

# THE BURDEN OF PROOF IN DISCRIMINATION CASES

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## 1. Purpose of the Paper

It is not the role of this paper to provide an academic analysis of the Burden of Proof provisions in the Race and Framework Directives. Rather, I hope to set out a practical guide to the application of the provisions from the perspective of an Employment Tribunal Judge with the hope that it will be of some assistance to colleagues from other jurisdictions attending this conference.

## 2. Introduction

Tomorrow we will hear of the discrimination suffered by the Roma people of Europe, described by Amnesty International in a 2009 report as "massive".

In 2007 a report published by the Commission concluded:

"A large proportion of Europeans are of the opinion that discrimination is widespread in their country. Discrimination based on ethnic origin is felt to be the most widespread (almost 2 Europeans out of 3, 64%; ....) Around one in two European considers discrimination based on disability and sexual orientation to be widespread. Discrimination on the basis of age (46%), religion or beliefs (44%) and gender (40%) are also felt to occur, albeit at to slightly lesser extent.

Moreover, a significant share of European citizens have the feeling that discrimination based on ethnic origin has increased in the last 5 years."<sup>1</sup>

The Eurobarometer survey completed in November 2009 concluded that:

"Personal experience of discrimination remains largely at 2008 levels, with "age" being the most common (6%) grounds upon which discrimination was experienced in the 12 months leading up

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<sup>1</sup> Special EUROBAROMETER 263 "Discrimination in the European Union" Report

to the study. Overall, 16% of Europeans reported experiencing discrimination in 12 months leading up to the study."<sup>2</sup>

It is thus evident that discrimination is a significant problem. The relatively low levels of litigation in many member states are almost certainly explained by the significant lack of awareness of rights which both these surveys also reveal. In the UK, where some form of anti discrimination legislation has been in place since 1974, there were nearly 40,000 complaints of discrimination to tribunals in 2009/2010.

### **3. The Role of the Court or Tribunal**

As judges and legal practitioners, we are uniquely placed to understand the vital importance of the legal dramas that play out in front of us. Most of us operate in systems that place the onus on individuals to combat discrimination by the pursuit of litigation in the context of legislation providing individual rights. It is Labour Courts and Tribunals that provide the forums in which people seek to address the historic imbalances described above. It falls to the courts and tribunals to hear the witnesses, sift the evidence, read the documents, make findings of fact and come to conclusions. The question of the burden of proof lies at the very heart of that task.

### **4. The Burden of Proof**

The idea that there should be a burden of proof at all is central to our notion of fairness. It seems inherently right that a claimant be required to prove his or her case. The alternative would be to unfairly privilege the mere act of accusation and to encourage frivolous or vexatious claims.

This orthodoxy has operated in European legal systems both civil and criminal for a very long time and that, perhaps, explains why, certainly in the United Kingdom, a more nuanced and subtle burden of proof, designed to address the historic difficulty of establishing discrimination in a court of law, has caused considerable difficulty.

The decision of the Court of Appeal in **Madarassy v Nomura International Plc**<sup>3</sup> required the court to consider no less than 21 previously decided cases from the higher courts in deciding what the proper approach should be to the reversed burden of proof which we shall be discussing. Since the relevant provision had only been introduced into British law in 2001, there is a temptation to

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<sup>2</sup> Special EUROBAROMETER 317 "Discrimination in the European Union in 2009" Report

<sup>3</sup> **Madarassy v Nomura International Plc** [2007] IRLR 246.

think that almost nothing else in the law of discrimination had occupied the minds of the judiciary of the higher courts in the intervening period.

Helpfully, the leading judgement in **Madarassy** (one of several joined appeals on the same subject before the court at the same time) explains.

“We were informed that, as evidenced by this clutch of appeals and by appeals pending in other cases, employment tribunals are experiencing difficulty with the burden of proof in sex and race discrimination cases. **This is surprising** (my emphasis).”

Thus chastened, we should go back to the beginning.

