

## **The Challenge of Evidence in Implementing EU Discrimination Law in Civil Law Countries – The Example of France**

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Traditionally, discrimination has been pursued before the penal courts. The civil recourse resulting from the EU directives is new and its outcome remains uncertain.

We therefore face a paradox: legal actors have more control over the methodology to follow before the penal courts in terms of evidence, but they have to face the fact that the burden of proof is so stringent that most cases are dismissed. The penal recourse is, most of the time, ineffective and does not provide a mean to obtain day to day implementation of the principle of non discrimination.

The challenge is to make this new legal regime effective and operational in countries where its approach, in terms of methodology and evidence, does not correspond to usual processes of adjudication.

### **I- THE MECHANICS OF EVIDENCE IN DISCRIMINATION CASES**

#### **1. The Approach of EU Law**

In many countries such as France, discrimination law appears in national law in the early eighties with the transposition of the EU directives relating to equality of treatment in the work force between men and women.

This first legal framework followed a classical approach to liability, Plaintiff bearing an impossible burden of proof. It was based on evidence of fault on the part of the discriminating party and demonstration of the discriminatory basis of the attacked measure. The requirements imposed by national judges in this regard proved to be impossible to meet.

The European Court of Justice (ECJ) recognized that the interpretation of the legal regime by national courts jeopardized the right of action of victims. Henceforth, it progressively proposed solutions inspired by countries who had already experienced enforcement of the prohibition of discrimination, i.e. the United Kingdom, the United States and Canada. All of them have comparable judicial processes in civil matters as regards rules of evidence and the function of the judge in the trial process.

**The first step was the construction of a new approach** to the burden of proof of Plaintiff by the Court. Starting with the Jenkins<sup>1</sup> case in 1980, the ECJ will put in place a reasoning by way of presumptions, based on deductive reasoning and evidence of discrimination in fact. Plaintiff will have satisfied the burden of proof if adverse impact of the decision under attack is established. The Court no longer requires Plaintiff to establish the discriminatory intent of the Defendant or the discriminatory basis of the decision. All that is required is a demonstration in fact of the discriminatory impact of a decision, or what the Court calls indirect discrimination.

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<sup>1</sup> ECJ, March 27, 1980.

In 1993, with the Enderby case<sup>2</sup>, the Court adopts a larger criteria, that of apparent discrimination. Evidence not longer has to be linked to the effects of a specific decision. Evidence of a discriminating situation of fact is sufficient to comply with Plaintiff's burden of proof, even if the employer is not directly responsible for some of the factors intervening in the discriminating result. It is not the employer's involvement that is put into question before the court, but a situation of fact which the Defendant alone can correct.

In these cases, the entire reasoning is based on a comparison between situations in terms of equal pay for comparable work or equal treatment. The evidence of Plaintiff is no longer oriented towards the discriminatory basis of the decision but on establishing adverse impact on a group, identified according to one of the prohibited criteria of discrimination, in this case sex.

Once apparent discrimination is established, the burden of proof shifts on Defendant. The Court will no longer be satisfied with simple denial of discrimination. In the Bilka case<sup>3</sup>, the Court decided that Defendant must justify the legitimacy of the decision under attack or of the situation. To that end it must establish that it does not pursue discriminatory objectives, that it is necessary and is strictly proportionate to the legitimate objectives pursued by the employer.

**Secondly, what are the fact patterns that will establish the presumption of discrimination or "apparent discrimination".**

Plaintiff must bring evidence of elements of facts which, combined, lead to a conclusion that there appears to be unequal treatment. Evidence will be based on a comparison between the situation of Plaintiff's group and that of the others, in fact or in theory. It is, by definition, comparative and the elements of comparison are most of the time in possession of Defendant.

In the Danfoss case<sup>4</sup>, the analysis of the court is based on a statistical presentation of the remuneration of the workforce of Defendant, establishing a difference in remunerations between men and women. This evidence is supplemented by evidence of the opacity and lack of objective criteria in the human resources management practices of Defendant. The combination of these facts will lead the court to a conclusion of apparent discrimination.

In Enderby, the Court based its decision on evidence of the historical depreciation of women's professions and the comparable value of the work of speech therapists, a profession held in majority by women, with that of clinical psychologists and pharmacists, professions held in majority by men. It took in consideration expert evidence on the reliability of the statistics presented, the historical background of these professions and an evaluation of the comparability of skills involved.

