



This training session is funded under the "Rights, Equality and Citizenship Programme 2014-2020" of the European Commission.

## **EU Gender Equality Law – Trier 8-10 April 2019**

# **The Burden of Proof in Sex Discrimination Cases**

*Her Honour Judge Jennifer Eady QC  
Senior Circuit Judge, Employment Appeal Tribunal*

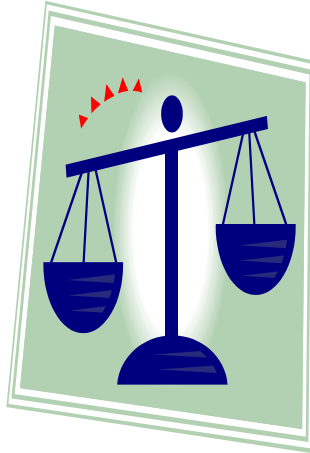


## **This presentation**

The aim of this presentation is to provide a summary of the theoretical and legislative background to the burden of proof in EU discrimination law and to offer some practical guidance to the operation of the shifting burden of proof for those charged with determining claims of unlawful sex discrimination.

## Introduction: the Burden of Proof

- In Court cases involving factual disputes, the onus of proof is generally on the person making the claim/accusation.
- A particular difficulty arises in discrimination cases: in practice, complainants will generally be poorly placed to prove unlawful discrimination.



## Why should the burden of proof shift?

- ✓ Covert discrimination
- ✓ Unrecognised prejudice
- ✓ *All human beings have prejudices that we do not always recognise....*
- ✓ Most evidence will lie in the hands of the employer
- ✓ Let the employer show that there was no discrimination

## **The importance for EU anti-discrimination law**

Put simply, EU substantive rights to equality are meaningless unless they are underpinned by rules of evidence and procedure that assist individuals to enforce those rights (**the principle of effectiveness**).

Arguably, the most important rules which fall into this category pertain to the burden of proof and access to evidence.

## **Origins of a shifting burden of proof**

Case 109/88, Danfoss [1989]  
ECR 3199

Case C-127/92 Enderby  
[1983] ECR I-5535

## Origins of a shifting burden of proof

**Danfoss** and **Enderby** were equal pay cases in which the burden of proof shifted to the employer to show the pay differential between men and women was objectively justified when:

- female workers were paid less, on average, than men, and the system of pay that led to this result was completely lacking in transparency (**Danfoss**);
- significant and valid statistics showed that a collective bargaining system had resulted in a predominantly female occupational group being paid less than predominantly male occupational groups (**Enderby**).

## Before the shifting Burden of Proof: the use of inferences in the UK

### **King v Great British-China Centre [1992]**

ICR 516, CA per Neill LJ:

- (1) It is for the applicant who complains of ... discrimination to make out his or her case. ...if the applicant does not prove the case on the balance of probabilities he or she will fail.**
- (2) ... it is unusual to find direct evidence of ... discrimination. Few employers will be prepared to admit such discrimination even to themselves. In some cases the discrimination will not be ill-intentioned but merely based on an assumption that "he or she would not have fitted in".**
- (3) The outcome of the case will therefore usually depend on what inferences it is proper to draw from the primary facts found ...**

## UK example contd

- (4) *Though there will be some cases where, for example, the non-selection of the applicant for a post or for promotion is clearly not on [prohibited] ... grounds, a finding of discrimination and a finding of a difference in [protected characteristic] ... will often point to the possibility of ... discrimination. In such circumstances the tribunal will look to the employer for an explanation. If no explanation is then put forward or if the tribunal considers the explanation to be inadequate or unsatisfactory it will be legitimate for the tribunal to infer that the discrimination was on grounds [of the protected characteristic]. This is not a matter of law but... "almost common sense".*
- (5) *It is unnecessary and unhelpful to introduce the concept of a shifting evidential burden of proof. At the conclusion of all the evidence the tribunal should make findings as to the primary facts and draw such inferences as they consider proper from those facts. They should then reach a conclusion on the balance of probabilities, bearing in mind both the difficulties which face a person who complains of unlawful discrimination and the fact that it is for the complainant to prove his or her case."*

## EU Directives

- The first Directive explicitly to address the issue was the **Burden of Proof Directive 97/80/EC** (dealing only with sex discrimination and not requiring implementation until 1 January 2001)
- It was replaced, from 15 August 2009, by virtue of the **Recast Directive**.

