



## **PROVING DISCRIMINATION: The Burden of proof**

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### **Context**

1. The experience of discrimination for the individual often takes the form of looking for an explanation for why something has happened to them which was detrimental. The person who has experienced unlawful discrimination may know that something bad has happened to them (not getting promotion or losing their job) but not KNOW the explanation for it. However one explanation may be that they have been treated in the way they have either directly because of a characteristic which the law protects or because of the effect of an arrangement by the person they accuse which, combined with their protected characteristics disadvantages that person without justification.
2. In the EU we believe that the principle of non-discrimination is a fundamental principle of law but the fog of explanation that surrounds even the most straightforward cases (except where there is overt and admitted discrimination) means that there must be a way of evaluating claims of discrimination which is different to how judges evaluate other types of claims.
3. At the heart of the discrimination problem is a problem of proof. The individual rarely starts out with plain and simple evidence of the tort that has been committed. Discrimination is both easy to allege, but also easy to deny. The same feature makes this possible. The court is looking for an explanation for treatment where there is unlikely to be direct evidence and where the reason for the treatment may be something that the accused does not even want to admit to him or herself. In those circumstances there have to be rules of evidence and procedure that assist individuals to enforce their rights. Rules need to exist concerning the burden of proof and access to evidence.
4. The EU strikes a balance between the autonomy of member states in an area which is generally regarded as procedural and the need to ensure effective and practical protection against discrimination in the tribunals and courts of the member states.

### **What are the evidential hurdles in discrimination cases?**

5. The burden of proof in a civil case falls on the claimant. This is an axiom. After all the claimant asserts and so must prove. I have sometimes spoken to baffled judges at ERA about this concept of the shifting burden of proof: in a normal case they do not need assistance with cases because they find themselves thinking that the evidence is so evenly-

balanced that they cannot make up their mind. Certain features of discrimination cases mean that there is a need to think carefully about who needs to prove what in a case. Thus judges in the UK noticed in the early cases that there were special problems of proof for complainants in discrimination cases. The courts noticed that those who discriminate unlawfully do not generally advertise their prejudices. They may not even be aware of those prejudices themselves.

6. So take direct discrimination cases as an example: The claimant will probably be faced with an absence of explicit evidence of less favourable treatment *because* of the relevant protected characteristic. The psychological insight which the judges in the UK articulated (as a result of the UK needing anti-discrimination laws in the 60s and 70s) was:

a. Individuals are unlikely to admit to discrimination or may unknowingly be influenced by unconscious prejudices or stereotypical views. In one case, *Glasgow City Council v Zafar*<sup>1</sup> the House of Lords summarised it this way:

- Claimants will often need to point to the treatment of other individuals who do not share their protected characteristic to make good their assertion that they have been treated less favourably because of the protected characteristic.
- This information will ordinarily not be in their possession. For example, a woman who suspects that she may have been paid less by way of bonus than her male colleague, will not ordinarily have access to his detailed pay information or performance data.

7. Consider also the problems arising in indirect discrimination claims: A claimant who can identify an apparently neutral provision, criterion or practice which places her at a particular disadvantage, will only succeed if she can demonstrate that other people who share her protected characteristic may be similarly disadvantaged; but that information to prove this group disadvantage will often be in the hands of her employer and may even require an employer to actively seek or collate that information.

8. Indirect discrimination (or direct age discrimination) may be lawful if it is justified. Clearly here the burden of proof needs to be on the person seeking to assert justification. Without rules on the burden of proof, that justification may be regarded as part of the definition of discrimination so that the claimant would be faced with being called on to prove that the arrangement was not justified. Without rules affecting evidence they would also be faced with the task of unpicking or challenging the defence with limited direct knowledge of the relevant matters.

#### **A. Shifting burden of proof**

9. The EU's formulation of rules relating to burden or proof reflect these special features of discrimination cases. The rules are necessary to render the laws against discrimination

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<sup>1</sup>[1998] ICR 120

effective and practical rather than theoretical and illusory. The ECJ recognised in *Danfoss*<sup>2</sup> and *Enderby*<sup>36</sup> that there was a need to have a shifting burden of proof in discrimination case due to the onerous nature of the exercise of proving that discrimination has occurred. .

