

Equality between men and women: Burden of proof

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 - how useful is shared burden of proof in cases of direct discrimination?
 - lack of independence from questions of merit
 - exclusion of criminal procedures
 - exclusion of statutory social security schemes

I. Origins and evolution

In simple terms, there are five important phases.

- A. origins in case-law
- B. Directive 97/80/EC of 15 December 1997
- C. subsequent case-law
- D. changes to the legal framework and context
- E. Directive 2006/54

I. Origins and evolution

A. Origins in case-law

- Link with the definition of indirect discrimination (judgments in *Jenkins*, *Bilka*...)

- *Danfoss*

"The concern for effectiveness which thus underlies the directive means that it must be interpreted as implying adjustments to national rules on the burden of proof in special cases where such adjustments are necessary for the effective implementation of the principle of equality." (Judgment of 17 October 1989, *Danfoss*, C-109/88, ECR p. I-3199, (14))

"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." (ibid (16)).

I. Origins and evolution

- *Enderby*

“... the onus may shift when that is necessary to avoid depriving workers who appear to be the victims of discrimination of any effective means of enforcing the principle of equal pay” (judgment of 27 October 1993, Enderby, C-127/92, ECR p. I 5535, (14))

“where significant 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, 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. “ (ibid (19)).

“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.” (ibid (17)).

I. Origins and evolution

B. Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex

Article 4 (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.”*

- Objective: efficacy
- Gives a definition of indirect discrimination
- Scope: pay / access to employment and employment conditions / maternity leave / parental leave / but not social security schemes
- No explicit reference to *statistics*
- Discretion for Member States (*conformity with legal system*) and option to exclude criminal procedures

I. Origins and evolution

C. Case-law subsequent to Directive 97/80

- *Seymour-Smith* ("fine-tuning" the role of statistics)

"...it must be ascertained whether the statistics available indicate that a considerably smaller percentage of women than men is able to satisfy the condition (...). That situation would be evidence of apparent sex discrimination unless the disputed rule were justified by objective factors unrelated to any discrimination based on sex."

"That could also be the case if the statistical evidence revealed a lesser but persistent and relatively constant disparity over a long period between men and women who satisfy the requirement of two years' employment. It would, however, be for the national court to determine the conclusions to be drawn from such statistics." (Judgment of 9 February 1999, Seymour-Smith, C-167/97, ECR. p. I-623, (60-61)).
- *Judgments of 10 March 2005, Nikoloudi, C-196/02* (access to employment); of 3 October 2006, *Cadman, C-17/05* (criterion in seniority); of 11 October 2007, *Paquay, C-460/06* (maternity leave); of 11 November 2010, *Danosa, C-232/09* (maternity leave and conditions of dismissal)

I. Origins and evolution

D. Changes to the legal framework and context after Directive 97/80

- Reinforcement of *primary* law (Article 141 TEC > old Article 119)
- Social objective of Article 119 > over economic objective (judgment of 10 February 2000 Deutsche Post, C-270/97 and C-271/97)
- Directive 2002/73:
 - Harassment and sexual harassment = discrimination
 - Definition of "direct discrimination" different from the one in Directive 97/80
- Article 23 of the Charter of Fundamental Rights: *"Equality between men and women must be ensured in all areas, including employment, work and pay."*
- Adoption of Directives 2000/78 and 2000/43 (with an identical provision on the burden of proof)

I. Origins and evolution

E. Directive 2006/54/EC of 5 July 2006 (Recast)

- Recast = coordination + integration of established case-law
- Objectives of Article 19 (*Recital 30*)
 - Efficacy
 - Reversal triggered by "*prima facie discrimination*"
 - National court must assess facts from which discrimination may be presumed
- Continuity in relation to Directive 97/80

II. Scope of Article 19

Areas covered by the Directive (Article 1)

- a) access to employment, including promotion, and to vocational training;
- b) working conditions, including pay;
- c) occupational social security schemes (new even though some aspects were already covered by equal pay)
- d) Included in the concept of discrimination (Article 2(2))
 - harassment,
 - instructions to discriminate on grounds of sex
 - any less favourable treatment of a woman related to pregnancy or maternity leave
- e) Exclusion of statutory social security schemes (covered by Directive 79/7)

Specific extension to Article 19 (see 19(4))

situations covered by Directives 92/85 (maternity leave) and 96/34 (parental leave) insofar as discrimination based on sex is concerned

II. Scope of Article 19

- No distinction made depending on the origin of the discrimination (law, contract, practice...).
- Exclusion: criminal law (see below) / "inquisitorial" procedure
- Beneficiaries of Article 19:
 - Person who believes him/herself to be the victim of a failure of respect the principle of equal treatment
 - Associations and organisations authorised by virtue of Article 17(2) to act on behalf of the plaintiff (*compare* judgment of 10 July 2008, *Feryn*, C-54/07)

II. Scope of Article 19

(Uniform) definition of indirect discrimination

- "*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*"
- lacks statistical element + uses the *conditional*
- Comparison with Directive 97/80, worded as follows:

where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.

