

Working paper

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## **Proving discrimination The mitigated burden of proof in EC equality law**

### *Introduction*

In civil law, the general rule on the burden of proof is that it is up to the party that asserts to establish the facts that are necessary to prove the claim. Thus, the party that feels that he has been treated unfairly, has to prove that this really was the case.

EC-equality legislation deviates from this general rule. On 15 December 1997 the Council of the European Union adopted the Directive on the burden of proof in cases of discrimination based on sex (Directive 97/80), which obliges the EU Member States to adopt a somewhat different provision on the burden of proof for sex discrimination cases. Article 4(1) of this Directive 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.” (Italics added)<sup>2</sup>

Three years later, this provision was copied in art. 8(1) of Council Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and into 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. It has further been re-

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<sup>2</sup> Art. 4(3) of Directive 97/80 provides for the possibility of an exception for proceedings that are inquisitorial rather than adversarial.

enacted in art. 19 of the so-called Recast Directive, that will replace the four main sex-equality directives, as of 15 August 2009.<sup>3</sup>

*Case law preceding directive 97/80*

The Directive on the burden of proof was preceded by, and actually codified, case law of the European Court of Justice (ECJ). A first landmark case was brought by a Danish trade union, on behalf of female workers who on average earned 7% less than a comparable group of male colleagues.<sup>4</sup> The Court in this case ruled that where a company applies a system of pay which is totally lacking in transparency and statistical evidence reveals a difference in pay between male and female workers, the burden of proof shifts to the employer. The employer, in other words, is held accountable for the lack of transparency.

Some years later a ms. *Enderby* complained about the pay system of her employer, a public health service, who paid speech therapists considerably less than pharmacists. Ms Enderby, herself a speech therapist, complained that this resulted in sex discrimination, because the job of speech therapist was predominantly carried out by women, whereas the pharmacists were mainly men.<sup>5</sup> The Court first gave an overview of its preceding decisions on the burden of proof in cases of sex discrimination regarding pay. It stated that, although in principle it is up to the applicant to prove discrimination, the burden may be shifted ‘when that is necessary to avoid depriving workers *who appear to be victims of discrimination* of any effective means of enforcing the principle of equal pay’ (italics added).

In this case, however, the Court established that the employer’s pay system was transparent, as opposed to the system in the *Danfoss* case. Moreover, there was no specific provision that caused the disadvantaged position of the speech therapists, as had been the case in *Bilka*.<sup>6</sup> Nevertheless, the Court continued, ‘if the pay of speech therapists is significantly lower than that of pharmacists and if the former are almost predominantly women while the latter are predominantly men, there is *a prima facie case of sex discrimination*. [...] Where there is a prima facie case of discrimination, it is for the employer to show that there are objective and non-discriminatory 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.’ (Italics added)

The importance of this ruling was neatly captured by mr. Justice Elias, President of the UK’s Employment Appeal Tribunal, who pointed out that the most likely explanation for the difference in pay in the *Enderby* case is the possibility of historical sexual stereotyping.<sup>7</sup>

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<sup>3</sup> Directive 2006/54/EC of the European Parliament and of the European Council of 5 July 2006 on the implementation of the principle of equal opportunity and equal treatment of men and women in matters of employment and occupation (recast), 5 July 2006. As of 15 August 2009 directives 75/117/EEC, 76/207/EEC, 86/378/EEC and 97/80/EC will be repealed and only this directive will be applicable (art. 34).

<sup>4</sup> ECJ 1989, C-109/88, *Danfoss*.

<sup>5</sup> ECJ 27 October 1993, C-127/92, *Enderby v. Frenchay Health Authority*, ECR I-5535.

<sup>6</sup> ECJ 13 May 1986, C 170/84, *Bilka Kaufhaus*.

<sup>7</sup> Quoted by J. Galbraith-Marten, Shifting the burden of proof and access to evidence, ERA paper, June 2007, § 25, accessible via [www.era.int](http://www.era.int).

