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The Anti-discrimination directives 2000/43 and 2000/78 in practice

**The Burden of Proof in Discrimination Cases
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Introduction

1. Directives 2000/78 and 2000/43 both contain an article that ‘reverses’ the burden of proof in discrimination cases. That is to say, that whereas normally it would be for the claimant to prove his or her case, in discrimination cases once the Claimant establishes a prima facie case, the Defendant is required to prove that he or she did not discriminate against the Claimant.

History

2. Before turning to the relevant articles of Directives 2000/78 and 2000/43, let us look at the history of this provision and the reason for its introduction.
3. In a number of cases going back to the 1980s concerning equal pay between men and women, the European Court of Justice (ECJ) held that in cases of indirect discrimination the burden of proof shifted from the complainant to the author of the alleged discrimination once the complainant established the facts that there was a disproportionate impact on one sex. If the complainant proved that, then it was for the employer to show that the reason was unrelated to sex.
4. In *Enderby v Frenchay Health Authority*, ECR [1993] I-5535, for example, the ECJ held as follows:

“13 It is normally for the person alleging facts in support of a claim to adduce proof of such facts. Thus, in principle, the burden of proving the existence of sex discrimination as to pay lies with the worker who, believing himself to be the victim of such discrimination, brings legal proceedings against his employer with a view to removing the discrimination.

14 However, it is clear from the case-law of the Court that the onus may shift when that 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 substantially more members of one or other sex, that measure must be regarded as contrary to the objective pursued by Article 119 of the Treaty, unless the employer shows that it is based on objectively justified factors unrelated to any discrimination on grounds of sex (Case 170/84 *Bilka-Kaufhaus* [1986] ECR 1607, at paragraph 31, Case C-33/89 *Kowalska* [1990] ECR I-2591, at paragraph 16, and C-184/89 *Nimz* [1991] ECR I-297, at paragraph 15). Similarly, where an undertaking applies a system of pay which is wholly lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men (Case 109/88 *Danfoss* [1989] ECR 3199, at paragraph 16).

15 In this case, as both the FHA and the United Kingdom observe, the circumstances are not exactly the same as in the cases just mentioned. First, it is not a question of de facto discrimination arising from a particular sort of arrangement such as may apply, for example, in the case of part-time workers. Secondly, there can be no complaint that the employer has applied a system of pay wholly lacking in transparency since the rates of pay of NHS speech therapists and pharmacists are decided by regular collective bargaining processes in which there is no evidence of discrimination as regards either of those two professions.

16 However, if the pay of speech therapists is significantly lower than that of pharmacists and if the former are almost exclusively women while the latter are predominantly men, there is a prima facie case of sex discrimination, at least where the two jobs in question are of equal value and the statistics describing that situation are valid.

17 It is for the national court to assess whether it may take into account those statistics, that is to say, whether they cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena, and whether, in general, they appear to be significant.

18 Where there is a prima facie case of discrimination, it is for the employer to show that there are objective 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 the onus of showing that the pay differential is not in fact discriminatory (see, by analogy, the judgment in *Danfoss*, cited above, at paragraph 13).

19 In these circumstances, the answer to the first question is that, where significant statistics disclose an appreciable difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men, Article 119 of the Treaty requires the employer to show that that difference is based on objectively justified factors unrelated to any discrimination on grounds of sex.”

5. Prompted in part by such decisions, the Commission drafted a proposal for a directive to govern the burden of proof in cases of discrimination on grounds of sex. Eventually, on 15 December 1997, the Council adopted Directive 97/80/EC, of 15 December 1997.
6. The proposed directive was intended to make the enforcement of the principle of equal treatment more effective. Recital 17 to the 1997 Directive noted that “plaintiffs 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 respondent the burden of proving that his practice was not in fact discriminatory.”
7. Article 1 of this directive, specified that its aim was: “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 of 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”.

8. It is important to note that whereas the decisions of the ECJ had dealt with Equal pay, the burden of proof directive was not limited to such cases. The burden of proof would shift in any case of discrimination (other than criminal cases), whether concerning pay or any other employment condition: see Article 3 dealing with Scope.

