

# **THE BURDEN OF PROOF IN SEX DISCRIMINATION CASES**

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## **1. INTRODUCTION**

1.1. The purpose of this presentation is to consider the practical application of Council Directive 97/80/EC regarding the burden of proof in Sex discrimination cases.

1.2. Despite being in force since 1997, and despite parallel directives governing other forms of discrimination, there is very little guidance from the ECJ on the application of the directive. Examples in this presentation are taken from the UK jurisdiction in which the author practices law; the ECJ where available and the European Court of Human Rights.

1.3. The importance of the elimination of gender discrimination is explained in the preamble to the both *Council Directive 2000/78*, which establishes a general framework for equal treatment in employment and occupation, dealing specifically with discrimination on the ground religion or belief; sexuality; disability and age and Council Directive 2000/43 which lays down a framework for combating discrimination on the grounds of racial or ethnic origin, as

well as being set out in numerous decisions of the ECJ. For example, in the recent decision of the ECJ *Palacios de la Villa v Cortefiel Servicios SA (C-411/05)* on age discrimination, the court considered the purpose of directive 2000/ 78 and cited extensively from European treaties and the conventions, to emphasise the importance of anti discrimination measures both as a means to economic effectiveness, but also as a fundamental human right. It is against this background that the difficulties for a complainant of proving discrimination, and the measures taken to combat these difficulties must be examined and understood.

## **1. The Background**

1.1. The principle of equal treatment for men and women is a principle of fundamental importance within the European Community. Council Directive 76/207/EEC made provision for equal access for men and women to employment, vocational training and promotion and working conditions as early as 1976, and the year before, council directive 75/117/EEC had introduced the principle of pay equality for men and women describing it as “an integral part of the establishment and functioning of the common market”<sup>1</sup>

1.2. More recently, the principles of equality have been extended to cover race, age, disability, sexuality and faith, in both employment and services. These are not the subject of today’s presentation, although many of the principles are common principles.

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<sup>1</sup> See council directive 75/117/EEC preamble.

1.3. Article 2(2) of 76/207/EEC as amended provides that the principle of equal treatment will include direct and indirect discrimination; harassment and sexual harassment; instructions to discriminate and less favourable treatment related to a woman's pregnancy or maternity leave.

1.4. Article 7 provides a general prohibition on victimisation, stating that

*“member states shall introduce into their national legal systems such measures as are necessary to protect employees, including those who are employees representatives provided for by national laws and/ or practices , against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.*

1.5. However, the particular problems of establishing discrimination, and the variety of approaches amongst member states, led to the introduction of further measures to enable national courts to deal with sex discrimination in a more uniform manner. These measures are found in the directives dealing with the burden of proof.

## **2. What are the particular problems which the Burden of proof Directive seeks to address?**

2.1. Assuming that a woman can prove that she has suffered some form of adverse treatment, (Not always easy in harassment cases

for example) by proving that she had been dismissed, denied access to training, or not been appointed to a job or a promotion for example, the key difficulty for women who complain of sex discrimination in any jurisdiction is proving that the reason *why* she has been treated as she has been, is related to her gender.

2.2. Of course, if someone tells the women, *we cannot appoint you because you are pregnant*, or, *we have not promoted you because we want a man for this job*, there is evidence of the reason for the treatment which is obviously related to gender. In reality this is rare. It is a truism noted by the UK courts<sup>2</sup> and doubtless by courts across Europe that those who discriminate are unlikely to advertise their prejudices and, in many cases, may not even be aware that gender is influencing their decision.

