

Proving discrimination: Evidence and the Burden of Proof

In most countries of Europe discrimination is a civil wrong, although there are some countries in which it is defined as a criminal offence. I wish to focus on proving discrimination in civil proceedings, looking at the forms of evidence that may be available and acceptable and on whom the burden of proof lies in discrimination proceedings.

The difficulty in proving discrimination was recognised by advocates on behalf of victims of discrimination from the early days of national anti-discrimination legislation and gradually also recognised by some courts which had to decide discrimination cases. The Court of Appeal in the UK, in a case of alleged race discrimination, sought to set out principles and guidance drawn from the authorities, including the following, which has been repeated consistently to the present day in decisions of UK courts at every level in respect of discrimination on any of the protected grounds:

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: "he or she would not have fitted in". King v The Great Britain-China Centre [1991] IRLR 513, CA

A few years later the House of Lords in a different race discrimination case reinforced this "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 v Glasgow City Council [1997]

As you will be aware, protection against discrimination has been fundamental to the EU from its earliest days – The 1957 Treaty of Rome¹ required Member States to ensure and maintain application of the principle that men and women should receive equal pay for equal work. This principle was embodied in the first equality legislation, the equal pay directive, 1975/117/EEC, which required Member States to introduce measures into their national legal systems enabling all employees who consider themselves wronged by failure to apply the principle of equal pay to pursue their claims by judicial process.² The following year the Equal Treatment Directive 76/207/EEC prohibited direct and indirect sex discrimination in the field of employment.

While in some jurisdictions measures had been developed to alleviate problems of proving equal pay and sex discrimination, EU law has had a decisive role in shaping a common approach. The CJEU recognised how difficult it was for a woman to prove that an employer had failed to apply the principle of equal pay when all she could show was different remuneration of women and men doing the same work.

¹ now TFEU Art 257 (ex Art 119 and Art 141)

² Directive 1975/117 Art. 2

In *Danfoss*³ the CJEU ruled,

“...where a system of individual pay supplements which is completely lacking in transparency is at issue, female employees...would be deprived of any effective means of enforcing the principle of equal pay before the national courts if the effect of adducing such evidence was not to impose upon the employer the burden of proving that his practice in the matter of wages is not in fact discriminatory.

“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.”

Thus the CJEU established the principle of a shifting burden of proof in cases of alleged discrimination. Although this should have been sufficient to secure a parallel approach in national courts of all Member States, when it became clear that this was not happening, the shift of the burden of proof was put into legislative form not only for equal pay cases but for all cases of discrimination (at that time, EU legislation only applied to discrimination on grounds of sex and only in employment and occupation) In December 1997 Council Directive 97/80/EC (the ‘Burden of Proof Directive’) was approved.

The aim of the EU legislators is indicated in the Recitals and Article 1:

(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;

Article 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.

³ *Handels-og Kontorfunktionaerernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* 109/88 [1989] ECR I-3199

Article 4

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. This Directive shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

3. 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.

When, in 2000, EU anti-discrimination law was expanded by the adoption of directives prohibiting discrimination on grounds of racial or ethnic origin in a number of fields and in the field of employment and occupation on grounds of religion or belief, disability, sexual orientation or age, from the outset the two directives 2000/43 and 2000/78 each included a requirement on Member States to ensure the application of the shift of the burden of proof in the same terms as specified in the Burden of Proof directive⁴. When EU legislation prohibiting sex discrimination was expanded to apply to goods and services in directive 2004/113 (mistakenly omitted from my slide) and consolidated in respect of employment in the Recast Directive⁵ this same requirement was stated. In all four of the Directives currently underpinning national anti-discrimination legislation the recitals emphasise the essential role of national judicial or other “competent bodies” in ensuring effective implementation of the principle of equal treatment and therefore the need for national rules on the burden of proof to be adapted when there is a *prima facie* case of discrimination to ensure the burden of proof shifts to the respondent.

