

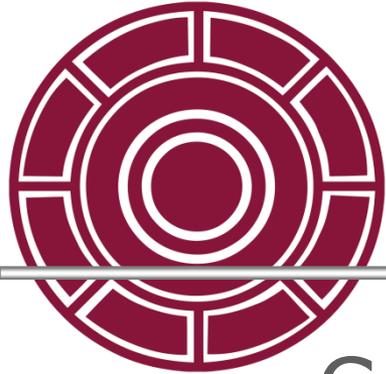
The Burden of Proof in Discrimination Cases

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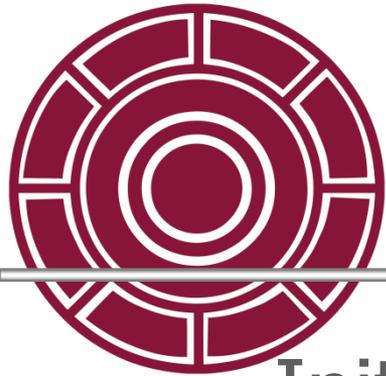
Office of the Ombud for Equal Treatment

- Austrian equality body
- Directive 2000/43/EC Art. 13; Directive 2006/54/EC Art. 20; Dir. 2004/113/EC Art. 12
- Independent, with the function of assisting victims in pursuing their grievances resulting from discrimination
- Independent investigations
- Independent reports/recommendations



Outline of the Presentation

- General remarks on the subject
- Evolution of burden-of-proof rules
 - Directive and ECJ case-law
- Example of implementation
- Role of the equality bodies
- Pending reference for a preliminary ruling



Evolution

- Initiative of European Commission, 1988 proposal for a directive
 - Problem: difficulties in law enforcement, ignorance of legislation
 - Fundamental guaranties lost effectiveness
 - No unanimity



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 for men



Danfoss

- 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.**
- **Otherwise,** female workers **would be deprived of any effective means** of enforcing the principle of equal pay before the national courts.



Danfoss

- Sufficient to impose upon the employer the burden of proving that his practice in the matter of wages is not discriminatory
 - To show that his practice of wages does not systematically work to the disadvantage of female employees, the employer will have to indicate how he has applied the criteria concerning supplements
- he will be forced to make his system of pay **transparent.**



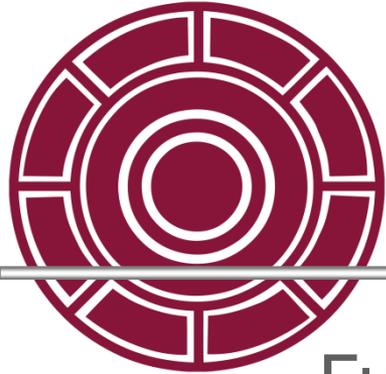
Danfoss

- 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.



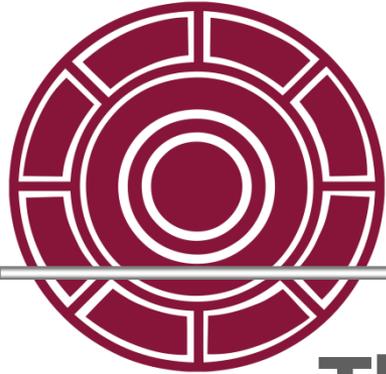
ECJ judgment of 30 June 1988 Commission v France, C-318/86

- Derogations from the principle of equal treatment may relate only 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
- This practice **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



ECJ judgment of 27 October 1993 Enderby, C-127/92

- 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.



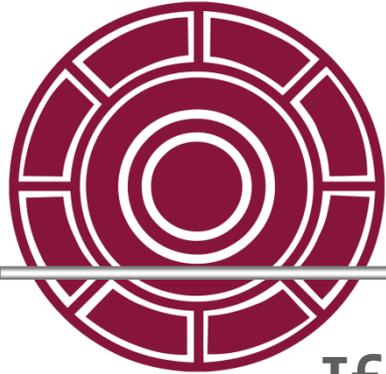
Enderby

- **The onus may shift**
- when that is necessary to avoid depriving workers **who appear to be victims of discrimination**
- of **any effective means** of enforcing the principle of equal pay.