2.3. It has been recognised by the UK courts that most respondents will not advertise their own prejudices even if they are aware of them. The UK courts have noted that

*“It is unusual to find direct evidence of 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 the assumption that he or she would not have fitted in”*

2.4. The judgment was subsequently approved by the House of Lords, then the highest UK court.

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<sup>2</sup> See *King v Great Britain China Centre* [1991] IRLR 513 per for example

- 2.5. What is far more common is for a woman to be told that she does not have the qualifications required, or that there are better candidates, or that all the places on the training courses were taken already.
- 2.6. Of course, on many occasions these reasons will be true ones, but, on many other occasions there is reason to believe that gender continues to play a negative role in the decision to employ and promote women across the community.
- 2.7. The evidence for this is the proportion of women in part time and lower paid , lower status jobs across Europe, the level of pay received by women, and the achievements of women in particular industries and particular companies. Whilst there may be reasons why individual women find it harder to progress in some instances, a real concern continues to be that women as a group or a section of society are still held back from achievement by the discriminatory attitudes of the decision makers.
- 2.8. In reality, much discrimination will not be intentional, or deliberate of at all, and may stem from a genuine belief that a person will not fit in, or that a man is needed for a job. Such attitudes are very difficult to prove, but, if they are influencing the decision not to appoint a woman, or not to promote a woman, they are of course contrary to EU law and women ought to be able to challenge the decisions successfully.

2.9. A central difficulty prior to the directive was that the burden of proving discrimination rested wholly on the individual women who complained of adverse treatment. If a woman alleges that she has suffered adversely because of another's attitude, she must prove the cause of her treatment. The organisation, or the manager or provider did not have to prove that their actions were either non discriminatory, or for a non discriminatory reason.

2.10. In practical terms, since the organisation or individual decision maker would also hold all the documentary information about the decision making process, if it existed at all, women were seriously prejudiced in bringing a claim. Without evidence, and with the burden of proving the case on the balance of probabilities, claims could only ever have good prospects of succeeding, where there was an admission, or where there was direct evidence of the reason, because of comments or statements made.

2.11. Some cases do come before the courts where the motivation for the alleged discrimination is clear on the face of the claim. For example, in Case C-267/06 before the ECJ, *Maruko v Versorgungsanstalt der deutschen Bühnen* (2008) the ECJ consider that a refusal to grant a survivors pension under the occupational pension scheme to a life partner was discrimination on the grounds of sexuality.

2.12. Mr. Maruko had entered into a registered life partnership. His partner was a member of an institution dealing with old age insurance for his profession and the related survivors benefits. His

partner died, and he claimed a pension, but was refused, on the basis that there was no such provision made by the schemes for surviving life partners. The German court ruled that there was less favorable treatment of surviving life partners than of married survivors, and the ECJ ruled that there was therefore discrimination on the grounds of sexual orientation. This was so, because there was a provision which restricted survivors pensions to surviving spouses. If surviving spouses and surviving partners are incomparable situations, then there will be discrimination if one is not granted the benefit and the other is.

2.13. In this case, there was no alleged intention to discriminate against people on the grounds of their sexuality, but it was clear from the terms of the policy, that the reason that the benefit was not granted, was that the plaintiff was not heterosexual.

2.14. In cases where there is a limitation on a benefit which is stated or expressed, the reason for that limitation will be easier to prove but in most cases, the reason for the exclusion, or limitation or non appointment will not be expressed or stated.

### **3. The Approach of the Directive Regarding the Burden of Proof**

3.1. Taking account of the particular problems faced by women, the council of Europe introduced a directive which addresses the problem, by imposing a partial reversal of the burden of proof.

- 3.2. The rationale is simple: If an organisation or an individual have made a decision about appointment; promotion or provisions of services to groups or individuals, they will have reason for those decisions, and the individuals chosen. It is common sense to recognise that the organisations will have possession of the information and knowledge about *why* a person was or was not chosen, and conversely that the individual who is *not* chosen, will not be in possession of that information, unless they are given it by the organisation.
- 3.3. It follows therefore that the organisations or individuals who make the decisions, and thus know why the decisions are made should bear some of the burden of proving the reason or cause of particular decisions in certain circumstances. Whilst proving that the employers' motivation is discriminatory is likely to be extremely difficult for a complainant, proving that their motivation is NOT discriminatory, but caused by entirely legitimate factors ought, conversely to be relatively straightforward for the employer or respondent.
- 3.4. This is because in a sensibly run organisation, it is to be expected that the reason for particular decision will be based on sound and sensible factors, and that those factors will be known and understood, and therefore be easily explained and proved by the respondent employer.
- 3.5. It is also to be assumed that a sensible and reasonable organisation will take steps to ensure that it does not discriminate, but abides by the law of the state and will be able to demonstrate