## 5. The Directives

In the civil (as opposed to criminal) systems of law that pertain in Europe (and this is certainly so in the United Kingdom) the normal approach to the burden of proof is that the task of proving the facts upon which a claim is based rests upon the claimant. At least in theory, at no point in a case does the defendant ever need to prove anything.

However, by as early as the late 1980s this was recognised by the European Court of Justice (ECJ) as an inadequate approach in the difficult area of discrimination. In two cases, **Danfoss**<sup>4</sup> and **Enderby**<sup>5</sup> the court began to develop a jurisprudence that found room for what might be described as a *shifting burden of proof*.

In certain circumstances, the court recognised, it was simply not right to expect to claimant to continue to bear the burden of proving the case. In **Danfoss**, an equal pay case, the court held that where the employer’s systems of pay were so opaque that it was impossible for a woman to understand why she was being paid less than a man doing the same job, it was for the employer to prove that

“his practice in the matter of wages is not in fact discriminatory” (para13)

**Enderby**, like **Danfoss** is an equal pay case and the Court there was operating from an understandable standpoint; that on the whole employees are poorly placed, in terms of their access to the

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<sup>4</sup> Case 109/88, Danfoss [1989] ECR 3199

<sup>5</sup> Case C-127/92 Enderby [1983] ECR I-5535

evidence to prove those matters which they would need to show in establishing that they are being paid less than comparable men.

In December of 1997, the EC adopted **COUNCIL DIRECTIVE 97/80** on the burden of proof in cases of discrimination based on sex.

1. 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.

As the Court of Justice made clear in **Vasiliki Nikoloudi v Organismos Tilepikoinonion Ellados AE. Case C-196/02<sup>6</sup>**, this is a codification and extension of that previous case law, which itself is founded in the very longstanding principle of effective judicial protection for community rights. It is also a significant exception to the general rule of national procedural autonomy.

Article 8 Directive 2000/43 (the Race Directive) and Article 10 Directive 2000/78 (the Framework Directive) are identically worded.

The recitals to the Burden of Proof Directive acknowledge the effect of the provisions on the legal systems of the member states by reassuring those states that the traditional national autonomy in matters of procedure is being respected.

(13) Whereas the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with national law or practice;

and

(15) Whereas it is necessary to take account of the specific features of certain Member States' legal systems, inter alia where an inference of discrimination is drawn if the respondent fails to produce evidence that satisfies the court or other

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<sup>6</sup> See paragraph 69

competent authority that there has been no breach of the principle of equal treatment;

Nevertheless, they go on to state,

(17) Whereas plaintiffs could be deprived of any effective means of enforcing the principle of equal treatment before the national courts if the effect of introducing evidence of an apparent discrimination were not to impose upon the respondent the burden of proving that his practice is not in fact discriminatory;

(18) Whereas the Court of Justice of the European Communities has therefore held that the rules on the burden of proof must 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 must shift back to the respondent when evidence of such discrimination is brought;

The following recital appears in the Framework Directive

(31) The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought. However, it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation.

It is thus clear, in principle, what the law requires and why it is required. Discrimination is different to other civil wrongs and must be approached in a different way by the courts. As is evident from the confusion in the UK courts that I mentioned above, it may be less clear what that means in practice for an individual case. Below I will try to set out what I consider to be a sustainable approach for both direct and indirect discrimination cases.

## **6. A Sustainable Approach**

### **6.1 Direct Discrimination**

The wording of the directive clearly contemplates two distinct stages. What has become known as the *two stage test*. In the first stage, the claimant shoulders the burden of proof to show "facts from which it may be presumed that there has been

direct or indirect discrimination". The second stage is, of course, never reached if the claimant fails to discharge the burden at the first. At that stage, the respondent must prove that, despite the prima facie case made out by the claimant there has in fact been no breach of the principle of equality.

