

# Anti-Discrimination Law – Shifting the Burden of Proof

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## Introduction

In this paper I want first to look at the law relating to the allocation of the probative burden between the parties in litigation involving the principle of equal pay and equal treatment. Consideration will be given to the practical application of the statutory provisions in that regard by reference to decided cases in Irish, British and European jurisprudence. Particular attention will be paid to the use of statistical evidence in establishing a presumption of indirect discrimination in equality cases. Finally, I want to consider the law in relation to the defence of objective justification for acts or omissions which would otherwise constitute unlawful discrimination.

## The Burden of Proof

The law in relation to the probative burden in gender discrimination cases was first codified in Directive 97/80/EC on the burden of proof in cases of discrimination based on sex. It is now contained in Directive 2006/54/EC on implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). Article 19.1 of this Directive provides: -

*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.*

While this rule of evidence was first prescribed in statutory form in Directive 97/80/EC, the concept which it encapsulates is jurisprudential in nature. This was made clear by the CJEU in C-196/02 Vasiliki Nikoloudi v Organismos Tilepikoinonion Ellados AE<sup>2</sup>. It was first formulated by the Court of Justice in C-127/92 Enderby v Frenchay Health Authority and Secretary of State for Health<sup>3</sup>. Here the Court enunciated the principle that where a *prima facie* case of discrimination is established the burden of proving the absence of discrimination shifts to the employer. Here the Court explained the rationale for this approach thus: -

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<sup>1</sup> Barrister-at-Law, Chairman of the Irish Labour Court

<sup>2</sup> At paragraph 69

<sup>3</sup> [1993] ECR I-5535

*“Workers would be unable to enforce the principle of equal pay before national courts if evidence of a prima facie nature did not shift to the employer the onus of showing that the pay differential is not in fact discriminatory”<sup>4</sup>*

The language used by the Court suggests that the formulation was seen as an adaptation of the principle of effectiveness which is well established in the jurisprudence of the Court. This is now clear from recital 30 in the Directive, which provides: -

*The adoption of rules on the burden of proof plays a significant role in ensuring that the principle of equal treatment can be effectively enforced. As the Court of Justice has held, provision should therefore be made to ensure that the burden of proof shifts to the respondent when there is a prima facie case of discrimination, except in relation to proceedings in which it is for the court or other competent national body to investigate the facts. It is however necessary to clarify that the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination remains a matter for the relevant national body in accordance with national law or practice. Further, it is for the Member States to introduce, at any appropriate stage of the proceedings, rules of evidence which are more favourable to plaintiffs.*

These provisions are based on a recognition that those who discriminate rarely do so overtly and will not leave evidence of the discrimination within the complainant's power of procurement. Hence, the normal rules of evidence must be adapted in such cases so as to avoid the protection of anti-discrimination laws being rendered nugatory by obliging complainants to prove something which is beyond their reach and which may only be in the respondent's capacity of proof.

This concept of a shifting burden of proof is generally regarded as a unique feature of European law. It has, however, a parallel in the common law tradition in what is known as the *peculiar knowledge principle*. This rule of evidence was explained in the old Irish case of Mahoney v Waterford and Limerick Railway Co<sup>5</sup> as follows: -

*“although it is the general rule of law that it lies upon the plaintiff to prove affirmatively all the facts entitling him to relief, there is a well-known exception to such rule in reference to matters which are*

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<sup>4</sup> At par 18

<sup>5</sup> [1900] 2. IR 273

*peculiarly within the knowledge of one defendant. In such cases the onus is shifted.”*<sup>6</sup>

In most if not all cases of discrimination the core fact at issue is the factual criteria (whether conscious or subconscious) for the act or omission complained of. It would be palpably unfair to require a complainant to prove that the respondent was influenced by discriminatory considerations. Conversely, it is eminently reasonable to require the actor or decision maker to explain the reason for his or her actions or decisions and to show the absence of a discriminatory taint.

