

THE BURDEN OF PROOF IN DISCRIMINATION CASES

Mary Stacey, Employment Judge, Employment Tribunals of England and Wales

1. Introduction

The equal treatment and non-discrimination principle (including equal pay for men and women) was a founding principle of the EU, initially limited to gender equality and equality of treatment for all nationalities of the EU nation states. It has now been extended, principally in the field of employment, to encompass other characteristics – age, disability, race and ethnicity, religion and belief and sexual orientation.

However, notwithstanding its central importance, substantive equality has not yet been achieved both within member states and across the EU as a whole.

For example – in 2011 on average across the EU women are paid 15% less than men, ranging from a 27% gender pay gap between men and women in Estonia to 2% in Slovakia. On average there is a higher gender pay gap for older women workers across the EU – for example in Cyprus women workers between the ages of 25-34 are paid less than 1% of their males counterparts, but women workers in Cyprus in the 45-64 age bracket receive 28% less pay than male employees¹.

EU youth unemployment rates are well documented, with recession related job losses disproportionately affecting the young. By the end of 2012 the youth unemployment rate across the EU was 2.6 times the total rate.²

In the special eurobarometer report commissioned in by the EU 2012 the commission found that overall discrimination is believed by EU citizens to be

¹ <http://epp.eurostat.ec.europa.eu>

² www.epp.eurostat.ec.europa.eu unemployment statistics data to December 2013

widespread, particularly on grounds of ethnic origin, and to a lesser extent disability and sexual orientation, with discrimination perceived to affect the over 55s more than the under 30s. Overall Europeans are more likely to believe discrimination is widespread in employment than in other areas of life.”³

2. The Background to the Directives

In European civil systems of law the normal approach to the burden of proof is that the task of proving the facts upon which a claim is based rests upon the claimant.

However, by as early as the late 1980s this was recognised by the European Court of Justice (ECJ) as an inadequate approach in the difficult area of discrimination. In two cases, **Danfoss**⁴ and **Enderby**⁵ the court began to develop a jurisprudence that has been described as a **shifting burden of proof**.

In certain circumstances, the court recognised, it was not right to expect to claimant to continue to bear the burden of proving the case since it could defeat the principle of effectiveness of implementation of EU Directives. In **Danfoss**, an equal pay case, the court held that where the employer’s systems of pay were so opaque that it was impossible for a woman to understand why she was being paid less than a man doing the same job, it was for the employer to prove that:

“his practice in the matter of wages is not in fact discriminatory”
(para13)

Enderby, like **Danfoss** is an equal pay case and the Court there was operating from an understandable standpoint; that on the whole employees

³ Discrimination in the EU Special Eurobarometer Report 393 “Discrimination in the European Union” www.ec.europa.eu/public_opinion/archives/ebs/ebs_393_sum_en.pdf

⁴ Case 109/88, Danfoss [1989] ECR 3199

⁵ Case C-127/92 Enderby [1983] ECR I-5535

are poorly placed, in terms of their access to the evidence to prove those matters which they would need to show in establishing that they are being paid less than comparable men.

3. The wording of the Directives

In December of 1997, the EC adopted Directive 97/80 on the burden of proof in cases of discrimination based on sex.

1. Member States shall take such measures as are necessary, in accordance with their national **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.

As the Court of Justice made clear in **Vasiliki Nikoloudi v Organismos Tilepikoinonion Ellados AE. Case C-196/02**⁶, this is a codification and extension of that previous case law, which itself is founded in the very longstanding principle of effective judicial protection for community rights. It is also a significant exception to the general rule of national procedural autonomy.

Article 8 Directive 2000/43 (the Race Directive), and Article 10 Directive 2000/78 (the Framework Directive) and Article 19(1) 2006/54 (the re-cast Equal Treatment Directive between men and women in employment and occupation) are identically worded.

The recitals to the Burden of Proof Directive acknowledge the effect of the provisions on the legal systems of the member states by reassuring those states that the traditional national autonomy in matters of procedure is being respected.

⁶ See paragraph 69

(13) Whereas the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with national law or practice;

and

(15) Whereas it is necessary to take account of the specific features of certain Member States' legal systems, inter alia where an inference of discrimination is drawn if the respondent fails to produce evidence that satisfies the court or other competent authority that there has been no breach of the principle of equal treatment;

Nevertheless, they go on to state,

(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;

The following recital appears in the Framework Directive

(31) The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, 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. However, 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.

It is thus recognised that discrimination is different to other civil wrongs and must be approached in a different way by the courts.

