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**BURDEN OF PROOF IN SEX DISCRIMINATION CASES**

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**Introduction**

1. This paper analyses the meaning and application of the Union legislation on the reversal of the burden of proof in cases of direct and indirect sex discrimination in employment and goods and services.
2. Cases of discrimination present special problems for claimants, since a person who discriminates does not in general advertise his prejudices, indeed, may not even be aware of them. That person is often in a considerably better position than the claimant to give evidence about why he acted as he did, and is more likely than the claimant to be in possession of the documents relevant to the reasons why he acted in that way.
3. The Commission's original proposal for Union legislation on reversing the burden of proof was made as long ago as 1988, OJ [1988] C176/5, but was only enacted in the Burden of Proof Directive 97/80/EC, which itself provided for implementation by 1 January 2001. In part that Directive was based on prior Court of Justice case law.
4. Those provisions in 97/80/EC are now contained, as regards sex discrimination, in the Re-Cast Directive 2006/54/EC; identical provisions are contained in the Race Directive 2000/43/EC and the Employment Framework Directive 2000/78/EC.

5. The Court of Justice case law on the meaning of the provisions in any one of those Directives is of course binding as regards the other two Directives.

### **Re-Cast Directive – Burden Of Proof Provision Art. 19(1)**

6. The reversal of the burden of proof is contained in Article 19(1), which provides as follows, *“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.”*
7. Accordingly, it is a matter for Member States to determine the procedural rules that will be sufficient to comply with the obligation to reverse the burden of proof. The Directive specifically envisages that provisions may be more favourable than the minimum standards that it contains. This paper must be read with these two qualifications in mind.
8. It is convenient to analyse the meaning and application of the burden of proof provisions separately as regards direct and indirect sex discrimination.

### **Direct Discrimination**

#### **Definition Of Direct Discrimination**

9. Article 2(1) (a) defines direct discrimination as follows, *“where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.”*

#### **The Burden On The Claimant**

10. Although Article 19(1) reverses the burden of proof, nevertheless its wording makes clear that in order for that reversal to occur, the claimant must first establish certain matters. What are those matters?

## Primary Facts

11. In the first place, it is for the claimant to establish the primary facts on which she relies in her claim of less favourable treatment on the grounds of sex<sup>1</sup>. If she does not prove such facts, she will fail.
12. 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 respondents 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 the person would not have fitted in.
13. In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis will therefore usually depend on what inferences it is proper to draw from the primary facts that have been found.
14. Discriminatory comments from the respondent, or from someone sufficiently closely associated with the respondent, may reverse the burden of proof.
15. In C-54/07 Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV, the respondent made the following ill-advised statement explaining why he would not recruit Moroccans, *“I must comply with my customers’ requirements. If you say I want that particular product or I want it like this and like that, and I say I’m not doing it, I’ll send those people, then you say I don’t need that door. Then I’m putting myself out of business. We must meet the customers’ requirements. This isn’t my problem. I didn’t create this problem in Belgium. I want the firm to do well and I want us to achieve our turnover at the end of the year, and how do I do that? – I must do it the way the customer wants it done!”*
16. The Court of Justice confirmed that these remarks evidenced a *prima facie* present discriminatory recruitment policy notwithstanding the absence of a

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<sup>1</sup> In this paper I use the conventional approach of referring to the claimant as female, although the claimant may equally be a male.

person who could show that they had been rejected by the respondent on the grounds of their race.

