

THE BURDEN OF PROOF IN SEX DISCRIMINATION CASES

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TOPICS

1. EU law provisions
2. ECJ cases
3. Conclusions

1. BURDEN OF PROOF IN EU LAW



BURDEN OF PROOF – What it means

- Which party has to prove?
- General rule of procedural law: asserting party, claimant

REVERSE OF THE BURDEN OF PROOF

- Stronger position of respondent
- Information monopoly, reluctance of witnesses etc.
- Opposite of the general rule?
- Shift, reversal, shared burden

OBJECTIVE

- Effective enforcement of EU anti-discrimination law
- Most important discrimination rule?

EU DIRECTIVES

- Directive 97/80 on burden of proof
- Race Directive 2000/43/EC
- Framework Directive 2000/78/EC
- Recast Directive 2006/54 on Sex discrimination

Article 19, Directive 2006/54/EC

“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.**”

TWO STAGES of the TEST

- **FIRST STAGE:**
the CLAIMANT establishes facts...
- **SECOND STAGE**
the RESPONDENT proves...

FIRST STAGE of the test

- First the **CLAIMANT** has to establish **FACTS from which it may be presumed** that there has been direct or indirect discrimination

Proofs: beyond witness, expert, document, - stats, situation testing, questionnaire

FACTS TO PRESUME direct discrimination

- Protected characteristic
- Less favourable treatment (disadvantage)
- Compared to another person without that protected characteristic

MODEL OF DIRECT DISCRIMINATION

- **Discrimination ground**
- **Disadvantage**
- **Causality**: the cause of disadvantage is the discrimination ground

COMPARATOR

„than another is, has been or would be treated in a comparable situation”

- Actual and hypothetical
- Disadvantage /causality

FACTS TO PRESUME indirect discrimination

- Apparently neutral provision/practice
- It puts persons of a particular status at disadvantage compared with others Statistics!

SECOND STAGE of the test

- Then the **RESPONDENT** has to **prove** that there has been **no breach** of the principle of equal treatment

SECOND STAGE of the test

- **RESPONDENT** has to prove:
 - No protected characteristic (not known)
 - No disadvantage (no act)
 - **No causality** – most common defence
- Justification?

INDIRECT DISCRIMINATION

- **Claimant:** establish facts on the provision and its effects
- **Respondent:** no provision or no alleged effect or justified

INDIRECT DISCRIMINATION

Types in ECJ case law

- **Provision:** eg. Nimz, Kowalska
- **Lack of transparency:** Danfoss
- **Statistics:** Enderby

2. ECJ CASES

RELEVANT CASES

- Danfoss – origin of the rule
- Enderby - statistics
- Feryn – statement by company
- Accept – statement by owner
- Kelly – refused information 1
- Meister – refused information 2

C-109/88 DANFOSS



C-109/88 DANFOSS – the origin

- Not transparent pay system
- Female worker establishes: *average pay* for women is less, than for men
- Employer has to prove his system is not discriminatory

C-127/92. ENDERBY



C-127/92. ENDERBY - facts

- speech therapists were overwhelmingly female
- paid less than clinical psychologists and pharmacists (mostly male)
- two jobs are of equal value

C-127/92. ENDERBY - judgement

- statistics alone may presume a prima facie indirect sex discrimination
- it will oblige the employer to justify the pay arrangements
- non-sex based reason for the difference in treatment?

C-54/07 FERYN



C-54/07 FERYN - Facts

- Public discriminatory statement: immigrants will not be recruited
- Lack of individual complainant
- Actio popularis by equality body

C-54/07 FERYN - Judgement

- Presumption of discrimination must arise
- Public statement of employer is enough for this presumption
- Employer: recruitment practice does not correspond to the statement

C-81/12 ACCEPT



C-81/12 ACCEPT - Facts

- Homophobic interview of Steaua FC's main shareholder (51%)
- Mr. Becali's decisive influence
- Steaua confirmed the policy
- Actio popularis by NGO v Equality Body

C-81/12 ACCEPT - Judgement

- Becali had no legal capacity to act
- His important role in management
- Employer did not distance itself
- Public perception is relevant
- Lack of negotiation is not relevant

C-81/12 ACCEPT - Judgement

- Probatio diabolica?
- By all legal means: recruitment policy is unrelated to any discrimination
- No homosexual player is needed – privacy!
- Distancing, express provisions

C-104/10 KELLY



C-104/10 KELLY - Facts

- (Male) course application refused
- Copies of applications, scoring sheets refused
- Right to information on qualifications of successful candidates?
- Establishing a comparator

C-104/10 KELLY - Judgement

- No entitlement to disclose information
- Refusal may risk compromising effectiveness
- National court must assess it!

C-415/10 MEISTER



C-415/10 MEISTER - Facts

- Twice rejected Galina Meister's application without reasoning
- Sex, age, ethnic discrimination?
- Who was engaged? Qualified?
Refusal of disclosure

C-415/10 MEISTER - Judgement

- Not entitled to information on engaged applicant
- All circumstances: any information refused, expertise OK
- Refusal may be a factor of establishing facts
- No clear guidance on burden of proof

HUNGARY

- 1. Claimant:** protected characteristic + disadvantage – only probability
- 2. Respondent:** equal treatment not violated or justified - prove

Key issue: **causality – respondent**

THE SOLUTION?

Causality is in the center

Danger: **division of courts**

More favourable than EU law (?)

Threat to employers?



3. CONCLUSIONS

- Aim: **effectice enforcement**
- Key issues:
 - **What facts** to establish by the claimant?
 - Is a **public statement** enough?
 - **Information obligation** exists?
- Lack of clear guidance by ECJ



**Thank you for your
attention!**

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