

PROVING DISCRIMINATION IN COMMUNITY LAW

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I. THE BURDEN OF PROOF IN CASES OF GENDER

DISCRIMINATION UNDER COMMUNITY LAW:

1. Directive 97/80/EC and its subsequent recasting

as Directive 2006/54/EC.

None of the Community Directives on gender equality adopted in the seventies and eighties contained rules on the burden of proof. As so often in the field of equality, the earliest formulations were prompted by the activism of the Court of Justice, inspired – not for the first time – by case-law in the United States¹. And they came hand-in-hand with a new concept of indirect discrimination, which shifted the centre of gravity for discriminatory behaviour from intention to an unjustified adverse impact on

¹ In *Green vs. McDonnell Douglas*, 411 US 792 (1973), the Supreme Court ruled that it was sufficient for the plaintiff to demonstrate a “*prima facie case of discrimination*” – in this case, the rejection of a qualified applicant who belonged to a minority where the job remained vacant or was given to somebody not from that minority – for the burden of evidence to shift to the employer because, as an employer acts rationally, he knows and can explain the reasons for his decision, and if he does not do so, discrimination is the most likely reason for rejecting the candidate. This doctrine was developed further in *St. Mary’s Honor Society vs. Hicks*, 509 US 502 (1993), in the sense that, even if the employer offers an explanation that the plaintiff shows to be pretextual, the court may conclude – depending on circumstances – that no

a subset of women: the ECJ's judgment of 31 January 1981 in Jenkins (C-96/80) was the first to allocate the parties to discrimination proceedings separate roles in the submission of evidence².

Questions of evidence were tackled head-on and in greater detail – without being specifically confined to indirect discrimination – in Danfoss, an authentic ‘leading case’, where the ECJ ruled in its judgment of 17 October 1989 (C-109/88) 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*”.

This reasoning – which required that statistical evidence be admitted and which did not predicate unlawfulness on intent – sat more easily with the common law systems of the United Kingdom and Ireland³. It jarred, however, with civil law systems. In France discriminatory behaviour was prosecuted as a criminal offence or punishable act and investigated *ex officio* by a court, whose verdict started from a presumption of innocence and made any conviction difficult. When the door opened for civil

discrimination occurred, and the plaintiff cannot derive an automatic right from anti-discrimination law to obtain a favourable ruling if he or she fails to persuade the court of the facts.

² The ECJ's judgment of 31 January 1981 in the Jenkins case, relating to different rates of pay for part-time work, a seminal case in European jurisprudence on indirect sex discrimination, was the first where adopting the concept of indirect discrimination made it unnecessary to establish an intention to discriminate, and establishing an adverse effect made it incumbent on the other party to establish a non-discriminatory justification for the behaviour that had produced this adverse effect. The roles of the party alleging discrimination and the party denying the allegation were assigned in a manner which, within a short space of time, – judgments of 13/5/1986, C-170/84, Bilka, 13/7/1989, C-171/88, Rinner-Kühn, 13/12/1989, C-102/88, Ruzius-Wilbrink, 27/6/1990, C-33/89, Kowalska, 7/12/1991, C-184/99, Nimz, or 4/6/1992, C-360/90, Bötzel – came to constitute a hallmark of cases involving the indirect sex discrimination commonly encountered in the field of part-time work.

³ In these common law systems, it is sufficient for a plaintiff in civil proceedings to demonstrate the greater plausibility of his evidence compared with that of the respondent, and there is an open system of evidence, which means that anything may be submitted with certain specific exceptions, whereas in civil law systems a plaintiff in civil proceedings must prove the truth of his allegations, and the evidence that can be submitted is subject to a system of regulations. Another difference is that, while in common law systems the principle of fair trial allows the plaintiff access to evidence held by the respondent and the court can insist on its disclosure, in civil law systems, in accordance with the Roman tradition, the judge is under no compulsion to require the party holding the evidence to discover it, or to carry out any further

proceedings – and of course industrial hearings – over alleged discrimination, the weight of tradition was such that applications were not admitted unless mismanagement on the part of the company could be established.