how it does this, by showing records of equalities monitoring, workforce statistics, and recruitment records for example.

#### **4. The content of the Directive – what does it say?**

4.1. Council Directive 97/80/EC of 15 December 1997 addresses the issue of the burden of proof in sex discrimination cases, reflecting the difficulties discussed above and states:

*“plaintiffs could be deprived of any effective means of enforcing the principle of equal treatment before national courts 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 discriminatory....the Court of Justice of the European communities 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, the burden of proof must shift back to the respondent when evidence of such discrimination is brought..”*

( see preamble at para 17-18 authors emphasis)

4.2. The directive then sets out at article 4 as follows

*“Member states shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that when person 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 discrimination or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment”

(authors emphasis added)

4.3. The scope of this formulation of the burden of proof to be applied in discrimination cases is also found in the directives dealing discrimination on the grounds of

- religion or belief; sexuality; disability and age (see Article 13 of Council Directive 2000/78) and
- racial or ethnic origin ( see Article 8 of Council Directive 2000/43)

## **5. What does this mean in Practice?**

5.1. There are three stages :

1. The plaintiff must establish a prima facie case of discrimination;
2. If the plaintiff does this, then the burden of proving the reason or the cause of the decision, lies with the respondent and not the plaintiff ;
3. The respondent must prove, on the balance of probabilities that the reason for the treatment complained of is NOT caused by any discrimination whatsoever.

5.2. Put another way, the decision maker must prove that there is a reason for the decision which is not discriminatory, and that the non discriminatory reason is the only reason for the decision.

## 6. The First Stage – The prima facie case

- 6.1. The prima facie case will be different depending upon the type of discrimination alleged and the approach of courts and judges may need to take a common sense and flexible approach. Approach, in the absence of any very clear guidance from the ECJ.
- 6.2. The first point to note is that in many case, the Claimant/ plaintiff will be able to prove a range of facts which are capable of pointing to the possible, or probable existence of discrimination, so that there can be an inference of discrimination, or a prima facie case, which requires explanation by the respondent.
- 6.3. The question of what sort of information might form the basis of the facts necessary to establish a prima facie case so that the burden shifts to the respondent has been considered by the ECJ in a race discrimination case C-54/07 *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding Firma Feryn NV* (2008).
- 6.4. In that case a Belgian company placed an advert for staff, noting that applications from certain ethnic minorities would be turned down. On the face of it, this appears to be clear direct discrimination.

6.5. The case was referred for a preliminary ruling on the interpretation of council directive 2000/43/EC , and the following questions were asked:

*“(4) What is to be understood by ‘facts from which it may be presumed that there has been direct or indirect discrimination’ within the terms of Article 8(1) of Directive 2004/43? How strict must a national court be in assessing facts which give rise to a presumption of discrimination?”*

*(a) To what extent do earlier acts of discrimination (public announcement of directly discriminatory selection criteria in April 2005) constitute ‘facts from which it may be presumed that there has been direct or indirect discrimination’ within the terms of Article 8(1) of [Directive 2000/43]?”*

