

THE FIGHT AGAINST DISCRIMINATION IN PRACTICE

SHIFTING THE BURDEN OF PROOF AND
ACCESS TO EVIDENCE

JASON GALBRAITH-MARTEN



1 Pump Court,
Temple,
London EC4Y 7AA
jngm@cloisters.com

Burden of Proof

Introduction

1. The Burden of Proof is the obligation on a party to establish the facts in a case to the required standard in order to prove their case. In civil, as opposed to criminal, proceedings the general rule is that “he who asserts must prove” i.e. the legal burden rests with the party bringing the action.
2. However proving unlawful discrimination presents particular problems. Nowadays it is extremely unusual to find explicit evidence of unlawful discrimination. Few employers will be prepared to admit such discrimination even to themselves. As Lord Browne-Wilkinson put it in the UK case of Glasgow City Council v Zafar¹ “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.”
3. In some cases the discrimination will not be ill-intentioned but merely based on an assumption that a person “would not have fitted in.” Occasionally, there may even be a benign reason for less favourable treatment².
4. In the UK it was recognised some time ago that the outcome of a discrimination case would therefore depend on what inferences it was proper to draw from the primary facts found by the court or tribunal³. So, for example, a finding of less favourable treatment and a finding of a difference in race might point to the possibility of racial discrimination. In such circumstances the tribunal would look to the employer for an explanation. If no explanation was put forward or if the tribunal considered that the explanation was inadequate or unsatisfactory it would be legitimate for the tribunal to infer that the less favourable treatment was on racial grounds.
5. However, as the House of Lords held in Zafar, whilst it might be legitimate for the tribunal to infer that a person had been subjected to unlawful discrimination in such circumstances, it was not obliged to do so. In other words UK law did not *impose* a legal duty on the employer to prove that it did

¹ [1998] ICR 120, House of Lords

² See the seminal UK case of James v Eastleigh Borough Council [1990] 3 WLR, House of Lords which concerned the provision of free access to a swimming pool for those of pensionable age. At the time, the pensionable age for men in the UK was 65 and for women it was 60. It was argued that the council's reason for giving free swimming to those of pensionable age was to give benefits to those whose resources would be likely to have been reduced by retirement. The aim was to aid the needy, whether male or female, not to give preference to one sex over the other.

³ The most commonly referred to statement of this principle in the UK is contained in the speech of Neill LJ in the case of King v. Great Britain China Centre [1992] 1 ICR 529

not discriminate; the respondent merely bore a tactical or evidential burden to explain its treatment of the employee.

Shifting the burden of proof

6. On 15 December 1997 the Council of the European Union adopted Directive 97/80 on the burden of proof in cases of discrimination based on sex in the light of the Community Charter of the Fundamental Social Rights of Workers 1989⁴. Paragraph 16 of the Social Charter provides that:

‘... action should be intensified to ensure the implementation of the principle of equality for men and women as regards, in particular, access to employment, remuneration, working conditions, social protection, education, vocational training and career development.’

7. In the light of this it was recognised in the 17th recital to Directive 97/80 that employees could be deprived of any effective means of enforcing the principle of equal treatment before national courts if the effect of introducing evidence of an apparent discrimination were not to impose upon the employer the burden of proving that his practice is not in fact discriminatory.
8. The 18th and 19th recitals record the fact that the Court of Justice had held that the rules on the burden of proof ought to be adapted when there is a prima facie case of discrimination and that, for the principle of equal treatment to be applied effectively, the burden of proof had to shift back to the employer when evidence of such discrimination was brought; but that the aim of adequately adapting such rules had not been achieved satisfactorily in all member states.
9. Article 1 of 97/80 thus provides that:

The aim of this Directive shall be to ensure that the measures taken by the Member States to implement the principle of equal treatment are made more effective, in order to enable all persons who consider themselves wronged because the principle of equal treatment has not been applied to them to have their rights asserted by judicial process after possible recourse to other competent bodies.

10. And Article 4(1) provides that:

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.