4. CJEU Caselaw

4.1 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV. Case C-54/07 (Firma Feryn)*

In *Firma Feryn* the Belgian Labour Court referred a number of questions to the court on the application of the burden of proof. The facts were that in 2005 an employer had publicly stated a policy of not employing certain ethnic minorities. The question was to what extent this earlier stated policy was capable of being a fact which would place the burden upon the employer to disprove the discriminatory nature of its recruitment policy at a later period. A further question was as to how strict the national court must be in assessing evidence in rebuttal of the presumption.

The ECJ was not expansive and its answers are to be found at paragraphs 29 to 34 of the judgement. The court concluded that a statement in 2005 by an employer that it would not appoint employees of certain ethnic minority backgrounds “**may constitute facts of such a nature as to give rise to a presumption of a (still existing) discriminatory recruitment policy**”

The court went on to say that it was for the employer to “**adduce evidence that it has not breached the principle of equal treatment**” and went on to give an example of what the employer might rely on in this case: by showing that the actual recruitment practice of the undertaking does not correspond to those statements; in other words, by disproving, with cogent and tangible evidence that the stated policy was inaccurate.

4.2 *Asociația ACCEPT v Consiliul National pentru Combaterea Discriminării (National Council for Combatting Discrimination) C-81/12.(ACCEPT)*

More recently the CJEU has reiterated and developed the principles enunciated in *Firma Feryn* in **ACCEPT**.

An individual, Mr Becali, who was closely and publicly associated as a one-time shareholder and banker of a Romanian football club, FC Steaua, made a number of public statements suggesting that a professional football player (X) rumoured to be gay would not be recruited because of his possible sexuality: “Not even if I had to close [FC Steaua] down would I accept a homosexual on the team..... There’s no room for gays in my family and [FC Steaua] is my family. It would be better to play with a junior rather than someone who was gay.....Even if God told me in a dream that it was 100 percent certain that X wasn’t a homosexual I still wouldn’t take him. Too much has been written in the papers about his being a homosexual. Even if [player X’s current club] gave him to me for free I wouldn’t have him! He could be the biggest troublemaker, the biggest drinker ... but if he’s a homosexual I don’t want to know about him.”

The CJEU held that even though the statements did not emanate directly from the defendant, but rather an individual closely associated with the alleged discriminator defendant, it is not necessarily a bar to establishing the existence of ‘facts from which it may be presumed that there has been ... discrimination’ against that defendant:

“49 It follows that a defendant employer cannot deny the existence of facts from which it may be inferred that it has a discriminatory recruitment policy merely by asserting that statements suggestive of the existence of a homophobic recruitment policy come from a person who, while claiming and appearing to play an important role in the management of that employer, is not legally capable of binding it in recruitment matters.”

Other relevant matters to take into account included whether the defendant had distanced itself from the comments and also public perception:

“50 In a situation such as that at the origin of the dispute in the main proceedings, the fact that such an employer might not have clearly distanced itself from the statements concerned is a factor which the court hearing the case may take into account in the context of an overall appraisal of the facts.

51 In that connection, it should be recalled that the perception of the public or social groups concerned may be relevant for the overall assessment of the statements at issue in the main proceedings (see, to that effect, Case C-470/03 AGM-COS.MET [\[2007\] ECR I-2749](#), paragraphs 55 to 58).”

So the national court may conclude that the burden of proof has shifted in these circumstances, although it is principally a matter for the national court. It is however a non-conclusive presumption and the fact only that the club has not commenced negotiations with the player concerned is not necessarily conclusive of discrimination.

As to what the defendant needs do to rebut the presumption that could have now shifted, the CJEU suggested:

56defendants may refute the existence of such a breach before the competent national bodies or courts by establishing, by any legally permissible means, inter alia, that their recruitment policy is based on factors unrelated to any discrimination on grounds of sexual orientation.

57 In order to rebut the non-conclusive presumption that may arise under the application of Article 10(1) of Directive 2000/78, it is unnecessary for a defendant to prove that persons of a particular

sexual orientation have been recruited in the past, since such a requirement is indeed apt, in certain circumstances, to interfere with the right to privacy.

58 *In the overall assessment carried out by the national body or court hearing the matter, a prima facie case of discrimination on grounds of sexual orientation may be refuted with a body of consistent evidence. As Accept has, in essence, submitted, such a body of evidence might include, for example, 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.”*

However, as stated in ***Firma Feryn*** 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 its contentions that it has not breached the principle of equal treatment*” (para 33)

4.3 Kelly v National University of Ireland C-104/10 (Kelly)

Mr Kelly had been denied access to a vocational masters degree by the National University of Ireland. He believed that he was better qualified than the least qualified female candidate and that he had been subjected to unlawful sex discrimination. The Irish Equality Tribunal dismissed the case on grounds that he had not established a prima facie case. He was also refused disclosure of the applications and details of the qualifications of the other candidates including the successful candidates, which Kelly said would demonstrate his superior qualifications.