Slide shows exactly the same wording in these later Directives.

Today a requirement for a shift of the burden of proof is not only stated in EU legislation but in the national anti-discrimination laws in most Member States. What does this mean in practice.

As stated by the CJEU in *Firma Feryn*⁶ (a Belgian case concerning an employer’s discriminatory advertisement) “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 the contentions that it has not breached the principle of equal treatment.”

⁴ Art. 8 Directive 2000/43/EC and Art. 10 Directive 2000/78/EC

⁵ Art. 19, Directive 2006/ ???

⁶ *Firma Feryn NV* Case C-54 - 07

In practice the court does not hear the evidence and argument in two stages but normally will have heard all of the evidence in the case before it embarks on the two-stage analysis in order to decide first, whether the burden of proof has moved to the respondent and, if so, secondly, whether the respondent has discharged the burden of proof.

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. It is necessary for the claimant to show more than difference in race/sex/religion etc and difference in treatment. Without more, the court would not be able to presume that **there has been discrimination**. It is important to note the wording of the directives: “ establish... facts from which it **“may be presumed that there has been”** - **not** **“there could have been”** direct or indirect discrimination. Without such evidence the claim comes to an end.

The court needs to look at the total picture. It would need to consider all the evidence relevant to the discrimination complaint. This will include evidence adduced by the claimant in support of the claim of discrimination. It will also include evidence adduced by the respondent contesting the complaint . This could include evidence that the alleged acts never occurred or that if they did they were not less favourable treatment of the claimant, for example, because the employer shouts at and bullies all of his employees, or that even if there was less favourable treatment of the claimant it was not on the alleged ground. As the UK Court of Appeal said in *Madarassy*,⁷ “It would be absurd if the burden of proof moved to the respondent to provide an adequate explanation for treatment which, on the tribunal’s assessment of the evidence, had not taken place at all.”

Evidence

What might constitute *prima facie evidence*? that is, evidence which is sufficient to establish a fact but is not conclusive evidence of the existence of that fact.

The evidence accepted by national courts as establishing facts from which discrimination may be presumed will be key to claimants overcoming the first hurdle.

Essential facts:

Did the alleged treatment occur? If so when? by whom? was it on the protected ground?

It may seem prosaic but there are often cases where what is in dispute is whether the alleged acts occurred, and if so when, where, and who was involved? If it was not the respondent personally (as the respondent could be a legal rather than natural person) was it a person whose actions, under national law, are the respondent’s responsibility , for example as their employee ?

Is there an actual comparator – a person in the same or nearly the same circumstances as the claimant but of different sex/ethnicity/ without the same

⁷ *Madarassy v Nomura International plc* [2007] EWCA Civ 33

disability... who was treated more favourably? An actual comparator might exist -- in an employment recruitment case – where a man is given a job over a better qualified woman -- or outside a bar where a Roma couple are refused entry, being told that the bar is shut for the night and they then see two non-Roma couples entering the bar with no trouble. Often, however there is no obvious actual comparator. The court can try to use the evidence to construct a hypothetical comparator who was or would have been treated more favourably.

For example, a gay man, who came out as gay after starting his job about 18 months ago complains of sexual orientation when his request for special leave to attend pre-promotion training is refused. The manager explained that it was company policy to allow special leave only after two years in the job. He is aware that a few months ago a straight man who had been in his job for less than one year was given special leave to accompany his wife on a business trip. Would this a hypothetical comparator to be constructed: a straight man with less than 2 years in his job who is permitted special leave to attend training?

Were proper procedures followed?

In most public and private sector organisations there are a number of formal procedures including a complaints procedure, employers' recruitment, dismissal, and disciplinary procedures, a public authority's procedures for approving applications for welfare benefits. If procedures are normally followed but were not followed in respect of the claimant this could be a fact which should be taken into account. Particularly relevant may be evidence that a complaints procedure was not followed when the claimant complained of discrimination.

Is there evidence of prejudice or segregation or of past discrimination?