10. *Danfoss*: The problem can be illustrated by this Danish case where there was evidence of a difference of treatment in relation to wages between men and women. There was evidence that the *average* wage for women was 6.85% lower than that received by men within a particular establishment. It was not possible for the claimants to prove definitively that women were paid less in respect of each element of their remuneration because the pay system completely lacked transparency.
11. What could the court do in this situation? The choices were either to say that the claim simply failed using classical theories of the burden of proof (asserter proves all assertions) or to introduce a more subtle distinction creating different phases of the process of proof and allocating the burden differently at each stage to reflect the power differences between the parties. The ECJ took this second option.
12. The ECJ stated that the burden of proof in such circumstances rests initially with the claimants to demonstrate that a relatively large proportion of women were paid less on average than men.
13. This approach means that it would not be possible just to say “I am a woman and I think I have been the subject of discrimination because of that in relation to my pay” and expect a judgment. The claimant has to prove facts from which it would be possible to conclude that she was the subject of discrimination due to a protected characteristic (sex).
14. However if the claimants could show that there was evidence that a relatively large proportion of the women in the workforce were paid less on average than men, the burden of proof changes. There is something suggestive of possible discrimination which needs explanation.
15. After that point, the burden shifted to the employer to demonstrate that there has been no discrimination.
16. The justification for this approach was the need to provide women with an *effective* means of enforcing the principle of equal pay. In relation to other, later, areas, this point about creating an effective means of enforcing the underlying non-discrimination principles is important. It will affect, for example, the way in which questions of the shifting burden of proof in cases which involve the concept of reasonable accommodation. The key passages from the Judgment are as follows:

“employees can establish differences only so far as average pay is concerned. They would be deprived of any effective means of enforcing the principle of

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<sup>2</sup> C-109/88, *Handels- og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] ECR 3199

<sup>3</sup> C-127/92, *Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health* [1993] ECR I-5535

equal pay before the national courts if the effect of adducing such evidence was not to impose upon the employer the burden of proving that his practice in the matter of wages is not in fact discriminatory.

14. Finally, it should be noted that under Article 6 of the Equal Pay Directive Member States must, in accordance with their national circumstances and legal systems, take the measures necessary to ensure that the principle of equal pay is applied and that effective means are available to ensure that it is observed. The concern for effectiveness which thus underlies the directive means that it must be interpreted as implying adjustments to national rules on the burden of proof in special cases where such adjustments are necessary for the effective implementation of the principle of equality.

15. To show that his practice in the matter of wages does not systematically work to the disadvantage of female employees the employer will have to indicate how he has applied the criteria concerning supplements and will thus be forced to make his system of pay transparent.

16. In those circumstances the answers to Questions 1 (a) and 3 (a) must be that the Equal Pay Directive must be interpreted as meaning that where an undertaking applies a system of pay which is totally lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men.”

17. In *Enderby* there was evidence that speech therapists, who were overwhelmingly women, were paid less by the English National Health Service (NHS) than pharmacists, who were predominantly male. However, the female claimants could not go one step further and prove that the difference in pay arose because of discrimination.
18. The ECJ used the concept of a *prima facie* case of discrimination to suggest the level to which the claimant must prove the case. It observed that on the facts of the reference for a preliminary ruling there was a *prima facie* case of discrimination. The effect of the claimant establishing those facts was that the burden of proof shifted to the NHS to prove that there was no sex discrimination. The justification for this approach was that it was necessary to provide women with an effective remedy. Paragraphs 13, 16, 18 and 19 of the judgment illustrate the Court's approach.
19. First the court noted that it is normally for the person alleging facts in support of a claim to adduce proof of such facts so that, in principle, the burden of proving the existence of sex discrimination as to pay lies with the worker who, believing himself to be the victim of such discrimination, brings legal proceedings against his employer with a view to removing the discrimination.
20. Second, what sort of things could create a *prima facie* case? The court stated that if the pay of speech therapists is significantly lower than that of pharmacists and if the former are almost exclusively women while the latter are predominantly men, there is a *prima facie* case of sex discrimination. This holds good “at least where the two jobs in question are of equal value and the statistics describing that situation are valid”. In other words where you are comparing like with like.
21. Third, IF there is a *prima facie* case of discrimination, it is for the employer to show that there are objective reasons for (in that case) the difference in pay.

22. In particular the ECJ said: “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 Danfoss, cited above, at paragraph 13).

### **The Directives**

23. The rule was recognised judicially for practical reasons. The institutions subsequently recognised the need for codification of the shifting burden of proof principle. The first Directive to codify explicitly was the now retired<sup>7</sup> Directive 97/80/EC on sex discrimination recital 17 of which stated

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

Explicitly in recital 18 the Directive stated that

“(18) ...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.”