The national court referred questions to the CJEU asking whether Kelly was entitled to the information in order to establish facts from which it may be

presumed that there had been direct or indirect discrimination. The CJEU was also asked whether the entitlement to information was affected by the operation of national or European laws relating to confidentiality.

CJEU enunciated the principles to be applied, without laying down a prescriptive answer. The burden of proof provisions did not specifically entitle persons who consider themselves wronged by breach of the equal treatment principle to have access to the information to establish facts from which discrimination may be presumed, but, a refusal of disclosure by the defendant could compromise the achievement of the objective pursued by the directive and deprive the provision of its effectiveness.

It is for member states to apply rules in accordance with their judicial systems and rules of procedure, but they may not apply rules which are liable to jeopardise the directive's objectives. It was noteworthy that the National University of Ireland had offered to provide Mr Kelly with part of the information he had requested.

The Court observed that:

39 Nevertheless, it cannot be ruled out that a refusal of disclosure by the defendant, in the context of establishing such facts, could risk compromising the achievement of the objective pursued by that directive and thus depriving, in particular, Article 4(1) thereof of its effectiveness. It is for the national court to ascertain whether that is the case in the main proceedings.

It is therefore for national courts to assess whether a refusal to provide disclosure to a claimant compromises the achievement of the equal treatment principle. It follows that if the national courts assess that a refusal would render the right ineffective, disclosure should be provided.

In answer to the subsequent question of the interplay between both EU and national confidentiality rights and access to information the CJEU stated that entitlement to access to information can be affected by rules of EU rules

relating to confidentiality, referring both the EU Directives 95/94/EC, 2002/58/EC, 2009/136/EC concerning data protection, privacy and electronic communications, and Article 8 charter of Fundamental Rights of the EU. It did not develop how the tension between access to information for the purposes of establishing facts concerning discrimination and data privacy should be resolved.

In the UK the issue of preserving confidentiality of information is resolved by redacting and anonymising documents.

4.4 *Meister v Speech Design Carrier Systems gmbH C-415/10 (Meister)*

Meister, decided shortly after **Kelly** also concerns access to information and disclosure and the burden of proof provisions. Ms Meister is a Russian national with a Russian degree in systems engineering recognised in Germany as equivalent to degree awarded by a university of applied science Fachhochschule. She applied twice for the position of an experienced software developer which the defendant had advertised on two occasions and her level of expertise matched that referred to in the job advert. On neither occasion was she interviewed. She suspected direct discrimination on grounds of sex, age and national origin. She brought proceedings under the German legislation implementing Directive 2000/43. Her claim was dismissed at first instance.

The CJEU was asked whether a worker who claims plausibly to meet the requirements listed in a job advert and whose application was rejected, is entitled to have access to information indicating whether the another applicant was engaged in the recruitment process and, if so on the basis of what criteria. Secondly, does the fact of failure to disclose the requested information give rise to a presumption of discrimination?

The CJEU reiterated and reinforced **Kelly** emphasising that the referring court:

“must ensure that a refusal of disclosure in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination, is not liable to compromise the achievement of the objectives pursued by Directives 2000/43, 2000/78 and 2006/54. It must, in particular, take account of all the circumstances of the main proceedings, in order to determine whether there is sufficient evidence for a finding that the facts from which it may be presumed that there has been such discrimination have been established.

The emphasis on considering all the circumstances of the main proceedings is significant in enabling national courts to make a detailed and case specific assessment.

The CJEU noted that indirect discrimination may be established by any means including the basis of statistical evidence. The Court went on to list other factors that may be taken into account:

- The fact that the defendant employer refused to disclose any access to the information she sought
- The fact that the Claimant’s expertise matched the job advert
- The fact that she had not been interviewed

5. Comparators

Although not strictly of relevance to the question of the burden of proof, it is worth mentioning the question of comparators. In all cases except those which relate to pregnancy, a claimant will have to show that he or she has been treated less favourably than a comparable person. It is however axiomatic that if a claimant has been treated less favourably on grounds of a protected characteristic that it must follow that someone without that protected characteristic would have been treated differently.

The comparison must be like with like i.e. the comparator must be someone whose circumstances are the same, or not materially different, to the claimant's except for the fact of the protected characteristic (racial origin, sexual orientation, age etc)⁷.

Where an **actual** comparator can be identified, the task of considering whether there has been difference of treatment is comparatively straightforward, requiring only findings of fact as to the treatment of the claimant, the treatment of his or her comparator and a comparison between the two. In our working example this is the case.

