

# The Burden of Proof

EU Law- Equal Treatment Provisions

James Dawson

Judge of the Employment Tribunal



Funded under the 'Rights, Equality and Citizenship Programme 2014-2020'  
of the European Commission

## Why have Special Provision?

- People bringing claims of discrimination face particular challenges in proving their claim
- Often the person will not admit his or her motivation (even to him or herself)
- Rarely is there direct evidence that a particular act was, say, because of a person's national origin.
- Consider the unsuccessful job applicant

## Danfoss A/S

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

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

## Council Directive 97/80/EEC

### Article 4

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

## The current provisions on burden of proof

- Article 19 of the recast EU Equal Treatment Directive (No.2006/54), which relates to 'the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation'
- Article 10 of the EU Equal Treatment Framework Directive (No.2000/78), which sets out a general framework for eliminating employment or occupational inequalities based on age, disability, religion or belief, and sexual orientation
- Article 8 the EU Race Equality Directive (No.2000/43), which implements the principle of equal treatment between persons irrespective of racial or ethnic origin

It remains for member states to take the measures to ensure that the burden of proof shifts in the way required

## Interaction between Member States' Autonomy & The Principle of Effectiveness

32. ... it is for the national court ... to assess, in accordance... whether Mr Kelly has established the facts from which it may be presumed that there has been direct or indirect discrimination.

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 ...

...

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

...

• *Kelly v National University of Ireland (University College, Dublin)*, (Case C-104/10) ECJ

## Establishing Facts from Which it May be Presumed that there has been Discrimination

- A possibility of discrimination?
- A “presumption” that there has been discrimination, and not a definite “conclusion” that such discrimination exists.
- It is thus sufficient for a reversal of the burden of proof that persons who consider themselves wronged establish facts which substantiate a prima facie case of discrimination.

*Belov v CHEZ Elektro Bulgaria AG C-394/11*

## Some examples:

- *Firma Feryn NV (C-54/07)* - a public statement that an employer would not employ immigrants.
- *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*
- *Asociația ACCEPT(C-81/12)*

## Gaining Access to Evidence

*Meister v Speech Design Carrier Systems GmbH.*

- art.19(1) of Directive 2006/54 must be interpreted as not entitling a worker ...to have access to information indicating whether the employer engaged another applicant at the end of the recruitment process
- 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.

## The Advocate General....

also referred to other facts, in that case, which the referring court might take into account including the fact that although the complainant satisfied the job description, the job was re-advertised without appointment, without even calling the complainant for interview

## The 2<sup>nd</sup> Stage

If a complainant establishes facts from which it may be presumed that there has been discrimination, it falls to employer to show that there has been no breach of the principle of equal treatment

## The Standard of Proof

Must the respondent prove that there has been no discrimination whatsoever either directly or indirectly?

## Methods available to the Employer?

- [show] by any legally permissible means, inter alia, that their recruitment policy is based on factors unrelated to any discrimination on grounds of sexual orientation.
- 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
- 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

*Asociatia Accept*

- The employer can do so by showing that the undertaking's actual recruitment practice does not correspond to those statements.

*Firma Feryn NV*

- A distinction must, however, be drawn between the employer's motivation and the reason for the treatment



## Indirect Discrimination

- First stage -the complainant establishes a prima facie case that there is a provision criterion or practice which exists and puts people of a protected characteristic at a particular disadvantage
- Second Stage - the employer must either disprove the PCP or the disadvantage or show justification

## Conclusion

- A 2 stage process
- It is for member states to
  - implement measures which give effect to the shift the burden of proof and
  - evaluate the evidence placed before them
- It is, perhaps, helpful if judges can show, in their judgment, that they have gone through the two-stage process and, therefore, correctly applied the burden of proof provisions