

PROVING DISCRIMINATION

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BURDEN OF PROOF: WHO

- The rule: The Claimant must prove his or her case on the balance of probabilities.
- But: a claimant in a discrimination case faces a particular burden because:
 - (1) discriminators don't tend to advertise their prejudices; and
 - (2) employers and/or service providers are the custodians of all the relevant evidence which poses a particular problem for indirect discrimination claimants

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BURDEN OF PROOF: WHY

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- The broad principle of effective judicial protection for community rights demands that it must not be virtually impossible for citizens to exercise their rights
 - Early ECJ jurisprudence recognised that it could be particularly difficult for claimants to prove discrimination:
 - **Danfoss** (C-109/88) Female workers earned 7% less than male workers
 - **Enderby** (C-127/92) Speech therapists (women) earned less than pharmacists (men)

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BURDEN OF PROOF: WHERE

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- Then: [Article 4 Burden of Proof Directive 97/80/EC]
 - Now:
 - Article 8(1) 2000/43 ("**Race Directive**") (race)
 - Article 10(1) 2000/78 ("**Framework Directive**") (religion or belief; disability; age and sexual orientation)
 - Article 19(1) 2006/54 ("**Recast Directive**") (sex)

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- “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.”
 - Identical wording across the directives (Article 8(1) 2000/43; Article 10(1) 2000/78 and Article 19(1) 2006/54)

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- “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.”

2-stage test

- (1) persons who consider themselves wronged (claimants) establish facts from which it may be presumed that there has been direct or indirect discrimination
- (2) respondent to prove that there has been no breach

BURDEN OF PROOF: WHAT

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- Presumption does not mean conclusion:
- **CHEZ** C-394/11 AG Kokott opinion
- The language of Article 8(1) of the Race Directive only requires a PRESUMPTION not a definite CONCLUSION. Any stricter interpretation would jeopardise the practical effectiveness of the burden of proof regulations making them practically redundant.
- The reversal of the burden of proof maintains a fair balance between the parties because they do not completely remove the burden of proof from the victim but merely modify it.

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DIRECT DISCRIMINATION

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- Direct Discrimination “**treated less favourably than**” = comparison
- Aristotle: treating like cases alike



- Article 2(2)(a) 2000/43 (race); Article 2(2)(a) 2000/78 (framework) and Article 2(1)(a) 2006/54 (sex)

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DIRECT DISCRIMINATION

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- 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
 - You cannot justify direct discrimination: although see the recent CJEU case in *HK v European Commission* (Case C-460/18) which the CJEU declined to award a surviving husband a survivor's pension (where the death occurred within the first year of the marriage and there was a rule that said the marriage had to last longer than a year) on the basis that the 1-year rule was justified in order to combat fraud.

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EVIDENCE: DIRECT DISCRIMINATION

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- *Firma Feryn* (C-54/07)
 - Public statements may establish a prima facie case or presumption of discrimination (Stage 1)
 - The employer must then prove that its recruitment process was not discriminatory (Stage 2)
 - *Kelly* (C-104/10) Claimant's belief did not entitle him to the information about other applicant's qualifications in order to establish Stage 1 prima facie case
 - *Meister* (C-415/10) All the evidence (including a failure to provide information) is relevant in considering whether a Stage 1 prima facie case has been established by the claimant

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- **ACCEPT** (C-81/12) Employer's failure to distance himself from discriminatory statements is relevant to establishing a Stage 1 presumption of discrimination case.
 - **CHEZ** (C-394/11) Is a difference of protected characteristic and a difference of treatment enough? What more is required? The service provider's actions were underscored with a pernicious belief based upon stereotypes.
 - **COLEMAN** (C-303/06): When there is a prima facie case, the effective application of the principle of equal treatment then requires that the burden of proof should fall on the respondents, who must prove that there has been no breach of that principle (paragraph 54).