17. A discriminatory comment was also sufficient to reverse the burden of proof in C-81/12 **Asociatia ACCEPT v Consiliul National pentru Combaterea Discriminari**, where the majority shareholder in a Romanian football club had made homophobic comments that he would prefer not to hire a player who was homosexual.
18. The Court of Justice held at paragraph 48, on the assumption that the shareholder played a part in the club's management, *"The mere fact that statements such as those at issue in the main proceedings might not emanate directly from a given defendant is not necessarily a bar to establishing, with respect to that defendant, the existence of "facts from which it may be presumed that there has been ... discrimination" ...."*
19. In answer to an argument from the respondent about how the circumstances in which such a comment from a third party would not be sufficient to reverse the burden, it added that a respondent could choose to dissociate itself from such remarks.
20. In C-83/14, **CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia; Nikolova, Darzhavna Komisia za energiyno i vodno regulirane**, a Bulgarian case concerning race discrimination, where the electricity board CHEZ RB placed electricity meters above certain heights in predominantly Roma urban areas, so they could not be accessed by residents, the Court of Justice held that relevant facts could include the following:
  - i. CHEZ RB established the practice only in urban districts which, are known to have Bulgarian nationals of Roma origin as the majority of their population.
  - ii. CHEZ RB asserted that in its view mainly Bulgarian nationals of Roma origin perpetrated the damage and unlawful connections.

Such assertions could suggest that the practice was based on ethnic stereotypes or prejudices.

21. One question that is often raised is whether the mere fact of less favourable treatment accompanied by a difference in status is sufficient to reverse the burden of proof (e.g. a female employee does not receive a promotion, but a male employee does).
22. The Court of Justice has not yet given a decisive answer, although it has decided two important cases on burden of proof.
23. The first of these is C-104/10 **Kelly v. National University of Ireland (University College, Dublin)**.
24. Mr Kelly applied for admission to the respondent's Master's Degree in Social Science for social workers. The respondent informed him that he had been unsuccessful. Mr Kelly made a formal complaint of discrimination on the grounds of sex, claiming that he was better qualified than the least-qualified female candidate to be offered a place, and brought a complaint in the courts.
25. In those proceedings he sought disclosure of copies of the retained applications, copies of the documents appended to or included with those applications, and copies of the scoring sheets of the candidates whose application forms had been retained. The respondent offered to provide Mr Kelly with part of the information requested.
26. It can be seen that the disclosure application was for the confidential data of other applicants.
27. The facts do not disclose whether there was a successful female candidate, although Mr Kelly's application for disclosure was based on the not unreasonable assumption that there was at least one.
28. As to the disclosure application, the Court of Justice held at paragraph 38, *"Article 4(1) of Council Directive 97/80 must be interpreted as meaning that it does not*

*entitle an applicant for vocational training, who believes that his application was not accepted because of an infringement of the principle of equal treatment, to information held by the course provider on the qualifications of the other applicants for the course in question, in order that he may establish 'facts from which it may be presumed that there has been direct or indirect discrimination' in accordance with that provision.”*

29. On one possible analysis the logic of this passage, although not stated expressly, is that even if less favourable treatment and a difference in status are both assumed, that is not sufficient to establish facts from which sex discrimination may be presumed.
30. The second case is C-415/10 **Galina Meister v. Speech Design Carrier Systems GmbH**.
31. Ms. Meister, a Russian national, with a Russian degree in systems engineering, the equivalent of a similar German degree, responded to a newspaper advertisement from the respondent for an experienced software developer. The respondent rejected Ms. Meister’s application without inviting her to a job interview.
32. Not long afterwards, the respondent published a second advertisement. Ms. Meister reapplied, but the respondent once again rejected her application, without inviting her to an interview, and without telling her on what grounds her application was unsuccessful. Ms. Meister made complaints of sex, age and race discrimination.
33. The referring court asked two questions. The first was about Ms Meister’s entitlement to disclosure of documents from the respondent about the successful candidate. The second was whether the respondent’s failure to disclose information requested by Ms. Meister gave rise to a presumption of sex discrimination.
34. Again, there is the issue of data protection, which the Court of Justice did not analyse.

35. The Court of Justice said at paragraph 42, *“Therefore, it is for the referring court to ensure that the refusal of disclosure by Speech Design, in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination against Ms Meister, is not liable to compromise the achievement of the objectives pursued by Directives 2000/43, 2000/78 and 2006/54. It must, in particular, take account of all the circumstances of the main proceedings, in order to determine whether there is sufficient evidence for a finding that the facts from which it may be presumed that there has been such discrimination have been established.”*
36. Thus the Court of Justice is stating expressly that the failure to provide the requested information may under national rules be sufficient to reverse the burden of proof, although it would be hard to detect an implied finding that the burden of proof is or is not reversed if all that is present are assumed less favourable treatment and an assumed difference in status.