Accordingly, it is not surprising to find that the UK courts have developed a "two stage approach". What may be slightly more surprising is that in the leading case on the point, **Igen v Wong [2005]**<sup>7</sup> the Court of Appeal found it necessary to set out guidelines which amplify those two stages to 13!<sup>8</sup> This is, in fact, really no more than an acknowledgement that we are dealing with issues which are often of extreme forensic difficulty.

At present, there has really only been one ECJ case which offers any assistance on this matter. In **Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV. Case C-54/07**, the Belgian Labour Court referred a number of questions to the court on the application of the burden of proof. The facts were that an employer had, in 2005, publicly stated a policy of not employing certain ethnic minorities. The question was to what extent this earlier stated policy was capable of being a fact which would place the burden upon the employer to disprove the discriminatory nature of its recruitment policy at a later period. A further question was as to how strict the national court must be in assessing evidence in rebuttal of the presumption.

The ECJ was not expansive and its answers are to be found at paragraphs 29 to 34 of the judgement. Perhaps to no one's great surprise, the court concluded that a statement in 2005 by an employer that it would not appoint employees of certain ethnic minority backgrounds "**may constitute facts of such a nature as to give rise to a presumption of a (still existing) discriminatory recruitment policy**"

The next paragraph in the judgment proceeds on the basis that, in fact, the burden is shifted because the court went on to say that it was for the employer to "**adduce evidence that it has not breached the principle of equal treatment**" and went on to give an example of what the employer might rely on in this case.

To the national court is left the task of verifying "**that the facts alleged against the employer are established and to assess the sufficiency of the evidence which the employer adduces**

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<sup>7</sup> 3 All ER

<sup>8</sup> See appendix

*in support of its contentions that it has not breached the principle of equal treatment” para 33*

This is the task which I shall now spend some time on.

### **6.1.1 Comparators**

Although not strictly of relevance to the question of the burden of proof, it is worth mentioning the question of comparators. In all cases except those which relate to pregnancy, a claimant will have to show that he or she has been treated less favourably than a comparable person. This is certainly the approach of the relevant legislation in the UK and is implied by the formal equality demanded by the directive.

The comparison must be like with like ie, the comparator must be someone whose circumstances are the same, or not materially different, to the claimant’s except for the fact of the protected characteristic (racial origin, sexual orientation, age etc)<sup>9</sup>.

Where an **actual** comparator can be identified, the task of considering whether there has been difference of treatment is comparatively straightforward, requiring only findings of fact as to the treatment of the claimant, the treatment of his or her comparator and a comparison between the two. In our working example this is the case.

A difficulty arises however where there is no actual comparator and the Court or Tribunal has to consider what would have been the case had there been a suitable comparator. In other words, an **hypothetical** comparator must be constructed. In such cases, the UK courts have said, it can be permissible to focus immediately on the question of why what occurred did occur, what is known as the “reason why” question.

### **6.1.2 The First Stage**

As is often remarked, discrimination is frequently subtle. Certainly in the UK it is rare, now, to try cases where the behaviour complained of, if proved, is obviously related to the prohibited ground. Employers are unlikely now to leave an email trace directly linking a claimant’s dismissal to their protected status. Furthermore, even if discriminatory behaviour is not deliberate, it may be unconscious, perhaps based on an unquestioned stereotype.

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<sup>9</sup> MacDonald v Advocate General for Scotland [2003] IRLR 512

This latter point has been emphasised by the UK House of Lords in **R v Immigration Officer at Prague Airport and another**<sup>10</sup>

“If the difference is on racial grounds the reasons or motive behind it are irrelevant...The whole point of the law is to require suppliers to treat each person as an individual, not as a member of a group. The individual should not be assumed to hold the characteristics which the supplier associates with the group, whether or not most members of the group do indeed have such characteristics”

### **A working example**

Let us at this point posit an example to which we can return for the purposes of illustration.

