
The Burden of Proof in sex discrimination cases

Based on Report for European
Commission on the Burden of Proof
by Lilla Farkas and Orlagh O'Farrell,
2010



This training session is funded under the 'Rights, Equality and Citizenship Programme 2014-2020'
of the European Commission.

Reversing the Burden of Proof

Practical dilemmas at the
national and European levels

European Network of Legal Experts in the
Non-discrimination field, 2015
Written by Lilla Farkas and Orlagh O'Farrell

The Report

- ❖ Eight substantive chapters - focus on EED & RED, but applies to gender too
 - ❖ analysis of 4 recent judgments (Ch 6)
 - ❖ full scheme of directive-compliant civil proceedings (causation: harm, conduct, protected ground, comparator) to locate the SHIFT
 - ❖ domestic practice and general trends (Ch 9)
 - ❖ recommendations - standard setting re application of BoP, facilitating access to information (Ch 10)

The BoP provision

- ❖ uniform across gender and the other grounds except for nationality
- ❖ application contingent on the definition of the type of discrimination invoked - sui generis forms of direct discrimination: harassment (Coleman), victimization & segregation (ECtHR case law)
- ❖ intent not necessary but taken into account when shown
- ❖ does not apply in criminal cases
- ❖ no obligation to ensure application in proceedings where court or competent body investigate the facts - contentious!

'Double trouble'

- ❖ In order to connect evidence to the showing of bias, the BoP is treated at two distinct junctions:
 - ❖ (i) it lowers the onus of proof (presumption) resting on the plaintiff in relation to the causal link between the protected ground and the conduct (prima facie case), while
 - ❖ (ii) placing and limiting the remaining onus of proof in relation to bias onto the respondent (justification defence).

Prima facie case

- The reversal of the burden of proof does not mean that plaintiffs are exempt from convincing the court that they have a case. When establishing a *prima facie* case, they convince the court of the likeliness or probability that they suffered discrimination.
- Bias and prejudice need to be 'factored in' to the process for the benefit of those who usually suffer it
- Racial Equality Directive, Art. 8; Employment Equality Directive, Art. 10; Gender Equality Directive (recast), Art. 19; Gender Goods and Services Directive, Art. 9.
- 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.

Justification defence

- The burden of proof shifts before causation is complete. It moves to the respondent. He will not be held liable if proving that discrimination played no part in the treatment or effect complained of.
- If the respondent fails to establish that the treatment arose from objective reasons unrelated to discrimination, he will be liable for a breach of non-discrimination law.
- This is the only interpretation compatible with Section 611a(1) of the German Civil Code the EU BoP provision was modeled on. This provision set out that “where an employee substantiates by prima facie evidence facts from which it may be presumed that there has been less favorable treatment on grounds of sex, it shall be for the employer to prove that this treatment is justified by *objective reasons other than sex*”.
- Justification defence is limited in certain cases.

The ex culpatio based scheme known from torts

plaintiff proving facts

respondent proving facts

respondent proving facts

burden of proof reverses

justification defence

Any party can refute the allegations made by the other party throughout the entire procedure

plaintiff's claim

prima facie case

causation complete

judgement

The Achilles heel: the comparator I.

- Talks to causality: harm - conduct - protected ground

“Discrimination is not a response to a given individual’s character or behavior, but rather a repeated and unthinking reaction to any person who possesses a particular trait”. What follows from this is that “a person is badly treated because he is, involuntarily, a member of a group” disliked by the respondent or by society at large. (Laurence Lustgarten)

- Difficult to identify

The Achilles heel: the comparator II.

- ❖ lack of clear definition of grounds - direct discrimination may be conceived as indirect (e.g. minority language)
- ❖ real, assumed and associated ground
- ❖ hypothetical - substantive ideal of human dignity or standard of treatment widely acknowledged (duty of care)
- ❖ homogeneity of groups - Nikoloudi and Maruko (covert direct discrimination)
- ❖ no comparator needed: pregnancy, statement of bias (Feryn, Accept), harassment (Coleman) ...