#### Inferences

37. At the initial stage in determining whether the claimant has managed to reverse the burden of proof, there is a question about whether, and to what extent, the court may consider explanations from the respondent, since the wording of Article 19(1) only requires an explanation from the respondent after the burden has been reversed.
38. However, subject to the rules in Member States, it would be reasonable for an appropriate adverse inference to be drawn where the respondent has given inconsistent explanations, or has given explanations that have been found to be untrue.
39. Can a respondent’s failure to provide an explanation permit an adverse inference to be drawn? The Court of Justice has stated in **Kelly** and in **Galina Meister** that it can, although without giving any detailed guidance on when, instead leaving it to Member States.
40. In **Kelly** the Court of Justice held at paragraph 39, *“It cannot be ruled out that a refusal of disclosure by the Defendant, in the context of establishing such facts, could risk*

*compromising the achievements of the objective pursued by that Directive and thus depriving, in particular, Article 4(1) of its effectiveness. It is for the national court to ascertain whether that is the case in the main proceedings.”*

41. It reached a similar conclusion in **Galina Meister**. It held at paragraph 44, *“Among the factors which may be taken into account is, in particular, the fact that, unlike in Kelly, the respondent in question in the main proceedings seems to have refused Ms. Meister any access to the information that she seeks to have disclosed.”*
42. In **Nikolova** the Court held that an inference could be drawn from the failure of the electricity board to supply evidence: Notwithstanding requests to this effect from the referring court in respect of the burden of proof, CHEZ RB failed to adduce evidence of the alleged damage, meter tampering and unlawful connections, asserting that they are common knowledge.
43. A failure by a respondent to reply, or to reply in a timely fashion, or where an respondent responds with evasive or equivocal answers to a questionnaire or interrogatories, or to supply documents, may enable a court to presume facts from which the burden of proof is reversed. The burden of proof may be more likely to shift where only the respondent has access to the material and it fails to provide it.
44. Less favourable treatment of the claimant or of others, on grounds of sex, on occasions that pre-date the matter complained of may assist, as well as treatment that post-dates it.

### Comparator

45. The definition of direct discrimination concerns less favourable treatment of the claimant on grounds of sex *“than another is, has been or would be treated in a comparable situation.”*
46. The words *“is, has been ... treated”* envisage a comparison with an actual comparator. If the burden is to reverse, the circumstances of the actual



comparator must not be materially different from those of the claimant, save for their sex.

47. It is always likely to be a question of fact and degree whether an actual person is truly in a comparable situation. As a matter of practicality, it may be rare to find an actual person whose position is truly comparable with that of the claimant.
48. The ability for the claimant to make a comparison with a hypothetical comparator comes from the words "*would be treated*".
49. A comparator is someone whose are not materially different from those of the claimant, save for their sex.
50. It may often not be possible to construct a hypothetical comparator without first determining why the claimant was treated as she was. The two issues are inextricably linked.
51. If that analysis is right it means that it is not necessary to construct a hypothetical comparator, and it is usually better not to engage in the exercise at all. Instead it is better to ask the reason why the claimant was treated in a particular way.
52. If, however, a court is to construct a hypothetical comparator, it will need to determine the relevant comparable circumstances by reasoning backwards from the reason for the treatment. Thus the relevant circumstances of the hypothetical comparator should reflect the circumstances relevant to the reason for the action or decision which is complained of.

"May be presumed"

53. This wording in Article 19(1) raises a question as to the standard of proof required before the burden of proof is reversed. There is as yet no decided Court of Justice case on the point.

