

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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