Proving discrimination

The shift of the burden of proof and access to evidence

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Context

In 2016, statistics about the occupational gender gap were worrying:

• 10.5% difference between numbers of men and women in employment
• Women are paid on average 16.3% less than men
• Older women are often particularly disadvantaged
• 39% gender pension gap

In 2010, the EU gender overall earnings gap (considering hourly pay, working hours, and employment rate) was 41.1%
What are the evidential hurdles in discrimination cases?

• Perpetrators don’t admit to discrimination, or may be unaware of it

• Information that may prove discrimination is often in the hands of the wrongdoer

• Statistics may be required

• A claimant may need to respond to a justification defence

How has the EU responded to these challenges?
Shifting burden of proof

• Stage 1: if a claimant proves a *prima facie* case of discrimination …

• Stage 2: … respondent must prove that there has been no discrimination

• Case law – *Danfoss (C-109/88)*, *Enderby (C-127/92)*

• Directives – 2000/43, 2000/78, 2006/54

In practice, what evidence is required to shift the burden of proof?

**Stage 1**

• Comparability: *Brunhoffer (C-381/99)*

• Lack of transparency: *Danfoss (C-109/88)*

• Occupational segregation: *Enderby (C-127/92)*

• Historic discrimination: *Firma Feryn NV (C-57/07)*

• Conduct of connected / influential parties: *ACCEPT (C-81/12)*

• Prejudicial assertions: *CHEZ (C-83/14)*
How can employers rebut the burden of proof once it has shifted?

**Stage 2**

- Proving the real reason (not disproving a discriminatory reason)
- *Firma Feryn*: showing that comments do not reflect the reality
- *ACCEPT*: denouncing discrimination and proving good recruitment practice

**Obtaining evidence**

- *Kelly (C-104/10)*
- *Meister (C-415/10)*
- Respect for national rules
- Respect for privacy
- But not at the expense of effectiveness
Conclusion

• The shifting burden of proof can be a powerful tool in advancing equality

• It remains unclear how much the CJEU will be influenced by national rules relating to disclosure

• There is the potential for new, creative and interesting future legal developments

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