



ALMA MATER STUDIORUM  
UNIVERSITÀ DI BOLOGNA

**Burden of proof in discrimination cases:  
reversal, shift, adaptation?**

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- 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



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**Tendencies in the Member States: legislation**



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- The legislation in the **United Kingdom** and **Portugal** does provide a shift in the burden of proof, but

- it requires the alleged victim to ‘prove’ facts, a wording that may be more stringent than the Directive allows



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- **In Portugal:**

- the provision on the burden of proof also requires the victim to point to ‘the worker or workers in regard to whom he or she believes to have been discriminated against’;
  - such a requirement is not in line with article 2(2)(a) of the Directive, which uses the words ‘would be treated’.



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- **In Italy:**

- the relevant provision is narrowly worded, and does not specify that it shall be for the respondent to prove that there has been no breach of the principle of equal treatment

- **In Austria:**

- the respondent only has to establish facts from which it may be presumed that there has been no discrimination; after such establishing of facts the burden of proof shifts back to the victim



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▪ In **France:**

- the shift in the burden of proof is so far only provided for private employment, not for public employment



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▪ In the **Czech Republic:**

- laws on the civil service, the armed forces and the security forces only provide for a shift in the burden of proof in cases of discrimination involving sex, nationality and race



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▪ In **Slovakia:**

- plaintiff must submit '*evidence*' capable of leading the court to reasonably assume that there has been a violation of the principle of equal treatment

✓ the Directive speaks only of the need to 'establish facts'.



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▪ In **Hungary:**

- complainant must 'prove' that he or she *possesses the protected characteristic*
- Mistaken assumption not covered?



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▪ In **Malta:**

- whomever makes a claim in court has to provide evidence in order to prove his or her right
- only a general principle of law



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- employee (who alleges discrimination) may request a **written statement** from the employer

- content: his/her versions of the facts and an explanation of any relevant procedure adopted to prevent discriminatory treatment
- can be used in Court
- if not presented, the Court may draw any inference that it considers just and equitable to draw, including an inference that the employer committed an unlawful act



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- In **Poland**:
  - certain acts of the employer are discriminatory ‘unless the employer can prove that the grounds for these actions were legitimate and objective’
- In **Latvia**:
  - employee shall ‘indicate conditions which may serve as a basis for his or her direct or indirect discrimination’,
  - the employer must prove that ‘the differential treatment is based on objective circumstances not related to the [gender] of the employee, or that belonging to a particular [gender] is an objective and substantiated precondition for the performance of the relevant work or the relevant employment’



8/04/2006 ERA - Trier      The burden of proof      13

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- There seems to be a degree of confusion here between *rules of evidence* and *substantive law*
- the provisions, whilst do not clearly state the sharing of the burden of proof, could also be regarded as an exception that is beyond what is allowed by the Directive, or as an attempt to transpose art. 4 (GOR)



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- No transposition in **Romania** and **Lithuania**



8/04/2006 ERA - Trier      The burden of proof      15

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## Proving discrimination



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## Characters

- Two-stage test
  1. Show (some) facts: worker
  2. Show disconnection btw conduct & ground: employer



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## Art. 4(1)

- “A difference of treatment ... shall not constitute discrimination ... where such a characteristic constitutes a genuine and determining occupational requirement
- provided that the objective is legitimate and the requirement is proportionate”.



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**And in case of indirect discrimination?**

- Emphasis on:
  - ✓ apparently neutral circumstances
  - ✓ effect (no intention)
  - ✓ the group (statistics)
  - ✓ justification



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**Art. 2(2)(b)(i)**

- Indirect discrimination shall be taken to occur...unless:
- “objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”



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**Tendencies in Member States: case law**



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Spain, Tribunal Constitucional, 13/2/2006

- para 3:

The employer needs to show *facts explaining the decision* that are *alien to a discriminatory reason*



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In practice the Court accepted *prima facie* discrimination because:

- Notorious position of social disadvantage, inequality and marginalisation of GLB people
- Troubled relationship between worker and superior because of the sexual orientation of the former
- Organisation and division of labour was prejudicial to the worker



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The employer :

- “Lo que para el Juez de instancia son indicios de discriminación constituyen, en realidad, simples conjeturas o meras suposiciones”
- ✓ Those presented as facts from which *prima facie* discrimination was inferred are in truth only unsubstantiated assumptions



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### The conceptual framework

- *Circumstantial evidence (prueba indiciaria)*: two-stage analysis

#### 1. Worker:

- indicio razonable, principio de prueba o prueba verosímil (*semiplena probatio*)



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#### 2. Employer:

- ✓ The conduct has “real causes absolutely alien to the claimed prejudice”



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### To sum up

- A subjective or an objective test?



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**Finally**

- The employee has shown facts which point to a relation between the dismissal and his sexual orientation
- The employer has not neutralised such 'beginning' of evidence
- Claim is upheld!



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**UK, Court of Appeal, February 2005**

- Two-stage test:
  1. Employee must prove facts from which the tribunal could conclude that the employer had committed an unlawful act of discrimination
  2. If such facts are shown, the employer needs to prove that it did not commit the unlawful act of discrimination



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**Guidelines**

- Employer's explanation must be ignored at stage 1
- Conduct must be the employer's
  - at stage 1, the employee must show that the alleged conduct was committed by the employer (mere possibility not enough, see *Webster v. Brunel University*)



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Sweden, Supreme Court, 28/03/2006

- Restaurant turned away a lesbian couple because the two women were kissing and hugging each other on the premises
- Burden of proof: the restaurant had not proved that there were *legitimate reasons that had nothing to do* with their sexual orientation



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▪ The rule:

- if the person who claims to have been discriminated 'shows circumstances that give reason to presume that he or she has been discriminated, the defendant has to prove that no discrimination has taken place'



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▪ The rule must be seen as a **rule of presumption**

- Which factual circumstances lead to the presumption of discrimination cannot be determined in the abstract, but must be decided on a case by case basis, according to the Supreme Court



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In this case the Supreme Case decided that the following facts would lead to a presumption of discrimination:

- The women were in the restaurant
- they hugged and kissed
- they were told to stop
- they were subsequently told to leave the restaurant, and finally
- the commonly known fact that people are normally not stopped from hugging and kissing in a restaurant nor are they told to leave because of such behaviour



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Thank you



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