

# FIGHTING SEX DISCRIMINATION CASES AND SHIFTING THE BURDEN OF PROOF

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## Introduction

1. The burden of proof is the obligation on a party to establish the facts in a case to the required standard in order to prove their case. In civil, as opposed to criminal, proceedings the general rule is that "he who asserts must prove" i.e. the legal burden rests with the party bringing the action.
2. However proving unlawful discrimination presents particular problems. Nowadays it is extremely unusual to find explicit evidence of unlawful discrimination. Few employers will be prepared to admit such discrimination even to themselves. As Lord Browne-Wilkinson put it in the UK case of *Glasgow City Council v Zafar*<sup>1</sup> "those who discriminate on the grounds of race or gender do not in general advertise their prejudices: indeed they may not even be aware of them."
3. In some cases the discrimination will not be ill-intentioned but merely based on an assumption that a person "would not have fitted in." Occasionally, there may even be a benign reason for less favourable treatment<sup>2</sup>.
4. In practice discrimination is often difficult to prove because direct evidence of discrimination is only rarely available<sup>3</sup>. Frequently the relevant evidence is in the hands of the respondent, i.e. the employer.

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<sup>1</sup> [1998] ICR 120, House of Lords.

<sup>2</sup> See the seminal UK case of *James v Eastleigh Borough Council* [1990] 3 WLR, House of Lords which concerned the provision of free access to a swimming pool for those of pensionable age. At the time, the pensionable age for men in the UK was 65 and for women it was 60. It was argued that the council's reason for giving free swimming to those of pensionable age was to give benefits to those whose resources would be likely to have been reduced by retirement. The aim was to aid the needy, whether male or female, not to give preference to one sex over the other.

<sup>3</sup> This has been acknowledged by the courts, see *Baker v Cornwall County Council* [1990] ICR 452, [1990] IRLR 194, CA; *North West Thames Regional Health Authority v Noone* [1988] ICR 813, sub nom *Noone v North West Thames Regional Health Authority (No 2)* [1998] IRLR 530, CA; *Khanna v Ministry of Defence* [1981] ICR 653, [1981] IRLR 331, EAT; *Oxford v Department of Health and Social Security* [1977] ICR 884, [1977] IRLR 225, EAT; *Wallace v South Eastern Education and Library Board* [1980] IRLR 193, NI CA; *Chattopadhyay v Headmaster of Holloway School* [1982] ICR 132, [1981] IRLR 487, EAT; *Barking and Dagenham London Borough Council v Camara* [1988] ICR 865, [1988] IRLR 373, EAT. The affirmative evidence of discrimination normally consists of inferences to be drawn by the court or tribunal from the primary facts: *Khanna v Ministry of Defence* supra.

## **The situation in the United Kingdom before the Burden of Proof Directive**

5. It was recognised some time ago in the United Kingdom that the outcome of a discrimination case would depend on what inferences it was proper to draw from the primary facts found by the court or tribunal<sup>4</sup>. So, for example, a finding of less favourable treatment and a finding of a difference in race might point to the possibility of racial discrimination. In such circumstances the tribunal would look to the employer for an explanation. If no explanation was put forward or if the tribunal considered that the explanation was inadequate or unsatisfactory it would be legitimate for the tribunal to infer that the less favourable treatment was on racial grounds.
6. However, as the House of Lords held in *Zafar*, whilst it might be legitimate for the tribunal to infer that a person had been subjected to unlawful discrimination in such circumstances, it was not obliged to do so. In other words UK law did not impose a legal duty on the employer to prove that it did not discriminate; the respondent merely bore a tactical or evidential burden to explain its treatment of the employee.