The court is dealing with a claim by a man of North African racial origins who is a Muslim and who alleges that he applied for a promoted post within her employer’s organisation but was unsuccessful. The successful candidate was a white European male. The claimant and the successful candidate are equally well qualified and of similar experience. The claimant complains that his non-promotion was because of his race and/or because of his religion.

### **What evidence is sufficient to shift the burden?**

The UK courts have been clear about this since the decision in **Madarassy**

**“The court in *Igen v Wong* expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent ‘could have’ committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal ‘could conclude’ that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.”<sup>11</sup>**

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<sup>10</sup> [2005]2 AC. Per Baroness Hale

<sup>11</sup> At paragraph 56, page 251

It is certainly the case that British commentators have suggested that this places too heavy a burden on the claimant but that, nevertheless, remains the law.

### **The Importance of primary facts**

It thus follows that for a court to discern what facts may satisfy the first stage of the test may be very difficult. The UK courts have firm views on this. The UK formulation of the reversed burden of proof requires a claimant to show "***facts from which the tribunal could... conclude in the absence of an adequate explanation that the respondent has committed an act of discrimination***".

The focus is on what are thought of as ***primary facts***; what happened; who said what; how many women does this firm employ in the promoted echelons; has this company got an equal opportunities policy; etc? From those primary facts, a court may draw inferences.

In our working example, the primary facts established so far would be

- 1) The racial origin and religion of the claimant
- 2) The racial origin of the successful candidate
- 3) The claimant and the successful candidate are equally well qualified and of similar experience.

### **The importance of inferences**

Inferences are a key concept here. On its own, the fact that a company employs only one non-white person in a promoted position does not prove that the claimant's lack of promotion is because of his race or his religion. It is, however, a fact based upon which a racially discriminatory motive could be inferred in the right circumstances.

Perhaps I might say something about what it means to draw an inference. We start from the proposition, as I have already pointed out, that discrimination will seldom be overt. If, in our example, the claimant satisfied us that the employer had said, after the interview "I am very impressed with your credentials for the job, what a pity it is that you are black" we would not need to draw an inference from the primary facts because they speak of discriminatory motivation ipso facto and clearly require the employer to attempt to disprove a discriminatory selection for the post.

On the other hand, if the tribunal found that the employer had said before the interview, "how was your last holiday?", without further evidence which would place that apparently neutral comment in a different light, a tribunal could not draw an inference against the employer.

If, however, the court was satisfied that the employer, just before the interview proper began, enquired casually as to how the claimant managed in the hot factory during the month of Ramadan (when observant Muslims may not eat or drink during daylight hours); that is not evidence that *necessarily* points to discriminatory intent. It might simply be that the employer was making polite small talk to put the claimant at his ease. However, the nature of the topic is certainly capable of bearing a sinister interpretation. The employer might be concerned that the claimant would be unable to fulfil the extra requirements of the promoted post during Ramadan perhaps because of reduced concentration or energy. Such a comment would support an inference of discrimination, requiring an explanation, provided that the other elements that we have already discussed are in place.

The process of inference drawing in this context is, therefore, no more than a consideration of what conclusions might properly be drawn from evidence not overtly or directly tainted with discrimination.

In the UK there is a pre-trial questionnaire procedure and courts are empowered to draw adverse inferences from the failure by an employer to complete the questionnaire or to provide accurate and unequivocal answers. Similarly, inferences have been drawn from failures to follow recommendations in a statutory code of guidance and from the failure by an employer to call as witnesses those who were involved in the events or decisions complained of.

Thus, to return to our example above, if our claimant can show that he applied for a promoted post for which she was, on the face of it, qualified, and was passed over in favour of a white colleague, the UK courts would not regard the burden as having been discharged, since she has so far only shown a difference of treatment (promotion as against being passed over) and a difference of status (North African Muslim as against white non-Muslim). If, however, the evidence further shows that, because the company is based in an area where a large percentage of the population is originally from North Africa and in consequence, 30% of the work force is of North African origins and is Muslim, but there is only one such person in the promoted echelons of the company, that may be sufficient to

shift the burden so as to require an explanation from the employer.

