

THE BURDEN OF PROOF IN SEX DISCRIMINATION CASES

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1. **Purpose of this paper**

The purpose of this paper is to give some practical guidance to judicial colleagues from other Member States based upon the jurisprudence of the European Court of Justice and that which has developed in the United Kingdom .

2. **Introduction**

At the forefront of this presentation is Article 19 of the Directive of the European Parliament and of the Council 2006/54:

- “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.
2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.
3. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.
4. Paragraphs 1, 2 and 3 shall also apply to:
 - a. the situations covered by Article 141 of the Treaty and, insofar as discrimination based on sex is concerned, by Directives 92/85/EEC and 96/34/EC (pregnant workers and parental leave);
 - b. any civil or administrative procedure concerning the public or private sector which provides for means of redress under national law pursuant to the measures referred to in (a) with the exception of out-of-court

procedures of a voluntary nature or provided for in national law.

5. This Article shall not apply to criminal procedures, unless otherwise provided by the Member States.”

Accordingly, this presentation addresses the practice of those colleagues whose jurisdiction is civil rather than criminal and whose procedure is not purely inquisitorial in that it requires the plaintiff or claimant to prove something. It is that “something” that lies at the heart of this presentation.

As recently as 2007, the English Court of Appeal was constrained to say:

“We were informed that, as evidenced by this clutch of appeals and by appeals pending in other cases, Employment Tribunals are experiencing difficulty with the burden of proof in sex and race discrimination cases. This is surprising.”¹

That is a polite way for a senior appellate judge to say that first instance judges have not been very clever!

3. **The evolution of the burden of proof in sex and race discrimination cases over the last 20 years in European Law**

In systems of law that impose a burden of proof, the task of proving the facts sufficient to satisfy the legal ingredients of the claim rested on the claimant or plaintiff. In theory, the respondent did not have to prove anything. That said, English common law jurisprudence developed the concepts of a legal burden on the claimant or plaintiff to prove the claim and an evidential burden on the defendant to adduce some evidence or risk losing the case. The shift in the burden of proof in claims of sex discrimination, however, is about the shift of the legal burden so that, if the claimant proves sufficient facts, the legal burden of disproving discrimination shifts to the respondent.

The earliest examples of this in both English and European jurisprudence are found in the realm of equal pay. As long ago as 1970, the British Equal Pay Act provided for a statutory pay equality clause in the contract of a woman who proved that she was engaged on like work with a man or work rated as equivalent with that of a man in the same employment. That equality clause, however, would not operate if the employer proved that the variation in pay was genuinely due to a material factor which was not the difference of sex and the material difference was between the woman’s case and the man’s².

¹ *Madarassy v Nomura International plc* [2007] IRLR 246

² Equal Pay Act 1970, sections 1(2) and (3)

In the late 1980s, the European Court of Justice recognised the limitation of the burden of proof resting solely on the woman in two cases. In the first, *Danfoss*³, the Court held that where the employer's systems of pay were so opaque that it was impossible for a woman to understand why she was being paid less than a man doing the same job, it was for the employer to prove that:

“His practice in the matter of wages is not in fact discriminatory”
(paragraph 13)

In *Enderby*⁴, the Court recognised that on the whole employees were poorly placed, in terms of their access to the evidence, to prove those matters which they would need to show in establishing that they were being paid less than comparable men.

Thus it was that, in December 1997, the Commission adopted Council Directive 97/80, the forerunner of Article 19 of Council Directive 2006/54. As the Court made clear in *Vasiliki Nikoloudi v Organismos Tilepikinonion Ellados AE*⁵, this was a codification and extension of the previous case law, which was itself founded on the very long-standing principle of effective judicial protection for Community rights. It also represented a significant exception to the general rule of national procedural autonomy.

The 30th recital to Council Directive 2006/54 provides:

“The adoption of rules on the burden of proof plays a significant role in ensuring that the principle of equal treatment can be effectively enforced. 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. It is, however, necessary to clarify that the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination remains a matter for the relevant national body in accordance with national law or practice. Further, it is for the Member States to introduce at any appropriate stage of the proceedings, rules of evidence which are more favourable to plaintiffs.”

The Court considered similar provisions set out in Article 8(1) of the Race Discrimination Directive 2000/43 in *Centrum voor Gelijkheid van Kansen*

³ Case 109/88 *Danfoss* [1989] ECR 3199

⁴ Case C-127/92 *Enderby* (1983) ECR I-5535

⁵ Case C-196/02

*en voor Racismebestrijding v Firma Feryn NV*⁶. The Applicant was the Belgian body designated to promote equal treatment. The Respondent employer specialised in the sale and installation of up-and-over and sectional doors. One of its directors made public statements to the effect that although the employer was looking to recruit fitters, it could not employ “immigrants” because its customers were reluctant to give them access to their private residences for the period of the work. The Applicant brought racial discrimination proceedings against the employer and the matter came before the Brussels Labour Court, which referred a number of questions to the Court of Justice.

