

The Burden of Proof

What is the shift in the burden in proof?
Who has to prove what?

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Introduction

- ▶ *“Employers should not be permitted to escape the statutory provisions by leaving it to the employee to prove her case. It was not appropriate in a discrimination context, given the reversal of the burden of proof, for an employer faced with a discrimination case to sit back and say **You prove it**”*

EB-v-BA [2006] IRLR 471 Court of Appeal

Why does the reverse burden of proof exist?

- ▶ 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
- ▶ Lets the employer show that there was no discrimination

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Some themes

- ▶ What practical measures exist to prove discrimination?
- ▶ How does a claimant gather evidence?
- ▶ Who has to prove what - and at what point?
- ▶ How do judges in the EU address these issues?
- ▶ EC Report 2014: Reversing the Burden

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Burden of Proof Directive 1997/80

- ▶ 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...**
- ▶ establish before a **court...facts from which it may be presumed** that there has been discrimination
- ▶ it **shall** be for the **employer to prove that there has been no breach** of equal treatment

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Equal Treatment Directive 2006/54 (recast)

- ▶ Recital 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...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 court

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Article 19

- ▶ Member states shall take such measures as are necessary in accordance with their national judicial systems to ensure that, when persons consider themselves wronged...has **established facts from which it may be presumed** that there has been discrimination
- ▶ It **shall** be for the respondent to prove that **there has been no breach** of the principle of equal treatment
- ▶ Considerable latitude to each member state
- ▶ But not excessively difficult

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Two Stage Test

- ▶ Claimant shows facts from which it may be presumed there has been discrimination - a prima facie case. **The burden shifts.**
- ▶ The respondent must then show facts that establish that events have a non-discriminatory explanation.
- ▶ Maintain the right balance

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Gathering evidence: judge's role

- ▶ Orders to disclose evidence
- ▶ What inferences to draw from an employer's failure
- ▶ *Kelly-v-National University or Ireland Case C-104/10*
- ▶ *Meister-v-Speech Design Carrier Systems GmbH Case C-415/10*
- ▶ *RB-v-BA [2006] IRLR 473*

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Inferences/Context/Background

- ▶ What is an inference?
- ▶ When is it proper to draw one?
- ▶ Platform of (neutral) facts/background
- ▶ Looked at in their totality
- ▶ Something more than an allegation
- ▶ An example - Philip

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Gathering evidence in the UK

- ▶ Statutory Questionnaires (abolished April 2014)
- ▶ ACAS Guidance on Asking Questions in Discrimination cases
- ▶ Order to provide information (Rule 19(2)(b))
- ▶ Order to disclose documents (Rule 10(2)(d))

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Shifting burden of proof in UK

- ▶ S136 Equality Act - two stages
- ▶ If there are **facts** from which the court **could** decide, in the absence of any other explanation **that the employer has discriminated**
- ▶ The court **must** find the discrimination occurred
- ▶ Unless the **employer shows it did not do so**

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13 point guidance Igen-v-

Wong

1. Claimant proves facts from which the court **could** conclude that discrimination has taken place
2. The claim will fail if the claimant does not do so
3. The court should bear in mind that it is unusual to find direct evidence of discrimination
4. What inferences should be drawn?
5. It is important that at the first stage the issue is only could discrimination have taken place
6. At the first stage assume there is no proper explanation for the facts
7. Inferences may be drawn from evasive or equivocal answers

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13 point guidance continued

8. Inferences may be drawn from a failure to follow relevant Codes of Practice
9. Once a prima facie case is established the burden shifts to the employer
10. The employer must then disprove discrimination
11. Employer must prove that there was no discrimination in any sense
12. The court must assess whether the explanation provided by the respondent is sufficient to discharge the burden upon it
13. Court would normally expect the employer to produce cogent evidence to discharge the burden

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Accept case: FC Steaua

- ▶ The facts
- ▶ The reference to the ECJ
- ▶ Concerns over fairness to the club
- ▶ The response of the ECJ

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Conclusions

- ▶ National rules on disclosure vary
- ▶ How does **Meister** assist?
- ▶ Inference from failure to disclose
- ▶ The totality of the evidence
- ▶ Fact finding is critical
- ▶ What inferences can be drawn
- ▶ Standing back - **may** presume
- ▶ Shift to the employer - **shall** prove

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Case studies

Thank you for listening

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