## **European Developments leading up to Directive 97/80**

7. In 1975 the European Commission introduced Directive 75/117 which was aimed at harmonising national legislation with regard to the principle of equal pay for work of equal value. In practice, however, claimants were having difficulty proving their case because employers did not always adopt a transparent system of pay and all the evidence was, usually, in their hands.
8. This issue was addressed for the first time in 1989 in the *Danfoss* case. This Danish case was brought by a trade union on behalf of female workers who earned, on average, 7% less than a comparable group of male colleagues<sup>5</sup>. The European Court of Justice ("ECJ") held that if a company applies a system of pay which is totally lacking in transparency and statistical evidence reveals a difference in pay between male and female workers the burden of proof shifts to the employer to account for the pay difference by factors unrelated to sex.
9. In 1993 Ms Enderby, a speech therapist, also complained about the pay system of her employer, the English National Health Service, because she was paid considerably less (£10,106) than a pharmacist (£14,106) and a clinical psychologist (£12,527) who were also employed by the NHS. Ms. Enderby claimed this amounted to indirect sex discrimination because the speech therapists were mostly female whereas pharmacists and clinical psychologists were mostly male. The employer argued that market forces and collective bargaining had created

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<sup>4</sup> The most commonly referred to statement of this principle in the UK is contained in the speech of Neill LJ in the case of *King v Great Britain China Centre* [1992] 1 ICR 529

<sup>5</sup> ECJ 1989, C-109/88, *Handels- og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] ECR 3199.

the pay differential and that this justified the difference. Unlike the *Danfoss* case the employer's pay system was transparent.

10. In *Enderby*<sup>6</sup> the ECJ reiterated the principle that it is up to the claimant to prove discrimination but added that the burden of proof

“(...) may shift when that is necessary to avoid depriving workers *who appear to be victims of discrimination* of any effective means of enforcing the principle of equal pay (...) Accordingly, when a measure distinguishing between employees on the basis of their hours of work has in practice an adverse impact on substantially more members of one or other sex, that measure must be regarded as contrary to the objective pursued by Article 119 [currently Article 141]<sup>7</sup> of the Treaty.” (emphasis added).

11. The ECJ further said:

“(...) if the pay of speech therapists is significantly lower than that of pharmacists and if the former are almost predominantly women while the latter are predominantly men, there is a *prima facie case of sex discrimination*. (...) Where there is a *prima facie* case of discrimination, it is for the employer to show that there are objective and non-discriminatory reasons for the difference in pay. Workers would be unable to enforce the principle of equal pay before national courts if evidence of a *prima facie* case of discrimination did not shift to the employer the onus of showing that the pay differential is not in fact discriminatory (see, by analogy, the judgment in the *Danfoss* Case (...).” (Emphasis added).

### **Shifting the burden of proof: Directive 97/80**

12. Shifting the burden of proof redresses the imbalance of power between the employer and the employee. On 15 December 1997 the Council of the European Union adopted Directive 97/80 on the burden of proof in cases of discrimination based on sex<sup>8</sup>. This Directive codified the case law of the ECJ on the reversal of the burden of proof. It also gave effect to paragraph 16 of the Community Charter of the Fundamental Social Rights of Workers 1989 which provides that:

“(...) action should be intensified to ensure the implementation of the principle of equality for men and women as regards, in particular, access to employment, remuneration, working conditions, social protection, education, vocational training and career development”

13. It was recognised in the 17<sup>th</sup> recital to Directive 97/80 that employees could be deprived of any effective means of enforcing the principle of equal treatment before national courts if the effect of introducing evidence of an apparent

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<sup>6</sup> ECJ 27 October 1993, C-127/92, *Enderby v. Frenchay Health Authority*, ECR I-5535.

<sup>7</sup> Under the Lisbon Treaty, Article 141 TEC is replaced by Article 157 of the Treaty on the Functioning of the European Union (TFEU).

<sup>8</sup> The Directive did not initially apply to the UK but was extended to apply there by Council Directive 98/52/EC, Art. 2

discrimination were not to impose upon the employer the burden of proving that his practice is not in fact discriminatory.

14. The 18<sup>th</sup> and 19<sup>th</sup> recitals record the fact that the ECJ had held that the rules on the burden of proof ought to 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 had to shift back to the employer when evidence of such discrimination was brought; but that the aim of adequately adapting such rules had not been achieved satisfactorily in all member states.

15. Article 1 of 97/80 thus provides that:

“The aim of this Directive shall be 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.”

16. And Article 4(1) states:

“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.” (Emphasis added)

17. Provisions identical to Art. 4(1) can be found in Art. 8(1) of Council Directive 2000/43 (the Racial Equality Directive)<sup>9</sup> implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Art. 10(1) of Council Directive 2000/78 (the Framework Directive)<sup>10</sup> establishing a general framework for equal treatment in employment and occupation (covering discrimination on grounds of religion or belief, disability, age or sexual orientation) and Art. 19(1) of Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (also known as the Recast Directive)<sup>11</sup>.

