences**

Inferences are a key concept here. On its own, the fact that a company employs only one non-white person in a promoted position does not prove that the claimant's lack of promotion is because of his race or his religion. It is, however, a fact based upon which a racially discriminatory motive could be inferred in the right circumstances.

Perhaps I might say something about what it means to draw an inference. We start from the proposition, as I have already pointed out, that discrimination will seldom be overt.

*If, in our example, the claimant satisfied us that the employer had said, after the interview "I am very impressed with your credentials for the job, what a pity it is that you are black. The workers in this factory will never take orders from you" we would not need to draw an inference from the primary facts because they speak of discriminatory motivation ipso facto and clearly require the employer to attempt to disprove a discriminatory selection for the post.*

*On the other hand, if the tribunal found that the employer had said before the interview, "how was your last holiday?", without further evidence which would place that apparently neutral*

*comment in a different light, a tribunal could not draw an inference against the employer.*

*If, however, the court was satisfied that the employer, just before the interview proper began, enquired casually as to how the claimant managed in the hot factory during the month of Ramadan (when observant Muslims may not eat or drink during daylight hours); that is not evidence that necessarily points to discriminatory intent. It might simply be that the employer was making polite small talk to put the claimant at his ease. However, the nature of the topic is certainly capable of bearing a sinister interpretation. The employer might be concerned that the claimant would be unable to fulfil the extra requirements of the promoted post during Ramadan, perhaps because of reduced concentration or energy. Such a comment could support an inference of discrimination, requiring an explanation, provided that the other elements that we have already discussed are in place.*

The process of inference drawing in this context is, therefore, no more than a consideration of whether evidence not overtly or directly tainted with discrimination could, in fact, when properly considered add to the prima facie case of discrimination the claimant is seeking to prove. Indeed, the material from which an inference can be drawn is not limited to the evidence in the case. In the UK inferences have been drawn from failures to follow recommendations in a statutory code of guidance and from the failure by an employer to call as witnesses those who were involved in the events or decisions complained of.

We will return to this matter later when we consider the cases of **Kelly, Meister and CHEZ**.

The task of the claimant is here both to prove the primary facts upon which he relies as amounting to the treatment of which he complains and also to establish material upon which the court could conclude that there is a causative link between the treatment and the claimant's protected status, that is that he has been treated less favourably than another on the grounds of his race or religion.

*In our example above, the claimant would need to establish that he had indeed applied for the job and that he had indeed been passed over. That is the treatment of which he complains. The facts of the race of the successful candidate and the low representation of people from non-European backgrounds amongst the promoted echelons are facts which go to causation, the link between his race and the treatment he complains of.*

### 5.1.2 The Second Stage.

Once the burden has been shifted to the employer, it is for him or her to provide an explanation **which is in no sense at all** connected to the protected status of the employee. The explanation must, of course, be adequate and must be accepted by the court. An employer falling short of that **must** be found to have discriminated, even though the court might perceive another reason, not advanced by the employer, but nevertheless non-discriminatory.

In this somewhat counter-intuitive proposition lies the power of the reverse burden of proof. The words "**it shall be for the respondent to prove** that there has been no breach of the principle of equal treatment" do not leave open the national court the possibility of finding its own non-discriminatory reason as the reason for dismissing a claim.

As we have already seen, it will be no defence to an employer to show that the treatment was not motivated consciously by race or that it was based on an accurate stereotype. This is often of particular significance in cases of alleged harassment. Statements which might be regarded as neutral and truthful observations can, nevertheless, in their adoption of a "one size fits all" mentality, belittle and humiliate individuals.