In respect of the burden of proof, it asked what was to be understood by the words “facts from which it may be presumed that there has been direct or indirect discrimination”? How strict must a national court be in assessing facts that give rise to a presumption of discrimination? To what extent did earlier acts of discrimination in the form of a public announcement of directly discriminatory selection criteria constitute such facts? Did an established act of discrimination in the past subsequently give rise to a presumption of the continuation of a directly discriminatory recruitment policy? Did the fact that the employer did not employ any fitters from ethnic minorities give rise to a presumption of indirect discrimination when that same employer some time previously had experienced great difficulty in recruiting fitters and, moreover, had also stated publicly that his customers did not like working with fitters who were immigrants? Was one fact sufficient in order to raise a presumption of discrimination? Having regard to the facts in the main proceedings, could a presumption of discrimination on the part of the employer be inferred from the recruitment of exclusively indigenous fitters by an affiliated company of that employer? How strict did the national court have to be in assessing the evidence in rebuttal that must be produced when a presumption of discrimination had been raised?

The Court in its judgment⁷ said that the precondition of the obligation to adduce evidence in rebuttal, which arises for the alleged perpetrator of the discrimination, is a simple finding that a presumption of discrimination has arisen on the basis of established facts. Statements by which an employer publicly let it be known that, under its recruitment policy, it would not recruit any employees of a certain ethnic or racial origin might constitute facts of such a nature as to give rise to a presumption of a discriminatory recruitment policy. It was thus for that employer to adduce evidence that it had not breached the principle of equal treatment, which it could do, *inter alia*, by showing that the actual recruitment practice of the undertaking did not correspond to those statements. It was for the national court to verify that the facts alleged against that employer were

⁶ Case C-54/07

⁷ Para 30 et seq

established and to assess the sufficiency of the evidence that the employer adduced in support of its contentions that it had not breached the principle of equal treatment. The Court went on to hold that public statements by which an employer let it be known that under its recruitment policy it would not recruit any employees of a certain ethnic or racial origin were sufficient for a presumption of the existence of a recruitment policy which was directly discriminatory within the Race Discrimination Directive.

4. **The evolution of British jurisprudence on the burden of proof**

In *King v Great Britain China Centre*⁸, the Claimant, an ethnic Chinese, responded to the employer's advert for the post of Deputy Director which specified that applicants should have first-hand knowledge of China and be able to speak fluent Chinese. She fulfilled these and other stipulated requirements but was not short-listed for interview. None of those selected for interview were ethnic Chinese. The reason advanced by the employer was that all the interviewees had experience of the institutions of China, which the employer claimed was a necessary attribute for the job. The Tribunal took the view that the Claimant satisfied all the advertised criteria for the job and that the criterion of experience of the institutions had not been advertised and only emerged at a late stage. It concluded that this criterion was merely being used to justify unlawful race discrimination. It was also noted that there were no existing ethnic Chinese employees and that, even though one-sixth of the applicants had been Chinese, none of them had been interviewed. The Court of Appeal upheld the finding of the Industrial Tribunal. Although the judgment was given before the transposition into national law of the requirements of the 1997 Directive, the judgment anticipated that development. The Court of Appeal said:

- (1) It is for the applicant who complains of racial discrimination to make out his or her case. Thus if the applicant does not prove the case on the balance of probabilities, he or she will fail. [*A classic statement of the burden of proof before the 1997 Directive*]
- (2) It is important to bear in mind that it is unusual to find direct evidence of racial discrimination. Few employers will be prepared to admit such discrimination even to themselves. In some cases the discrimination will not be ill-intentioned but merely based on an assumption that "he or she would not have fitted in".
- (3) The outcome of the case will therefore usually depend on what inferences it is proper to draw from the primary facts

⁸ [1992] ICR 516

found by the Tribunal. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with (the British Race Relations Act 1976) from an evasive or equivocal reply to a questionnaire [*a British pre-trial procedure to enable claimants to decide whether they have a case*].

