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

Mag. a Sandra Konstatzky
Ombud for Equal Treatment
Office of the Ombud for Equal Treatment

- Austrian equality body
- Independent, with the function of assisting victims in pursuing their grievances resulting from discrimination
- Independent investigations
- Independent reports and/or recommendations
Outline of the Presentation

- General remarks on the subject
- Development of the rule regarding burden of proof
  - The directive and the case-law of the Court of Justice of the European Union
- National practices as regards access to justice
- Role of the equality bodies
General Remarks on the Subject

- Assertions and burden of proof
- Facts showing the unfavourable treatment
- Causal link between unfavourable treatment and connection with one of the grounds of discrimination (sex)
General Remarks on the Subject

- Burden of proof
  - Who suffers the disadvantage if it is not possible to ascertain the facts?
- Intensity of proof
  - The required degree of persuasiveness: full evidence, prima facie case
Development of the burden of proof

- European Commission’s 1988 proposal for a directive
- Judgments from the Court of Justice of the European Union
- Differing interpretations between the Member States
  - Art. 2 (2) of the Social Policy Agreement
Derogations from the principle of equal treatment may only relate to specific occupational activities. They must be sufficiently transparent so as to permit effective supervision by the Commission and in principle they must be capable of being adapted to social developments. A procedure like the one contested makes it impossible to exercise any form of supervision, not only by the Commission and the courts but also by persons adversely affected by discriminatory measures.
Judgment of the ECJ of 17 October 1989, Danfoss, C-109/88

- Where an undertaking applies a system of pay which is **totally lacking in transparency**, it is **for the employer to prove** that his practice in the matter of wages is not discriminatory,
- if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men.
• Where a system of individual pay supplements which is completely lacking in transparency is at issue,
• it is only necessary to establish differences so far as average pay is concerned
• to have the effect of imposing on the employer the burden of proving that his practice in the matter of wages is not in fact discriminatory.
• The employer would have to indicate how he applies the system of supplements so that his practice in the matter of wages does not systematically discriminate.
→ He must thus do this transparently.
Interpretation of Art. 6 of Directive 75/117:

- Member States shall take the measures necessary to ensure that the principle of equal pay is applied **effectively**.

- High procedural and de-facto barriers make it more difficult to achieve realisation of the principle.
It is impossible for the female employee to show the causes for the inequality of treatment.

- She is not close to the evidence.
- The evidence is not within her sphere.
• Fundamentally, anyone invoking facts in support of a claim has a duty to prove them.

• The burden of proof for the existence of pay discrimination on grounds of sex thus lies fundamentally with the female employee who believes that she is a victim of discrimination and thus brings legal proceedings against her employer to eliminate this discrimination.
Enderby

- **The burden of proof** is shifted,
- if workers (whatever their gender), who appear *prima facie* to be victims of discrimination,
- would otherwise have *no effective means* of enforcing the principle of equal pay.
Enderby

- Where statistics which the national court considers significant disclose an **appreciable difference** in pay between **two jobs of equal value**, one of which is carried out almost exclusively by women and the other predominantly by men,

- Article 119 of the Treaty requires the employer to show that that **difference is based on objectively justified factors** unrelated to any discrimination on grounds of sex.
What can a female worker be reasonably expected to show?

What falls within her sphere?
Judgment of the ECJ of 31 May 1995: Royal Copenhagen, C-400/93

- Piece-work pay scheme
- A prima facie case of discrimination does not arise solely because significant statistics disclose appreciable differences between the average pay of two groups of workers.
- Such differences may be due to differences in individual output.
It is **not possible to identify the factors** which determined the rates or units of measurement used to calculate the variable element in the pay.

- The **employer may have to bear the burden of proving** that the differences found are not due to sex discrimination. If the (female) worker would otherwise be deprived of **any effective means** of enforcing the principle of equal pay.
Judgment of the ECJ of 7 February 1991, Nimz, C-184/89

• It is possible to show unfavourable treatment that is particularly above-average due to a **neutral provision**.

• The employer must produce evidence that the provision concerned is justified by objective criteria and that these **criteria are based, in particular, on the relationship between the nature of the work** and the requirement of the **neutral provision**.