III. Role of the court when transposition is inadequate

Equal pay (Article 157(1), old Art. 141(1) TEC, formerly Art. 119):

- has direct horizontal effect (see Judgment in *Defrenne II* of 8 April 1976)
- implies a shift in the burden of proof
- the court must apply the principle of “*equal pay for equal work*” regardless of the transposition

III. Role of the court when transposition is inadequate

Other areas :

- The Treaty does not have direct effect (cf. Article 157(3) TFEU)
- need to refer to a Directive:
 - The Directive does not have direct horizontal effect (i.e. between “individuals”)
 - If the deadline for transposition has passed, duty to interpret national law in accordance with the purpose of the Directive (and/or in accordance with the requirements of Community law)
 - Possibly action for damages against the Member State

IV. Examples from national case-law

Netherlands

Commissie Gelijke behandeling (CGB), oordeel 2009/96, www.cgb.nl: recruitment and selection – under-representation of women – non-transparency of selection criteria – proof of willing behaviour not required

Commissie Gelijke behandeling (CGB), oordeel 2011/119 and oordeel 2012/6, www.cgb.nl: pension funds – reduction because of age differences – data allowing to presume discrimination - lack of proportionality of the measure

France

Cass., ch. soc., 6 July 2010, *Droit social*, 2010, p. 1084: comparability: hierarchical tier, responsibilities, capacities, “nervous strain” - different pay – not refuted by “unrelated factor”

Belgium

C. trav. Bruxelles, 16 June 2009, *Chron. Dr. soc.*, 2010, p. 19: miscarriage – dismissal – facts from which discrimination can be presumed (comparable case in Sweden, 19 January 2011, cited in *Revue du droit européen de l'égalité de genres*, 2011/n°1, p. 163)

IV. Examples from national case-law

Corr. Bruxelles, 16 December 2009, *Chron. Dr. soc.*, 2010, p. 270 (harassment): sharing of proof – incompatible with a presumption of innocence

Germany

Ruling 15 Sa 517/08 of 26 November 2008 of the *Landesarbeitsgericht* (Higher Employment Tribunal), *Neue Juristische Online Zeitschrift* (NJOZ) 2008, p. 5206;

Ruling 2 Sa 2070/08 of 12 February 2009 of the Higher Employment Tribunal of Berlin-Brandenburg, *Beck-Rechtsprechung* (BeckRS) 2009 52314.

Ruling 8 AZR 483/09 of 27 January 2011 of the *Bundesarbeitsgericht* (Federal Labour Court) – declaration when announcing non-selection (cited in *Revue du droit européen de l'égalité de genres*, 2011/n°1, p. 55).

V. Observations and comments

A. How useful is sharing the burden of proof in cases of direct discrimination?

- The victim has to establish:
 - Different treatment in relation to a person of another sex
 - Existence of a comparable situation
- In response, the defender has to establish:
 - Either that the situation is not comparable
 - Or that the different treatment is based on "objective factors unrelated to any discrimination on grounds of sex"
- Different from "*affirmanti (actori) incumbit probatio*"?
- To ensure that sharing the burden of proof is useful, should it not be easier to establish facts from which discrimination can be presumed?
 - No (Judgment of 26 June 2001, *Brunnhoffer*, C-381/99, (59))

V. Observations and comments

B. The issue of burden of proof is interdependent of questions of merit

Examples:

- 1) In matters of equal pay, facts from which discrimination can be presumed depend on *comparability* requirements:
 - *Before examining evidence: ascertain what comparisons are admissible*
 - Women working for different employers? Judgments in *Lawrence* and *Allonby*
 - Jobs not simultaneous? Judgment in *Macarthy's*
 - Individuals in the same job category? Judgment in *Brunnhoffer*
 - What if the same tariff is charged for a treatment, but skills and qualifications are different? Judgment in *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse* C-309/97
 - *Response from the case-law: global approach, a range of factors are taken into account, such as "the nature of the work, conditions of training and working conditions"*

V. Observations and comments

- Role of national courts and imprecision in national legislation (except Sweden since 2008)
- Consequence: how *predictable* is the burden of proof ?

2) In cases of indirect discrimination (cf. above):

Impact of the definition of indirect discrimination on what the plaintiff must establish

V. Observations and comments

C. Option for Member States not to apply the shared burden of proof in criminal proceedings

- Optional *re-inclusion*
- A “presumption of guilt” in criminal proceedings is not necessarily a breach of the European Convention for the Protection of Human Rights, “as long as States remain within certain limits, taking into account the importance of what is at stake and maintaining the rights of the defence” (E.C.H.R. Judgments of 7 October 1988, *Salabiaku v France*, (28); of 25 September 1992, *Pham Hoang v France*, (33); of 5 July 2001, *Phillips v United Kingdom*, (40))

Is sharing the burden of proof admissible *a fortiori*?

V. Observations and comments

D. Exclusion of statutory social security schemes

- No stipulations in Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security
- ECHR case-law
 - social security benefits = patrimonial right in the meaning of Article 1 of the 1st Protocol
 - Article 14 of the Convention applies to this right
 - differences in treatment must be justified by "*very strong considerations*"
 - "*once the applicant has shown a difference in treatment, it is for the Government to show that it was justified*" (judgment in Andrejeva v Latvia of 18 February 2009, (84); judgment in D.H. et al. / Czech Republic of 13 November 2007, (177f.))