In the Nimz case<sup>5</sup>, where men justified more years of service than women, the Court forced Defendant to justify its salary scale. It concluded that unless Defendant establishes

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<sup>2</sup> ECJ, October 27, 1993.

<sup>3</sup> ECJ, May 13, 1986.

<sup>4</sup> ECJ, October 17, 1989.

<sup>5</sup> ECJ, 1991, rec. I-297.

that experience has a direct impact on execution of the work, length of service is not a relevant criteria to differentiate remuneration. Evidence of the proportionality and legitimacy of a measure must be precise. Defendant has the burden of convincing the Court.

## **2. Implementing This Approach to Evidence in Civil Law Countries**

National courts will received the ECJ jurisprudence reluctantly. Difficulty in enforcing the transfer of the burden of proof will be such that the Commission will propose a draft directive on the burden of proof and that it will remain under negotiation for ten years<sup>6</sup>. This directive will only be adopted in 1997 and will have little time to foster evolutions before the adoption of directives 2000/43 and 2000/78.

The new directives build upon the ECJ's jurisprudential developments and propose a legal framework based on evidence of elements of facts leading to a presumption of apparent discrimination which in turn gives rise to a transfer of the burden of proof upon the Defendant.

This new legal regime generates two problems in civil law jurisdictions:

- First, difficulty to convince a judge to conclude to a presumption of apparent discrimination without looking for evidence of a fault on the part of Defendant
- Second, convincing the judge to the right of Plaintiff to have access to evidence in the hands of Defendant.

These two issues are interconnected. In case of reluctance on the part of the judge, his degree of expectations in terms of the required evidence before shifting the burden of proof will increase.

In common law legal systems, where this approach to evidence was developed, Plaintiff's access to evidence is a given principle and does not require specific arguing of the peculiarities resulting from the transposition of EU law. Court proceedings set the stage for a process dedicated to the gathering of evidence by the parties. Normal rules allow Plaintiff to request access to the documents and elements of facts necessary to establish his case, whether it be by way of discovery , motions to request documents or expert evidence. This "know-how" is part of the trade of judges and lawyers.

On the contrary, if we take the French example, this approach to civil litigation is totally foreign to judicial practice. Civil court proceedings, as opposed to criminal proceedings, are based on the premise that the trial is in the hands of the parties and that the burden of proof is Plaintiff's burden. Giving Plaintiff access to documents is seen as an intervention on his burden of evidence. Even when the law provides for a lesser burden, he has the obligation to satisfy it.

Thus, the issues of Plaintiff's access to evidence and of the approach of a the trial process by judicial actors is central to the enforceability of discrimination law in civil cases.

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<sup>6</sup> Directive 97/80 of December 15, 1997, see M.-T. Lanquetin, *Discrimination à raison du sexe*, Dr. Soc. 1998, 688.

In civil law countries, the judicial practice and tradition is to go before civil courts with the element of evidence readily available to the party, which explains why Plaintiffs often go to criminal court to obtain access to evidence.

Evidence in the hands of the Defendant is not readily accessible and requires a special request to the judge which is by definition exceptional. Obtaining an order to obtain communication of documents is conditional upon having already brought sufficient evidence before the Court and limited to completing Plaintiff's proof: normal rules prevents the of use of such a procedure to establish the facts of Plaintiff's case.

This conception of civil proceedings is so paramount that, despite case law supporting a right to have access to evidence in discrimination cases, the common victim will face the reluctance of the legal actors when constructing a legal strategy based on access to evidence. It is not in the legal culture of judicial actors, judges and lawyers, to use procedural means of access to evidence. The judge in civil matters is seen as not inquisitive and not taking part to the process leading to the introduction of evidence before the court.

This logic is pushed to such an extent that, in France, making copy of the documents of the employer is considered as theft, and stolen documents cannot be filed in the record. In civil matters, evidence is under the control of the parties and only legal evidence is admissible.

The judge rarely orders Defendant to produce evidence and there is no preliminary deposition or obligation to transmit evidence beyond elements alleged by the parties. Expertise is seen as an exceptional measure and the expert is mandated by the judge and selected on a predetermined list fixed by the Court of Appeal. The burden on the victim in civil matters is very difficult to uphold in reason of judicial practice, the traditional conception of the civil recourse and rules of civil procedure.

