



Proving discrimination

*Shifting the burden of proof
How to establish a presumption of discrimination
by Partner Jacob Sand*

24 June 2021



Gorrißen Federspiel



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

1



Case Law

Shifting the burden of proof
Court of Justice of the European Union

2

DANFOSS

1989 C-109/88



Unequal pay within the same wage group for men and women.



Employer's system of pay is completely lacking in transparency.



Men is paid 6.85 % more than women based on wages paid to 157 workers between 1982 and 1986.

The Court's ruling:

'...the Equal Pay Directive must be interpreted as meaning that where an undertaking applies **a system of pay which is totally 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.'

3

CODIFICATION OF NON-DISCRIMINATION

Charter of Fundamental Rights of the European Union

Art 21(1) Non-discrimination

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation **shall be prohibited**.

Art 23(1) Equality between men and women

Equality between women and men Equality between women and men must be ensured **in all areas**, including employment, work and pay.

Directive 2006/54 of the European Parliament and of the Council

Article 19 Burden of proof

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.

Preamble 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**.

4

FERYN

2008 C-54/07

The Court's ruling:

'public statements by which an employer lets it be known that under its recruitment policy it will not recruit any employees of a certain ethnic or racial origin **are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory**'



'..looking to recruit fitters, **but that it could not employ 'immigrants'** because its customers were reluctant to give them access to their private residences.'

5

KELLY

2011 C-104/10

The Court's ruling:

'... on the burden of proof in cases of discrimination based on sex must be interpreted as meaning that **it does not entitle an applicant [...] to information** held by the course provider on the qualifications of the other applicants [...] in order that he may establish 'facts from which it may be presumed that there has been direct or indirect discrimination'...'

'Nevertheless, it cannot be ruled out that a refusal of disclosure by the defendant, in the context of establishing such facts, could **risk compromising the achievement of the objective pursued by that directive [...] in particular of its effectiveness.**'



Kelly was refused acceptance to a course at UCD in Dublin.



Kelly requested information related to candidates to prove discrimination based on sex.



Kelly's request for documents was refused.

6

MEISTER

2012 C-415/10

Ms Meister applied for a job as a software developer.

- She was not invited to a job interview, even though she met all requirements.
- She requested information for the person who was engaged.
- The employer refused to give access to the information.

The Court's ruling:

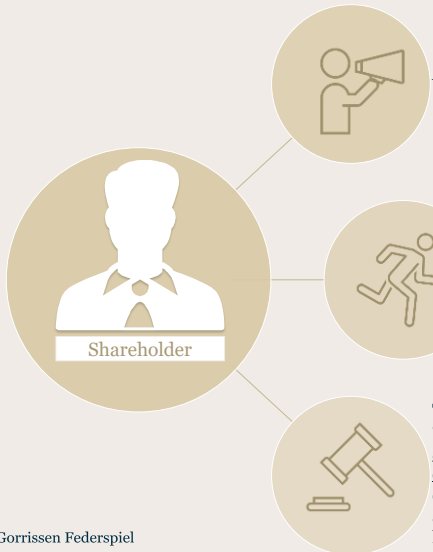
- The burden of proof **does not entitle** '...a worker [...] to get access to information'
- 'Nevertheless, it cannot be ruled out that a defendant's **refusal to grant any access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed** that there has been direct or indirect discrimination.'

Gorissen Federspiel

7

ASOCIATA ACCEPT (FC STEAUA)

2013 C-81/12



A shareholder with a leading role in a FC Steaua made a public statement.

E.g.: 'Rather than having a homosexual on the side, it would be better to have a junior player' and 'Not even if I had to close [FC Steaua] down would I accept a homosexual on the team'

The court's ruling:

'... facts such as those from which the dispute in the main proceedings arises **are capable of amounting to 'facts from which it may be presumed that there has been ... discrimination'** as regards a professional football club, **even though** the statements concerned come from a person presenting himself and being perceived in the media and among the general public as playing a leading role in that club without, however, necessarily having legal capacity to bind it or to represent it in recruitment matters.'

Gorissen Federspiel

8

8

RAMOS

2019 C-531/15

Health and safety risks



- Ms Ramos breastfed her child while working as a nurse in the accident and emergency unit at a hospital.
- She informed her employer that the tasks required by her expose her to health and safety risks.

Request for adjustments



- She requested for her working conditions to be adjusted and for preventative measures to be put in place.
- The hospital rejected the request stating that Ms Ramos did not pose any risk to breastfeeding her child.

Evidence



- The hospital presented a list of risk-free jobs, including a nurse, and further a report of a doctor confirming that Ms Ramos had been examined and declared that she was fit to carry out the tasks relating to her work.
- Ms Ramos presented a letter signed by her line manager stating that the work of a nurse in that unit posed physical, chemical, biological, and psychosocial risks to a breastfeeding worker and her child.

