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## PROVING DISCRIMINATION

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1

## 3 CUMULATIVE ELEMENTS

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- Unequal treatment against a person or a group of persons
- Based on one or many grounds prohibited by law
- In a domain specified by law

That is not otherwise authorized through an exception provided by the directive and national law

2

## THE BURDEN OF PROOF ARTICLE 10 DIRECTIVE 2000/78 - ARTICLE 8 DIRECTIVE 2000/43 AND ARTICLE 19 DIRECTIVE 2006/54

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- **2 steps:**
- 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.
- **Not applicable** to criminal procedure par. 3, proceedings in which it is for the court or competent body to investigate the facts of the case par. 5.

3

## HOW TO ESTABLISH « FACTS FROM WHICH IT MAY BE PRESUMED »

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- The Approach of EU Law:
  - Comparative analysis of results or situation
  - Based on elements of facts, many of which are in possession of Defendant
  - Unequal situation in fact of persons linked to a prohibited ground
  - Leads to a transfer of the burden of proof
  - Plaintiff **does not have to** introduce evidence that the prohibited ground is the basis of the decision
- Two issues :
  - Access to evidence of unfavourable situation or result in the possession of Defendant
  - Convince the Court without evidence of fault

4

# ACCESS TO EVIDENCE :THE IMPACT OF RULES OF PROCEDURE

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## A Common Law Model

- Directives have been framed on a procedural model coming from Common Law countries
- In Common Law Countries access to evidence is part of the procedure

### In Civil Law countries:

- The burden is on Plaintiff
- No procedural access to evidence in possession of Defendant

5

# ARGUING ACCESS TO EVIDENCE

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- Implementing an obligation to communicate information on the situation of co-workers
  - In possession of Defendant
  - In possession of third parties
- CJEU : Implementing impact of refusal to communicate on the part of Defendant (underlying right to access):
  - Access to information must be assured and consistent –Non- transparency justifies the transfer to the burden of proof : CJEU 17 October 1989, DANFOSS C-109/88
  - Refusal by Defendant to communicate elements relating to the case , must not alter access to rights, in such case the Court may shift the burden of proof (CJEU MEISTER C-415/10)

6

## FRENCH EXAMPLE COURT OF CASSATION SOCIAL CHAMBER 22 SEPTEMBER 2021 NO 19-26144

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- Request of Plaintiff to obtain access to evidence on the basis of article 145 of the Code of civil procedure to verify whether he was discriminated before engaging the proceedings
- Denied by the court.
- Court of cassation decided that Plaintiff had a legitimate reason to request access to evidence on the ground of a right to evidence provided by Articles 6 and 8 of ECHR, article 9 of the civil code and article 9 of the code of civil procedure.
- The employer cannot oppose violation of the right to privacy of co-workers to refuse to communicate nominative elements of comparison related to the salary and career evolution, if the evidence is indispensable to exercise one's right and proportionate to the exercise of this right.

7

## ELEMENTS OF THE PRESUMPTION DECLARATIONS CJEU, FERYN, C-54/07, 18 JULY 2008

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An employer declared on TV that he would not hire persons of North African origin to install garage doors in private persons homes.

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The Court decides that this declaration allows the court to presume that the employer has applied the policy he has publicly announced .

- Shift of the burden of proof to establish the contrary

8

## THE PRESUMPTION

### CJEU ACCEPT, C-91/12, 21 MARCH 2013

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- A person perceived as Manager of the Accept football Club declared that he would prefer to hire a member of the junior league than an homosexual.
- The Court decided that the homophobic declaration of a person closely related to the management of the club could lead to a presumption of discrimination

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## PRESUMPTION

### CJEU, CHEZ RB, C-83/14, 17 JULY 2015

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- Inaccessible electricity relay and measuring instruments in a Roma neighborhood
  - Justifies installation by arguing degradation and illegal connections in Roma neighborhoods
- Refusal of the electricity provider to provide comparative data.

10

## PRESUMPTION CJEU, CHEZ RB, C-83/14, 17 JULY 2015

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- Refusal by Defendant to communicate elements relating to the case , must not alter access to rights of Plaintiff
- In such case the Court may shift the burden of proof (CJEU MEISTER C-415/10)
- In this context, affirmations that can be deemed to be the result of prejudices and stereotypes are enough to shift the burden of proof
- The fact that plaintiff is not Roma, has no impact on the protection of the Directive, because she is subjected to unequal treatment by reason of a measure taken because the of origin of members of the neighborhood.

11

## OTHER ELEMENTS

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- Statistics and social Sciences Studies – Recital 15 Directive 2000\43 – France Cass. Civ. 9 november 2016, racial profiling case)
- Medical records (Harassment)
- Colleague statements
- Answers to questions of union representatives

12

## JUSTIFICATIONS PRECISE EVIDENCE REQUIRED OF THE EMPLOYER

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Legitimate and objective justifications

Motivation unrelated to discrimination

Proportionate and reasonable

- Economical justifications are irrelevant: CJEU, Kutz-Bauer, 20/03/2003, C- 187/00)
- Client's requests are irrelevant : CJEU, FERYN, CJEU Bougnaoui, 14/03/2016
- Onus is on Defendant : Absence of justification is lack of transparency
- (CHEZ RB)

13

## ECJ, 27 OCTOBER 1993, ENDERBY C-127/92

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- Difference of remuneration between two jobs of comparable value related to salary levels and classifications in a public health collective agreement:
  - Speech Therapist (female)
  - Pharmacists (male)
- Apparent discrimination on the basis of statistics of the presence of male and female in each job category

14

## ENDERBY – COLLECTIVE BARGAINING

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- Employer must show that objective reasons justify the difference in remuneration
- The fact that they are the result of collective bargaining is not a justification since collective agreements must respect the principle of equal treatment
- The fact that each bargaining process did not take into account discriminatory considerations is not a justification either

15

## ENDERBY – TENSIONS ON THE LABOUR MARKET

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- The insufficient number of professionals explaining their high value on the market cannot be presumed
- The employer has the burden to justify the reality of the pressure of the labour market and the court must appreciate the proportionality of its impact in each situation

16



## ECJ, 26 JUNE 2001, BRUNNHOFER C-381/99 §43

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- Definitions of comparable situations:

Test: taking into account of a number of factors such as the nature of the work, the training requirements and the working conditions, whether those persons can be considered to be in a comparable situation

Each component must be established

17

## BRUNNHOFER

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- Plaintiff complains that a male colleague hired 1 years after her at the same level benefits form a higher premium, negotiated at the time of his employment.
- She was dismissed after 4 years because of problems that had appeared before her male colleague was even hired
- The bank invokes the quality of plaintiff's work

18

## BRUNNHOFER

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- The Bank cannot invoke the quality of plaintiff's work or elements related to the performance of the employment contract to justify unequal pay fixed at the time of hire

19

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20