



## PROVING DISCRIMINATION: THE SHIFT OF THE BURDEN OF PROOF AND ACCESS TO EVIDENCE

**Anna Beale**

### Context

1. The principle of non-discrimination is a fundamental principle throughout the EU, but equality for all is not yet a reality. Some statistics from the most recent Eurobarometer survey, conducted in 2015,<sup>1</sup> reveal the size of the problem:
  - a. Discrimination on the various grounds is seen as more widespread than was the case in 2012, particularly so far as discrimination on grounds of ethnic origin, sexual orientation and gender identity are concerned. Almost two thirds of respondents believed discrimination on grounds of ethnic origin to be widespread in their country, and over half believed this to be true of sexual orientation and gender identity discrimination.
  - b. 56% of Europeans believe that a job applicant's age is a disadvantage if they are over 55 (up 2 points from 2012);
  - c. 46% consider skin colour or ethnic origin to be a disadvantage (up 7 points from 2012);
  - d. 46% believe that disability is a disadvantage (up 6 points from 2012);
  - e. 34% believe that gender identity is a disadvantage (up 15 points from 2012);
  - f. 28% believe sexual orientation is a disadvantage (up 9 points from 2012); and
  - g. 27% believe gender is a disadvantage (up 5 points from 2012).

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<sup>1</sup> Special Eurobarometer 437, "Discrimination in the EU in 2015". A summary factsheet can be found at [http://ec.europa.eu/justice/fundamental-rights/files/factsheet\\_eurobarometer\\_fundamental\\_rights\\_2015.pdf](http://ec.europa.eu/justice/fundamental-rights/files/factsheet_eurobarometer_fundamental_rights_2015.pdf)

2. In 2015, for the economy as a whole, women's gross hourly earnings were on average 16.3% below those of men in the European Union.<sup>2</sup> The gender pay gap is particularly stark amongst older employees. For example, in Spain, the pay gap for workers aged under 25 is 5.7% in favour of men, but for workers aged over 65, the gap widens to 45.3%.<sup>3</sup> This inter-relationship between age, gender and earnings is consistent with the general pattern in the EU.<sup>4</sup>
3. These statistics clearly show that, despite extensive legal provisions guaranteeing equality between people with different protected characteristics, EU countries remain a long way from achieving such equality in practice. In this context, it is important to understand that the legal provisions are meaningless unless they are underpinned by rules of evidence and procedure that assist individuals to enforce their rights. Arguably, the most important rules which fall into this category pertain to the burden of proof and access to evidence.
4. In this paper, I will examine the way in which the EU has sought to balance the autonomy of member states with the need to ensure that the protection against discrimination is effective.

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

5. In theory, rules about the burden of proof are no more than rules about who will win a case where the evidence is evenly balanced. But in practice, the issue tends to be more complex.
6. The general rule about the burden of proof for civil proceedings within the EU (and its member states) is that a claimant must prove his or her case. However, proving discrimination in this way can be very difficult in comparison to other civil claims. This is because establishing discrimination requires the Claimant to show why a particular (disadvantageous) thing happened to them. This is usually something that will only be known to the perpetrator(s), and in some cases may not consciously be known even by them.
7. Accordingly, the challenge most commonly faced by claimants in direct discrimination claims is the absence of explicit evidence of less favourable treatment *because* of the relevant protected characteristic. This situation arises because:
  - a. Individuals are unlikely to admit to discrimination or may unknowingly be influenced by subconscious prejudices or stereotypical views. This was neatly

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<sup>2</sup> [http://ec.europa.eu/eurostat/statistics-explained/index.php/Gender\\_pay\\_gap\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Gender_pay_gap_statistics)

<sup>3</sup> Ibid

<sup>4</sup> Ibid, although the pattern is not universal, with Bulgaria, Italy, Poland and Slovenia counting amongst the exceptions.

summarised by Lord Browne-Wilkinson in a well-known case in the House of Lords in the UK called *Glasgow City Council v Zafar*<sup>5</sup> as follows:

Claims brought under [legislation prohibiting sex and race discrimination] present special problems of proof for complainants since those who discriminate on the grounds of race or gender do not in general advertise their prejudices: indeed they may not even be aware of them.

- b. 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.
8. Indirect discrimination claims pose a different problem. A claimant who can identify an apparently neutral provision, criterion or practice which places her at a disadvantage, will only succeed if she can demonstrate that other people who share her protected characteristic may be similarly disadvantaged. Again, the information required 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. For example, a practice of requiring all train drivers to work 24 hours on a flexible, shift basis might place women at a disadvantage due to their traditional role caring for children, but in order to make good that argument, a claimant might ordinarily be expected to produce some evidence to show what proportion of the train company's workforce can comply with that requirement.
9. Lastly, 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. For example, an employer who seeks to justify a compulsory retirement age of 65 might rely on a justification defence that such a step is necessary to encourage younger generations of workers to progress through the ranks; evidence to support this proposition will primarily come from the employer's experiences and observations.

### **How has the EU responded to these challenges?**

10. In this paper, I consider two aspects of EU law which may alleviate the difficulties faced by claimants in discrimination claims:

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<sup>5</sup> [1998] ICR 120.