The task of the claimant is here both to prove the primary facts upon which he relies as amounting to the treatment of which he complains and also to establish material upon which the court could conclude that there is a causative link between the treatment and the claimant's protected status ie he has been treated less favourably than another on the grounds of his race or religion.

In our example above, the claimant would need to establish that he had indeed applied for the job and that he had indeed been passed over. That is the treatment of which he complains. The facts of the race of the successful candidate and the low representation of North Africans amongst the promoted echelons are facts which go to causation ie the link between his race and the treatment he complains of.

### **Background and context**

In providing material from which the court may draw an inference, the claimant may wish to rely on evidence which might, at first sight, be considered irrelevant. He may wish to call evidence about the treatment of others in the workplace or of events which are not now the subject of her complaint, for example matters which occurred some time ago. This, of course, presents a case management challenge to the court or tribunal. On the one hand, there must be some legitimate and reasonable limit to the scope of the current enquiry. On the other hand, the claimant must be permitted to adduce evidence which is relevant to the claim and from which, if established as fact, a court could draw inferences.

In the UK, this principle was established by the Court of Appeal in a race discrimination case, **Anya v University of Oxford** [2001] IRLR 377. In that case, once again, the observation is made that very little discrimination is overt (or perhaps, even deliberate). **Anya**, like the example we have chosen to consider throughout this presentation, was an appointment case.

Dr Anya applied, unsuccessfully, for a research post. The successful candidate was white. Dr Anya is a black Nigerian. The tribunal heard from a witness for the university who explained that Dr Anya had not been selected for reasons related entirely to his qualities as a scientist. They found that witness truthful and dismissed the claim. Dr Anya had called evidence about five events prior to his rejection which he said indicated bias against him. He did not seek to make this instances part of his claim but relied on them to establish that

his rejection for the post was on the grounds of his race. The tribunal failed to make findings of fact on any of those matters, let alone indicate whether they could draw any inferences from them. This was despite the fact that they noted, in the evidence on those matters, inconsistencies between the University's witnesses and also inconsistencies between their evidence and the documents.

The Court of Appeal remarked that in obvious and straightforward cases it might be possible to reject a complaint without a detailed consideration of the background evidence. However, here, when a choice lay between two well qualified candidates and the decision depended on judgments which are notoriously capable of being influenced by idiosyncratic factors, that was not possible. If any of the factors influencing the decision were racial factors, that would generally only emerge from the surrounding circumstances and previous history.

**Anya**, in fact, represents a paradigm example of the task before a court or tribunal. The tribunal must first decide what occurred. Primary facts must be found and these are not limited to the facts of the event or decision under immediate consideration by the tribunal. The tribunal must then decide what, if any, inferences it draws from those facts and explain why it draws them. At that moment, but only then, is the court or tribunal is equipped to decide whether the burden shifts to the respondent for an explanation.

To return to the example; the claimant may wish to show that he has applied for promoted posts in the past and has, on each occasion, lost out to a white person. Or he may wish to show that the last 5 promoted posts in the factory have all gone to white people, despite the fact that there have been candidates of North African origin. These matters are not complaints before the court but are matters which may allow the court, if decided in favour of the claimant, to draw an inference in this case.

### **6.1.2 The Second Stage.**

Once the burden has been shifted to the employer, it is for him or her to provide an explanation **which is in no sense at all** connected to the protected status of the employee. The explanation must, of course, be adequate and must be accepted by the court. An employer falling short of that **must** be found to have discriminated, even though the court might perceive another reason, not advanced by the employer, but nevertheless non-discriminatory.

As we have already seen, it will be no defence to an employer to show that the treatment was not motivated consciously by race or that it was based on an accurate stereotype. This is often of particular significance in cases of alleged harassment. Statements which might be regarded as neutral and truthful observations can, nevertheless, in their adoption of a "one size fits all" mentality, belittle and humiliate individuals.

