



Proving Discrimination: The burden of proof, situation testing (and statistics)

Recent Developments in EC Anti-Discrimination Law

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Burden of proof in discrimination cases - Issue

- Only **very limited number of cases** with conclusive evidence of discrimination
- How to unveil hidden or structural discrimination?

→ I. Rorive, *Proving Discrimination Cases. The Role of Situation Testing*, Brussels, Centre for Equal Rights and M.P.G., 2009 (91 p.)
http://www.migpolgroup.org/public/docs/153.ProvingDiscriminationCases_theoleofSituationTesting_EN_03.09.pdf

Shifting the burden of proof – Judicial step forward

- Early case law of the US Supreme Court
 - *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)
- In the 1980s-90s, ECJ case law in the field of pay discrimination between men and women (cf. effectiveness of EC law)
 - The Council Directive 1997/80 on the burden of proof in gender discrimination cases

Shifting the burden of proof – Directives

Racial Equality Directive (2000/43/EC), Art. 8

Employment Equality Directive (2000/78/EC), Art. 10

Gender Goods and Services Equality Directive (2004/113/EC), Art. 9

Gender Employment Equality Recast Directive (2006/54/EC), Art. 19

« Member States shall take ... measures ... 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 »

Shifting the burden of proof – *Prima facie* case

- *Prima facie* case: Facts pointing to a presumption of discrimination
 - The respondent has the burden of proving that his/her practice is not discriminatory
- Right of equality of arms?

Shifting the burden of proof – “Body of facts”

- CJCE, *Feryn*, 10 July 2008 (Case C-54/07)
The head of the Feryn company stated publicly that he was not hiring people of Moroccan origin because his clients did not want them
 - Request for a preliminary ruling by the ECJ on what are the “*facts from which it may be presumed that there has been direct discrimination*”

Shifting the burden of proof – “Body of facts” and the ECtHR

See, for instance,

- *Baczkowski v. Poland*, 3 May 2007
- *Ivanova v. Bulgaria*, 12 April 2007
- *Danilenkov v. Russia*, 30 July 2009

ECtHR, *Danilenkov v. Russia* (2009)

“The Court notes that *various techniques were used by the Kaliningrad seaport company in order to encourage employees to relinquish their union membership, including their re-assignment to special work teams with limited opportunities, dismissals subsequently found unlawful by the courts, decrease of earnings, disciplinary sanctions, refusal to reinstate following the court's judgment etc.*” (§ 130)

ECtHR, *Danilenkov v. Russia*
(2009)

“It agrees therefore that the clear negative effects that one's membership of DUR had on the applicants were sufficient to constitute a prima facie case of discrimination in enjoyment of the rights guaranteed by Article 11 of the Convention.” (§ 130)

ECtHR, *Danilenkov v. Russia*
(2009)

« *The Court is (...) not persuaded that a **criminal prosecution**, which depended on the ability of the prosecuting authorities to unmask and prove direct intent to discriminate against the trade union members, could have provided adequate and practicable redress in respect of the alleged anti-union discrimination.*”

Shifting the burden of proof is not enough

- Traditional ways of collecting evidence may be unsatisfactory
- Other tools:
 - Situation testing
 - Statistics

Shifting the burden of proof - EU requirement

Racial Equality & Employment Equality Directives

Recital 15 of the Preamble

« 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 »

Situation testing - Notion

Experimental method aiming to establish discrimination “on the spot” (« *sur le vif* »)

< dossier of the French *Centre for Strategic Analysis* (July 2007)

→ situation tests, situational tests, testing, auditing, pair-comparison testing or paired testing, ...

Situation testing - Types

- **Scientific testing** (research testing)
 - Cf. the ILO project in the 1990s
 - Cf. US and Great Britain (starting in the 1970s)
 - But also, more recently “external auto-testing” by companies (e.g. in France)
- **Litigation testing** (complaint-based testing)
 - To unmask ‘concealed’ (direct or structural) discrimination frequently hidden behind pretexts

Litigation testing – Origin in the US

■ Housing

- End of the 1960s, systematic use of situation testing
- Gain of expertise and resources allocation

Litigation testing – Origin in the US

Beginning of the 1990s, litigation testing used in other fields:

- Employment
- Goods and services
- + innovative uses
 - ex.: Cab companies in the Columbia District (1989)
 - ex.: Chain of restaurant Denny's and compliance with judicial settlements

Litigation testing – Legal European framework (HR)

Admissibility of situation testing subject to

- the respect of the right to privacy
- the exclusion of any incitement
- more generally, the fairness of proof

Litigation testing – Necessary methodology

- *Per se*, not in breach of human rights (cf. body of case law of the ECtHR)
- But pitfalls because artificial situation and risk of provocation (cf. debates in France around « the nights of testing »)

Litigation testing – Methodology

- **Comparability**
 - Neutralising variables
- **Fairness and credibility**
 - Behaviour of the testers
 - Quality of the testers
 - Proactive testing?
- **Representativeness**
 - Repetition of the test?

Litigation testing – Methodology

- Planning and documentation
 - A test organiser
 - Protocol (goal and procedure)
 - Testers supervision
 - Forms to be completed by each tester
 - General report of the test organiser

Litigation testing – Methodology

- More generally...
 - Recruiting and training testers
 - Remuneration
 - Journalists' involvement
 - Limits and cost of situation testing

Litigation testing – Opposition - Example

- In Belgium, stormy debates in 2005:
 - A political party declared its refusal “*to set up a team of spies, send moles to infiltrate companies, open informer hotlines and sanction Big Brother*”
 - The Prime Minister publicly said “*you do not send a naked woman to a man to see if he is adulterous*”

Litigation testing in European countries

Formal admissibility (exceptional)

■ Hungary

- Proactive attitude of a NGO (NEKI)
- Strategic litigation (ex. the *K.L. discotheque* case in 2002)
- Governmental decree (2004)

Litigation testing in European countries – Formal admissibility

■ France

- Three rulings of the Court of Cassation (2000, 2002, 2005)
- Legislative Act (2006): only in criminal cases (difficult to implement in practice, cf. HALDE's experience)

Litigation testing in European countries - Formal admissibility?

- The Belgian compromise – “recurrence tests” and “comparability tests”

As examples of facts leading to a presumption of direct discrimination, the anti-discrimination Acts of 2007 list

- (1) factors revealing a certain recurrence of unequal treatment, among which, repeated isolated complaints to the equality body and
- (2) factors revealing that the situation of the alleged victim is comparable to that of a reference individual (a person who does not share the protected characteristic)

Litigation testing in European countries – Case law based

- The Czech Republic
 - Denmark
 - Finland
 - Latvia
 - Lithuania
 - The Netherlands
 - Slovakia
 - The UK
- ➔ Model legislation recently discussed in the Migration Policy Group

Statistics – Gender discrimination

- In ECJ case law, linked to « disparate impact » and indirect discrimination
 - Reliable and significant (ECJ, *Enderby*, 27 October 1993, Case C-127/92, § 17)
- **Methodological issue:** framing the groups to be compared and defining the statistic gap (ECJ, *Seymour-Smith*, 9 February 1999, Case C-167-97; ECJ, *Voss*, 6 December 2007, Case C-300/06)

Statistics – Strong methodological issues after the 2000 directives

- Right to private life and the protection of **sensitive data**
- **E.g.: the question of ethnic data**
 - How to place people in « ethnic groups »?
 - Control of the purpose of such a grouping
 - Different national cultures on the issue