



Proving discrimination: The shift of the burden of proof and access to evidence

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Context

In 2012, Europeans were asked about which protected characteristics were seen by employers as causing problems for job applicants:

- 54% - age
- 50% - disability
- 39% - skin colour and ethnic origin

In 2012, the statistics about pay were also worrying:

- Poland - women's gross hourly rate on average 16.4% less than men
- Older women are generally in a worse position

What are the evidential hurdles in discrimination cases?

- Perpetrators don't admit to discrimination, or they are unaware of it
- Information proving discrimination is in the hands of the perpetrator
- Statistics are required
- Justification defences

How has the EU responded to these challenges?

Shifting burden of proof

- Stage 1: claimant to prove *prima facie* case of discrimination
- Stage 2: respondent to prove no discrimination
- Case law – *Danfoss, Enderby*
- Directives

In practice, what evidence is required to shift the burden of proof?

Stage 1

- Comparability: *Brunhoffer*
- Lack of transparency: *Danfoss*
- Segregation: *Enderby*
- Conduct of connected / influential parties:
ACCEPT
- Historic discrimination: *Firma Feryn NV*

How can employers rebut the burden of proof once it has shifted?

Stage 2

- Advancing a positive case vs. proving a negative
- *Firma Feryn*
- *ACCEPT*

Obtaining evidence

- *Kelly*
- *Meister*
- Respect for national rules
- But, not at the expense of effectiveness

Conclusion

- Shifting burden of proof is a powerful tool
- Extent to which national rules relating to matters like disclosure will be influenced by the CJEU is less clear
- Potential for interesting future legal developments

Follow up

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