

Proving discrimination

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1

Matters covered:

Part I	Introduction
Part II	Direct discrimination
Part III	Indirect discrimination
Part IV	The problem of access to information/evidence

2

Part I: Introduction

3

What does EU law prescribe?

Art. 19(1) Directive 2006/54 (Recast)

Art. 9(1) Directive 2004/113 (Goods and services)

What on its face looks like discrimination (a *prima facie* case) should be considered discrimination **unless** there is proof to break that presumption

Why?

- Difficult or impossible for the Claimant to prove a discriminatory motive
 - The Claimant does not have access to the relevant information/evidence
- ⇒ Problem for effectiveness of prohibition and effectiveness of remedies

4

What does EU law prescribe?

Although formulated as one rule, it applies differently in situations of alleged direct and indirect discrimination

In alleged **direct discrimination** – the presumption applies to the causal link between the negative treatment and the protected ground. The Respondent has to provide an alternative explanation and prove that the treatment was due to other factors than the protected ground to break the presumption

In alleged **indirect discrimination** – the presumption triggers the need for the Respondent to objectively justify the neutral provision, criterion or practice as appropriate and necessary in the light of a legitimate aim, unrelated to discriminatory considerations, serving a real need, and to provide proof for the factual claims underpinning the justification

5

Confusing terminology – the burden of proof is not only about *evidence*

The Claimant's burden of proof

The Respondent's burden of proof

Burden of proof
(*stricto sensu*)
for facts
establishing the
presumption



Burden of
explanation or
justification
breaking the
presumption



Burden of proof
(*stricto sensu*) for
any facts necessary
to fulfill the
burden of
explanation or
justification

Actual *evidence* not
always required e.g. for
some justifications of
neutral rules and practices

6

Part II: Direct discrimination

7

The Claimant's burden of proof Direct discrimination

To establish a presumption of discrimination, the Claimant has to prove facts that taken together make it plausible that discrimination has occurred, and thus call for an explanation from the Respondent. This means that the Claimant has to present and prove facts that support

(i) that the claimant has suffered a certain treatment

(ii) that the treatment is worse than what a person of the opposite sex in a comparable situation is, has been or would be subjected to

NB 1: What specific facts need to be proven in order to create the presumption may vary according to the situation. E.g. when a woman applies for a specific position that she is highly qualified for, is not called for an interview but does not know who was called, it should normally be enough to prove that she was highly qualified for the position to trigger an explanation from the employer as to why she was not called

NB 2: Important to stress. The court is to make an overall assessment of all the facts presented to determine whether there is a *prima facie* case of discrimination (C-83/14, *Chez RB* p. 80)

NB 3: Practice tip in the absence of an actual comparator: if proven that the treatment suffered deviates from normal routines and practices, there is a presumption that a hypothetical comparator would be treated better (according to the routines and practices)

8

The Claimant's burden of proof

Direct discrimination

There is no need to prove discriminatory intent, purpose or considerations, but proven facts that indicate such elements support that the Claimant was treated worse for reasons connected to the protected ground (for our purposes sex)

Examples from case law:

Statements from a person connected to the employer indicative of a discriminatory practice (C-81/12, ACCEPT p. 47-51)

Facts indicative of discriminatory considerations behind a neutral provision, criterion or practice (Chez RB, p. 80-84)

NB: If the treatment challenged appears to be the result of the application of a neutral provision, criterion or practice (PCP), i.e. not connected to the protected ground, proof regarding discriminatory considerations behind the PCP would be necessary to establish a presumption of direct discrimination, otherwise the treatment should be assessed under the rules of indirect discrimination (C-83/14, Chez RB p. 95)

Examples of facts that *may* contribute to the creation of a presumption (hiring)

- The Respondent directly or indirectly has indicated a gender preference in the job ad or in media
- The Respondent employee statistic show a strong preference for hiring men in similar positions
- The Respondent asked irrelevant and gendered questions during the interview
- The Respondent has produced an internal report showing strong customer preference for interactions with male employees
- The Respondent generally assigned female job applicants a lower score in the assessment of their qualifications

The Claimant's burden of proof Direct discrimination – Pregnancy

The Claimant has to present (and prove) facts

(i) that the claimant suffered negative treatment after the respondent found out about the pregnancy

and sometimes also, depending on the situation, additional facts

(ii) indicative that the negative treatment is linked to pregnancy

NB 1: No need for a male comparator since pregnancy is inherently related to feminine sex
(Case 177/88, Dekker p. 15-18)

NB 2: Special protection for employed women against dismissal during pregnancy and subsequent maternity leave not requiring any evidence of causal link between dismissal and pregnancy/maternity leave in Directive 92/85 (the Maternity Directive)

Examples of facts that may *contribute* to the creation of a presumption (hiring+pregnancy)

- The Respondent cancelled the hiring procedure shortly after finding out about the pregnancy
- The Respondent asked whether the Claimant has planned “back-up” for taking care of the infant
- The Respondent expressed concerns regarding the difficulty of hiring a replacement during maternity leave
- The Respondent stressed the importance of complete dedication and the expectation to step in on short notice after hours if need be

The Respondent's burden of proof (hiring)

To break the presumption, the Respondent has to prove that there was another explanation for the worse treatment unrelated to sex. Examples:

- The Claimant had typos in his/her CV and was therefore not called for an interview
- The Claimant did not call the employer back swiftly enough to discuss the job offer (assumed lack of interest)
- The Claimant answered poorly to certain questions posed in the interview
- The Claimant's salary requirement was much higher than the man or woman hired
- The decision not to hire the Claimant was made before she told the employer of her pregnancy
- A manager had previous negative experience of the Claimant from another job/position

