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## PROVING DISCRIMINATION

SOPHIE LATRAVERSE JUNE 2024



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## DEFINITION– WHAT SHOULD BE PROVEN

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- Direct discrimination article 2 par 1 a) Directive 2006/54:
  - Where one person is treated less favourably on ground of sex than another is, has been or would be treated in a comparable situation
- Indirect discrimination article 2 par 1 b) Directive 2006/54:
  - Where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary

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## 3 CUMULATIVE ELEMENTS

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- Unfavourable treatment against a person or a group of persons
- Based on one or many grounds prohibited by law – sex, pregnancy, gender
- In a domain specified by law – pay, hiring, career evolution, retirement benefits....

That is not otherwise authorized through an exception provided by the directive and national law

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## THE BURDEN OF PROOF ARTICLE 19 DIRECTIVE 2006/54

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- **2 steps:**
  - 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.
- **Not applicable** to criminal procedure par. 5, proceedings in which it is for the court or competent body to investigate the facts of the case par. 3.

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## « FACTS FROM WHICH IT MAY BE PRESUMED »

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- Recital 30 : ... As the Court of Justice has held, provision should therefore be made to ensure that the burden of proof shifts to the respondent when there is a *prima facie* case of discrimination, except in relation to proceedings in which it is for the court or other competent national body to investigate the facts.

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## HOW TO ESTABLISH « FACTS FROM WHICH IT MAY BE PRESUMED »

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- The Approach of EU Law:
  - Comparative analysis of results or situations
  - Based on elements of facts, many of which are in possession of Defendant
  - Unequal situation in fact of persons linked to a prohibited ground
  - Leads to a transfer of the burden of proof
  - Plaintiff does not have to introduce particular evidence that sex, pregnancy or gender is the basis of the decision
- Two strategic issues central to effective implementation :
  - Access to evidence of unfavourable situation or results that is in the possession of Defendant
  - Convince the Court without evidence of fault

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# ACCESS TO EVIDENCE :THE IMPACT OF RULES OF PROCEDURE

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## **A Common Law Model**

- Directives have been framed on a procedural model coming from Common Law countries
  - Based on comparative analysis of employees information
- In Common Law Countries access to evidence is part of the rules of procedure

## **In Civil Law countries:**

- The burden of proof rests on Plaintiff
- No automatic procedural access of Plaintiff to evidence that is in possession of Defendant
- Substantive equality law has an impact on procedural law

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# EQUAL PAY DIRECTIVE 2023/970 OF 10 MAY 2023

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## • 2 NEW PRINCIPLES

- HOW TO PROVE OF WORK OF EQUAL VALUE Article 19
  - Criteria for comparing pomparable situaitons – all situations related to a source of pay conditions
  - Not limited to employees employed at the same time
  - In absence of comparator other evidence admissible including statistics
- RIGHT TO ACCESS TO EVIDENCE Article 20
  - States must ensure that courts and competent authorities order Defendants to disclose relevant evidence under its control

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## PRESUMPTION CJEU, CHEZ RB, C-83/14, 17 JULY 2015

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- Refusal by Defendant to communicate elements relating to the case, must not alter access to rights of Plaintiff
- In such case the Court may shift the burden of proof (CJEU 2012, MEISTER C-415/10)

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## CJEU, 2 MARCH 2023, NORRA STOCKHOLM BYGG AB, C-268/21

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### **Plaintiff's right to have access to evidence :**

- Par 17: Defendant requested to produce staff register over 15 months.
- Objection of defendant on the grounds that it would violate protection of employees personal data under article 5 (1) (b) of the GDPR.

Par 53 « ... In order to ensure that individuals can enjoy a right to effective judicial protection and, in particular, a right to a fair trial, within the meaning of the second paragraph of Article 47 of the Charter, the parties to civil court proceedings must be in a position to access the evidence necessary to establish to the requisite standard the merits of their complaints, which may possibly include personal data of the parties or of third parties. »

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## FRENCH EXAMPLE COURT OF CASSATION SOCIAL CHAMBER 22 SEPTEMBER 2021 NO 19-26.144

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- Request of Plaintiff to obtain access to evidence on the basis of article 145 of the Code of civil procedure to verify whether he was discriminated before engaging the proceedings
- Denied by the trial court on the ground that plaintiff has the burden of proof.
- Access to evidence is intricately related to access to remedy
- Court of cassation decided that Plaintiff had a legitimate reason to request access to evidence on the ground of a right to evidence provided by Articles 6 and 8 of ECHR, article 9 of the civil code and article 9 of the French Code of Civil Procedure.
- The employer cannot oppose violation of the right to privacy of co-workers to refuse to communicate nominative elements of comparison related to the salary and career evolution, if the evidence is indispensable to exercise one's right and proportionate to the exercise of this right.