⁴ The Directive did not initially apply to the UK but was extended to apply there by Council Directive 98/52/EC, Art. 2

11. Provisions identical to Art. 4(1) are now found in Art. 8(1) of Council Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Art. 10(1) of Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation (covering discrimination on grounds of religion or belief, disability, age or sexual orientation).
12. Note, however, that the shifting of the burden of proof need not apply to proceedings in which it is for the court or competent body to investigate the facts to the case itself i.e. to proceedings that are inquisitorial rather than adversarial (see Art. 4(3) of Directive 97/80 Art. 8(5) of Directive 2000/43; and Art. 10(5) of Directive 2000/78).
13. It has been suggested that the shifting of the burden of proof imposes an obligation on the respondent to prove a negative i.e. to prove that it has not discriminated unlawfully. However, the better view is that what the respondent is required to prove is simply a *non-discriminatory* explanation for its conduct (see for example the 17th recital to Council Directive 97/80, set out above). It is only in the absence of an ‘innocent’ explanation that a court or tribunal is compelled to make a finding of unlawful discrimination.
14. Thus the burden on the respondent is to provide an explanation which is adequate to discharge the burden of proving that a prohibited ground was not any part of the reasons for the treatment in question; not an adequate explanation for its conduct *per se*.
15. In the UK the proper application of the shifting burden of proof, referred to more commonly as the ‘reversal’ of the burden of proof, has proved problematic⁵. The main issue has been the proper interpretation of the phrase equivalent to ‘facts from which it may be presumed that there has been direct or indirect discrimination’ in the implementing legislation. There has been a plethora of cases at the Employment Appeal Tribunal and Court of Appeal, although the House of Lords has yet to consider the issue. The leading case is now Igen Ltd. Wong [2005] EWCA Civ 142 in which the Court of Appeal approved a 13-stage approach⁶. It is fair to say that practitioners have not always found the approach easy to apply.

⁵ The Directives are given effect by s. 63A of the Sex Discrimination Act 1975; s. 54A of the Race Relations Act 1976; s. 17A(1C) of the Disability Discrimination Act; reg. 29 of the Employment Equality (Religion or Belief) Regulations 2003; reg. 29 of the Employment Equality (Sexual Orientation) Regulations 2003; and reg. 37 of the Employment Equality (Age) Regulations 2006. By way of example s. 17A(1C) of the DDA provides: ‘Where, on the hearing of a complaint under subsection (1), the complainant proves facts from which the tribunal could, apart from this subsection, conclude in the absence of an adequate explanation that the respondent has acted in a way which is unlawful under this Part, the tribunal shall uphold the complaint unless the respondent proves that he did not so act.’

⁶ The guidance is set out in full in an Annex at the end of this paper.

16. What has emerged from the authorities is that the burden of proof does not shift simply on proof of a difference in race (to take one example) and a difference in treatment⁷. So the mere fact that a person of a particular race was not appointed to a particular job coupled with the fact that the job was given to a person of a different race will not normally be enough to shift the burden of proof. In addition the complainant in such a case would have to show not only that they met the stated qualifications etc. for the post but also that they were at least as well qualified as the successful candidate⁸.

Indirect discrimination and statistics

17. Indirect discrimination poses its own particular problems⁹. How is a complainant meant to raise even a *prima facie* case that an apparently neutral provision, criterion or practice has a disparate impact? In some cases such impact is obvious, or at least it is more readily assumed. In the UK, for example, women are (currently at least) more likely to take responsibility for childcare than men so that a provision in a contract of employment requiring full time rather than part time working is more likely to impact on women than men. It is generally thought that evidence of ‘social customs’ may be particularly important in establishing disparate impact in cases of discrimination on the ground of religion or belief. In many cases, however, disparate impact is far from obvious.

18. The 15th recital to both Directives 2000/43 and 2000/78 therefore provides that:

‘The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence.’

19. Enderby v Frenchay Health Authority, Case C-127/92 [1993] ECR I-05535, is an equal pay case in which the ECJ considered the concept of disparate

⁷ See cases such as University of Huddersfield v Wolff [2004] IRLR 534, EAT; Sinclair Roche & Temperley v Howard [2004] IRLR 763, EAT, Dresdner Kleinwort Wasserstein Ltd v Adebayo [2005] IRLR 514, EAT, Network Rail Infrastructure Ltd v Griffiths-Henry [2006] IRLR 865, EAT and most recently Madarassy v Nomura International Plc [2007] EWCA Civ 33, Court of Appeal.

⁸ See the comments by Cox J. in Adebayo at paragraph 35.

⁹ The concept of indirect discrimination is covered in another paper. It exists where an apparently neutral provision, criterion or practice puts a group at a particular disadvantage compared with other persons unless the provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, see Art. 2(2)(b) of Directive 2000/43 and Art. 2(2)(b) of Directive 2000/78.

impact¹⁰. In that case the respondent Health Authority employed speech therapists (a mainly female group) and pharmacists and clinical psychologists (both mainly male). Dr Enderby, a speech therapist, claimed that she was employed on work of equal value with male pharmacists and clinical psychologists. At the relevant time, her annual pay was £10,106, while that of a clinical psychologist was £12,527 and that of a pharmacist was £14,106.