*(b) Does an established act of discrimination in April 2005 (public announcement in April 2005) subsequently give rise to a presumption of the continuation of a directly discriminatory recruitment policy? Having regard to the facts in the main proceedings, is it sufficient, in order to raise the presumption (that an employer operates and continues to pursue a discriminatory recruitment policy) that, in April 2005, in answer to the question whether, as an employer, he did not treat people from foreign and indigenous backgrounds in the same manner and was thus actually a bit racist, he publicly stated: ‘I must comply with my customers’ requirements. If you say “I want that particular product or I want it like this and like that”, and I say “I’m not doing it, I’ll send those people”, then you say “I don’t need that door”. Then I’m putting myself out of business. We must meet the customers’ requirements. This isn’t my problem. I didn’t create this problem in Belgium. I want the firm to do well and I want us to*

*achieve our turnover at the end of the year, and how do I do that? – I must do it the way the customer wants it done!’[?]*

*(c) Having regard to the facts in the main proceedings, can a joint press release issued by an employer and the national body for combating discrimination, in which acts of discrimination are at least implicitly confirmed by the employer, give rise to such a presumption?*

*(d) Does the fact that an employer does 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?*

*(e) Is one fact sufficient in order to raise a presumption of discrimination?*

*(f) Having regard to the facts in the main proceedings, can 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?*

*(5) How strict must the national court be in assessing the evidence in rebuttal which must be produced when a presumption of discrimination within the meaning of Article 8(1) of Directive 2000/43 has been raised? Can a presumption of discrimination within the meaning of Article 8(1) of Directive 2000/43 ... be rebutted by a simple and unilateral statement by the employer in the press that he does not or does not any longer discriminate and that fitters from ethnic minorities are welcome; and/or by a simple declaration by the employer that his company, excluding the sister company, has filled all vacancies for fitters and/or by the statement that a Tunisian cleaning lady has been taken on and/or, having regard to the facts in*

*the main proceedings, can the presumption be rebutted only by actual recruitment of fitters from ethnic minorities and/or by fulfilling commitments given in the joint press release?”*

6.6. The ECJ were brief in their answer to these questions, giving the following guidance:

*“29. The third to fifth questions concern the application of the rule of the reversal of the burden of proof laid down in Article 8(1) of Directive 2000/43 to a situation in which the existence of a discriminatory recruitment policy is alleged by reference to remarks made publicly by an employer concerning its recruitment policy.*

*30. Article 8 of Directive 2000/43 states in that regard that, where there are facts from which it may be presumed that there has been direct or indirect discrimination, it is for the defendant to prove that there has been no breach of the principle of equal treatment. The precondition of the obligation to adduce evidence in rebuttal which thus 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.*

*31. Statements by which an employer publicly lets it be known that, under its recruitment policy, it will not recruit any employees of a certain ethnic or racial origin may constitute facts of such a nature as to give rise to a presumption of a discriminatory recruitment policy.*

*32. It is, thus, for that employer to adduce evidence that it has not breached the principle of equal treatment, which it can do, inter alia,*

*by showing that the actual recruitment practice of the undertaking does not correspond to those statements.*

*33. It is for the national court to verify that the facts alleged against that employer are established and to assess the sufficiency of the evidence which the employer adduces in support of its contentions that it has not breached the principle of equal treatment.*

*34. Consequently, the answer to the third to fifth questions must be that public statements by which an employer lets it be known that under its recruitment policy it will not recruit any employees of a certain ethnic or racial origin are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory within the meaning of Article 8(1) of Directive 2000/43. It is then for that employer to prove that there was no breach of the principle of equal treatment. It can do so by showing that the undertaking's actual recruitment practice does not correspond to those statements. It is for the national court to verify that the facts alleged are established and to assess the sufficiency of the evidence submitted in support of the employer's contentions that it has not breached the principle of equal treatment."*

7. This response is the clearest statement made on the application of the burden of proof and the practical application of it.

## **8. Establishing a prima facie case in gender cases**

8.1. In a direct discrimination, it is likely that a claimant or plaintiff must prove both actual adverse treatment, and either the difference

of gender, or the fact of pregnancy, which is known to the alleged discriminator.