54. However, there is guidance in the opinion of AG Kokott in C-394/11 **Belov v. Chez Elektro Bulgaria AD**, 20/9/12 (the Court of Justice ultimately decided that it did not have jurisdiction to entertain the reference, and did not make any rulings).
55. That case was concerned with the burden of proof provisions in 2000/43/EC. It was another case concerned with the height of electricity meters. The claimant was of Roma origin. He alleged race discrimination, regarding his inability to read his household electricity meter, placed 7 metres from the ground, other than by special appointment.
56. AG Kokott concluded that it is not necessary, for the burden of proof to reverse, for the claimant to demonstrate a high degree of certainty of discrimination, since that would jeopardise the provisions of the practical effectiveness and render them almost redundant.
57. She concluded that, *“It is thus sufficient for a reversal of the burden of proof under Article 8(1) of Directive 2000/43 that persons who consider themselves wronged because the principle of equal treatment has not been applied establish facts which substantiate a prima facie case of discrimination.”*
58. The reference was found to be inadmissible by the court in January 2013, and so the issue has not been determined further.
59. It must be implicit in the words “may be presumed”, that the Directive has in mind whether on those facts, a reasonable tribunal, properly directing itself in law, has established facts from which discrimination may be presumed.

If the burden reverses, what must the respondent prove?

60. Article 19(1) provides that it is *“For the respondent to prove that there has been no breach of the principle of equal treatment.”*
61. There are various ways in which the respondent might seek to rebut the presumption of sex discrimination.

## Knowledge

62. One way in which it may seek to rebut the presumption is that it did not have knowledge of the relevant protected characteristic. This is less likely to be relevant in a case of sex discrimination than it is in a case of, for example, race discrimination, or discrimination because of some other protected characteristic. Nevertheless, it may still apply, for example in pregnancy cases.

## The acts alleged did not occur

63. It is open to the respondent to seek to demonstrate that the facts on which the claimant relies did not in fact occur. However, if the court is applying a strict two-stage process (has the burden of proof shifted? If so, has the respondent rebutted the presumption?) this would have been considered at the first stage.

## Non-discriminatory explanation

64. It is always open to the respondent to seek to defend the claim on the basis that sex was not part of the reason why it treated the claimant in the way that it did.
65. There is a difference between the reason that causes a person to act as he or she does, and the motive for which he or she acts. Even if the respondent acts out of the best possible motive, the treatment may nevertheless still be found to be on the grounds of sex.
66. In addition, the wording of 2006/54/EC indicates that in seeking to rebut the prima facie case of discrimination, it is for the respondent to demonstrate that sex played no part whatsoever in the reason for the treatment of the claimant.
67. If there are several reasons for the treatment, and sex is one of those reasons, even if not the principal reason, provided it is a reason that is more than

trivial the respondent will not succeed in rebutting the presumption of discrimination.

68. Can the respondent ever escape liability by pointing to the state of mind of the decision maker? This may be possible.
69. If the proper approach is that a discriminatory act or omission can occur because of a prescribed factor as long as that factor operates on the mind of the would-be discriminator (consciously or unconsciously), it is open to the respondent to seek to argue that the starting point is to identify the individual(s) responsible for the act or omission in question.
70. If that is right, this places yet another hurdle in the way of a claimant, since a respondent may be able to avoid liability where the claimant is unable to prove to the requisite standard that a particular individual decision-maker had the requisite knowledge.

### **Indirect discrimination**

#### Introduction

71. Article 2(1)(b) defines indirect discrimination is as follows, *“Where an apparently neutral provision, criterion or practice 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.”*

#### Three situations where the burden of proof reverses

72. There are three situations in which a claimant in a claim for indirect discrimination may prove facts which result in the reversal of the burden of proof.
73. One is where the claimant proves the existence of a provision, criterion or practice (“PCP”) putting persons of one sex at a particular disadvantage. The

second is where there is a lack of transparency in the treatment by the respondent that puts persons of one sex at a particular disadvantage. The third is where there is no PCP or lack of transparency, but nevertheless statistics show male or female employees to receive less favourable treatment.