## **The test for shifting the onus**

The statutory test requires the Complainant to prove facts from which discrimination may be inferred before the onus shifts to the Respondent. What those facts are will vary from case to case and there is no closed category of facts which can be relied upon. All that is required is that they be of sufficient significance to raise a presumption of discrimination. In the jurisprudence of the Irish Labour Court the test for applying this notion is that developed in *Southern Health Board v Mitchell*<sup>7</sup>. Here the Court adopted the following analysis of Article 2 of the Burden of Proof Directive: -

*“ The first requirement is that the claimant must establish facts from which it may be presumed that the principle of equal treatment has not been applied to them. This indicates that a claimant must prove, on the balance of probabilities, the primary facts on which they rely in seeking to raise a presumption of unlawful discrimination.*

*It is only if those primary facts are established to the satisfaction of the Court, and they are regarded by the Court as being of sufficient significance to raise a presumption of discrimination, that the onus shifts to the respondent to prove that there is no infringement of the principle of equal treatment.”*

This test has three stages: -

1. The complainant must prove the primary facts upon which they rely in alleging discrimination,
2. The Court must evaluate those facts, if proved, and satisfy itself that they are of sufficient significance in the context of the case as a whole to raise a presumption of discrimination

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<sup>6</sup> This rule of evidence was applied in more modern times by the Irish Supreme Court in *Hanrahan v Merck Sharpe and Dohme* [1988] ILRM 629, where it was held that the defendant bore the burden of proving that fumes omitted from its chemical plant were not toxic and responsible for the unexplained death of livestock on the plaintiff's farm.

<sup>7</sup> [2001] E.L.R. 201

3. If the complainant fails at stage 1 or 2 he or she cannot succeed. If the complainant succeeds at stages 1 and 2 the presumption of discrimination comes into play and the onus shifts to the respondent to prove, on the balance of probabilities, that there is no discrimination.

A more expansive version of what is essentially the same test was formulated by the UK Employment Appeals Tribunal in Barton v Investec Henderson Crosthwaite Securities Ltd<sup>8</sup>. Here the Tribunal (per Ansell J, presiding) provided the following guidelines to Employment Tribunals on the application of the domestic UK legislation that implemented the Burden of Proof Directive in that jurisdiction. The Tribunal said: -

*'(1) Pursuant to s. 63A of the 1975 Act, it is for the applicant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the applicant which is unlawful by virtue of Part II, or which, by virtue of s. 41 or 42 SDA, is to be treated as having been committed against the applicant. These are referred to below as "such facts."*

*(2) If the applicant does not prove such facts he or she will fail.*

*(3) It is important to bear in mind in deciding whether the applicant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in."*

*(4) In deciding whether the applicant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.*

*(5) It is important to note the word is "could". At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts proved by the applicant to see what inferences of secondary fact could be drawn from them.*

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<sup>8</sup> [2003] IRLR 332

*(6) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s. 74(2)(b) of the Sex Discrimination Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within s. 74(2) of the Sex Discrimination Act: see Hinks v Riva Systems Ltd (22 November 1996, unreported).*

*(7) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant, and if so, take it into account in determining such facts pursuant to s. 56A(10) SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.*

*(8) Where the applicant has proved facts from which inferences could be drawn that the employer has treated the applicant less favourably on the grounds of sex, then the burden of proof moves to the respondent.*

*(9) It is then for the respondent to prove that he did not commit, or, as the case may be, is not to be treated as having committed, that act.*

*(10) To discharge that burden it is necessary for the employer to prove, 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) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not any part of the reasons for the treatment in question.*

*(12) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.'*

These guidelines were subsequently adopted by the Court of Appeal for England and Wales in *Wong v Igen Ltd*<sup>9</sup>

The type or range of facts which may be relied upon by a complainant can vary significantly from case to case. They will also vary depending on the type of discrimination alleged and whether direct or indirect discrimination is at issue.

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<sup>9</sup> [2005] EWCA Civ 142

Taking the paradigm case of a complainant who alleges that he or she was discriminated against in the filling of a job, it may be alleged that he or she was better qualified than the successful candidate of the opposite sex. This is a fact which, if proved, may be sufficient to shift the probative burden. It might also be alleged that a pattern exists showing that the members of one gender are more likely to be promoted than those of the opposite sex.