In the hope that harmonisation would make equality provisions more effective, and following several attempts of a more ambitious nature⁴, the Council adopted its Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex which – in the words of its Article 1 – sought “*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*”.

Another positive feature of this Directive – in Article 2 – was its definition of indirect discrimination, this being “*where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex*”. Inserting the definition at this point reflects the role of evidence in cases about indirect discrimination. As Recital (19) of the Preamble points out, “*it is all the more difficult to prove*

investigation, be it *ex officio* or at the request of a party. In fact, it has even on occasion been considered an offence for a worker to hold copies of company documents for use in evidence.

⁴ On 27 May 1988 the Commission presented a Proposal for a Directive, which was discussed several times without obtaining Council support. Another failed attempt was undertaken by means of social dialogue under the Social Protocol of the Treaty of Maastricht. The last Proposal – which became the basis for Directive 92/80/EC – was presented by the Commission on 20 September 1996. Generally speaking the provisions were more extensive than those in the final wording of Directive 97/80/EC: its scope included public social security; the shift in the burden of proof was expressly admitted if a respondent had applied a system of taken a decision lacking in transparency; the plaintiff did not have to prove fault on the part of the respondent; courts were able to direct effective investigation of any discrimination complaint; and there was a provision governing the plaintiff’s right of access to documents held by the respondent.

discrimination when it is indirect”, which is why it is “therefore important to define (it)”.

Where the Directive falls down is in establishing its scope – in Article 3. This remains limited, because although it covers *“the situations covered by Article 119 of the Treaty and by Directives 75/117/EEC, 76/207/EEC and, insofar as discrimination based on sex is concerned, 92/85/EEC and 96/34/EEC”*⁵, it does not – perhaps fearing a flood of complaints which might plunge the finances into disarray – include Directive 79/7/EEC on public social security. Nor does it include the current Directive 2012/41/EU on self-employment. It does not even mention Directive 86/378/EEC, amended by Directive 96/97/EC, on occupational social security schemes, despite the fact that this falls within the scope of Article 119 TEC⁶.

In this same Article 3, hardly has the Directive demarcated its scope when, from another perspective, it declares that it applies to *any civil or administrative procedure concerning the public or private sector which provides for means of redress under national law pursuant to the measures referred to*”, meaning both judicial and administrative procedures with the exception of *“out-of-court procedures of a voluntary nature or provided for in national law”* – notably, according to Recital (12) of the Preamble, mediation and conciliation procedures. Moreover, *“[t]his Directive shall not apply to criminal procedures, unless otherwise provided by the Member States”*.

⁵ The inclusion of Directives 92/85/EEC and 96/34/EEC – now 2010/18/EU – *“insofar as discrimination based on sex is concerned”* is rather confusing because not only these, but any others – such as the Directives on occupational health, working time, transfers of undertakings or guarantees for companies in difficulty – relating to employment and working conditions (the scope of 75/117/EEC and 76/207/EEC) are actually covered *“insofar as discrimination based on sex is concerned”*.

⁶ This is established case-law repeated on numerous occasions since its first appearance in the Barber judgment of 7/5/1990, C-262/88. And the application of Directive 97/80/EC to occupational social security schemes is confirmed by Directive 2006/54/EC, insofar as it recasts Directive 86/378/EEC, amended by Directive 96/97/EC, and insofar as the horizontal provisions to be applied in general to all the recast directives include the rules on the burden of proof – likewise recast – from Directive 97/80/EC.

Article 4 on the distribution of the burden of proof, strictly speaking the substantive core of the Community instrument, establishes – in general terms with regard to the evidentiary responsibilities of both plaintiff and respondent – 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*” – Article 4 (1).