18. However, Member States do not need to apply the shifting of the burden of proof to proceedings that are inquisitorial rather than adversarial<sup>12</sup>.

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<sup>9</sup> The Racial Equality Directive protects persons irrespective of racial or ethnic origin in a wide scope of social activities: employment, self-employment, social security, health care, education, housing and the supply of goods and services.

<sup>10</sup> The Framework Directive is limited to employment.

<sup>11</sup> This Directive repeals Directives 75/117/EEC, 76/207/EEC, 86/378/EEC and 97/80/EC from 15 August 2009 (Article 34).

<sup>12</sup> There is an exception for inquisitorial proceedings in Art. 4(3) of Directive 97/80, Art. 8(5) of Directive 2000/43, Art. 10(5) of Directive 2000/78 and Art. 19(3) of Directive 2006/54.

19. It has been suggested that the shifting of the burden of proof imposes an obligation on the respondent to prove a negative i.e. to prove that it has not discriminated unlawfully. However, the better view is that what the respondent is required to prove is simply a *non-discriminatory* explanation for its conduct (see for example the 17<sup>th</sup> recital to Council Directive 97/80, set out above). It is only in the absence of an ‘innocent’ explanation that a court or tribunal is compelled to make a finding of unlawful discrimination.
20. Thus the burden on the respondent is to provide an explanation which is adequate to discharge the burden of proving that a prohibited ground was not any part of the reasons for the treatment in question; not an adequate explanation for its conduct *per se*.
21. It follows from this that if the claimant establishes a *prima facie* case of discrimination, that is to say, establishes facts which give rise to a presumption of discrimination, the burden of proof shifts to the respondent who then has to prove that the actions or omissions complained of were not discriminatory.
22. For example, a pregnant employee may contend that she has been discriminated against when compared with a male colleague who has shorter service and less relevant experience but who was nonetheless promoted instead of her. Once she establishes a *prima facie* case of sex discrimination the burden shifts to the employer who then has to provide a non-discriminatory explanation for its decision to promote the male colleague instead.

## **Implementation**

23. The Directives must be implemented in accordance with each Member State’s national judicial system. This implies that the circumstances under which the burden of proof is shifted may vary according in Member States and therefore the way in which the provision on shifting the burden of proof is applied be different from country to country.
24. Two recent decisions of the ECJ have considered the autonomy of individual Member States in relation to deciding what constitutes a *prima facie* case and when the burden can be shifted. *Kelly v National University of Ireland (University College, Dublin)* (C-104/10) [2012] 1 WLR 789 confirmed that the assessment of facts from which it might be presumed that there had been direct or indirect discrimination was a matter for national judicial or other competent bodies, in accordance with national law or practice.
25. However, in *Meister v Speech Design Carrier Systems GmbH* (C-415/10) [2012] ICR 1006, the ECJ emphasised that this autonomy is not unlimited: in the context of establishing a *prima facie* case of discrimination “it must be ensured that a refusal of disclosure by the respondent is not liable to compromise the achievement of

the objectives pursued by Directives 2000/43 , 2000/78 and 2006/54" (para 40 of the judgment).

26. In the United Kingdom the reversal of the burden of proof was given effect in several anti-discrimination statutes<sup>13</sup>. The Equality Act 2010 which came into force on 1 October 2010 has since consolidated this legislation. Section 136 provides:

"136 Burden of proof

- (1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court *must* hold that the contravention occurred.
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
- (4) (...)"<sup>14</sup> (Emphasis added)

### When does the burden shift?

27. A difficult point is to decide exactly when the burden of proof will shift: what exactly amounts to a *prima facie* case of discrimination? The main issue has been the proper interpretation of the phrase equivalent to "facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned"<sup>15</sup> in the implementing legislation.