A difficulty arises however where there is no actual comparator and the Court or Tribunal has to consider what would have been the case had there been a suitable comparator. In other words, a **hypothetical** comparator must be constructed. In such cases, the UK courts have said, it can be permissible to focus immediately on the question of why what occurred did occur, what is known as the "reason why" question.

To consider how a comparator would have been treated can be a useful exercise in testing the cogency of the evidence.

6. The First Stage

It is therefore for the national courts to consider if a claimant has established facts from which discrimination can be presumed in accordance with national law and procedure bearing in mind the principle of effectiveness.

The difficulty is often in establishing why an act or treatment occurred which can involve consideration of conscious and sub-conscious motivations. It involves subtlety and most people do not admit to prejudices or may not even be aware of them themselves. An unconscious or unquestioned stereotype can lead to discrimination.

⁷ MacDonald v Advocate General for Scotland [2003] IRLR 512

This latter point has been emphasised by the UK House of Lords in **R v Immigration Officer at Prague Airport and another** ⁸

“If the difference is on racial grounds the reasons or motive behind it are irrelevant...The whole point of the law is to require suppliers to treat each person as an individual, not as a member of a group. The individual should not be assumed to hold the characteristics which the supplier associates with the group, whether or not most members of the group do indeed have such characteristics”

However the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal ‘could conclude’ that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

Primary facts, background and context and drawing inferences

As CJEU has made clear, national courts must consider all the circumstances in the claim to assess whether the Claimant has established facts from which discrimination can be presumed. It may include the primary facts, the claimant’s circumstances and wider, background information and context relevant to the issues. Inferences may be drawn from, for example a failure voluntarily to disclose relevant information which would assist in establishing whether or not discrimination has occurred.

In the UK, this principle was established by the Court of Appeal in a race discrimination case, **Anya v University of Oxford**⁹. In that case, once again, the observation is made that very little discrimination is overt (or perhaps, even deliberate). Dr Anya applied, unsuccessfully, for a research post. The successful candidate was white. Dr Anya is a black Nigerian. The tribunal heard from a witness for the university who explained that Dr Anya had not been selected for reasons related entirely to his qualities as a scientist. They found that witness truthful and dismissed the claim. Dr Anya had called

⁸ [2005]2 AC. Per Baroness Hale

⁹ [2001] IRLR 377

evidence about five events prior to his rejection which he said indicated bias against him. He did not seek to make these instances part of his claim but relied on them to establish that his rejection for the post was on the grounds of his race. The tribunal failed to make findings of fact on any of those matters, let alone indicate whether they could draw any inferences from them. This was despite the fact that they noted, in the evidence on those matters, inconsistencies between the University's witnesses and also inconsistencies between their evidence and the documents.

The Court of Appeal remarked that in obvious and straightforward cases it might be possible to reject a complaint without a detailed consideration of the background evidence. However, here, when a choice lay between two well qualified candidates and the decision depended on judgments which are notoriously capable of being influenced by idiosyncratic factors, that was not possible. If any of the factors influencing the decision were racial factors, that would generally only emerge from the surrounding circumstances and previous history. The superficial plausibility of witnesses may not be sufficient.

7. The Second Stage.

Once the burden has been shifted to the employer, it is for him or her to provide an explanation ***which is in no sense at all*** connected to the protected status of the employee. The explanation must, of course, be adequate, supported by evidence and must be accepted by the court. An employer falling short of that ***must*** be found to have discriminated, even though the court might perceive another reason, not advanced by the employer, but nevertheless non-discriminatory.

So if the employer or other defendant is able to establish that the reason for the treatment was nothing whatsoever to do with the protected characteristic, then the national court will find that the reason for the treatment was the non-suspect reason and the claim will fail. If the employer does not, then the presumed discriminatory reason becomes the reason and the claim succeeds.

8. Statistical Evidence

The importance of statistical evidence was expressly referred to in the context of the burden of proof in *Meister* in indirect discrimination cases.

In the case of *Enderby*, the court concluded that where two jobs are of equal value and one is carried out almost exclusively by men and the other by women, a prima facie case of indirect discrimination is established if statistics show an appreciable difference in pay between the two jobs. This is so even if it is not possible to explain how the differential has arisen.

The key question here is whether the statistics are adequate to demonstrate a general state of affairs, and whether the difference(s) they reveal is/are significant. The size of the group and whether it is statistically significant, the period of time of the differences and the extent of the differences will all be relevant as will explanations for differences. A comparison of industry wide statistics and those of the particular employer may also be relevant. The make-up of the geographical area from where employees are drawn may also be relevant.

Statistical evidence may not only be relevant in indirect discrimination cases but also in establishing the presumption of discrimination in direct discrimination claims.

Mary Stacey,
London
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