

The burden of proof in European law. Proving discrimination.

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Shifting the burden of proof

„1. 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.

(Art. 8 Race Directive; Art. 13 Employment Directive; Art. 9 Gender Equality in Access to Goods and Services Directive; Art. 19 Recast Gender Directive)

- 1** The relevance of the burden of proof
- 2** Reliance on the principle of effectiveness
- 3** Identical provisions in Directives (2000/43/EC, 2000/78/EC, 2006/54/EC)
- 4** The concept of shifting the burden of proof

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Shifting the burden of proof

A longstanding concern in anti-discrimination law

- in Danfoss, the court acknowledged the necessity of adjusting national rules on the burden of proof to ensure effective implementation of the principle of equality
- in Enderby, the court articulated the principle of shifting the burden of proof once certain conditions are met: '[w]here there is a prima facie case of discrimination, it is for an employer to show that there are objective reasons for a difference in pay'

Sources:

1. C-109/88, Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss [1989] ECR 3199
2. C-127/92, Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health [1993] ECR I-5535

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Shifting the burden of proof: how does it work?

Two-stage test:

- A complainant must establish facts from which it can be presumed that there has been direct or indirect discrimination, i.e. establish a prima facie case of discrimination
- If a court deems that a prima facie case of discrimination has been established, a defendant can try to rebut the presumption by proving that discrimination has not occurred.

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Shifting the burden of proof

Currently

- Once the person alleging discrimination establishes a presumption of discrimination (prima facie discrimination), the burden then shifts to the defendant who can show that the difference in treatment is not discriminatory in two ways:
 - by proving that there was no causal link between the prohibited ground and different treatment
 - by demonstrating that even though different treatment is related to the prohibited ground, it has a reasonable and objective justification

C-181/99, *Susanna Brunnhofer vs der österreichischen Postsparkasse AG, 2001 (lower wages for female workers)*

- „However, it is clear from the case-law of the court that the burden of proof can shift when this is necessary to avoid depriving workers who appear to be the victims of discrimination of effective means of enforcing the principle of equal pay”

C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*

- „Public statements by which an employer lets it be known that under its recruitment policy it will not recruit any employees of a certain ethnic or racial origin are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory within the meaning of Article 8(1) of Directive 2000/43. It is then for that employer to prove that there was no breach of the principle of equal treatment. It can do so by showing that the undertaking's actual recruitment practice does not correspond to those statements.”

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How to establish a presumption of discrimination?

To establish a prima facie case of discrimination, complainants must adduce facts that are adequate and sufficient to raise a suspicion of discrimination. They have to 'persuade a court of the likelihood or probability that they suffered discrimination.'

Cases:

- *Igen v Wong* (the Court of Appeal of England and Wales); '...a claimant has to prove on the balance of probabilities facts from which a tribunal could conclude, in the absence of an adequate explanation, that an employer has committed an act'
- *Mitchell v Southern Health Board* (the Irish Labour Court); 'a claimant must prove, on the balance of probabilities, the primary facts on which they rely in seeking to raise a presumption of unlawful discrimination'

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How to establish a presumption of discrimination?

1 Direct discrimination

In EU law it is defined as arising where one person is, has been, or would be because of a feature that is protected treated less favourably in a comparable situation than another.

Complainants must persuade a court of two things: **first**, that they suffered harm in the form of unfavourable treatment and **second** that there is a causal relation between the unfavourable treatment and a feature that is protected.

2 Indirect discrimination

Defined as resulting from an apparently neutral provision, criterion, or practice which would put persons having a feature that is protected at a particular disadvantage when compared to other persons.

Complainants need to establish that the measure that is contested imposes a disadvantage and that the disadvantage – despite the fact that the measure is not directly based on a prohibited ground – is likely to affect *in particular* persons possessing a feature that is protected in comparison to other persons.

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How to establish a presumption of discrimination?

