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# The Burden of Proof in sex discrimination cases

Based on Report for European  
Commission on the Burden of Proof  
by Lilla Farkas and Orlagh O'Farrell,  
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## Reversing the Burden of Proof

Practical dilemmas at the  
national and European levels

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European Network of Legal Experts in the  
Non-discrimination field, 2015  
Written by Lilla Farkas and Orlagh O'Farrell

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## The Report

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- ❖ Eight substantive chapters - focus on EED & RED, but applies to gender too
  - ❖ analysis of 4 recent judgments (Ch 6)
  - ❖ full scheme of directive-compliant civil proceedings (causation: harm, conduct, protected ground, comparator) to locate the SHIFT
  - ❖ domestic practice and general trends (Ch 9)
  - ❖ recommendations - standard setting re application of BoP, facilitating access to information (Ch 10)

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## The BoP provision

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- ❖ uniform across gender and the other grounds except for nationality
- ❖ application contingent on the definition of the type of discrimination invoked - sui generis forms of direct discrimination: harassment (Coleman), victimization & segregation (ECtHR case law)
- ❖ intent not necessary but taken into account when shown
- ❖ does not apply in criminal cases
- ❖ no obligation to ensure application in proceedings where court or competent body investigate the facts - contentious!

## 'Double trouble'

- ❖ In order to connect evidence to the showing of bias, the BoP is **treated** at two distinct junctions:
  - ❖ (i) it lowers the onus of proof (presumption) resting on the plaintiff in relation to the causal link between the protected ground and the conduct (prima facie case), while
  - ❖ (ii) placing and limiting the remaining onus of proof in relation to bias onto the respondent (justification defence).

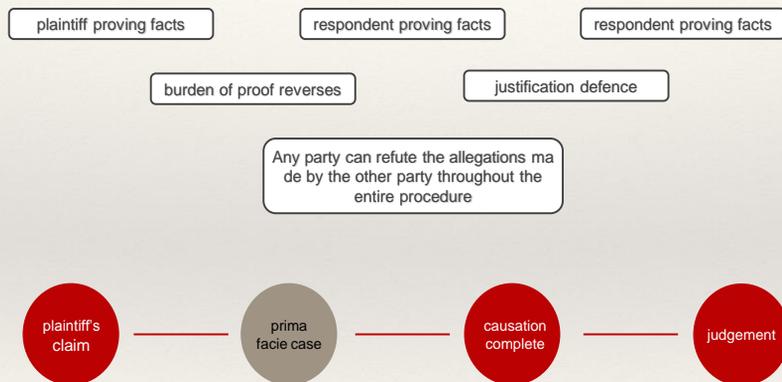
## Prima facie case

- The reversal of the burden of proof does not mean that plaintiffs are exempt from convincing the court that they have a case. When establishing a *prima facie* case, they convince the court of the likeliness or probability that they suffered discrimination.
- Bias and prejudice need to be 'factored in' to the process for the benefit of those who usually suffer it
- Racial Equality Directive, Art. 8; Employment Equality Directive, Art. 10; Gender Equality Directive (recast), Art. 19; Gender Goods and Services Directive, Art. 9.
- 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.

# Justification defence

- The burden of proof shifts before causation is complete. It moves to the respondent. He will not be held liable if proving that discrimination played no part in the treatment or effect complained of.
- If the respondent fails to establish that the treatment arose from objective reasons unrelated to discrimination, he will be liable for a breach of non-discrimination law.
- This is the only interpretation compatible with Section 611a(1) of the German Civil Code the EU BoP provision was modeled on. This provision set out that “where an employee substantiates by prima facie evidence facts from which it may be presumed that there has been less favorable treatment on grounds of sex, it shall be for the employer to prove that this treatment is justified by *objective reasons other than sex*”.
- Justification defence is limited in certain cases.

# The ex culpatio based scheme known from torts



## The Achilles heel: the comparator I.

- Talks to causality: harm - conduct - protected ground

“Discrimination is not a response to a given individual’s character or behavior, but rather a repeated and unthinking reaction to any person who possesses a particular trait”. What follows from this is that “a person is badly treated because he is, involuntarily, a member of a group” disliked by the respondent or by society at large. (Laurence Lustgarten)

- Difficult to identify

## The Achilles heel: the comparator II.

- ❖ lack of clear definition of grounds - direct discrimination may be conceived as indirect (e.g. minority language)
- ❖ real, assumed and associated ground
- ❖ hypothetical - substantive ideal of human dignity or standard of treatment widely acknowledged (duty of care)
- ❖ homogeneity of groups - Nikoloudi and Maruko (covert direct discrimination)
- ❖ no comparator needed: pregnancy, statement of bias (Feryn, Accept), harassment (Coleman) ...