8.2. In a pregnancy claim, there is no requirement for a comparator, but in direct sex discrimination a woman will usually also need to show that a man in a comparable situation has been treated differently to her.

8.3. However, in both types of case, there are some who argue that the mere fact of different treatment without more will not lead to a shift in the burden of proof. It is argued that there must be some prima facie evidence of a discriminatory motive. What inferences may be drawn from primary facts found by a court, is considered below, but it must be noted that national jurisdictions will determine themselves how to apply the directive, and the rules of evidence applied.

8.4. If it is considered that the facts of different treatment and the act of differences in gender may of its self be enough to lead to a shift in burden, there is nothing apparent in the directive which prevents this.

## **9. Indirect discrimination**

9.1. The test for indirect discrimination is

*“ 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.”*

9.2. Whilst the test already has built into it a requirement for an alleged discriminator to justify a discriminatory policy or procedure, where a plaintiff proves that there is policy procedure or practice which places her and other women at a particular disadvantage compared to men, it is arguable that the burden of proof will shift before women have to prove that men are not disadvantaged.

9.3. That is, that once a women proves the existence of the PCP, that she is disadvantaged and that other groups of women are also disadvantaged, the organisation or employer must demonstrate that it is not discriminatory at all, or that if it is, it is justified.

9.4. The test requires that the comparison shows only that a test puts people of a particular characteristic at a *particular disadvantage*. It is arguable whether it is for the claimant to prove that the policy also puts people of their status in general at a disadvantage, or whether it will be sufficient for them to demonstrate a likelihood or probability that it would.

9.5. It is probable that the wording of the directive, and the practice of national courts and the ECJ and indeed the EU Court of Human Rights in indirect discrimination cases, allows and indeed encourages national courts to place emphasis on knowledge of industrial practices, and common knowledge of recognised trends in society, in reaching conclusions on these matters, as well as statistical evidence of the way that people in general are treated, or

the sorts of pressures and disadvantages which affect people in general.

9.6. This might include some of the following “common knowledge”

- women tend to care for children more often than men, and will therefore find part time working harder;
- Christians will find it harder to work on Sundays;
- Jewish people will find it harder to work on a Saturday;
- Women will find it harder to work flexible shift systems;
- Gay men and lesbians will find it harder to comply with conditions of marriage;
- A requirement for a language as ones birth language will be harder for people of different nationalities or ethnic origin;

9.7. Once the plaintiff/ claimant proves these facts, the respondent must demonstrate that any such provision or practice is objectively justified by a legitimate aim. This requires the standard test balancing the need of the policy or practice against the discriminatory effect of that policy or practice.

9.8. However, at present this author is not aware of any further guidance and certainly the UK courts continue to consider that the plaintiff claimant must prove both the pcp and the comparative disadvantage.

## 10. Drawing Inferences from the findings of Fact

- 10.1. Unfortunately for claimants and plaintiffs, it is more usual for a statement of discriminatory intent, or motive to be wholly absent, and instead, for there to be a statement of absolute denial.
- 10.2. Therefore in most cases, drawing from the ECJ guidance, what the courts must rely upon is inferences it would be appropriate to draw from the facts that they find. Could the court infer from the facts found that, in the absence of an explanation from the respondent employer, that discrimination may have taken place?
- 10.3. This allows for facts or matters other than direct evidence, which is unlikely to exist in most cases, to be considered by the court. If the sum of the facts, including circumstantial and maybe statistical evidence could lead to a finding of discrimination, then the onus moves to the respondent.
- 10.4. This basic test has been approved in the UK Court of Appeal, which has considered the burden of proof in the context of gender equality.<sup>3</sup>
- 10.5. However, in recent consideration of the nature of the shifting burden in the UK courts, the Court of Appeal<sup>4</sup> has suggested that before the burden of proof can move to the respondent, there is need for evidence to support facts which point towards

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<sup>3</sup> See *Igen Ltd & others v Wong and others* [2005] ICR 931 Court of Appeal

<sup>4</sup> See *Maddarassy v Nomura International* [2007] EWCA Civ 33

the grounds of the decision being the status, in addition to the mere fact of the differential treatment and differential status. It is argued that without this, a reasonable court would not presume that discrimination had taken place. Of course, in many cases, the circumstantial and statistical evidence will arguably provide such evidence.