### *Codification and extension*

It is this case law that has been codified in the Directive on the burden of proof. The definition of the shift in the burden of proof was modelled after the German Civil Code (art. 611a(1)). According to the German provision, the burden of proof shifts to the employer when an employee manages to substantiate a (sex-)discrimination claim by submitting facts that support prima facie evidence of such discrimination.<sup>8</sup>

The Directive, however, extends the scope of the case law from the issue of equal pay to equal treatment more generally. The Court stated in the *Nikoloudi* case that: ‘This directive thus codified and expressly extended to the principle of equal treatment within the meaning of Directive 76/207 previous case-law according to which the burden of proof, which in principle lies with the worker, may shift when this is necessary to avoid depriving workers who appear to be the victims of discrimination of any effective means of enforcing the principle of equal pay. Accordingly, when a measure distinguishing between employees on the basis of their hours of work has in practice an adverse impact on a substantially greater percentage of members of one or other sex, it is for the employer to show that there are objective reasons which justify the difference in pay that has been found.’<sup>9</sup>

As was already mentioned in the introduction, in later years the provision has been copied into directives covering grounds of discrimination other than sex.

### *Scope*

Out-of-court procedures provided for by law or of a voluntary nature are exempted. Also criminal law is explicitly exempted from the rule regarding the shift in the burden of proof (see art. 3 of Council Directive 97/80).

Furthermore, it is important to note that the scope of the provision on the shift in the burden of proof is limited to proving discrimination as such. This means that in cases of victimization, the obligation to prove the assertion remains squarely with the applicant. After all, victimization has not been conceptualised as a form of discriminatory unequal treatment. In the same vein, if one wishes to establish an (un)equal pay claim, the burden of proving that one’s work in fact equals the work of the comparator (the first step), rests with the applicant. The burden of proof only shifts to the employer once the employee has proven the equal value of the jobs. In *Brunnhofer* the Court stated that it is up to the applicant to prove that his position is comparable (equal) in the first place.<sup>10</sup> However, it is important to note that there is not always a need to prove the equal value of the jobs at issue, namely when the discrimination (or difference) is caused directly by law or by labour agreement, as was the case in *Allonby*.<sup>11</sup>

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<sup>8</sup> Schiek, Waddington & Bell 2007, above note 5, p. 241.

<sup>9</sup> ECJ 10 March 2005, C-196/02, *Vasiliki Nikoloudi v. Organismos Tilepikinonion Ellados AE*, para. 69.

<sup>10</sup> ECJ, 26 June 2001, C-381/99, *Susanna Brunnhofer v. Bank der Österreichischen Postsparkasse AG*. See also ECJ 8 June 2004, C-220/02, *Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten v. Wirtschaftskammer Österreich*, ECR I-4961.

<sup>11</sup> *Debra Allonby v. Accrington & Rossendale College, Education lecturing Services and Secretary of State for Education and Employment*, ECJ 13 January 2004, C-256/01. See for instance D. Schiek, L. Waddington & M. Bell (eds.), *Cases, materials and text on national, supranational and international non-discrimination law*, Oxford / Portland: Hart Publishing, 2007, p. 223.

### *Purpose*

The intended effect of the provision is to enhance the effectiveness of measures taken to implement the principle of equal treatment, by lowering the legal threshold for people who feel they have been treated unequally and would like to present their case to a judicial body (art. 1 of Directive 97/80). Art. 1 reads:

‘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.’

The importance of this provision cannot easily be underestimated. Proving discrimination is notoriously difficult.

Many, if not most people, including employers, are by now aware that discrimination is ‘not done’ (at least since the legal principle of equal treatment was introduced). Thus, they will not readily admit to the discriminatory nature of their acts or intentions.<sup>12</sup> Most employers, for instance, who do not wish to renew the contract of a pregnant employee, know better than to confess that the foreseeable absence due to pregnancy leave is the reason to let the employee go. They will look for more ‘innocent’ explanations for their actions such as disfunctioning of the employee. This tendency to cover up the discriminatory nature of decisions and actions, to avoid witnesses and refrain from explanations in writing, etc., makes discrimination very difficult to prove.

Secondly, the mitigation of the burden of proof is important in cases where applicants do not have access to the kind of information and data that are necessary to prove their case, such as information on the pay system of a company. In this type of cases, the shifting of the burden of proof redresses the imbalance of power between the employer and the employee.

It is important to keep in mind, however, that in many if not most cases there is no intention to discriminate. Structural inequalities in the organisation of everyday life often have concrete discriminatory effects. For instance, a society that regards care-taking for children primarily as a task for the child’s parents, combined with the sex-based division of work and unpaid care, makes that many women leave the labour market either temporarily or permanently when their first child is born. This in turn is one of the causes of the pay gap between men and women. In this kind of cases the burden of proof may be useful as well. Intention, after all, is not a necessary element of discrimination within the context of equality legislation.

