

## Proving discrimination

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EU equality law

Seminar for members of the judiciary

09./10.11.2023



Funded under the 'Citizens, Equality, Rights and Values programme 2021-2027' of the European Commission

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## Proving discrimination

### ***Basically***

*the person who relies on facts in support of a claim must prove them.*

- Burden of proof for the existence of discrimination in pay
- therefore always affects an employee who believes he or she has been discriminated against.

(Enderby, C-127/92, ECJ v. 27.10.1993)

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## Reversal of the burden of proof

**But**

in cases of **indirect discrimination**

- **Identification of an adverse effect** (of higher pay for full-time employees, where the majority of women were employed part-time)
- obliges the other party,
- demonstrate non-discriminatory justification for the conduct.

(Jenkins, C-96/80, ECJ, 13.03.1981)

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## Reversal of the burden of proof

in cases of **direct discrimination**

- **Untransparent remuneration system**
- Average pay of female employees lower than that of male employees
- Evidence that wage policy
- is non-discriminatory, with employer

(Danfoss, C-109/88, ECJ, 17.10.1989)

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## Reversal of the burden of proof

- Burden of proof reverses if
- EMPLOYEES who
- are discriminated against on the face of it (different pay for equivalent professions, one of which is almost exclusively held by women speech therapists, the other mainly by men - pharmacists), otherwise
- had no effective remedy,
- to enforce compliance with the principle of equal pay.  
Prima facie to be supported by **meaningful statistics**

(Enderby, C-127/92, ECJ v. 27.10.1993)

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## Reversal of the burden of proof

If

- Employee claims **violation of the principle of equal treatment AND**
- **The applicant must establish facts from which it may be presumed that there has been** direct or indirect discrimination,
- the **respondent must prove that** there was no violation of the principle of equal treatment.

(Nikoloudi, C-196/02, ECJ, 10.03.2005)

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## Legal development

Council **Directive 97/80/EC** of 15 December 1997 on the burden of proof in cases of discrimination based on sex

- If prima facie evidence does not lead to shifting the burden of proof
- the claimant might not have an effective means of enforcing compliance with the principle of equal treatment before the national courts
- Amendment of the rules on the allocation of the burden of proof in cases of prima facie discrimination called for
- on the effective application of the principle of equal treatment

(EWGs 17/18)

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## Legal development

Council **Directive 97/80/EC** of 15 December 1997 on the burden of proof in cases of discrimination based on sex

- **Measures required** by MS in accordance with national law to ensure that
- if persons consider themselves **aggrieved by a violation of the equal treatment requirement AND**
- establish before a court ... (b) **make a prima facie case that there has been** direct or indirect discrimination,
- it is for the **defendant to prove that there was no breach of the** principle of equal treatment

(Art 4(1))

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## Legal development

Council **Directive 97/80/EC** of 15 December 1997 on the burden of proof in cases of discrimination based on sex

- Definition of indirect discrimination (Article 2)  
*Indirect discrimination is even more difficult to prove. It is therefore important that the concept of indirect discrimination is defined. (EWG 19)*
- Does not apply to criminal proceedings (Article 3/1)

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## Legal development

**Equal Treatment Directive 2006/54** (recast)

- Provisions on the burden of proof are essential to
- Ensure that the **principle of equal treatment** can be **effectively enforced**. Therefore
- Provisions ensuring that the **burden of proof ...** shifts to the **defendant if**
- There is a **prima facie case of discrimination**

The assessment of the facts from which it may be presumed that there has been direct or indirect discrimination remains the responsibility of the relevant national body.

(EWG 30)

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## Legal development

### Equal Treatment Directive 2006/54 (recast)

- Article 19 (1)- identical to Article 4 (1) of the Burden of Proof Directive
- Only exception of paragraph 3, which provided for the possibility of non-application if court or other body had investigative jurisdiction, fell.

para 1

Directive 2000/78/EC, Art 10

para 1

Directive 2000/43/EC, Art 8

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## Two-stage test

### Persons affected by discrimination

- **Submission of facts,**
- which give rise to a **presumption of** discrimination.  
= facts made credible.

Burden of proof shifts.

### Defendant Party

- **Proof of facts,**
- proving that there is no discrimination.

Evaluation of evidence by the court

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## Two-step test - indirect discrimination

### Persons affected by discrimination

- **Evidence of adverse effects**
- of a seemingly gender-neutral measure for members of one gender  
= facts made credible.

Burden of proof shifts.

### Defendant Party

- **Evidence of justification** for the measure,
- which is legitimate

Evaluation of evidence by the court

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## 1.1 Submission of facts

- Mere allegation of discrimination or
- The fact that the plaintiff belongs to the discriminated gender,
- is not enough

Relevant identity feature

- The following are preconditions for the existence of discrimination
- but no fact from which it can be derived:

*"Neither mere allegations nor the simple fact of an employee's pregnancy  
... justify the presumption,*

*that there is discrimination on the grounds of sex".*

(Judgment of 26.10.2017, T-706/16 P, HB v. Commission; and

Judgment of 7.11.2019, T-706/16, VN v. Parliament)

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## 1.1 Submission of facts

### No requirement to prove facts.

They must be brought forward ("*present facts*")

Evidence may also consist of

- Fact common knowledge
- uncontradicted by the defendant lot or
- is added

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## 1.2 Presumption of discrimination

Discrimination appears **credible** on the basis of the allegations

*Prima facie*/ prima facie evidence

Entry point for statistical data

Assessment of the facts of indirect discrimination can be established by any means, including statistical evidence.