In seeking to establish primary facts from which discrimination may be inferred a Complainant may seek to rely on evidence which may, at first sight, be regarded as unconnected to his or her complaint. It may relate to the treatment of others and be relied upon to show a pattern of behaviour on the part of the Respondent. Evidence may also be adduced in relation to past events which do not form part of the complaint being pursued but which can be relied upon to show a discriminatory disposition on the Respondent's part. Consequently, in considering if there is a *prima facie* case of discrimination considerable latitude should be allowed in deciding if evidence is probative and relevant to the facts in issue in a case.

The Directive provides that the probative burden shifts where a complainant proves facts from which it **may** be presumed that there has been direct or indirect discrimination. The language used indicates that where the primary facts alleged are proved it remains for the Court to decide if the inference or presumption contended for can properly be drawn from those facts. This entails a process of inferential reasoning and involves a consideration of the range of conclusions which may appropriately be drawn to explain a particular fact or a set of facts which are proved in evidence. At the initial stage the complainant is merely seeking to establish a *prima facie* case. Hence, it is not necessary to establish that the conclusion of discrimination is the only, or indeed the most likely, explanation which can be drawn from the facts relied upon. It is sufficient that the presumption is within the range of inferences which can reasonably be drawn from those facts.

## **Direct Discrimination / Indirect Discrimination**

The notion of a shifting burden of proof is applicable in all cases involving discrimination. However its practical application differs depending on whether the discrimination alleged is direct or indirect.

### **Direct Discrimination**

It is now well settled that discrimination, including discrimination in matters of pay, can be direct or overt or indirect or covert. Direct discrimination arises where a person is discriminated against because of a protected characteristic or because of a criterion which is indissociable from that characteristic (see Opinion of Jacobs AG in *Schnorbus v Land Hassen*<sup>10</sup>

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<sup>10</sup> [2000] ECR I 10997

Where direct discrimination is in issue the Court will normally be looking for credible evidence which suggests that the Complainant was treated differently to another person who does not have the relevant characteristic (i.e. gender, race, etc.) and that there is no immediately apparent reason for the difference. It should, however, be pointed out that there is authority for the proposition that a mere difference in gender [or other characteristic] is normally insufficient in and of itself to shift the burden of proof (see the Judgment of the Court of Appeal for England and Wales to that effect in Madarassy v Nomura International plc)<sup>11</sup>.

There is some judicial guidance available on what a Court should be looking for in considering if the burden of proof is to be shifted to the Respondent. While some of these authorities pre-date the Burden of Proof Directive they are nonetheless apposite in applying the Directive.

A useful starting point in considering this question can be found in the speech of Lord Browne-Wilkinson in the UK House of Lords Decision in Glasgow City Council v Zafar<sup>12</sup>, at p. 958, in which he quoted with approval the guidance given to Employment Tribunals by Neill LJ in the Court of Appeal in King v Great Britain China Centre<sup>13</sup>, as follows:

*'From these several authorities it is possible, I think, to extract the following principles and guidance.*

- 1. It is for the applicant who complains of racial discrimination to make out his or her case. Thus if the applicant does not prove the case on the balance of probabilities he or she will fail.*
- 2. It is important to bear in mind that it is unusual to find direct evidence of racial 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 an assumption that "he or she would not have fitted in."*
- 3. The outcome of the case will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 65(2)(b) of the Act of 1976 from an evasive or equivocal reply to a questionnaire.*

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<sup>11</sup> [2007] IRLR 256

<sup>12</sup> [1998] 2 All ER 953

<sup>13</sup> [1992] I.C.R. 516

4. *Though there will be some cases where, for example, the non-selection of the applicant for a post or for promotion is clearly not on racial grounds, a finding of discrimination and a finding of a difference in race will often point to the possibility of racial discrimination. In such circumstances the tribunal will look to the employer for an explanation. If no explanation is then put forward or if the tribunal considers the explanation to be inadequate or unsatisfactory it will be legitimate for the tribunal to infer that the discrimination was on racial grounds. This is not a matter of law but, as May L.J. put it in *North West Thames Regional Health Authority v. Noone* ([1988] ICR 813 at 822), "almost common sense."*
  
