The Burden of Proof in Discrimination Cases

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1. Introduction

- The burden of proof in common law countries is not the same as in Roman law countries

- Consequences of the difference between an adversarial procedure and an inquisitorial procedure

- Adversarial judicial system:

The judge remains neutral. His role is that of an impartial arbiter, and the parties are responsible for administering evidence.

- Inquisitorial judicial system:

Written, ex parte, undisclosed procedure. The judge plays an active role in establishing the truth, and his role is not confined simply to deciding.

Difference between civil and criminal procedure: in criminal procedure, the judge can be tasked with investigating the case and adducing the evidence (as in many countries such as France and Luxembourg, e.g. with the *juge d'instruction*)

2. The burden of proof as a general principal

"Actori incumbit probatio"

The burden of proof resides with the plaintiff.

The general principal behind the inquisitorial system derives from the principle of legal certainty.

e.g.: Section 1315 (1) of the Civil Code of France/Luxembourg:

"The party who claims the performance of an obligation must prove it."

- The material difficulties in proving discrimination

- Discrimination is a fuzzy and widespread phenomenon
- Lack of witnesses
- Absence of written proof
- Fear of reprisals
- Contractual freedom

3. Shifting the burden of proof

- A concern to establish the facts in the inquisitorial system of justice.
- The need to help the victim present evidence of discrimination.
- Established EUCJ case-law – discrimination on grounds of sex (e.g.: DANFOSS, C-109/88).
- A reversal of the burden of proof, but partial, not total (= shift):

  The plaintiff submits a simple presumption, a possibility that discrimination has occurred. This is *prima facie* evidence.

  The defendant must adduce evidence that the discrimination has not occurred.

- Limited to certain categories of discrimination:
  - Sex discrimination: Directive 1997/80/EC.
  - Discrimination relating to equal treatment of persons irrespective of racial or ethnic origin: Directive 2000/43/EC.
  - Discrimination relating to equal treatment in employment and occupation: Directive 2000/78/EC.

- Article 8 of Directive 2000/43/EC, and Article 10 of Directive 2000/78/EC:

  "*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 proceedings brought in accordance with Article 7(2). (Article 9(2) for Directive 2000/78)

  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.*****"**

- Member States must apply a mechanism that partially reverses the burden of proof in discrimination cases.

- This can be a complete reversal, as countries are allowed to adopt rules which are more favourable to victims.

- The scope excludes criminal matters and proceedings where the court is responsible for collecting the evidence (+ presumption of innocence).

- Transposed in the law of Luxembourg by Section 5 of the Act of 28/11/2006 on implementing the principle of equal treatment:

  "*(1)* ***when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, directly or through a non-profit-making association*** *competent to do so pursuant to Section 7 below or through a trade union competent to do so subject to the limitations described in Section L. 253-5 (2) of the Labour Code, or in the framework of an action arising from the collective labour agreement or an agreement concluded pursuant to Section L. 165-1 of the Labour Code in accordance with and respecting the limitations described in Section L. 253-5 (1) of the Labour Code, before a civil or administrative court,* ***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 apply to criminal procedures****."*

Belgium

- Applies to “facts which reveal a certain recurrence of unfavourable treatment”

(Section 28 (2) of the “Antidiscrimination Act”, Section 30 (2) of the Act of 30 July 1981 , inserted by the “Racism Act”).

4. Applying the mechanism for sharing the burden of proof

- Handled differently according to whether discrimination is direct or indirect:
  - In cases of direct discrimination:

    The victim must draw a concrete comparison between two personal situations.
  - In cases of indirect discrimination:

    The victim must demonstrate the effects of the measure or practice which is causing unjustifiably different treatment and compare the situations (‘disparate impact’).

- Directives 2000/43/EC and 2000/78/EC

  Recital 15: "*The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice.* ***Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence.***"

CJEU case-law

FERYN JUDGMENT

ECJ, 10 July 2008, *Centrum voor gelijkheid van kansen en voor racismebestrijding contre Firma Feryn NV*, C-54/07

- §29 The third to fifth questions concern the application of the rule of the reversal of the burden of proof laid down in Article 8(1) of Directive 2000/43 to a situation in which the existence of a discriminatory recruitment policy is alleged by reference to remarks made publicly by an employer concerning its recruitment policy.

- §30 Article 8 of Directive 2000/43 states in that regard that, where there are facts from which it may be presumed that there has been direct or indirect discrimination, it is for the defendant to prove that there has been no breach of the principle of equal treatment. The precondition of the obligation to adduce evidence in rebuttal which thus arises for the alleged perpetrator of the discrimination is a simple finding that a presumption of discrimination has arisen on the basis of established facts.

FERYN (cnt.)

- §31 Statements by which an employer publicly lets it be known that, under its recruitment policy, it will not recruit any employees of a certain ethnic or racial origin may constitute facts of such a nature as to give rise to a presumption of a discriminatory recruitment policy.
- §32 It is, thus, for that employer to adduce evidence that it has not breached the principle of equal treatment, which it can do, inter alia, by showing that the actual recruitment practice of the undertaking does not correspond to those statements.
- §33 It is for the national court to verify that the facts alleged against that employer are established and to assess the sufficiency of the evidence which the employer adduces in support of its contentions that it has not breached the principle of equal treatment.

- Acceptable evidence:

  – Testing: situation testing is admitted as evidence in France following “Moulin Rouge” case-law from the Court of Appeal in Paris (Cour d’Appel, 11ème chambre, 17 October 2003, no. 03/00387).

  In Belgium: comparison with a reference individual (situation testing admitted in 2003 and removed in 2007– symbolic).

  – Statistics: allow effective comparison of situations, in particular in cases of indirect discrimination.

  The ECtHR is relying increasingly on statistics, notably in the case of “D.H. and others versus the Czech Republic” of 13 November 2007 (app. 57325/00 – Grand Chamber).

D.H. and others

- §189. Where an applicant alleging indirect discrimination thus establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent State, which must show that the difference in treatment is not discriminatory (see, *mutatis mutandis, Nachova and Others* [GC], cited above, § 157). Regard being had in particular to the specificity of the facts and the nature of the allegations made in this type of case (*ibid.,* § 147), it would be extremely difficult in practice for applicants to prove indirect discrimination without such a shift in the burden of proof.

- §190. In the present case, the statistical data submitted by the applicants was obtained from questionnaires that were sent out to the head teachers of special and primary schools in the town of Ostrava in 1999. It indicates that at the time 56% of all pupils placed in special schools in Ostrava were Roma. Conversely, Roma represented only 2.26% of the total number of pupils attending primary school in Ostrava. Further, whereas only 1.8% of non-Roma pupils were placed in special schools, the proportion of Roma pupils in Ostrava assigned to special schools was 50.3%.
- … .

5. Examples

1. Recruitment
2. Housing
3. Night clubs