*In our example, the employer's case is that the successful candidate was appointed on merit and not by reference to race. The employer will want to adduce a clear explanation of the factors that were taken into account in assessing the claimant's performance, and that of the successful candidate. The more objective the comparison is, the easier it will be for the employer to dispel any suggestion of even unconscious bias.*

#### **What evidence may be considered at each stage?**

Since we are facing a two-stage test, it is pertinent to ask what material can be considered at each stage. One approach would be to insist that at the first stage the claimant's evidence alone should be considered and only at the second stage should the respondent's evidence be considered, by which point the evidence should concern only matters not previously canvassed at stage one. (Apparently this is the preferred approach in Sweden<sup>15</sup>.)

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<sup>15</sup> NJA 2006 s 170. I am indebted to Italian legal scholar Matteo Bonini-Baraldi for this example which is taken from his presentation to the May 2009 ERA conference on directives 2000/43 and 2000/78.

The UK approach is different. The Court of Tribunal is required, at the first stage to consider evidence from the claimant in support of his contention that there had been discrimination *and* any evidence from the respondent. The Tribunal considers all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like and available evidence of the reasons for any differential treatment.

*To return once again to our example, the UK approach would permit the court, for example, to consider evidence from the employer which tended to show that, although it had very few non-Europeans in promoted posts, this was because the claimant was one of very few non-Europeans who had ever applied for promotion and that the employer had a well-developed policy of encouraging applications from non-Europeans. If accepted, this might be sufficient to negate the evidence upon which the claimant relied to shift the burden.*

The contrary approach would prevent the employer from advancing such evidence until the second stage. To take a more extreme example, the first approach would prevent the employer from adducing evidence to show that the complained of act never happened at all. The burden of proof would then shift, requiring the employer to show that acts which, on later analysis were found never to have occurred, were not discriminatory.<sup>16</sup>

An added problem with this approach is the practical difficulties for a court or tribunal in dividing up a hearing so as to decide each stage separately. In reality, courts tend to hear all the evidence at once and it is highly artificial to expect the court to exclude from its considerations at stage one, cogent evidence which it has heard advanced by the employer, in case it should be required to meet a shifted burden of proof.

### **Discharging the burden on the employer**

It would be a very brave employer indeed who simply declined to call any evidence, on the assumption that the claimant would not succeed in shifting the burden. This is born out by the example of the case of **EB v BA**<sup>17</sup> (a transgender case) a decision of the UK

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<sup>16</sup> This absurdity was pointed to by the judgement of Elias J Laing v. Manchester City Council [\[2006\] IRLR 748](#)

<sup>17</sup> [2006] IRLR 471

Court of Appeal. In that case the absence of adequate documentation, which was all in the possession of the employer, made it difficult, but ultimately not impossible, for the claimant to shift the burden. However, once the burden had shifted, that same absence meant that it was impossible for the employer to discharge the burden now resting on it.

*Thus, in our example, the employer would wish to produce copies of the notes of the interviews of the claimant and his comparator and the score sheets, if any, that the interview panel drew up in deciding who should be promoted. Although they might provide material upon which the claimant could draw, an absence of such records would leave the respondent extremely vulnerable once the burden had shifted. The employer will be required to satisfy the Tribunal or court that, on the civil standard of proof, there was no discrimination whatsoever.*

## **6.2 Indirect Discrimination**

*Our working example now changes. The claimant complains that he has not been promoted because there is an informal practice at the company (which is in Portugal) of only promoting staff who have a high degree of fluency in Portuguese and that this policy is indirectly discriminatory.*

In such a case, discrimination has taken place if there exists a provision or criteria or practice which, although of neutral application, puts someone of the claimant's particular characteristics (i.e his racial origin) at a particular disadvantage and which cannot be justified.<sup>18</sup>

It will be for the claimant to show the existence of the provision and the fact that it places (in this case) a person of African origin at a particular disadvantage.

*In our new example, the claimant might show both by statistical evidence. An analysis of the linguistic skills (perhaps an analysis of which is the first language) of successful as opposed to unsuccessful candidates in promotion competitions over the preceding years might go some way to showing the existence of the practice. A break down of the racial origins of successful and unsuccessful candidates might establish the disadvantage.*

Once again, it is open to the employer to adduce evidence to rebut the presumption. Thus, the employer might show that although the

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<sup>18</sup> Directive 2002/73/EC of the European Parliament and the Council.

statistics seem to show that people with fluency in German are more likely to be preferred, this is not as the result of any practice but because they tend to be the better candidates overall and that all appointments are made on merit, not length of service.

