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Proving Discrimination
The Burden of proof and
directive

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Who must prove what in a discrimination claim?

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- The usual rule is that the person who makes an allegation must prove it - either by giving oral evidence; producing documents or calling other witnesses to give evidence.
- The legal burden and the evidential of proving a case rests in most instances on the plaintiff, on the balance of probabilities.
- BUT because of the nature of discrimination, the Directive now requires that a respondent may have to prove that certain decisions made, or actions taken, or omissions of action are NOT or were not taken on grounds of sex (or Race etc).
- This is referred to as shifting the burden of proof

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The problem of proof



Discrimination has the reputation of being particularly hard to substantiate. This is even truer in respect of discrimination in employment. Aware of this problem, the European Union legislature has adopted measures to assist applicants claiming to be victims of discrimination on the grounds of, in particular, sex, age or origin. The European Union legislature has thus provided for a shift in the burden of proof, without, however, going so far as to uphold its complete reversal since the long-standing freedom of employers recruit the people of their choice must not be completely disregarded.

Meister V Speech Design Carrier Systems Gmbh (Case C-415/10) Court Of Justice Of The European Union (Second Chamber) Advocate General(p Mengozzi)

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Why reverse the burden of proof?



- The EU members are not progressing with Sex Equality as quickly as hoped. One issue is that the legal process can be difficult where a plaintiff has to prove that treatment is caused by their gender.
- To prove that treatment is on grounds of gender requires proof of the motivation of the decision maker. This is difficult for several reasons:
 - Use of a comparator to show that a man is treated differently may not be possible - there may not be one
 - If a person does take account of a persons sex, they are unlikely to admit it- most people who discriminate do not announce it, or tell others.
 - The Unconscious bias of those making decisions - people may not realise that they are making a decision based on sex or may not be prepared to admit to it, even to themselves - The decision maker excuse their decision by stating that the woman does not fit it, or would not be comfortable in the workplace, or would upset the balance of the team.

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The problem of proof



- Stereotyping of men and women - *for EG women cannot be engineers because their brains are less developed; Men are better at driving; Women cannot do heavy lifting jobs.....*
- Women often find it harder than men to work full time, or changeable and unpredictable hours because they have childcare commitments; childcare commitments can mean women are perceived by an employer as being less committed to the work than men are.
- The cause or reason for an act of Discrimination is usually only known to the perpetrator;
- There is rarely any witness to discriminatory statements or acts of harassment;
- Proving discrimination can often depends on who is believed

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What Facts must be proved to succeed in a discrimination claim?



- Direct Discrimination is defined as
- Where one person has been *treated less favourably on grounds of sex than another* is, has been or would be treated *in a comparable* situation
- A plaintiff may be able to show
 - Adverse treatment, or a failure to act (failing to appoint for example)
 - Difference in treatment - either of an actual other person, or a hypothetical other person

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What Facts must be proved?



- But it may be difficult for the plaintiff to prove on balance of probabilities that the act or omission is *on grounds of sex*
 - A difference in treatment and a difference in sex may raise a question of why a person is treated as they are, but will not usually be enough to prove discrimination,
 - but does it raise a prima facie case of discrimination, requiring an explanation?
 - NOT BY ITS SELF - a plaintiff must also show facts from which it may be presumed that discrimination has taken place

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Indirect Discrimination - what must be proved by Plaintiff?



- Indirect discrimination
 - 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.
- A plaintiff will usually be able to demonstrate
 - The existence of a treatment in the nature of a PCP
 - That the PCP would put women at particular disadvantage compared to men;

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Indirect Discrimination - what must be proved by Plaintiff?



- They may not be able to prove that there is an adverse impact on the group, but may be able to raise a presumption that a Policy criteria or practice *would or might* have an adverse group impact

For example

- A woman with children works in a telephone call centre for emergency help with computers. It is a 24 hour service and staff work shifts. She can work most shifts but needs them arranged in advance and fixed so that she can organize child care and school drop offs and pick ups. When the firm introduce a 6 week rotating shift system for all staff, she cannot do it.
- She does not know whether other women with children will be affected, or whether men will also be affected, but it is highly likely that women with children at school or younger will be more adversely affected than men with children because women still take more responsibility for childcare than men in most European Countries.