Any interpretation that clings to the letter of the law – which uses the word “*presumed*” – would result in recognising circumstantial evidence in the classical sense. In other words, by applying a rational criterion to a proven underlying fact, a court would be able to deduce that sexist behaviour had occurred. We would have indirect, rather than direct, evidence of the sex discrimination. In both cases, of course, we would be founding our judgment on legal truth (*juicio de veracidad*), i.e. we would be requiring the plaintiff to produce absolute proof of either the discriminatory fact (direct evidence) or the underlying fact from which we can deduce the discriminatory fact (indirect evidence).

However, the word “*presume*” can be interpreted more broadly than that, enabling us to found our judgment on credibility (*juicio de verosimilitud*), in accordance with the principle of prima facie, preliminary or presumptive evidence, which rests on justifications or appearances rather than absolute proof⁷. The judicial history points in this direction with the

⁷ Throughout this presentation we shall be referring to the principle of prima facie evidence or presumptive evidence or preliminary evidence, as well as to concepts just as justification and appearance, using these in the broadly equivalent sense of probative mechanisms which lead a court to suspect strongly that discrimination occurred. In so doing we shall be departing to some degree or other from the reference model which, in a civil law system, establishes a standard of direct or indirect proof. It should be said that there is no doctrinal consensus about the precise meaning of any of these terms. We have opted to standardise the terminology, aware of the risk that we may be sounding a little imprecise, given that the imprecisions do not seem relevant to the purposes of this presentation.

admission of statistical evidence⁸. And Directive 2006/54/EC endorses this when it states, in Recital (30) of its Preamble, that “*provision should therefore be made to ensure that the burden of proof shifts to the respondent when there is a prima facie case of discrimination*”.

In any case, the Directive leaves room for national laws to institute rules more favourable to plaintiffs – Article 4 (2) – and we can see that major civil law systems – such as Italy⁹, Spain¹⁰ and Belgium¹¹ – have started to recognise the credibility principle in legislation, case law and legal doctrine by means of mechanisms that shift the burden of proof in discrimination proceedings. The Directive grants domestic law an option of allowing for courts or other bodies to investigate the facts, in which case the shift in the burden of proof will not apply – Article 4 (3) – which is

⁸ There are explicit references to statistical evidence in Recital (10) of Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. These Directives were recast in Directive 2006/54/EC.

⁹ In Italy, Article 40 of the Equal Opportunities Code, Legislative Decree no. 198 of 11 April 2006, which recast Article 4 (6) of Law no. 125 of 10 April 1991, triggers a shift in the burden of proof when the plaintiff proves “*facts, including such as are derived from statistical data*” that establish “*precisely and consistently a presumption of the existence of discriminatory acts, agreements or conduct on grounds of sex*”. According to Article 2729 of the Italian Civil Code, a court will only admit a simple presumption if it is serious, precise and consistent, which means that, as the above-mentioned Article 40 does not mention the word ‘serious’, the evidentiary mechanism hereby established can be regarded as less exacting than the standards for circumstantial evidence usually associated with a judgment beyond reasonable doubt – “*id quod plerumque accidit*” – in which the employer’s action has been measured against typical management criteria.

¹⁰ In Spain, constitutional case-law has accepted the principle of evidence that is sufficient – like prima facie evidence – to trigger a shift in the burden of proof, beginning with Constitutional Court rulings 90/97 (6 May), 74/1998, (31 March) and 87/1998 (21 April). This was further clarified in Judgment 17/2003 (30 January) and other subsequent judgments, when the Court set out that for such purposes “*suitable evidence may be facts which clearly indicate the probability that the substantive right was infringed, and facts which, although they do not generate such an obvious connection and are therefore more easily neutralised, are nevertheless sufficient in substance to found a reasonable hypothesis that a fundamental right has been violated*”. The Court also warns that “*when submitting plausible or preliminary evidence of a complaint, it is not enough simply to affirm discrimination or the infringement of a fundamental right or to reflect such an affirmation in a number of facts*” – Judgment 41/2006 (13 February).