74. This paper analyses each of those three in turn.

Provision, Criterion or Practice

75. A PCP case occurs where there is some explicit practice of the respondent (or it may be implicit) which places one group of employees, usually women, at a disadvantage, compared to the other group of employees (usually male).
76. The classic cases that came before the Court of Justice 30 years ago involved part-time work. In one of those, Case 170/84 **Bilka-Kaufhaus GmbH v. Weber Von Hartz**, the Court of Justice held at paragraph 29, *“If, therefore, it should be found that a much lower proportion of women than of men work full-time, the exclusion of part-time workers from the occupational pension scheme would be contrary to Article 119 [the predecessor of Article 157] of the Treaty, when, taking into account the difficulties encountered by women workers in working full-time, that measure could not be explained by factors which exclude any discrimination on grounds of sex.”*
77. The question that **Bilka** raised was whether it applied only where statistics revealed “a much lower proportion” of women benefiting from the pension scheme.
78. The Court of Justice case law has expressly or tacitly considered that there was “a significant difference” with regard to the following percentages:
- i. Case 171/88 *Rinner-Kühn*, in the category of part-time workers 89% were women and 11% men
  - ii. C-33/89 *Kowalska*, in the category of part-time workers the percentages for women were 77.3% (and in that year they were

only 55.5% of full-time employees), 97.8% and 90.2% according to service and hours worked per week,

iii. C-184/89 *Nimz*, in the same category the percentages of women were 77.3% and 90.2% according to hours worked per week, whereas the percentage of women in the category of full-time workers was 55%,

iv. C-243/95 *Hill*, of employees working on a job-sharing basis, the category suffering unfavourable legal treatment, 98% to 99.2% were women.

79. In C-167/97 **R v. Secretary of state for employment ex parte Seymour-Smith and Perez**, in the case of rules adopted by a Member State that had a disparate impact, and having regard to the wording of what was then Directive 76/207/EC, the test was stated to be in paragraph 60, *“Whether the statistics available indicate that a considerably smaller percentage of women than men is able to satisfy the condition of two years' employment required by the disputed rule.”*

80. It added in paragraph 61, *“That could also be the case if the statistical evidence revealed a lesser but persistent and relatively constant disparity over a long period between men and women who satisfy the requirement of two years' employment. It would, however, be for the national court to determine the conclusions to be drawn from such statistics.”* It held that a disparate impact of 8.5% did not appear to be sufficient.

#### Lack of transparency

81. In C-109/88 **Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss (“Danfoss”)**, there was evidence that the average wage for women was 6.85% lower than that received by men. However, due to a lack of transparency within the pay system, it was not possible for the claimants to prove definitively that women were paid less in respect of each element of their remuneration.

82. The Court of Justice further developed the reversal of the burden of proof. In particular, it held in the operative part of its judgment, paragraph 16, that *“Where an undertaking applies a system of pay which is totally lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men.”*
83. In other words, the burden reversed, on the facts of that case, where there was disadvantage to a relatively large number of female employees. However the Court of Justice did not specify that any particular differential was required before that occurred.

#### Numbers – Enderby v. Frenchay Health Authority

*What does Enderby say?*

84. In C-127/92 **Pamela Mary Enderby v. Frenchay Health Authority and Secretary of State for Health**, the Court of Justice extended the concept of indirect discrimination.
85. Mrs Enderby was a speech therapist employed in the National Health Service. Speech therapists were overwhelmingly female. She claimed that she was paid less well than clinical psychologists and pharmacists, who were, in different degrees, predominantly male. It was assumed that the work performed was of equal value.
86. Mrs Enderby was not claiming that there was any direct sex discrimination. Equally, she was not claiming that there were any specific hurdles (i.e. a PCP) which created an impediment to her gaining access to either of the other professions. The pay structures of the different professions were governed by different processes of collective bargaining.
87. The Court of Justice found, at paragraph 16 that, *“However, if the pay of speech therapists is significantly lower than that of pharmacists and if the former are principally women while the latter are predominantly men, there is a prima facie case of sex*

*discrimination, at least where the two jobs in question are of equal value and the statistics describing the situation are valid.*”