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Indirect Discrimination - what must be proved by Plaintiff?



- If a prima facie case of adverse impact is established, should the respondent have to show that there is no group adverse impact?
- A respondent must of course prove that there is a legitimate aim and tht the aim is proportionate if discrimination is proved
- What then, does the directive say about the burden of proof, and what each party must prove?
- Does it make any significant difference to claims?

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The Terms of Directive 2006/54/EC (Equal Treatment Directive 2006)



Preamble at 30

The adoption of the rules on the burden of proof plays a significant role in ensuring that the principle of equal treatment can be effectively enforced. As the Court of Justice has held provisions should therefore be made to ensure that the burden of proof shifts to the respondent when there is a prima facie case of discrimination, except in relation to proceedings in which it is for the court or other competent national body to investigate the facts. It is however necessary to clarify that the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination remains a matter for the relevant national body in accordance with national law or practice.

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The Terms of Directive 2006/54/EC (Equal Treatment Directive 2006)



Article 14

There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors including public bodies.....

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The Terms of Directive 2006/54/EC (Equal Treatment Directive 2006)



Further it is for the Member States to introduce , at any appropriate stage of the proceedings, rules of evidence which are more favourable to plaintiffs.

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The Terms of Directive 2006/54/EC (Equal Treatment Directive 2006) - Article 19



1. Member states shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves to have been wronged because the principal of equal treatment has not been applied to them to ***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.***

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The Terms of Directive 2006/54/EC (Equal Treatment Directive 2006) -Article 19



2. Paragraph 1 shall not prevent member States from introducing rules of evidence which are more favourable to plaintiffs

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When will a respondent bear the burden of proof?



- If the plaintiff can prove facts from which direct or indirect discrimination *may be presumed to have taken place* then Respondent will have burden of proving that the reason or cause of the treatment or act was NOT discrimination.
- If the respondent does not discharge this burden then discrimination will be proven.

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What Facts might support the presumption of discrimination?



- The facts need not be conclusive - all that is needed is a presumption that discrimination has taken place - so discrimination ***might have taken place, could have taken place***, rather than ***has, or, on balance of probabilities has taken place*** is sufficient to move the burden of proving that they have not discriminated to the respondent
- What facts?
 - Evidence of qualifications of applicant and others
 - Questions asked at interview: Are they fair? Are they justified?
 - Discriminatory advertising? Does the advert suggest a bias?
 - Discriminatory practices in the past - if they existed have they been changed?
 - Make up of the workforce? Are men and women equally well represented? If not why not?

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What Facts might support the presumption of discrimination?



- Evidence of how others have been treated in the past in the same job
- Comments made by others including managers, both official comments and unofficial comments;
- Actions taken to address complaints in the work place - are those who complain treated with respect or are they silenced and threatened?
- The presence or absence of appropriate workplace policies which are then followed
- Training on equalities and harassment for managers
- Witness evidence either of the acts or events being complained about, or witness evidence of the effect of those events on others

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Indirect Discrimination - what facts might shift the burden of proof?



- A woman may show that a policy of fixed 5 day working impacts on her because she has caring responsibilities which more women than men have;
- A job description asking for good upper body strength may be one that women may find harder to comply with, and which may not be justified if lifting equipment is available for example;
- A requirement of full time work as a prerequisite for a pension or a benefit or for promotion may adversely affect women who have taken time off for pregnancy and childcare

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The problem of the Comparator - How to prove the facts when no actual comparator?



Case C-196/02 Nikoloudi [2005] ECR I-1789, paragraph 68).

- In a case concerning a Greek Employment practice of allowing only women to be recruited to certain part time Cleaning positions, which were paid less than full time positions and a claim by Ms N that there was discrimination against her as a woman, the issue arose where there was no male comparator. The very provision being complained against was one which meant that there was no man in the same circumstances as she was.
- None the less the court was able to point the national court to the comparable pay of full time equivalent workers.