## **Burden of Proof Directive:**

Effective judicial protection for  
community rights vs. general rule of  
national procedural autonomy



## **Recitals to the Burden of Proof Directive 97/80**

*(17) Whereas plaintiffs could be deprived of any effective means of enforcing the principle of equal treatment before the national courts if the effect of introducing evidence of an apparent discrimination were not to impose upon the respondent the burden of proving that his practice is not in fact discriminatory;*

## **Recitals to the Burden of Proof Directive 97/80**

*(18) Whereas the Court of Justice of the European Communities has therefore held that the rules on the burden of proof must be adapted when there is a prima facie case of discrimination and that, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought;*

## **COUNCIL DIRECTIVE 97/80\***

### **Article 10**

**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.**

\*Now the recast Directive 2006/54 (Art 19).

Also Art 8 Directive 2000/43 (the Race Directive) and  
Article 10 Directive 2000/78 (the Framework Directive)

## And currently

- Article 8 in **Council Directive 2000/43/EC** of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (“the Race Directive”)
- Article 10(1) in **Council Directive 2000/78/EC** of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (“the Framework Directive”)
- Article 19(1) in **Directive 2006/54/EC** of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (“the Recast Directive”).

## Recital to the Equal Treatment Directive 2006/54

*(30) The adoption of 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, provision should therefore be made to ensure that the burden of proof shifts to the respondent when there is a prima facie case of discrimination ... the appreciation of the facts from which it may be presumed that there has been ... discrimination remains a matter for the relevant national body in accordance with national law or practice ...*



## The Two Stages of the Shifting Burden of Proof: Stage 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 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.

## Presumed?

### Presumed ≠ Concluded

Opinion of AG Kokott in C-394/11 Belov

## **The Two Stages of the Shifting Burden of Proof: Stage 2**

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.**

## **The role of the Court**

**The role of the national court is to verify**

*“that the facts alleged against the employer are established and to assess the sufficiency of the evidence which the employer adduces in support of its contentions that it has not breached the principle of equal treatment.”*

(para 33, **Firma Feryn NV**. Case C-54/07)

## The role of the Court in practice

- Gathering evidence: Judge's role
- Orders to disclose evidence
- The drawing of inferences
- Case C-104/10 Kelly v National University of Ireland
- Case C-415/10 Meister v Speech Design CarrierSystems GmbH
- RB-v-BA [2006] IRLR 473

## Stage 1: evidence

Case C-54/07 Firma Feryn NV:

- ✓ An employer's prior statement that it would not appoint employees of certain ethnic minority backgrounds "*may constitute facts of such a nature as to give rise to a presumption of a (still existing) discriminatory recruitment policy*"

## **Firma Feryn NV**

Statements reported as made by a director of the company:

*“It is not just immigrants who break in. I won’t say that, I’m not a racist. Belgians break into people’s houses just as much. But people are obviously scared. So people often say: ‘no immigrants’...I must comply with my customers’ requirements. If you say ‘I want a particular product or I want it like this and like that’, and I say ‘I’m not doing it, I’ll send these 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!”*

## **Firma Feryn NV**

The CJEU confirmed that such statements may constitute facts of such a nature as to give rise to a presumption of a discriminatory recruitment policy, thus shifting the burden of proof.

On the facts of the case, this may be thought unsurprising: the discriminatory remarks had been made only a little over a year earlier, and there were no current employees of Moroccan origin.

## Stage 1: evidence

Case C-81/12 Asociata ACCEPT v Consiliul National pentru Combaterea Discriminarii [2013] 3 C.M.L.R 26

A shareholder in Steaua Bucuresti football club had made statements to the effect that he would not hire a player who was homosexual.

## ACCEPT

Although the statement was made by someone who could not bind the employer in relation to any recruitment decisions, the CJEU held this did not matter:

*“... a defendant employer cannot deny the existence of facts from which it may be inferred that it has a discriminatory recruitment policy merely by asserting that statements suggestive of the existence of a homophobic recruitment policy come from a person who, while claiming and appearing to play an important role in the management of that employer, is not legally capable of binding it in recruitment matters.*

*... the fact that ... an employer might not have clearly distanced itself from the statements concerned is a factor which the court ... may take into account in the context of an overall appraisal of the facts.”*

## Stage 2: evidence

### Firma Feryn NV:

- It is for the employer to “*adduce evidence that it has not breached the principle of equal treatment*”

## ACCEPT

In the **ACCEPT** case, the CJEU allowed that:

“ ... defendants may refute the existence of [unlawful discrimination] by establishing, ... inter alia, that their recruitment policy is based on factors unrelated to any discrimination on grounds of sexual orientation. ...[but] it is unnecessary for a defendant to prove that persons of a particular sexual orientation have been recruited in the past, since such a requirement is indeed apt, in certain circumstances, to interfere with the right to privacy. ... [Rather] a prima facie case of discrimination on grounds of sexual orientation may be refuted with a body of consistent evidence [which] might include, for example, a reaction by the defendant ... clearly distancing itself from public statements on which the appearance of discrimination is based, and the existence of express provisions concerning its recruitment policy aimed at ensuring compliance with the principle of equal treatment within the meaning of Directive 2000/78.”

