

APPLYING EU ANTI-DISCRIMINATION LAW

SEMINAR FOR MEMBERS OF THE JUDICIARY

Bucharest, 22-23 May 2023

Proving Discrimination

IOANNA DERVISOPOULOS, ADMINISTRATIVE LAW JUDGE



Funded under the 'Citizens, Equality, Rights and Values programme 2021-2027' of the European Commission

Burden of proof

- ▶ Definition: answer to the question which party has to prove facts disputed by the opponent.
- ▶ Principle: burden of proof lies with the plaintiff (the person making the claim or allegation)
- ▶ This is often problematic
 - ▶ Why?

Burden of proof

- ▶ Facts in the sphere of the discriminators
- ▶ In particular in cases of indirect discrimination
- ▶ Solution: Reversal of the burden of proof or shifting of the burden of proof

Origin

- ▶ ECJ decisions on equal pay
- ▶ Judgment of 17.10.1989, Danfoss – C-109/88, para. 14:
„The concern for effectiveness [...] must lead [...] to [Community law] implying changes in national rules on the burden of proof in those special cases where such changes are indispensable for the effective implementation of the principle of equality.“
- ▶ Judgment of 27.10.1993, Enderby - C-127/92, para. 18:
„If a prima facie case of discrimination exists, the employer must show that there are factual reasons for the identified difference in pay.“

Origin

- ▶ Arguments:
 - ▶ Principle of effectiveness (effet utile)
 - ▶ Principle of effective judicial protection

Codification

Burden of Proof Directive 97/80 (sex discrimination, now repealed)

- ▶ Artikel 4 Burden of proof

(1) Member States shall introduce into their national legal systems such measures as are necessary 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.**

(2) This Directive shall be without prejudice to the right of Member States to lay down rules of evidence which are more favorable to the plaintiff.

(3) Member States may refrain from applying paragraph 1 to proceedings in which the determination of the facts is a matter for the court or other competent authority.

Codification Secondary Legislation in force

- ▶ Art. 8 para. 1 Directive 2000/43
- ▶ Art. 10 para. 1 Directive 2000/78
- ▶ Art. 19 para. 1 Directive 2006/54
- ▶ Art. 9 para. 1 Directive 2004/113

Directive 2000/78

- ▶ Artikel 10 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.**

Paragraph 1 shall be without prejudice to the right of Member States to provide for a burden of proof regime more favourable to the claimant.

Paragraph 1 shall not apply to criminal proceedings.

[...]

Member States may refrain from applying paragraph 1 to proceedings in which it is for the court or competent authority to determine the facts.

Two-steps test

▶ **Step 1:**

The complaining party must prove facts from which discrimination may be presumed (presumption of discrimination) - prima facie case of discrimination

▶ **Step 2:**

The defendant then has the obligation to prove to the contrary that there has been no breach of the principle of equal treatment.

Step 1

- ▶ "Presumption" NOT "certain conclusion" (Advocate General Kokott, *Belov* - C-394/11, para. 88).
- ▶ All the circumstances of the dispute must be taken into account in an overall assessment of the facts (ECJ, 25 April 2013, *Accept* -C-81/12, para. 50).

Step 1

- ▶ ECJ, 10 July 2008, Feryn - C-54/07:
- ▶ Employer advertises an offer for an employee position.
- ▶ Shortly afterwards, he publicly declared that his company wanted to employ fitters in principle, but could not employ people of foreign origin, as the clients would have reservations about allowing them access to their private homes for the duration of the work.

Step 1

- ▶ Judgement Feryn:
- ▶ Para. 31: „Such facts, which are likely to give rise to a presumption of a discriminatory recruitment policy, may include statements by which an employer publicly announces that it will not employ workers of a particular ethnic origin or race as part of its recruitment policy.”

Step 1

- ▶ ECJ, 25 April 2013, *Accept* - C-81/12
- ▶ Para. 49: „In order to establish facts from which it may be presumed that discrimination has occurred, it is not necessary that the author of statements about the recruitment policy of a particular institution should necessarily have the legal authority to directly influence that policy or to bind or represent that institution in recruitment.”
- ▶ Para. 51: „In that regard, it should be noted that the perception of the public or of the circles concerned may constitute relevant evidence for the overall assessment of the statements at issue in the main proceedings.”

Step 1

- ▶ ECJ, 16 July 2015, *CHEZ* - C-83/14
- ▶ In the context of proving the facts from which discrimination may be presumed, it is necessary to ensure that a refusal to provide information by the defendant does not undermine the attainment of the objectives pursued by Directive 2000/43.
- ▶ Practices based on ethnic stereotypes or prejudices.

Step 2

- ▶ ECJ, 25 April 2013, *Accept* - C-81/12
- ▶ In that context, the defendants may contest before the competent national bodies the existence of such an infringement by demonstrating, in particular, by any means provided for by law, that their recruitment policy is based on factors unrelated to discrimination on grounds of sexual orientation.
- ▶ Overall assessment
- ▶ Rebuttal with bundle of consistent indications: e.g. clear distancing from the public statements, existence of explicit provisions in the area of recruitment policy

Step 2

- ▶ Judgment *CHEZ*:
- ▶ "[...] it was incumbent on CHEZ RB, as the defendant, to contest the existence of such a breach of the principle of equal treatment by demonstrating that the introduction of the practice at issue and its maintenance were in no way based on the fact that the neighbourhoods in question were predominantly inhabited by Bulgarian nationals of Roma origin, but were based exclusively on objective factors unrelated to discrimination on grounds of racial or ethnic origin."

Statistics and situation tests

- ▶ Statistics regularly used in the assessment of indirect discrimination (part-time employment)
- ▶ Mentioned in the recitals, e.g. EC 15 of Directive 2000/43
- ▶ ECJ, 03.10.2019, Shukh-Ghannadan -C-274/18, para 51ff: general statistical data sufficient if data specifically on relevant group of workers is difficult to access or not available at all
- ▶ Situation tests, e.g. in application procedures
- ▶ But see ECJ, 28.07.2016, Kratzer -C-423/15

Access to evidence

- ▶ ECJ, 21 July 2011, Kelly -C-104/10:
- ▶ Directive 97/80, Directive 76/207
- ▶ No claim to information in the possession of the organiser of this training on the qualifications of the other applicants
- ▶ However, it cannot be ruled out that a refusal by a defendant to provide information in the context of proving such facts may undermine the attainment of the objective pursued by that directive and thus, in particular, deprive Article 4(1) thereof of its effectiveness in practice.
- ▶ Provisions of Union law on confidentiality

Access to evidence

- ▶ ECJ, 19 April 2012, Meister -C-415/10
- ▶ Directive 2000/43
- ▶ No right of the applicant to know whether the employer has hired another applicant at the end of the recruitment process.
- ▶ A defendant's refusal of any access to information may be a factor to be taken into account in proving facts from which it may be presumed that there has been direct or indirect discrimination. That is a matter for the referring court to determine.
- ▶ Tensions with data protection

Thank you very much for your attention!