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Evidence of sex as causative of discrimination



- Proof of Difference in treatment and difference in sex is necessary, but what else might shift the balance?
- Statements of an employer or prospective employer that they will not employ people of a particular class (Pregnant women; Muslim men; immigrant workers; Those with child care commitments;)
- See *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV* (Case C-54/07)
- Statements or policies which are intrinsically discriminatory:
- Direct evidence of discrimination, in the form of a statement of discriminatory intent, or an admission that the persons gender was a factor in refusing a job.
-

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Problems of Documentary evidence and Disclosure



- **Kelly v National University of Ireland (University College, Dublin)**
C-104/10 CJEU
- Mr Kelly complained of sex discrimination when he was not offered a place on a vocational training course.
- He compared himself to women who were appointed
- He argued that he was better qualified than the least well qualified women, and that therefore sex discrimination had played a part in him being rejected.
- BUT he could not prove that the women were less well qualified, because he did not have access to the recruitment paperwork
- The papers which would prove or disprove his case were all in the possession and control of the university

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Problems of disclosure Kelly v University of Ireland



- K made an application for disclosure arguing that he needed the information in order to be able to prove his case
- The national court refused but made a reference to the ECJ asking whether or not the directives, including the burden of proof directive, mean that respondents must disclose documents of this type?
- Not necessarily say the ECJ

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The ECJ in Kelly were asked....



1. Does Article 4(1) of Council Directive 97/80 ... entitle an applicant who believes that he or she has been denied access to vocational training because the principle of equal treatment was not applied to him or her, to information on the respective qualifications of the other applicants for the course in question and in particular the applicants who were not denied access to vocational training so that the applicant can "establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination"?

2. Does Article 4 of Council Directive 76/207 ... entitle an applicant for vocational training, who believes that he or she has been denied access to vocational training "on the basis of the same criteria" and discriminated against "on grounds of sex" in terms of accessing vocational training, to information held by the course provider on the respective qualifications of the other applicants for the course in question and in particular the applicants who were not denied access to vocational training?

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The ECJ in Kelly were asked....



3. Does Article [1(3)] of Council Directive 2002/73 ... prohibiting "direct or indirect discrimination on the grounds of sex" in relation to "access" to vocational training entitle an applicant who claims to have been discriminated against "on the grounds of sex" in terms of accessing vocational training, to information held by the course provider on the respective qualifications of the other applicants for the course in question and in particular the applicants who were not denied access to vocational training?

4. Does the nature of the obligation under paragraph 3 of Article 267 TFEU differ in a Member State with an adversarial (as opposed to inquisitorial) legal system and, if so, in what respect?

5. Can any entitlement to information under the aforesaid directives be affected by the operation of national or European laws relating to confidentiality?"

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The ECJ reminds its self that ...



it is the person who considers himself to have been wronged because the principle of equal treatment has not been applied to him who must initially establish the facts from which it may be presumed that there has been direct or indirect discrimination. It is only where that person has established such facts that it is then for the defendant to prove that there has been no breach of the principle of non-discrimination.

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And states that....



....although Article 4(1) of that directive does not specifically entitle persons who consider themselves wronged because the principle of equal treatment has not been correctly applied to them to information in order that they may establish 'facts from which it may be presumed that there has been direct or indirect discrimination' in accordance with that provision, the fact remains that it cannot be excluded that a refusal of disclosure by the defendant, in the context of establishing such facts, could risk compromising the achievement of the objective pursued by that directive and thus depriving that provision in particular of its effectiveness.

In that regard, it must be borne in mind that Member States may not apply rules which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness (see para 30-31)

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And concludes



the answer is that Article 4(1) of Council Directive 97/80 ...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.

