

PROVING DISCRIMINATION

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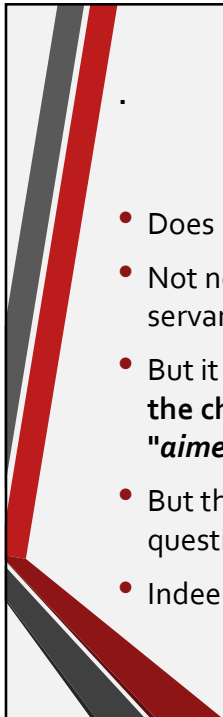
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Is the allocation of the burden of proof a 'procedural technique'?

- Even if this were the case, it would have to be addressed by looking at EU law.
- ...which does not intervene in procedural rules, but demands **REMEDIES** (as a **whole**) that are effective, proportionate, and dissuasive; these include jurisdictional instruments.
- A proper distribution of the burden of proof certainly belongs in the realm of **REMEDIES**
- See Art. 17, Directive 2006/54; Art. 7 Directive 2000/43, Art. 9 Directive 2000/78; Art. 8 Directive 2004/113; Art. 14 Directive 2023/970
- "*Member States shall ensure that judicial procedures for the **enforcement of obligations under this Directive** are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, **even after the relationship in which the discrimination is alleged to have occurred has ended***" Directive 2023/970 adds "**EASILY ACCESSIBLE PROCEDURES**".

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- Does EU law therefore require a 'special process'?
- Not necessarily (e.g. in Italy the non-privatised civil servant does not have a special procedure).
- But it certainly requires a judicial procedure "*aimed at...*"; **the choice on the distribution of the burden of proof is "*aimed at...*"**
- But that is not all. The question of evidence is **not a** question of procedural technique, but of **substantive law**
- Indeed

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Equality needs no justification, only inequality must provide a reason
(Isahia Berlin)

- The provision, in matters of discrimination, of a test regime **different** from the ordinary one is linked to the **centrality of the principle of equality**, which is a general principle of Union law.
- If equality is the rule, what needs to be explained, proved, justified **is the difference**.

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- **A confirmation in Italian law:**

the regime of proof **does not depend on the rite**. See *Cass. 5 June 2013 no. 14206*; *Cass. 26.2.2021 no. 5476*.

- **A confirmation in EU law**

"The intention of effectiveness that thus underlies the directive must lead to its interpretation as involving adjustments to national rules on the burden of proof in specific situations where such adjustments are **indispensable for the effective implementation of the principle of equality**." (CJEU, *Danfoss*, C-109/88, Judgment of 17.10.1989, para. 14)

"...Workers...would have no means of enforcing the principle of equal pay before the national court if the provision of elements making it possible to presume discrimination did not have the consequence of imposing on the employer the burden of proving that the wage disparity is not in fact discriminatory." (CJEU, *Enderby*, C-127/92, Judgment of 27.10.1993, para. 18)

- **Without a different burden regime, no equality possible**

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The principles of the directives

*"Member States must ensure that the burden of proving that there has been no discrimination lies with the respondent where the person who claims to have been harmed by the breach of the principle of equal treatment has produced **facts from which it may be presumed** that there has been direct or indirect discrimination"*

- Thus Art. 19 Directive 2006/54
- Thus Art. 8 Directive 2000/43, Art. 10 Directive 2000/78, Art. 9 Directive 2004/113 (specifying that the rule **also applies to actions brought by bodies and associations within the meaning of the directive**).

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Definitions and Questions - 1

- Presumption is the logical mechanism by which known facts are traced back to the unknown fact. But what is the 'unknown fact' to be ascertained by presumptions?
- **Not** disadvantageous treatment, **not** membership of the protected group: proof of these remains with the plaintiff under the ordinary rules (Cass.3361/2023)
- **The connection between the two (i.e. that the disadvantage occurred 'because of' the membership) is the subject of the presumptive test.**
- Once "the facts from which..." are stated, the burden shifts to the defendant.
- (NB: sometimes even proof of disadvantage is not easy - see CJEU case *Minoo Schuch-Ghannadan* 3.10.19 C-274/18, henceforth *Minoo*)

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Definition and questions - 2