5. *It is unnecessary and unhelpful to introduce the concept of a shifting evidential burden of proof. At the conclusion of all the evidence the tribunal should make findings as to the primary facts and draw such inferences as they consider proper from those facts. They should then reach a conclusion on the balance of probabilities, bearing in mind the difficulties which face a person who complains of unlawful discrimination and the fact that it is for the complainant to prove his or her case.'*

This passage was adopted by the Irish High Court in *Davis v Dublin Institute of Technology*<sup>14</sup>

The Judgment in *King* was more recently relied upon by the UK Court of Appeal in *Anya v University of Oxford*<sup>15</sup>. This was a case in which the appellant claimed to have been discriminated against on race grounds in the filling of a post. An Industrial Tribunal had found that his claim was not made out. In the course of a Judgement by Sedley LJ, setting that decision aside, the following passage appears at paragraphs 13 and 14:

*“Here the industrial tribunal were satisfied, on balance, that despite inconsistencies which emerged under cross-examination Dr Roberts was essentially a truthful witness. Dr Roberts had explained his reasons, which had to do entirely with Dr Anya's qualities as a scientist, for not choosing him for the new post. It followed, in the industrial tribunal's judgment, that the inevitably less favourable treatment of Dr Anya had nothing to do with his race.*

*Such a conclusion was without doubt open to them, but only provided it was arrived at after proper consideration of the indicators which Dr Anya relied on as pointing to an opposite conclusion. His case was that the evidence showed two critical things. One was a preconceived hostility to him: this depended on matters of fact which it was for the*

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<sup>14</sup> High Court, Unreported Quirke J. 23<sup>rd</sup> June 2000

<sup>15</sup> [2001] IRLR 377

*industrial tribunal to ascertain or refute on the evidence placed before them. The other was a racial bias against him evinced by such hostility: this was a matter of inference for the industrial tribunal if and in so far as it found the hostility established. Experience shows that the relationship between the two may be subtle. For example, a tribunal of fact may be readier to infer a racial motive for hostility which has been denied but which it finds established than for hostility which has been admitted but acceptably explained. The industrial tribunal in paragraph 5 of its reasons directed itself correctly in law about this, with one arguable exception: it concluded the paragraph with this remark:*

*'If an employer behaves unreasonably towards a black employee, it is not to be inferred, without more, that the reason for this is attributable to the employee's colour; the employer might very well behave in a similarly unreasonable fashion to a white employee.'*

*As Neill LJ pointed out in King [1991] IRLR 513, such hostility may justify an inference of racial bias if there is nothing else to explain it: whether there is such an explanation as the industrial tribunal posit here will depend not on a theoretical possibility that the employer behaves equally badly to employees of all races, but on evidence that he does”.*

These cases relate to alleged discrimination on grounds of race. However, the general principles enunciated are of general application in considering if a prima facie case of discrimination has been made out on other grounds.

In cases involving access to employment or promotion the preferment of a less qualified man over a more qualified woman will frequently be sufficient to raise a *prima facie* case of discrimination. The Northern Ireland Court of appeal so decided in Wallace v. South Eastern Education and Library Board<sup>16</sup> [1980] NI 38 [1980] IRLR 193. In Boyle v Ely Properties Ltd<sup>17</sup> the decision in Wallace was adopted by the Irish Labour Court in holding that where a better qualified woman was dismissed and replaced by a less qualified man the burden of proof was on the Respondent.

Likewise where the reason given for an impugned decision was not the real reason, and there is a difference in treatment between persons having different characteristics, an inference of discrimination may arise. The decision of the Irish Labour Court in Shaskova v Goode Concrete<sup>18</sup> illustrates the point. This was a case in which the Complainant, a Russian National, claimed that she had been dismissed on grounds of her nationality. The Respondent employer told the employee, at the time of the dismissal, that her work was to be outsourced

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<sup>16</sup> [1980] IRLR 193

<sup>17</sup> Labour Court, Unreported, 15<sup>th</sup> October 2009, Determination EDA0920

<sup>18</sup> Labour Court, Unreported, , 18<sup>th</sup> October 2009, Determination EDA0919

and that she was being made redundant. None of the Irish employees were considered for redundancy. It subsequently transpired that the work was not outsourced and the Court was satisfied on the evidence that at the material time there were no firm plans in place to outsource the work. On these facts the Court held that the onus was on the Respondent to prove the absence of discrimination.

