
THE BURDEN OF PROOF IN SEX DISCRIMINATION CASES

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- How to establish a presumption of discrimination?
- How can the presumption be rebutted?
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INTRODUCTION : ORIGIN OF SPECIAL RULES ON THE BURDEN OF PROOF IN DISCRIMINATION CASES

- Inequality between the parties in accessing proof typical of discrimination cases
- Jeopardises the effectiveness of the protection against discrimination

'The concern for effectiveness which thus underlies the directive means that it must be interpreted as implying adjustments to national rules on the burden of proof in special cases where such adjustments are necessary for the effective implementation of the principle of equality.' (CJUE, *Danfoss*, C-109/88, Judgment of 17.10.1989, para. 14)

'Where there is a prima facie case of discrimination, it is for the employer to show that there are objective reasons for the difference in pay. Workers would be unable to enforce the principle of equal pay before national courts if evidence of a prima facie case of discrimination did not shift to the employer the onus of showing that the pay differential is not in fact discriminatory.' (CJUE, *Enderby*, C-127/92, Judgment of 27.10.1993, para. 18)

INTRODUCTION : DIRECTIVE PROVISIONS ON THE BURDEN OF PROOF IN DISCRIMINATION CASES

- First Codified in Article 4 of Council Directive 97/80 of 15 December 1997 on the burden of proof in sex discrimination cases
- Now enshrined in Art. 9 Gender Equality in Access to Goods and Services Directive & Art. 19 Recast Gender Directive

'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'

THE SHARING OF THE BURDEN OF PROOF: HOW DOES IT WORK?

- Complainants are not exempted from providing evidence but their task is alleviated.
- Two-stage test:
 - 1. The claimant must establish **facts from which it may be presumed** that there has been direct or indirect discrimination, i.e. establish a prima facie case of discrimination.
 - 2. If the Court deems that a prima facie case of discrimination has been established, **the respondent may try to rebut the presumption** by proving that no discrimination has occurred.

HOW TO ESTABLISH A PRESUMPTION OF DISCRIMINATION?

- Complainants must adduce facts that are sufficient to raise a *suspicion* of discrimination:
 - ‘...prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the claimant’. (Court of Appeal of England and Wales, *Igen v Wong* (2005))
 - ‘At the initial stage the claimant is merely seeking to establish a prima facie case. Hence, it is not necessary to establish that the conclusion of discrimination is the only, or indeed the most likely, explanation which can be drawn from the proved facts. It is sufficient that the presumption is within the range of inferences which can reasonably be drawn from those facts.’ (Irish Labour Court, *McCarthy v Cork City Council*, EDA0821, 16.12.2008)

HOW TO ESTABLISH A PRESUMPTION OF DISCRIMINATION?

- In case of **direct discrimination**, claimants must establish that :
 - They suffered unfavourable treatment (eg: application for a job rejected; unequal pay; firing);
 - There is a causal link between this unfavourable treatment and a protected ground (ie sex).
 - Sharing of the burden of proof is especially useful to prove this causal link.
 - What kind of facts may be adduced to substantiate this causal link?
 - Use of a comparator
 - Other types of facts raising suspicion that the adverse treatment was determined by the prohibited ground

DIRECT DISCRIMINATION: CAUSAL LINK BETWEEN UNFAVOURABLE TREATMENT AND A PROTECTED GROUND

- Use of a comparator (= comparison with the treatment granted to a person of the other sex):

Example in a case of alleged sex discrimination in relation to pay:

'It is accordingly for the plaintiff to prove by any form of allowable evidence that the pay she receives from the Bank is less than that of her chosen comparator, and that she does the same work or work of equal value, comparable to that performed by him, so that prima facie she is the victim of discrimination which can be explained only by the difference in sex' (ECJ, *Brunnhofner*, 26 June 2001, para. 58)

DIRECT DISCRIMINATION: CAUSAL LINK BETWEEN UNFAVOURABLE TREATMENT AND A PROTECTED GROUND

- Other types of facts raising suspicion that adverse treatment was determined by a prohibited ground

NB: comparator not necessarily needed to prove direct discrimination!