Gorissen Federspiel

9

9

RAMOS

2019 C-531/15

The Court's ruling

'the letter provided by Ms Otero Ramos constitutes evidence capable of showing that the risk assessment of her work did not include a specific assessment taking into account her individual situation and that [...] assessment was therefore not conducted in conformity with the requirements of Article 4(1) of Directive 92/85.

'It will **therefore be for the defendant to prove that the risk assessment provided for in Article 4 of Directive 92/85 was conducted in accordance with the requirements** of that provision, bearing in mind that documents such as a certificate from the employer according to which the work is classified as 'risk-free', in conjunction with a certificate according to which the worker in question is 'fit' to work, without any explanations capable of substantiating those conclusions, cannot alone provide an irrefutable presumption that such is the case. **Otherwise both that provision and the rules of evidence provided for in Article 19 of Directive 2006/54 would be deprived of all practical effect.'**

Gorissen Federspiel

10

10

SCHUCH-GHANNADAN

2019 C-274/18

Minoo Schuch-Ghannadan (MSG) was a researcher at Medizinische Universität Wien.

Alleged discrimination based on sex.

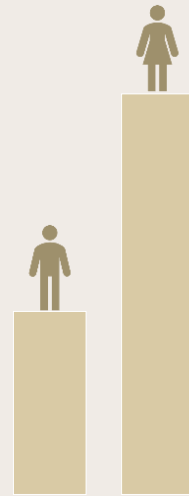
- Domestic law in Austria favored part time employees.

MSG presented statistics of the austrian labour market in general.

- More women are working part time compared to men.
- She was not in position of information related to the employment at Austrian universities.

The Court's ruling:

- To maintain **the effectiveness** of Art 19 in Directive 2006/54 it must be interpreted as making it possible for the employee to **establish a presumption based on statistics for the labour market in general in the Member State**. This is in the situation where **it cannot be expected** by the employee to present more specific statistics concerning the relevant group of employees, **if the employee does not have access to or have difficulty accessing these statistics or conditions**.



Part time employees in the member state.






Shifting the burden of proof

The direction of the Court of Justice of the European Union

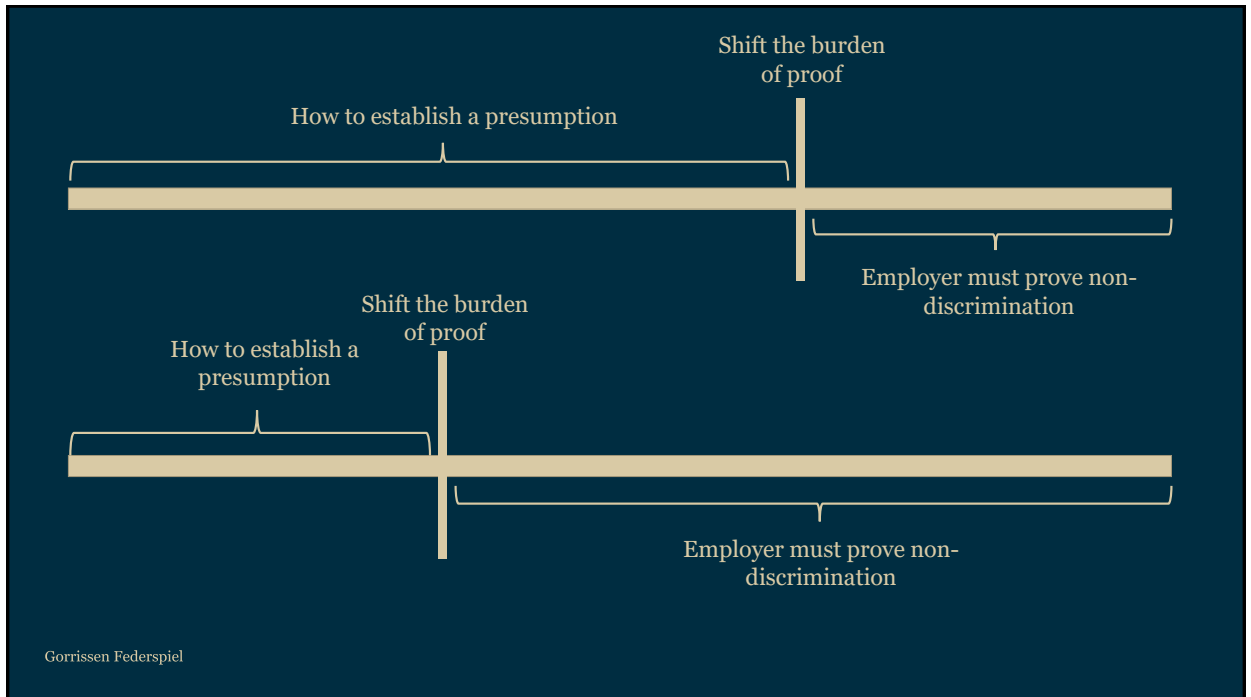
TAKEAWAYS

To ensure an effective enforcement of non-discrimination and equal treatment the burden of proof plays a significant role.