20. Before a UK Employment Tribunal, the employers denied that the work was of equal value, but contended, in any event, that the variation in pay was genuinely due to a material factor unrelated to sex: the separate negotiating structures by which the pay for the relevant professions was determined. Speech therapists' pay has been conducted by negotiations through Committee B of Professional and Technical Council A of the NHS Whitley Councils. The pay of clinical psychologists was dealt with by Committee A of Council A. Pharmacists' pay was negotiated within a separate Whitley Council.
21. The employers argued that there was no sex discrimination within the professions or in the negotiations. It was accepted on behalf of Dr. Enderby that the pay negotiations had not been conducted with the intention of treating women less favourably, but it was argued that the salaries of speech therapists were artificially depressed because of the profession's predominantly female composition.
22. The Tribunal dismissed the complaints. It held that the employers had established a material factor defence by showing that the variation in pay “arose because of the bargaining structure and its history which was non-discriminatory, and from the structures within their own professions which were also non-discriminatory”.
23. Dr Enderby appealed contending that she had established a *prima facie* case of indirect sex discrimination in pay by showing that she was a member of a predominantly female group doing work of presumed equal value with her male comparator employed in a group which is predominantly male and that she was paid less than him. The case was ultimately referred to the ECJ which found that there was *prima facie* indirect discrimination that needed to be justified. The Court said at paragraph 16 of its judgement:

“... if the pay of speech therapists is significantly lower than that of pharmacists and if the former are exclusively women while the latter are predominantly men, there is a *prima facie* case of sex discrimination”

24. The Court also indicated that it was for the national court to assess whether the statistics concerning the situation of the workforce are valid and can be taken into account, that is to say, whether they cover enough individuals, whether

¹⁰ Under the Equal Pay Act 1970 the employer is required to objectively justify a disparity in pay if the complainant who is otherwise employed on ‘equal work’ can raise a *prima facie* case of indirect discrimination.

they illustrate purely fortuitous or short-term phenomena, and whether, in general, they appear to be significant.

25. In a speech to the Employment Lawyers Association given on 8 November 2006 Mr. Justice Elias, President of the UK's Employment Appeal Tribunal, commented on the ECJ decision in Enderby as follows:

“ ... in effect the court is saying that where the statistics are stark enough, then even given the clear finding of fact that there was no discrimination [in each bargaining structure] the only proper inference is that sex must have played a part somewhere in the process. The most likely explanation of any such discrimination I would suggest – and this will generally be the case with this form of discrimination – is the possibility of historical sexual stereotyping. In this case there was historically an expectation that women would go into speech therapy and men (or at least predominantly more men) into the other two professions; and that it was reasonable to assume that this must left its mark on the relevant pay. The speech therapists would historically have been paid what would have been perceived as the appropriate female rate, and that historical discrimination had not been eradicated.”

26. Enderby-type indirect discrimination is of course somewhat different from the more common form of indirect discrimination, what is sometimes termed ‘barrier’ discrimination, where a provision, criterion or practice prevents the disadvantaged group from enjoying a particular benefit. In Enderby there was no question of a barrier operating to prevent women becoming pharmacists or clinical psychologists. It just happened that there were significantly fewer women in the former professions than the latter. However, there can be no doubt that both Enderby-type discrimination and barrier-type discrimination fall within the broad definition of indirect discrimination in the various Directives.

27. In another UK case, Home Office v Bailey [2005] EWCA Civ 327, another equal pay case, Lord Justice Peter Gibson expressed the view that the test for establishing disparate impact ought to be the same, whichever type of indirect discrimination was in issue. He said this:

‘29. In each case the employment tribunal is concerned to determine whether what on its face is a gender-neutral practice may be disguising the fact that female employees are being disadvantaged as compared with male employees to an extent that signifies that the disparity is *prima facie* attributable to a difference of sex. The distinction drawn by the appeal tribunal between true "requirement or condition"¹¹ cases and "cases involving disparity of pay which has arisen between two work groups" may not always be capable of clear definition or consistent practical application ... Usually the disparity of pay between two work groups will reflect the fact that they do different

¹¹ This was how indirect discrimination was originally defined in UK legislation. It has now been replaced in the employment field by ‘provision, criterion or practice’ to bring UK legislation into line with the Directives.

