

ESSEX COURT CHAMBERS
BARRISTERS

SEX DISCRIMINATION

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DIRECT DISCRIMINATION

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- Direct Discrimination **“treated less favourably than”** = comparison
- Aristotle: treating like cases alike



- Article 2(1)(a) 2006/54 Recast Directive

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- The comparator must be someone whose circumstances are the same or not materially different to the claimant: [MacDonald v Advocate General for Scotland](#) [2003] IRLR 512

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EVIDENCE: DIRECT DISCRIMINATION

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- [ACCEPT](#) (C-81/12) Employer's failure to distance himself from discriminatory statements is relevant to establishing a presumption of discrimination case.
- [CHEZ](#) (C-394/11) Is a difference of protected characteristic and a difference of treatment enough? What more is required? The service provider's actions were underscored with a pernicious belief based upon stereotypes.
- [Firma Feryn](#) (C-54/07)
- Public statements may establish a prima facie case or presumption of discrimination
- The employer must then prove that its recruitment process was not discriminatory

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RECENT CASES

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- Parental Rights Cases
 - *CD v ST* (C-167/12) and *Z v A* (C-363/12)
 - AG Kokott (CD): Intended Mother had the right to maternity leave because such leave is intended to protect the special relationship between mother and child.
 - Court (CD): Maternity leave presupposes that the worker has been pregnant and given birth. There was no indirect discrimination because there was no evidence that the refusal of paid leave put female workers at a particular disadvantage.
 - *Z v A*: Refusal to grant paid leave was disability discrimination

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RECENT CASES

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- Goods and Services Cases
 - *Test-Achats* (C-236/09): Taking the gender of the insured individual into account as a risk factor in insurance contracts constitutes discrimination
 - *X* (C-318/13): legislation which relies on sex-based actuarial factors is not compatible with EU Law;
- Equal Pay Cases
 - *Vos* (C-300/06): National legislation which leads part-time workers to be paid less than full-time workers for the same number of hours worked breaches the principle of equal pay where it affects a considerably higher percentage of women than men and is not objectively justified
 - *Kenny v Minister for Justice, Equality and Law Reform* (C-247/11): 'civilianisation of the Gardai in Ireland: male police officers paid more than female civil servants. How much weight should be given to 'good industrial relations' (which predominantly favours men)?

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INDIRECT DISCRIMINATION

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- Indirect Discrimination:
 - **“...where an apparently neutral provision, criterion or practice would put persons [with the protected characteristic] at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”**
 - Article 2(1)(b) 2006/54 Recast Directive

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EVIDENCE: INDIRECT DISCRIMINATION

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

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EVIDENCE: INDIRECT DISCRIMINATION

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- 3 stages:
- Stage 1: Has the claimant established a prima facie case that there is a provision, criteria or practice which puts those with a protected characteristic (women etc) at a particular disadvantage and which causes them detriment?
- Stage 2: Has the employer/service provider shown cogent evidence which disproves the existence of any of the elements of the complaint?
- Stage 3: Can the employer justify the provision, practice or criteria?

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EVIDENCE: STATISTICS

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- The problem with statistics:



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EVIDENCE: STATISTICS

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|--------------------------------|---------------------------------|
| ▪ Example 1 | Example 2 |
| ▪ Total Pool = 10,000 | Total Pool = 20 |
| ▪ Men = 9,000 Women = 1,000 | Men = 12 Women = 8 |
| ▪ Compliant men = 700 | Compliant men = 9 |
| ▪ Compliant women = 50 | Compliant women = 7 |
| ▪ %age of compliant men = 7.7% | %age of compliant men = 75% |
| ▪ %age of compliant women = 5% | %age of compliant women = 87.5% |

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HARASSMENT:

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- Article 2(1)(c), 2006/54 (sex):
 - “Where **unwanted conduct** related to the sex of a person occurs with the **purpose or effect of violating the dignity** of a person, and of **creating an intimidating, hostile, degrading, humiliating or offensive environment.**”
- Article 2(1)(d), 2006/54 (sex):
 - Sexual Harassment:
 - “Where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.”

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RECENT CASES

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- *Kalliri* (C-409/16): A law that lays down, as a criterion for admission to a police school, a minimum height requirement irrespective of sex may constitute unlawful discrimination against women

 - *Leone* (C-171/13): French rules on certain pension-related advantages granted to civil servants give rise to indirect discrimination on grounds of sex

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BURDEN OF PROOF: WHO

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

 - But: a claimant in a discrimination case faces a particular burden because:
 - (1) discriminators don't tend to advertise their prejudices; and

 - (2) employers and/or service providers are the custodians of all the relevant evidence which poses a particular problem for indirect discrimination claimants

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BURDEN OF PROOF: WHY

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- The broad principle of effective judicial protection for community rights demands that it must not be virtually impossible for citizens to exercise their rights
 - Early ECJ jurisprudence recognised that it could be particularly difficult for claimants to prove discrimination:
 - **Danfoss** (C-109/88) Female workers earned 7% less than male workers
 - **Enderby** (C-127/92) Speech therapists (women) earned less than pharmacists (men)

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BURDEN OF PROOF: WHERE

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- Then: [Article 4 Burden of Proof Directive 97/80/EC]
 - Now:
 - Article 19(1) 2006/54 (“**Recast Directive**”) (sex)

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BURDEN OF PROOF: WHAT

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- “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.” Article 19(1) 2006/54

2-stage test

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

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BURDEN OF PROOF: WHAT

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- Presumption does not mean conclusion:
 - **CHEZ C-394/11 AG Kokott** opinion
 - The language of Article 8(1) of the Race Directive only requires a **PRESUMPTION** not a definite **CONCLUSION**. Any stricter interpretation would jeopardise the practical effectiveness of the burden of proof regulations making them practically redundant.
 - The reversal of the burden of proof maintains a fair balance between the parties because they do not completely remove the burden of proof from the victim but merely modify it.

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APPLICATION

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- Direct Discrimination and Harassment:
 - First Stage
 - (1) Find primary facts: central facts, background facts, statistics
 - (2) Draw any appropriate inferences
 - Second Stage (where burden has shifted)
 - Explanation

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APPLICATION

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

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REMEDY

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- Article 25, 2006/54 (sex):
 - “Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are applied. The penalties, which may comprise the payment of **compensation to the victim**, must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 5 October 2005 at the latest and shall notify it without delay of any subsequent amendment affecting them.”

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CONCLUSION

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- Discrimination cases are about:
 - Inherently discriminatory acts: *Ahmed v Amnesty International* [2009] ICR 1450;
 - Mental processes: *Nagarajan v London Regional Transport* [1999] ICR 877

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