- Often: Combination of factors:

A national court 'should take account of *all the circumstances* surrounding the practice at issue, in order to determine whether there is sufficient evidence for a finding that the facts from which it may be presumed that there has been direct discrimination on grounds of ethnic origin have been established'. (CJEU, CHEZ case, C-83/14, 16.7.2015, para. 80-84).

DIRECT DISCRIMINATION: CAUSAL LINK BETWEEN UNFAVOURABLE TREATMENT AND A PROTECTED GROUND

- CHEZ Razpredelenie Bulgaria AD case (C-83/14):
 - Practice of an electricity supplier of placing electricity meters at a height of between 6 and 7 meters in a district inhabited mainly by Roma (v. 1.7 meter in other districts)
 - Elements to take into account: i.a. it was common knowledge that the company had established this practice only in districts inhabited mainly by Roma; statements made by the company suggesting prejudice against Roma; company had failed to adduce evidence of alleged damage caused by inhabitants of these districts; compulsory, widespread and lasting nature of the practice.

DIRECT DISCRIMINATION: PROTECTION AGAINST DISMISSAL BASED ON PREGNANCY OR MATERNITY

- Special case: protection against pregnancy or maternity discrimination
- Where a woman shows that she has been dismissed after her employer had been informed of her pregnancy or during maternity leave,
- The onus is on the employer to prove that the dismissal was grounded on exceptional circumstances unrelated to pregnancy or maternity.

NB: the female worker does not have to prove the causal link between her dismissal and her pregnancy or maternity.

DIRECT DISCRIMINATION: PROTECTION AGAINST DISMISSAL BASED ON PREGNANCY OR MATERNITY

Art. 10 of Council Directive 92/85/EC of 19 October 1992 on safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding:

« 1. Member States shall take the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8 (1), save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent;

2. if a worker, within the meaning of Article 2, is dismissed during the period referred to in point 1, the employer must cite duly substantiated grounds for her dismissal in writing (...) »

See also the Recast Directive:

'A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would have been entitled during her absence.' (Article 15)

HOW TO ESTABLISH A PRESUMPTION OF DISCRIMINATION? INDIRECT DISCRIMINATION

- In case of **indirect discrimination**, claimants must establish that :
 - The contested measure imposes a disadvantage;
 - This disadvantage is likely to affect particularly persons possessing a protected characteristic compared to other persons.
- How to demonstrate the particular disadvantage?
 - Statistics
 - Showing that the measure intrinsically disadvantages especially members of a protected group

INDIRECT DISCRIMINATION: THE PARTICULAR DISADVANTAGE

- **Statistics** showing that a measure has an adverse impact on a substantially higher proportion of members of the protected group than members of other groups:

'...where significant statistics disclose an appreciable difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men, Article 119 of the Treaty requires the employer to show that that difference is based on objectively justified factors unrelated to any discrimination on grounds of sex' (CJEU, *Enderby*, para. 19)

Difference of treatment between full-time and part-time workers: 'If the statistics available indicate that, of the workforce, the percentage of part-time workers who are women is considerably higher than the percentage of part-time workers who are men, it will be necessary to hold that such a situation is evidence of apparent sex discrimination, unless the legislation at issue in the main proceedings is justified by objective factors wholly unrelated to any discrimination based on sex' (CJEU, *Voss v Land Berlin*, C-300/06, para. 40).

STATISTICS AS MEANS OF PROOF IN DISCRIMINATION CASES

- In order to be conclusive, statistics must meet certain conditions:

‘It is for the national court to assess whether it may take into account those statistics, that is to say, whether they cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena, and whether, in general, they appear to be significant.’ (CJEU, *Enderby*, para. 17).