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<sup>12</sup> However, there are some remarkable exceptions to this rule in the case law of the Dutch CGB. In case 2006-161 for instance, the employer, a small shop owner, told the job applicant he had not been selected because there was only one toilet available. Because all other employees were women, his being male was a problem. It turned out later that she just did not like the applicant and had used the one-toilet-only story as an ‘easy’ excuse.

### *Establishing a presumption of discrimination*

A difficult point is to decide exactly when the burden will shift: what kind of facts and how many of them are needed to establish a prima facie case? It seems to be generally accepted that the required level of proof is to some extent contingent on the facts of each specific case.<sup>13</sup>

Some instances of discrimination are easy to prove. In the case of *Commission v. France*, for example, it was no issue at all.<sup>14</sup> The European Court of Justice had to decide whether special rights for women, such as extended maternity leave and reduction of working time for elderly female employees came within the scope of the exception of art. 2(3) of Directive 76/207 regarding the protection of motherhood. In such cases the difference in treatment of men and women is clear and undisputed, as is the fact that the difference in treatment is based on sex.

The difference in treatment can be just as clear in cases concerning job applications, such as in the cases that the CGB decided on in 2004 and 2006 on a young woman and an elderly, handicapped man that applied for jobs. The woman applied for a function in a so-called coffeeshop. During the interview she was asked if she had any children – she answered that she didn't have any but did want to have children in due time - and her application was turned down with the message that she should 'rather occupy herself making babies with her boyfriend'.<sup>15</sup> The elderly handicapped man had been turned down for a job by e-mail. In the e-mail it was expressly stated that his age and his handicap were problems that caused his application to be uninteresting.<sup>16</sup>

However, proving discrimination unfortunately is not that easy most of the time. In the daily practice of the Dutch CGB it regularly happens that applicants merely state that they *are* gay, or black, or female and that they *did suffer* a particular disadvantage. Some of them add that they just cannot think of any other explanation for the way they have been treated. This is not enough. The directive allows for a shift in the burden of proof when, and only when, a prima facie case of discrimination has been established. If merely stating ground and disadvantage were enough, anyone could complain all the time of any treatment that is felt to be unfair, and blame it on his sex, his sexual preferences or the colour of his skin. After all, everybody does have a sex, a sexual preference, a particular skin colour and so on. This boils down to a reversal of the burden of proof, which very clearly is not what the directive is about.

The applicant is required to present facts that are capable of raising suspicion (the presumption) that there is a *connection* between the disadvantage or unequal treatment suffered and the protected ground (race, sex, sexual orientation etc.). The applicant needs to prove that there is a link between his being black (or male or both) and the rejection of his job application. He must forward facts that support his claim that the protected ground, his

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<sup>13</sup> Schiek, Waddington & Bell 2007, above note 5, p. 253.

<sup>14</sup> *Commission v. France*, 30 June 1988, case 318/86, *Jur.* 1988, p. 3559.

<sup>15</sup> CGB Opinion 2004-229, 24 November 2004

<sup>16</sup> CGB Opinion 2006-16, 31 January 2006.

being black, has either directly or indirectly influenced the negative outcome of e.g. his job application.

A first step would be to show that the applicant is qualified for the job. However, more is needed. Thus, the applicant may try to provide statistical evidence showing, for example, that hardly any staff members are black, whereas the percentage of black job seekers with the right qualifications is significantly higher.<sup>17</sup> Or he could try to argue that his appearance in person at the job interview caused a stir among the members of the selection committee. Maybe questions were asked that were hardly relevant for the job and mainly seemed to be inspired by the colour of his skin.<sup>18</sup> He could try to support his case with testimonies of others who experienced similar situations with the same employer.<sup>19</sup> Statements by the applicant that remain uncontested may be regarded as ‘facts’ as well.