• Justification grounds  \( \rightarrow \) Justification for indirect discrimination
Principles Contained in the Judgments

- Prima facie discrimination
- The transparency requirement – effective scrutiny
- Closeness to the evidence
- Sphere theory
Burden-of-Proof Directive 97/80/EG

• Recital 17
  • Plaintiffs could, in certain circumstances, be deprived of any effective means of enforcing the principle of equal treatment,
  • if the effect of introducing evidence of an apparent discrimination were not to impose upon the respondent the burden of proving that his practice is not in fact discriminatory.
Burden-of-Proof Directive

- Recital 18
- The ECJ has therefore held that the rules on the burden of proof must be adapted when there is a *prima facie case of discrimination*, and
- That, for the principle of equal treatment to be applied *effectively* in such cases, the burden of proof must shift back to the respondent.
The Burden-of-Proof Rule: Art. 4

- The plaintiff must present facts from which it may be presumed that direct or indirect discrimination has occurred.
- The onus is on the respondent to produce evidence to show that no breach has occurred.
Burden-of-Proof Directive

- Civil and administrative legal proceedings
- Not in criminal law
- Not mandatory when it is the job of the court to investigate the facts of the case
- Definition for indirect discrimination
- No duty to provide information
Burden-of-Proof Directive

Aim

• To guarantee the effective enforcement of the principle of equal treatment

• Approximation of the legal situation
Directive 2006/54/EC

- Recital 30

- Burden of proof is shifted to the respondent when there is a prima facie case of discrimination.

- The appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination is a matter for the relevant national body in accordance with national law or practice.
Development of the burden of proof

Directive 2006/54/EC

- Art. 19 Rule on burden of proof
- When persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish … 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.
Judgment of the ECJ of 26 June 2001, Brunnhofer, C 381/99

- Direct discrimination
- The fact that the comparators are classified in the same job category is not in itself sufficient.
- The employer does not therefore have to prove that the activities of the comparators are different.
• Previous case-law is not applicable
• It is for the plaintiff to establish..., 
  • that the respondent pays her a lower salary compared with her male colleagues chosen as comparators,
  • that she really does the same work or work of equal value.

→ She would then appear to be the victim of discrimination that can be explained only by the difference in sex.
It is once the appearance of discrimination has been proven that the employer must prove:

- that the two jobs done are in reality not comparable
- objective factors
Judgment of the ECJ of 10 July 2008, Feryn, C-54/07

• The duty to prove that there was no breach depends solely on establishing,

• on the grounds of apparent discrimination, that there is a presumption that discrimination has occurred.

• **Public statements** by an employer may also suffice for such a presumption.

• As evidence to the contrary, the employer might show that his actual recruitment practice did not tally with his statements.
Reversal of the Burden of Proof

- Positive measure
- The duty to prove that there was no breach depends on establishing, on the grounds of apparent discrimination, there is a presumption that discrimination has occurred.
- No distinction between direct and indirect discrimination
Reversal of the Burden of Proof

- Appearance
- Showing apparent discrimination: reducing the standard of evidence
  - if it is impossible to get close to the evidence,
  - if lack of transparency would otherwise make scrutiny impossible.
Access to Justice

- Appreciation of the facts that would lead to the presumption that discrimination had occurred lies with the Member States.
- Recital 13
Example of Sweden

- Swedish Discrimination Act: Section 4 Information about qualifications

  “If a job applicant has not been employed or selected for an interview,... the applicant shall, upon request, receive written information from the employer about the education, professional experience and other qualifications that the person had who was selected...”
Example of Germany

- § 22 of the “AGG” (general law on equal treatment)
- “If, in a dispute, one party is able to establish **circumstantial evidence** from which it may be assumed that unfavourable treatment … then the burden of proof lies with the other party…”
- Case: does probability constitute adequate circumstantial evidence?
Equality Bodies

• Role of the national equality bodies
• Equinet (www.equineteurope.org)
• Discussions on obtaining evidence
Conclusions

- Is effective legal enforcement possible?
- No right to information
- Interpretation of burden of proof in the various Member States
• Thank you for your kind attention!