

## *Proving Discrimination: the shift of the burden of proof and access to evidence*

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## Purpose

The purpose of this presentation is to provide a summary of the burden of proof in EU discrimination law and to provide some practical guidance to those with responsibility for determining claims of unlawful discrimination.



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## Introduction

### Sources of European Law:

- Treaty on the Functioning of the European Union (TFEU)
- Charter of Fundamental Rights
- Treaty on European Union (TEU)
- Directives and Regulations



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## Introduction

### Equality and Human Rights are a core aim of EU

**BUT** equality is far from being achieved –

- Women still earn less per hour than men do overall. In 2017, women's gross hourly earnings were **16.0 % below** those of men in the EU; across Member States, the gender pay gap varied by 22 percentage points, ranging from **3.5 % in Romania to 25.6 % in Estonia**.
- 2017 Survey found that a quarter of black people experienced racial discrimination at work or when looking for work. Young black people are especially vulnerable; in some countries, up to 76% are not in work, education or training compared to 8% of the general population.



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## Background and Context

- The Burden of Proof is the obligation on a party to establish the facts in a case to the required standard to prove their case.
- Civil Proceedings burden is on the claimant.
- But how do you prove discrimination when it isn't obvious?  
***Glasgow City Council v Zafar*** “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”



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## Background and Context

### Difficulties in proving discrimination include:

- the covert nature of some discrimination;
- unbiased or unrecognised discrimination;
- the bulk of evidence is often in the employer's hands;



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## Background and Context

### ECJ cases of **Danfoss** and **Enderby**

Both equal pay cases in which the ECJ began to develop concept of shifting burden.

#### Danfoss

- The employer paid same basic minimum pay to workers in the same pay grade.
- However, the agreement allowed the employer to make two sets of additional payments for flexibility and vocational training, determined by individual managers.
- Statistics showed that women's average pay was 6.85% less than men within the same grades.
- The system was such that women were unable to identify cause of the difference in pay.

#### **ECJ found:**

- where pay system is lacking transparency and there is little that employees can do to establish a prima facie case of discrimination other than showing the pay difference, the burden must then fall on the employer to show there has been no discrimination.



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## Background and Context

### Enderby

- HA employed speech therapists (a mainly female group) and pharmacists and clinical psychologists (both mainly male).
- E, a speech therapist, claimed she was employed on work of equal value with male pharmacists and clinical psychologists but received less pay than comparable male pharmacists and psychologists.
- HA argued that she did not do work of equal value but even if she did the pay difference was due to a material factor unrelated to sex: but also that the variation in pay was genuinely due to a material factor unrelated to sex. HA argued that difference in pay had resulted from different collective bargaining processes.
- E accepted that the negotiations had not been conducted with the intention of disadvantaging women.

#### **ECJ found:**

- *"If the pay of speech therapists is significantly lower than that of pharmacists and if the former are almost exclusively women while the latter are predominantly men, there is a prima facie case of sex discrimination, at least where the two jobs in question are of equal value and the statistics describing that situation are valid....."* (para 16)
- *"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"* (para 18)



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## Background and Context

### King v Great Britain-China Centre [1991] IRLR 513

- K is Chinese but educated in Britain. Not short-listed for job which required "first-hand knowledge of China and fluent spoken Chinese".
- All short-listed candidates were white and successful candidate was an English graduate in Chinese. K's claim won at tribunal; because GBCC failed to demonstrate that K had not been treated less favourably.
- The EAT allowed an appeal on grounds that tribunal wrongly placed the burden of proof on the respondent. The Court of Appeal allowed K's appeal. Of 8 applicants, 4 were ethnic Chinese but none were shortlisted nor had any ethnic Chinese ever been employed. As GBCC could not explain, to the tribunal's satisfaction, why this was the case its original decision could stand. The Court made it clear that there was no official "shifting burden of proof": rather it was about drawing inferences from the primary facts.

#### **ECJ found:**

*(1) It is for the applicant who complains of ... discrimination to make out his or her case. ...if the applicant does not prove the case on the balance of probabilities he or she will fail.*

*(2) ... it is unusual to find direct evidence of ... 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".*

*(3) The outcome of the case will therefore usually depend on what inferences it is proper to draw from the primary facts found ...*



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## Background and Context

*(4) Though there will be some cases where, for example, the non-selection of the applicant for a post or for promotion is clearly not on [prohibited] ... grounds, a finding of discrimination and a finding of a difference in [protected characteristic] ... will often point to the possibility of ... discrimination. In such circumstances the tribunal will look to the employer for an explanation. If no explanation is then put forward or if the tribunal considers the explanation to be inadequate or unsatisfactory it will be legitimate for the tribunal to infer that the discrimination was on grounds [of the protected characteristic]. This is not a matter of law but... "almost common sense".*