There may be evidence about the policies or practices of an organisation indicating prejudice, for example remarks made by a manager overheard by a number of witnesses. There may be evidence of segregation, for example, a policy of employing only men at managerial level? For a small employer this should easily be discernible, for a large employer this may require some statistical data. (More on this topic below) Or the segregation of Roma children in separate schools.

Does the respondent organisation have an equal opportunities policy? If so, is it generally applied in circumstances like those in the present case? Was it followed in this case?

Sources of evidence

What are likely sources of evidence which can be considered by a court in deciding whether the claimant has established facts from which it may be presumed that there has been a breach of the principal of equal treatment? I am aware that national rules on civil proceedings differ widely regarding who can give evidence, what evidence is admissible, what weight can be given to different types of evidence. For the purposes of today may we assume very permissive rules in order to consider the

widest variety of sources of evidence – not all of which may be permissible in your national courts.

Oral evidence by the parties and relevant witnesses: This should include a description of the acts in question, when and where they occurred, who was involved as a party or as a witness. It could include descriptions of the treatment of the claimant before and after the acts in question, for example hostility, inappropriate remarks, such as frequently being asked, ‘when are you planning to have children?’

The parties or witnesses could also describe treatment of other people, who may be relevant comparators, at the time of, before or after the acts in question.

Documents: created before the alleged acts, relating to/part of the alleged acts of discrimination, or created following or in response to the alleged acts::

- Written records held by the respondent - in an employment case this could include record of the recruitment process, the claimant’s personal file, correspondence (including emails), contract of employment, time sheets, attendance records, complaints, minutes of meetings, notes of telephone conversations, employer’s written policies, such as those covering equal opportunities, recruitment, promotion, discipline, dismissal procedures
- Documents in response to the alleged acts of discrimination could include claimant’s diary in which they have recorded relevant incidents, medical report showing physical or mental health symptoms occurring on dates corresponding with dates of alleged acts of discrimination,

Video or sound recordings.

The use of sound recordings as evidence in discrimination cases has recently been considered by two national courts.⁸

- In Slovenia a woman produced in discrimination proceedings a recording of a meeting with her employer when she was dismissed. The employer initiated criminal proceedings alleging that the recording was in breach of “the confidentiality of oral expression... of a personal nature” protected under Criminal Code. The Regional Court upholding the decision of the court of first instance that the criminal proceedings were irrelevant to the discrimination claim held, “if a plaintiff has submitted a sound recording as evidence... in civil proceedings, with which she proves a breach of the principle of equal treatment in an employment relationship, the district court... will have to evaluate this evidence with regard to the subject matter of the given proceedings... As with regard to other evidence submitted, the district court will evaluate and judge whether it will use this evidence further in the proceedings”.

⁸ Discussed in European Anti-Discrimination Law Review, Number 14 – 2012, The European Network of Legal Experts in the Non-Discrimination Field pages 61 and 67

- In the Netherlands, a man who had had a positive performance during his second temporary contract with a company called in sick on several occasions after he had taken over care of his paralysed wife. He recorded a meeting when the company director told him that his family situation had influenced the decision not to renew his contract again. The company alleged that recording was unlawful; they said the decision not to renew his contract was based on financial motives as the company's annual profit had declined. The Equal Treatment Commission (ETC) held that recordings can be used as proof of discrimination, in particular because collecting proof is generally extremely difficult for victims. In this case sufficient evidence was brought forward to shift the burden of proof onto the defendant. Disability did not need to constitute the sole motive for non-extension of a contract, and other factors, such as financial reasons, could be taken into consideration. The ETC concluded there was discrimination by association on ground of disability.