If, nevertheless, the burden does shift, the employer may attempt to justify the practice, perhaps by showing that it is a legitimate business need to only promote staff whose linguistic abilities are adequate for the demands of the promoted post.

### **6.2.1 Statistical Evidence**

We have already mentioned statistical evidence but it is worth spending a little more time on the subject.

In the case of *Enderby*, the court concluded that where two jobs are of equal value and one is carried out almost exclusively by men and the other by women, a prima facie case of indirect discrimination is established if statistics show an appreciable difference in pay between the two jobs. This is so even if it is not possible to explain how the differential has arisen.

The key question here is whether the statistics are adequate to demonstrate a general state of affairs, as opposed to a temporary or fortuitous one, and whether the difference(s) they reveal is/are significant.

Statistics, as I have already remarked, may help to show the existence of a policy or practice. Here the court will most often be referred to statistics deriving from the relevant employer's work force. They may also be relied on to show particular disadvantage. Here the court may be referred to broader, industry wide or even national labour force, statistics. Sometimes the only evidence advanced at all, particularly on the disadvantage issue, is statistical.

Arguably, the importance of statistical evidence may be taken to have diminished with the new definition of indirect discrimination in the 2002 directive. The 1997 directive on Burden of Proof spoke of "substantially higher proportion of the members of one sex". This was described in the decision of the House of Lords in **Rutherford v Secretary of State for Trade and Industry (No2)**<sup>19</sup> as the language of comparison which demanded a consideration of the proportions of women and men disadvantaged by the criterion. This, in the view of the House of Lords, implied a statistical analysis.

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<sup>19</sup> [2006] IRLR 553

The new wording<sup>20</sup> seems to propose a less onerous burden in showing disadvantage. As yet, there has been no CJEU jurisprudence that I am aware of that attempts to delineate the difference in the two definitions. A suspicion of what might be regarded as less rigorous approaches has, to some extent, been born out by facts. In the case of **R v Secretary of State for Employment ex parte Seymour-Smith and Perez**<sup>21</sup>, statistical evidence established beyond doubt that a legislative measure which it had been assumed by the parties had significant disparate impact on women, had ceased to do so by the time that the litigation was concluded!

## **7. Access to evidence and the cases of Kelly<sup>22</sup> Meister<sup>23</sup> and CHEZ<sup>24</sup>**

In the UK, litigants are entitled to full disclosure of all relevant documents held by their employer (with certain very limited exceptions) and the Tribunal is empowered to order their production, if not volunteered. The failure by an employer to produce documents may allow the Tribunal to draw inferences, as has already been noted.<sup>25</sup>

The rights of complainants to have access to documentary and other evidence in this way differ greatly across Europe. For example, neither Germany nor Italy give their labour courts the power to order disclosure of documents, whereas in France such a power does exist.

Traditionally, the ECJ/CJEU has treated legal procedural rules as broadly matters for member states<sup>26</sup>. In two recent judgments the CJEU has concluded that the burden of proof provisions do **not** require that member states introduce rules requiring the disclosure of information or documents by employers to claimants. However, in **Kelly** the Court observed that where rules

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<sup>20</sup> "Indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary"

<sup>21</sup>[1995] IRLR 464

<sup>22</sup> **Kelly v National University of Dublin** CJEU C-104/10

<sup>23</sup> **Meister v Speech Design Carrier Systems GmbH** CJEU C-415/10

<sup>24</sup> **CHEZ Razpredelenie Bulgaria AD v Komisia za zasshtita ot diskriminatsia** CJEU C-83/14

<sup>25</sup> In fact the formal provision for this procedure was abolished on 6 April 2014 (S66 Enterprise and Regulatory Reform Act 2013) but the Tribunal still retains a general power to order an employer to answer questions posed by the employee and the abolition is probably of little practical effect.