28. The leading case is *Igen Ltd v Wong*<sup>16</sup> in which the Court of Appeal approved a 13-stage approach. These guidelines explain the factors tribunals need to consider in order to decide whether the burden of proof shifts and the correct approach after the burden has shifted:

- (1) It is initially for the claimant who complains of discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in

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<sup>13</sup> These provisions have since been repealed by the implementation of the Equality Act 2010: s. 63A of the Sex Discrimination Act 1975; s. 54A of the Race Relations Act 1976; s. 17A(1C) of the Disability Discrimination Act; reg. 29 of the Employment Equality (Religion or Belief) Regulations 2003; reg. 29 of the Employment Equality (Sexual Orientation) Regulations 2003; and reg. 37 of the Employment Equality (Age) Regulations 2006.

<sup>14</sup> Previously the burden of proof was not reversed in race discrimination claims brought because of colour and nationality, and victimisation claims relating to race discrimination, non-work disability discrimination claims, and sex discrimination claims which relate to the exercise of public functions, see for example *Oyarce v Cheshire County Council* [2007] ICR 1693, but this has changed since the implementation of the Equality Act 2010.

<sup>15</sup> The slightly different wording in the repealed legislation set out in the previous footnote was: "facts from which it may be presumed that there has been direct or indirect discrimination".

<sup>16</sup> *Igen v. Wong* [2005] EWCA Civ 142, [2005] ICR 931, CA  
(<http://www.bailii.org/ew/cases/EWCA/Civ/2005/142.html>).

the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful.

- (2) If the claimant does not prove such facts he or she will fail.
- (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.
- (4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
- (5) It is important to note the word 'could' in s 63A(2)<sup>17</sup>. At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
- (6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
- (7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s 74(2)(b) of the SDA 1975 from an evasive or equivocal reply to a questionnaire or any other questions that fall within s 74(2) of the SDA 1975<sup>18</sup>.
- (8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s 56A(10) of the SDA 1975<sup>19</sup>. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
- (9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

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<sup>17</sup> Now found in s 136(2) Equality Act 2010.

<sup>18</sup> The questionnaire provisions can now be found in s 138 Equality Act 2010.

<sup>19</sup> The relevant codes for matters occurring on or after 1 October 2010 are the Equality Act 2010 Code of Practice on Employment and the Equality Act 2010 Code of Practice on Equal Pay.

- (10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
- (11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.
- (12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
- (13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.<sup>20</sup>

29. It is fair to say that practitioners have not always found the approach set out in *Igen v Wong* easy to apply. In *Laing v Manchester City Council*<sup>21</sup> Elias P observed as follows:

"71. We would add this. There still seems to be much confusion created by the decision in *Igen v Wong*. What must be borne in mind by a tribunal faced with a race claim is that ultimately the issue is whether or not the employer has committed an act of race discrimination. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing an employee which it would be very difficult to overcome if the employee had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of race.

72. The courts have long recognised, at least since the decision of Lord Justice Neill in the *King* case to which we have referred, that this would be unjust and that there will be circumstances where it is reasonable to infer discrimination unless there is some appropriate explanation. *Igen v Wong* confirms that, and also in accordance with the Burden of Proof directive, emphasises that where there is no adequate explanation in those circumstances, then a Tribunal must infer discrimination, whereas under the approach adumbrated by Lord Justice Neill, it was in its discretion whether it would do so or not. That is the significant difference which has

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<sup>20</sup> Jordans Employment Law, Jordan Publishing Limited, General Editor Ingrid Simler QC at E2:280.

<sup>21</sup> [2006] IRLR 748, [2006] ICR 1519

been achieved as a result of the burden of proof directive, as Peter Gibson LJ recognised in *Igen*.

73. No doubt in most cases it will be sensible for a tribunal formally to analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case. As I said in *Network Rail Infrastructure v Griffiths-Henry* [2006] IRLR 865 (at para 17), it may be legitimate to infer that a black person may have been discriminated on grounds of race if he is equally qualified for a post which is given to a white person and there are only two candidates, but not necessarily legitimate to do so if there are many candidates and a substantial number of other white persons are also rejected. But at what stage does the inference of possible discrimination become justifiable? There is no single right answer and tribunals can waste much time and become embroiled in highly artificial distinctions if they always feel obliged to go through these two stages."