- The point at which the burden shifts is left to national laws, which may enhance statistical evidence (CJEU *Minoo* para. 46; *Kelly* p. 31)
- It is an **asymmetrical burden: the employer bears the full burden**, i.e. he must show that the choice '*would have been made with the same parameters in respect of any worker without the risk factor, who would have been in the same position*' (Cass. 1/2020).
- It is not necessary that the "*facts on the basis of which it may be presumed...*" exhaust every possible meaning and are incompatible with a different conclusion: it is sufficient that the connection is the most plausible according to rules of common experience. There can be a "*margin of uncertainty*" (Cass. 1/2020); an "*appearance of discrimination*" is sufficient (CJEU *Minoo*, para. 51)
- The use of the plural ("*facts*") does not require that the "*facts*" be more than one (but Court of Cassation 14206/2013 considers it necessary, referring to the Equal Opportunities Code)

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Definition and Questions - 3

- Are "statements" an element of proof ? **YES** (CJEU *Chez* p. 80 et seq.) the "social stigma" manifested towards the protected group may contribute to proving the link.
- Is the 'falsity' of the stated reason an element of proof? **YES**, see the case of the reason for dismissal
- Is statistical data an element to build the presumption? Certainly **YES**, even if the directives do not cite it (CJEU *Minoo*, p. 46); the Italian legal system cites it far too much (see e.g. Art. 28, paragraph 4, Legislative Decree 150/2011: "...factual elements, also inferred from statistical data...")
- **But how significant is the statistic?**

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Statistical data - 1

- **Supreme Court of Cassation 5.6.2013 no. 14206 = "overestimation" of the statistical data:** *"the reference to the statistical data is significant of the seriousness that must characterise the elements on which to base the probabilistic reasoning (a statistical proof, in fact, even if not characterised by a scientific rigour cui resisti non potest cannot but be characterised, for the purposes of the global controllability of the results, by a clear explanation of the methods of detection, by the objective and quantitative measurement of the phenomena, by clear ways of presenting the information).*

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Statistical data - 2

Supreme Court of Cassation 7.3.2022 no. 7415 = devaluation of statistical data 'it is not envisaged that the data can become an independent source of evidence' ;

Or Cass. 3.2.23 no. 3361: annulment of judgment because it had not considered a figure of 1 to 200.

Or Trib. Rome decr. 23.3.2022 ITA/AIRWAYS: overall pregnancy rate and percentage of pregnant women among recruits

Or Trib.Milano 12.6.2023: non-renewal of fixed-term contracts, 1 in 3

• So? One variable effect, but three certainties:

1) Avoid the 'umbrella paradox'. correlation does not imply CAUSALITY; it can be CASUAL correlation (see graph below).

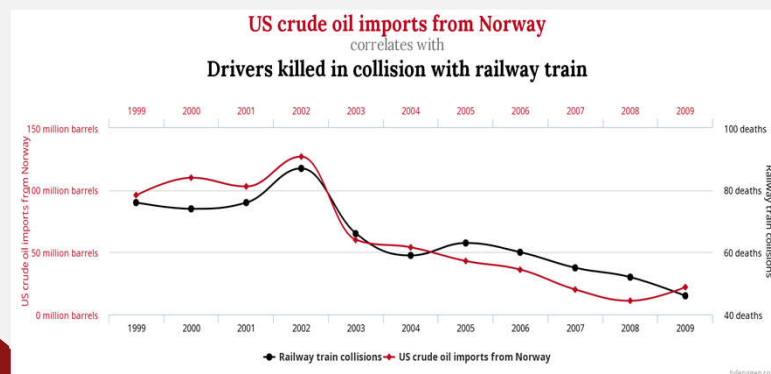
"it is necessary that the statistical data do not reflect purely fortuitous or cyclical phenomena and that, in general, they appear significant" (CJEU 3.10.2019 C-274/18)

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Correlation, causation, causality

- ''Oil imports from Norway and the trend of car-train collisions''



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Statistical data - 3

This does not mean that we have to find a **causal correlation**: it is an 'objective' correlation (the percentage of women in part-time jobs is higher, but it does not mean that being a woman is the 'cause' of the disadvantageous treatment); it **can therefore be something less than causal**: however, the correlation does not have to be '*fortuitous or conjunctural*'

2) What counts is the difference.

The percentage of members of the protected group who remain disadvantaged may also be small, what is relevant is the DIFFERENCE with the percentage of members of the unprotected group (again CJEU *Minoo* point 47).

- E.g. the case of long-stay requirements in relation to the nationality factor.

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Statistical data - 4

3) What if the data are not there or are difficult to find?