In our example, the employer's case is that the successful candidate was appointed on merit and not by reference to race. The employer will want to adduce a clear explanation of the factors that were taken in to account in assessing the claimant's performance, and that of the successful candidate. The more objective the comparison is, the easier it will be for the employer to dispel any suggestion even of unconscious bias.

### **What evidence may be considered at each stage?**

Since we are facing a two stage test, it is pertinent to ask what material can be considered at each stage. One approach would be to insist that at the first stage the claimant's evidence alone should be considered and only at the second stage should the respondent's evidence be considered, by which point the evidence should concern only matters not previously canvassed at stage one. Apparently this is the preferred approach in Sweden<sup>12</sup>

Ms Madarrassy complained that she had been chosen for redundancy because of her recent pregnancy and period of maternity leave. She failed in her claim of discrimination and appealed, eventually reaching the Court of Appeal. There it was argued that only evidence from the claimant and any evidence from the respondent which might assist the claimant, could be considered at the first stage. This was rejected by the court which set out the following approach.

"Could conclude" in section 63A(2) must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would **include evidence adduced by the claimant** in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would **also include evidence adduced by the respondent contesting the complaint**. .....the tribunal

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<sup>12</sup> NJA 2006 s 170. I am indebted to Italian legal scholar Matteo Bonini-Baraldi for this example which is taken from his presentation to the May 2009 ERA conference on directives 2000/43 and 2000/78.

would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the claimant to prove less favourable treatment; evidence as to whether the comparisons being made by the claimant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment."

To return once again to our example; the **Madarrassy** approach would permit the court, for example, to consider evidence from the employer which tended to show that, although it had very few North Africans in promoted posts, this was because the claimant was one of very few North Africans who had ever applied for promotion and that the employer had a well developed policy of encouraging applications from North Africans. If accepted, this might be sufficient to negate the evidence upon which the claimant relied to shift the burden. The contrary approach would prevent the employer from advancing such evidence until the second stage.

To take an even more extreme example, the first approach would prevent the employer from adducing evidence to show that the complained of act never happened at all. The burden of proof would then shift, requiring the employer to show that acts which, on later analysis were found never to have occurred, were not discriminatory<sup>13</sup>

An added problem with the first approach is the practical difficulty for a court or tribunal in dividing up a hearing so as to decide each stage separately. In reality, courts hear all the evidence at once and it is highly artificial to expect the court to exclude from its considerations at stage one, cogent evidence which it has heard advanced by the employer, in case it should be required to meet a shifted burden of proof.

It would be a very brave employer indeed who simply declined to call any evidence, on the assumption that the claimant would not succeed in shifting the burden. This is born out by the example of the case of **EB v BA**<sup>14</sup> (a transgender case) a decision of the UK Court of Appeal. In that case the absence of adequate documentation, which was all in the possession of the employer, made it difficult, but ultimately not impossible, for the claimant to shift the burden. However, once the burden had shifted, that same

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<sup>13</sup> This absurdity was pointed to by the judgement of Elias J **Laing v. Manchester City Council** [2006] IRLR 748

<sup>14</sup> [2006] IRLR 471

absence meant that it was impossible for the employer to discharge the burden now resting on it.

Thus, in our example, the employer would wish to produce copies of the notes of the interviews of the claimant and his comparator and the score sheets, if any, that the interview panel drew up in deciding who should be promoted. Although they might provide material upon which the claimant could draw, an absence of such records would leave the respondent extremely vulnerable once the burden had shifted.

## **6.2 Indirect Discrimination**

Our working example now changes. The claimant complains that he has not been promoted because there is an informal practice at the company (which is in France) of only promoting staff who have a high degree of fluency in French and that this policy is indirectly discriminatory.

In such a case, discrimination has taken place if there exists a provision or criteria or practice which, although of neutral application, puts someone of the claimant's particular characteristics (ie his racial origin) at a particular disadvantage and which cannot be justified.<sup>15</sup>

It will be for the claimant to show the existence of the provision and the fact that it places (in this case) North Africans at a particular disadvantage.