88. It found at paragraph 17 that “*It is for the national court to assess whether it may take into account those statistics, 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.*”
89. In effect, therefore, **Enderby** establishes that statistics alone may in a sufficiently powerful case create an apparently irrebuttable presumption of prima facie indirect sex discrimination.
90. Once there is a statistically relevant and material element to demonstrate that a group is in fact being adversely affected on sex grounds, it will oblige the respondent to justify the pay arrangements. It will not be enough in those circumstances for the respondent to demonstrate that the arrangements have resulted without any direct sex discrimination being practised of any kind. In effect, the court is holding that there must somewhere have been some element of indirect sex discrimination.
91. The statistics must at least show that it is reasonable to infer that the treatment of the disadvantaged group must have resulted from some factor or combination of factors which impinge adversely on women because of their sex, even though no obvious feature causing disparate impact can be identified, and indeed even though the respondent has apparently demonstrated to the contrary.

*Relationship between Enderby and the PCP type of indirect discrimination*

92. One of the key questions raised by **Enderby** is whether the effect of the decision is limited to cases where the disparate impact is, as in **Enderby**, such that the disadvantaged group is “*principally*” female.
93. It may well be that the **Enderby** principle can operate in less extreme circumstances (and indeed, in the UK, has been found to be the case, for



example where the claimant group was almost exactly half female, although the comparator group was predominantly male).

94. Another key question is as to whether the statistics which would be sufficient to reverse the burden of proof in the **Bilka** type of indirect discrimination would also be sufficient to establish the **Enderby** type, or whether in the latter case, where there is no apparent reason why women have been adversely affected, should require more striking statistics.
95. The wording of 2006/54/EC would seem to suggest that the evidence sufficient to justify a finding that a particular PCP adopted by the respondent adversely affects women is not the same as the statistical evidence required to justify the inference in an **Enderby** situation, that there must be prima facie discrimination when none apparently exists.
96. One reason is that the definition of indirect discrimination in Article 2 includes the requirement that there be a PCP. That wording would be redundant if the claimant only needed to prove that there was a disadvantage (to whatever requisite statistical threshold).

#### *Statistics*

97. The definition of indirect discrimination has been quoted in paragraph 71 above. It refers to a PCP placing a group at a “particular disadvantage”. It replaced the definition in 97/80/EC, which defined it as existing “*Where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex*”.
98. This important change in the legislation meant that it is now not always necessary for a claimant to produce statistics regarding “substantially higher proportion” in order to be able to show adverse impact. Sometimes it may be obvious that there is an adverse impact that, to use the wording of 2006/54/EC, would put persons of one sex at a particular disadvantage e.g. all drivers for a train company being required to move from fixed daytime shifts to rolling shifts worked at any point in the day or the night.

99. However, in certain cases such as **Enderby** type indirect discrimination the use of statistics must still be required notwithstanding the legislative change, since adverse impact must be proved.
100. What statistics are required to reverse burden of proof in the **Enderby** type of discrimination?
101. It may be necessary for a court to consider whether the statistics on which a claimant relies, or indeed, on which a respondent relies, have been subjected to any form of statistical analysis, to determine, for instance, whether the variations in incidents of treatment as between men and women exceed the limits of randomness; whether the numbers involved are sufficient for meaningful analysis; and whether (more controversially, see below) the factors alleged to affect the treatment have a causally more significant impact than does the incidence of gender.
102. Further, the relevant pool for comparison must encompass all the employees who are in a comparable situation (see the Commission's Explanatory Memorandum to 2006/54/EC, COM(2004) 279 final.)

### The Brunnhofer problem

103. One of the Court of Justice cases that has caused some difficulties is C-381/99 **Brunnhofer v. Bank Oesterreichischen Postsparkasse AG**. In that case, the Court of Justice appeared to decide that, at least as concerns unequal pay, where a woman is being paid less than a man the burden of proof shifts to the respondent, to demonstrate that there is objective justification for the difference in pay.
104. Ms. Brunnhofer was employed by the bank from July 1993 to July 1997. She claimed equal pay with a male colleague who had been employed from August 1994. He, from the time of his recruitment, had received an individual supplement which she had not received.