Replies to questionnaires or requests for information

In a few jurisdictions, notably the UK and Ireland, anti-discrimination legislation includes a statutory procedure under which a person who considers they have been discriminated against may serve a questionnaire on the alleged discriminator before proceedings have begun or shortly afterwards. The main question will normally be, "why was I treated in this way by you?" To begin to build a case, for example where a woman who considers she was discriminated against on grounds of sex in recruitment could ask the employer about the number of men and women who applied, who were short listed and the sex of the successful applicant and their qualifications. She could also ask how many men and how many women have been given jobs in the last 3 years and how many men and how many women are employed. The UK and Irish laws permit a court to draw an inference from a failure to reply or from an evasive (UK) false or misleading (Ireland) reply. It is often the case that replies to questionnaires demonstrate that no discrimination has occurred and any claim would be unlikely to succeed.

Where national laws do not include such a procedure it is much more difficult for a person to know before commencing proceedings the reasons for treatment they consider to be discriminatory.

In recent referrals from national courts in Ireland and Germany the CJEU has considered and rejected the notion that the EU equality directives entitle a claimant to have access to information held by the respondent in order to establish facts from which it may be presumed that there has been direct or indirect discrimination. The national court could, however, consider refusal by a respondent to disclose any information as a factor to be taken into account, with all the circumstances of a case, in the establishment of *prima facie* evidence of discrimination.

- In *Kelly*⁹ the claimant, who believed that he was discriminated against on grounds of sex when he was denied access to vocational training, requested copies of specified documents relating to the qualifications of the other applicants. The respondent refused his request as did the Circuit Court and the

⁹ *Kelly v National University of Ireland (University College, Dublin)* CJEU Case C-1040/10

High Court, ruling that under national law the respondent was not obliged to disclose the documents requested by the claimant; the High Court referred to the CJEU questions as to whether refusal of the disclosure is contrary to EU law.

- In *Meister*¹⁰ the claimant sought an order for production of the file of the person who was appointed in a recruitment process in which she had twice been unsuccessful. On appeal, her case came before the German Federal Labour Court which referred to the CJEU questions relating to the right, under the EC directives, of an unsuccessful job applicant to information regarding the outcome of the recruitment process.
- In both *Kelly* and *Meister* the CJEU drew attention to the risk that a refusal of disclosure by a respondent, in the context of the claimant seeking to establish facts from which discrimination may be presumed, could compromise the achievement of the objective of the relevant directive (including that Member States shall ensure that judicial and/or administrative procedures... for the enforcement of the obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them¹¹). The CJEU referred to the Treaty of the European Union which in Art. 4(3) states that Member States “shall... refrain from any measure which could jeopardise the attainment of the Union’s objectives,” including objectives pursued by directives.

In *Meister* the Court also stated, “it cannot be ruled out that a defendant's refusal to grant any access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination. It is for the referring court to determine whether that is the case in the main proceedings, taking into account all the circumstances of the case before it.”

Statistics

Statistical evidence, showing, for example, the number or proportion of women, or disabled people, or Roma, affected by a policy or practice, may establish a discernible pattern in the treatment of a particular group. If in the context of employment for example, such pattern demonstrates a regular failure of members of that group to obtain promotion in particular jobs, and under-representation in such jobs, it may give rise to an inference of discrimination.

Statistics are not conclusive in themselves, but if they show gender or ethnic or other imbalance or disparities, they may indicate areas of discrimination. Statistics may be particularly relevant to establish ‘disadvantage’ of a particular group in a claim of indirect discrimination.

Of course, the ability of an individual litigant to rely on statistical evidence will depend on the availability of such data. In some jurisdiction there is a general prohibition on the collection of ethnicity information, and in many jurisdiction few employers or service providers collect data by religion or belief, sexual orientation or disability,

¹⁰ *Meister v Speech Design Carrier System GmbH* CJEU Case C-415/10

¹¹ Art. 7(1) Directive 2000/43, Art. 9(1) Directive 2000/78, Art. 17(1) Directive 2006/54 etc.

especially different forms of disability (for which different accommodations would be reasonable).

Once a *prima facie* case of discrimination is established, the burden of proof shifts to the respondent to prove that there has been no breach of the principle of equal treatment.