¹¹ In Belgium, Article 33 of the Gender Discrimination Act of 10 May 2007, having established in its first paragraph a general rule on the burden of proof, then provides non-exhaustive lists in its second and third paragraphs of facts sufficient to found a presumption of direct discrimination, namely “(1) *elements that demonstrate some recurrence of less favourable treatment for the same sex ... or (2) elements that reveal a situation whereby the plaintiff suffered worse treatment than a comparable individual*” or indirect discrimination, namely “(1) *general statistics relating to the situation of the group to which the plaintiff belongs, of facts of general knowledge; or (2) the use of an intrinsically suspect criterion; or (3) basic*

logical, as in this instance the subsequent proceedings will not expressly oblige the victim to produce the evidence.

It only remains to highlight what an important influence this Directive turned out to have on later Directives protecting other forms of equality¹² and equality outside the workplace¹³, and the recast Directive 2006/54/EC of 5 July 2006¹⁴, in particular its Article 19. This has been methodically positioned within the Chapter on “*remedies and enforcement*” along with the other clauses devoted to effective judicial protection, a sign that the rule on the burden of proof was seen in that light, and, moreover, within the Title devoted to “*horizontal provisions*”, making it applicable to the full scope of Directive 2006/54/EC.

2. Community case-law.

While the Community legislators were doing their homework by approving Directives defining rules about sharing the burden of proof in sex discrimination cases, the Court of Justice, the catalytic force behind this normative process, continued applying those rules, and if we examine all its

statistical data revealing less favourable treatment”. Reading this it is easy enough to see that the evidentiary standards of civil law systems have been improved.

¹² Article 8 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and Article 8 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, which includes within its scope discrimination on grounds of religion or belief, disability, age and sexual orientation.

¹³ Article 9 of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services

¹⁴ Recital (30) of the Preamble to Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) states – and this is worth noting insofar as the Preamble to a Directive is a crucial factor in its interpretation – that “*the adoption of rules on the burden of proof plays a significant role in ensuring that the principle of equal treatment can be effectively enforced*”, that “*provision should therefore be made to ensure that the burden of proof shifts to the respondent when there is a prima facie case of discrimination*”, that “*the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination remains a matter for the relevant national body*” and that “*it is for the Member States to introduce (...) rules of evidence which are more favourable to plaintiffs*”.

case-law, we can draw the following conclusions about the burden-of-proof rules in proceedings relating to gender discrimination which, with appropriate modifications, could be extended to other forms of discrimination, creating a genuine common right to the defence of equal treatment:

1. Even prior to Directive 97/89/EC, the Court reasoned that “*the burden of proving the existence of sex discrimination may shift when that is necessary to avoid depriving workers who appear to be the victims of discrimination of any effective means of enforcing the principle of equal pay*” – ECJ 27/10/1993, Enderby. Thus, when applying Directive 97/89/EC, “[w]here employees plead that the principle of equal treatment has been infringed to their detriment and establish 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 that principle.” ECJ 10/3/2005, Nikoloudi.

2. It is therefore up to the plaintiff to establish facts from which it may be presumed that discrimination has occurred, and, if this relates to pay discrimination, either (1) “*that they are receiving lower pay than that paid by the employer to a colleague of the other sex and that they are in fact performing the same work or work of equal value*” – ECJ 26/6/2001, C-381/99, Brunnhofer, or (2) that “*in relation to a relatively large number of employees, that the average pay for women is less than that for men*” when an undertaking applies a system of pay which is “*totally lacking in transparency*” – ECJ 17/10/1989, C-109/88, Danfoss.

Note that whereas in Danfoss the comparison is performed against a relatively large number of employees of whatever category, in Brunnhofer the comparison is between two jobs. It may also be performed between two different occupations, even if a different collective agreement applies to predominantly female speech therapists and predominantly male

pharmacists – ECJ 27/10/1993, C-127/92, Enderby. The aim, then, is not to carve a comparative rule in stone, but to identify the discriminatory situation in each specific case, and that obliges us to use, again on a case-by-case basis, different indicators to reach the same end.