39. Nevertheless, it cannot be ruled out that a refusal of disclosure by the defendant, in the context of establishing such facts, could risk compromising the achievement of the objective pursued by that directive and thus depriving, in particular, Article 4(1) thereof of its effectiveness. It is for the national court to ascertain whether that is the case in the main proceedings.

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Conclusions on other questions...



- The ECJ also answer in similar terms the second and third questions.
- They recognized in respect of 4 that where there was an obligation to disclose documents, that this would be affected by EU rules on confidentiality and
- That the rules will apply in the same way in all members states regardless of the type of legal system.

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Conclusions following Kelly



- No automatic right to confidential information under EU Directives and wider law
- BUT national legal provisions may make rules for disclosure in legal cases where documents are relevant or necessary
- If the documents are not confidential because of containing personal data, or can be anonymised, then they may be necessary
- The National rules should not frustrate the purpose of the directives and should not prevent enforcement.
- Some classes of documentation should always be disclosable - monitoring, the numbers of men and women in a staff group for example
- Respondents will often be well advised to disclose information since it may be necessary to demonstrate that there was another reason or a legitimate reasons for a refusal to offer a place, or a take a decision for example.

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Otero Ramos v Servicio Galego de Saúde, Instituto Nacional de la Seguridad Social Case C-531/15



How the Provisions are applied

- The case concerns breast feeding and risk assessments at work. Here a woman had evidence that her work would pose a risk to her, but no changes were made to her workplace and her applications for change and challenges were denied and rejected. She claimed that this was sex discrimination and that the information she had provided demonstrated a prima facie case.

The ECJ determined firstly that

“the condition of a breastfeeding woman being intimately related to maternity, and in particular to pregnancy or maternity leave, workers who are breastfeeding must be protected on the same basis as workers who are pregnant or have recently given birth.

Accordingly, any less favourable treatment of a female worker due to her being a breastfeeding woman must be regarded as falling within the scope of Article 2(2)(c) of Directive 2006/54 and therefore constitutes direct discrimination on grounds of sex.”

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- failure to assess the risk posed by the work of a breastfeeding worker in accordance with the requirements of Article 4(1) of Directive 92/85 must be regarded as less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of that directive and constitutes, as appears from paragraph 60 above, direct discrimination on grounds of sex within the meaning of Article 2(2)(c) of Directive 2006/54.
- The ECJ conclude that the information provided by the the plaintiff was sufficient to raise the prima facie case, AND tht therefore the Defendant must prove that no discrimination had taken place

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What must the Respondent prove?



- Once a prima facie case has been raised, it is then for the respondent to prove
 - in a direct discrimination case that the action or omission, was not on grounds of sex at all
 - In indirect discrimination either that the PCP does not have the adverse impact OR that it is justified as a proportionate means of achieving a legitimate aim

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What must the Respondent prove?



- An inadequate explanation, or one which is only a partial explanation will probably not be enough. The directive requires no sex discrimination at all.
- Whilst plaintiffs will not have access to all documentation, a respondent may be well advised to disclose information which demonstrate a non discriminatory explanation at an early stage, and a failure to provide information which would prove a non discriminatory motive may be considered as evasive or suspect unless concerns of confidentiality or other.

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Common explanations considered



- Bad or disorganized employer defence - *it was not discrimination we treat everyone badly* - the question of fact for a court will be whether this is demonstrated with evidence of equal poor treatment produced by the employer, or not?
- *It was not intentional and we did not know* - there is no requirement of intention in sex discrimination - causation is about whether the discrimination is on grounds of sex, not whether the alleged perpetrator intended to discriminate. Organisations should be aware of the impact of their actions - monitoring and assessment of impact is good practice and often a requirement

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What must the Respondent prove?



- *The person who did the act was not our employee* - The directive applies to workers and imposes obligations upon those who the person works for. Third party actions may not be the responsibility of an employer, but if they fail to deal with an issue, they may also be discriminating.
- In Harassment - *we thought they did not mind/ we did not realise they were upset/ it was just a joke!* - this will not be sufficient to defend a claim. The plaintiffs subjective experience is what matters, and that the environment created has the effect for her.

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