

# The Burden of Proof in Discrimination



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JUDICIAL  
COLLEGE



This training session is funded under the 'Rights, Equality and Citizenship Programme 2014-2020' of the European Commission.

## Origins of the Directive

Case 109/88, *Danfoss* [1989]  
ECR 3199

Case C-127/92 *Enderby*  
[1983] ECR I-5535

## COUNCIL DIRECTIVE 97/80\*

### Article 10

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.

\*Now the recast Directive 2006/54.

Also Art 8 Directive 2000/43 (the Race Directive) and Article 10 Directive 2000/78 (the Framework Directive).

## A two-stage test

### Article 10.

Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that,

**(1) 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,**

**(2) it shall be for the respondent to prove that there has been no breach of the principle of equal treatment**

## In summary

“The three directives opted for a mechanism making it possible to lighten, though not remove, the burden on the victim”

AG Mengozzi C-415/10 Meister (p 22)

## When does it apply?



## *Firma Feryn*

“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.”

## Role of the Court

The role of the national court is to verify

*“that the facts alleged against the employer are established and to assess the sufficiency of the evidence which the employer adduces in support of its contentions that it has not breached the principle of equal treatment.”*

(para 33, **Firma Feryn NV**. Case C-54/07)

## The Comparator



The comparison must be *like* with *like*, the comparator must be someone whose circumstances are the same or not materially different to the claimant.

## An example



Completed school ✓  
Two years vocational training ✓  
10 years in employment ✓



Completed school ✓  
Two years vocational training ✓  
10 years in employment ✓

## Direct Discrimination The First Stage (1)

# Find primary facts.

### Primary facts include:

The facts **central** to the complaint.

Facts from **background** and circumstantial evidence.

Relevant **statistical** evidence.

## Background?

Previous failed  
promotion applications

Insensitive or  
stereotyping comments  
by managers

Complaints about  
harassment by white  
colleagues ignored



Refusal to provide  
training opportunities

History of poor relationship  
with manager

De facto  
segregation of  
black staff

Non-promotion of black colleague

## The First Stage (2)

Draw any appropriate inferences.



What is needed to reverse the burden?

**Presumed ≠ Concluded** -Belov

*But*

**Negative treatment +**

**Protected characteristic alone ≠**

**Burden shifted**

Has the burden shifted to the employer?



Employer's explanation



Claim fails

## Second Stage.

Employers explanation.



(2) it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

## Indirect Discrimination (1)

### First stage

Claimant establishes a *prima facie case*

- 1) that there is a provision, criteria or practice.
- 2) which is *liable*\* to place a substantially higher proportion of affected group at a disadvantage
- 3) puts claimant at that particular disadvantage

Yes? Second Stage.

No? Claim fails.

\**O'Flynn C-237/94*

## Indirect Discrimination (2)

### Second stage

Has the employer shown **cogent evidence which disproves the existence of any of the elements** of the complaint?

Yes? Claim fails.

No? Justification.

## Indirect Discrimination (3)

### Justification

Can the employer **justify** the provision, practice or criteria?

No? Claim succeeds.

Yes ? Claim fails.

## Statistical Evidence



### *Kelly C-104/10, Meister C-415/10*

Where rules of procedure operate in such a way as to risk the achievement of the objectives of the directive (97/80) it is for the national court to

**“take all appropriate measures to ensure that that did not occur”.**

## CHEZ C-83/14

“Matters that may be taken into consideration include the fact that, notwithstanding requests to this effect from the referring judge..., CHEZ RB failed to adduce evidence”

## Accept

“not even if I had to close *Steaua* down would I accept a homosexual on the team. There’s no room for gays in my family, and *Steaua* is my family.”



## Accept C-81/12

“ Articles 2(2) and 10(1) of Council Directive 2000/78/EC of 27 November 2000,... **must be interpreted** as meaning that ...**homophobic statements by a person closely connected with the employer...**are capable of amounting to ‘facts from which it may be presumed that there has been ... discrimination’ ”

!!

“**How can a woman play football?** She isn't built for playing football. Her body isn't made for football. It's dangerous. **The female was created to be beautiful, to attract the opposite sex.**”



