

The burden of proof in sex discrimination law

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Introduction

- ▶ Normal rules of evidence/burden-difficulties for claimants
- ▶ Shifting burden of proof EU law

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Case law: need for special rules

- ▶ *Danfoss* C-109/88: effective enforcement requires special rules re adducing evidence
- ▶ *Enderby* C-127/92: prima facie discrimination, shift to employer to objective reasons for difference in pay
- ▶ *Dansk Industri* C-400/93: piece work pay scheme

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Burden of Proof Directive/Recast Directive

- ▶ Burden of Proof Directive (Council Directive 97/80) devised: reflective of case law
- ▶ Now Recast Directive (Directive 2006/54/EC):-
- ▶ (a) Claimant establish facts from which discrimination presumed;
- ▶ (b) Respondent no connection with protected characteristic

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Case law Court of Justice: introduction

- ▶ Deferential approach to national rules
- ▶ Case law from other areas of discrimination

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Case law: claimant and burden of proof

- ▶ ***Brunhofer*** (C-381/99): claimant receiving less pay than comparator, performing like work. Employer activities not comparable or objective factors unrelated to sex
- ▶ ***Firma Feryn*** (C-54/07): discriminatory public statement of employer absent claimant sufficient

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Case law claimant and burden of proof

- ▶ ***Asociatia ACCEPT*** (C-81/12): shareholder homophobic statement: sufficient facts to shift burden of proof
- ▶ ***CHEZ*** (C83-14) discriminatory and prejudicial views of respondent-sufficient to shift burden of proof

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Examples of inference of discrimination

- ▶ Qualifications and experience of applicant and comparator-equal?
- ▶ No clear objective criteria for promotion process;
- ▶ Lack of transparency
- ▶ Witness evidence
- ▶ Discriminatory non objective criteria
- ▶ Questions at interview

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Examples of inference of discrimination

- ▶ Discriminatory practices in the past?
- ▶ Composition of interview panel
- ▶ Statistics
- ▶ Appropriate policies in place
- ▶ Public statements of employer

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Case law: Disclosure of information: burden of proof

- ▶ **Kelly** (C-104/10): refusal of employer to disclose information to claimant could be factor in burden of proof in limited circumstances. No general right.
- ▶ **Meister** (C-415/10): refusal to disclose information could be a factor in presumption of discrimination

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Case law: Rebuttal by employer

- ▶ **CHEZ** (C83-14): explanation by respondent-if depended on race-could not discharge the burden of proof
- ▶ **Firma Feryn** (C-54/07): discharge of inference of discrimination: had respondent distanced itself from discriminatory public statements?
- ▶ **Asociatia ACCEPT** (C-81/12): explicit recruitment policy? Good recruitment practice, necessary policies?

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Conclusions

- ▶ Shifting burden of proof: significant tool in advance of equality: equality subtle or subconscious
- ▶ Court of Justice careful not to trespass on national procedural rules

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Q&A

- ▶ Thank you for your attention!
- ▶ Questions, comments very welcome!