24. So the rationale was the principle of effectiveness and it gives the formulation of that Directive in Article 4. Article 4 states:

“Burden of proof

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.

2. This Directive shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.”

25. This formula of the test appears identically in the following:

- a. Article 8 in Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (“the Race Directive”);
- b. Article 10(1) in Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (“the Framework Directive”); and
- c. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 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”).

26. The distinction between the procedural rules of a national court and the requirements of EU law is an important one. However the procedural rules of the national court can never frustrate the practical application of EU law to guarantee effective and practical rights. This is why the concept of the shifting burden of proof is so important despite the fact that it looks

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<sup>7</sup> From 15 August 2009 by virtue of the Recast Directive.

like an intrusion into the national court's realm of procedural rules. Member states must adapt their usual procedural rules so as to conform to its requirement. The underlying rationale is that otherwise the underlying purpose of the Directives (and the general principles they embody) would be wholly frustrated in practice and the law would become a dead letter. The standards required by the Directives in this respect are minimum standards and do not prevent member states from introducing rules of evidence which are more favourable to the claimant.

27. A member state that wished to do so would however now have to consider whether the Charter on Fundamental Rights would have an impact in this area. Businesses might well complain that their rights are being infringed if disproportionately favourable rules concerning the shift in the burden of proof were imposed by a measure of law in a member state.

**Stage 1: In practice, what evidence is required to shift the burden of proof?**

28. I think for many judges within the EU the concept of a shift in the burden of proof may be difficult to understand other than as a formal rule. When, crucially, has the claimant proved a prima facie case? What precisely is required in order to demonstrate a prima facie case of discrimination? That is a question which may be simpler to ask than answer.
29. It is first important to break down the type of discrimination rule which you are seeking to apply. What are the components of that rule? There will be a different answer in the case of direct discrimination (less favourable treatment of a real or hypothetical comparator), indirect discrimination (a rule placing those with a particular protected characteristic at a particular disadvantage, and placing the claimant at that disadvantage compared to others and which cannot be justified).
30. There is a question as to whether the burden of proof provision applies to a claim for reasonable accommodation (formulated in accordance with Article 5 of Directive 2000/78 and the UNCRPD in national law). The answer is probably yes, as the failure to make a reasonable accommodation is a form of discrimination (see UNCRPD). However the CJEU has not examined this point. Harassment is deemed to be a form of discrimination, and so the burden of proof provisions will apply to such cases.
31. In both direct and indirect discrimination cases one crucial issue is whether the claimant is comparing him or herself to a real or actual person who is treated more favourably than the claimant or who is not placed at the particular disadvantage (and who does not share the protected characteristic). This concept of comparability needs careful consideration.
32. **Comparability:** *Brunnhofe*<sup>4</sup> was an equal pay case which considered comparability. A central question was the extent to which certain female claimants were comparable to male colleagues who were employed under the same collective agreement. The ECJ gave the principle that once a woman could establish that she was "comparable" to a man and she was paid less, then that was sufficient to shift the burden of proof (see paragraphs 51 -62 see also Advocate General Geelhoed at paragraph 20).

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<sup>4</sup> C-381/99 *Brunnhofe v Bank der österreichischen Postsparkasse AG* [2001] ECR I-4961.