It is also important to remember that the motive or reason for an impugned decision may be conscious or subconscious<sup>19</sup>. This was pointed out by Lord Nicholls of Birkenhead in Nagarajan v London Regional Transport<sup>20</sup> as follows: -

*I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn.*

Thus in A Worker v a Hotel<sup>21</sup> the Irish Labour Court held, in a case involving a claim of harassment on grounds of gender, that humiliating treatment of a woman by a man gave rise to an inference of discrimination on gender grounds where there was evidence that the alleged harasser was negatively disposed towards women in general.

## **Where a prima facie case is made out**

Where a *prima facie* case is made out the onus shifts to the Respondent to prove the absence of discrimination. This requires the Respondent to show a complete dissonance between the gender of the complainant and the impugned act or omission alleged to constitute discrimination. Thus in Wong v Igen Ltd and others<sup>22</sup> (a decision of the Court of Appeal for England and Wales) Peter Gibson L.J. pointed out that where the Respondent fails to show that the

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<sup>19</sup> See the decision of the UK House of Lords in Chief Constable of the West Yorkshire Police v Khan [2001] UKHL 48 and that of the Irish Labour Court in Nevins, Murphy, Flood v Portroe Stevedores [2005] 16 ELR 282,

<sup>20</sup> [1999] IRLR 572

<sup>21</sup> Labour Court, Unreported, 15<sup>th</sup> July 2009, Determination EDA0915

<sup>22</sup> [2005] IRLR 258

discriminatory ground was anything other than a trivial influence in the impugned decision the complaint will be made out.

In practice the Court or Tribunal will be looking to the Respondent to show that the sex of the complainant had no influence whatsoever in arriving at the impugned decision. Many cases in which direct discrimination is alleged relate to the filling of jobs or promotions. Here the employer will be expected to show that the criteria for selection was objective and free from any discriminatory taint. The Court or tribunal should also expect evidence to show that the process of selection was transparent and this will normally require the Respondent to tender evidence showing how candidates were evaluated against predetermined criteria.

In the first stage, in which the complainant is seeking to make out a *prima facie* case, the qualification of the successful candidate relative to those of the unsuccessful candidate may well be relied upon. If the onus shifts to the Respondent the emphasis will then be on the process of selection rather than the result. In that regard the Irish Labour Court has consistently held that in cases involving selection for employment or selection for promotion its role is not to decide on which of the candidates is the most meritorious; that being a matter for the designated decision makers. Rather, the Court's role is to ensure that the process of selection was not tainted by discrimination whether conscious or sub-conscious. If the employer proves on credible evidence that the process was properly conducted and the criteria used were objective and free of discriminatory bias, that will normally be the end of the matter and a finding that there was no discrimination will follow even if the Court believed that an unsuccessful candidate was more meritorious than the successful candidate.

## **Indirect Discrimination – Use of Statistics**

It is a completed defence to a claim of discrimination for a Respondent to show that the impugned practice or decision has nothing whatever to do with the sex of the complainant. However what might appear to be a gender-neutral explanation may give rise to a claim of indirect discrimination.

Article 2(1)(b) of Directive 2007/54/EC provides that indirect discrimination arises where: -

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*[A]n 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;*

Statistics are frequently used as an evidential tool in seeking to establish a *prima facie* case of indirect discrimination. In cases of indirect discrimination

there are two types of situation in which statistics may be used. Firstly, statistics can be relied upon to show that a particular provision, criterion or practice (a PCP) puts a person of one gender at a particular disadvantage relative to those of the other gender<sup>23</sup>.

An obvious example of this type of discrimination is where a particular attribute or qualification which one gender is more likely to meet is specified as a requirement for employment or a condition of employment. In this type of situation statistical evidence will be adduced to compare the number of persons of one gender who can comply with the PCP by contrast with those of the another gender. This is the type of situation which arose in Case C- 1/95, *Gerster v Freistaat Bayern*<sup>24</sup>. Here, the criterion for eligibility for promotion was length of service. Length of service was calculated by reference to the number of hours worked per year with the result that part-time workers took longer to accrue the equivalent of a year's service than full-time workers. It was shown on statistical evidence that those working part-time were mainly women. It was thus held that the system of calculation of service was indirectly discriminatory against women.