The enforcement of rules of evidence and their evolution is one of the real challenges facing enforcement of anti-discrimination rules in civil law countries. Judicial actors in civil cases do not perceive rules of evidence as a central aspect of the judicial process and lack experience in making a systematic use of them.

Therefore, making discrimination law operational in France does not only depend upon knowledge of substantive law, but requires the assertion of Plaintiff's right of access to evidence, as well as evolutions in terms of the evidentiary process.

## **II- The Construction of the Case**

### **1. Arguing the Right to Have Access to Evidence : the First Milestone**

The civil recourse in discrimination raises the problem of Plaintiff's access to evidence, which is, in light of legal definitions, comparative and in the hands of Defendant or third parties.

In this context, to facilitate enforcement is to make it operational and provoke evolutions as regards access to evidence in civil cases. Attaining such objectives is conditional upon

obtaining recognition of a principle of the Plaintiff's right to have access to evidence in discrimination cases. Otherwise, discrimination practices will continue to face low risks of sanction.

In France, discrimination law is seldom sanctioned in penal cases and remains ineffective in labour law until the mid-nineties when the Unions brought forward actions for discrimination against unions representatives.

These cases were the set for a large scale mobilisation using the approach to discrimination developed by the ECJ. Unions argued discrimination on the basis of the comparative situation of union members and other employees. The Social Chamber of the French High Court, the Cour de cassation, progressively accepted the comparative approach as a proper way to establish a presumption of direct discrimination.

As a consequence, the Court eventually recognized that unless Plaintiff had access to evidence held by the employer, his right of action would be ineffective<sup>7</sup>. The Court went further and decided that, in derogation of common practice, it was the duty of the judge to look for evidence and impose to Defendant to file the necessary documents in order to verify the allegation of unequal treatment of Plaintiff<sup>8</sup>.

This jurisprudence opens up a movement towards opening up of access to evidence in discrimination cases that could foster a theory of the right to access to evidence. But even today, despite this clear and constant position of the highest court in labour cases, this approach is so contrary to judicial practice that it is ignored and still meets the defiance of lawyers and judges.

Yet, this breakthrough is only a first step, because enforcing the right to access to evidence involves a redefinition of the various stages of the procedure and the education of lawyers and judges in this direction. Not only must this jurisprudence be publicised, but judicial practice must evolve. From a two stages process limited to drafting the proceedings and pleading the case, judicial practice must incorporate an intermediary stage aimed at providing access to evidence to the parties.

## **2. The Methodology for Constructing Evidence**

The objective is to bring the practice of lawyers and judges to evolve towards a methodology based on the construction of a theory of the case, based on three targets:

- Identifying the facts to be proven ,
- How to establish these facts
- Where to find the facts.

This second part proposes elements of method to approach the construction of a case in discrimination.

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<sup>7</sup> Cass. Soc. 9 April 1996, no. 1727 P, *RJS* 5/96 no. 550; CCass. Soc. 23 November 1999 no. 4290, *RJS* 5/00 no. 498,

<sup>8</sup> Cass. soc., 28 mars 2000, Fluchère, Dick et Syndicat CFDT c. SNCF, arrêt no 1027 P+B, Voir Lanquetin, Un tournant en matière de preuve des discriminations, *Dr.soc.* 2000, 589; Cass.crim. 14 juin 2000, CFDT Interco., arrêt no. 2792, 99-81.108

## **1. Evidence Accessible to Plaintiff**

Because of their lack of expertise, Plaintiffs are often unaware of the useful elements of proof they hold or can have access to. A first step consists in identifying with Plaintiffs the documents they have a right to obtain or can get access to. For example:

- Documents of Defendant employer accessible in application of labour law:
  - As an employee
  - Through the union or labour representation bodies
- Documents accessible in application of their right of access to information from public bodies
- Their own complete file
- Witness statements (co-workers – third parties intervening in the situation)
- Correspondence with labour inspectors or public bodies
- Statements of relatives (in cases of harassment for example)
- Medical certificates
- Documents relevant to context such as prior requests for public housing

This first step allows Plaintiff to get involved and document his or her file. It also allows counsel to identify a theory of the case and list documentation to be requested of Defendant or a third party. This preparation work can take the form of a narrative completed by research on the context, prepared by Plaintiff and completed by discussion with Counsel or consultants. This process will help Plaintiff's team to assess the potential of the case, to evaluate its force and weaknesses and to construct a strategy.