10.6. It is suggested, based on the UK experience, that such facts may be about the surrounding circumstances of the employment or benefit, or the attitude of the employer, as demonstrated by the following types of information:

- Facts showing the profile of the workforce by gender; race; ethnic group; religion and sexuality (if known)
- Details of the number of disabled people in the workforce;
- Records of the retention of disabled people or people of particular religious or racial backgrounds;
- Information about the reasons why people leave the organisation, why they are dismissed, or promoted for example.

10.7. Taking these matters into account, the requirements of the directive can be more easily understood and applied when answering the question, what facts must the complaints prove in order to satisfy the requirement of “facts from which it *may* be presumed that discrimination has taken place”

10.8. The first point to note is the emphasis on the word *may*. The directive does not require facts to be proved from which it *must* be presumed that discrimination has taken place. The expectation is that the court or tribunal will make findings of

fact, but when assessing those facts, need not require that they conclusively prove discrimination has taken place, but rather, that the facts are of sufficient weight to point to presumed discrimination.

10.9. This must mean that the fact finding court or tribunal does not have to be wholly satisfied that the facts found *do* amount to evidence of discrimination, only that they may do so, or are capable of doing so. It is suggested that this can include a very wide range of factual circumstances, and because it is a range, it will encompass both those cases where the facts are wholly persuasive but also, necessarily those case in which the facts are less persuasive, in that whilst they point to discrimination, they may also simply be evidence of unfairness, poor management or a fair and non discriminatory decision arising in unusual circumstances.

## **11. The Respondents Explanation**

11.1. Once the burden of proof moves to the respondent, the question is what must he or she prove, in order to show that the reason for the treatment was non discriminatory?

11.2. This question was considered by the UK Court of Appeal in *Igen v Wong*<sup>5</sup>, and the Court held that for the respondent to prove that he did not commit, or was not to be treated as having committed that act of discrimination, he must prove,

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<sup>5</sup> see above note 1.

*“on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.”*

11.3. This, the court noted required not merely consideration of whether the respondent has provided an explanation all, but further an assessment of whether the explanation is one which the court believes, one which is adequate to discharge the burden of proof, on the balance of probabilities, and one which shows that the treatment was not on the grounds alleged, but was for a non discriminatory reason.

11.4. In addition, as noted above, it is more than likely that the evidence and facts necessary to provide the explanation will be in the possession of the respondents. The Court can expect therefore cogent evidence to discharge the burden. Explanations can of course vary enormously, but there are some examples which are worth considering.

## **12.Examples**

### **12.1. The bad employer defence**

12.2. If an employer states that whilst they have treated the complainant badly, the reason was not her gender, race or religion for example, but arose from the general low management skills of the organisation, or the fact that this particular manager treats all employees badly, the court ought to expect evidence from the employer which is more than a bare

assertion. Actual evidence of specific instances of similar bad treatment of different employees in comparable situations should be produced.

**12.3. The complainant was not as good a candidate as the person we appointed.**

12.4. The employer can be expected to have details of the relative merits of candidates including discussion or subjective views of the candidates. They ought to be able to produce notes of interviews, examples of questions asked, and details of any scoring. Evidence that questions are asked of one candidate but not another, which relate to the status of the complainant, such as, “will you need to take time off for child care” or “ Do you plan to have any more children?” or “ as a woman are you strong enough to lift these boxes? Can you work in an all male environment?” for example, may point to a particular and discriminatory mindset, albeit an unconscious one and one which is not ill intentioned.