33. A mere difference in treatment between a man and a woman is enough to shift the burden of proof onto the employer *where there is comparability*. This can be seen from the “preliminary remarks” (paragraphs 24 to 31 Judgment).
34. **Lack of transparency:** *Danfoss* establishes that a lack of transparency in a pay system, where there is evidence that average wages differ as between men and women, is sufficient to shift the burden of proof. The type of fact that can shift the burden of proof can include therefore some state of affairs that calls for explanation and which is consistent with discrimination occurring. Here there was evidence of a difference in pay, no explanation of whether the circumstances of the comparator and claimant were the same or materially different, but the explanation of any material difference had to come from the employer because to impose any other rule in the context of the employer’s lack of transparency would be to render the challenge to whether discrimination had taken place practically ineffective.
35. **Occupational segregation:** Similarly, the burden of proof is shifted where there are two professions within one organisation which are essentially divided along gender lines, and the “male” profession is paid better than the “female” profession as established in *Enderby*. Again this was a case where there was information calling for an explanation from the person potentially equipped with the information to give it (the employer).
36. **Conduct of connected / influential parties:** The practicality of the approach can be seen from *ACCEPT*<sup>5</sup>. It is a very practical consideration. There the conduct of the majority shareholder of the employer was considered to be capable of shifting the burden of proof. That shareholder in a Romanian football club had made homophobic comments that he would prefer not to hire a player who was homosexual. The CJEU concluded that these comments could shift the burden of proof although the Judgment appears to be premised on an understanding that the majority shareholder apparently had an important role in the management of the team. The relevant passage is as follows:
- “48. The mere fact that statements such as those at issue in the main proceedings might not emanate directly from a given defendant is not necessarily a bar to establishing, with respect to that defendant, the existence of ‘facts from which it may be presumed that there has been ... discrimination’ within the meaning of Article 10(1) of that directive.
49. It follows that a defendant employer cannot deny the existence of facts from which it may be inferred that it has a discriminatory recruitment policy merely by asserting that statements suggestive of the existence of a homophobic recruitment policy come from a person who, while claiming and appearing to play an important role in the management of that employer, is not legally capable of binding it in recruitment matters.
50. In a situation such as that at the origin of the dispute in the main proceedings, the fact that such an employer might not have clearly distanced itself from the statements concerned is a factor which the court hearing the case may take into account in the context of an overall appraisal of the facts.”
37. In short it is a very practical consideration of whether there is evidence that in practice the decision making of the defendant has been influenced (consciously or unconsciously) by the precluded factors. As it is very practical it is important for judges to see the aim of the Directive and to consider the practical difficulties of proving discrimination in relation to the

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<sup>5</sup> C-81/12 Asociația ACCEPT v Consiliul National pentru Combaterea Discriminării

particular case before them. It is important not to treat the decided cases as setting limits to what can be taken into account. What sets the limit is the question of whether the information before the judge is capable of showing that there may be discrimination taking place unless there is a non-discriminatory explanation for what has happened.

38. So a further example of material that might shift the burden of proof in consideration of **Historic discrimination**. In the case of *Firma Feryn NV*<sup>6</sup> the employer had made the following statement explaining why he would not recruit Moroccans:

We must meet the customers' requirements. This isn't my problem. I didn't create this problem in Belgium. I want the firm to do well and I want us to achieve our turnover at the end of the year, and how do I do that? - I must do it the way the customer wants it done!

39. The ECJ confirmed that these remarks evidenced a *prima facie* present discriminatory recruitment policy notwithstanding the absence of a person who could show that they had been rejected by the employer on the grounds of their race.<sup>7</sup> This conclusion is not particularly surprising bearing in mind that the discriminatory remarks had been made only a little over one year earlier and there were no current employees of Moroccan origin. An interesting question for future litigation is whether “older” allegations of discrimination could also be sufficient to shift the burden of proof. However what the judge must do is to consider whether the allegation of discrimination or such remarks mean that there is something warranting explanation by the employer.

40. There are also cases in which the context of the case makes it clear what the claimant will need to prove<sup>8</sup>. In all of these cases what the judge must consider is whether the claimant has proved, on a balance of probabilities, facts *which are capable* of showing that discrimination has occurred. In *Ramos* the worker could show that a proper risk assessment relating to breastfeeding whilst working in an accident and emergency unit of a hospital had not been carried out. She argued that her treatment was less favourable treatment related to pregnancy. The CJEU held that any less favourable treatment of a female worker due to her being a breastfeeding woman must be regarded as falling in scope of the concept of direct discrimination on grounds of sex. In that context the CJEU stated (paragraph 69 Judgment) that the worker must present before a court facts or evidence capable of showing that the risk assessment was not conducted properly (ie. In accordance with Directive 92/85) and that therefore she was discriminated against. In that context the proof that a risk assessment was not conducted properly is capable of leading to the conclusion that there had been discrimination. Therefore the burden of proving that there had been no breach of the principle of equal treatment shifts to the defendant.

41. There is a continuum between obviously probative evidence and secondary evidence which does not directly show discrimination but indicates that it may be occurring. The judge has to assess where on that continuum the facts of the case lie. Previous experience may lead the judge away from considering anything other than directly probative evidence. The

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<sup>6</sup> C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] ECR I-5187.

Unusual because the claimant was an organisation established to combat racism; there was no actual individual who alleged that s/he had been treated less favourably by Firma Feyn NV on the grounds of race.

<sup>7</sup> Judgment, paragraph 31.