30. The Court of Appeal has confirmed that it is not always necessary for tribunals to expressly go through the two-stage test in sequence and that it can be appropriate to focus on the respondent's reasons for the treatment<sup>22</sup>.

31. What has emerged from the authorities is that the burden of proof does not shift simply on proof of a difference in race (to take one example) and a difference in treatment<sup>23</sup>. So the mere fact that a person of a particular race was not appointed to a particular job coupled with the fact that the job was given to a person of a different race will not normally be enough to shift the burden of proof. In addition the complainant in such a case would have to show not only that they met the stated qualifications etc. for the post but also that they were at least as well qualified as the successful candidate<sup>24</sup>.

32. As to what evidence is required such that a tribunal could conclude that there has been a difference in treatment, the Court of Appeal in *Madarassy v Nomura International Plc* [2007] ICR 867 stated:

"[56] 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

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<sup>22</sup> *Brown v London Borough of Croydon* [2007] EWCA Civ 32, [2007] ICR 909 and see also *Laing, Khan and Ladele* supra.

<sup>23</sup> See cases such as *University of Huddersfield v Wolff* [2004] IRLR 534, EAT; *Sinclair Roche & Temperley v Howard* [2004] IRLR 763, EAT, *Dresdner Kleinwort Wasserstein Ltd v Adebayo* [2005] IRLR 514, EAT, *Network Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865, EAT, *Madarassy v Nomura International Plc* [2007] EWCA Civ 33, [2007] IRLR 246, Court of Appeal, *Fox v Rangecroft* [2006] EWCA Civ 1112, *Islington London Borough Council v Ladele* [2009] ICR 387.

<sup>24</sup> See the comments by Cox J. in *Adebayo* at paragraph 35.

balance of probabilities, the respondent had committed an unlawful act of discrimination.”

33. The Court of Appeal held in *Madarassy* that the employment tribunal had not erred in following the two-stage approach, whereby it had first considered whether the claimant had been treated less favourably than a hypothetical male comparator in the same circumstances and whether that had been on the grounds of her sex and pregnancy, before going on to consider at the second stage (once the burden has shifted) whether the employer’s explanation for the alleged less favourable treatment was adequate.

34. It is clear from *Madarassy* that more than a coincidence of different status and different treatment is required to establish discrimination. The views on the burden of proof expressed by Mummery LJ in *Madarassy* were recently endorsed by Lord Hope when he handed down the judgment of the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054<sup>25</sup>. At para 31, he stated:

“The complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the complainant which is unlawful. So the *prima facie* case must be *proved*, and it is for the claimant to discharge that burden.

32 The points made by the Court of Appeal about the effect of the statute in these two cases<sup>26</sup> could not be more clearly expressed, and I see no need for any further guidance.”

35. In *Nazir v Asim* [2010] ICR 1225, a case involving claims of sex and race harassment, the EAT emphasised the need, at the first stage, to take into account the *context* of the conduct complained of:

“70 In our judgment, when a tribunal is considering whether facts have been proved from which it could conclude that harassment was on the grounds of sex or race, it is always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on the grounds of sex or race. The context may, for example, point strongly towards or strongly against a conclusion that harassment was on the grounds of sex or race. The tribunal should not leave the context out of account at the first stage and consider it only as part of the explanation at the second stage, after the burden of proof has passed.

71 We think a simple illustration will suffice to show why this must be the law. Suppose that Y, a man, shouts and swears loudly at Z, a woman. He

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<sup>25</sup> “Nevertheless Mummery LJ went on in paras 56 and following of his judgment in *Madarassy* to offer his own comments as to how the guidance in *Igen Ltd v Wong* ought to be interpreted, which I would respectfully endorse.” (per Lord Hope at para 30)

<sup>26</sup> *Madarassy v Nomura* and *Igen v Wong*

does so immediately after Z accidentally spills a cup of coffee over his clothing; and prior to this Y had never shouted or sworn at Z. It would be absurd to ignore the spilling of the cup of coffee on Y when deciding if there is a *prima facie* case that he harassed Z on the grounds of sex. The spilling of the coffee is not merely explanation; it is also part of the context in which the tribunal must decide whether there is a *prima facie* case of sexual harassment. And this is the case whether or not Y's conduct is thought to be reasonable."