<sup>26</sup> For example, **Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland**. C-33/76.

of procedure operate in such a way as to risk the achievement of the objectives of the directive (97/80), it is for the national court to "take all appropriate measures to ensure that that did not occur"<sup>27</sup>. Quite what that means in practice is not made clear.

Some more clarity is provided by the Court's later decision in **Meister**. In that case Ms Meister applied for, but did not succeed in obtaining, a job with the defendant. She brought proceedings and sought an order that the defendant disclose the file of the successful applicant. Such an order would have readily been granted in the UK courts but was not in the German court. The CJEU ruled as it had in **Kelly**. However, it also made the important observation that it was open to a national court, when deciding whether the claimant had established facts which would shift the burden of proof to the employer, to draw an adverse inference against an employer refusing to volunteer relevant information. Since that inference might well be sufficient to shift the burden to the defendant to disprove discrimination, which would in all probability require the disclosure of the file, the force of the national rule becomes significantly diluted if not removed altogether.

**Meister** was specifically referred to by the Court in its judgment in **CHEZ**. In that latter case the CJEU said that the national Court could draw an inference from, amongst other factors, the failure by the respondent to adduce certain evidence (of damage to meters) which had been ordered by the national court.<sup>28</sup>

## 7. The Accept case<sup>29</sup>

On 25 April 2013, the CJEU handed down its preliminary ruling in the **Accept** case, referred by the Curtea de Apel București (Romania). The case concerned Steaua Bucharest football club and a Mr Becali who, although not holding any official position in the club, had until recently been its chief shareholder and was at the relevant time widely accepted as still having significant influence on the management of the club. Mr Becali made some extremely homophobic remarks, making it clear that the football club would never employ a gay footballer. Once the remarks were made public, the club did not distance itself from them and indeed may even have confirmed that that was their policy.

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<sup>27</sup> **Kelly** at paragraph 4(1).

<sup>28</sup> Paragraph 83.

<sup>29</sup> **Case C-81/12, Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării**.

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=136785&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=134982>.

The referring court wanted to know “to what extent” those remarks might shift the burden to the employer to prove that it did not have a discriminatory recruitment policy.

The Court pointed out in its ruling that it was for the national courts to assess what evidence did or did not shift the burden and referred to its judgment in **Ferma Feryn**. However, drawing on its power to give “guidance” it went on to say that:

“Articles 2(2) and 10(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation **must be interpreted** as meaning that **facts such as those which form the dispute in the main proceedings are capable of amounting to ‘facts from which it may be presumed that there has been ... discrimination’** as regards a professional football club, even though the statements concerned come from a person presenting himself and being perceived in the media and among the general public as playing a leading role in that club without, however, necessarily having legal capacity to bind it or to represent it in recruitment matters.”

## 6 Conclusion

The willingness of the Court to be so firm in its conclusion on what ought actually to have been a matter for the referring court, may be seen as part of a gathering impatience on the part of the Court. It contrasts with the somewhat more tentative approach adopted to very similar facts in **Firma Feryn**. The decision in **Meister** is certainly an attempt to grapple with a national procedural rule (no requirement to disclose documents) which the Court senses makes litigation to enforce equality prohibitively difficult. It is at least possible that the CJEU perceives a reluctance on the part of national courts to be serious about tackling discrimination and to use the important tool of the reversed burden of proof to do it, and increasingly wishes to encourage a different approach. That impression has only been strengthened by the detailed guidance given in **CHEZ**.

If so, the developing jurisprudence on fundamental rights and the increasing significance of the Charter of Fundamental Human Rights of the European Union<sup>30</sup> can only add impetus.

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<sup>30</sup> Cf Article 47: Right to an Effective Remedy and Fair Trial

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