PROVING DISCRIMINATION: THE SHIFT OF THE BURDEN OF PROOF AND ACCESS TO EVIDENCE

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BURDEN OF PROOF: WHO

- The rule: The Claimant must prove his or her case on the balance of probabilities.

- But: a claimant in a discrimination case faces a particular burden because:

  1) discriminators don't tend to advertise their prejudices; and

  2) employers and/or service providers are the custodians of all the relevant evidence which poses a particular problem for indirect discrimination claimants.
BURDEN OF PROOF: WHY

- The broad principle of effective judicial protection for community rights demands that it must not be virtually impossible for citizens to exercise their rights

- Early ECJ jurisprudence recognised that it could be particularly difficult for claimants to prove discrimination:
  - **Danfoss** (C-109/88) Female workers earned 7% less than male workers
  - **Enderby** (C-127/92) Speech therapists (women) earned less than pharmacists (men)

BURDEN OF PROOF: WHERE

- Then: [Article 4 Burden of Proof Directive 97/80/EC]

- Now:
  - Art 8(1) 2000/43 ("Race Directive") (race)
  - Art 10(1) 2000/78 ("Framework Directive") (religion or belief; disability; age and sexual orientation)
  - 2006/54 19(1) ("Recast Directive") (sex)
BURDEN OF PROOF: WHAT

• “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.”

• Identical wording across the directives (Article 8(1) 2000/43; Article 10(1) 2000/78 and Article 19(1) 2006/54)

* 2-stage test
  * (1) persons who consider themselves wronged (claimants) establish facts from which it may be presumed that there has been direct or indirect discrimination
  * (2) respondent to prove that there has been no breach
BURDEN OF PROOF: WHAT

- Presumption does not mean conclusion:
  - CHEZ C-394/11 AG Kokott opinion
  
  The language of Article 8(1) of the Race Directive only requires a PREASSUMPTION not a definite CONCLUSION. Any stricter interpretation would jeopardise the practical effectiveness of the burden of proof regulations making them practically redundant.

- The reversal of the burden of proof maintains a fair balance between the parties because they do not completely remove the burden of proof from the victim but merely modify it.

BURDEN OF PROOF: DIRECT DISCRIMINATION

- Direct Discrimination "treated less favourably than" = comparison
- Aristotle: treating like cases alike

The comparator must be someone whose circumstances are the same or not materially different to the claimant: MacDonald v Advocate General for Scotland [2003] IRLR 512
BURDEN OF PROOF: DIRECT - JURISPRUDENCE

• **Firma Feryn (C-54/07)**
  - Public statements may establish a prima facie case or presumption of discrimination (Stage 1)
  - The employer must then prove that its recruitment process was not discriminatory (Stage 2)

• **Kelly (C-104/10)**
  - Claimant's belief did not entitle him to the information about other applicant's qualifications in order to establish Stage 1 prima facie case

• **Meister (C-415/10)**
  - All the evidence (including a failure to provide information) is relevant in considering whether a Stage 1 prima facie case has been established by the claimant

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BURDEN OF PROOF: DIRECT - JURISPRUDENCE

• **ACCEPT (C-81/12)**
  - Employer's failure to distance himself from discriminatory statements is relevant to establishing a Stage 1 presumption of discrimination case

• **CHEZ (C-394/11)**
  - Is a difference of protected characteristic and a difference of treatment enough? What more is required? The service provider's actions were underscored with a pernicious belief based upon stereotypes.
BURDEN OF PROOF: INDIRECT DISCRIMINATION

- Indirect Discrimination:

  “....where an apparently neutral provision, criterion or practice would put persons [with the protected characteristic] at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”

- Article 2(2)(b) 2000/43
- Article 2(2)(b) 2000/78
- Article 2(1)(b) 2006/54

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3 stages:

- Stage 1: Has the claimant established a prima facie case that there is a provision, criteria or practice which puts those with a protected characteristic (women etc) at a particular disadvantage and which causes them detriment?

- Stage 2: Has the employer/service provider shown cogent evidence which disproves the existence of any of the elements of the complaint?

- Stage 3: Can the employer justify the provision, practice or criteria?
BURDEN OF PROOF: INDIRECT - JURISPRUDENCE

- Showing “particular disadvantage”
- *Bilka-Kaufhaus* (C-170/84): “much lower proportion”
- *Seymour-Smith* (C167/97): “considerably smaller percentage”
- *O’Flynn* (C-237/94): “substantially higher proportion”

BURDEN OF PROOF: INDIRECT - STATISTICS

- The problem with statistics:
### BURDEN OF PROOF: STATISTICS

<table>
<thead>
<tr>
<th>Example 1</th>
<th>Example 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Pool = 10,000</td>
<td>Total Pool = 20</td>
</tr>
<tr>
<td>Men = 9,000, Women = 1,000</td>
<td>Men = 12, Women = 8</td>
</tr>
<tr>
<td>Compliant men = 700</td>
<td>Compliant men = 9</td>
</tr>
<tr>
<td>Compliant women = 50</td>
<td>Compliant women = 7</td>
</tr>
<tr>
<td>%age of compliant men = 7.7%</td>
<td>%age of compliant men = 75%</td>
</tr>
<tr>
<td>%age of compliant women = 5%</td>
<td>%age of compliant women = 87.5%</td>
</tr>
</tbody>
</table>

### BURDEN OF PROOF: APPLICATION

- **Direct Discrimination:**
  - **First Stage**
    - (1) Find primary facts: central facts, background facts, statistics
    - (2) Draw any appropriate inferences
  - **Second Stage (where burden has shifted)**
  - **Explanation**
BURDEN OF PROOF: APPLICATION

- Indirect Discrimination:
  - First Stage
  - Prima facie case that there is a provision criterion or practice (PCP) which puts claimant at a particular disadvantage and causes detriment
  - Second Stage
  - Has employer/service provider shown cogent evidence which disproves the existence of any of the elements of the complaint
  - Third Stage
  - Can the employer/service provider justify the PCP

In preparing my presentation I have had the benefit of reading and in some cases drawing upon previous presentations by Anna Beale (Cloisters Chambers), Philip Rostant (Employment Judge, England & Wales) and Mary Stacey (Employment Judge, England & Wales).

Danke fur Ihre Aufmerksamkeit!