36. Applying the principles in *Laing and Madarassy* to harassment claims, the EAT in *Nazir* held, at para 75, that "[e]vidence of context which tends to show that conduct, even if unreasonable, was not on the grounds of sex or race is relevant and should be weighed and considered at the first stage."<sup>27</sup>
37. Once the burden of proof has shifted the respondent is required to provide a cogent explanation and it is not sufficient to merely assert this, it must be proven by adducing the necessary evidence to discharge the burden of proof (*EB v BA*<sup>27</sup>). The weight of the burden imposed at the second stage will depend on the strength of the *prima facie* case established by the claimant at the first stage<sup>28</sup>. Absent a cogent explanation the tribunal *must* make a finding of discrimination.

### **Indirect discrimination and statistics**

38. Indirect discrimination poses its own particular problems. It exists where an apparently neutral provision, criterion or practice puts a group at a particular disadvantage compared with other persons unless the provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary<sup>29</sup>.

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<sup>27</sup> [2006] EWCA Civ 12, [2006] IRLR 471.

<sup>28</sup> *Network Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865, EAT, *Islington London Borough Council v Ladele* [2009] ICR 387, *Khan v Home Office* [2008] EWCA Civ 578, *Virdi v Metropolitan Police Comr* [2009] EWCA Civ 477, [2009] All ER (D) 62 (Jun).

<sup>29</sup> See Art. 2(2(b) of Directive 2000/43 and Art. 2(2)(b) of Directive 2000/78. In the United Kingdom section 19 of the Equality Act 2010 provides:

"19 Indirect discrimination

- (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
  - (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
  - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
  - (c) it puts, or would put, B at that disadvantage, and
  - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
- (3) The relevant protected characteristics are—  
age;  
disability;

39. How is a complainant meant to raise even a *prima facie* case that an apparently neutral provision, criterion or practice has a disparate impact? In some cases such impact is obvious, or at least it is more readily assumed. In the UK, for example, women are (currently at least) more likely to take responsibility for childcare than men so that a provision in a contract of employment requiring full time rather than part time working is more likely to impact on women than men. It is generally thought that evidence of 'social customs' may be particularly important in establishing disparate impact in cases of discrimination on the ground of religion or belief. In many cases, however, disparate impact is far from obvious.

40. The 15<sup>th</sup> recital to both Directives 2000/43 and 2000/78 therefore provides that:

"The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence."

41. The *Enderby* case, above, is a good example of an indirect discrimination case where the burden of proof did shift. The ECJ held at paragraph 16

"(...) if the pay of speech therapists is significantly lower than that of pharmacists and if the former are exclusively women while the latter are predominantly men, there is a *prima facie* case of sex discrimination (...)"

42. The ECJ also indicated that it was for the national court to assess whether the statistics concerning the situation of the workforce are valid and can be taken into account, that is to say, whether they cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena, and whether, in general, they appear to be significant.

43. *Enderby*-type indirect discrimination is of course somewhat different from the more common form of indirect discrimination, what is sometimes termed 'barrier' discrimination, where a provision, criterion or practice prevents the disadvantaged group from enjoying a particular benefit. In *Enderby* there was no question of a barrier operating to prevent women becoming pharmacists or clinical psychologists. It just happened that there were significantly fewer women

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gender reassignment;  
marriage and civil partnership;  
race;  
religion or belief;  
sex;  
sexual orientation."

in the former professions than the latter. However, there can be no doubt that both *Enderby*-type discrimination and barrier-type discrimination fall within the broad definition of indirect discrimination in the various Directives.