(EEC 15, Directives 43/2000 and 78/2000)

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## Establishing credibility

- Statistics
- Lack of transparency
- Public statements

(Enderby, C-127/92,  
Danfoss, C-109/88,  
Feryn, C-54/07)

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## 2. Evidence by the defendant

### **Proof,**

- that there is no discrimination
- that different treatment is justified or
- Measures/structures/rules that have different impacts are necessary, appropriate and justified

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## Evidence by the defendant

- Discrimination against more people of one sex than the other
  - > Evidence that this is justified by objective factors that have nothing to do with discrimination based on sex

(Enderby, C-127/92)

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## Evidence by Respondent

- **Public statements** that no employees with a specific identity share will be hired
  - > Evidence that the company's actual hiring practices do not correspond to these statements.
  - > Dissociation from public statements
  - > no need to present evidence that would constitute interference with right to private life (sexual orientation)
  - > Rebuttal of suspicion by "conclusive evidence" - Existence of an equal opportunities policy

(Feryn, C-54/07, Asociația Accept, C-81/12)

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## Evidence by the defendant

Different pay for work of equal value?

Defendant may

- Deny that the conditions for the application of the principle of equal pay for men and women are fulfilled in the specific case - Evidence that activities are not equivalent
- Justify unequal pay by objective factors that have nothing to do with the gender identity of the persons being compared

(Brunnhofer, C-381/99)

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## Access to documents

Application for university education

Discrimination on the grounds of gender?

- Entitled to information about the qualifications of the other applicants for this training? so that
- facts can be made credible which give rise to the presumption of the existence of direct or indirect discrimination?

**No right of access to information**

**BUT:** Access to the information **cannot be denied if** this impairs the implementation of Union law and de facto deprives it of its practical effectiveness.

Information should be provided in **compliance with confidentiality rules** for the protection of other applicants. (Kelly, C-104/10)

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## Access to documents

Non-consideration of an application

Presumption of discrimination on grounds of sex, age and ethnicity

- Right to inspect application documents of the person recruited?

**No right of access to information**

**BUT:** Refusal to grant access may be a factor to be taken into account in proving facts from which it may be presumed that there has been direct or indirect discrimination.

(Meister, C-415/10)

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## Excursus: Role of statistical data

Statistical data as an aid to the presumption of discrimination -> reversal of the burden of proof

Statistical data as evidence in cases of indirect and structural discrimination

Available data can also serve as evidence that no discrimination has taken place

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## Presumption of discrimination

**Official statistics** that ensure that prima facie presumption suggests that a particular regulation - although neutrally worded - in fact affects a significantly higher percentage of women than men.

Shifting the burden of proof to respondent that this is the result of objective factors that are not related to gender

*(ECtHR, Hoogendijk v. the Netherlands, No 58641/100, 6 January 2005)*

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## Evidence of adverse effects

In order to be able to prove adverse effects, a measure must affect

- *'considerably more men than women' or*  
*(CJEU, C-171/88, Ingrid Rinner-Kühn v. FWW, 13 July 1989)*
- *'a significantly lower proportion of men than of women' or*  
*(CJEU, C184/89, Helga Nimz v. Freie und Hansestadt Hamburg, 7 February 1991)*  
*(CJEU, C-33/89, Maria Kowalska v. Freie und Hansestadt Hamburg, 27 June 1990)*
- *'far more women than men'*  
*(CJEU, C-343/92, M.A. De Weerd, and Others v. Bestuur van de Bedrijfsvereniging voor de Gezondheid, and Others, 24 February 1994)*

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## Evidence of adverse effects

Differences must be significant

- 89 percent of a group affected (*Rinner-Kühn*)
- 60 would not be enough

(AG Leger in CJEU, C-317/93, Inge Nolte v. LVA Hannover, 14 December 1995)

But: can still be *a* sufficient indicator of indirect discrimination *if they show persistent and relatively constant inequality over a long period of time.*

(Seymour-Smith, CJEU, C-167/97)

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## Evidence of adverse effects

Admission to the selection procedure for admission to the police school - minimum height (170 cm) required

Far more men than women affected - indirect discrimination

(CJEU Kalliri C-409/16)

1.70m is

- a) 7-8cm lower than the average height of men  
6-7 cm taller than the average height of women
- b) 80% of the male population has this size, but only 19% of the female population.

The percentage of female potential applicants who are excluded is disproportionately higher than that of male potential applicants.

(Council of State (Supreme Administrative Court) Judgment No 2055/2019)

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## Proof of justification

BUT - as in any case of indirect discrimination!!!

If defendant can prove that the means chosen

- achieve a necessary objective (e.g. of the social policy of the member states) and
  - that they are suitable and necessary to achieve this objective,
- > mere fact that the provision affects a much larger number of female than male workers -> not discriminatory

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