



Proving discrimination: Shifting the burden of proof and access to evidence

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Some important context

We are all affected - in our protected characteristics and for some, at different times:

- whether our gender, our race, ethnicity, our physical or mental disabilities, our sexual orientation, our religion and our age
- whether perceived or actual

Discrimination and inequality - a recognised reality –
And yet, (very) difficult to prove

- Interview – visible, later rejected – how to prove?
- An application form - disability – later rejected – why?
- Conditions at work - a rumour gay - change in treatment – how to show why?
- and then there is also unconscious bias

Our fundamental human rights are concerned – dignity, respect, equality => our laws must combat and safeguard against the hidden social evil of inequality and discrimination





A recognised reality

“Discrimination has the reputation of being particularly hard to substantiate. This is even truer in respect of discrimination in employment. Aware of this problem, the European Union legislature has adopted measures to assist applicants claiming to be victims of discrimination on the grounds of, in particular, sex, age or origin. The European Union legislature has thus provided for a shift in the burden of proof, without, however, going so far as to uphold its complete reversal since the long-standing freedom of employers to recruit the people of their choice must not be completely disregarded.”

Opinion of Advocate General Paolo Mengozzi 12/1/2012
Meister v Speech Design Carrier Systems GmbH Case C-415/10



Why?

“It has long been recognised that proving discrimination claims may pose great difficulties for claimants.”

Igen v Wong [2005] EWCA Civ 142

“It is important to bear in mind that it is unusual to find direct evidence of racial discrimination. Few employers will be prepared to admit such discrimination even to themselves. In some cases the discrimination will not be ill-intentioned but merely based on an assumption that “he or she would not have fitted in.”

King v Great Britain – China Centre [1992] ICR 516





Key concepts in anti-discrimination law

- Burden of proof – Who bears the burden to prove or disprove a claim of discrimination ?
- Evidence - How do you prove or disprove discrimination?
- What evidence can you rely on?



Burden of proof Who proves what?

“The rules on the burden of proof **must be adapted** when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof **must shift back** to the respondent when evidence of such discrimination is brought.”

“No need to apply the rules on the burden of proof when it is for the court to investigate the facts of the case. “





Why so essential?

"[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** 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." *Danfoss C-109/88*



An essential tool....

Enderby v Frenchay Health Authority C-127/92

[13] It is normally for the person alleging facts in support of a claim to adduce proof of such facts. Thus, 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.

[14] However, it is clear from the case law of the Court that the onus may shift when that is necessary to avoid depriving workers who appear to be the victims of discrimination of any effective means of enforcing the principle of equal pay. Accordingly, when a measure distinguishing between employees on the basis of their hours of work has in practice an adverse impact on substantially more members of one or other sex, that measure must be regarded as contrary to the objective pursued by **Article 119 EEC**, unless the employer shows that it is based on objectively justified factors unrelated to any discrimination on grounds of sex. Similarly, where an undertaking applies a system of pay which is wholly 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.



How does it work?

“1. Where persons considering themselves wronged establish 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.”

“Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs. “



Proof and evidence

- Kelly C-104/10 – Male course application refused , copies of others refused, no entitlement but may compromise effectiveness, national court to assess.
- Meister C-415/10 – Speech design, 2x rejected, disclosure refused, not entitled but may be a factor of establishing facts
- Asociatia ACCEPT C-81/12 – homophobic interview, no legal capacity to act but employer did not distance themselves





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Steps

Stage 1
The complainant employee must establish a prima facie case of discrimination.

Stage 2
If s/he does this, then the burden of proving the reason or the cause of the decision shifts – it lies with the defending employer and not the complainant.

Stage 3
The accused employer must prove that the reason for the treatment complained of is NOT caused by any discrimination whatsoever.



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Complainant proves protected characteristic

“However, it is **not** for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation”
(Recital. Framework)



Evidence

How do you prove a claim?

- Key concept particular to discrimination
- Inferences
- “Appreciation of the facts from which it may be **inferred** that there has been direct or indirect discrimination is a matter for the national judicial or other competent bodies (incl statistical evidence).”
- “facts from which it may be presumed that there has been direct or indirect discrimination”



Practical guidance and evidence

- Acting on behalf of the employer –
What to look for? What to advise?
- Acting on behalf of the employee – how
to substantiate your claim?
- As the Judge – what evidence will be of
assistance?



Types of evidence?

- What is the evidence of the complaint – direct evidence? Documentary evidence? Witness evidence? Personnel files? Company notes? Statistics of disparate impact?
- Is there circumstantial evidence? remarks; general statistics; past complaints; inconsistent/ contradictory behaviour (bad/ unfair employer or discriminatory employer?)
- How did the employee/employer handle matter internally? Grievance? Delay? Conduct in any investigation?



What other factors?

- Explanation? Reasonableness of explanation?
- Degree of treatment?
- Disclosure? Request for information? Questionnaire – inferences
- What are the employer's Equal Opportunities policies?
- Contract of employment?
- Induction/ training on Equal Opps? Is this updated/ repeated?





And finally - good practice and prevention ...

- Systems in place to combat discrimination?
- Evidence of commitment to equality? Equal Opportunities policies?
- Human resources? Equal Opportunities Officer?
- Training for staff? At all levels? Regular reviews?
- Statistics of workforce? Updated? Monitored? Analysed?
- Internal fair, independent and timely grievance procedures?
- Past complaints – how have these been addressed? How tackled?
- Contracts of employment with provision as to combating discrimination? Show serious commitment?
- Compliance with statutory or best practice guidance issued by Equal Opportunity bodies?
- In specific cases, is there an explanation for conduct complained of?
- Personnel files? Properly maintained and reviewed?



Thank you.