

# Burden of Proof

Declan O'Dempsey

Dod@cloisters.com



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Axiom of Civil Law: the person who asserts a fact must prove it

- Discrimination: a set of facts in search of an explanation?
- The psychology of discrimination: few admit doing it even to themselves.
- The reason may not be known to the discriminator; let alone the claimant.
- Unequal access to relevant information in order to prove discrimination.



## The need for comparators

- Comparators are necessary to prove discrimination:
  - A real comparator – C will need to have evidence of how that person was treated in reality;
  - A hypothetical comparator – C will need to have evidence to suggest that although not in the same situation, the court can see how the D would have treated a person to whom the relevant characteristic did not apply.
- They are also needed for indirect discrimination.
- Who has the evidence?



## Why have a shifting burden of proof?

- Danfoss
- Enderby



## The two stage

- Stage 1: MS must ensure that, when claimants establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination;
  - Stage 2: MS must ensure that once that is done, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.
- States can introduce more plaintiff friendly rules, but does the Charter limit that?



## The Directives

- E.g.
- 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"); and
- 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").



## Harassment, reasonable accommodation cases and the burden of proof.

- Harassment is a form of discrimination (either direct or indirect, it matters not);
- A claim for a breach of the duty to make reasonable accommodations is probably a form of discrimination (direct or indirect it matters not) due to the treatment of the concept of discrimination in the UNCRPD.



## In practice, what evidence is required to shift the burden of proof?

- How long is a piece of string?
- What is a prima facie case?
- C-381/99 *Brunnhöfer v Bank der österreichischen Postsparkasse*
- C-109/88 *Danfoss*
- C-81/12 *Asociația ACCEPT v Consiliul National pentru Combaterea Discriminării*
- C-054/07 *Firma Feryn*
- C531/15 *Otero Ramos*



## How can the defendant rebut the allegation if the burden of proof has shifted?

“and Coleridge too has lately taken wing, explaining metaphysics to the nation:

I wish he would explain his explanation” (Lord Byron on Coleridge’s philosophical lectures).

- The employer is not required to prove a negative;
- The employer is required to provide an explanation which is innocent of discrimination.
- Firma Feryn – actually we haven’t discriminated
- ACCEPT – distancing statements, proof of good practice and objective choice factors



## Innocent explanations

- Customer preference:
  - Bougnaoui
  - Achbita
  - Not an innocent explanation if it is discriminatory in itself.
  - Cannot hide behind “customer preference”.
- Neutrality in relation to customers;
  - Can be an innocent explanation but is a very narrow concept.



## Collision between EU law and national procedural law: resolution

- C – 104/10 Kelly v National University of Ireland (University College, Dublin)
- C – 415/10 Galina Meister v Speech Design Carrier Systems GmbH
- C 83/14 CHEZ
  
- Practically effective law.