No guidelines from the CJEU

- The CJEU has clarified the standards of prima facie cases (pregnancy) and justification re gender & shaped the justification of age discrimination.
- No standard setting despite domestic courts' requests in Feryn & Accept.
- Standard setting feasible and beneficial: Igen v Wong, UK Court of Appeals.
- Standard setting necessary:
 - imperfect understanding of how the rule applies re *prima facie* cases
 - standard of proof for rebuttal not known for all states, may be lenient in others
 - before EBs the outcome tends to be better for the plaintiff
 - may also be differences whether litigant is an individual or an NGO

Standard setting

IGEN LTD V WONG: British Court of Appeal 18 FEB 2005

Each case raises procedural issues in discrimination cases, asking where the burden of proof had shifted. It required a two stage process before a complaint could be upheld.

First the claimant had to establish facts allowing the tribunal to conclude, in the absence of an adequate explanation, that an unlawful act of discrimination had taken place. If that was established, the respondent was to establish that he did not commit the unlawful act.

The court set out 13 additional considerations.

Once an employee has established a prima facie case of discrimination by showing that there is prima facie evidence to the effect that he/she has been treated less favourably than a relevant comparator the burden of proof transfers to the employer.

If he is to escape liability the employer must then prove on the balance of probabilities that the less favourable treatment complained of was not on the grounds of discrimination.

The stumbling block: access to information

- ❖ Flagged as a huge issue at domestic level
- ❖ Reinforced by referrals: Kelly & Meister, Accept & Feryn
 - ❖ lack of transparency of the employer's practices (Danfoss: prevents any form of supervision by the national courts): total or partial lack of information
 - ❖ equal pay v access (to employment) cases: worker not yet 'in'
 - ❖ respondents cultivate the reluctance of courts to make orders of disclosure if that could lead to disclosing confidential data of identifiable individuals who are not party to the proceedings.

How to establish a presumption of discrimination?

- ❖ In case of **direct discrimination**, complainants must establish that :
 - They suffered unfavourable treatment;
 - There is a causal link between this unfavourable treatment and a protected ground.
 - => Sharing of the burden of proof 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 (NB: comparator not necessarily needed to prove direct discrimination)

Direct discrimination: causal link between unfavourable treatment and a protected ground

- Use of a comparator:

Example (alleged sex discrimination in relation to pay):

'It is accordingly for the plaintiff to prove by any form of allowable evidence that they 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, Brunnhofer, 26 June 2001, para. 58)

How to establish a presumption of discrimination?

Indirect discrimination

- ❖ In case of **indirect discrimination**, complainants 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.

Statistics as means of proof in discrimination cases

❖ Especially used in the context of *indirect* discrimination

❖ But can be also useful in *direct* discrimination cases:

=> Statistics showing a pattern of discrimination by a public or private person or organisation can reinforce other evidence and contribute to trigger a shift in burden of proof

Cf. Ethnic Profiling case before the French Court of Cassation (2016):

- Complainants claiming to be the victim of ethnic profiling.

- Research findings showing that discriminatory identity checks carried out by French police on persons belonging to certain ethnic minorities are especially frequent can constitute a contextual element which, combined with witness reports, may lead to a shift in the burden of proof (Court of Cassation, First Civil Chamber, Decision No. 15-25873, 9.11.2016).

Special means of proof: statistics and situation testing

- Commonly accepted means of evidence (like written documents, witness statements, audio or video recordings) are often not available to alleged victims in case of discrimination.

- Development of particular evidentiary tools to help complainants establish a presumption of discrimination: statistics and situation testing.