<sup>8</sup> See e.g. C 531/15 *Otero Ramos* at paragraph 36, 38 (question referred) and 68-70.

advocate's job is to show the judge how the facts show that discrimination may be the explanation for what has happened. It is not the advocate's job at this stage to show that discrimination probably is the explanation for what happened. That would be to ignore the burden shifting mechanism.

### **Stage 2: How can employers rebut the burden of proof once it has shifted?**

42. Sometimes too rapid a consideration of what the claimant has to prove at stage 1 may lead the defendant and, more dangerously, the judge to think that the shifting of the burden of proof places an unfair burden on the defendant in the case. "Proving a negative" is rarely easy and sometimes it is impossible.
43. A better way of thinking about this process is to consider that at stage 2 the defendant needs to provide an explanation for facts which might prove discrimination. If the defendant does not, an inference will be drawn against the defendant. If the defendant does provide an explanation then that explanation must have no discrimination whatsoever in it.
44. So usually the employer is not required to prove a negative. However sometimes the employer must.
45. Take *Firma Feryn*: the ECJ concluded that in order to rebut the presumption of *prima facie* race discrimination, Firma Feryn BV would need to demonstrate that as a matter of fact, its recruitment policy did not correspond to the statements made publicly.<sup>9</sup>
46. Note however that this does not in fact involve proving a negative. All that FF would have needed to do would have been to show that its recruitment policy did permit/or had allowed the employment of Moroccan people. The effects of the public statement would have needed to be counteracted in practice before FF could have discharged the burden of proof.
47. *ACCEPT* shows that an employer can discharge the burden of proof by simply identifying generalised, positive steps to prevent discrimination as opposed to specific examples of non-discrimination. There the CJEU explained that statements by the football club distancing itself from the shareholder's comments could have been sufficient to discharge the burden of proof. The relevant passage is as follows:

"56. ...defendants may refute the existence of such a breach before the competent national bodies or courts by establishing, by any legally permissible means, inter alia, that their recruitment policy is based on factors unrelated to any discrimination on grounds of sexual orientation.

57. In order to rebut the non-conclusive presumption that may arise under the application of Article 10(1) of Directive 2000/78, it is unnecessary for a defendant to prove that persons of a particular sexual orientation have been recruited in the past, since such a requirement is indeed apt, in certain circumstances, to interfere with the right to privacy.

58. In the overall assessment carried out by the national body or court hearing the matter, a *prima facie* case of discrimination on grounds of sexual orientation may be refuted with a body of consistent evidence. As *Accept* has, in essence, submitted,

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<sup>9</sup> Judgment, paragraph 34.

such a body of evidence might include, for example, a reaction by the defendant concerned clearly distancing itself from public statements on which the appearance of discrimination is based, and the existence of express provisions concerning its recruitment policy aimed at ensuring compliance with the principle of equal treatment within the meaning of Directive 2000/78.”

48. Once again the jurisprudence emphasises the practical nature of the considerations. The normative role of the courts emerges from this aspect of the case law. Judicial interventions encourage organisations to adopt “best practice” in respect of equal opportunities. Such an approach creates a business case for good practice as it can act as a defence in litigation. Essentially it is showing that the cause for the treatment in question is not the irrelevant characteristic (age, disability, sex, sexual orientation, race or religion or belief). However other “innocent” explanations cannot be put forward as is obvious. The alleged customer discrimination is not an “innocent” explanation for less favourable treatment and notice also that it cannot constitute a genuine and determining occupational requirement (see *Bougnaoui v Micropole*<sup>10</sup>). In *Bougnaoui* the CJEU did not decide that observing customer preference could be a legitimate aim. It did indicate that if the national court in France found that there had been a particular disadvantage created by a rule, the aim of being neutral towards its customers might constitute a legitimate aim (see para 40 judgment). In *Achbita v G4S*<sup>11</sup> the CJEU found that a policy of political and religious neutrality towards customers was a legitimate aim in principle. There is no warrant for extending that principle to a principle of mirroring the prejudices of customers. Such behaviour would not be a policy of neutrality.

## **B. Obtaining evidence**

49. A mechanism for shifting the burden of proof can only work if claimants have access to evidence and information relevant to their case. This absence of information creates another point at which the effectiveness of the substantive law can be impeded by national courts’ procedures relating to the provision of information in civil cases. Member states are free to create and implement their own procedures when it comes to obtaining evidence, but the practical effectiveness of the right to be protected from discrimination means that a minimum standard of procedure is required.