In our new example, the claimant might show both by statistical evidence. An analysis of the linguistic skills (perhaps an analysis of which is the first language) of successful as opposed to unsuccessful candidates in promotion competitions over the preceding years might go some way to showing the existence of the practice. A break down of the racial origins of successful and unsuccessful candidates might establish the disadvantage.

Once again, it is open to the employer to adduce evidence to rebut the presumption. Thus, the employer might show that although the statistics seem to show that people with fluency in French are more likely to be preferred, this is not as the result of any practice but because they tend to be the better candidates overall and that all appointments are made on merit, not length of service.

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<sup>15</sup> **DIRECTIVE 2002/73/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

If, nevertheless, the burden does shift, the employer may attempt to justify the practice, perhaps by showing that it is a legitimate business need to only promote staff whose linguistic abilities are adequate for the demands of the promoted post.

### 6.2.1 Statistical Evidence

We have already mentioned statistical evidence but it is worth spending a little more time on the subject.

In the case of *Enderby*, the court concluded that where two jobs are of equal value and one is carried out almost exclusively by men and the other by women, a prima facie case of indirect discrimination is established if statistics show an appreciable difference in pay between the two jobs. This is so even if it is not possible to explain how the differential has arisen.

The key question here is whether the statistics are adequate to demonstrate a general state of affairs, as opposed to a temporary or fortuitous, one and whether the difference(s) they reveal is/are significant.

Statistics, as I have already remarked, may help to show the existence of a policy or practice. Here the court will most often be referred to statistics deriving from the relevant employer's work force. They may also be relied on to show particular disadvantage. The court may be referred to broader, industry wide or even national labour force, statistics. Sometimes the only evidence advanced at all, particularly on the disadvantage issue, is statistical.

Arguably, the importance of statistical evidence may be taken to have diminished. The 1997 directive on Burden of Proof spoke of "substantially higher proportion of the members of one sex". This was described in the decision of the House of Lords in **Rutherford v Secretary of State for Trade and Industry (No2)**<sup>16</sup> as the language of comparison which demanded a consideration of the proportions of women and men disadvantaged by the criterion. This, in the view of the House of Lords, implied a statistical analysis.

The new wording<sup>17</sup> seems to propose a less onerous burden in showing disadvantage. As yet, there has been no ECJ jurisprudence, that I am aware of, that attempts to delineate the

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<sup>16</sup> [2006] IRLR 553

<sup>17</sup> "indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary"

difference in the two definitions. It would be fair to say that cases decided in the appellate courts in the UK have continued to regard statistical evidence as the primary method of establishing the disadvantage element of the complaint. There is a suspicion of what might be regarded as less rigorous approaches which has, to some extent, been born out by facts. In the case of **R v Secretary of State for Employment ex parte Seymour-Smith and Perez**<sup>18</sup>, statistical evidence established beyond doubt that a legislative measure which it had been assumed by the parties had significant disparate impact on women, had ceased to do so by the time that the litigation was concluded!

## 7 Conclusion

As our experience of dealing with cases of discrimination in the workplace has increased, it has become clear that overt, crude, discrimination is less and less practiced. Nevertheless, statistics such as those set out at the start of this presentation disclose that many people are still the subject of discriminatory treatment on the grounds of a protected status. Promotion glass ceilings, opaque pay practices, stereotypical assumptions, hostility to people not apparently living "conventional" lifestyles, lack of awareness and other factors denying people an equal place in the world of work, still operate.

On the other hand, not every person who claims to have been discriminated against on the ground of a protected status has been.

Our task, fairly applying the burden of proof provisions and approaching the task of considering the evidence in a sensitive and conscientious manner, is to discern, as best we can, the truth.

Philip Rostant

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<sup>18</sup>[1995] IRLR 464