



PROVING DISCRIMINAT ION

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THE CONTEXT

- Discrimination as a consistent challenge for the EU
- Special Eurobarometer Report, April-May 2023, *Discrimination in the European Union*
- More than **half of respondents** say there is widespread discrimination in their country on the basis of being Roma (65%), of skin colour (61%), of ethnic origin (60%), of gender identity (being transgender, 57%) or sexual orientation (54%).
- **Over one in five (21%) respondents** say they have personally felt discriminated against or experienced harassment in the past 12 months. The most mentioned forms of discrimination or harassment were based on age, gender, “political opinions”, “socio-economic situation” and “general physical appearance”.
- Public spaces and work are the primary locations where discrimination or harassment happens.

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THE NATURE OF DISCRIMINATION

- How to prove something invisible....



Galway, 1 August 2022

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THE LIMITS OF CIVIL LITIGATION

- The **general rule** in meeting the burden of proof in civil proceedings within member states is that a plaintiff/complainant must prove their case
- Applying that system, in order to establish liability a plaintiff/claimant must provide evidence to prove the nexus between unfavourable treatment and the protected characteristic (the '**why**' in the equation)
- Impossible task where that knowledge is peculiar to the perpetrator(s) of that act, if in fact the discrimination was a conscious rather than an unconscious act
- Rules of evidence and burdens of proof inform the effectiveness of mechanisms of rights protection

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PROVING DISCRIMINATION

- *Glasgow City Council v Zafar* [1998] ICR 120, per Lord Browne-Wilkinson;
- “Claims brought under [legislation prohibiting sex and race discrimination] present special problems of proof for complainants since those who discriminate on the grounds of race or gender do not in general advertise their prejudices: indeed they may not even be aware of them.”

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PROVING DISCRIMINATION

- The specific challenge of unconscious prejudice
- *Portroe Stevedores v Nevins* [2005] ELR 282
- The Irish Labour Court, held that, denials of discriminatory motive, in the absence of independent corroboration, had to be approached with caution since discrimination was “usually covert and often rooted in the subconscious of the discriminator”.
- See also *Chief Constable of the West Yorkshire Police v Khan* [2001] UKHL 48 (UK House of Lords)

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CONTEXT AND PRINCIPLE OF EFFECTIVE PROTECTION

► Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern*

- The principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and which has also been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union.
- Under the principle of cooperation laid down in Article 10 EC, it is for the Member States to ensure judicial protection of an individual's rights under Community law. In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law... Thus, while it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection. It is for the Member States to establish a system of legal remedies and procedures which ensure respect for that right.

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CONTEXT AND PRINCIPLE OF EFFECTIVE PROTECTION

► Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* (cont.)

- In that regard, the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).
- Moreover, it is for the national courts to interpret the procedural rules governing actions brought before them, **in such a way as to enable those rules, wherever possible, to be implemented in such a manner as to contribute to the attainment of the objective of ensuring effective judicial protection of an individual's rights under Community law.**

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EFFECTIVENESS AND THE RIGHT TO AN EFFECTIVE REMEDY

► Charter of Fundamental Rights

- **Article 47 (1):** *Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*
- **Article 51 (1):** *The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law*

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THE NEED FOR A SHIFTING BURDEN

- Origins of the shifting burden
- The rationale for procedural rules allowing for effective remedy in equality claims
- The CJEU applied a shifted burden with specific reference to the principle of effectiveness in;
- C-109/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] ECR 3199
- C-127/92, *Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health* [1993] ECR I-5535

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THE NEED FOR A SHIFTING BURDEN

- Origins of the shifting burden
- burden of proof was shifted to the employer to show that the pay differential between men and women was objectively justified in circumstances where:
 - (a) female workers were paid less, on average, than men, and the system of pay that led to this result was completely lacking in transparency (*Danfoss*);
 - (b) statistics showed that a collective bargaining system had resulted in a predominantly female group of speech therapists being paid less than predominantly male groups of pharmacists and clinical psychologists (*Enderby*).

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THE NEED FOR A SHIFTING BURDEN

- *Danfoss* paras 13 and 14;
- *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.*
- *Finally, it should be noted that under Article 6 of the Equal Pay Directive Member States must, in accordance with their national circumstances and legal systems, **take the measures necessary to ensure that the principle of equal pay is applied and that effective means are available to ensure that it is observed.** The concern for effectiveness which thus underlies the directive means that it must be interpreted as implying adjustments*

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THE NEED FOR A SHIFTING BURDEN

► *Enderby*, para 18:

► *Where there is a prima facie case of discrimination, it is for the employer to show that there are objective reasons for the difference in pay. Workers would be unable to enforce the principle of equal pay before national courts if evidence of a prima facie case of discrimination did not shift to the employer the onus of showing that the pay differential is not in fact discriminatory (see, by analogy, the judgment in Danfoss, cited above, at paragraph 13).*

► enunciation of the principle that where a *prima facie* case of discrimination is established the burden of proving the absence of discrimination shifts to the employer.

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CODIFICATION OF ECJ LAW AND CURRENT LEGAL FRAMEWORK

► Article 8 (1) of Directive 2000/43/EC; Article 10 (1) of Directive 2000/78/EC and Article 19(1) Recast Directive 2002/54

► *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 burden of proof and its application in domestic law can be fortified by reference to ancillary principles of EU law

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A SHIFTING BURDEN

► Two-stage test:

1. A complainant must establish facts from which it can be presumed that there has been direct or indirect discrimination, i.e. establish a *prima facie* case of discrimination
2. If a court deems that a *prima facie* case of discrimination has been established, a defendant attempts to to rebut the presumption by proving that discrimination has not occurred.