ECJ Judgment of 31 May 1995 Royal Copenhagen, C-400/93

- Burden of proof is normally on the worker
- May be shifted **when that is necessary to avoid depriving** workers who appear to be victims of discrimination
- **of any effective means** of enforcing the principle of equal pay



Principles Contained in the Judgments

- If there is prima facie evidence of discrimination
- which may be accompanied by an non-transparent system
- the burden of proof must shift.



Commission's 1996 Proposal

- Where persons establish facts from which discrimination may be presumed to exist,
- it shall be for the respondent to prove that there has been no contravention of the principle of equal treatment.
- Plaintiff to benefit from any doubt that might remain



Commission's 1996 Proposal

- When the defendant applies a system or a decision lacking transparency,
- it is for the defendant to prove that the apparent discrimination is due to objective factors unrelated to any discrimination



Commission's 1996 Proposal

- The parties concerned may have access to all the relevant information
- which is in the possession of the other party or which
- may reasonably assumed to be in its possession
- and which is necessary for them to exercise their rights.



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.



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.



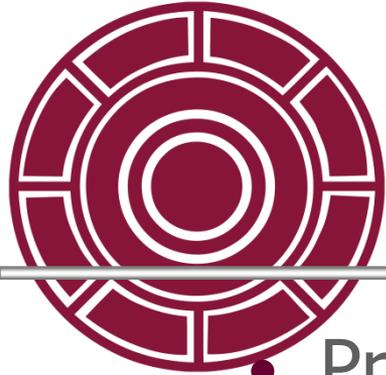
Directive 2006/54/EC

- Measures in accordance with national judicial systems
- Establishing facts from which discrimination may be presumed – proof
- ECJ: Active role of the respondents
- It is for the court or competent national body to investigate the facts of a case



ECJ Judgment 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



Brunnhofer

- 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



Brunnhofer

- Once a prima facie case of discrimination has been established, the employer must prove that
 - the two jobs done are in fact not comparable
 - objective factors justify the difference in pay and have nothing to do with the plaintiff's gender



ECJ Judgment 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



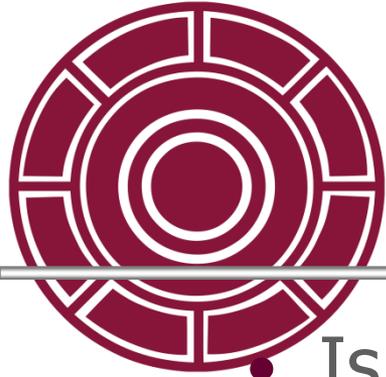
Example of Sweden

- 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 of the person who was selected...”



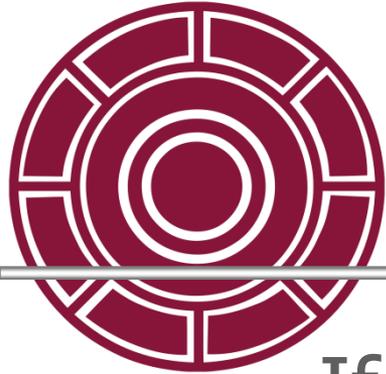
Equality Bodies

- Role of the national equality bodies
- Equinet (www.equineteurope.org)
- Situation testing



Reference for a Preliminary Ruling, C-415/10

- Is Art. 19 (1) to be interpreted as meaning that,
 - where a worker shows that he meets the requirements for a post advertised by an employer,
 - he has the right vis-à-vis that employer, if he does not obtain the post, to information as to whether the employer has engaged another applicant and, if so, as to the criteria on the basis of which that appointment has been made?



Reference for a Preliminary Ruling, C-415/10

- If the answer to the first question is affirmative,
- Where the employer does not disclose the requested information, does that fact give rise to a presumption that the discrimination alleged by the worker exists?



Summary

- Objective is to facilitate effective law enforcement
- Prima facie evidence:
 - if otherwise female workers were deprived of any effective means
 - if lack of transparency made it impossible to exercise any form of supervision