The court must uphold the claim unless the respondent provides an explanation which is sufficient to prove, on the balance of probabilities, that there has been no discrimination whatsoever. There may have been a number of reasons for the treatment of the claimant. Why have they done what could be considered to be a discriminatory act? Was sex or ethnicity or religion or age any part of the reason? For example, in responding to a claim of religious discrimination, an employer could explain that in dismissing Mr. Ahmed he needed to make savings, he preferred to retain long-serving staff he knows he can trust, and Mr. Ahmed, who is a Muslim, never really did fit in – an explanation that would not be sufficient to discharge the burden of proof.

In a number of cases the UK appellate courts have accepted that the court hearing the claim can move straight to the 'second stage' focusing on the respondent's reason for the treatment.¹² To do so would not disadvantage the claimant. Where there is no actual comparator, rather than attempt to create a hypothetical comparator, it may be preferable to act on an assumption that the burden may have shifted and then to consider the reason put forward by the respondent.¹³

Indirect discrimination

The Directives require that the shift of the burden of proof should apply in cases of direct and indirect discrimination. Much of the case law relates to the problem of proving direct discrimination. To uphold a complaint of indirect discrimination the court must first be satisfied that the provision criterion or practice would put persons of a [racial or ethnic origin...], at a particular disadvantage compared with other persons, and if it is satisfied on that point, the court must then be satisfied that the provision, criterion or practice cannot be objectively justified. How then does the shift of the burden of proof apply in cases involving an allegation of indirect discrimination? Looking at the two-stage process, the claimant must establish facts from which a court or other competent authority may presume that a provision, criterion or practice of the respondent puts/would put [persons of a racial or ethnic origin, ...] at a particular disadvantage compared with other persons. If such facts are established then the court would turn to the respondent for an explanation proving on the balance of probabilities that any disadvantage is wholly unrelated to [racial or ethnic origin ...]. If the respondent fails to do this then the court would again turn to the respondent to justify the provision criterion or practice as having a legitimate aim and the means of achieving that aim are appropriate and necessary.

¹² See, for example, *Laing v Manchester City Council* [2006] UKEAT 0128_06_2807

¹³ *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11

Unless the respondent is able to do so, the court must uphold the claim of indirect discrimination. In many cases, sufficient non-discriminatory reasons may also constitute objective justification for the provision, criterion or practice.

The burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have little to offer where the court is in a position to make positive findings on the evidence one way or the other. Where there is no real dispute about the respondent's acts and the reason, there may be no need in practice to consider the burden of proof provisions.

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For further reference:

Decisions of UK courts related to the burden of proof or evidence in discrimination cases.

(all are available to download on <http://www.bailii.org/>)

Anya v University of Oxford [2001] EWCA

Central Manchester University Hospitals NHS Foundation Trust v Browne [2012] UKEAT 02941/11

Igen Ltd. & Others v Wong [2005] EWCA Civ 142

Laing v Manchester City Council [2006] UKEAT 0128_06_2807

London Borough of Ealing v Rihal [2004] EWCA Civ 623

Madarassy v Nomura International plc [2007] EWCA Civ 33

Martin v Devonshires Solicitors [2010] UKEAT 0086_10_0812

Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11

West Midlands Passenger Transport Executive v Singh [1988] EWCA Civ

Zafar v Glasgow City Council [1998] UKHL

NOTE:

EWCA Civ - England and Wales Court of Appeal Civil Division

UKHL - United Kingdom House of Lords

UKEAT - United Kingdom Employment Appeal Tribunal

See also: How to Present a Discrimination Claim: Handbook on seeking remedies under the EU Non-discrimination Directives, European Network of Legal Experts in the non-discrimination field, Lilla Farkas, published by European Commission, Directorate-General for Justice, 2011

<http://www.non-discrimination.net/content/media/How%20to%20Present%20a%20Discrimination%20Claim%20EN.pdf>