3. The ECJ’s judgment of 9/2/1999 in the matter of Nicole Seymour-Smith and Laura Pérez (C-167/97) – which is the case where statistical evidence was presented in its most technical contours – applies the following three criteria to evaluating statistical data for the purpose of establishing proof of discrimination: “*whether they cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena, and whether, in general, they appear to be significant*”. As to the time frame for testing the statistics, it is for the national court “*taking into account all the material legal and factual circumstances, to determine the point in time at which the legality of a rule of the kind at issue is to be assessed*”¹⁵.

The ECJ’s judgment of 6/12/2007 in Ursula Voss (C-300/06) picks up the doctrine underlying the case of Nicole Seymour-Smith and Laura Pérez, arguing that “*the best approach to the comparison of statistics is to consider, on the one hand, the proportion of men in the workforce affected by the difference in treatment and, on the other, the proportion of women in the workforce who are so affected*”, and that “*(i)f the statistics available indicate that, of the workforce, the percentage of part-time workers who are women is considerably higher than the percentage of part-time workers who are men*”, this constitutes evidence of apparent sex discrimination.

¹⁵ There are two theoretical approaches. One is to consider the entire period during which the instrument applied – the diachronic criterion – and the other is to examine a specific point in time – the synchronic criterion – begging the question of what point in time to choose, the point when the instrument was adopted, which would require the authorities to legislate with gender in mind, or the moment of application, which would mean considering any subsequent social changes. This question was relevant to the case of Nicole Seymour-Smith and Laura Pérez, because eight years had passed between the date of adoption and its application. The Court of Justice avoided providing a universal answer.

4. According the Court's judgment of 21 July 2011 in the Kelly case (C-104/10), the provision on the burden of proof in cases of discrimination does not entitle an applicant for vocational training who believes that his application was not accepted because of an infringement of the principle of equal treatment to information held by the course provider on the qualifications of the other applicants, although the Court then makes the point that access to this information cannot be refused if, in the context of establishing such facts, the Community provision would be deprived of its effectiveness. In this event, the course provider will supply the information, while respecting the right of the other applicants to confidentiality.

5. In the light of the plaintiff's evidence, the respondent can either (1) "*dispute the fact that the conditions for the application of the principle of equal pay for men and women are met in the case*", which would be counter-evidence designed to invalidate the indications of discrimination, or (2) "*put forward objective grounds, unrelated to any discrimination based on sex, to justify the difference in pay*", which would conclusively disprove any link between those indications, in themselves undisputed, and the conclusion that they were discriminatory – ECJ 26/6/2001, C-381/99, Brunnhofer.

II. THE BURDEN OF PROOF IN CASES OF DISCRIMINATION ON OTHER GROUNDS UNDER COMMUNITY LAW:

1. Rules of evidence in Directive 2000/43/EC and Directive 2000/78/EC.

Both Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation –

which, of course, specifically refers to discrimination on grounds of religion or belief, disability, age or sexual orientation – contain provisions on the “*burden of proof*”, Directive 2000/43/EC in Article 8 and Directive 2000/78/EC in Article 10, in both cases within the Chapter devoted to “*remedies and enforcement*”.

These two provisions have the same wording as each other and as the corresponding provisions on sex discrimination. Accordingly, Article 8 of Directive 2000/43/EC and Article 10 of Directive 2000/78/EC set out in the first paragraph that “*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.*”

This provision “*shall not prevent ... rules of evidence which are more favourable to plaintiffs*” (paragraph 2 of the respective Articles), “*shall not apply to criminal procedures*” (paragraph 3), nor to “*proceedings in which it is for the court or competent body to investigate the facts of the case*” (paragraph 5). It shall, however, apply to proceedings brought by “*associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with*” (paragraph 4).