work, and there may well be features of the work of the advantaged group which could be elevated to a requirement or condition. For example, where the disadvantaged group works in ordinary office or shop hours and the advantaged group does shifts or unsocial hours, it might be said that there was a requirement or condition for entry into the advantaged group of availability to work shifts or unsocial hours. The same statistics would be available whichever categorisation was used, and yet, if the Home Office was right, if it could be labelled a "requirement or condition" case the Seymour-Smith approach could lead to a conclusion of *prima facie* discrimination whereas, if it were categorised as a case involving disparity of pay between two work groups, *prima facie* discrimination could only be found if the disadvantaged group was predominantly female (or male) and the advantaged group predominantly of the other gender. As Ms Gill submitted, the difference between a formal requirement or condition for obtaining a benefit which divides two groups of workers and a division by reference to jobs for which different amounts are paid is one of form rather than substance, and a common approach to the two types of case has the merit of ensuring that the 1970 Act is applied consistently to all forms of indirect discrimination.

30. I can see no justification for the imposition of a high threshold for satisfying the test of *prima facie* discrimination. Where, as here, there is one group of employees of an employer which contains a significant number, even though not a clear majority, of female workers whose work is evaluated as equal to that of another group of employees of the employer who are predominantly male and who receive greater pay, it would be very surprising if an employment tribunal were to be precluded by the presence in the disadvantaged group of a significant number of men from holding that that disparity in favour of men required justification by the employer. In the present case it may well be that, as the Home Office suggests, there is a genuine material factor which is not the difference of sex and which justifies that disparity. Whether there is such factor is for further determination.'

28. The reference to Seymour-Smith case in the above citation is to the case of R v Secretary Of State For Employment, ex parte Nicole Seymour-Smith & Laura Perez [1999] ECR I-623 in which a female claimant challenged a provision in UK law (since amended) which required her to have two years' continuous employment in order to claim compensation for 'unfair dismissal'. She alleged that fewer women than men could comply with this requirement as women were more likely to take career breaks to have and to care for children. The ECJ held that the best approach to the comparison of statistics was to consider, on the one hand, the respective proportions of men in the workforce able to satisfy the requirement of two years' employment and of those unable to do so, and, on the other, to compare those proportions as regards women in the workforce. The ECJ held that it was not sufficient to consider simply the *number* of persons affected, since that would depend on the number of working people in the Member State as a whole as well as the percentages of men and women employed in that State.

29. Importantly the Court said that disparate impact could be demonstrated even in cases where the statistical evidence revealed a minor but persistent and relatively constant disparity over a long period between men and women who satisfy the requirement of two years' employment, leaving it to the national court to determine the conclusions to be drawn from such statistics.

Victimisation

30. There is some uncertainty about whether the shifting of the burden of proof applies in cases of victimisation. Victimisation occurs where an individual is treated adversely or suffers adverse consequences as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment¹² rather than because of his or her sex, race etc.
31. The shifting burden of proof applies only where 'persons consider themselves wronged because the principle of equal treatment has not been applied to them.' Art. 2(1) of Directive 2000/43 and the corresponding article of Directive 2000/78 both define 'the principle of equal treatment' by reference to direct and indirect discrimination only. Victimisation is not referred to. So, for example, a person who is treated adversely because he had previously brought a complaint of unlawful discrimination, but not for a prohibited ground, would not appear to be able to take advantage of the shifting burden of proof¹³.

Access to evidence

32. Evidence, and in particular documentary evidence, is critical at two stages: first the point at which the claimant is seeking to establish a *prima facie* case of unlawful discrimination and second the point at which, if the burden of proof has shifted, the respondent is seeking to prove a non-discriminatory explanation for its conduct. In practice of course both stages occur within a single trial or hearing¹⁴, so that a respondent ought to produce the evidence on which it will rely at an early stage, or else run the risk that the claimant does enough to shift the burden of proof and then be left without sufficient evidence to discharge that burden. This is a very real risk. In the case of EB v BA [2006] IRLR 471, the claimant was employed as a principal in the financial services group of the respondents' management consultancy business from January 1997. On 28 April 2000, she began a transition process of male to female gender reassignment by living full-time in a female role. She underwent gender reassignment surgery on 4 November 2000 and returned to work at the end of that month.

¹² See Council Directive 2000/43 Art. 9

¹³ I am aware of at least one case in the EAT, yet to be decided, in which this issue is to be considered.

¹⁴ Furthermore in the UK it has been held that there are cases in which the tribunal could move straight to the second stage of the test see Laing v Manchester City Council [2006] IRLR 748, EAT and Brown v Croydon London Borough Council [2007] EWCA Civ 32, Court of Appeal.

