



The burden of proof in sex discrimination cases.

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Garden Court Chambers, London



What is this about?

The burden of proof refers to the obligation or responsibility to prove, in a case before the courts, the assertion/s made by a complainant.

The general rule is that the burden of proof lies with the party who makes the allegation.

But that is the general rule



What is the context? Treaty on the European Union

“The Union is founded on the values of respect for
**human dignity, freedom, democracy, equality,
the rule of law and respect for human rights,**
including the rights of persons belonging to **minorities**.

These values are common to the Member States in a society in
which **pluralism, non-discrimination, tolerance, justice, solidarity
and equality**
between women and men prevail.” [Art 2]

The Union “shall combat .. discrimination and promote .. equality
between women and men.” [Art 3.3]

What is the aim? Treaty on the Functioning of the European Union

“In all its activities, the Union shall aim to eliminate
inequalities, and to promote equality between men and
women.” [Art 8]

“In defining and implementing its policies and activities,
the Union **shall** aim to combat discrimination
based on **sex** “
[Art 10]



The Charter of Fundamental Rights of the European Union

“Everyone is equal before the law.” [Art 20]

“Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited” [Art 21]

“Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.” [Art 23]



Burden of Proof in sex discrimination cases - the Recast Directive

Directive **2006/54/EC** of 5 July 2006 the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation – the “**Recast Directive**”

[see previously Burden of Proof Directive 97/80/EC]



Crux of it all – Art 19

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.
2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.
3. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

A recognised reality ...

Discrimination has the reputation of being particularly hard to substantiate. This is even truer in respect of discrimination in employment. Aware of this problem, the European Union legislature has adopted measures to assist applicants claiming to be victims of discrimination on the grounds of, in particular, sex, age or origin. The European Union legislature has thus provided for a shift in the burden of proof, without, however, going so far as to uphold its complete reversal since the long-standing freedom of employers to recruit the people of their choice must not be completely disregarded.

Opinion of Advocate General Paolo Mengozzi 12/1/2012
Meister v Speech Design Carrier Systems GmbH Case C-415/10

Why so essential?

[13] It should next be pointed out that in a situation where a system of individual pay supplements which is **completely lacking in transparency** is at issue, female employees can establish differences **only so far** as average pay is concerned. They **would be deprived of any effective means** of enforcing the principle of equal pay before the national courts if the effect of adducing such evidence was not to impose upon the employer the burden of proving that his practice in the matter of wages is not in fact discriminatory.

[14] Finally, it should be noted that under Article 6 of the Equal Pay Directive member-States must, in accordance with their national circumstances and legal systems, take the measures necessary to ensure that the principle of equal pay is applied and that effective means are available to ensure that it is observed. **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." *Danfoss C-109/88*

An essential tool in discrimination cases

Enderby v Frenchay Health Authority C-127/92

[13] It is normally for the person alleging facts in support of a claim to adduce proof of such facts. Thus, in principle, the burden of proving the existence of sex discrimination as to pay lies with the worker who, believing himself to be the victim of such discrimination, brings legal proceedings against his employer with a view to removing the discrimination.

[14] However, it is clear from the case law of the Court that 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. Accordingly, when a measure distinguishing between employees on the basis of their hours of work has in practice an adverse impact on substantially more members of one or other sex, that measure must be regarded as contrary to the objective pursued by **Article 119 EEC**, unless the employer shows that it is based on objectively justified factors unrelated to any discrimination on grounds of sex. Similarly, where an undertaking applies a system of pay which is wholly 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.

How does it work?

- “1. Where persons considering themselves wronged 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.”
- “Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs. “
- Kelly C-104/10
- Meister C-415/10
- Asociația ACCEPT C-81/12

Kelly v National University of Ireland (University College, Dublin) C-104/10

38 Accordingly, the answer to the first question is that art.4(1) of Directive 97/80 must be interpreted as meaning that it does not entitle an applicant for vocational training, who believes that his application was not accepted because of an infringement of the principle of equal treatment, to information held by the course provider on the qualifications of the other applicants for the course in question, in order that he may establish “facts from which it may be presumed that there has been direct or indirect discrimination” in accordance with that provision.