The burden of providing them in order to show "the appearance of discrimination" is "undermined", because if "impossible proof were required, the useful effect of the directive would be undermined (CJEU *Minoo* paragraph 57)

"Article 19 Directive 2006/54 is to be interpreted as NOT requiring a party who is alleged to be injured...to produce, in order to establish an appearance of discrimination, precise statistics or facts relating to the workers concerned by the national legislation in question if that party does not have access, or has only limited access, to those statistics or facts" (*Minoo* device)

In Italian law, this has been translated as the principle of 'closeness of evidence'.

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The proximity of the test

"This principle stems from the consideration that one party may often encounter difficulties, often insuperable, in meeting its burden of proof, which is therefore, in concrete terms, apportioned taking into account the possibility for one or the other party to prove facts and circumstances falling within their respective spheres of action and responds to a purpose of facilitating and rendering the trial effective and efficient, by making up for the evidentiary deficiency by means of circumstantial and presumptive criteria, which the weaker party in the relationship may use against the party close to the source of evidence and in a strategically privileged position, with a view to restoring the balance of positions between the parties to the dispute, in order to ensure a fair trial on an equal footing between the litigants, in accordance with Art. 111 Const. and Art. 47 Nice Charter (= right to an effective remedy and to an impartial judge). [Cass. 26.2.2021 no. 5476](#)

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Note: the anomaly of the Italian legal system

For all discrimination factors, the transposition of the directives is correct and is contained in Art. 28 dlgs 150(2011 ("*facts ..from which it may be presumed...*")

For gender discrimination in employment only (Art. 40 of the Equal Opportunities Code), the formula is different: "*elements of fact, ...capable of establishing, **in precise and concordant terms, the presumption...***" of discrimination.

But when it transposes Directive 2023/970, it will have to apply the general wording of the directives on wages.

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Two new issues: (1) discrimination by 'failure to inform'

- Art. 18(2) Directive 2023/970

Where an employer has failed to implement the obligations regarding pay transparency set out in Articles 5, 6, 7, 9, 10 Member States shall ensure that it is for the employer to prove, in administrative and judicial proceedings concerning alleged direct or indirect pay discrimination, that there has been no discrimination. The plaintiff shall benefit from any residual doubt".

- Art. 5 = information to candidate before recruitment
- Art. 6 = information to all employees on criteria for determining remuneration and economic progression
- Art. 7 = information to workers (via trade unions or equality bodies) on average wage levels
- Art. 9 = information on the pay gap to trade unions, inspectorate, equality bodies.
- Art. 10 = Obligation of joint evaluation with trade unions
- **So reversal can occur in many cases**

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- It is much more than that already stated in Meister C-415/10, 19.4.2012 and Kelly cit.
- This is different from the ordinary 'reversal' of the burden of proof. It is an **ex lege assimilation of silence** to '*fact capable of giving rise to a presumption*'.
- Effects in Italian law ? The report on the personnel situation pursuant to Art. 46 PCO and the certification of equality pursuant to Art. 46bis PCO
- Para. 2 '*does not apply if the employer proves that the violation was manifestly **unintentional and minor***'.
- But isn't court action based on failure to provide information alone too risky? See Art. 22 of the Directive: the court must be able to assess whether, in the case of "reasonable grounds" for bringing the action, the plaintiff should be exempted from the other party's costs.

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2. Discrimination due to lack of reasonable accommodation for persons with disabilities.

The absence of reasonable accommodation constitutes discrimination (Directive 2003/78 Art. 5, UN Convention on the Rights of Persons with Disabilities Art. 2)

The principles of the **Conejero** judgment **4.7.2013 C-312/2011** and **Court of Cassation 31.3.2023 no. 9095**: the provision of an equal maximum period of sick leave constitutes indirect discrimination on grounds of disability and can only be allowed according to the criteria laid down for 'justification causes'

Therefore, the proof of the cause of justification lies with the defendant

But how does the mitigation of the burden of proof operate for the plaintiff?

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- Proof of the condition of disability is full evidence for the plaintiff (but the notion of disability is that of the directives, it does not require formal certification).
- The proof of disadvantage *ditto*.
- On the other hand, proof of the employer's 'knowledge of the disability' is not necessary (so **Supreme Court of Cassation 31.3.2023 no. 9095**) because the prohibitions of discrimination operate objectively.
- But the same principle also applies if the plaintiff challenges the lack of reasonable accommodation, invoking **KH Danmark 11.4.2013 C-335/11**. ?
- Can a reasonable accommodation be requested from an employer who has no knowledge of the disability?
- Open questions.

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