- (1) the shifting burden of proof; and
- (2) pronouncements on the rules pertaining to disclosure.

**A. Shifting burden of proof**

**The Principle of Effectiveness and Early Case Law**

11. An important driver behind the development of the shifting burden of proof in EU discrimination law is the principle of effectiveness. This principle provides that substantive and procedural conditions governing actions for the enforcement of EU law must not be framed in such a way as to make it virtually impossible to exercise rights conferred by that law.
12. Early decisions of the ECJ, particularly in the field of equal pay, recognised that proving discrimination could be particularly onerous for claimants. Thus, in the seminal cases of *Danfoss*<sup>6</sup> and *Enderby*<sup>7</sup>, the burden of proof was shifted to the employer to show that the pay differential between men and women was objectively justified in circumstances where:
  - (a) female workers were paid less, on average, than men, and the system of pay that led to this result was completely lacking in transparency (*Danfoss*);
  - (b) significant and valid statistics showed that a collective bargaining system had resulted in a predominantly female group of speech therapists being paid less than predominantly male groups of pharmacists and clinical psychologists (*Enderby*).<sup>8</sup>
13. In both cases, the ECJ referred explicitly to the principle of effectiveness. The Court in *Danfoss* said:

13. It should next be pointed out that in a situation where a system of individual pay supplements which is completely lacking in transparency is at issue, female 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 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

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<sup>6</sup> C-109/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] ECR 3199

<sup>7</sup> C-127/92, *Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health* [1993] ECR I-5535

<sup>8</sup> These decisions are analysed further below in connection with indirect discrimination.

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.

14. Similarly, in *Enderby*, the Court commented:

18. Where there is a prima facie case of discrimination, it is for the employer to show that there are objective reasons for the difference in pay. 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

15. Despite these early developments in the law of equal pay, the first Directive explicitly to address the issue was the Burden of Proof Directive 97/80/EC, which dealt only with sex discrimination and did not require implementation until 1 January 2001<sup>9</sup>. The now defunct<sup>10</sup> Directive stated that:

#### Article 4

##### 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.

(Emphasis added)

16. Recital 17 to the Directive repeated verbatim the reference to the principle of effectiveness which appears in *Danfoss* at [13]. Recital 18 noted that:

...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.

<sup>9</sup> Even though the Commission's original proposal for EU legislation on reversing the burden of proof was made as long ago as 1988 (OJ [1988] C176/5).

<sup>10</sup> From 15 August 2009 by virtue of the Recast Directive.

17. The current regime of Directives contains identically worded provisions as follows:
- 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. Article 19(1) in 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”).
18. It is important to recognise that the shifting burden of proof in these Directives has real bite in member states. It requires member states to adapt their usual procedural rules so as to conform. However, this does not prevent member states from introducing more favourable rules of evidence.<sup>11</sup>
19. The wording of the provision in the Directives is simplicity itself: in order to shift the burden to the respondent, the claimant must “establish...facts from which it may be presumed that there has been direct or indirect discrimination”, following which “it shall be for the respondent to prove that there has been no breach of the principle of equal treatment”. But what does this mean in practice?
20. Below, I consider the meaning and application of the burden of proof provisions separately in relation to direct and indirect discrimination.<sup>12</sup>

## **Direct Discrimination**

What factors are capable of shifting the burden of proof to the respondent?

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<sup>11</sup> The different methods of implementing the burden of proof provisions in a variety of member states are considered in “Reversing the burden of proof: Practical dilemmas at the European and national level”, Farkas and O’Farrell, European Commission, December 2014.

<sup>12</sup> These are the principal forms of discrimination in relation to which the burden of proof has been examined by the CJEU, and they are therefore the forms of discrimination on which I concentrate in this paper. It appears clear that the burden of proof provisions in the Directives also apply to harassment, which is deemed to be a form of discrimination (see e.g. Directive 2000/78/EC at Article 2(3)). The position is less clear in relation to reasonable accommodation and victimisation, which are not in terms defined as discrimination or a violation of the principle of equal treatment.

21. Direct discrimination arises where one person is treated less favourably on one of the protected grounds than another is, has been or would be treated in a comparable situation.<sup>13</sup>
22. What matters, then, might constitute “facts from which it may be presumed” that there has been such direct discrimination?
23. National courts grapple with this issue on a daily basis. They weigh detailed and nuanced evidence before reaching a conclusion as to whether or not there is a *prima facie* case. The cases which have reached the CJEU<sup>14</sup> are those with unusual or difficult facts. However, the case law is still useful because it demonstrates the breadth of circumstances in which a *prima facie* case of discrimination can be established.
24. It is clear that **discriminatory comments** from the respondent, or from someone sufficiently closely associated with the respondent, may reverse the burden of proof.
25. In *Firma Feryn*,<sup>15</sup> one of the directors of the respondent company made various statements, some of which were reported in the press, and some broadcast on national television, to the effect that he would not recruit Moroccans:

“Apart from these Moroccans, no one else has responded to our notice in two weeks...but we aren’t looking for Moroccans. Our customers don’t want them. They have to install up-and-over doors in private homes, often villas, and those customers don’t want them coming into their homes.”