50. This can be seen from the case of *Kelly*.<sup>12</sup> Mr Kelly was rejected for a place on a university course. To establish that he had been the victim of sex discrimination he sought disclosure of extensive documentation. The documents were personal to other individuals who had applied to go on the same course. They were documents such as application forms, documentation attached to application forms and scoring sheets. When this request was refused, a question was referred to the CJEU. There he argued that a failure to provide disclosure was contrary to Directive 97/80 and in particular Article 4(1) which sets out the shifting burden of proof. Article 4 was breached because the non-disclosure prevented him from being able to discharge the first stage of the shifting burden of proof.

51. The CJEU explained that Directive 97/80 (and by extension the Directives which contain the same provisions) does not create an entitlement to disclosure. However, it also stated

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<sup>10</sup> C-188/15 *Bougnaoui & ADDH v Micropole*

<sup>11</sup> C-157/15. *Achbita v G4S* at paragraph 37.

<sup>12</sup> C-104/10 *Kelly v National University of Ireland (University College, Dublin)*

that it was theoretically possible that a refusal to provide disclosure could deprive Article 4(1) of its effectiveness. Whilst not explicitly stated, *Kelly* must mean that national courts are obliged to ensure that its rules of procedure and evidence do not prevent individuals from being able to pursue claims for discrimination. The key passage is as follows:

33. Nevertheless, it must be stated that Directive 97/80, pursuant to Article 1 thereof, seeks 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.

34. Thus, although Article 4(1) of that directive 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, the fact remains that it cannot be excluded that a refusal of disclosure by the defendant, in the context of establishing such facts, could risk compromising the achievement of the objective pursued by that directive and thus depriving that provision in particular of its effectiveness.

35. In that regard, it must be borne in mind that Member States may not apply rules which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness (see Case C-61/11 PPU *EI Dridi* [2011] ECR I0000, paragraph 55).

52. The question for the judge in a case therefore is whether the refusal of the disclosure by the defendant means that (regardless of the truth of what happened) the claimant cannot begin to establish facts. If the rules of procedure mean that the aim of the Directive is jeopardised, then the rule of procedure should be set aside to achieve the aim which would otherwise be *liable* to be jeopardised. The question in other words is not whether on the facts of the particular case the judge feels that non-disclosure would prevent the Directive's proper implementation. It is a more general question: do the rules of procedure in this court have the tendency to jeopardise the effectiveness of the Directive in achieving equal treatment?

53. *Kelley* can be read with *Meister*<sup>13</sup> usefully. Twice-rejected Ms Meister wanted to argue that she was rejected because of her sex or age or ethnicity. She sought disclosure of the successful candidate. When this was refused a question was referred to the CJEU. She argued that the burden of proof articles of the relevant Directives had not been observed. The CJEU agreed with the decision in *Kelley*. A defendant's refusal to grant any access to information may undermine the effectiveness of the shifting burden of proof.<sup>14</sup> The CJEU noted matters suggesting that there may have been discrimination: in *Meister* the employer conceded that she had the relevant expertise, yet she was not invited to interview and there was a blanket refusal to provide any disclosure.<sup>15</sup> A claimant in those circumstances could plausibly claim to have been discriminated against.<sup>16</sup> As there was enough information for the burden of proof to have shifted on the facts, the CJEU appears

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<sup>13</sup> C-415/10 in *Galina Meister v Speech Design Carrier Systems GmbH*.

<sup>14</sup> Judgment, paragraphs 36 to 39

<sup>15</sup> Judgment, paragraph 45

<sup>16</sup> Judgment, paragraph 46

to to conclude that on those facts *without disclosure*, it could *not* be said that the burden of proof was rendered ineffective. So the distinction is between cases in which the judge does not have to engage with the effect of the national court's procedure, because there is sufficient information in any event to shift the burden of proof, and those cases in which the judge cannot say that. In such cases the national court's procedure needs to be assessed to consider whether the national rule on disclosure or provision of information renders the burden of proof provision less effective than it needs to be to achieve the aim of the Directive.

54. The CJEU then went on to state that:

45. Moreover, as the Advocate General noted in paragraphs 35 to 37 of his Opinion, account can also be taken of, in particular, the fact that Speech Design does not dispute that Ms Meister's level of expertise matches that referred to in the job advertisement, as well as the facts that, notwithstanding this, the employer did not invite her to a job interview and she was not invited to interview under the new procedure to select applicants for the post in question.

