

Proving Discrimination: Evidence and the Burden of Proof

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Proving discrimination: the problem

- It is unusual to find direct evidence of discrimination.
- “Few employers will be prepared to admit such discrimination even to themselves.” (*King* [1991] EWCA)
- those who discriminate on the grounds of race or gender do not in general advertise their prejudices: indeed they may not even be aware of them.” (*Zafar* [1997] UK House of Lords)

Proving discrimination: CJEU establishes the principle of a shifting burden proof

“The Equal Pay Directive must be interpreted as meaning that where an undertaking applies a system of pay which is totally 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.” (*Danfoss* C- 109/88 (1989))

Burden of Proof Directive 97/80/EC

Recital 17

...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.

Burden of Proof Directive 97/80/EC

Art. 1

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.

Burden of Proof Directive 97/80/EC

Art. 4(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.

Race Equality Directive 2000/43, Art. 8;
Employment Equality Directive 2000/78,
Art 10; and Equal Treatment (Recast)
Directive 2006/54, Art.19

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Role of national courts

- “It is for the national court to verify that the facts alleged against the 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.”
(Firma Feryn NV, CJEU Case C-54-07)
- Step-by-step guidance for UK courts - annex to judgment in *Igen Ltd. v Wong* [2005] EWCA

The initial burden is on the claimant to establish facts from which it may be presumed that there has been direct or indirect discrimination.

If the claimant does not do so, the case fails.

- “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.” (*Madarassy* [2007] EWCA Civ 33)

prima facie evidence of discrimination

- did the alleged treatment occur?
- if so, when, by whom? who was affected?
- is there an actual or hypothetical comparator who was/would have been treated differently?
- were proper procedures followed?
- is there evidence of prejudice, segregation or past discrimination?
- was the treatment on the alleged grounds?

The court needs to consider all the evidence relevant to the complaint of discrimination, including evidence adduced by the respondent disputing or rebutting the claimant's evidence.

possible sources of evidence

- oral or written evidence by the parties and witnesses
- documents held by/created by either party
- audio or video recordings
- respondent's reply to questionnaire or other questions posed by claimant
- statistics

The evidence accepted by national courts will be key to the prospects of the claimant's case.

“Member States may not apply rules which are liable to jeopardise the achievement of the objectives pursued by a directive and therefore deprive it of its effectiveness” (CJEU in *Kelly*, Case C-1040/10)

The burden shifts to the respondent, once a *prima facie case* is established, to prove no breach of the principle of equal treatment

- The court must uphold the complaint unless the respondent provides a cogent explanation which is sufficient to prove, on the balance of probabilities, that there has been no discrimination whatsoever.
- The court can go directly to the 'second stage' focusing on the respondent's reason for the treatment

Indirect discrimination: shift of the burden of proof and justification

- If the claimant establishes a *prima facie* case that a provision, criterion or practice of the respondent puts/would put women at a particular disadvantage compared to men;
- Then, if the respondent is not able to provide an adequate explanation to rebut the claimant's evidence and to prove that any disadvantage is wholly unrelated to sex, the court must make a finding of indirect discrimination
- unless the respondent can justify the provision, criterion or practice as an appropriate and necessary means of achieving a legitimate aim.