What may also help in establishing a presumption of unequal treatment, is a brief lapse of time between the moment an employer hears about a pregnancy, a handicap or a sexual orientation and the occurrence of the alleged unequal treatment. In pregnancy cases, it is standard for the CGB to regard a very brief time lapse as a ‘fact’ that may support the establishment of a presumption of discrimination. However, it is not enough to just state that such was indeed the case. The asserted quick, negative reaction to the pregnancy announcement must somehow be founded in facts in order to be considered a fact in itself. For instance, if the employer shows that the stated brief period actually was not that brief, the applicants statement cannot be regarded as a fact, in the sense of the Directive.<sup>20</sup> If the employer shows that the employee didn’t qualify for a long-term contract or a promotion anyway, the brief time lapse, although still an uncontested fact, no longer is able to support the presumption that the pregnancy was the reason (or one of the reasons) for the disadvantage suffered.

Views differ as to where to discuss the statements of the respondent with regard to the ‘facts’ that an applicant has brought forward. Sometimes the ‘other side of the story’ is taken

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<sup>17</sup> A problem however, is that such information often is not available for other grounds than sex, because registration of for instance race or sexual preference is regarded by many as problematic. Cf. Schiek, Waddington & Bell, 2007, above note 5, p. 398.

<sup>18</sup> Cf. the complaint of a woman making use of a wheelchair, who was asked by an employer whether she minded people helping her if she had not asked them to help her. She replied that it depended on context, adding that to her it made quite a difference whether a stranger started placing her shoppings on the counter in the supermarket (which she resented, as she explained quite vehemently), or whether a colleague did something or other that she otherwise would have done herself. The employer stated that this kind of question was always asked, because he considered flexibility an important competence. The employer concluded, on the basis of this one answer and the fierceness of the woman’s reaction, that the applicant was unwilling to accept help and inflexible in her attitude towards people trying to be helpful. The woman’s application was turned down. The CGB concluded that the employer should have realized that this kind of question, even if a standard question, would have a different meaning for someone in a wheelchair. Thus, the employer should at least have explained the purpose of the question as well as the fact that it was a standard question, and should have framed the question within the context of the job. CGB 23 October 2007, oordeel 2007-184.

<sup>19</sup> In the practice of the Dutch CGB it sometimes happens that complainants try to argue that they simply were the best candidate and that therefore it is inconceivable that they were not selected. Thus, they feel the rejection of their application can only be explained in terms of discrimination. In my experience, however, this approach is not very successful, at least for external job seekers, because job applicants are mostly unaware of the identity and qualifications of other applicants, and the statement is easily refuted by employers.

<sup>20</sup> See A.G. Castermans & A. Terlouw, ‘Bewijs van discriminatie’. In: A.S. Hartkamp, C.H. Sieburgh & L.A.D. Keus (eds.), *De invloed van het Europese recht op het Nederlandse privaatrecht*. Deventer: Kluwer, 2007, p. 191-209.

into account while assessing whether the applicant has established a presumption of discrimination. Sometimes discrimination is assumed on the basis of the statements of an applicant in combination with, for instance, the fact that in a certain company there are no female, black or older employees working and the explanation of the employer for the apparent discrimination is only taken into consideration in the second phase, when it is up to the respondent to prove that no discrimination occurred/occurs. The latter way is clearly less to the advantage of the respondent, as he then has to prove something did not occur. Yet it is not always so easy to decide where to assess the parties' statements. For instance, when would you take the explanation of an employer into account for a remark on burqa's in an internal e-mail, that accidentally ended up in a formal message to the applicant stating she was not hired for a job: while assessing whether the applicant – who doesn't wear a burqa but is Islamic and has an Arabic name – has established a prima facie case or while assessing the objective justification, thus after you have presumed there was discrimination, based on the remark?<sup>21</sup> The answer to this question is not easy to give and depends on the particularities of each case.

In a case like this, the applicant may also bring forward the acknowledged general fact that in Dutch society at this moment, persons of Arabic descent are related to the Islamic faith and that persons keeping this faith is often believed to be extremists. There are more of such general facts, like that it is generally known that the number of women in top functions in politics, management and the executive is far less than the number of men or that discrimination on the basis of skin colour still occurs. These general facts however are in themselves not enough to establish a presumption of discrimination: only because things often work in a particular way, doesn't mean it did also in the case at hand. These generally known facts may sometimes explain how a disadvantage or treatment that cannot be labelled as discrimination, but merely as 'insensitive' has come about.