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## ACCESS TO EVIDENCE = ACCESS TO RIGHT

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- Implementing an obligation to communicate information on the situation of co-workers
  - In possession of Defendant
  - In possession of third parties
- CJEU/ECJ : Implementing impact of refusal to communicate on the part of Defendant (underlying right to access):
  - Access to information must be assured and be consistent – Non- transparency justifies the transfer to the burden of proof : ECJ 1989, DANFOSS C-109/88
  - Refusal by Defendant to communicate elements relating to the case , must not alter access to rights, in such case the Court may shift the burden of proof (CJEU 2012, MEISTER C-415/10)

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## ELEMENTS OF THE PRESUMPTION DECLARATIONS CJEU, FERYN, C-54/07, 18 JULY 2008

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An employer declared on TV that he would not hire persons of North African origine to install garage doors in private persons homes.

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The Court decides that this declaration allows the court to presume that the employer has applied the policy he has publicly announced .

- Shift of the burden of proof to establish the contrary

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## ADMISSIBILITY OF PUBLIC STUDIES AND STATISTICS

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- Impact of apparently neutral rule on a particular group can be established by taking in consideration national statistics and public studies
- CJEU, 08/05/2019, Praxair MRC SAS C-486/18
  - (Par. 82) Considering the greater proportion of women taking parental leave according to national statistics, compensation for redundancy in the context of part time parental leave is discriminatory on the ground of sex if it takes in consideration the remuneration received during this parental leave (Par 65 – 81 – 83)
- CJEU 16/07/2015, CHEZ Razpredelenie Bulgaria AD, n° C-83/14
  - Taking in consideration public statistics of the population residing in a neighbourhood to conclude to evidence of a neutral practice that has adverse impact on a population of a particular origin.

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## THE PRESUMPTION

### ECJ, 17 OCTOBER 1989, DANFOSS C-109/88

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- Collective agreement foresees salary by categories
- Scales can be increased by the employer on the basis of :
  - flexibility,
  - professional training, and
  - seniority
- The average salary of men is 6,85 % higher
- No information on how these rules are implemented

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## DANFOSS

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- A remuneration system characterised by a lack of transparency resulting in average inferior remuneration of women is presumed to be discriminatory
- The lack of transparency precludes access to evidence
- The employer has the burden to prove that his practice is not discriminatory
- Must establish how the grounds were applied:
  - Objective
  - Non discriminatory
  - Proportionate

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## OTHER ELEMENTS

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- Medical records (Harassment)
- Colleagues statements
- Answers given to questions of union representatives

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## JUSTIFICATIONS PRECISE EVIDENCE REQUIRED OF THE EMPLOYER

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Legitimate and objective justifications

Motivation unrelated to discrimination

Proportionate and reasonable

- Economical justifications are irrelevant: CJEU, Kutz-Bauer, 20/03/2003, C- 187/00)
- Client's requests are irrelevant : CJEU, FERYN, CJEU Bougnaoui, 14/03/2016
- Onus is on Defendant :
  - Absence of justification is lack of transparency ; CJEU, 2012, Meister C-415/10; ECJ, 1989 Danfoss C-109/88

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## ECJ, 27 OCTOBER 1993, ENDERBY C-127/92

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- Difference of remuneration between two jobs of comparable value related to salary levels and classifications in a public health collective agreement:
  - Speech Therapist (female)
  - Pharmacists (male)
- Apparent discrimination on the basis of statistics of the presence of male and female in each job category and salary differential

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## ENDERBY – COLLECTIVE BARGAINING

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- Employer must show that objective reasons justify the difference in remuneration
- The fact that they are the result of collective bargaining is not a justification since collective agreements must respect the principle of equal treatment
- The fact that each bargaining process did not take into account discriminatory considerations is not a justification either

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## ENDERBY – TENSIONS ON THE LABOUR MARKET

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- The insufficient number of professionals explaining their high value on the market cannot be presumed
- The employer has the burden to justify the reality of the pressure of the labour market and the court must appreciate the proportionality of its impact in each situation

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## ECJ, 26 JUNE 2001, BRUNNHOFER C-381/99 §43

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- Definitions of comparable situations:  
Test: taking into account of a number of factors such as the nature of the work, the training requirements and the working conditions, whether those persons can be considered to be in a comparable situation (see Article 19 of Directive 2023/970)

Each component must be established

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## BRUNNHOFER

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- Plaintiff complains that a male colleague hired 1 years after her at the same level benefits from a higher premium, negotiated at the time of his employment.
- She was dismissed after 4 years because of problems that had appeared before her male colleague was even hired
- The bank invokes the quality of plaintiff's work

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## BRUNNHOFER

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- The Bank cannot invoke the quality of plaintiff's work or elements related to the performance of the employment contract to justify unequal pay fixed at the time of hire

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## ECJ, 17 JUNE 1998, HILL & STAPELTON C-243/95

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- In a case where part time workers faced slower career evolution, the majority of which were women, the court replied to the employer's economic argument that:
  - The cost of implementing equal treatment, and economic considerations in general cannot be presented by the employer as a justification for maintaining unequal treatment

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