105. The bank did not seek to contend that there were any genuine differences which would have justified a difference in pay at the date of his recruitment. Indeed, both the claimant and her comparator were classified in the same category under the relevant collective agreement. Instead, the respondent sought to justify the difference in pay by relying on circumstances which were only established after the comparator had taken up the post. These were that his performance was better than Ms. Brunnhofer's, and that he carried out more important functions. The bank never put its case on the simple basis that the difference in pay was genuinely due to factors other than sex.
106. At paragraph 66 the court said, "*It is appropriate to recall here the case law according to which the difference in the remuneration paid to women in relation to that paid to men for the same work of equal value must, in principle, be considered contrary to Article 119 of the Treaty [now Article 157 TFEU] and consequently, to the Directive. It would be otherwise only if the difference in treatment were justified by objective factors unrelated to any discrimination based on sex....*"
107. On the face of it this would appear to decide that, at least so far as concerns pay, where a woman and a man are differently paid, the burden of proof is automatically reversed i.e. there is always an obligation on the respondent objectively to justify the pay differential.
108. For a number of reasons, this cannot be the proper meaning of **Brunnhofer**.
109. In the first place, 2006/54/EC and Article 157 TFEU are concerned with equality as between men and women, and discrimination in pay. They are not concerned with fair pay, which would be the effect if objective justification were always required. Therefore, an irrational system of pay may be unfair, but it is obviously not automatically discriminatory on sex grounds if – to take a wholly extreme example – pay is determined by a toss of a coin.
110. Second, if the Court of Justice in **Brunnhofer** meant that all differences in pay between men and women must be objectively justified, it would mean that the burden of proof would be reversed, and a woman could potentially

recover under the equal pay legislation, simply because she happens to be a woman.

111. That would provide her with a remedy in circumstances where a man would be denied one. Therefore, if, for example, 100 men were employed in job A at £X and 100 men in job B at £X plus 10% for historical reasons which could not be objectively justified, the men in the lower paid job would have no grounds for complaint under discrimination law. However, if **Brunnhofer** were to mean that there was always a reversal of the burden of proof, if a female were placed into the lower grade job, the burden would be on the respondent objectively to justify the difference in pay (which it could not).
112. Third, if the Court of Justice meant that the burden of proof was reversed in such a situation it would draw a wholly artificial and highly significant distinction between reversal of burden of proof as regards sex discrimination in relation to pay, and as regards sex discrimination in relation to other matters. That is not what the Union legislation means.
113. Finally, if that is what the Court of Justice meant in **Brunnhofer**, it is surprising to say the least that it did not expressly say that it was overturning the previous case law, and it is surprising that it did not expressly mention that issues of statistical evidence, adverse impact and the pool of comparators were henceforth not relevant.

What does the respondent need to prove?

114. In indirect discrimination, once the burden reverses, the respondent must demonstrate that was seeking to achieve a legitimate aim, and that the means used to achieve it were both appropriate and necessary.
115. One of the difficult questions is whether, in the case of **Enderby** discrimination, there is in effect an irrebuttable presumption of indirect sex discrimination, which always requires the respondent objectively to justify any differences in treatment, or whether it is open to an respondent to seek to

demonstrate that there is a non-sex based reason for the difference in the treatment, and that the need to justify does not arise.

116. As a matter of principle, since the **Enderby** type of presumed indirect sex discrimination arises in the absence of any discrimination on the part of the respondent, it should be open to the respondent to seek to demonstrate that there is a non-sex based reason for the difference in treatment.
117. On one view, it could be said that, if the respondent is able to prove such a reason, he is demonstrating that the statistics are not meaningful or valid.
118. The contrary approach argues that the point of **Enderby** is to place the burden on the respondent where there is an appropriately disproportionate adverse impact on women as opposed to men, and that that itself is the discrimination that reverses the burden of proof and requires objective justification.
119. The point is yet to be determined at the level of the Court of Justice.

**Paul Epstein QC**

**5 OCTOBER 2017**