Insensitivity to how discrimination works is a factor that often hugely contributes to the feeling of being discriminated. Many employers and/or employees have no idea how certain remarks may be taken and how serious complaints about discrimination are. They may waive the complaints away with a simple answer that discrimination doesn't occur in their company, that the remarks should be regarded as a joke or they may half-heartedly investigate the complaints, while – often unconsciously – looking for proof that the applicant got it wrong. This may in turn give the applicant the idea that he is being discriminated against not just by his colleagues, but also by the management. Sometimes, this leads applicants to believe that they are not just the victim of discriminatory remarks, but that they are treated less favourably to their colleagues as well when it comes to salary, training and education possibilities, promotion etcetera. Although this may of course actually be the case, it is very hard to prove, as even in the case the discriminatory remarks are established, that alone doesn't suffice for the conclusion that the applicant did not get a promotion due to his ethnicity/age/gender.

Also in cases of indirect discrimination the mitigated burden of proof may be helpful, in particular by using statistics. The difficulty in this kind of cases is to determine the relevant context. For instance, if one wishes to establish whether it is more difficult for people of non-national descent than for people of national descent to acquire a house, what then is the

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<sup>21</sup> Case currently pending before the CGB.

relevant context from which to take statistics? Is that the neighbourhood, or the town, or maybe all the houses of a particular housing corporation? And does one look at all people of non-national descent, or maybe only of non-western descent? Should one merely look at first generation migrants or should second generation migrants be included as well? The answer to these questions is contingent on the kind of case that needs to be answered, as well as on the very pragmatic matter of the statistics available. Unfortunately, in many cases it is very difficult to find relevant statistics at all and the only possibility left is to resort to 'facts of general knowledge'. Sometimes, this is hardly problematic. For instance, even if statistics on the number of women of Islamic faith wearing a headscarf are lacking, it is quite clear that requirements regarding headwear will have a bigger influence on this group than on many others. If the disparate impact is not so readily visible, however, one should be cautious in accepting a prima facie case, because of the consequences for the respondent of the subsequent shift in the burden of proof.

#### *A difference between the European and the Dutch approach*

The European Court of Justice has ruled on the establishment of a presumption of (indirect) discrimination in regard to the use of the length of service criterion in a pay system. Ms *Cadman* compared her annual salary to that of four male colleagues whose salaries were significantly higher.<sup>22</sup> This difference was caused by the differences in length of service of these employees. Both in the UK as well as in Europe generally, the length of service of female workers (as a group) is less than that of male workers. Thus the use of length of service as a determinant of pay has a disproportionate impact on women. It is one major cause of the ongoing pay gap between men and women.

Still, the mere fact that the use of this - in itself neutral - criterion resulted in a pay difference between male and female workers, was not enough for a presumption of discrimination. Referring to the *Danfoss* case<sup>23</sup> the Court reiterated that length of service should be regarded as legitimate in principle, because it is interconnected closely with work experience and as such allows for better performances. Obviously, employers should be allowed to reward their better performing employees extra. Thus, despite the disparate impact on female employees, the Court did not find a presumption of (indirect) discrimination, because, generally speaking, length of service is regarded as an acceptable pay determinant. This could be different if the employee provides evidence that raises serious doubt regarding the appropriateness of the use of the criterion.

In the Netherlands the outcome would have been different, due to the use of the concept of distinction (*onderscheid*) rather than discrimination:<sup>24</sup> The mere fact of disparate impact on female workers proves distinction; thus there is no further need for proof. Without further ado the burden of proof will shift to the respondent.<sup>25</sup> In the European case law this would only occur if Ms Cadman would have succeeded in raising serious doubt as to the

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<sup>22</sup> European Court of Justice (Grand Chamber), *B.F. Cadman v. Health & Safety Executive* (C-17/05), 3 October 2006.

<sup>23</sup> European Court of Justice, *Danfoss*, (C-109/88), ECR 3199, para. 25.

<sup>24</sup> R. Holtmaat extensively researched the benefits and disadvantages of the use of either concept and concluded that it is impossible to choose between the one or the other on the sole basis of legal arguments. See R. Holtmaat, external periodical evaluation of the General Act on equal treatment (AWGB), 2007.

<sup>25</sup> See Castermans & Terlouw, 2007, above note 18.

appropriateness of the criterion in this specific instance. In the Netherlands, the objective justification test would be applied to assess the (non)acceptability of the criterion of length of service.