The Preambles to the two Directives 2000/43/EC and 2000/78/EC merely contribute a few details. Both contemplate the use of statistical evidence – Recital (15) in both. The notion of the “*prima facie case*” is presented in Recital (21) of Directive 2000/43/EC and Recital (31) of

2000/78/EC. Directive 2000/78/EC – but not 2000/43/EC – then adds that “*it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation.*”

There has thus been an evident extension of the rules on the burden of proof as applied to sex discrimination in employment and occupation to other types of discrimination and to other spheres by means of the technique, widely used in the field of Community law on protection from discrimination, that some have picturesquely referred to as the “Russian doll technique”, whereby successive instruments reiterate the content of their precursors and extend them to new areas, although so far not all the rules designed to protect citizens from discrimination have been extended to all forms of discrimination and to all spheres where they might occur.

Apart from any criticism of this drip-drip approach to strengthening protection from discrimination, although the link with human rights and personal dignity really require universal declaration and recognition without having to pass through normative stages, the positive aspect is the gradual construction of a common body of European anti-discrimination law, so that with regard to the question before us now we can observe the development of an *acquis communautaire* on the burden of proof in all spheres where the Community equality Directives apply. And the obvious consequence is that all these common rules can be interpreted in a uniform manner.

2. Community case-law.

Indeed, the CJEU has had occasion to apply the rules on the burden of proof from Directives 2000/43/EC and 2000/73/EC in four judgments:

Case C-54/07 *Feryn* of 10/7/2008 (on Article 8 of 2000/43/EC); Case C-303/06 *Coleman* of 17/6/2008 (on Article 10 of 2000/78/EC); Case C-415/2010 *Meister* of 19/4/2012 (on Article 8 of 2000/43/CE, Article 10 of 2000/78/CE and Article 19 of 2006/54/CE); and Case C-81/2012 *Accept* of 25/4/2013 (on Article 10 of 2000/78/CE). At first sight, all these cases endorse the recent idea that, although these rules relate to different kinds of discrimination, they express a common principle and hence lend themselves to uniform interpretation.

In the *Feryn* case, which relates to ethnic or racial discrimination against a diffuse group of people, the Court concludes that “*public statements by which an employer lets it be known that under its recruitment policy it will not recruit any employees of a certain ethnic or racial origin are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory*”, adding that “*(i)t is then for that employer to prove that there was no breach of the principle of equal treatment*”. It is the national court that will verify whether the alleged facts are established, based on its application of these rules.

In the *Coleman* case, which concerns direct discrimination and harassment of someone caring for a disabled person – this being seen as a case of discrimination by association on the ground of disability – the Court reasons – without stating as much in the judgment – that cases such as this fall under Article 10 of Directive 2000/78/EC, requiring that Ms Coleman “*establishes facts from which it may be presumed that there has been direct discrimination*” (54) or “*harassment*” (62), and if she is able to do so, the respondents must prove that the principle of equality has not been breached. This judicial doctrine teaches us that any discrimination or harassment can benefit from the more flexible rules on the burden of proof.

In the Meister case, where the plaintiff claimed that her job application had failed on the grounds of multiple discrimination – due to her sex, her age and her ethnic origin – the Court ruled, referring to the doctrine laid out in the Kelly judgment of 21/7/2011, C-104/10, that the burden-of-proof rules enshrined in the three relevant Directives “*must be interpreted as not entitling a worker who claims plausibly that he meets the requirements listed in a job advertisement and whose application was rejected to have access to information indicating whether the employer engaged another applicant at the end of the recruitment process*”.

Nevertheless, “*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.*” Indeed, “*(i)t 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*”, although the Court does in its reasoning – no doubt with a view to offering the national court a helpful reply – mention some of the circumstances that might be considered, and which do not leave much doubt as to the suspicion that discrimination has occurred:

- viz., “*among the factors which may be taken into account is, in particular, the fact that, unlike in Kelly, the employer in question in the main proceedings seems to have refused Ms Meister any access to the information that she seeks to have disclosed*” (44);

- and “*Speech Design (the respondent company) does not dispute that Ms Meister’s level of expertise matches that referred to in the job advertisement, as well as the facts that, notwithstanding this, the employer did not invite her to a job interview and she was not invited to interview under the new procedure to select applicants for the post in question*” (45).

