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# “APPLYING EU ANTI-DISCRIMINATION LAW” BURDEN OF PROOF & ACCESS TO EVIDENCE

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INTRODUCTION:  
*“He who asserts  
must prove!”:*

- Onus of proof is generally on the person making the claim or allegation
- The psychology of discrimination = few admit it, even to themselves!



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## Why should the BOP shift?

- ✓ Covert discrimination
- ✓ Unrecognised prejudice
- ✓ Unconscious bias
- ✓ Most evidence will lie in the hands of the employer
- ✓ Let the employer show that there was no discrimination



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## The need for comparators:

- Comparators are necessary to prove discrimination → must be like with like (someone whose circumstances are the same or not materially different, but without the protected characteristic)
- Actual comparator = C will need evidence of how that person was actually treated
- Hypothetical comparator = C will need evidence to show how someone would have been treated in the same situation
- Who has this evidence?



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## The importance of the BOP for EU anti-discrimination law:

- Put simply, EU substantive rights to equality are meaningless unless they are underpinned by rules of evidence & procedure that assist individuals to enforce those rights (**principle of effectiveness**)
- Arguably, the most important rules pertain to the BOP & access to evidence



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## Origins of a shifting BOP

- **Danfoss** Case 109/98 [1989] ECR 3199
- **Enderby** Case C-127/92 [1993] ECR I-5535



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## Origins of shifting BOP....

- **Danfoss & Enderby** were equal pay cases in which the BOP shifted to the employer to show the pay differential between men and women was objectively justified when:
  - i. 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**)
  - ii. Significant & valid statistics showed that a collective bargaining system had resulted in a predominantly female occupational group being paid less than predominantly male occupational groups (**Enderby**)



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## EU Directives:

- The first Directive explicitly to address the BOP was the **Burden of Proof Directive 97/80/EC** (dealing only with sex discrimination & not requiring implementation until 1 Jan 2001)
- Replaced by:
  - i. **Race Directive 2000/43/EC** (implementing principle of treatment between persons irrespective of racial or ethnic origin)
  - ii. **Framework Directive 2000/78/EC** (establishing a general framework for equal treatment in employment & occupation in relation to religion or belief, disability, age or sexual orientation)
  - iii. **Recast Directive 2006/54/EC** (still sex discrimination only)



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- Effective judicial protection for community rights *versus* general rule of national procedural autonomy:

## Burden of Proof Directive - Recital (18):

*Whereas the Court of Justice of the European Communities has therefore held that 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*



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## Recast Directive Recital (30):

*The adoption of rules on the burden of proof plays a significant role in ensuring that the principle of equal treatment can be effectively enforced. As the Court of Justice has held, provision should therefore be made to ensure that the burden of proof shifts to the respondent when there is a prima facie case of discrimination... The appreciation of the facts from which it may be presumed that there has been...discrimination remains a matter for the relevant national body in accordance with national law and practice*



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## Stage 1:

Member States must ensure that, **when claimants 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....**

→ Presumed ≠ Concluded (Opinion of AG Kolkott in **Belov** Case C-394/11, para 91)



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## Stage 2:

....once the claimant has established facts from which it may be presumed that there has been discrimination, **it shall be for the respondent to prove that there has been no breach of the principle of equal treatment**



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## The role of the Court in practice....

- What are facts from which it may be “presumed” there has been discrimination?
- Gathering evidence: Judge’s role
- Drawing of inferences
- **Kelly v National University of Ireland** Case C-104/10
- **Meister v Speech Design CarrierSystems GmbH** Case C-415/10
- **RB –v- BA** [2006] IRLR 473



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## The “stage 1” evidence:

### **Firma Feryn NV** Case C-54/07

- ✓ An employer’s prior statement that it would not appoint employees of certain ethnic minority backgrounds “*may constitute facts of such a nature as to give rise to a presumption of a (still existing) discriminatory recruitment policy*”



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## Firma Feryn NV 'customer requirements' ....

Statements reported as made by a director of the company:

*"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!"*



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## The stage 1 evidence.....

### Asociata ACCEPT v Consiliul National pentru Combaterea Discriminarii Case C-81/12

- ✓ A shareholder in Steaura Cucuresti football club had made statements to the effect that he would not hire a player who was homosexual



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## ACCEPT case:

Although the statement was made by someone who could not bind the employer in relation to any recruitment decisions, the CJEU held this did not matter:

*“...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....*

*The fact that an employer might not have clearly distanced itself from the statements concerned is a factor which the court...may take into account in the context of the overall appraisal of the facts”*



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## The stage 2 evidence:

- It is for the employer to “*adduce evidence that it has not breached the principle of equal treatment*”
- The employer is not required to prove a negative
- The employer is required to provide an innocent explanation
- **ACCEPT** – factors unrelated to discrimination: distancing statements; proof of good practice; objective choice factors



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What is NOT an answer:

- The employer's reason or motive: **R v Immigration Officer at Prague Airport** [2005] 2 AC 1
- Stereotypical assumptions relating to a protected characteristic: **CHEZ** Case C-83/14



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Access to evidence:

**Kelly** Case C-104/10 (para 34):

*...although Article 4(1) of Directive 97/80 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, it is not however inconceivable that a refusal of disclosure by the defendant, in the context of establishing such facts, is liable to compromise the achievement of the objective pursued by that directive and, in particular, to deprive that provision of its effectiveness.*



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## Access to evidence / national rules of procedure:

### Meister Case C-415/10:

*In the context of establishing the facts from which it may be presumed that there has been direct or indirect discrimination, it must be ensured that a refusal of disclosure by the defendant is not liable to compromise the achievement of the objectives pursued by Directives 2000/43, 2000/78 and 2006/54*



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## Application in Practice (stage 1):

FIRST: find the primary facts:

- i. The facts central to the complaint (which will include those relevant to any comparison)
- ii. Facts from background & circumstantial evidence
- iii. Relevant statistical evidence

NEXT: draw any appropriate inferences from those facts



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Stage 1: what is  
needed to shift  
BOP?

Presumed  $\neq$  Concluded (**Belov**)

*but*

➤ Negative treatment + protected  
characteristic alone → burden NOT  
shifted (**CHEZ**)

*although*

➤ Evidence suggesting a practice based  
on stereotype or prejudice might  
suffice (**CHEZ**)



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