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- Indirect Discrimination:
 - **"...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"**
 - Article 2(2)(b) 2000/43 (race)
 - Article 2(2)(b) 2000/78 (framework)
 - Article 2(1)(b) 2006/54 (sex)

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- 3 stages:
 - Stage 1: Has the claimant established a prima facie case that there is a provision, criteria or practice which puts those with a protected characteristic (women etc) at a particular disadvantage and which causes them detriment?
 - Stage 2: Has the employer/service provider shown cogent evidence which disproves the existence of any of the elements of the complaint?
 - Stage 3: Can the employer justify the provision, practice or criteria?

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- Showing “**particular disadvantage**”
 - *Bilka-Kaufhaus* (C-170/84): “much lower proportion”
 - *Seymour-Smith* (C167/97): “considerably smaller percentage”
 - *O’Flynn* (C-237/94): “substantially higher proportion”
 - *Rinke* (C-25/02): “affects women in relatively larger numbers than men”
 - *RE v Praxair* (C/486/18): It is indirect discrimination to have a rule in which those who take part-time parental leave (mainly women) receive fewer benefits on dismissal than regular workers
 - *DW v Nobel Plastiques* (C-397/18) : dismissal selection criteria which take into account attendance adversely affect disabled employees who have high disability-related absence

EVIDENCE: STATISTICS

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- The problem with statistics: They can be misleading.
 - Example 1
 - Example 2
 - Total Pool = 10,000
 - Total Pool = 20
 - Men = 9,000 Women = 1,000
 - Men = 12 Women = 8
 - Compliant men = 700
 - Compliant men = 9
 - Compliant women = 50
 - Compliant women = 7
 - %age of compliant men = 7.7%
 - %age of compliant men = 75%
 - %age of compliant women = 5%
 - %age of compliant women = 87.5%

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EVIDENCE: STATISTICS

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- Recent Judgment:
 - *Minoo Schuch-Ghannadan v University of Vienna* (Case C-274/18):
 - do not need to submit specific statistics (case concerning part-time worker discrimination)

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HARASSMENT

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- Article 2(3) 2000/43 (race) and 2000/78 (framework):
 - “When an **unwanted conduct** related to racial or ethnic origin takes place with the **purpose or effect of violating the dignity** of a person and of **creating an intimidating, hostile, degrading, humiliating or offensive environment**. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.”

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HARASSMENT:

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- Article 2(1)(c), 2006/54 (sex):
 - “Where **unwanted conduct** related to the sex of a person occurs with the **purpose or effect of violating the dignity** of a person, and of **creating an intimidating, hostile, degrading, humiliating or offensive environment**.”
 - Article 2(1)(d), 2006/54 (sex):
 - Sexual Harassment:
 - “Where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.”

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APPLICATION

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- Direct Discrimination and Harassment:
 - First Stage
 - (1) Find primary facts: central facts, background facts, statistics
 - (2) Draw any appropriate inferences
 - Second Stage (where burden has shifted)
 - Explanation

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APPLICATION

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- Indirect Discrimination:
 - First Stage
 - Prima facie case that there is a provision criterion or practice (PCP) which puts claimant at a particular disadvantage and causes detriment
 - Second Stage
 - Has employer/service provider shown cogent evidence which disproves the existence of any of the elements of the complaint
 - Third Stage
 - Can the employer/service provider justify the PCP

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- Article 15, 2000/43 (race) ; Article 17, 2000/78 (framework):
 - “Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of **compensation to the victim**, must be effective, proportionate and dissuasive.”

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- Article 25, 2006/54 (sex):
 - “Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are applied. The penalties, which may comprise the payment of **compensation to the victim**, must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 5 October 2005 at the latest and shall notify it without delay of any subsequent amendment affecting them.”

CONCLUSION

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- Discrimination cases are about:
 - Inherently discriminatory acts: *Ahmed v Amnesty International* [2009] ICR 1450;
 - Mental processes: *Nagarajan v London Regional Transport* [1999] ICR 877

 - In preparing my presentation I have had the benefit of reading and in some cases drawing upon previous presentations by Anna Beale (Cloisters Chambers), Philip Rostant (Employment Judge, England & Wales) and Mary Stacey (Employment Judge, England & Wales).

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