*(5) It is unnecessary and unhelpful to introduce the concept of a shifting evidential burden of proof. At the conclusion of all the evidence the tribunal should make findings as to the primary facts and draw such inferences as they consider proper from those facts. They should then reach a conclusion on the balance of probabilities, bearing in mind both the difficulties which face a person who complains of unlawful discrimination and the fact that it is for the complainant to prove his or her case."*



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## Doctrine of Effectiveness

- Article 47 of the European Charter of Fundamental Rights says: “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article”
- The doctrine of effectiveness means that domestic procedural law must not make it impossible or excessively difficult to enforce rights derived from EU law. Rights to equality are meaningless if they are not underpinned by rules of evidence and procedure that assist individuals to enforce those rights.
- It is for the national states to establish rules of protection for EU rights in accordance with the principle of procedural autonomy. However domestic procedural law must operate in the same way for rights derived from domestic law and their EU law equivalents (“doctrine of equivalence”). For example, EU law does not permit domestic law to have different limitation periods for domestic law rights and similar EU law rights.



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## The Directives

Council Directive 97/80\* (“the Burden of Proof Directive”), Article 10 provided:

- “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 (Art 19).

Also Art 8 Directive 2000/43 (the Race Directive) and

Article 10 Directive 2000/78 (the Framework Directive)



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## Two Stage Approach

### Stage 1

C must sufficiently establish the facts from which it may be presumed that there has been discrimination, i.e. the claimant must establish a *prima facie* case of discrimination.

Burden of proof remains on the claimant, but it is a reduced burden.

- Note, the requirement is to establish facts from which it may be **presumed** that discrimination has taken place and not facts from which it can be **concluded** that discrimination has taken place – see AG Kokott's opinion in case of **Belov v CHEZ Elektro Bgaria AD and others** (linked to **Nikolova v CHEZ Elektro Bgaria AD and others (C-83/14)**).
- Both cases concerned the supply of electricity in a predominantly Roma region. Electricity company located the electricity meters at a height of 7 meters, as opposed to the usual 1.7 meters in other districts because of the level of meter tampering which had occurred in this particular district. Mr Belov is Roma Ms Nikolova is not Roma but complained of associative discrimination because of the district in which she lived with had a majority Roma population.
- Reference to ECJ in Belov asked for ruling on 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. AG Kokott concluded that it was not necessary, in order for the burden of proof to reverse, for the claimant to demonstrate anything more than a "presumption" of discrimination.



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## National Court's Role

It is for national courts 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 **Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV. Case C- 54/07 ("Firma Feryn")**,



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## Direct Discrimination – Stage 1

Means less favourable treatment because of protected characteristic in comparison to someone who does not have the protected characteristic.

### Stage 1

What evidence is required to shift the burden?

Discriminatory comments:

- (i) a public statement made by an employer in the Belgian media to the effect that they would not employ Moroccans (***Firma Feryn***)
- (ii) Homophobic comments by shareholder of football club (***ACCEPT***)

Inferences – national courts to consider all circumstances to assess whether Claimant has established prima facie case. From the **primary facts, inferences** of discrimination may be drawn (UK case of ***Anyia***)



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## Direct Discrimination – Stage 1

- Failure to disclose relevant information (***Kelly***)
- Comparability (***Meister***)
- Less favourable treatment and a different in status is not enough (UK case ***Madarassy***)



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## Direct Discrimination – Stage 2

- At stage 2 for the Respondent to provide an explanation **which is in no sense at all** connected to the protected status of the employee
- Prove the non-discriminatory reason instead of proving a negative



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## Indirect Discrimination – Stage 1

An apparently neutral PCP would put persons [with the protected characteristic] at a particular disadvantage compared with other persons unless PCP is objectively justified

### Stage 1

Has Claimant proved PCP causes “particular disadvantage”? Use of Statistics (“a substantially higher proportion”). NO? Claim fails; YES? Move to Stage 2.



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## Indirect Discrimination – Stage 2

### Stage 2

Has Respondent shown evidence that PCP does not put Claimant at particular disadvantage? YES? Claim fails; NO? Claim moves to justification.

What material can be considered at each stage?

At Stage 1 should it be just the Claimant's evidence and Stage 2 the Respondent's?  
OR should all available evidence be considered at Stage 1?



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## Conclusion

Shifting burden is an effective tool recognising the difficulties in proving discrimination.



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