

# THE BURDEN OF PROOF



A practical guide.

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## Origins of the Directive

Case 109/88, Danfoss [1989]  
ECR 3199

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

## 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.

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

## A Two Stage Test

Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, **(1) 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.

## A Two Stage Test

Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, (1) **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.

## A Two Stage Test

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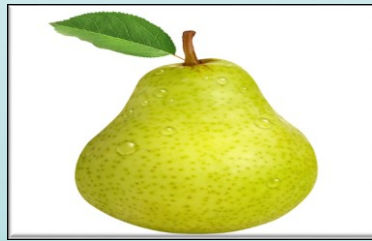
## Role of the Court

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 Comparator



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)

## An Example



Completed school  
Two years vocational training  
10 years in employment



Completed school  
Two years vocational training  
10 years in employment

What is needed to reverse the burden?

**Presumed ≠ Concluded -Belov**

*But*

**Negative treatment +**

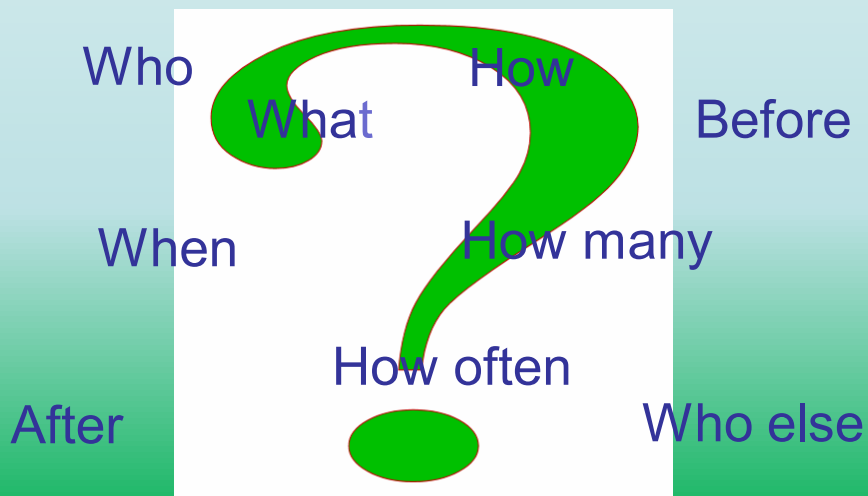
**Protected characteristic alone ≠**

**Burden shifted -Nikolova**

**Direct Discrimination  
The First Stage (1)**

**Find primary  
facts.**

**FACTS**



# Background?

Previous failed promotion applications

Insensitive or stereotyping comments by managers

Complaints about harassment by male colleagues ignored

Refusal to provide training opportunities

History of poor treatment of pregnant colleagues

History of poor relationship with manager



Non-promotion of female colleague

## The First Stage (2)

Draw any appropriate inferences.



Has the burden shifted to the employer?



Employer's explanation



Claim fails

## Second Stage.

Employers explanation.



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



## Indirect Discrimination (1)

### First stage

Has the claimant shown a **prima facie case** that a provision, criteria or practice puts *women* at a particular disadvantage and causes *her* detriment?

Yes? Second Stage.

No? Claim fails.

## Indirect Discrimination (2)

### Second stage

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 (3)

### Justification

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

No? Claim succeeds.

Yes? Claim fails.

## Statistical Evidence



## *Kelly and Meister*

Where rules of procedure operate in such a way as to risk the achievement of the objectives of the directive (97/80) it is for the national court to

“take all appropriate measures to ensure that that did not occur”.



## Accept C-81/12\*

“ Articles 2(2) and 10(1) of Council Directive 2000/78/EC of 27 November 2000,... **must be interpreted** as meaning that ...**homophobic statements by a person closely connected with the employer**...are capable of amounting to ‘facts from which it may be presumed that there has been ... discrimination ’ ”

\* (see also NH v Associazione Avvocatura per i diritti LGBTI — Rete Lenford-C 507/18)