“It is not just immigrants who break in. I won’t say that, I’m not a racist. Belgians break into people’s houses just as much. But people are obviously scared. So people often say: ‘no immigrants’...I must comply with my customers’ requirements. If you say ‘I want a particular product or I want it like this and like that’, and I say ‘I’m not doing it, I’ll send these people’, then you say ‘I don’t need that door’. Then I’m putting myself out of business. 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!”

26. The case against the respondent was not brought by an individual Moroccan claimant who had applied for a post and been rejected, but by a Belgian body for the promotion of equal treatment. There was, in fact, no identifiable claimant who had applied unsuccessfully for a post, or who could be shown to have been deterred from applying by the comments.

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<sup>13</sup> See the Recast Directive at Article 2(1)(a) and the Race and Framework Directives at Article 2(2)(a).

<sup>14</sup> The acronym “CJEU” is used throughout this paper to denote the Court of Justice.

<sup>15</sup> C-54/07 *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV* [2008] ECR I-5187

27. The CJEU nevertheless held that a public statement that an employer will not recruit employees of a certain ethnic or racial origin can constitute direct discrimination in respect of recruitment, without the need to identify an individual “victim”. It further confirmed that such statements may constitute facts of such a nature as to give rise to a presumption of a discriminatory recruitment policy, thus shifting the burden of proof. On the facts of the case, this was unsurprising: the discriminatory remarks had been made only a little over a year earlier, and there were no current employees of Moroccan origin. An interesting question for future litigation is whether older statements might also be sufficient to shift the burden of proof.
28. In *ACCEPT*,<sup>16</sup> a shareholder in Steaua Bucuresti football club had made statements to the effect that he would not hire a player who was homosexual. It was argued that those statements should not be considered sufficient to shift the burden of proof in a claim for sexual orientation discrimination in circumstances where they had been made by a person who, in law, could not bind the company in relation to the recruitment of employees. The CJEU held that:

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.

29. It is clear from this passage of the Judgment that the decision was premised on an understanding that the maker of the statements held an important role in the management of the respondent. Thus in future cases there may be a question as to the extent to which statements by a less prominent or influential person within the employer’s structure might constitute facts from which discrimination may be presumed.
30. The importance of discriminatory comments was reaffirmed in the case of *CHEZ (Nikolova)*,<sup>17</sup> where the CJEU considered a claim of direct race discrimination arising from CHEZ’s practice of positioning electricity meters 6 – 7 metres above ground in

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<sup>16</sup> C-81/12 *Asociata ACCEPT v Consiliul National pentru Combaterea Discriminarii* [2013] 3 C.M.L.R 26

<sup>17</sup> C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*,



predominantly Roma districts, in contrast to the usual positioning at head height. The Court held that the referring court could take into account previous assertions by CHEZ that damage and unlawful connections were perpetrated mainly by Bulgarian nationals of Roma origin, as such assertions could suggest that the practice was based on ethnic stereotypes or prejudices. It appears from the Judgment that the comments may have been made in previous court proceedings arising from similar facts, but it is not clear who made the statements, or when precisely they were made.

31. In most cases, however, there will not be such clear evidence of the employer's motivation, and it will be necessary for the claimant to persuade the court that an adverse inference of discriminatory treatment can be drawn from the primary facts before it, such as to shift the burden of proof.
32. One question that is often raised is whether the **mere fact of less favourable treatment, accompanied by a difference in status** (for example where a male employee receives a promotion, but a female employee does not) is sufficient to reverse the burden of proof.
33. The CJEU has not formally pronounced on this question; however, there are some indications that a mere difference in status is insufficient.
34. One example is the Judgment of the CJEU in *CHEZ (Nikolova)*. As explained above, the case involved an allegation of direct race discrimination based on the Roma ethnicity of the majority of the inhabitants of the districts where electricity meters were positioned at inaccessible heights. The complainant, Ms Nikolova, was not in fact herself of Roma ethnicity, but the Court held that such a measure might constitute direct race discrimination "irrespective of whether [it] affects persons who have a certain ethnic origin, or those who, without possessing that origin, suffer together with the former, the less favourable treatment...resulting from that measure".<sup>18</sup>
35. The Court had therefore established a difference in status and a difference in treatment. It went on to consider what factors might be taken into account by the referring court in determining whether the burden of proof should shift to the respondent.

**81** The matters which may be taken into consideration in this connection include, in particular, the fact, noted by the referring court, that it is common ground and not disputed by CHEZ RB that the latter has established the practice at issue only in urban districts which, like the 'Gizdova mahala' district, are known to have Bulgarian nationals of Roma origin as the majority of their population.

**82** The same applies to the fact relied on by the KZD in its observations submitted to the Court that, in various cases that were brought before the KZD, CHEZ RB asserted that in its view the damage and unlawful connections are perpetrated mainly by Bulgarian nationals of Roma origin. Such assertions could in fact suggest that the practice at issue

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<sup>18</sup> Judgment, paragraph 60.

is based on ethnic stereotypes or prejudices, the racial grounds thus combining with other grounds.

**83** Matters that may also be taken into consideration include the fact, mentioned by the referring court, that, notwithstanding requests to this effect from the referring 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 are common knowledge.