One of the questions in the Accept case was whether statements about not wanting to sign a player with a particular sexual orientation made by a person presenting himself in public as a major force in a football club constitute evidence of discrimination on the ground of sexual orientation. As in the Feryn case, statements like this do not merely express an opinion but can actually influence the facts – which is why they are known in linguistics as “speech acts”. The Accept case gave the Court of Justice a chance to build on the doctrine relating to evidence that it had begun to formulate in the Feryn case. On this matter, the ruling by the CJEU reaches the following conclusions:

- That, even if the statements were not made by a person necessarily having the legal capacity to bind the club or to represent it in recruitment matters, these statements may serve as facts from which it may be presumed that there has been discrimination if they come from “*a person presenting himself and being perceived in the media and among the general public as playing a leading role in that club*”.

- That, when a defendant is called upon to submit evidence refuting a prima facie case, the respondent cannot be asked to supply “*evidence impossible to adduce without interfering with the right to privacy*”, which would be the case if a company was obliged to demonstrate that it had recruited other persons with the same sexual orientation in the past (57). A legitimate form of evidence to refute the prima facie case might be “*a reaction by the defendant concerned clearly distancing itself from public statements on which the appearance of discrimination is based, and the existence of express provisions concerning its recruitment policy aimed at ensuring compliance with the principle of equal treatment within the meaning of Directive 2000/78*” (58).

III. STATISTICAL EVIDENCE.

There is a close theoretical and practical relationship between indirect discrimination and statistical evidence, although the intensity of this relationship varies, depending whether the strict model or the tempered variation apply. The strict model is characteristic of the United States, where statistical evidence is managed from a technical perspective using fairly well defined criteria to quantify the adverse impact, the most common indicators being adverse impact on selection¹⁶ and deviation analysis¹⁷. But defining the elements for comparison poses problems, whether within the company¹⁸ or, the other element of comparison, the number of applicants¹⁹ or the qualified population within the local labour market²⁰.

¹⁶ The Equal Employment Opportunities Commission has published Uniform Guidelines on Employee Selection Procedures, which show how to calculate an adverse impact on the rate of selection using a rule of thumb known as the “4/5ths” or “80%” rule, which is obtained in four steps: (1) Calculate the rate of selection for each group – for example, if 100 whites apply and 52 are taken on, the rate is 52%, and if 14 people are recruited from 50 black applicants, the rate is 28%. (2) Observe which group has the highest selection rate – in this example the whites. (3) Calculate the impact ratios by comparing the selection rate for each group with that of the highest group – in this example, divide 28 by 52. (4) If the result is less than 4/5 or 0.80, an adverse impact is indicated – in the example, the result is 0.538, which indicates an adverse impact. Source: Adoption of questions and answers to clarify and provide a common interpretation of the Uniform Guidelines on Employee Selection Procedures, Federal Register 44, no. 43, 2.3.1979, page 11998.

¹⁷ In the case of *Hazelwood School District vs. United States*, 433 US 299 (1977), deviation analysis was accepted as a method, and figures more than double or triple were significant. Let us take a closer look: From 1972 to 1974 Hazelwood hired 15 black teachers out of 405 new recruits. The court upheld the government’s plea that in the area of employment – including the city of Saint Louis – 15.4% of those qualified were black, so that it might have been expected that 62 black teachers would be taken on, so the deviation – from 15 to 62 – was more than fourfold, prima facie evidence of an adverse impact. However, if the city of Saint Louis was excluded, the percentage of qualified black teachers fell to 5.7%, and so the District could have been expected to recruit 23 black teachers, and the deviation, from 15 to 23, was less than twofold: no indication of adverse impact. The Supreme Court – which does not resolve these matters directly – establishes criteria for evaluating these statistics and refers the matters back to the court of instance.