Thus, Dutch implementation of the provision on the shift in the burden of proof is not identical to its European counterpart. However, Dutch implementation still is in accordance with the European directives because it widens the scope of protection and this is allowed under Article 4(2) of Directive 97/80, which does not preclude Member States from introducing rules of evidence which are more favourable to plaintiffs.

Another interesting feature of Dutch equality legislation is the fact that in the Netherlands it is enough to establish that a specific identity marker, such as sexual preference, has played any role at all. The applicant does not need to find a real or hypothetical person to compare himself with, as one would need to do for instance under UK law.<sup>26</sup>

#### *Helping victims to substantiate their claims*

The Dutch CGB has the possibility to invite applicants who seem unable to substantiate their claim for an interview. The purpose of such interviews, that are conducted by two of the commission's legal secretaries, is to find out whether there is any possibility at all that pieces of evidence may turn up if the case will be investigated in more depth. The secretaries will explore all aspects of the complaint and make an assessment of the probability that further research will produce any or more evidence of the alleged discrimination so that there is a chance that ultimately a prima facie case may be established. Sometimes facts are found that could help to establish a presumption of discrimination. However, oftentimes the intake merely underscores the lack of any concrete indications of discrimination, in which case most applicants withdraw their complaint. Obviously, this is not to say that there *was* no discrimination. It does show that, *if* discrimination happened, it is impossible to prove it. A report will be made of the interview. If the case is continued, the respondent will receive a copy of the interview report.

Another possibility is to refer applicants to one of the local or regional anti-discrimination bureaus, non-governmental organisations that will investigate discrimination complaints and sometimes also assist victims of discrimination in filing their complaints with the Dutch CGB.<sup>27</sup>

In the UK complainants have the possibility to present the accused with a questionnaire containing questions that should clarify the issue. Respondents are obliged to answer the questionnaire and provide an explanation for the situation at issue. The responses may be relied upon later on if the victim decides to go to court. If an employer does not respond to the questionnaire, this may be taken as an indication that there actually was discrimination.<sup>28</sup>

#### *After the shift*

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<sup>26</sup> See Schiek, Waddington & Bell, 2007, above note 5, p. 205.

<sup>27</sup> For more information see the website of the umbrella organisation Art.1: [www.art.1.nl](http://www.art.1.nl). The organisation was named after the first article of the Dutch constitution, containing an equality clause as well as a non-discrimination provision.

<sup>28</sup> See Schiek, Waddington & Bell, 2007, above note 5, p. 237.

When a presumption of discrimination has been established, the burden of proof shifts to the respondent, who has to prove that, despite appearances to the contrary, discrimination did not actually occur.

The wording of this obligation is somewhat confusing. It is quite difficult to prove that one did not do something, or that something did not happen. However, it seems to be generally accepted that this must be understood to mean that the respondent should provide another explanation for what happened, and present evidence to support this other non-discriminatory explanation.<sup>29</sup>

This may be done for instance by completing the picture drawn by the applicant by offering additional facts, or by presenting the same facts in a different light. To illustrate the point: a job applicant, who because of her Islamic conviction was wearing a headscarf, was asked extensively about the scarf, her reasons for wearing it, and how she reacted when people objected. She did not get the job, and asked the Dutch CGB whether this amounted to unlawful discrimination on the basis of religious conviction. The employer confirmed that he had asked many questions about the applicant's headscarf, but explained that the purpose of these questions was to test her reaction. If she would have been given the job, she would have had to deal with clients who might not be too sensitive in their remarks on her headscarf. The employer thought it important that employees could handle that (at least to some extent), and thus asked this kind of questions to test applicants. In combination with the fact that the employer did employ other women with headscarves in similar positions, the CGB concluded that the employer had proven that he had not discriminated.<sup>30</sup>

In the CGBs' experience some of the most difficult cases, at least regarding question of proof, are those cases in which all the applicant's assertions of discrimination are met by the respondent with blank denial. The applicant may have difficulty establishing facts because of a lack of witnesses, or because colleagues don't want to testify because they don't want to jeopardize their relation with the employer. For the employer on the other hand, if really nothing happened it is not so easy to do anything other than just deny that anything out of order happened.