Statistics as means of proof in discrimination cases

- ❖ NB: in order to be conclusive, statistics must meet certain conditions.
- ❖ In particular: according to CJEU case-law, in order to determine whether a national law affects a considerably higher number of members of a protected group than other, national courts must take into account all workers *subject to this specific legislation* (see e.g. *Seymour-Smith*, C-167/97, 9.2.1999, para. 59).
- ❖ But: CJEU, *Minoo Schuch-Ghannadan*, C-274/18, 3 October 2019:
 - ❖ 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.
 - ❖ Therefore, where workers alleging indirect discrimination have no access or little access to statistics or facts on workers specifically concerned by the national legislation at stake, they should be allowed to present general data on the employment market of the Member State concerned (para. 55-57)

Situation testing as means of proof in discrimination cases

- ❖ Two ways in which situation testing can serve as means of proof:
 - ❖ A person who took part in a situation test and was refused a job, good or service in this context sues the 'tested' organisation.
 - ❖ A person who did not participate in a situation test, but was refused a job, good or service by a given person or organisation, invokes, among other evidence, a situation test documenting the discriminatory behaviour of this person or organisation.
- ❖ Official recognition of situation testing as valid means of proof in discrimination cases:
 - ❖ The case of France
 - ❖ The case of Belgium

Situation testing: the case of France

- ❖ Use of situation testing as evidence of discrimination admitted in criminal proceedings by Court of Cassation in 2005

Decision No. 04-87354, 7.6.2005. See also Decision No. 15-87378, 28.2.2017.

- ❖ Article 225-3-1 Penal Code inserted in 2006: the fact that the victim sought access to goods, an act, service or contract *with the aim of demonstrating the existence of a discriminatory behaviour*, does not impede a finding of discrimination if proof of this behaviour is provided.
- ❖ Situation testing must be deemed reliable and conclusive by the court.
- ❖ In practice, courts generally consider that the results of a test must be supported by other sources of evidence to lead to a finding of discrimination.

How to rebut a presumption of discrimination?

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

- By invalidating the elements established prima facie by the complainant:
 - Proving that the treatment was not determined by a protected ground (direct discrimination)
 - Proving that the contested measure would not put members of a protected group at a particular disadvantage compared to other persons (indirect discrimination)
- Or by showing that the contested measure rests on a legitimate justification.

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
 - Combination of factors
 - CJEU, CHEZ case, C-83/14, 16.7.2015, para. 80-84.
 - Irish Equality Tribunal, *McGreal v Cluid Housing*:
 - Eviction of an older tenant from social housing
 - Presumption of age discrimination => established based on a set of facts: eviction decided without giving reasons and inviting the complainant to respond; procedure adopted was extraordinary and at variance with standard practice in social housing; the decision followed a complaint of elder abused made by complainant and other tenants.

Indirect discrimination: the particular disadvantage

- ❖ How to demonstrate the particular disadvantage?
 - ❖ **Statistics** showing that the measure has an adverse impact on a significantly higher proportion of members of the protected group than members of other groups.
 - ❖ But also: 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.
 - ❖ Requirement to have competence in English likely to place persons whose native language is not English at a disadvantage relative to English native speakers (Irish Labour Court, *Noonan Services v A Worker*, EDA1126, 29.07.2011)
 - ❖ 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)

Situation testing: the case of Belgium

- ❖ New provisions inserted in 2017 in the Brussels Region antidiscrimination legislation:
 - ❖ Where a situation test is conclusive, it constitutes a fact on the basis of which a presumption of discrimination can be established (in civil or criminal proceedings).
 - ❖ Conditions to be met for the test to be admissible in court as means of proof:
 - ❖ The test may be carried out by designated civil servants, victims themselves or an equality body or an NGO acting in support of a victim.
 - ❖ The test cannot amount to provocation within the meaning of criminal law:
'The test cannot have the effect of creating, reinforcing or confirming a discriminatory practice where there was no strong indication or practices likely to be characterized as discrimination.'
 - ❖ The test cannot be carried out randomly.