**84** The referring court must likewise take account of the compulsory, widespread and lasting nature of the practice at issue which, because, first, it has thus been extended without distinction to all the district's inhabitants irrespective of whether their individual meters have been tampered with or given rise to unlawful connections and of the identity of the perpetrators of that conduct and, secondly, it still endures nearly a quarter of a century after it was introduced, is such as to suggest that the inhabitants of that district, which is known to be lived in mainly by Bulgarian nationals of Roma origin, are, as a whole, considered to be potential perpetrators of such unlawful conduct. Such a perception may also be relevant for the overall assessment of the practice at issue (see, by analogy, judgment in *Asociatia Accept*, C-81/12, EU:C:2013:275, [2013] IRLR 660, paragraph 51).

36. Although not explicitly stated, the implication of this passage may be that the difference in status and difference in treatment referred to at [81] were not considered sufficient by the Court to shift the burden of proof. Had they been sufficient, there would have been no need for the Court to go on to enumerate the other matters set out at [82] – [84].
37. The apparent implication of the Judgment in *CHEZ (Nikolova)* is also supported by the authors of a recent Commission report on the burden of proof. They note that the Hungarian burden of proof provisions, under which the burden shifts if the injured party establishes facts from which it may be presumed that a disadvantage was suffered and the party possesses a protected characteristic, is “more advantageous to the victim than the wording of the Directives”.<sup>19</sup>
38. On the assumption that a mere difference in status and difference in treatment is insufficient to shift the burden of proof, what other factors, leaving aside the type of openly discriminatory comments referenced above, might be sufficient to do so?
39. In many cases, the claimant will rely on evidence about the treatment of an **actual or hypothetical comparator** in support of a claim of direct discrimination. The purpose of relying on such a comparator is to demonstrate that a person not sharing the relevant characteristic *whose circumstances are the same or similar* has been treated differently from the complainant.

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<sup>19</sup> “Reversing the burden of proof: Practical dilemmas at the European and national level”, Farkas and O’Farrell, European Commission, December 2014. I should note that the authors also report that the Hungarian law has not, in practice, necessarily been applied in this more advantageous manner.

40. *Brunnhofer*<sup>20</sup> was a reference concerning a claim for equal pay, and therefore subject to the specific regime applicable to such claims. However, the language used in the Court's Judgment is instructive in considering the importance of comparability in shifting the burden of proof more generally. In its preliminary remarks, the Court commented:

27 It should be recalled at the outset that Article 119 of the E.C. Treaty lays down the principle that the same work or work to which equal value is attributed must be remunerated in the same way, whether it is performed by a man or a woman.

28. As the Court has already held in Case 43/75, *Defrenne v Societe Anonyme Belge de Navigation Aerienne (SABENA)*, that principle, *which is a particular expression of the general principle of equality which prohibits comparable situations from being treated differently unless the difference is objectively justified*, forms part of the foundations of the Community [emphasis added].

41. Dealing specifically with the issue of the burden of proof in equal pay claims, the Court went on to hold:

60 If the plaintiff in the main proceedings adduced evidence to show that the criteria for establishing the existence of a difference in pay between a woman and a man and for identifying comparable work are satisfied in this case, a *prima facie* case of discrimination would exist and it would then be for the employer to prove that there was no breach of the principle of equal pay.

42. In practice, certainly in the UK, the most important facts from which discrimination may be presumed are often facts establishing comparability between the complainant and another person who does not possess the protected characteristic, and has been treated more favourably in similar circumstances.

43. One slightly unusual example of the importance of comparability is the case of *Meister*.<sup>21</sup> Ms Meister, a Russian national, who held a Russian degree in systems engineering which was considered to be equivalent to a similar German degree, responded to Speech Design's newspaper advertisement for an experienced software developer. Her application was rejected without an interview, despite the fact that she fulfilled the criteria for the post. The post was advertised for a second time shortly afterwards, and Ms Meister again applied and was rejected without interview. No information was provided as to why her application had not been successful.

44. The main question in the proceedings, which is discussed further below, was the extent to which Speech Design should be required to disclose certain documents pertaining to the recruitment process and the successful candidate, which might assist Ms Meister in

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<sup>20</sup> C-381/99 *Brunnhofer v Bank der osterreichischen Postsparkasse AG* [2001] ECR I-4961

<sup>21</sup> C-415/10 *Meister v Speech Design Carrier Systems GmbH*

establishing a prima facie case of discrimination. Having decided that question against Ms Meister, the Court went on to give an indication of the facts already known to her on which she might rely in attempting to shift the burden of proof. The Court held that one such factor was that Ms Meister's level of expertise matched that referred to in the job advertisement.<sup>22</sup> Advocate General Mengozzi's Opinion notes, at paragraph 35, that other applicants *were* called to a job interview. Whilst the identity and relevant characteristics of the other applicants were not, apparently, known to Ms Meister, the fact that she met the requirements of the post would clearly be relevant in establishing comparability with those others, who had been treated more favourably.

45. A **failure to disclose relevant documents upon request** could be a factor in shifting the burden.
46. As noted above, this issue arose in *Meister*, and a particularly instructive passage appears in the Opinion of the Advocate General explaining the importance of taking such failures into account in considering the shifting burden.