History: the UK experience

9. It is interesting to note that long before the Burden of Proof Directive, the UK courts had already recognised the difficulties faced by complainants of proving discrimination. In 2002 an analysis showed that only 16% of employment tribunal claims alleging race discrimination were successful.
10. The UK Court of appeal established guidance for dealing with discrimination cases in the case of *King v Great Britain China Centre* [1992] ICR 516. This guidance essentially allowed courts to draw inferences that discrimination had taken place where the alleged discriminator failed to provide an innocent explanation for matters that appeared to indicate that discrimination may have taken place. Neill L.J. (with whom Nourse L.J. and Sir John Megaw agreed) said this (at pp 528–9):

"From these several authorities it is possible, I think, to extract the following principles and guidance. (1) It is for the applicant who complains of racial discrimination to make out his or her case. Thus if the applicant does not prove the case on the balance of probabilities he or she will fail. (2) It is important to bear in mind that it is unusual to find direct evidence of racial discrimination. Few employers will be prepared to admit such discrimination even to themselves. In some cases the discrimination will not be ill-intentioned but merely based on an assumption that "he or she would not have fitted in." (3) The outcome of the case will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 65(2)(b) of the Act of 1976 from an evasive or equivocal reply to a questionnaire. (4) Though there will be some cases where, for example, the non-selection of the applicant for a post or for promotion is clearly not on racial grounds, a finding of discrimination and a finding of a difference in race will often point to the possibility of racial discrimination. In such circumstances the tribunal will look to the employer for an explanation. If no explanation is then put forward or if the tribunal considers the explanation to be inadequate or unsatisfactory it will be legitimate for the tribunal to infer that the discrimination was on racial grounds. This is not a matter of law but, as May L.J. put it in *North West Thames Regional Health Authority v. Noone* [1988] I.C.R. 813, 822, "almost common sense." (5) It is unnecessary and unhelpful to introduce the concept of a shifting evidential burden of proof. At the conclusion of all the evidence the tribunal should make findings as to the primary facts and draw such inferences as they consider proper from those facts. They should then reach a conclusion on the balance of probabilities, bearing in mind both the difficulties which face a person who complains of unlawful discrimination and the fact that it is for the complainant to prove his or her case."

11. In this way, the UK courts hoped to address the difficulty complainants faced when making a claim of discrimination. The UK Court of Appeal did not go so far as to suggest that the burden of proof was reversed. The guidance in that case received the express approval of the UK House of Lords in *Glasgow City Council v Zafar* [1998] ICR 120. In that case Lord Browne-Wilkinson acknowledged that remarks which he made when, as a more junior judge, he presided in the Employment Appeal Tribunal in two earlier cases, *Khanna v Ministry of Defence* [1981] ICR 653 and *Chattopadhyay v Headmaster of Holloway School* [1982] ICR 132, went too far and should not be followed. Thus in *Chattopadhyay* it was said:

"the law has been established that if an applicant shows that he has been treated less favourably than others in circumstances which are consistent with that treatment being based on racial grounds, the industrial tribunal should draw an inference that such treatment was on racial grounds, unless the respondent can satisfy the industrial tribunal that there is an innocent explanation."

12. Clearly, however, those remarks are actually consistent with the law that the burden of proof directive established. The directive does require the respondent to prove – satisfy the tribunal – that there is an innocent explanation once a prima facie case of discrimination is made out by a complainant.

13. The wording of the 1997 directive is materially identical to the 2000 directives as regards the shift of the burden of proof.

Directives 2000/78 and 2000/43

14. Directives 2000/78 and 2000/43 imported the reversal of the burden of proof established by the 1997 directive for all forms of prohibited discrimination. In Directive 2000/43 it is Article 8, which reverses the burden of proof in cases of race discrimination. This article is materially identical to Article 10 of Directive 2000/78, which provides:

Article 10

Burden of proof

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.