‘...in order to establish whether a measure adopted by a Member State has a disparate effect as between men and women to such a degree as to amount to indirect discrimination (...), the national court must verify whether the statistics available indicate that a considerably smaller percentage of women than men is able to fulfil the requirement imposed by that measure.’ (CJEU, *Seymour-Smith and Laura Perez*, C-167/97, Judgment of 9.2.1999, para. 65)

STATISTICS AS MEANS OF PROOF IN DISCRIMINATION CASES

‘...the best approach to the comparison of statistics is to consider, on the one hand, the respective proportions of men in the workforce able to satisfy the requirement of two years’ employment under the disputed rule and of those unable to do so, and, on the other, to compare those proportions as regards women in the workforce. It is not sufficient to consider the number of persons affected, since that depends on the number of working people in the Member State as a whole as well as the percentages of men and women employed in that State.’ (CJEU, *Seymour-Smith and Laura Perez*, C-167/97, Judgment of 9.2.1999, para. 65)

=> in order to determine whether a national law disadvantages a considerably higher number of women than men, the best approach for the CJEU is to take account of all workers subject to this specific legislation.

STATISTICS AS MEANS OF PROOF IN DISCRIMINATION CASES

- But: relevant statistics may be inaccessible or unavailable to the complainant.
- Cf. CJEU, *Minoo Schuch-Ghannadan*, C-274/18, 3 October 2019:
 - Austrian legislation allowing universities to set different maximum durations of successive fixed-term work contracts for full-time workers and part-time workers alleged to entail discrimination against women.
 - Unable to provide data on workers employed by universities, complainant presented statistical data on the Austrian labour market in general, showing that a considerably higher proportion of women than men were working part-time.
 - The Court: Unavailability or inaccessibility of statistical data relating specifically to the legislation at stake may compromise the achievement of the objective of the special rule on the burden of proof.
 - Hence, where workers alleging indirect discrimination have no access or little access to statistics on workers specifically concerned by the legislation at stake, they should be allowed to present general data on the employment market of the Member State concerned (para. 55-57).

INDIRECT DISCRIMINATION: THE PARTICULAR DISADVANTAGE

- How to demonstrate the particular disadvantage?
 - Elements showing that the measure, **by its very nature**, based on facts that are **common knowledge**, has an adverse impact mainly or especially on a protected group.
 - Cf. CJEU, *O'Flynn case*: Funeral payment made to workers under UK legislation not covering transportation of the coffin outside the UK – alleged to entail indirect discrimination against migrant workers:

‘it is above all the migrant worker who may, on the death of a member of the family, have to arrange for burial in another Member State, in view of the links which the members of such a family generally maintain with their State of origin’ (*O'Flynn v Adjudication Officer*, C-237/94, Judgment of 23.5.1996, para. 22)
 - Eg: Requirement to work full time deemed to have an ‘obviously disproportionate impact on women’ (Irish Equality Tribunal, *McDonagh v Navan Hire Limited*, DEC-S2004-017, 6.2.2004)

HOW CAN A PRESUMPTION OF DISCRIMINATION BE REBUTTED?

Two ways in which a respondent may rebut a presumption of discrimination:

- By invalidating the elements established prima facie by the claimant:
- Or by showing that the contested measure rests on a legitimate justification under EU law:

HOW CAN A PRESUMPTION OF DISCRIMINATION BE REBUTTED?

Two ways in which a respondent may rebut a presumption of discrimination:

- By invalidating the elements established prima facie by the claimant:
 - Proving that the treatment was not determined by sex (in case of alleged direct discrimination)
 - Proving that the contested measure did not impose any particular disadvantage on women/men compared to men/women (in case of alleged indirect discrimination)

HOW CAN A PRESUMPTION OF DISCRIMINATION BE REBUTTED?

Two ways in which a respondent may rebut a presumption of discrimination:

- By showing that the contested measure rests on a legitimate justification under EU law:
 - In case of alleged direct discrimination: only a limited range of justification admitted by EU law.
 - In case of alleged indirect discrimination: defendant must prove that the contested provision, criterion or practice, despite the particular disadvantage it entails:
 - is objectively justified by a legitimate aim
 - And that the means of achieving that aim are appropriate and necessary.

COMPLAINANT'S ACCESS TO EVIDENCE HELD BY RESPONDENT

Common problem in discrimination cases: documents that would allow to substantiate a discrimination claim are in the hands of the alleged discriminator.