C-381/99, Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG [2001]

1 *the fact that a female employee who claims to be the victim of discrimination on grounds of sex and a male equivalent are classified in the same job category under a collective agreement governing their employment is not in itself sufficient to conclude that the two employees are performing the same work or work to which equal value is attributed within the meaning of Article 119 of the Treaty and Article 1 of the Directive because that fact is only one indication amongst others that the criterion is met*

2 *as a general rule, it is for employees who consider themselves to be the victims of discrimination to prove that they are receiving lower pay than that paid by the employer to a colleague of the other sex and that they are in fact performing the same work or work of equal value, comparable to that performed by the chosen equivalent; an employer may then not only dispute the fact that the conditions for the application of the principle of equal pay for men and women are met in the case but also put forward objective grounds, unrelated to any discrimination based on sex, to justify the difference in pay*

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Prima facie case of discrimination

- 1** Comparability
- 2** Lack of transparency
- 3** Occupational segregation
- 4** Conduct of connected / influential parties
- 5** Historic discrimination

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Rebutting the presumption

Once a presumption of discrimination has been established, the onus shifts to the defendant who is responsible for demonstrating that discrimination has not occurred. There are two ways in which a defendant can rebut the presumption:

- 1** Invalidating the factors that the complainant established by proving that :
 - the individual was not unfavourably treated (in direct discrimination)
 - a protected ground did not apply to the individual (in direct discrimination)
 - that the contested measure did not impose any particular disadvantage on members of the protected group (in indirect discrimination).
- 2** By showing that the contested measure has legitimate justification under EU law.

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Rebutting the presumption

- 1 It might be said that shifting the burden of proof places an unfair onus on organisations responding to claims of discrimination on the basis that “proving a negative” is hardly easy and sometimes it is impossible.
- 2 In most cases, that type of criticism will be unfair because an employer is not proving a negative in so much as proving a positive, non-discriminatory explanation for actions. For example, a claim from a woman who complains that she received a lower bonus than a male counterpart because of her gender will easily be defeated if her employer can prove that the male performed a higher standard.

Case *Firma Feryn*:

In that case, the ECJ concluded that to rebut the presumption of prima facie race discrimination, Firma Feryn BV would need to demonstrate that as a matter of fact its recruitment policy did not correspond to the statements made publicly.¹³ As Firma Feryn BV had not employed any Moroccan employees after making its discriminatory statement, it could be said that it is difficult to see how Firma Feryn BV could possibly have discharged the burden of proof even if in reality, the failure was wholly unconnected to ethnicity, e.g. no one who was Moroccan had applied for a position.

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Access to evidence

- 1 Determining the evidence can be used in discrimination proceedings is, in principle, a matter for domestic authorities.
- 2 Both the Racial Equality and Employment Equality Directives provide in preambles that ‘...the appreciation of facts from which it can be presumed that there has been direct or indirect discrimination remains a matter for the relevant national body to decide in accordance with national law or practice.
- 3 Commonly accepted evidence:
 - written documents,
 - witness statements
 - audio or video recordings
 - statistics
 - situation testing
- 4 public declarations revealing a discriminatory predisposition in contexts where victims of discrimination have not made themselves known deserve attention. It was at the center of two: Feryn and Accept

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Access to evidence

1 Ordinary means of proof

Commonly accepted means of proof include written documents, witness statements, and audio or video recordings.

2 Statistics

Statistical data showing a pattern of discrimination by a defendant can contribute to a presumption of direct discrimination when it corroborates and reinforces other evidence adduced by a complainant.

3 Situation testing

Situation testing consists of a real-life experiment aimed at testing the selection practices of employers or providers of goods or services to ascertain whether they are tainted by discrimination.

4 Discriminatory public statements

It has become rare for employers or service providers to express publicly a discriminatory inclination. As a matter of course, where this is the case, a person who alleges that they have been discriminated by such an employer or service provider could adduce the statements in court as evidence in support of their case.

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Thank you for your attention.



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