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PRIMA FACIE CASE

- To establish a *prima facie* case of discrimination, complainants must adduce facts that are sufficient to raise an inference or presumption of discrimination.
- *Mitchell v Southern Health Board* [2001] E.L.R. 201 - decision of the Labour Court of Ireland
- “The first requirement is that the claimant must establish facts from which it may be presumed that the principle of equal treatment has not been applied to them. This indicates that a claimant must prove, on the balance of probabilities, the primary facts on which they rely in seeking to raise a presumption of unlawful discrimination.
- It is only if those primary facts are established to the satisfaction of the Court, and they are regarded by the Court as being of sufficient significance to raise a presumption of discrimination, that the onus shifts to the respondent to prove that there is no infringement of the principle of equal treatment.”

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PRIMA FACIE CASE

► Mitchell - Three stage test

1. The complainant must prove the primary facts upon which they rely in alleging discrimination,
2. The Court must evaluate those facts, if proved, and satisfy itself that they are of sufficient significance in the context of the case as a whole to raise a presumption of discrimination
3. If the complainant fails at stage 1 or 2 they cannot succeed. If the complainant succeeds at stages 1 and 2 the presumption of discrimination comes into force and the onus shifts to the respondent to prove, on the balance of probabilities, that there is no discrimination.

See also *Wong v Igen Ltd* [2005] EWCA Civ 142 - Court of Appeal of England and Wales

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BURDEN OF PROOF AND CJEU CASE LAW

► The Standard of Proof

- “*Presumption*” is 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).

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BURDEN OF PROOF AND CJEU CASE LAW

- *Brunnhofer* (C-381/99)
- *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn* (C-54/07)
- *Kelly v National University of Ireland (University College, Dublin)* (C-104/10)



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WHAT EVIDENCE IS REQUIRED TO SHIFT THE BURDEN

- Will of course depend on the facts of the case
- Discriminatory comments - *Firma Feryna*, *CHEZ* and *ACCEPT* cases
- *Brunnhofer* - once “comparable” to a man and paid less it was established - sufficient to shift the burden of proof
- *Danfoss* - a lack of transparency in a pay system, where there was evidence that average wages differed as between men and women, was sufficient to shift the burden of proof.

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WHAT EVIDENCE IS REQUIRED TO SHIFT THE BURDEN

- ▶ Cumulative effect of the evidence
- ▶ *Sheehy Skeffington v National University of Ireland* DEC-E2014-078
- ▶ “While none of these findings would be determinative on their own, cumulatively I am satisfied that the complainant has established a *prima facie* case of discrimination.”



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WHAT EVIDENCE IS REQUIRED TO SHIFT THE BURDEN

- ▶ *Enderby* - where two professions within one organisation were divided along gender lines, and the “male” profession is paid better than the “female” profession.
- ▶ Evidence of nexus between less favourable treatment and protected characteristic - Court of Appeal of England and Wales - *Madarassy v Nomura International plc* [2007] EWCA Civ 33
- ▶ What is the correct approach - subjective or objective assessment of facts?

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REBUTTING THE PRESUMPTION

► Adduce evidence or undermine prima facie evidence in the following respects;

► Direct discrimination

- the individual was not unfavourably treated
- No protected characteristic/no knowledge
- No connection between conduct and protected characteristic

► Indirect discrimination

- The provision or measure did not impose any particular disadvantage on members of the protected group (in indirect discrimination).
- Complaint may be defeated by legitimate justification

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INFERENCES, DISCLOSURE AND ACCESS TO INFORMATION

- Based on principle of effectiveness and the inequality of arms
- Relationship between disclosure of information and an inference of discrimination
- *Kelly* - while no obligation to disclose documents the Court found that a failure to do so may result in an inference of discrimination/shifting of burden of proof
- *Mesiter* - again, no obligation to disclose but failure to disclose may lead to an inference

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DISCLOSURE AND DOCUMENTARY EVIDENCE

- ▶ Deference for the autonomy of member states to create and implement their own procedures in obtaining evidence
- ▶ UK - questionnaire pre 2013
- ▶ Ireland - section 21(2)(b) Equal Status Act
- ▶ S.I. No. 321/1999 - Employment Equality Act, 1998 (Section 76 - Right To Information) Regulations, 1999



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DISCLOSURE AND ACCESS TO INFORMATION

- ▶ Statistics - useful in the assessment of indirect discrimination and referred to in the recitals, e.g. EC 15 of Directive 2000/43 but legal aid and limited means of procuring
- ▶ **Vulnerabilities** in the limited domestic means
- ▶ Question **effectiveness**
- ▶ **Equivalence** where other domestic remedies have information obtaining procedures built in
- ▶ Reality where complainants are **vulnerable** or **not represented**
- ▶ Assisting dispute resolution mechanisms - **inquisitorial** forums and duty on decision makers

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DISCLOSURE AND ACCESS TO INFORMATION

- Creative use of avenues available
- Freedom of information
- Data protection
- Access to Information on the Environment Regulations
- Gender pay gap reporting
- Strategic co-operation and pooling of resources

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USEFUL RESOURCES

- Consolidation of legislation and relevant case law
- https://era-comm.eu/eu-anti-discrimination-law/wp-content/uploads/sites/22/2022/12/Diskri_DOKU_EN_12_22.pdf

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Questions?

Thank you

Question and comments welcomed

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