32 ...[T]he referring court must not overlook the fact that, given that the employer refused to disclose information, it is not unlikely that that employer can, in that way, make his decisions virtually unchallengeable. In other words, the employer continues to keep in his sole possession the evidence upon which ultimately depend the substance of an action brought by the unsuccessful job applicant and, therefore, its prospects of success. In the context of a recruitment procedure, it should also be borne in mind that the position of the applicant – inevitably external to the undertaking in question – makes obtaining evidence or facts from which it may be presumed that there has been discrimination even more difficult than if the applicant sought to prove that the employer applies discriminatory measures in respect of conditions of employees' pay, for example. The job applicant is therefore entirely dependent on the good will of the employer with regard to obtaining information capable of constituting facts from which it may be presumed that there has been discrimination and may experience genuine difficulty in obtaining such information which is, nevertheless, essential in order to trigger the lightening of the burden of proof....

33 Where a job applicant appears to be entirely dependent on the good will of the employer with regard to obtaining information capable of constituting facts from which it may be presumed that there has been discrimination, the balance between the freedom of employers to recruit the people of their choice and the rights of job applicants, to which the EU legislature has attached special significance, would therefore seem to have been upset.

47. Based on these concerns, the CJEU held that:

...it cannot be ruled out that an employer'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...<sup>23</sup>

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<sup>22</sup> Judgment, paragraph 45

<sup>23</sup> Judgment, paragraph 47

48. Adverse inferences of discrimination might also be drawn from the **explanation – or lack thereof** – given by the respondent for its treatment of the claimant. For example, if the respondent has given inconsistent or untrue explanations, that might be sufficient to shift the burden of proof. A failure to provide or substantiate an explanation given may also be a relevant factor.
49. In *CHEZ (Nikolova)*, the CJEU held that the domestic court could take into account the respondent’s failure to produce evidence of the alleged damage, meter tampering and unlawful connections it said had occurred in the predominantly Roma districts, despite requests from the referring court.<sup>24</sup>
50. Finally, in the recent case of *Otero Ramos v Servicio Galego de Saúde*,<sup>25</sup> the CJEU considered the applicability of the burden of proof provisions in a case where the allegation of direct discrimination was based on a **breach of the Pregnant Workers Directive 92/85 (‘PWD’)**.
51. Ms Otero Ramos was a breastfeeding mother, who claimed that her work as a nurse in Accident and Emergency posed a risk to her (and her baby’s) health and safety, meaning that measures should have been taken to obviate the risk under article 5 of the PWD. She argued that her employer’s risk assessment, which found her employment was risk-free, had not been conducted in accordance with the requirements of article 4 of the PWD. Under article 2(2)(c) of the Recast Directive, discrimination includes any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of the PWD. The Court held this covered any treatment related to being a breastfeeding woman, and that a failure to assess the risk to Ms Otero Ramos in accordance with article 4(1) must be regarded as direct discrimination.
52. The burden of proof provisions in the Recast Directive thus applied to Ms Otero Ramos’s complaint. In order to shift the burden of proof to the employer, Ms Otero Ramos had to present facts or evidence that were capable of showing that the risk assessment of her work was not conducted in accordance with article 4(1). Both Advocate General Sharpston and the Court noted that Ms Otero Ramos had a letter from her line manager, a senior hospital consultant, stating with reasons that her employment posed risks within the PWD, whereas the employer’s risk assessment contained no explanation of how it had concluded that her employment was risk free. Whilst confirming that the decision was a matter for the domestic court, the CJEU noted that, in these circumstances, the letter was a priori evidence capable of shifting the burden of proof.

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

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<sup>24</sup> Judgment, paragraph 83

<sup>25</sup> Case C-531/15 [2018] IRLR 159

53. The wording of the Directives requires the claimant to prove facts from which it “may be presumed” that there has been discrimination. What standard of proof does this wording require?
54. This question was addressed by the Advocate General in *Belov*,<sup>26</sup> which, like the later *CHEZ (Nikolova)* case referred to above, arose out of the respondent’s practice of placing electricity meters in Roma districts seven metres above ground. The claimant, who was subjected to this practice, brought a claim of direct race discrimination.
55. The referring court asked for a ruling on the extent to which the facts established must allow a conclusion that there had been discrimination, or whether the mere presumption that there had been discrimination was sufficient. The query arose in part from different language versions of the relevant Directive.
56. AG Kokott concluded that it was not necessary, for the burden of proof to reverse, for the claimant to demonstrate anything more than a “presumption” of discrimination, rather than a definite conclusion that it exists. Any stricter interpretation of the wording would jeopardise its practical effectiveness and mean that the rule on the reversal of the burden of proof would be practically redundant.
57. She concluded:

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. A similar question arose in the *Otero Ramos* case in the context of sex discrimination in failing to carry out an adequate risk assessment in respect of a breastfeeding mother. As set out above, Ms Otero Ramos relied on a letter signed by a senior hospital consultant which stated with reasons that her employment posed various risks to lactation, and thus cast doubt on the employer’s own risk assessment. The CJEU held that what was required to shift the burden of proof was “evidence capable of suggesting that the risk assessment of her work had not been carried out in accordance with the requirements of Art 4(1) of [the PWD]” [emphasis added].<sup>27</sup>

How can employers rebut the presumption of discrimination once the burden has shifted?