¹⁸ It is one thing to assess the sexual structure of the entire company workforce, which would rule out demonstrating an adverse impact in companies with a high percentage of unskilled female labour, and another to assess the sexual structure of a higher occupational category or of the workers hired as a result of a particular job offer, which are far more demanding criteria.

¹⁹ Known as “flow statistics”. The trouble with this criterion is that focusing on applicants may exclude qualified individuals if the job offer has been configured in a discriminatory way.

²⁰ Known as “stock statistics”. The trouble with this criterion – adopted in the EEOC Guidelines – is that it is not always easy to delineate the area where the company is active.

These problems, of which what we just heard was only a sample, have doubtless attenuated the role of statistical evidence of adverse impact in Europe, and in the United Kingdom courts have placed more trust in common sense and in general experience and knowledge than in statistical insights, given that in any case an employer cannot be expected to disclose the gender composition of the company. In the United States, too, critical views have been expressed, the wittiest by a judge who reckoned that “*Too many use statistics as a drunk man uses a lamppost – for support and not for illumination*”²¹.

One way or the other, statistical evidence has been a departure point for applying the doctrine of more flexible burden-of-proof rules to cases of indirect sex discrimination. But submitting such data is not a demand that must be rigorously implemented on pain of losing the proceedings. Every case will require the court to determine whether the statistics submitted, by themselves or in conjunction with other evidence and with the court’s own knowledge of social realities, enable us to constitute a body of evidence that triggers a shift in the burden of proof. Any rigorous rules on the value of statistics can thus only be relative, and it is impossible to devise universally valid rules that will apply in every instance.

IV. PUBLIC ASSISTANCE FOR DISCRIMINATION VICTIMS.

Article 13 (2) of Directive 2000/43/EC, which has no match in Directive 2000/78/EC, Article 12 (2) (a) of Directive 2004/113/EEC and Article 20 (2) (a) of Directive 2006/54/EC bestow upon the equality bodies a responsibility for providing “*independent assistance to victims of discrimination in pursuing their complaints about discrimination*”. And

²¹ To quote *Keely versus Westinghouse Electric Corporation*, 404 FSupp. 573 (E.D.Mo. 1975).

assistance to victims must include matters of evidence, which are particularly relevant where there is a suspicion of indirect discrimination, because individuals may not have access to the evidence they are called upon to submit, whether for technical reasons or due to the cost.

V. BRIEF CONCLUDING REMARKS.

Conventional rules on the burden of proof as expressed in the classical aphorisms “*ei incumbit probatio qui dicit, non qui negat*” and “*da mihi factum, dabo tibi ius*” are too rigid when it comes to proving discriminatory conduct because conduct of this kind is always changing shape, displays many subtleties and is usually concealed beneath a mantle of legitimacy. Consequently, as evidence is an essential factor in protecting people from such conduct, a need has arisen to make the rules on the burden of proof more flexible by opening up evidentiary methods. Otherwise there is a risk that equality laws and human rights will be confined to a limbo of statements of good intent.

This is not – either in Community legislation and case-law or in the legislation and case-law of Member States – a genuine reversal of the burden of proof in the strict technical sense, because the plaintiff has the duty to submit a certain amount of evidence. The burden of proof is shared, so that once the plaintiff has met this requirement, the focus shifts to the respondent, who must prove that his motives had nothing to do with discrimination or an infringement of fundamental rights, and if he has acted rationally, as a good employer can be expected to do, this should not turn out to be difficult.

Sharing the burden of proof between the parties is designed to lighten, alleviate, attenuate, correct, facilitate, flexibilise or modulate (some

of the most frequent expressions used) the burden on the plaintiff, while adding to the burden of the respondent, although the criteria for sharing this load are open rather than rigid, and can be adjusted to each specific case. Hence the distribution of the burden of proof with regard to discrimination or infringements of fundamental rights cannot be compressed into an unbending formula, but it does require judges to be receptive to doctrinal suggestions about the advisability of applying evidence rules more flexibly.