12.5. Further, where it appears that the complainant and the successful candidate were very close in qualifications and experience, and both did well at interview, employers will be expected to provide clear and rational explanations for taking on one person rather than the other. Any suggestions that a judgement has been made that a woman would not “fit in” must be explored. An employer may well have good reason for seeking particular personal qualities to complement an existing

team, or of placing slightly more weight on one factor than another, but they must be able to explain it.

12.6. **We have never appointed a woman , but only because they have never done as well as the other candidates. This is an engineering firm, and that is to be expected.**

12.7. An employer will have to demonstrate that as a matter of fact this is the case. Where there is a pattern of failure to appoint, the first time may be chance, the second coincidence, but after that, the case for suggesting discrimination looks far stronger. There may of course be some policy, criteria or practice at work, which is indirectly discriminating against the complainant. Do women apply at all? Are there working hours which prevent women from applying? Is part time work an option? Are there equalities policies and maternity provisions? Are there any women on the interview panel?

12.8. Finally, it must be remembered that an employer/ respondent who cannot provide an adequate explanation **will** be found to have discriminated.

### **13. Statistics as Evidence**

13.1. In both cases of direct discrimination and in cases of indirect discrimination, statistical evidence from a variety of sources will be useful and often of key importance. The relevance of statistics has been recognised by the UK national courts, but also by the ECJ and by the European Court of Human rights.

13.2. The directives recognise the potential importance of statistics as evidence, particularly in the context of indirect discrimination.

Both directives state:

*“The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide, in particular, for indirect discrimination to be established by any means including on the basis of statistical evidence.”*<sup>6</sup>

13.3. In addition, the ECJ have long recognised the problem of historical stereotyping in equal pay cases for example, evidenced by clusters of one gender in some roles, and clusters of men in other roles.<sup>7</sup>

13.4. The ECJ have held that a prima facie case of indirect sex discrimination is established if valid statistics 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 for example. In the case of *Enderby* for example the court noted<sup>8</sup>

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<sup>6</sup> See article 15 of both council directive 2000/43 and of council directive 2000/78

<sup>7</sup> See for example the Danfoss case *Handels –OG Kontofunktionoerernes Forbund i Danmark v Dansk Arbejdsgiverforening* Case C-109/88, and [the Swedish Ombudsman case \[2000\] IRLR 421](#)

<sup>8</sup> *Enderby v (1) Frenchay Health Authority (2) Secretary of State for Health [1993] IRLR 591*

“It is for the national court to assess whether it may take into account those statistics, that is to say, whether they cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena, and whether, in general, they appear to be significant.”

(see Judge O’Due)

13.5. Some examples of the types of evidence that may be useful to claimants are as follows:

- workforce statistics which show that no or a low proportion of employees of the complainants status have been appointed to posts at similar levels;
- Figures which show that a particular class of employee is under represented in a particular area of work, or in a particular level of work;
- Statistics which show that the proportion of white and non white applicants and appointments to posts broadly similar to the one the claimant has applied for but failed to be appointed to;<sup>9</sup>
- workforce statistics which show clusters of employees of a particular race; gender or faith for example are over represented in particular types of job, or at particular levels within an organisation;
- Workforce statistics which suggest what is colloquially known as a “glass ceiling” for particular classes of employee;<sup>10</sup>
- The practices of a particular manager over a period of time, on realthion to promotion or appontments for example;

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<sup>9</sup> See the UK case of West Midlands Passenger Transport v Singh 1988 ICR Court of Appeal

<sup>10</sup> ( see Rihal v London Borough of Ealing [2004] IELR 642

- Evidence that a particular manager or member of an appointments panel has displayed discriminatory attitudes in the past, or has made discriminatory or disparaging remarks about others in the past;
- Evidence of a culture within the organisation which does not value or promote equalities such as a failure to implement proper policies and procedures, or a failure to follow established procedures or policies ;
- Evidence from before the events complained of, or after the events complained of may be indicative of a culture within an organisation
- Compelling statistics can demonstrate an irrebuttable presumption of indirect sex discrimination. For example in the UK case of *Villalba* the Judge Mr Justice Elias noted that <sup>11</sup>