'[T]he referring court must not overlook the fact that, given that the employer refused to disclose information, it is not unlikely that that employer can, in that way, make his decisions virtually unchallengeable. In other words, the employer continues to keep in his sole possession the evidence upon which ultimately depend the substance of an action brought by the unsuccessful job applicant and, therefore, its prospects of success. [...]

The job applicant is therefore entirely dependent on the good will of the employer with regard to obtaining information capable of constituting facts from which it may be presumed that there has been discrimination and may experience genuine difficulty in obtaining such information which is, nevertheless, essential in order to trigger the lightening of the burden of proof.'

(Opinion of Advocate General Mengozzi, 12. I.2012, Meister, para. 32).

COMPLAINANT'S ACCESS TO EVIDENCE HELD BY RESPONDENT

- Can complainants in discrimination proceedings require the disclosure of information retained by the respondent that would allow them to establish a presumption of discrimination?
- Issue of confidentiality and protection of personal data of third parties mentioned in the documents.
- CJEU case law:
 - *Kelly v National University of Ireland (University College, Dublin)*, C-104/10, 21.7.2011
 - *Meister v Speech Design Carrier Systems GmbH*, C-415/10, 19.4.2012

COMPLAINANT'S ACCESS TO EVIDENCE HELD BY RESPONDENT

- Response of the Court:
 - EU antidiscrimination law **does not entitle complainants to information** held by the respondent that would allow to establish a presumption of discrimination – such as information on whether another applicant was recruited or on the qualifications of other applicants.
 - However, a respondent's **refusal to disclose information may be one of the factors to be taken into account** when establishing facts from which it may be presumed that there has been discrimination.
 - National judges also need to have regard to personal data protection norms.

COMPLAINANT'S ACCESS TO EVIDENCE HELD BY RESPONDENT

- Some national devices may mitigate the problem of complainants' access to information:
 - In some countries, civil judges have **investigatory powers allowing them to order the delivery of certain documents** (but issuing of such order may be conditional on the existence of other evidence)
 - In some countries, **information-seeking procedures** are available to all persons who consider themselves victims of discrimination
- Cf. Ireland - Section 76 Employment Equality Act (EEA):
- Allows a person seeking redress for discrimination to request information from the alleged discriminator, using the form prescribed by the regulation.
 - Courts may draw such inferences as are appropriate from a failure to supply the information sought under Section 76 (EEA, Section 81).

COMPLAINANT'S ACCESS TO EVIDENCE HELD BY RESPONDENT

- See however *Danfoss* case on pay discrimination:
 - Employer applying a system of individual pay supplements implemented in such way that employees were unable to find out the reasons for pay differences between them.
 - '...where an undertaking applies a system of pay which is totally lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men' (CJEU, *Danfoss*, C-109/88, Judgment of 17.10.1989, para. 16).

COMPLAINANT'S ACCESS TO EVIDENCE HELD BY RESPONDENT

- Commission's initiatives aimed at fostering 'pay transparency':
 - Commission recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency
 - Draft directive on pay transparency to be proposed in late 2021.

COMPLAINANT'S ACCESS TO EVIDENCE HELD BY RESPONDENT

- Commission recommendation on pay transparency:

'Obscure pay structures and a lack of available information about pay levels of employees performing the same work or work of equal value are major contributing factors to these difficulties.' (Recital 8)

Right of employees to obtain information on pay levels:
'Member States should put in place appropriate and proportionate measures to ensure that employees can request information on pay levels, broken down by gender, for categories of employees doing the same work or work of equal value (...)' (art. 3)

Reporting on pay:
'Member states should put in place measures that ensure that employers in undertakings and organisations with at least 50 employees regularly inform employees, workers' representatives and social partners of the average remuneration by category of employee or position, broken down by gender.' (art. 4)

COMPLAINANT'S ACCESS TO EVIDENCE HELD BY RESPONDENT

- Commission recommendation on pay transparency:

Pay audits

'Member States should take appropriate measures to ensure that pay audits are conducted in undertakings and organisations with at least 250 employees. These audits should include an analysis of the proportion of women and men in each category of employee or position, an analysis of the job evaluation and classification system used and detailed information on pay and pay differentials on grounds of gender. These audits should be made available to workers' representatives and social partners on request.' (article 5)