



## Proving discrimination

### The shift of the burden of proof and access to evidence

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19<sup>th</sup> February 2018

## Context

In 2015, Europeans were asked about which protected characteristics were seen by employers as causing problems for job applicants:

- 56% - age (if over 55)
- 46% - skin colour or ethnic origin
- 46% - disability

In 2015, the statistics about pay were also worrying:

- Across the EU - women's gross hourly rate on average 16.3% less than men's.
- Older women are often particularly disadvantaged.

## What are the evidential hurdles in discrimination cases?

- Reason for the treatment often only known (if at all) by the perpetrator.
- Perpetrators don't admit to discrimination, or may be unaware of it
- Comparator information is held by the wrongdoer
- Statistics may be required
- A claimant may need to respond to a justification defence

How has the EU responded to these challenges?

## Shifting burden of proof

- Case law – *Danfoss, Enderby*
- Directives – 2000/43, 2000/78, 2006/54
- Stage 1: claimant to prove *prima facie* case of discrimination
- Stage 2: respondent to prove no discrimination

## Direct discrimination: what evidence is required to shift the burden of proof?

- Discriminatory comments: *Firma Feryn, ACCEPT, CHEZ*
- Mere fact of less favourable treatment + difference in status? Probably not: *CHEZ*.
- Comparability: *Brunnhofer, Meister*
- Failure to disclose relevant information: *Meister*
- Employer's inadequate explanation: *CHEZ*
- Pregnant Workers Directive - different matrix: *Otero Ramos*

## What standard of proof is required to shift the burden?

- *Belov:*
  - a “presumption” of discrimination rather than a definite conclusion that it exists
- *Otero Ramos:*
  - “evidence capable of suggesting....”

## Direct discrimination: how can employers rebut the presumption of discrimination?

- Must prove treatment is “not in any way founded on [protected characteristic]”: *CHEZ*.
- Proving the real reason (not proving a negative).
- Positive case: *Firma Feryn* and *ACCEPT*
- Mere assertion without substantiating explanation is not enough: *Otero Ramos*

## Indirect discrimination: what evidence is required to shift the burden of proof?

- Prima facie case that there is a PCP which puts those possessing a protected characteristic at a particular disadvantage.
- How can “particular disadvantage” be shown?
  - statistical evidence;
  - “intrinsically liable”;
  - relevance of *Danfoss* and *Enderby*
- Failure to grant access to information: *Meister*.

## Indirect discrimination: how can employers rebut the presumption of discrimination?

- Cogent evidence disproving one or more element(s) of the prima facie case:
  - did not apply the alleged PCP at all;
  - did not apply the PCP to the claimant;
  - statistical evidence is invalid.
- Reaffirmation of orthodox approach: *Essop* (UK)
- Otherwise: must prove that in applying the PCP they sought to achieve a legitimate aim through appropriate and necessary means.

## Obtaining evidence

- *Kelly* (C-104/10)
- *Meister* (C-415/10)
- Respect for national rules
- Respect for privacy
- Not at the expense of effectiveness: but what does effectiveness require (see *Meister*)?

## Conclusion

- The shifting burden of proof can be a powerful tool in advancing equality
- It remains unclear how much the CJEU will be influenced by national rules relating to disclosure
- There is the potential for new, creative and interesting future legal developments



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