Situation testing: the case of Belgium

- ❖ Conditions to be met for the test to be admissible in court as means of proof:
 - ❖ The test cannot be carried out randomly:
 - ❖ The decision to carry out a test must be based on elements raising a suspicion of discriminatory behaviour on the part of a given employer or activity sector.
 - ❖ Where test is carried out by civil servants or NGO: it can only be used following complaints or reports of discrimination and based on strong indication of practices likely to be characterized as discrimination within one employer or activity sector.

Situation testing: the case of Belgium

NB:

- ❖ Belgian Region Legislation also allows regional labour inspectors to carry out situation tests in the context of their general employment regulations monitoring.
- ❖ Federal Law adopted in 2018 authorizes social inspectors to carry out, under certain conditions, situation tests in order to monitor compliance with (criminal provisions of) antidiscrimination legislation. But the law does not state whether these tests would be admissible as means of proof in court.

Cf. New Art. 42/1(1) Belgian Social Criminal Code.

Complainant's access to evidence held by respondent

'[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, 12.1.2012, Meister, para. 32).

Complainant's access to evidence held by respondent

- 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
- 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.

Need to improve access to Information

- ❖ Two ways available
 - ❖ CJEU analyses and resolves mismatches between data protection and right to equal treatment provisions once a thoughtful referral comes before it
 - ❖ legal tools adopted at EU level to facilitate access to information, e.g. through questionnaire procedures

Table of legislation

- Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201, 26.7.2013, pp. 60-65.
- Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, Official Journal L 014 20/01/1998, p. 6.
- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180, 19/07/2000 pp. 0022-0026.
- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303, 02/12/2000, p.0016-0022.
- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Official Journal L 204, 26.7.2006, pp. 23-36.
- Proposal for a Council Directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services COM (2003) 657 final.

List of cases

- ❖ **CJEU**
- ❖ Case C-109/88 Danfoss [1989] ECR I-3199.
- ❖ Case C-127/92 Enderby v Frenchay Health Authority 1993 ECR I-05535.
- ❖ Case C-13/94 P v S and Cornwall County Council, ECR 1996.
- ❖ Case C-167/97 R v Secretary of State for Employment, ex parte Seymour-Smith and Perez [1999] ECR I-623.
- ❖ Case C-432/05 Unibet Ltd v Justitiekanslern [2007] ECR I—2271.
- ❖ Case C-267/06 Tadao Maruko v Versorgungsanstalt der deutschen Bühnen [2008] ECR I-1757.
- ❖ Case C-303/06 S. Coleman v Attridge Law and Steve Law [2008] ECR I-5603.
- ❖ Case C-13/05 Sonia Chacón Navas v Euresst Colectividades SA [2006] ECR I-6467.
- ❖ Case C-54/07 Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV [2008] ECR I—5187.
- ❖ Case C-246/09 Bulicke [2010] ECR I-7003.
- ❖ Case C-415/10 Meister v Speech Design [2012] ECR I-0000.
- ❖ Case C-104/10 Patrick Kelly v National University of Ireland (University College, Dublin), [2011] ECR I-06813.
- ❖ Case C-81/12 Asociația Accept v Consiliul Național pentru Combaterea Discriminării, 25 April 2013 .

National Courts

Oxford v Department of Health and Social Security (1977) ICR 885, United Kingdom.

Mitchell v Southern Health Board (2001) Labour Court DEE 011, Ireland.

IBM v Buscail, Court of Appeal, Montpellier, (2003) No 0200504, France.

Equality Tribunal (2004) EED048, Ireland.

Igen Ltd (Formerly Leeds Careers Guidance) and Others v Wong, Chamberlin and Another v Emokpae, and Webster v Brunel University (2005) IRLR 258, United Kingdom.

Madarassy v Nomura International Plc, (2007) ICR 867, United Kingdom.

Supreme Court decision (2008) 9ObA177/07f, Austria.

