

Burden of proof in cases of sex discrimination

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Outline

- ▶ Sharing the burden of proof in **direct discrimination** cases and in **indirect discrimination** cases.
- ▶ How to establish a **prima facie case** of discrimination?
- ▶ How to prove **causal link**?
- ▶ How to prove that a measure is **affecting in particular** persons possessing a protected characteristic?
- ▶ How can the respondent **rebuttle** the case?

Definition from the Directives

- ▶ Art.8 Race Directive; Art.13 Employment Directive; Art.9 Gender Equality in Access to Goods and Services Directive; Art.19 Recast Gender Directive:

« ... [W]hen 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. »

Complainant → **Presumption of discrimination** → Respondent

Complainant: Establish a prima facie case of discrimination

- ▶ **Direct discrimination**
 - Unfavourable treatment
 - There is a (*probable*) causal link between this unfavourable treatment and a protected ground.
- ▶ **Indirect discrimination**
 - A disadvantage
 - *Likely to affect in particular* persons possessing a protected characteristic compared to other persons.

Direct discrimination: “Causal link”

- ▶ Use of comparator (CJEU, C-381/99 *Brunnhofer*) (situational testing, audio-video recordings, access information held by the respondent)
- ▶ Conduct diverges from standard practice (CJEU, C-83/14 *CHEZ*)
- ▶ Temporal proximity
- ▶ Public statements (CJEU, C-81/12 *Asociatia ACCEPT*, 2013)
- ▶ Special protection of pregnant women
- ▶ Special protection of persons with disabilities

Indirect discrimination: “Affecting in particular”

- ▶ Statistics
- ▶ The measure by its very nature, based on facts that are common knowledge, has an adverse impact mainly or especially on a protected group.

Respondent: Rebuttal

- Invalidate the prima facie case of discrimination:
 - Prove the treatment was not determined by a protected ground (direct discrimination).
 - Prove the contested measure would not put members of a protected group at a particular disadvantage compared to other persons (indirect discrimination).
- Show legitimate justification.

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