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<sup>26</sup> C-394/11 *Belov v CHEZ Elektro Balgaria AG* [2013] 2 CMLR 29; the CJEU later decided the case was inadmissible, so made no ruling.

<sup>27</sup> Judgment, paragraph 76

59. As explained in *CHEZ (Nikolova)*, once the burden has shifted it is for the respondent to prove that the treatment in issue is “not in any way founded on [the protected characteristic]”.<sup>28</sup>
60. It might be said that the shifting burden of proof places an unfair onus on organisations responding to discrimination claims on the basis that “proving a negative” is rarely easy and sometimes it is impossible.
61. In most cases, that type of criticism will be unfair because the employer is not proving a negative so much as proving a positive, non-discriminatory explanation for its actions. For example, a claim from a woman who complains that she has been awarded a lower bonus than her male counterpart because of her gender will easily be defeated if her employer can prove that he performed to a higher standard.
62. However, there are cases which are less straightforward and where the employer is faced with possibly needing to “prove a negative”. A good example is *Firma Feryn*, which has already been discussed above. In that case, the CJEU 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>29</sup> As Firma Feryn BV had not employed any Moroccan employees after making its discriminatory statement, it could be said that it is difficult to see how it could possibly have discharged the burden of proof even if in reality, this failure was wholly unconnected to ethnicity e.g. no one who was Moroccan had applied for a position.
63. However, *ACCEPT*, also discussed above, demonstrates that an employer can discharge the burden of proof simply by identifying generalised, positive steps to prevent discrimination as opposed to specific examples of non-discrimination. In that case, 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.

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.

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<sup>28</sup> Judgment, paragraph 85.

<sup>29</sup> Judgment, paragraph 34.

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, 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.

64. It follows that the case law of the CJEU actively encourages organisations to adopt “best practice” in respect of equal opportunities as this could act as a “shield” in any future litigation.
65. It is clear that a simple assertion by the employer that there has been no discrimination will be insufficient to satisfy the burden of proof. In the *Otero Ramos* case, the employer argued that the burden of proving that the treatment was not discriminatory was necessarily satisfied where “the job performed by the worker is included in the list of risk-free jobs drawn up by the employer after consulting with workers’ representatives and...the department of preventive medicine and for occupational risks of the hospital in question has issued a declaration that the worker is fit for work”.<sup>30</sup> The CJEU held that documents such as a certificate from the employer according to which the work was classified as “risk free” could not, without explanations capable of substantiating that conclusion, provide an irrebuttable presumption that this was the case. To hold otherwise would deprive the rules on the burden of proof of all practical effect.<sup>31</sup>

### **Indirect Discrimination**

66. Indirect discrimination is defined in the various Directives cited above as occurring:

...where an apparently neutral provision, criterion or practice would put persons [with the protected characteristic] at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.<sup>32</sup>

### **What factors are capable of shifting the burden of proof to the respondent?**

67. The “stage 1” requirement is therefore that the claimant establish facts from which it may be presumed that there is an apparently neutral provision, criterion or practice (‘PCP’) which places persons with a protected characteristic at a particular disadvantage compared with other persons.

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<sup>30</sup> Judgment, paragraph 38(3)

<sup>31</sup> Judgment, paragraph 74

<sup>32</sup> See Directive 2000/43, Article 2(2)(b); Directive 2000/78, Article 2(2)(b); Directive 2006/54, Article 2(1)(b).



68. The most difficult hurdle for claimants alleging indirect discrimination in shifting the burden of proof tends to be the requirement to establish a presumption that the PCP puts the protected group at a “particular disadvantage”.
69. It is important to note that many of the older decided cases which consider the question of what might be needed to show “disadvantage” were determined under different and more stringent legislation.
70. Thus, for example, in *Bilka-Kaufhaus*,<sup>33</sup> an equal pay case concerning the exclusion of part-time employees from an occupational pension scheme, the CJEU required a finding that a “much lower proportion” of women than of men worked part-time in order to establish the required disadvantage.
71. Similarly, a relatively substantial statistical difference was required in *Seymour Smith*,<sup>34</sup> in which the Court considered whether national rules requiring completion of a two year “qualifying period” of employment and a minimum number of working hours before an unfair dismissal claim could be brought were indirectly discriminatory against women. Having regard to the wording of what was then Directive 76/207/EC, the test was stated by the Court to be:<sup>35</sup>

Whether the statistics available indicate that a considerably smaller percentage of women than men is able to satisfy the condition of two years’ employment required by the disputed rule.

although it did add the caveat:

That could also be the case if the statistical evidence revealed a lesser but persistent and relatively constant disparity over a long period between men and women who satisfy the requirement of two years’ employment. It would, however, be for the national court to determine the conclusions to be drawn from such statistics.<sup>36</sup>

72. The wording of Directive 97/80/EC also required the claimant to show that the PCP disadvantaged a “substantially higher proportion” of the members of one sex, which is a more stringent test than that contained in the current Directives.
73. There is no clear guidance from the CJEU on what might be required to show a prima facie case under the current test. However, the replacement of the words “a substantially

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<sup>33</sup> C-170/84 *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] ECR 1607

<sup>34</sup> C-167/97 *R v Secretary of State for Employment ex parte Seymour Smith and Perez* [1999] ECR I-623

<sup>35</sup> Judgment, paragraph 60

<sup>36</sup> Judgment, paragraph 61. In the event, the Court did not consider a disparity of 8.5% sufficient, but the case was ultimately decided in favour of the female claimants in the domestic courts, on the basis of a long-term disparity of this order.

higher proportion” with the simpler requirement for “a particular disadvantage” suggests that it may not be necessary to conduct a detailed statistical analysis of the advantaged and disadvantaged groups in every case.