In some situations, it has become easier for the person who consider themselves wronged to establish a presumption:

-  If the information is held by the employer.
-  If the presumption can be established on statistics.
-  If a person connected to the employer has made a public statement.

13



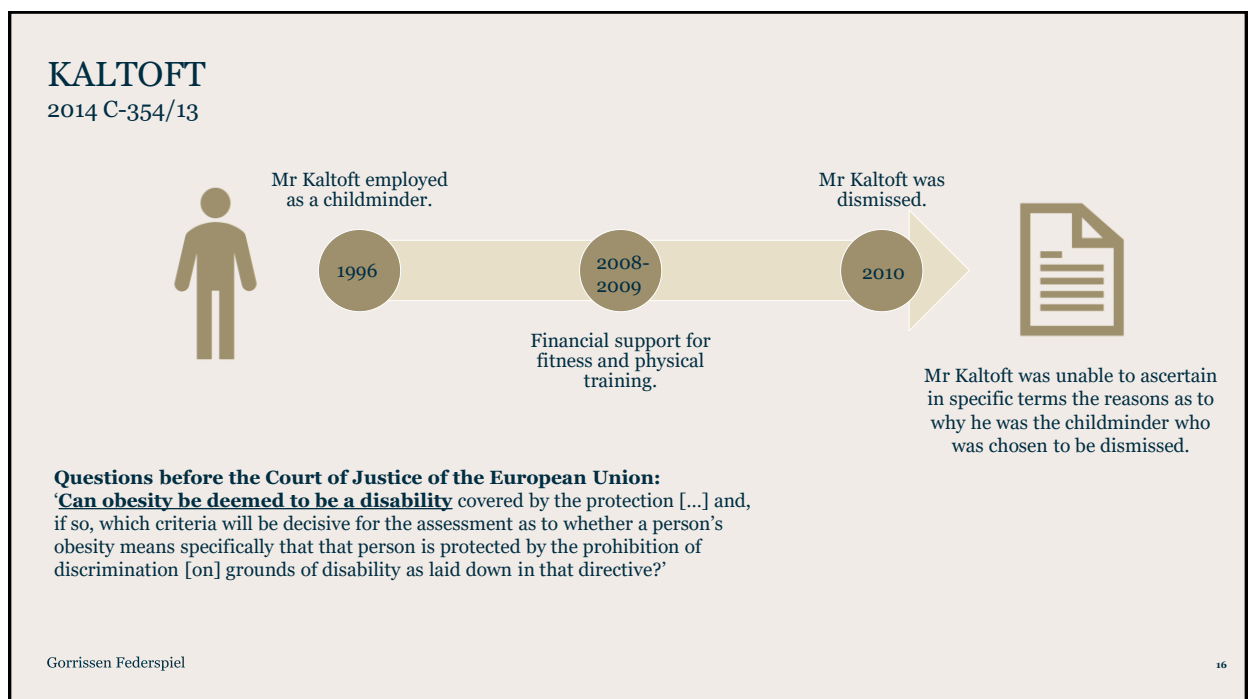
14



Kaltoft

2014 C-354/13

15



16

KALTOFT

2014 C-354/13

OPINION OF ADVOCATE GENERAL	JUDGMENT OF THE COURT
<p>'Obesity is usually measured with reference to body mass index (BMI)[...]. [...] Persons with a BMI of 30.00 to 34.99 are Obese class I, persons with a BMI of 35.00 to 39.99 are Obese class II, and persons with a BMI in excess of 40.00 are Obese class III, which is sometimes referred to as severe, extreme or morbid obesity.'</p> <p>'For these reasons I propose that question 4 is answered in the sense that only severe obesity can amount to a disability [...], and only when it fulfils all the criteria set out in the Court's case-law on the concept of disability. It is for the national Court to verify whether this is the case with respect to Mr Kaltoft.'</p>	<p>'Having regard to the foregoing considerations, the answer to the fourth question is that [...] the obesity of a worker constitutes a 'disability' within the meaning of that directive where it entails a limitation resulting in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers. It is for the national court to determine whether, in the main proceedings, those conditions are met.'</p>

17

Poll

Based on the available facts would Mr Kaltoft be considered disabled?

- a) Yes
- b) No

18

KALTOFT

The Danish Western High Court



Mr Kaltoft

Weight: 160 kilos.

BMI: >54. (Obese class III, severe, extreme or morbid obesity)



Court of Justice of the European Union

It is for the Danish Western High Court to determine whether the conditions for disability has been met.



Danish Western Highcourt

Mr Kaltoft's obesity does not constitute a disability.

- Contrary to the opinion of Advocate General.