13

Part III: Indirect discrimination

14

Indirect Discrimination

An apparently neutral provision, criterion or practice (PCP) that would put women or men at a particular disadvantage compared to a comparable group of persons of the opposite sex **is presumed to constitute indirect discrimination**

Unless the Respondent **objectively justifies** the PCP by advancing arguments and, if necessary, proving the factual claims underpinning those arguments, that the PCP

- (i) fulfills at least one legitimate aim (not tainted by discriminatory considerations) serving a real need
- (ii) constitutes an appropriate/suitable means to attain the aim
- (iii) constitutes a necessary means to attain the aim (i.e. cannot be attained by less infringing means)
- (iv) and, that the disadvantages caused by the PCP to members of the group are not disproportionate to the aim pursued (Chez RB, p. 123)

15

The Claimant's burden of proof Indirect discrimination

The Claimant must prove that there is a **particular disadvantage** for the protected group

This normally means that it must be proven that the neutral PCP **negatively affects a far larger portion** of members of the protected group **compared to** the portion of members negatively affected by the PCP in a **comparable group** of the opposite sex (C-83/14 Chez RB p. 100-101)

E.g. Most of the female security guards at security company X work daytime shifts as opposed to a minority of male security guards working daytime shifts. Female security guards at company X thus suffer a particular disadvantage by a company bonus policy rewarding amounts of hours worked night time.

Important: in some cases the particular disadvantage need not be proven "in practice" if the disadvantage can be readily assumed based on common knowledge. It's enough to point to that the measure *is liable* to have such a negative effect (C-237/94, O'Flynn, p. 21). E.g. a minimum height requirement of 175 cm to be employed will obviously put women at a particular disadvantage.

16

The Respondent's objective justification – a legitimate aim

If a *prima facie* case of indirect discrimination is established, it is for the Respondent to justify the PCP in the light of one or several **legitimate aims**. If there are several aims, each and everyone of them can be used separately to justify the measure

No exhaustive list of possible legitimate aims, but the aim must objectively address a real need, which sometimes requires proof (C-83/14, *Chez RB* p. 116) and be unrelated to discrimination (Case 170/84, *Bilka* p. 30)

Important to note is that only the actual aims behind the PCP can be used to justify it. Whether an invoked aim was an actual aim behind the PCP can sometimes be inferred and sometimes be a question of evidence (compare C-83/14, *Palacios de la Villa*, p. 57). If there is evidence as to the actual aims, the Claimant normally has an interest in presenting that evidence to limit the advancement of other "invented" aims by the Respondent

If any of the actual aims behind the neutral measure is tainted by considerations related to sex – the application of the measure to persons negatively affected will be directly discriminatory (compare C-83/14, *Chez RB* p. 91)

17

The Respondent's objective justification – proportionality

The challenged neutral PCP must be deemed appropriate and necessary to attain the legitimate aim. This is a proportionality assessment that is made in relation to each of the stated aims

The test as to whether the PCP is suitable/appropriate is essentially an abstract functional test, i.e., can the challenged rule attain the aim in question? If this appears questionable, the Respondent may have to *prove* that the rule serves the purpose (e.g. regarding PCP:s motivated by hygiene or safety)

The test as to whether the PCP is necessary is a test as to whether the aim could be attained by means less restrictive than the PCP. The Respondent may have to *prove* that an alternative less restrictive measure could not attain the aim as effectively. The Claimant should point to alternative measures

Important: even if the PCP in the abstract could be seen as the most effective to attain the aim, it could still be deemed disproportionate if the disadvantages to the persons affected are such that they outweigh the advantages. The legitimate interests of the persons affected cannot be excessively prejudiced (C-83/14 *Chez RB* p. 123 and 128)

18

Part IV: The problem of access to information and evidence

19

Access to information/evidence from the Respondent

(i) EU law does not proscribe a specific right for the claimant to have access to information/documents from the Respondent, but national procedural rules that render the protection ineffective must be disapplied (Case C-104/10, Kelly p. 34-35)

(ii) Difficulty for the Claimant may lower the requirement of proof necessary for the shift

E.g. the intransparency of the Respondent's pay system, lowered the requirement of proof for the Claimant – it was enough to prove that the system resulted in a lower average pay for female employees as opposed to male (Case 109/88, Danfoss, p. 16)

Similarly, in *Schuch-Ghannadan*, considering the lack of access to specific statistical data regarding the gender distribution among part time workers in Austrian universities, it was enough for the Claimant to point to general data from Austrian labor market showing a higher proportion of female part time workers (C-274/18, Schuch-Ghannadan, p. 53-56)

(iii) The Respondent's refusal to present the Claimant with any information may be a factor, which together with other facts can shift the burden of proof (C-415/10, Meister, p. 47)

20

Summary

(i) In alleged **direct discrimination**, the Claimant has to prove facts supporting that he or she was treated worse than an actual or hypothetical comparator of the opposite sex – the presumption then applies to the causal link between the worse treatment and the protected ground

The Respondent can break the presumption by proving that there was an alternative explanation unrelated to the Claimant's sex

(ii) In alleged **indirect discrimination** – the Claimant (unless it appears more or less obvious) has to prove that the neutral PCP in question negatively affects a far larger portion of members of the protected group compared to the portion of members negatively affected by the PCP in a comparable group of the opposite sex

The Respondent can break the presumption by providing an objective justification of the PCP as an appropriate and necessary mean to attain a legitimate aim, unrelated to discriminatory considerations and serving a real need, and by providing proof for the factual claims underpinning the justification

(iii) Difficulty for the Claimant to attain information/evidence from the Respondent may lower the requirement of proof necessary for the shift. A refusal from the Respondent to provide any information may make it easier for the Claimant to shift the burden of proof. National rules on access to information/evidence held by the Respondent may not render the protection ineffective. If so, they should be disapplied