74. Some examples of cases where the Court has adopted a less rigid analysis are set out below.
75. In *O’Flynn*,<sup>37</sup> the CJEU considered a PCP under which funeral payments in respect of close family members were offered equally to national and migrant workers, but only if the burial took place in the UK. The Court held that the PCP was prima facie indirectly discriminatory, without the need for statistical evidence showing the proportions of UK and non-UK nationals affected.

[20] It follows from all the foregoing case law that, unless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage.

[21] It is not necessary in this respect to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect....

76. The language used by the Court in *O’Flynn*, and in particular the firm finding that it is only necessary for the claimant to show that the PCP is “liable” to affect a substantially higher proportion of the protected group (or, in the current less stringent terminology, put that group at a particular disadvantage) is a helpful indication of the standard of proof required to shift the burden in indirect discrimination cases.
77. The cases of *Danfoss* and *Enderby*, already discussed above, provide some guidance as to circumstances outside of the paradigm indirect discrimination claim in which the CJEU has been willing to shift the burden of proof. Those cases were determined under the equal pay regime, which differs in some respects from the framework applicable in other direct/indirect discrimination claims, but nevertheless provide helpful indications as to the Court’s general approach.
78. In *Danfoss*, the Court found, as noted above, that the burden of proving that there had been no pay discrimination shifted to the employer in circumstances where the average wage for women within the organisation was 6.85% lower than that for men, and where the pay system that led to this discrepancy was totally lacking in transparency. It is noteworthy that the statistical discrepancy in *Danfoss* was significantly lower than that

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<sup>37</sup> C-237/94 *O’Flynn v Adjudication Officer* [1996] 3 CMLR 103

thought to be required in later indirect discrimination cases such as *Bilka Kaufhaus* and *Seymour Smith*.

79. In *Enderby*, the collective bargaining structures in the NHS resulted in speech therapists (a predominantly female group) being paid less well than clinical psychologists and pharmacists (predominantly male groups), although their work was assumed to be of equal value. The claimants did not argue that there was any direct sex discrimination, or any PCP creating an impediment to their joining the predominantly male professions. The Court of Justice nevertheless found that this combination of factors was capable of shifting the burden of proof to the employer to show that the pay differential was objectively justified, subject to consideration by the national court of:

17....whether it may take into account those statistics, that is to say, whether they cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena, and whether, in general, they appear to be significant.

80. It should be noted that factors that may be taken into account in shifting the burden of proof in direct discrimination claims may also be relevant in indirect discrimination claims. Thus the CJEU explicitly stated in *Meister* that a refusal to grant access to information could assist in shifting the burden in cases of indirect as well as direct discrimination.<sup>38</sup>

How can employers rebut the presumption of discrimination once the burden has shifted?

81. In some cases, it may be possible for the employer to rebut the presumption of discrimination by producing cogent evidence disproving one or more elements of the prima facie case.

82. Thus, for example, the employer might seek to show:

- (a) that it did not apply the alleged PCP at all;
- (b) that it did not apply the PCP to the claimant;
- (c) that the statistical or other evidence relied upon by the claimant to show particular disadvantage is flawed or otherwise invalid.

83. Controversially, in 2015, the UK Court of Appeal held in two separate decisions<sup>39</sup> that the employer may in some circumstances be able to rebut the presumption of discrimination even where it is based on valid and reliable statistics showing particular disadvantage to the relevant protected group. The Court took the view that, if the employer can show that the statistical disparity is caused by something that is not peculiar to or inherent in people belonging to the protected group, the presumption of discrimination may be rebutted

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<sup>38</sup> Judgment, paragraph 47

<sup>39</sup> *Essop v Home Office (UK Border Agency)* [2015] EWCA Civ 609 and *Naeem v The Secretary of State for Justice* [2015] EWCA Civ 1264

without the need for objective justification. The cases were heard by the Supreme Court last year.<sup>40</sup> The Supreme Court disagreed with the Court of Appeal and reaffirmed that, once the claimant has shown (if necessary using statistical evidence) that persons with the protected characteristic are placed at a particular disadvantage by the PCP, the burden shifts to the employer to show it is a proportionate means of achieving a legitimate aim. There is no need to prove why the PCP puts the protected group at that disadvantage, or that the disadvantage is caused by something peculiar to the protected group.

84. Assuming that the prima facie case of indirect discrimination cannot be undermined in one of these ways, the employer will need to demonstrate that it was, in applying the PCP, seeking to achieve a legitimate aim and that the means used to achieve it were both appropriate and necessary.