*“where cogent, relevant and sufficiently compelling statistics demonstrate that women suffer a disparate impact when compared with men, there is an irrebuttable presumption that sex has indirectly tainted the arrangements even though it may not be possible to identify how that has occurred, and the differential needs to be objectively justified.”*

13.6. The existence of such evidence coupled with different treatment and difference in status will, it is suggested, be sufficient in most cases of alleged direct discrimination to shift to the respondent the burden of providing a full and non discriminatory explanation for the treatment.

13.7. A useful example of the approach of the European Court of Human Rights to the burden of proof in indirect discrimination cases is the Bulgarian Roma education Case ( DH v Czech

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<sup>11</sup> Villalba v Merrill Lynch and Co Inc and Ors [2007] ICR 523

Republic [2006] 43 EHRR 41) which may be of assistance in a broad sense when considering discrimination contrary to the European Convention.<sup>12</sup>

13.8. In that case the ECtHR held that the placement in special schools of Roma children had been the result of racial prejudice. The ECtHR upheld a claim by Czech nationals of Roma origin that their A2P1/Art. 14 rights had been breached. They had been placed in special schools for children with learning difficulties. Their contention was that the educational evidence supporting their placement in such schools was unsound and that they had been the victim of discrimination in their educational rights on racial grounds.

13.9. The statistical evidence was as follows:

*a) According to data supplied by the applicants, which was obtained through questionnaires sent in 1999 to the head teachers of the 8 special schools and 69 primary schools in the town of Ostrava, the total number of pupils placed in special schools in Ostrava came to 1,360, of whom 762 (56%) were Roma. Conversely, Roma represented only 2.26% of the total of 33,372 primary-school pupils in Ostrava. Further, although only 1.8% of non- Roma pupils were placed in special schools, in Ostrava the proportion of Roma pupils assigned to such schools was 50.3%. Accordingly, a Roma child in Ostrava was 27 times more likely to be placed in a special school than a non-Roma child.*

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<sup>12</sup> See *DH and others v the Czech Republic* [2006] 43 EHRR 41 14 November 2007

- b) *According to data from the European Monitoring Centre for Racism and Xenophobia (now the European Union Agency for Fundamental Rights), more than half of Roma children in the Czech Republic attend special schools.*
- c) *The Advisory Committee on the Framework Convention for the Protection of National Minorities observed in its report of 26 October 2005 that, according to unofficial estimates, the Roma represent up to 70% of pupils enrolled in special schools.*
- d) *Lastly, according to a comparison of data on fifteen countries, including countries from Europe, Asia and North America, gathered by the OECD in 1999 and cited in the observations of the International Step by Step Association, the Roma Education Fund and the European Early Childhood Research Association<sup>1</sup>, the Czech Republic ranked second highest in terms of placing children with physiological impairments in special schools and in third place in the table of countries placing children with learning difficulties in such schools. Further, of the eight countries who had provided data on the schooling of children whose difficulties arose from social factors, the Czech Republic was the only one to use special schools. The other countries concerned almost exclusively used ordinary schools for the education of such children.*

## **14. Conclusions**

14.1. Whilst awaiting further and maybe fuller guidance from the ECJ on the question of how to apply the shifting burden of proof in discrimination cases, it is suggested that the focus should be initially on what the claimant/ plaintiff is able to prove, based on what ought to be within their knowledge.

14.2. Whether this is simply a difference in treatment and a difference in status or whether additional evidence which suggests a discriminatory motive is also necessary is likely to depend upon the types of case, and the facts of that case. However, any explanation given by the respondent, can be expected to be full and cogent, and only needs consideration once the burden has passed to the respondent.

Catherine Rayner

Tooks Chambers

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