39 Nevertheless, it cannot be ruled out that a refusal of disclosure by the defendant, in the context of establishing such facts, could risk compromising the achievement of the objective pursued by that directive and thus depriving, in particular, art.4(1) thereof of its effectiveness. It is for the national court to ascertain whether that is the case in the main proceedings

Meister v Speech Design Carrier Systems GmbH C-415/10

42 Therefore, it is for the referring court to ensure that the refusal of disclosure by Speech Design, in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination against Ms Meister, is not liable to compromise the achievement of the objectives pursued by Directives 2000/43, 2000/78 and 2006/54. It must, in particular, take account of all the circumstances of the main proceedings, in order to determine whether there is sufficient evidence for a finding that the facts from which it may be presumed that there has been such discrimination have been established.

43 In that regard, it should be recalled that, as is clear from Recital 15 of Directives 2000/43 and 2000/78 and Recital 30 of Directive 2006/54, national law or the national practices of the Member States may provide, in particular, that indirect discrimination may be established by any means including on the basis of statistical evidence.

44 Among the factors which may be taken into account is, in particular, the fact that, unlike in Kelly [2011] 3 C.M.L.R. 36, the employer in question in the main proceedings seems to have refused Ms Meister any access to the information that she seeks to have disclosed.

Meister continued ..

45 Moreover, as the A.G. noted in [35]– [37] of his Opinion, account can also be taken of, in particular, the fact that Speech Design does not dispute that Ms Meister's level of expertise matches that referred to in the job advertisement, as well as the facts that notwithstanding this, the employer did not invite her to a job interview and she was not invited to interview under the new procedure to select applicants for the post in question.

46 In the light of the foregoing, the answer to the first question is that art.8(1) of Directive 2000/43, art.10(1) of Directive 2000/78 and art.19(1) of Directive 2006/54 must be interpreted as not entitling a worker who claims plausibly that he meets the requirements listed in a job advertisement and whose application was rejected to have access to information indicating whether the employer engaged another applicant at the end of the recruitment process.

47 Nevertheless, 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.



Accept C-81/12

Articles 2(2) and 10(1) of Council Directive 2000/78/EC of 27 November 2000,... **must be interpreted** as meaning that ***...homophobic statements by a person closely connected with the employer...***are capable of amounting to ‘facts from which it may be presumed that there has been ... discrimination



Steps

Stage 1

The complainant employee must establish a prima facie case of discrimination.

Stage 2

If s/he does this, then the burden of proving the reason or the cause of the decision lies with the defending employer and not the complainant.

Stage 3

The accused employer must prove that the reason for the treatment complained of is NOT caused by any discrimination whatsoever.



Evidence

How do you prove a claim?

- Key concept particular to discrimination
- Inferences
- “Appreciation of the facts from which it may be **inferred** that there has been direct or indirect discrimination is a matter for the national judicial or other competent bodies (incl statistical evidence).”
- “facts from which it may be presumed that there has been direct or indirect discrimination”

Practical guidance and evidence

- Acting on behalf of the employer – What to look for? What to advise?
- Acting on behalf of the employee – how to substantiate your claim?
 - As the Judge – what evidence will be of assistance?

What to look for?

- What is the *treatment* complained of? Job Offer, promotion, pay, access to training, hours?
- Or what is the *outcome* complained of?
- What is the evidence of the complaint – direct evidence? documentary evidence? witness evidence? personnel files? Company notes? Statistics of disparate impact?
- Is there circumstantial evidence? Remarks; general statistics; past complaints; inconsistent/ contradictory behaviour (bad/unfair employer or discriminatory employer?)
- How did the employee/employer handle matter internally? Grievance? Delay? Conduct in any investigation?

What other factors?

- Explanation? Reasonableness of explanation?
- Degree of treatment?
- Disclosure? Request for information? Questionnaire – inferences
- What are the employer's Equal Opportunities policies?
- Contract of employment?
- Induction/ training on Equal Opportunities?
- Is this updated/ repeated/ reviewed?



Good practice and prevention ...

- Systems in place to combat discrimination?
- Evidence of commitment to equality? Equal Opportunities policies?
- Human resources? Equal Opportunities Officer?
- Training for staff? At all levels? Regular reviews?
- Statistics of workforce? Updated? Monitored? Analysed?
- Internal fair, independent and timely grievance procedures?
- Past complaints – how have these been addressed? How tackled?
- Contracts of employment with provision as to combating discrimination? Show serious commitment?
- Compliance with statutory or best practice guidance issued by Equal Opportunity bodies?
- In specific cases, is there an explanation for conduct complained of?
- Personnel files? Properly maintained and reviewed?



Thank you for listening!