## **B. Obtaining evidence**

85. We have seen above, in considering the case of *Meister*, that a failure by the respondent to disclose relevant documentation and information is a factor that may be taken into account by courts in considering whether the burden of proof has shifted.
86. But to what extent is this sufficient? Whilst the failure to disclose may help some claimants who have other useful evidence at their disposal to create a prima facie case of discrimination, many others are likely to be unable to prove “facts from which discrimination may be presumed” without access to evidence that is not in their possession.
87. The case law of the CJEU shows that it is in general unwilling to enforce general disclosure rules on member states; it has been careful to respect the autonomy of member states to create and implement their own procedures when it comes to obtaining evidence. However, the Court has also categorically stated the need for national courts to ensure that the right to be protected from discrimination is effective within the context of procedural rules such as the disclosure of documentation. The question is, what is needed in order to make that right “effective”?
88. One relatively recent example is the case of *Kelly*.<sup>41</sup> There, Mr Kelly had been rejected for a place on a course provided by a university. He believed that he had been the victim of sex discrimination. In order to make good that contention, he sought disclosure of extensive documentation personal to other individuals who had applied to the same course e.g. application forms, documentation attached to application forms and scoring sheets. When this request was refused, he argued in the CJEU that a failure to provide disclosure was contrary to Directive 97/80 and in particular Article 4(1) which sets out the

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<sup>40</sup> [2017] UKSC 27

<sup>41</sup> C-104/10 *Kelly v National University of Ireland (University College, Dublin)* [2011] 3 C.M.L.R. 36.

shifting burden of proof, as it prevented him from being able to discharge the first stage of that test.

89. 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 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 El Dridi [2011] ECR I0000, paragraph 55).

90. It is important to read *Kelly* in conjunction with *Meister*.<sup>42</sup> The request for disclosure in that case was for the file of the person who had been recruited to the position for which Ms Meister had applied and the CJEU held that she was not entitled to that information. However, the Court appeared to conclude that, in view of the various matters that could suggest discrimination in Ms Meister's case, it could not be said that the refusal of disclosure rendered the burden proof provisions ineffective.

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.

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<sup>42</sup> C-415/10 in *Galina Meister v Speech Design Carrier Systems GmbH*; see above.

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.

91. 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 they are so prejudiced that their EU rights are not effective, although (as discussed above) a failure to provide disclosure is of itself relevant to the first stage of the shifting burden of proof.
92. 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.
93. For example, UK law is currently in a state of flux over this issue, in the light of the abolition of the statutory questionnaire procedure in April 2014, as part of the government policy to reduce regulation of British businesses.
94. Historically, this procedure was the most flexible method used to obtain information in UK employment law. Questions were set out on a prescribed form but otherwise a complainant might ask the respondent any question relevant to the alleged discrimination. This could (and, ideally, should) be done before legal proceedings were begun. The questions and replies were admissible in proceedings under the Equality Act 2010. The questionnaire procedure was provided for in UK domestic legislation and did not have its origin in European directives/practices.
95. Questionnaires were particularly useful in indirect discrimination claims because they were a way to obtain the necessary statistical data to support an assertion that a particular PCP had a discriminatory effect on a particular group. In the United Kingdom it was common to ask questions about the make-up of the workforce (for example a question might read '*Please give the race, ethnic and national origin of all employees employed at [a particular place] or in [a particular grade]*'). Time limits were set within which respondents were to reply. Employers were not bound to answer the questionnaire, but the questions asked were admissible in evidence and a court or tribunal could draw an adverse inference from a failure to reply or from an evasive or equivocal reply, including an inference that the respondent had behaved unlawfully.

96. In the light of the abolition of the statutory questionnaire procedure, other methods for obtaining evidence in UK discrimination cases are likely to be used more often including:
- a. standard court and tribunal procedures such as a request for additional information, for written answers to questions<sup>43</sup> or disclosure of documents;
  - b. data protection legislation may contain useful tools for obtaining information. In the UK, for example, individuals have the right to request copies of all “personal data” held about them which, under s. 1(1) includes “... *any expression of opinion about an individual and any indication of the intentions of anyone in respect of the individual...*”

There would be support for the use of such procedural tools via cases like *Meister* at [47].

### **Conclusion**

97. Overall, it is plain that EU law is a powerful source of law for a claimant who believes that s/he has been the victim of discrimination. The impact of the shifting burden of proof cannot be underestimated; it means that cases which would otherwise be unwinnable have a fighting chance. It also seems that there is scope for inventive arguments concerning the extent to which national rules of evidence require modification so as to make access to documentation far easier. However, the EU’s jurisprudence on access to evidence is at a less-developed stage and future guidance is to be welcomed.<sup>44</sup>

ANNA BEALE  
Cloisters  
January 2018

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<sup>43</sup> The UK Advisory, Conciliation and Arbitration Service (ACAS) has now produced guidance on asking and responding to questions of discrimination in the workplace:  
<http://www.acas.org.uk/media/pdf/m/p/Asking-and-responding-to-questions-of-discrimination-in-the-workplace.pdf>

<sup>44</sup> Thanks to my colleagues Rachel Crasnow QC, Dee Masters, Tom Brown, Paul Epstein QC and Declan O’Dempsey for earlier papers on which parts of this paper are based.