- (4) There will be some cases where, for example, the non-selection of the applicant for a post or for promotion is clearly not on racial grounds [or grounds of sex], A finding of discrimination and a finding of a difference in race [or sex] will often point to the possibility of racial [or sex] discrimination. In such circumstances, the Tribunal will look to the employer for an explanation. If no explanation is then put forward or if the Tribunal considers the explanation to be inadequate or unsatisfactory, it will be legitimate for the Tribunal to infer that the discrimination was on racial grounds [or grounds of sex]. This is not a matter of law but (as was put in another case) “almost common sense”.
- (5) It is unnecessary and unhelpful to introduce the concept of a shifting evidential burden of proof [*they got that wrong!*]. At the conclusion of all the evidence the Tribunal should make findings as to the primary facts and draw such inferences as they consider proper from those facts. They should then reach a conclusion on the balance of probabilities, bearing in mind both the difficulties which face a person who complains of unlawful discrimination and the fact that it is for the complainant to prove his or her case.”

The British Sex Discrimination Act 1975 was amended in 2001 to give effect to the 1997 Directive. Section 63A provides:

“Where on the hearing of the complaint, the complainant proves facts from which the Tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent has committed an act of discrimination; the Tribunal shall uphold the complaint unless the respondent proves that he did not commit that act.”

The fundamental change to the law as it had been described by the Court of Appeal in *King v Great Britain China Centre* was **to make it compulsory for the Tribunal to uphold the complaint where the burden had shifted and the respondent had failed to prove that it did not commit the act of discrimination.**

The Court of Appeal revisited the law on the burden of proof in a case that came out of my Employment Tribunal Region in Leeds – *Igen Limited (formerly Leeds Careers Guidance) and Others v Wong and Others*⁹. The Court of Appeal gave the following guidance:

- “(1) It is for the claimant to prove, on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail.
- (2) In deciding whether the claimant has proved such facts, it is important to bear in mind that it is unusual to find direct evidence of sex discrimination.
- (3) The outcome at this stage will usually depend upon what inferences it is proper to draw from the primary facts found by the Tribunal.
- (4) The Tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was sex discrimination – it merely has to decide what inferences could be drawn.
- (5) When the claimant has proved facts from which inferences could be drawn that the respondent has treated the claimant less favourably on the ground of sex, the burden of proof moves to the respondent.
- (6) It is then for the respondent to prove that he did not commit that act.
- (7) To discharge that burden, it is necessary for the respondent to prove on the balance of probabilities that his treatment of the claimant was in no sense whatsoever on the ground of sex, since “no discrimination whatsoever” is compatible with the EC Burden of Proof Directive.
- (8) The respondent must not only provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove on the balance of probabilities that sex was no part of the reason for the treatment.

⁹ [2005] ICR 931

- (9) Since the respondent would generally be in possession of the facts necessary to provide an explanation, the Tribunal would normally expect cogent evidence to discharge that burden.”

Directive 2006/54 does not replicate the language of Directive 97/80 by using the words ‘no discrimination whatsoever’ (in the French text, “l’absence de toute discrimination”). Instead, Article 19 of Directive 2006/54 requires the respondent to prove that there has been no breach of the principle of equal treatment. It is suggested that the Commission did not intend to dilute the obligation imposed upon the respondent so that it is enough if the employment decision in question is in any way tainted by considerations of sex.

5. **What are the facts the claimant has to prove?**

They are, of course, the facts “from which it may be presumed that there has been direct or indirect discrimination”. That involves looking at the definitions in Article 2(1)(a) and (b):

“Direct discrimination”: where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;

“Indirect discrimination”: 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”.

The provisions of your national law may have transposed that language word for word or it may have used different language in order to convey essentially the same meaning. Either way, in the case of direct discrimination there has to be less favourable treatment compared with that given either to an actual comparator or to a hypothetical comparator and that treatment has to have been on the grounds of sex. In the British case of *Madarassy*, the Court of Appeal said:

“The Court in *Igen v Wong* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the Tribunal could conclude that the respondent “could have” committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination, they are not, without more, sufficient material from which a Tribunal “could conclude” that, on the balance

of probabilities, the respondent had committed an unlawful act of discrimination”.

The distinction being made here is between a mere possibility and what is seen as the higher burden of demonstrating acts from which a Tribunal could conclude that the respondent had committed an unlawful act of discrimination. First, it is to be noted that this is an example of different words being used as between the Directive and national law. Secondly, this interpretation, whilst reflecting the law in the UK, remains controversial with certain British commentators. They suggest it places too heavy a burden on claimants. The missing ingredient that gives the principle in *Madarassy* its cogency, however, is the absence of a fact from which it could be presumed that the less favourable treatment was on the ground of sex.

