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## SHARING THE BURDEN OF PROOF

A practical guide.

David Sneath, Employment Judge,  
Employment Tribunals of England and  
Wales

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### A Useful Tool

- Not needed where evidence of unlawful discrimination clear
  - Tool for examining the respondent's mental processes
  - Less favourable treatment – the reason why?
  - Motivation and motive
  - Stereotyping
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## Introduction: the problem

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- “We were informed that, as evidenced by this clutch of appeals and by appeals pending in other cases, Employment Tribunals are experiencing difficulty with the burden of proof in sex and race discrimination cases. This is surprising.”
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## Introduction: Arts 19 Recast Directive 2006/54

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- 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
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## Evolution of the Burden of Proof (BoP) in ECJ Jurisprudence

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- BoP traditionally on the claimant
  - English common law concepts of legal and evidential burden
  - BoP about shift in legal burden
  - Danfoss*
  - Enderby*
  - Brunnhofer*
  - Directives 97/80 & 2006/54 (Recast)*
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## Firma Feryn C-54/07

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- ECJ judgment on BoP provisions in Art 8(1) Directive 2000/43 on race discrimination
  - Facts
  - Reference
  - Judgment
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## Kelly v National University of Ireland C-104/10

- ~~□ Applicant for vocational training~~
- C not entitled to see applications by other candidates but
- refusal of disclosure could compromise effectiveness of BoP Directive
- National courts must '*take all appropriate measures to ensure that this did not occur.*'
- But observe confidentiality rules (redaction)

## Meister v Speech Design Carrier System GmbH C-415/10

- Russian applicant with relevant qualification rejected twice for job
- Refused access to file of successful applicant
- Procedural autonomy confirmed 'but it cannot be ruled out that a defendant's refusal to grant any access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination. It is for the referring court to determine whether that is the case in the main proceedings, taking into account all the circumstances of the case before it.'

## Asociata ACCEPT v Consiliul National pentru Combaterea Discriminarii C- 81/12

- “ Articles 2(2) and 10(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation **must be interpreted** as meaning that **facts such as those from which the dispute in the main proceedings are capable of amounting to ‘facts from which it may be presumed that there has been ... discrimination’** as regards a professional football club, even though the statements concerned come from a person presenting himself and being perceived in the media and among the general public as playing a leading role in that club without, however, necessarily having legal capacity to bind it or to represent it in recruitment matters.”

## Evolution of British Jurisprudence on BoP

- Equal Pay Act 1970 – claimant: like work or work rated as equivalent
- Respondent: variation in pay genuinely due to a material factor not the difference of sex/material difference between cases
- *King v Great Britain China Centre*
- *Section 136 Equality Act 2010*

## Igen Ltd v Wong [2005 3 All England Reports

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- ❑ Current interpretation – an elaborate attempt to identify type of facts that could shift the BoP
  - ❑ How much discrimination? Directive 2000/43 and 2000/78 – no discrimination whatsoever/l'absence de toute discrimination
  - ❑ Art 21 Charter of Fundamental Rights – any discrimination based on any ground such as sex...shall be prohibited
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## What facts does a Claimant have to prove?

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- ❑ "Facts from which it may be presumed that there has been direct or indirect discrimination"
  - ❑ Art. 2(2)(a) & (b) – set out the elements of direct and indirect discrimination
  - ❑ Difference of treatment and difference of sex not enough
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## Two stage procedure?

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- What evidence may be considered at each stage?
  - English Court of Appeal has rejected two stage hearing
  - Preferable to read and hear all the evidence
  - Two stage reasoning
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## Background facts and context to support inference of sex

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- The Claimant's narrative
  - Anya v University of Oxford
  - Case management – the problem
  - Case management – a solution
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## Indirect discrimination

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- Directive (including Recast) definitions focus on particular disadvantage of the gender group
- Directive 97/80 definition focuses on substantially higher proportion of group members – disparate impact
- Where does the BoP come into play?
  - Enderby and Essop v Home Office
- British Airways v Starmer

## Conclusion

- Identify complaints early
- Manage complaints proportionately
- Identify any clear background material said to sustain the complaints
- Has the claimant proved sufficient facts for BoP to shift?
- Or has the respondent proved enough to prevent that shift?
- If not, has the respondent discharged burden of negating unlawful discrimination?