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Burden of Proof in Discrimination Cases
A General Guide



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Introduction

■ Content:-

- Why a shifting burden of proof
- History
- Direct discrimination
- Test for shifting the burden
- What the Complainant / Plaintiff must prove
- Some guidelines
- What the Respondent / Defendant must prove
- Indirect discrimination
- Use of statistics
- Other means of showing disparate impact
- Defences / objective justification

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Background

- The normal rule in civil proceedings is that the person who makes a assertion must prove it.
- Proving every element of unlawful discrimination can be notoriously difficult
- Applying the normal rules of evidence could undermine the effectiveness of anti-discrimination law

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Why a Shifting Burden

- Discrimination often lies in the thought process of the discriminator
- A person who believes that they suffered discrimination may find it difficult to establish the factual criteria applied in reaching a decision
- Direct evidence of a discriminatory disposition is rarely available

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History

- Concept is derived from the jurisprudence of the CJEU
 - C-127/92 *Enderby v Frenchay Health Authority* [1993] E.C.R. I-5535
 - C-109/88 *Handels- og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening ex p. Danfoss A/S* [1989] E.C.R. 3199
- Based on the principle of effectiveness
 - This is made clear at recital 30 of Directive/54/EC (the Recast Directive)

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Burden of Proof Directive 97/80/EC

- Recitals: -
 - (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;*

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Recast Directive

- Article 19 of Directive 2006/54/EC on the implementation of the principle of equal treatment of men and women in matters of employment and occupation (recast Directive) provides: -

– “Member States shall take such measures as are necessary, in accordance with their national judicial system, 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”

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The Reason Explained

Case C-415/10 *Meister v Speech Design Carrier systems GmbH* [2012] 2 C.M.L.R. 39

- *“Discrimination has the reputation of being particularly hard to substantiate. This is even truer in respect of discrimination in employment. Aware of this problem, the European Union legislature has adopted measures to assist applicants claiming to be victims of discrimination on the grounds of, in particular, sex, age or origin. The European Union legislature has thus provided for a shift in the burden of proof, without, however, going so far as to uphold its complete reversal since the long-standing freedom of employers to recruit the people of their choice must not be completely disregarded”.*
- (Mengozi A.G.)

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Direct Discrimination

- Direct discrimination arises:-

“ where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation”

(Article 1 Directive 2006/54/EC)

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What it Entails

- Direct discrimination arises where a person is treated differently because of their gender or a criterion which is indissociable from that gender (i.e. pregnancy)

(Jacobs A.G.in Case C-79/99, *Schnorbus v land Hassen* [2000] E.C.R. I-10997)

- In considering if the burden of proof has shifted that Court will be looking for credible evidence that the Complainant was treated differently from another a person of the opposite sex and there is something to suggest that the reason for the difference is that of sex

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Approach of the Irish Labour Court – The Mitchell Test

“The first requirement is that the claimant must ‘establish facts’ from which it may be presumed that the principle of equal treatment has not been applied to him or her. This indicates that a claimant must prove, on the balance of probabilities, the primary facts on which they rely in seeking to raise a presumption of unlawful discrimination.

It is only if these primary facts are established to the satisfaction of the Court, and they are regarded by the Court as being of sufficient significance to raise a presumption of discrimination, that the onus shifts to the respondent to prove that there was no infringement of the principle of equal treatment.”

(Teresa Mitchell v Southern Health Board [2001] ELR 201)

(See also Barton v Investic [2003] IRLR 332)

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Test for Shifting the Onus

1. Complainant must prove primary facts on which they rely (stage 1)
2. Court must evaluate the fact and be satisfied that they are of sufficient significance to raise a presumption of discrimination (stage 2)
3. If Complainant succeeds at 1 and 2, the onus shifts to the employer who must prove the absence of discrimination . (stage 3)

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What Must the Complainant Prove

- Complainant is seeking to make out a *prima facie* case. The conclusion that there was discrimination need not be the only or the most likely inference to be drawn. It is sufficient that it is within a range of reasonable inferences

(*O'Higgins v UCD* [2013] 24 E.L.R. 146)

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Some General Guidance

- Those who discriminate rarely admit it, even to themselves.
- It is often based on an assumption that he or she will not fit in or that a job is more suited to a man / woman
- The outcome of the case usually depends of the inferences properly drawn from the primary facts as a whole
- An evasive or equivocal response to a questionnaire may be taken into account.
- Where there is a difference in treatment and a difference in gender and no acceptable explanation is given by the employer an inference of discrimination may follow