The facts of *Madarassy* illustrate this. One of the Claimant’s complaints was that a colleague had conducted a discriminatory campaign against her, regularly shouting at her and abusing, intimidating and threatening her. The Tribunal at first instance was satisfied on the evidence that the colleague shouted at members of staff whether they were male or female and that this was the culture of the workplace. According to the Tribunal, although the treatment might be horrible, it was not sexist. The complaint of discrimination therefore failed at the first stage, as there was no less favourable treatment of the Claimant compared to anyone else. The Court of Appeal could find no error of law in the Tribunal’s decision – the Tribunal had referred to and accepted the evidence of the employer that the colleague treated all employees under him the same, and so there was nothing to shift the burden of proof.

Contrast that with the facts in *King v Great Britain China Centre* above, where the facts included the late introduction of a recruitment selection criterion and the absence of existing ethnic Chinese employees employed in the Centre. The burden of proof would plainly have shifted on those facts and the Claimant would still have succeeded.

6. **A two-stage process – procedural or as a matter of reasoning?**

The question is: what evidence may be considered at each stage? One approach would be to insist that at the first stage, the claimant’s evidence alone should be considered and only at the second stage should the respondent’s evidence be admitted, by which point the evidence should concern any matters not previously canvassed at the first stage. This is said to be the preferred approach of our Swedish colleagues. The English Court of Appeal in *Madarassy* decisively rejected this idea on the basis that the Tribunal would need to consider all of the evidence relevant to the discrimination complaint and that must include evidence adduced by the

respondent contesting the complaint; for example, by adducing evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like; and available evidence of the reasons for the differential treatment.

The first approach which involves procedurally dividing up the hearing and consideration of the evidence in two parts poses obvious practical difficulties in those judicial systems where the courts or tribunals gather all of the evidence together, both written and oral, before considering how to determine the complaints before it. A two-stage procedure, as opposed to two-stage reasoning, could also yield an absurdity. It would prevent the employer from adducing evidence to show that the act complained of never happened at all. The burden of proof would then shift, requiring the employer to show that acts, which on later analysis were found never to have occurred, were not discriminatory.

7. **Background facts and context to support inferences**

There is no legal aid available in British Employment Tribunals. The claim form for claimants is designed to be user-friendly. Claimants are obliged to identify the nature of their claim and to describe the grounds upon which they seek to support it. In discrimination claims, claimants often provide a detailed narrative that can cover a period of years and embrace a number of grievances. In some claims, claimants seek a remedy in respect of all those grievances on the basis that there has been a sufficient degree of continuity to the discrimination up to and including an act within the national three month limitation period for bringing claims. On other occasions, the earlier grievances are narrated to support an inference that the act of discrimination complained of was on the ground of sex, race or one of the other proscribed grounds.

Such a case was *Anya v University of Oxford*¹⁰ in which the Claimant, a Postdoctoral Research Assistant at the University was one of two candidates, equally well-qualified, short-listed for a research post. They were interviewed by a panel of three, which included the Claimant's supervisor. The other candidate was selected. The Claimant was a black Nigerian and the successful candidate was white. The Claimant raised an internal grievance and the grievance panel, while upholding the interview panel's decision, found shortcomings in the way in which the University's equal opportunities and recruitment policies had been operated. Dr Anya's complaint was of racial discrimination arising from his non-selection for the new research post. He relied, however, not only on the findings of the grievance panel but also on his supervisor's treatment of

¹⁰ (2001) ICR 847

him in the previous two years. The Employment Tribunal dismissed the claim on the basis that it believed the evidence of Dr Anya's supervisor. It failed, however, to make findings about the other matters put before it in Dr Anya's evidence. One of those was that Dr Anya had been repeatedly side-lined by his supervisor in the course of his research work. Of that, Sedley LJ said that the Employment Tribunal had started at the far end of the process of reasoning and had never returned to base.

The inclusion in the claim of many alleged facts going back over a number of years can present formidable case management problems for a court or tribunal. In an earlier case¹¹, Mummery J of the English Employment Appeal Tribunal said:

“Circumstantial evidence presents a serious practical problem for the Tribunal of fact. How can it be kept within reasonable limits?...The temptation of the claimant and his advisors, in these circumstances, is to introduce into the case as many items as possible as material from which the Employment Tribunal might make an inference that “racial grounds” are established. The respondent has to respond to the introduction of those items. He may dispute some of them as factually incorrect. He may seek to introduce other evidence to negate any possible inference of racial grounds, e.g. common non-racial explanations for his acts and decisions. The result of this exercise is that the parties and their advisors may confuse each other (and the Tribunal) as to what the Tribunal really has to decide; as to what is directly relevant to the decision which it has to make and as to what is only marginally relevant or background. It is a legitimate comment that in some cases of race discrimination (*and sex discrimination*) so much background material of marginal relevance is introduced that focus on the foreground is obscured, even eclipsed. In practical terms, this may lead the case to run on and on for many days or weeks.”

