

BURDEN OF PROOF: RECENT CJEU CASE LAW

Tamás Gyulavári

TOPICS

- 1. EU law provisions**
- 2. Case law**
- 3. Conclusions**

1. BURDEN OF PROOF IN EU LAW

BURDEN OF PROOF – What it means

- Which party has to prove?
- General rule of procedural law: asserting party, claimant

Reverse of the burden of proof

- Stronger position of respondent
- Information monopoly, reluctance of witnesses etc.
- Opposite of the general rule?
- Shift, reversal, shared burden

OBJECTIVE

- Effective enforcement of EU anti-discrimination law
- Most important discrimination rule?
- Burden of proof Directive
- Recast, Race, Employment Dir.

FIRST STAGE of the test

- First the **CLAIMANT** has to establish FACTS from which it may be PRESUMED that there has been direct or indirect discrimination

Proofs: beyond witness, expert, document, - stats, situation testing, questionnaire

Facts to presume direct discrimination

- Protected characteristic
- Less favourable treatment (disadvantage)
- Compared to another person without that protected characteristic
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Facts to presume indirect discrimination

- Apparently neutral provision/practice
- It puts persons of a particular status at disadvantage compared with others

Statistics!

SECOND STAGE of the test

- Then the **RESPONDENT** has to prove that there has been no breach of the principle of equal treatment

2. CJEU CASE LAW

RELEVANT CASES to discuss

- Danfoss – origin of the rule
- Feryn – statement by company
- Accept – statement by owner
- Kelly – refused information 1
- Meister – refused information 2

C-109/88 DANFOSS – the origin

- Not transparent pay system
- Female worker establishes:
average pay for women is less than for men
- Employer has to prove his system is not discriminatory

C-54/07 FERYN - Facts

- Public discriminatory statement:
immigrants will not be recruited
- Lack of individual complainant
- Actio popularis by equality body

C-54/07 FERYN - Judgement

- Presumption of discrimination must arise
- Public statement of employer is enough for this presumption
- Employer: recruitment practice does not correspond to the statement

C-81/12 ACCEPT - Facts

- Homophobic interview of Steaua FC's main shareholder (51%) on not contracting a player
- Mr. Becali's decisive influence
- Steaua confirmed the policy
- Actio popularis by NGO v Equality Body

C-81/12 ACCEPT - Judgement

- Becali had no legal capacity to act
- His important role in management
- Employer did not distance itself
- Public perception is relevant
- Lack of negotiation is not relevant

C-81/12 ACCEPT - Judgement

- Probatio diabolica?
- By all legal means: recruitment policy is unrelated to any discrimination
- No homosexual player is needed – privacy!
- Distancing, express provisions

C-104/10 KELLY - Facts

- (Male) course application refused
- Copies of applications, scoring sheets refused
- Right to information on qualifications of successful candidates?
- Establishing a comparator

C-104/10 KELLY - Judgement

- No entitlement to disclosure of information
- Refusal may risk compromising effectiveness
- National court must assess it!

C-415/10 MEISTER - Facts

- Twice rejected Galina's application without reasoning
- Sex, age, ethnic discrimination?
- Who was engaged? Qualified?
Refusal of disclosure

C-415/10 MEISTER - Judgement

- Not entitled to information on engaged applicant
- All circumstances: any information refused, expertise OK
- Refusal may be a factor of establishing facts
- No clear guidance on burden of proof

3. CONCLUSIONS

- Aim: effective enforcement
- Key issues:
 - What facts to establish by the claimant?
 - Public statement is enough?
 - Information obligation exists?
- Still lack of clear guidance

**Thank you for your
attention!**

Tamás Gyulavári

gyulavari.tamas@jak.ppke.hu