# No guidelines from the CJEU

- The CJEU has clarified the standards of prima facie cases (pregnancy) and justification re gender & shaped the justification of age discrimination.
- No standard setting despite domestic courts' requests in Feryn & Accept.
- Standard setting feasible and beneficial: Igen v Wong, UK Court of Appeals.
- Standard setting necessary:
  - imperfect understanding of how the rule applies re *prima facie* cases
  - standard of proof for rebuttal not known for all states, may be lenient in others
  - before EBs the outcome tends to be better for the plaintiff
  - may also be differences whether litigant is an individual or an NGO

# Standard setting

IGEN LTD V WONG: British Court of Appeal 18 FEB 2005

Each case raises procedural issues in discrimination cases, asking where the burden of proof had shifted. It required a two stage process before a complaint could be upheld.

First the claimant had to establish facts allowing the tribunal to conclude, in the absence of an adequate explanation, that an unlawful act of discrimination had taken place. If that was established, the respondent was to establish that he did not commit the unlawful act.

The court set out 13 additional considerations.

Once an employee has established a prima facie case of discrimination by showing that there is prima facie evidence to the effect that he/she has been treated less favourably than a relevant comparator the burden of proof transfers to the employer.

If he is to escape liability the employer must then prove on the balance of probabilities that the less favourable treatment complained of was not on the grounds of discrimination.

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## The stumbling block: access to information

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- ❖ Flagged as a huge issue at domestic level
- ❖ Reinforced by referrals: Kelly & Meister, Accep & Feryn
  - ❖ lack of transparency of the employer's practices (Danfoss: prevents any form of supervision by the national courts): total or partial lack of information
  - ❖ equal pay v access (to employment) cases: worker not yet 'in'
  - ❖ respondents cultivate the reluctance of courts to make orders of disclosure if that could lead to disclosing confidential data of identifiable individuals who are not party to the proceedings.

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## Need to ensure access to Information

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- ❖ Two ways available
  - ❖ CJEU analyses and resolves mismatches between data protection and right to equal treatment provisions once a thoughtful referral comes before it
  - ❖ legal tools adopted at EU level to facilitate access to information, e.g. through questionnaire procedures

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## Table of legislation

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- Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201, 26.7.2013, pp. 60-65.
- Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, Official Journal L 014 20/01/1998, p. 6.
- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180, 19/07/2000 pp. 0022-0026.
- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303, 02/12/2000, p.0016-0022.
- 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), Official Journal L 204, 26.7.2006, pp. 23-36.
- Proposal for a Council Directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services COM (2003) 657 final.

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## List of cases

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- ❖ **C-JEU**
- ❖ Case C-109/88 Danfoss [1989] ECR I-3199.
- ❖ Case C-127/92 Enderby v Frenchay Health Authority 1993 ECR I-05535.
- ❖ Case C-13/94 P v S and Cornwall County Council, ECR 1996.
- ❖ Case C-167/97 R v Secretary of State for Employment, ex parte Seymour-Smith and Perez [1999] ECR I-623.
- ❖ Case C-432/05 Unibet Ltd v Justitiekanslern [2007] ECR I—2271.
- ❖ Case C-267/06 Tadao Maruko v Versorgungsanstalt der deutschen Bühnen [2008] ECR I-1757.
- ❖ Case C-303/06 S. Coleman v Attridge Law and Steve Law [2008] ECR I-5603.
- ❖ Case C-13/05 Sonia Chacón Navas v Eures! Colectividades SA [2006] ECR I-6467.
- ❖ Case C-54/07 Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV [2008] ECR I—5187.
- ❖ Case C-246/09 Bulicke [2010] ECR I-7003.
- ❖ Case C-415/10 Meister v Speech Design [2012] ECR I-0000.
- ❖ Case C-104/10 Patrick Kelly v National University of Ireland (University College, Dublin), [2011] ECR I-06813.
- ❖ Case C-81/12 Asociația Accept v Consiliul Național pentru Combaterea Discriminării, 25 April 2013 .

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# National Courts

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Oxford v Department of Health and Social Security (1977) ICR 885, United Kingdom.

Mitchell v Southern Health Board (2001) Labour Court DEE 011, Ireland.

IBM v Buscail, Court of Appeal, Montpellier, (2003) No 0200504, France.

Equality Tribunal (2004) EED048, Ireland.

Igen Ltd (Formerly Leeds Careers Guidance) and Others v Wong, Chamberlin and Another v Emokpae, and Webster v Brunel University (2005) IRLR 258, United Kingdom.

Madarassy v Nomura International Plc, (2007) ICR 867, United Kingdom.

Supreme Court decision (2008) 9ObA177/07f, Austria.