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Some Examples

- A difference in treatment and a difference in gender, in and of itself, is rarely enough to shift the burden: More is required. That can include-
 - Where a less qualified man is preferred to a more qualified woman
 - Where a woman is dismissed and replaced by a less qualified man
 - Where criteria for selection are applied inconsistently
 - A pattern of not employing / promoting women
 - Questions / comments that suggest a stereotyping or discriminatory disposition
- Where men and women are engaged in like work and there is a difference in pay it can be inferred that the difference is gender based and it is for the employer to establish the contrary (Irish High Court in *Flynn v Primark* [1997] 8 E.L.R. 218)

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More Examples

- In cases involving filling of jobs, look at the criteria and the process of selection – was it transparent and free of discriminatory taint
- In cases of pregnancy, did the treatment of the Complainant change after her pregnancy became known
- In cases of dismissal, were proper and transparent procedures observed
- A rational decision is less likely to be discriminatory than an irrational one

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Where a *Prima Facie* Case is Made Out –Direct Discrimination

- Direct Discrimination cannot be justified
- The Respondent must prove that there was no discrimination *whatsoever*
- Look to the Respondent to prove that the Complainant’s gender had no influence on the impugned decision

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Indirect discrimination

- Arises where: -

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

(Directive 2006/54/EC, Article 1(b))

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Use of Statistics

- Statistics are often used as an evidential tool to show a *prima facie* case of discrimination and so shift the burden of proof
- Can be used in cases in which direct discrimination is alleged, but are usually employed to show indirect discrimination.

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Identifying the Pool

- Usually the impact of a PCP on a pool or group made up predominately of one gender is compared to group made up mainly of the other gender
 - The pool selected can be crucial because this may determine the outcome
 - The pool must be one which tests the particular discrimination complained of.
 - In general the pool should include all those who are actually or potentially affected by the PCP

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Pool Cannot be Artificially Created

- *“a comparison is not relevant where it involves groups formed in an arbitrary manner so that one comprises predominantly women and the other predominantly men with a view to carrying out successive comparisons and thereby bringing the pay of the group consisting predominantly of women to the level of that of another group also formed in an arbitrary manner so that it consists predominantly of men”*

Case C-400/93 *Royal Copenhagen* [1995] ECR I-1275. See also Case C- 427/11 *Kenny v Minister for Justice Equality and Law Reform*, [2013] 2 CMLR 50,

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Other Means of Identifying Disparate Impact

- Courts don't sit in blinkers
 - Courts can rely on their own knowledge and experience
- Some PCPs are self evidently discriminatory
 - You don't need statistics to show that a requirement as to physical strength may put women at a disadvantage relative to men

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Objective Justification

- *“that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”*

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Test

- Does the PCP meet a legitimate need of the employer
- Is the measure appropriate
 - Is it proportionate
- Is the measure necessary
 - Are there alternative less discriminatory options

Case C-170/84 *Bilka-Kaufhaus GmbH v. Weber Von Hartz* [1986] E.C.R. 1607

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The Elements of the Test

- The Respondent must show: -
 - (1) *that there were objective reasons for the difference;*
 - (2) *unrelated to sex;*
 - (3) *corresponding to a real need on the part of the undertaking;*
 - (4) *appropriate to achieving the objective pursued;*
 - (5) *it was necessary to that end;*
 - (6) *that the difference conformed to the principle of proportionality;*
 - (7) *that was the case throughout the period during which the differential existed.*
- (British EAT - *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] I.R.L.R. 332

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Applying the Test

- Objective Justification is a defence
 - It is for the Respondent to prove each element of the defence
- Objective Justification equates to a derogation
 - It must be applied strictly, C-476/99 *Lommers v Minister van Landbouw, Natuurbeheer en Visserij* [2002] E.C.R. I-2891
- Mere generalisations in relation to the effect of a measure can not be sufficient to make out a defence of objective justification, C-171/88 *Rinner-Kuhn v FWW Spezial-Gebaudereinigung GmbH & Co. KG* [1989] E.C.R. 2743
- It must relate to the employment concerned
 - Must not relate to broad policy or legislative provisions of the Member State C-212/04 *Adeneler and others v Ellinikos Organismos Galaktos (ELOG)* [2006] E.C.R. I-6057

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Conclusion

- We now see less overt discrimination but it is still around.
- The shifting burden of proof is a powerful weapon in the fight against discrimination
- Drawing the appropriate inferences is all important.
- The objective is always to ensure that justice is done
- The shifting burden of proof is to assist the victims of discrimination to obtain redress: it should not inhibit an innocent employer from mounting a full defence.

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