



Proving discrimination

The shift of the burden of proof and access to evidence

Anna Beale

19th 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



Anna Beale
abe@cloisters.com
0207 827 4030