46. In the light of the foregoing, the answer to the first question is that Article 8(1) of Directive 2000/43, Article 10(1) of Directive 2000/78 and Article 19(1) of Directive 2006/54 must be interpreted as not entitling a worker who claims plausibly that he meets the requirements listed in a job advertisement and whose application was rejected to have access to information indicating whether the employer engaged another applicant at the end of the recruitment process.

47. Nevertheless, it cannot be ruled out that 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.

55. In other words, the CJEU has appeared to conclude that if a claimant is in the position of Ms Meister, and there is some evidence which goes to the first stage of the shifting burden of proof, then it will be difficult to demonstrate that s/he is so prejudiced that their EU rights are not effective, although a failure to provide disclosure is of itself relevant to the first stage of the shifting burden of proof. Paragraph 47 of Meister creates the judicial problem with which judges will need assistance: the CJEU is indicating that a defendant's refusal to grant access may (in some situations) be one of the factors to take into account when establishing facts from which it may be presumed that there has been discrimination. This accounts for the rather broad statement at the end of paragraph 47 that it is for the referring court. Once again there will be a continuum of circumstances ranging between those in which there is an absolute refusal to provide information and no other way of showing the matters that need to be shown in the first stage of the burden shifting process and cases where further information is not necessary because there is enough to show facts from which discrimination can be inferred. In the first type of case the rules of procedure may undermine the Directive's effectiveness and must be set aside. At the other end of the continuum there is no undermining effect. In the middle there will be cases where there is doubt. In those circumstances the Court should fall on the side of giving effect to the Directive, and any refusal of disclosure can either be countermanded by the court or the fact of refusal can be taken into account with the other facts to form the basis of facts from which an inference of discrimination can be made (and hence the burden will shift).

56. AG Kokott's Opinion in C 394/11 *Belov v CHEZ Elektro Bulgaria AD* (20 September 2012)<sup>17</sup> reasoned about the level to which the evidence must reach in the first stage of the burden shifting legal test. AG Kokott argued it was for the defendant to prove that there was no discrimination (this unhelpfully described as "the reverse burden of proof"). AG Kokott set that standard as being met where the complainant's evidence *permits* a finding of discrimination.

57. Importantly AG Kokott recognised that it is not necessary for the complainant's evidence to show that discrimination was *probable* (paras 86-94). Again the reason is that the alternative approach would undermine practical effectiveness. That approach:

"90. ....would jeopardise its practical effectiveness and mean that the rule on the reversal of the burden of proof would be practically redundant. Without such a reversal of the burden of proof, however, the normal rules on the burden of proof would be applicable with the result that anyone who believed that they were a victim of discrimination would be required to adduce and prove all the necessary facts which support their claim and indicate that discrimination has occurred with a sufficient degree of certainty.

91. Specifically to avoid such difficulties and to improve the situation of the potential victim of discrimination, however, the reversal of the burden of proof was introduced. It strengthens the position of the presumed victim. A national practice like that described by the KZD would be diametrically opposed to that purpose, since the requirement to adduce and prove facts which allow a definite conclusion as to discrimination ultimately corresponds to the normal distribution of the burden of proof. Article 8(1) of Directive 2000/43 would not then improve the procedural position of presumed victims of discrimination at all.

92. My understanding of Article 8(1) of Directive 2000/43 also does not constitute a breach of the principle of a fair hearing at the expense of CEB and CRB. Rather, with the rules on the reversal of the burden of proof in all the anti-discrimination directives, the legislature made a choice which maintained a fair balance between the interests of the victim of discrimination and the interests of the other party to the proceedings. (64) In particular, those rules do not completely remove the burden of proof from the presumed victim of discrimination, but merely modify it.

93. Certainly, the reversal of the burden of proof in the present case may mean that in the main proceedings CEB and CRB have to make submissions to justify a commercial decision, which may have been taken long ago, to install electricity meters in the Roma districts differently than is normal in Bulgaria. Such a burden of adducing evidence is only appropriate, however, since the relevant information comes from the sphere and the area of responsibility of precisely those undertakings or their legal predecessors. Furthermore, in the main proceedings the distribution undertaking described the reasons for the particular way in which the electricity meters were installed in the two districts concerned as being 'generally known', (65) so it should not find it difficult to make submission to justify those measures.