## **2. Evidence in Possession of Defendant or a Third Party**

Most of the elements of evidence which reflect the decisional process at the origin of the complaint are in the hands of Defendant: internal rules, human resources management files, public housing deliberations and files etc...

The victim and his counsel will have to recapitulate the history of the context and of Defendant's management in order to identify, in theory and practice, the process followed, the possible form and title of documents bearing the relevant information, the services responsible for the information, etc...

Further to this preparatory work counsel will have to choose the legal and procedural means to obtain access to the information. Most of the case's preparatory work will consist of the various stages of the search for evidence: Identifying what to prove, what documents to ask for, when to ask them, and how to argue a right of access to these information or documents?

When access to documents will be denied, the challenge will be to find another way to establish a fact or evaluate whether the theory of the case can support the failure to obtain access to the requested document or information.

### **3. Elements Contributing to the Presentation of the Case**

#### **a. Expertise**

Once Plaintiff has obtained access to documents, counsel will re-evaluate the theory of the case and identify the strength and weaknesses of the file. This analysis will allow for the identification of the required expertise and the pattern of facts which they can support as supplementary evidence.

The facts established by way of expertise can be of a technical nature, medical, scientific, or provide an analysis of the facts revealed by the documentary evidence, such as statistical evidence, accounting evidence offering comparative analysis of remuneration and calculation of deficits in career evolution, etc...

For example, when arguing reasonable accommodation to the benefit of a disabled employee, such an expertise could allow Plaintiff to bring evidence as to the reasonableness and extent of the investments required of the employer.

At this stage, it is paramount to identify what objective the expertise will pursue and what is expected, in order to participate to the elaboration of the expert's mandate, a crucial aspect of the process.

In civil law countries, where the judge defines the expert's mandate, Plaintiff's active implication may determine whether or not the conclusions of the expert will be relevant to Plaintiff's theory of the case.

#### **b. Witnesses**

In common law countries, examination of witnesses occupy an important part of the judicial process. Out of court examinations allow Plaintiff to evaluate the strength of Defendant's position before trial. They often offer an occasion to require Defendant to file documents relating of the alleged facts of the case.

In France, the judicial process does not entail out of court discoveries, except in exceptional circumstances. Moreover, third parties are often reluctant to testify and the parties' reliance on witnesses is only supplemental.

However, with the support of documentary evidence, interrogation of witnesses can fill a renewed purpose. It may be the occasion to evaluate the credibility of Defendant and obtain further information. In discrimination cases, where evidentiary difficulties are often linked to 'the law of silence'; hearing witnesses may also bring a tactical advantage and allow Plaintiff to confront Defendant's inaccuracies or bring the first elements of evidence necessary to obtain production of documents.

**c. Arguing the Failure of Defendant to Provide the Evidence Requested by Plaintiff**

In this period of transition, where Defendants are not used to produce their document in court to the benefit of Plaintiff's case, we observe that many Defendants chose not to comply with the courts' orders and fail to file the required documentation. This strategy is often complemented with an argument of Plaintiff's failure to comply with his or her burden of proof.

Since the court's order will have been rendered by a separate judge and this approach of the case will remain derogatory to usual practice, not only will the respective burden of the parties have to be argued in law at trial, but Defendant's failure to comply with such orders must become the subject for a legal argument on the impact of Defendant's attitude on Plaintiff's burden of proof.

In *IBM c. Buscail*, the Montpellier Court of appeal concluded in 2004 that Defendant could not argue the insufficiency of Plaintiff's evidence if he didn't communicate the documents ordered by the Court. The right to access document has for consequence that failure to comply transfers the burden of proof on Defendant.

Discrimination law is only starting its construction in civil law countries. Its efficiency depends upon the capacity of actors to tackle the legal framework, but also on their ability to go beyond traditional judicial practice in terms of civil procedure and access to evidence. This issue has often been overlooked but is crucial.

I hope this presentation has helped actors to understand that in matters of discrimination access of Plaintiff to evidence is the corner stone of enforceability.