BURDEN OF PROOF: RECENT CJEU CASE LAW

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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
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!

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