94. All in all, it is thus sufficient for a reversal of the burden of proof under Article 8(1) of Directive 2000/43 that persons who consider themselves wronged because the principle of equal treatment has not been applied establish facts which substantiate a *prima facie* case of discrimination."

58. The reference was later found to be inadmissible by the Court, so the issue was not

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<sup>17</sup> Its notorious facts can be quickly stated: the applicant alleged race discrimination regarding his inability to read his household electricity meter other than by special appointment, since in that Roma part of the Bulgarian city of Montana, the electricity supplier has placed household electricity meters at a height of 7 meters as opposed to the usual head height.

determined further in that case but in *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* (Case C-83/14) Anelia Nikolova complained about the positioning of such electricity meters in the area in which she operated a shop. She brought proceedings alleging direct discrimination because of race. The CJEU considered that in determining whether there was sufficient evidence for a conclusion that a complainant had established the facts from which it might be presumed that there had been direct discrimination, the national court might take account of:

- a. the fact that CHEZ RB had established the practice of siting electricity meters high above the grounds only in urban districts which were known to have Bulgarian nationals of Roma origin as the majority of their population;
- b. CHEZ RB's assertion that in its view damage and unlawful connections were perpetrated mainly by Bulgarian nationals of Roma origin. Such assertions could in fact suggest that the practice at issue was based on ethnic stereotypes or prejudices, the racial grounds thus combining with other grounds;
- c. notwithstanding requests from the Bulgarian court in respect of the burden of proof, CHEZ RB failed to adduce evidence of the alleged damage, meter tampering and unlawful connections, asserting that they were common knowledge;
- d. the compulsory, widespread and lasting nature of the practice at issue: where the practice of installing electricity meters on pylons forming part of the overhead electricity supply network at a height of between six and seven metres had been extended without distinction to all the inhabitants of a district which was lived in mainly by Bulgarian nationals of Roma origin, irrespective of whether their individual meters had been tampered with or given rise to unlawful connections and of the identity of the perpetrators of that conduct, and where such a practice still endured nearly a quarter of a century after it was introduced, that practice was such as to suggest that the inhabitants of that district were, as a whole, considered to be potential perpetrators of such unlawful conduct. Such a perception might also be relevant for the overall assessment of the practice at issue.

59. The language of the court refers to presumptions of discrimination, but the process can be mirrored in the language of a shifting burden of proof using the stage 1 and stage 2 model. It is perhaps better to think of it in that way as the language of presumption creates a thought that the defendant in the case may have an *a priori* presumption of the guilt made against it. This of course is not the aim of the Directive.

60. The CJEU reasoned that if a national court were to conclude that there was a presumption of discrimination, (i.e. if Stage 1 is fulfilled), the effective application of the principle of equal treatment would require that the burden of proof then fell on the respondent(s) concerned, who would have to prove that there had been no breach of that principle (i.e. Stage 2 must be observed and the defendant must give an innocent explanation).

61. In that case this process would mean that the defendant would have the task of rebutting the existence of such a breach of the principle of equal treatment by proving that the establishment of the practice at issue and its current retention were not in any way founded on the fact that the districts concerned were districts inhabited mainly by Bulgarian nationals of Roma origin, but exclusively on objective factors unrelated to any discrimination on the

grounds of racial or ethnic origin.

62. The CJEU noted that it was the claimant<sup>18</sup> who must initially establish facts from which it might be presumed that there had been direct or indirect discrimination, a refusal of disclosure by a respondent could not be permitted to compromise the achievement of the objectives pursued by the equal treatment directives. A refusal of disclosure which has this tendency cannot be permitted.

63. The CJEU has still very much left the door open to an argument that national rules of procedure and evidence can be modified if the principle of effectiveness is wholly eroded. The tendency of the case law is to encourage modification as necessary to achieve effectiveness. Going back to the *Danfoss* principle, it is possible to identify a continual principle of ensuring effectiveness of the EU law. National judges confronted with the cases in which national procedural rules create a lack of transparency in the explanation of the employer (for example because the employer cannot be compelled to provide information) should consider applying the Directive to overcome that lack of transparency.

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November 2017<sup>19</sup>

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<sup>18</sup> I.e. “the person who considered herself to have been wronged on the grounds that the principle of equal treatment had not been applied”

<sup>19</sup> With thanks to my colleagues at Cloisters, Tom Brown, Rachel Crasnow QC and Dee Masters for their previous presentations on this topic to ERA.