

The Burden of Proof and Access to Justice in Sex Discrimination Cases

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The burden of proof and access to justice in sex discrimination cases

- **INTRODUCTION**

- In the light of the concepts defined in the last presentation, we shall now examine how equality can be rendered effective by means of judicial procedures.
- Two questions will be addressed, although the time will not be equally divided.
 - I The question of proof
 - II More briefly, if we have time, substantive issues (reparations, requirements)

The Burden of Proof and Access to Justice in Sex Discrimination Cases

- **PROOF**

- Relevance and difficult issues
- What needs proving?
- Who has to prove it?
- When does it happen?

The Burden of Proof and Access to Justice in Sex Discrimination Cases

- **A SURVEY OF PROOF**
- I - Proof in EU law
- II - Application in Member States: theory and practice

The Burden of Proof and Access to Justice in Sex Discrimination Cases

- **I PROOF IN EU LAW**

- I - 1 Sources
- I - 2 A two-stage mechanism
- I - 3 Scope and practicalities

I PROOF IN EU LAW

- I - 1 Sources

- I - 1 - 1 ECJ judgments

- Jenkins 31 March 1981 96/80
- Bilka 13 May 1986 170/84
- Danfoss 17 October 1989 C 109/88
- Enderby 27 October 1993 C 127/92
- etc...

Enderby 27 October 1993 C 127/92

- Where there is a prima facie case of discrimination, it is for the employer to show that there are objective reasons for the difference in pay. Workers would be unable to enforce the principle of equal pay before national courts if evidence of a prima facie case of discrimination did not shift to the employer the onus of showing that the pay differential is not in fact discriminatory (see, by analogy, the judgment in Danfoss, cited above, at paragraph 13).

I - PROOF IN EU LAW

- **I - 1 The Sources**

- **I - 1 - 2 Directives**

- I 1 2 1 Directive 97/80 of 15 December 1997
- I 1 2 2 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006

I 1 2 1 Directive 97/80 of **15 December 1997**

Article 4

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.
2. This Directive 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.

I 1 2 2 Directive 2006/54/EC of the European Parliament and the Council of 5 July 2006

- Article 19

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.

I PROOF IN EU LAW

- I - 3 Scope and PRACTICALITIES

- Exclusions
- Bodies providing support

I PROOF IN EU LAW

- **I - 3 SCOPE and PRACTICALITIES**

EXCLUSIONS

- Not applied to criminal procedures (presumption of innocence)
- Option not to apply the rule to proceedings in which it is for the court or the competent body to investigate the facts of the case.
- And an option to introduce rules more favourable to plaintiffs.

I - 3 SCOPE and PRACTICALITIES

- **Mechanism to be combined with the duty to set up equality bodies**

Art 8a

2. Member States shall ensure that the competences of these bodies include:

a) without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 6(3), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination;

I PROOF IN EU LAW

- I - 2 Proving discrimination (under national law) in EU law: a two-stage procedure
- I 2 1 FIRST STAGE, duties of the plaintiff
- I 2 2 SECOND STAGE, justification; proof rests with the respondent

I 2 Proving discrimination (under national law) in EU law: a two-stage procedure

- **I 2 Proving discrimination (under national law) in EU law: a two-stage procedure**
- **I 2 1 FIRST STAGE, duties of the plaintiff**
- I 2 1 1 Purpose of the proof: to establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination
- I 2 1 2 Evidence that can be submitted in this first stage

I 2 Proving discrimination (under national law) **in EU law: a two-stage procedure**

- **I 2 1 FIRST STAGE, duties of the plaintiff**
- **I 2 1 1 Purpose of the proof: to establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination**
- Immediate facts
- The role of statistics

I 2 Proving discrimination (under national law) in EU law: a two-stage procedure

- At this stage the respondent can contest
 - The evidence that has been submitted: as in national law
 - the relevance of groups chosen for comparison
 - etc.....
- If this first stage is not completed, failure
- If it is completed, the second stage begins

I 2 Proving discrimination (under national law) **in EU law: a two-stage procedure**

- **I 2 2 SECOND STAGE, justification; proof rests with the respondent.**
- It is up to the respondent to prove that there has been no violation of the principle of equal treatment.
- Proof that the observed difference was legitimate

Proving discrimination (under national law) in EU law: a two-stage procedure

- **1 2 2 SECOND STAGE, justification;
proof rests with the respondent.**
- **Quality of the relevant evidence**
- **Objectivity**
- **Aims**

Proving discrimination (under national law) in EU law: a two-stage procedure

- **I 2 2 SECOND STAGE, justification;
proof rests with the respondent.**
- Genuine and determining occupational requirement
- Specific justifications
- Others

I PROOF IN EU LAW

- CONCLUSION
- A precise regime
- Judges have considerable room for manoeuvre

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- **II PROOF IN THE MEMBER STATES:**
theory and practice
- II - 1 General review
- II - 2 An example: France

II PROOF IN THE MEMBER STATES: **theory and practice**

- **II - 1 General review**
- Studies in 1995 prior to the directive: recommendations
- Report by the network of legal experts, Bulletin 1 2005
- The directive has been transposed, but what is the practice?

II PROOF IN THE MEMBER STATES: **theory and practice**

- II - 2 An example: the practice in France
- Judicial courts
 - An old question
 - Recent developments

II PROOF IN THE MEMBER STATES: **theory and practice**

- II 2 An example: the practice in France

Administrative courts

- Acclimatisation difficulties for the proof regime. The example of appeals on the grounds of excessive power.

II PROOF IN THE MEMBER STATES: **theory and practice**

- II - An example: the practice in France
- Acclimatisation for HALDE (equality agency)

II PROOF IN THE MEMBER STATES: **theory and practice**

- Conclusion
- From good rules to good practice
- Effectiveness is not just a question of proof.

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- **Other issues (apart from proof)**
- **The proof is not sufficient.**
- **Some other issues to examine**

The Burden of Proof and Access to Justice in Sex Discrimination Cases

- **Other issues (apart from proof)**
- **HOW EFFECTIVE IS THE PROTECTION?**
PROCEDURAL ISSUES OTHER THAN PROOF
- **Disputes relating to regulations**

The Burden of Proof and Access to Justice in Sex Discrimination Cases

- **Other issues (apart from proof)**
- **HOW EFFECTIVE IS THE PROTECTION?**
PROCEDURAL ISSUES OTHER THAN PROOF
- **Issues relating to requirements**

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- **Other issues (apart from proof)**
- **HOW EFFECTIVE IS THE PROTECTION?**
PROCEDURAL ISSUES OTHER THAN PROOF
- **Reparations: declaring rules void and compensating for damages**

- **GENERAL CONCLUSIONS**