44. In another UK case, *Home Office v Bailey*<sup>30</sup>, an equal pay case, Lord Justice Peter Gibson expressed the view that the test for establishing disparate impact ought to be the same, whichever type of indirect discrimination was in issue.
45. In *R v Secretary Of State For Employment, ex parte Nicole Seymour-Smith & Laura Perez*<sup>31</sup> a female claimant challenged a provision in UK law (since amended)<sup>32</sup> which required her to have two years' continuous employment in order to claim compensation for 'unfair dismissal'. She alleged that fewer women than men could comply with this requirement as women were more likely to take career breaks to have and to care for children. The ECJ held that the best approach to the comparison of statistics was to consider, on the one hand, the respective proportions of men in the workforce able to satisfy the requirement of two years' employment and of those unable to do so, and, on the other, to compare those proportions as regards women in the workforce. The ECJ held that it was not sufficient to consider simply the *number* of persons affected, since that would depend on the number of working people in the Member State as a whole as well as the percentages of men and women employed in that State.
46. Importantly the ECJ said that disparate impact could be demonstrated even in cases where the statistical evidence revealed a minor but persistent and relatively constant disparity over a long period between men and women who satisfy the requirement of two years' employment, leaving it to the national court to determine the conclusions to be drawn from such statistics.

## Obtaining evidence

47. Specific procedures have been developed to assist a claimant in deciding whether to start proceedings and to assist the presentation of the claim in the most effective way, although practice does vary across Member States. In the United Kingdom the primary method used to obtain information is the Questionnaire. Questions are set out on a prescribed form but otherwise a complainant may ask the respondent any question relevant to the alleged discrimination. The questions and replies are admissible in proceedings under the Equality Act 2010<sup>33</sup>.

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<sup>30</sup> [2005] EWCA Civ 327, [2005] IRLR 757.

<sup>31</sup> [1999] ECR I-623

<sup>32</sup> As part of the Government's package of reforms to the employment tribunal system in the United Kingdom, the minimum qualifying period for unfair dismissal claims was increased to two years as of 6 April 2012, thus reversing the decision in *Seymour-Smith*.

<sup>33</sup> The Equality Act (Obtaining Information) Order 2010, SI 2010/2194 came into force on 1 October 2010. It prescribes forms on which a person who thinks that he or she may have been subject to a contravention of the Equality Act 2010 may ask questions of a person who he or she thinks was responsible for the contravention or breach, and also prescribes forms on which that person may reply: Harvey on Industrial Relations and Employment Law at L:74.02.

A questionnaire can be particularly useful in indirect discrimination claims because it is a way to obtain the necessary statistical data to support an assertion that a particular provision, criterion or practice has a discriminatory effect on a particular group. In the United Kingdom it is common to ask questions about the make-up of the workforce (for example a question might read ‘Please give the race, ethnic and national origin of all employees employed at a particular place or in a particular grade’). There are time limits set for the respondent to reply (21 days for cases in the employment tribunal). Although not bound to answer the Questionnaire, the questions asked are admissible in evidence and a court or tribunal may draw an adverse inference from a failure to reply or from an evasive or equivocal reply, including an inference that the respondent has behaved unlawfully.

48. The provisions of the Equality Act 2010 which deal expressly the discrimination questionnaire procedure are to be abolished in Spring 2013 as they are considered by the UK Government to be an unnecessary burden on employers.
49. Furthermore information can be obtained using standard court and tribunal procedures such as a request for additional information or for written answers to questions and disclosure of documents<sup>34</sup>.
50. Finally the Data Protection Act 1998 provides a further, very useful tool, to obtain information. Individuals have the right to request copies of all “personal data” held about them which, under s. 1(1) includes “... any expression of opinion about an individual and any indication of the intentions of anyone in respect of the individual.”
51. The respondent can of course argue that the statistics or other evidence that establishes the *prima facie* case of discrimination should be interpreted otherwise. If this fails a respondent can still rely on objective justification. The criteria for objective justification of indirect discrimination were developed in the ECJ case of *Bilka-Kaufhaus* and subsequent cases<sup>35</sup> but this falls outside the scope of this paper. In summary, the requirements entail that the provision, criterion or practice can be objectively justified on grounds other than the relevant discrimination ground, that the measure corresponds to a real need on the part of the employer, is appropriate with a view to meeting that need, and is necessary to meet that need.

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<sup>34</sup> See for example the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004.

<sup>35</sup> Case 170/84 *Bilka-Kaufhaus* [1986] 2 CMLR 701, [1987] ICR 110 and consequently developed in later case law, such as in Case C-381/99 *Susanna Brunnofer v. Bank der österreichischen Postsparkasse AG* [2001] ECR I-04961.

<sup>36</sup> Many thanks to Yvette Budé and Jason Galbraith-Marten, for their previous papers on this topic.