## What is not an answer

- The employer's reasons or motive, **R v Immigration Officer at Prague Airport and anor** [2005] 2AC, HL, per Baroness Hale
- Stereotypical assumptions relating to a protected characteristic, C-83/14 **CHEZ**, CJEU

## Procedure

*... although Article 4(1) of that **Directive 97/80** 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, it is not however inconceivable that a refusal of disclosure by the defendant, in the context of establishing such facts, is liable to compromise the achievement of the objective pursued by that directive and, in particular to deprive that provision of its effectiveness.*

C-104/2010 **Kelly** para 34

## Procedure

***“... in the context of establishing the facts from which it may be presumed that there has been direct or indirect discrimination, it must be ensured that a refusal of disclosure by the defendant is not liable to compromise the achievement of the objectives pursued by Directives 2000/43, 2000/78 and 2006/54.”***

C-415/2010 Meister

## Procedure

***“... a defendant's refusal to grant any access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination. It is for the referring court to determine whether that is the case in the main proceedings, taking into account all the circumstances of the case before it.”***

Meister



## **Application in Practice: Direct Discrimination -The First Stage**

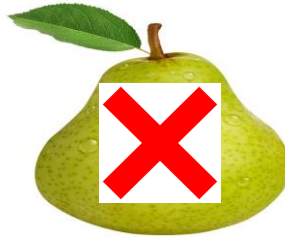
- (1) Find primary facts**
- (2) Draw appropriate inferences**

### **Stage 1: First find the primary facts**

Primary facts include:

- ✓ The facts **central** to the complaint.
- ✓ Facts from **background** and circumstantial evidence.
- ✓ Relevant **statistical** evidence.

**Stage 1: First find the primary facts** – which will include those relevant to any comparison



*The comparison must be like with like, 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)**

**Stage 1: Now draw any appropriate inferences**

- Platform of (neutral) facts/background
- Looked at in their totality and in context
- What inference do you draw?



## What is needed to reverse the burden?

Presumed ≠ Concluded (Belov)

*But*

Negative treatment + protected characteristic alone ≠ burden shifted (CHEZ)

*Although*

Evidence suggesting a practice based on stereotype or prejudice might suffice (CHEZ)

## Second Stage: the employer's explanation



*... it shall be for the respondent to prove that there has been no breach of the principle of equal treatment*

## **The Shifting Burden of Proof in Cases of Indirect Discrimination**

### **Indirect discrimination occurs:**

“...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.”

Directive 2000/43, Article 2(2)(b); Directive 2000/78, Article 2(2)(b); Directive 2006/54, Article 2(1)(b).

## **Stage 1 in an Indirect Discrimination case**

The “stage 1” requirement is that the claimant establish facts from which it may be presumed that there is an apparently neutral provision, criterion or practice (‘PCP’) which places persons with a protected characteristic at a particular disadvantage compared with other persons.

## Stage 1: Indirect Discrimination

**So:**

Has the claimant established a *prima facie* case that there is a provision, criteria or practice which puts those possessing the protected characteristic at a particular disadvantage and which causes her detriment?

Yes?      **Second Stage**

No?        **Claim fails**

## Stage 1: Indirect Discrimination

The most difficult hurdle for claimants alleging indirect discrimination in shifting the burden of proof tends to be the requirement to establish a presumption that the PCP puts the protected group at a “particular disadvantage”

## ‘particular disadvantage’

For example in the equal pay context, **McNeil v Revenue and Customs Commissioners**, UKEAT/01831/17

- A differential distribution of men and women within a pay range may indicate a problem or give the appearance of disadvantage. However without evidence that it reflects a sufficient or patterned pay inequality, particular disadvantage is unlikely to be established. There must be significant or consistent patterns of pay difference to lead to an inference that the material factor leading to lower pay put women at a particular disadvantage in terms of lower pay.
- Particular disadvantage in relation to pay can be proved in different ways, but it cannot be assumed.

## Second Stage: Indirect Discrimination

Has the employer shown **cogent evidence which disproves the existence of any of the elements** of the complaint?

Yes? Claim fails

No? **Justification**

## Indirect Discrimination – Justification

Can the employer **justify** the provision,  
practice or criteria?

No? Claim succeeds.

Yes Claim fails.

