

Proving discrimination: burden of proof and access to evidence

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Difficulties in proving discrimination

- discrimination is a phenomenon (actions) which in practice is extremely difficult to prove (except for few evident cases)
- „word against word”
- victim's of discrimination difficulties in access to evidence: personal and documentary
- the reason that caused the different treatment usually exists only in the mind of the perpetrator of discrimination
- fear against revenge
- freedom of contract and freedom from discrimination – competitiveness?



EU law and the burden of proof

The Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex

laid the foundation for further expansion of the concept of the burden of proof (although preceded by judgements of CJEU)

basis for judicial decisions in gender discrimination cases

standard of gender equality has gained operational and warranted dimension



EU law and the burden of proof

'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'.

Directives: 2000/43/WE, 2000/78/WE, 2004/113/WE, 2006/54/WE



EU law and the burden of proof

Aim of shift of burden of proof:

provides an effective tools and procedures to enforce their rights of victims of discrimination

ensures unified standards of protection against discrimination in all EU countries



EU law and the burden of proof

What does shifting the burden of proof mean in practice for the plaintiff?

this is not a complete plaintiff's release to show authenticity of his assertions

obligation to show facts, which may suggest suspicion of a biased unequal treatment

unequal treatment should be associated with any of the legally protected characteristics (sex, age, disability, etc.)

a *prima facie* case of discrimination



EU law and the burden of proof

What does shifting the burden of proof mean in practice for the defendant?

Proving that the action was not against the law

Showing objectivity of the actions (not being generated by legally protected characteristics)

Not showing objectivity of the actions (objective justification) means that the plaintiffs justification should prevail (the court's evaluation based on presumption of fact – based on the court's life experience)



EU law and the burden of proof

EU legislator allowed the Member States to introduce even more plaintiff friendly rules

shift of burden of proof principle does not apply to criminal proceedings and those in which the basic principle is the principle of the presumption of innocence



EU law and the burden of proof

Direct discrimination:

The obligation imposed on the plaintiff (the victim of discrimination) to show biased inequality in comparison to other people + characteristics

Indirect discrimination:

The obligation to show by the plaintiff experiencing unfavourable effects of apparent neutral criteria, practice or regulation (also using statistics or other means) + characteristics



Burden of proof in the jurisdiction of the CJEU

Danfoss C-109/88 (one of the first judgements in this area)

lack of clarity in the remuneration system which does not allow to identify the criteria that were used by the employer, leads to transferring the burden of proof of lack of discrimination on the employer

the employee only needs to prove that the average salary of employees of one sex is less than of the opposite sex, compared with a sufficiently large number of employees



Burden of proof in the jurisdiction of the CJEU

Kelly (C-104/10) oraz Meister (C-415/10)

allegation of discrimination at the recruitment stage

The EU legislation does not provide for employee's right, who claims that he/she meets the conditions set by the employer in recruitment advertisement but his candidacy has not been taken into account, to obtain information on whether or not as a result of the recruitment process another candidate was hired. The same applies to access to other information - archived applications of other candidates, candidates score cards)

protection of personal data, as guaranteed by EU law

However, the CJEU left the door open for further explanatory actions to the national court



Burden of proof in the jurisdiction of the CJEU

Enderby (C-127/92)

Objectivity of reasons of unequal treatment: needs and objectives of the company, employee flexibility, ie its ability to adapt to the times and places of work, his professional training and work experience



Burden of proof in the jurisdiction of the CJEU

Brunnhofer (C-381/99)

Objective factors (non-discriminatory) can justify the unequal treatment if they are related to the real purpose and are appropriate and necessary for its implementation. They must be proportionate, must not go beyond what is necessary to achieve the objective and can not be in any way related to discrimination based on one or more legally protected characteristics



Burden of proof in the jurisdiction of the CJEU

ACCEPT (C-81/12)

- conflict of several values - protection against discrimination, the obligation to prove by the defendant the legality of the actions and protection of values such as the right to privacy

- rebutting the presumption (discrimination based on sexual orientation in the recruitment process) does not require that the defendant proves that people of a particular sexual orientation were formerly employed as such a requirement could, in certain circumstances, violate the right to respect for private life

- there are other ways to demonstrate that the recruitment policy is based on factors having nothing to do with discrimination based on sexual orientation (for example, by cutting off from discriminatory statements, anti-discrimination rules, etc.)



Burden of proof in the jurisdiction of the CJEU

Feryn (C-54/07)

- the intention, reluctance to specific groups does not matter
- lack of individualized victim does not matter
- the effect matters (even non-intentional)
- public announcement of discriminatory actions constitutes an evidence of discrimination



Evidence and methods of proving

Statistics

- included in the Preambles to the directives 2000/43/WE and 2000/78/WE
- facilitate the appearance of presumption of discrimination
- particularly useful in proving indirect discrimination (proving the outcome of the apparent neutrality actions)
- it is recognized that reliance on statistical data should take place at an early stage of the proceedings to transfer the burden of proof



Evidence and methods of proving

Statistics

- what "threshold" must be exceeded, to determine whether there was discrimination?
- CJEU stated (though not precisely) that the given data should be "substantial": (the Commissioner General of the CJEU in the Nolte case)

In order for the measure to be considered discriminatory, it must have an effect on "significantly more women than men" (Rinner-Kühn) or "significantly lower percentage of men than women" (Nimz, Kowalska) or "a lot more on women than on men" (De Weerd and others), "the percentage of women that are affected by the measure must be clearly visible"



Evidence and methods of proving

Statistics

In the Rinner-Kühn case the Court established the presence of discriminatory situation when the proportion of women was 89%

In the Seymour-Smith case - 77,4% men and 68,9% women met the criteria for special protection against dismissal. Lack of discrimination, but the Court emphasized that "lower level of disproportion would also prove discrimination if it revealed a persistent and relatively constant difference between men and women in the long term perspective ,,



Evidence and methods of proving

Statistics

Using judgements of ECtHR:

Opuz against Turkey (statistically more women are victims of domestic violence)

D. H. and others against the Czech Republic (a tool used to send children to special schools led to placing in them a high percentage of Roma children, their number was "disproportionately high" in relation to their share in the total population)



Środki dowodowe i metody dowodzenia

Situation testing

- experimental method designed to measure the effectiveness of formal methods of counteracting discrimination, detection and determination of the scale of discrimination
- specific methodology and tools
- „provocation"
- expressly permitted by the laws of ie. France, Hungary, to some extent Belgium
- prima facie evidence of discrimination



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Thank you for your attention

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Used ie. materials prepared by K. Wencel, Thien Uyen Do and F. Moyses