The Burden of Proof
in Discrimination Cases

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- Austrian equality body
- Independent, with the function of assisting victims in pursuing their grievances resulting from discrimination
- Independent investigations
- Independent reports/recommendations
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
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
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.
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.
• 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.
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
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.
• 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.
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

Evolution of the Burden of Proof
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
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.
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.

Evolution of the Burden of Proof
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
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
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
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
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