The CGB tries to find its way through this kind of dispute by asking questions that are aimed at clarifying the broader picture. For instance, in a case in which a migrant worker complained of discrimination by the management, which of course was denied by the employer, the Commission asked questions about the daily routine in the organisation and found that during lunch in the canteen, Dutch employees ate with Dutch colleagues, and employees of foreign descent shared another table. Although this is in itself not enough to support a discrimination claim, it does clarify the context in which feelings of being discriminated against may be aroused, and it suggests at least that diversity management has not been successfully implemented in the company.<sup>31</sup> In such cases, the CGB may try to raise awareness to the importance of diversity management and a well-balanced and thorough complaints procedure. However, this kind of cases remains very difficult and even if one manages to uncover the cause of the problems, often it still is very difficult to draft a

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<sup>29</sup> Cf. Castermans & Terlouw, 2007, above note 18, and Galbraith-Marten, 2007, above note 10.

<sup>30</sup> CGB 2007-143.

<sup>31</sup> See for instance CGB Opinion 2006-156 for an example of this approach.

decision that, if maybe not acceptable to the parties, at least will be understood by both parties.

### *What if?*

If the respondent succeeds in refuting the presumption of discrimination, the conclusion must be that equality law has not been violated. But what if the respondent does not succeed in proving that 'he didn't do it'? In cases of direct discrimination the only way out is to argue that a legal exception, such as contained in Article 2 of Council Directive 76/207 is applicable.

In case of established indirect discrimination, the possibility of an objective justification for the discriminatory treatment is still open.

Some respondents feel that a defence based on the denial of discrimination whatsoever, precludes an objective justification defence. After all, how can one argue that discrimination is justified, if you have just said that no discrimination occurred?

However, it is important to make respondents realize that these defences are not necessarily in conflict. Many respondents for instance do not understand the concept of indirect discrimination.<sup>32</sup> As they don't have the intention to discriminate, they restrict themselves to emphasizing that point, without bothering to go into an explanation that might serve as an objective justification. If no objective justification is offered, the conclusion must be that the respondent has discriminated.

Thus respondents should be warned for this situation and must be encouraged to prepare a secondary defence along these lines.

### *Conclusion*

Oftentimes, it is assumed that there is a big difference between the general civil law rule on the burden of proof and the mitigated burden of proof in equality law. In reality, however, it seems to be more of a gliding scale. In civil law cases, the burden to prove one's position may move back and forth between parties as well, assumptions are derived from facts etc. In many civil law cases the proof is not 100% conclusive either, even if it is sometimes presented that way. Other important principles of law, such as fairness, do play a role. However, under equality law, the benefit of the doubt is awarded to the applicant at an earlier stage. Obviously, this is to the disadvantage of the respondent. Therefore, it is important that not only the working and scope are made clear to both parties, but the purpose of the mitigation of the burden of proof as well.

All in all, shifting the burden of proof has proven to be a useful addition to equality legislation. Without it, discrimination is even more difficult to prove. This is not to say, however, that the application of the provision is easy.

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<sup>32</sup> This is of particular importance in the work of the CGB because parties are not obliged to avail themselves of legal assistance.

## **Annex: The Dutch Equal Treatment Commission (*Commissie Gelijke Behandeling*)**

The General Act on Equal Treatment (*Algemene wet gelijke behandeling, AWGB*) provides for the establishment of an Equal Treatment Commission. The CGB is a semi-judicial body. Its main task is the investigation and assessment of discrimination complaints. The Commission's opinions are not binding. However, in approximately 65% of all cases in which discrimination is found, the respondents comply with the Commission's opinion.

If either one of the parties chooses to go to court, after obtaining an opinion, the court cannot deviate from the Commission's opinion without providing a motivation for its different stance.

To make the threshold as low as possible for victims of discrimination, parties do not need to avail themselves of legal assistance and there are no fees to be paid. Moreover, the Commission is not passive in the sense that it only takes note of the parties' arguments. The Commission plays an active role in finding out what happened. The Commission's competence is limited to equal treatment legislation, thus permitting the Commission to focus exclusively on the interpretation and implementation equal treatment and anti-discrimination norms.

The Commission has nine members, who are appointed for six years, with a possible extension of another three years.

A particularity of Dutch equal treatment legislation is that it focuses on 'distinction' (*onderscheid*) as opposed to discrimination. One reason being that it is easier to explain that someone is 'guilty' of not making or causing discrimination, which by most respondents is clearly felt as worse.