The answer to this problem is simple to state but difficult to put into practice: it involves the early definition of the issues that the court or tribunal has to determine. Thus the court or tribunal in a sex discrimination case must as early as possible in the proceedings identify the nature of the complaint or complaints (direct, indirect discrimination, harassment etc.), set out the core complaint or complaints and identify those parts of the narrative or pleadings that the claimant accepts is background and context said to support the inference that sex was the ground for the less favourable treatment. If the inference can be drawn, then the burden of proof will have shifted to the respondent to prove on the balance of probability that the ground for the treatment was not sex.

¹¹ Qureshi v Victoria University of Manchester (2001) ICR 863

8. **Indirect discrimination**

As we saw earlier, Article 2 of the Directive provides that indirect discrimination occurs 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.

The definition of indirect discrimination in the 2006 Directive differs from that in the 1997 Directive which provided that indirect discrimination occurred when an apparently neutral provision, criterion or practice disadvantaged a substantially higher proportion of the members of one sex, unless that provision, criterion or practice could be justified. The current definition is designed to make it easier for claimants to discharge the burden of proof at the first stage by simply having to prove that the provision, criterion or practice puts persons of the same sex at a particular disadvantage compared with persons of the opposite sex, as opposed to imposing a burden to adduce statistical evidence to support an inference based on proportions.

Given that the definition of indirect discrimination already imports a shift in the burden to the respondent to justify indirect discrimination, where does the Article 15 burden of proof apply to indirect discrimination? The short answer is that the burden lies on the claimant to prove facts from which it could be presumed that an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex.

If the claimant does that, the respondent has two bites of the cherry: first, he might disprove on the balance of probabilities that a provision, criterion or practice has been applied at all or that it puts persons of one sex at a particular disadvantage compared with persons of the other sex.

In *British Airways v Stamer*¹², the Claimant was a pilot in the airline's Heathrow Airbus fleet who applied to work 50% of full-time so as to accommodate her childcare arrangements. The airline refused but did offer her 75% of full-time. Counsel for the airline argued before the Employment Appeal Tribunal that the decision to reject her request for 50% but to offer her 75% was simply a one-off decision by the Respondent and not a provision, criterion or practice. There was no pool to which the decision applied, nor anyone by reference to whom the detriment suffered by the Claimant could be compared. It was a discretionary decision relating to that particular Claimant. Permission for 50% had been given to two pilots, both captains, being one man and one

¹² (2005) IRLR 862

woman, also part of the Heathrow Airbus fleet, and to 21 others across the entire Flight Operations crew.

The Judge said that it was the provision, criterion or practice upon which the Claimant relied that had to be tested and went on to hold that the decision to the effect that if the Claimant was to go part-time it must be 75% and not 50% was a requirement or a condition or a provision, even if it might not have been a criterion or a practice.

In respect of substantial disadvantage, the Appeal Tribunal appeared to adopt the reasoning of the Employment Tribunal. The statistics before the Employment Tribunal showed that a larger proportion of women than men within the pool worked part-time, that the disparity in the proportions increased the further one journeyed from 100% to 50% of full-time. Most applications for part-time work within the Respondent's work force were from women, which reflected national statistics. Applications by women pilots were generally for childcare reasons, women generally having the primary childcare responsibility. Thus the Claimant in that case shifted the burden of proof, the Respondent failed to prove that there was not indirect discrimination and subsequently failed to justify that discrimination.

9. **Conclusion**

Despite nearly 34 years of UK legislation promoting the principle of equal opportunities and equal treatment of men or women in matters of pay, employment and occupation, claims continue to be presented to Employment Tribunals. There is evidence to show that women are still the subjects of discriminatory treatment in the workplace. Promotion glass-ceilings, opaque pay practices, stereotypical assumptions about jobs appropriate for women, family-unfriendly policies and other factors that are denying women an equal place in the world of work, still operate.

On the other hand, of those claims in the UK that are not settled and that have to be determined by an Employment Tribunal, only a minority succeed. For not every woman who claims to have been discriminated against on the ground of her sex has been.

Our task as judges is to evaluate all the evidence in claims before us, applying the burden of proof to the elements of discrimination as defined by our national laws and to determine the merits fairly and impartially.