33. In July 2001, the claimant was selected for redundancy and dismissed. The employers claimed that this was largely because her monthly billings were insufficient at a time of a general downturn. She claimed that she was not able to bill because she was not allocated projects on grounds of her gender reassignment. She submitted that her billability was 92% in the seven months as a principal prior to her transition, whereas there were no billable hours between January and mid-June 2001. She identified a handful of projects that she said ought to have been allocated to her. The respondent offered a non-discriminatory explanation for each such project.
34. An employment tribunal dismissed the claim finding that “there was at no stage any project where we were able to conclude on a balance of probabilities that the reason put forward by the respondent for the applicant not being staffed on it was wrong. All the explanations were inherently plausible, and we are not satisfied that they were discredited by the applicant.”
35. However the Court of Appeal allowed an appeal against this decision. The Court said that the tribunal was wrong to find that the burden of proof did not shift to the respondent. Thereafter the respondent had to justify the fact that the claimant worked on only three projects out of over 200. The Court said that the respondent could only discharge the burden of proof by a detailed analysis of *all* of the projects and proposals to which the claimant was not assigned. The fact that the respondent had not adduced evidence in relation to each and every project (confining itself to the projects identified by the claimant) could only be adverse to them.
36. Specific procedures have been developed to assist a claimant in deciding whether to start proceedings and to assist the presentation of the claim in the most effective way, although practice does vary across Member States¹⁵. In the UK the primary method used to obtain information is the Questionnaire procedure¹⁶. Questions are set out on a prescribed form but otherwise a complainant may ask the respondent any question relevant to the alleged discrimination. In the UK it is common to ask questions about the make-up of the workforce (for example a question might read ‘Please give the race, ethnic and national origin of all employees employed at a particular place or in a particular grade’). The Commission for Racial Equality’s ‘Code of Practice on Racial Equality in Employment’ recommends that monitoring the workforce, by reference to racial group, gives employers the information they need to understand how their policies, practices and procedures in the field of employment affect people from different racial groups¹⁷.

¹⁵ I understand that there are no comparable procedures in France for example.

¹⁶ See the Sex Discrimination (Questions and Replies) Order 1975; the Race Relations (Questions and Replies) Order 1977, the Disability Discrimination Act (Questions and Replies) Order 2004, reg. 33 of the Sexual Orientation Regulations and reg. 33 of the Religion or Belief Regulations and reg. 41 of the Age Regulations. See also the Equal Pay (Questions and Replies) Order 2003.

¹⁷ The CRE is a body established by statute with the express function of promoting equality of opportunity and good relations between people from different racial groups. Its Code of Practice can be used in evidence in legal proceedings brought

37. There are time limits set for the respondent to reply (21 days for cases in the Employment Tribunal). Although not bound to answer the Questionnaire, the questions asked are admissible in evidence and a court or tribunal may draw an adverse inference from a failure to reply or from an evasive or equivocal reply, including an inference that the respondent has behaved unlawfully¹⁸.
38. Furthermore information can be obtained using standard court and tribunal procedures such as a request for additional information or for written answers to questions and disclosure of documents¹⁹.
39. Finally the Data Protection Act 1998 provides a further, very useful tool, to obtain information. Individuals have the right to request copies of all 'personal data' held about them which, under s. 1(1) includes '... any expression of opinion about an individual and any indication of the intentions of anyone in respect of the individual.'

London, 8 June 2007

under the Race Relations Act 1976 and courts and tribunals must take account of any provision of the Code that might be relevant to a question arising during those proceedings.

¹⁸ See SDA s. 74(2)(b), RRA s. 65(2)(b) DDA s. 56(3)(b), reg. 33(2)(b) of the SO and R/B Regs and reg. 41(2)(b) of the Age Regs.

¹⁹ See for example the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004.

Annex

1. Pursuant to section 63A of the Sex Discrimination Act²⁰, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s. 41 or s. 42 of the Sex Discrimination Act is to be treated as having been committed against the claimant. These are referred to below as "such facts".
2. If the claimant does not prove such facts he or she will fail.
3. It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".
4. In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
5. It is important to note the word "could" in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
6. In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
7. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the Sex Discrimination Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the Sex Discrimination Act.
8. Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to section 56A(10) of the Sex Discrimination Act. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

²⁰ The principles are equally applicable to all other relevant strands of discrimination

9. Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
10. It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
11. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.
12. That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
13. Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.