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

3. Paragraph 1 shall not apply to criminal procedures.

4. Paragraphs 1, 2 and 3 shall also apply to any legal proceedings commenced in accordance with Article 9(2).

5. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

15. It is worth briefly noting that the shift of the burden of proof does not apply in criminal proceedings. Article 6(2) of the European Convention on Human Rights provides that “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.” That right includes the right not to incriminate oneself. In *Funke v France* 16. EHR 297, the European Court of Human Rights held that the right to a fair trial includes “the right of anyone charged with a criminal offence ... to remain silent and not to contribute to incriminating himself”. It therefore follows that when facing a criminal charge, it would not be compatible with that right to insist that the Defendant bear the burden of proving that there was no discrimination.
16. Leaving aside criminal cases, the Article clearly envisages a two-stage process. First the complainant must prove facts from which the court could find that there had been discrimination. If such facts are proved, the Defendant must prove that there was no breach of the principle of equal treatment.
17. It is interesting to look at how this process has been used in domestic cases. The ECJ will only lay down principles and it is for the national court to apply those principles to the facts that it is dealing with. Clearly the national court is at the coalface.
18. In *IGEN and others v Wong and others* (2005) IRLR 258, the issue of the burden of proof was considered by the UK Court of Appeal, which held as follows:
 - a. The new provisions in the Discrimination Acts as amended, which implemented European directives, provided that if an applicant showed that he had been treated less favourably than others in circumstances which were consistent with that treatment being based on grounds of race or sex, the tribunal should draw an inference that such treatment was discriminatory unless the respondent could satisfy the tribunal that there was an innocent explanation.
 - b. The provisions required the tribunal to go through a two-stage process. The first stage required the complainant to prove facts from which the tribunal could, apart from the section, conclude in the absence of an adequate explanation that the respondent had committed, or was to be treated as having committed, the unlawful act of discrimination. If the complainant proved those facts, the second stage required the respondent to prove that he did not commit or was not to be treated as having committed that act.
 - c. The words "in the absence of an adequate explanation", followed by "could", indicated that at the first stage the tribunal was required to assume that there was no adequate explanation for those facts.
 - d. It was for the complainant to prove the facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent committed an unlawful act of discrimination. It was not sufficient to prove facts from which the tribunal could conclude that the respondent "could have committed" such an act. It was not sufficient for the complainant to prove only the possibility rather than the probability of those facts at the first stage.

19. Another interesting UK decision on this issue is *EB v BA* 2006 IRLR 471. In this case the complainant, who had undergone gender reassignment, argued that he had been discriminated against in the allocation of consultancy work. EB sought disclosure of detailed information about the allocation of the work. The Respondent refused to disclose it, saying that it was for EB to prove his case. The Court of Appeal said that it was not appropriate in a discrimination context, given the reversal of the burden of proof, for an employer faced with a discrimination case to sit back and say “you prove it”. By failing to make the documentation and other evidence available, the employer is likely to find it cannot rebut the prima facie case that has been made.
20. In the UK there is provision for a potential claimant to obtain information from a respondent prior to issuing a claim. It is well established that the courts will draw adverse inferences if a respondent fails to respond or provides an inadequate response to such requests for information.

Conclusion

21. The provisions in Directives 2000/78 and 2000/43 reversing the burden of proof are an attempt to address the difficulties that complainants often face in proving their case in discrimination cases. The provision applies in both direct and indirect discrimination cases. The aim of the provision is to render the principle of equal treatment more effective in practice. The provision requires courts to take a two-step approach to discrimination cases. First, the complainant must establish a prima facie case of discrimination. If that prima facie case is established, the burden of proof shifts to the respondent to show that there is a non-discriminatory reason for the treatment. It is a matter of debate how far a complainant must go in order to demonstrate a prima facie case, and for the burden to shift to the respondent: this will be for national courts to determine on the facts before them. It may also be that these provisions must be interpreted to include some responsibility on the part of the respondent to provide information from which even the prima facie case might be established.
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