In C- 167/97 *Secretary of State for Employment ex p Seymore-Smith and Perez*<sup>25</sup> the CJEU had to consider if a UK rule restricting access to statutory unfair dismissal protection to those with two or more years service was indirectly discriminatory against women. The answer given by the Court of Justice was that the UK legislation could have that result (always assuming that it could not be objectively justified) where it was shown that a considerably smaller percentage of women than men are able to satisfy the impugned rule. The CJEU held that it was for the national court to decide whether the statistics relied upon were sufficient to establish the existence of indirect discrimination and how the statistics were to be interpreted. The Court did, however, give a clear indication that a compliance rate with the impugned criterion of 77.4% in the case of men and 68.9% in the case of women should not be regarded as sufficient to establish disparate impact.

Secondly, situations may arise in which there is no discernable PCP but statistical evidence can be adduced to show that persons in a particular category are, in practice, disadvantaged relative to those in another category. A classic example of this latter type of situation is that which gave rise to Case 127/92, *Enderby v Frenchay Health Authority and the Secretary of State for Health*<sup>26</sup>. In that case it was found that through separate transparent collective bargaining processes, in which there was no evidence of discrimination, the pay of speech therapists, a grade made up almost exclusively of women, was significantly

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<sup>23</sup> This is now the standard definition of indirect discrimination which is contained in each of the relevant directives.

<sup>24</sup> [1997] ECR I- 5253

<sup>25</sup> [1999] ECR I-623

<sup>26</sup> [1993] ECR 5535

lower than that of pharmacists, a grade made up predominately of men. It was accepted for the purpose of the case that the work of each group was equal in value. The Court of Justice held that on these facts there was a *prima facie* case of discrimination.

The Court of Justice, in confirming that the analysis of the statistics is a matter for the national courts, had this to say: -

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

## **Establishing Disparate Impact**

The usual means of establishing that an impugned PCP has disparate impact on a particular group is to compare the compliance rate within that group with the compliance rate within the comparator group. This involves identifying an appropriate pool of individuals who are potentially affected by the disputed measure. The identification of the correct pool is often crucial to the outcome of the exercise and is frequently controversial.

Where, for example, it is alleged that a particular PCP is indirectly discriminatory on the gender ground it is first necessary to establish the overall pool of individuals who wish to obtain the benefit which is conditional on compliance with the PCP. The normal approach is then as follows: -

1. Identify all those men and women who, but for the impugned PCP would be in a position to qualify for the benefit at issue,
2. Divide the population into those who can comply with the requirement and those who cannot comply,
3. Ascertain the number of men and the number of women in the pool as a whole,
4. Express the number of men in the pool who can comply with the PCP as a percentage of the total number of men in the pool. Do the same in relation to the women in the pool.
5. Compare the percentage proportion of men who can comply with the PCP with the percentage proportion of women who can comply with it and decide whether the comparison discloses that a considerably smaller proportion of women than men in the pool can meet the requirement.

### Example

The following example will illustrate the point. This is based on the paradigm case where a minimum requirement of 10 years service is required for promotion.

The potential pool of applicants, were it not for the requirement, is the entire workforce, say 700.

Number with > 10 years service	450
Number with < 10 years service	250
Total Number of Men in pool	350
Total number of women in pool	350
Total number of men with > 10 years service (advantaged)	300
Total number of women with > 10 years service (advantaged)	150
Total number of men with <10 years service (disadvantaged)	50
Total Number of women with < 10 years service (disadvantaged)	200

The ratio of advantaged against disadvantaged is thus as follows: -

	<b>Women</b>	<b>Men</b>	<b>Gender Ratio W/M</b>
<b>Advantaged</b>	<b>150</b>	<b>300</b>	<b>1:2</b>
<b>Disadvantaged</b>	<b>200</b>	<b>50</b>	<b>4:1</b>
<b>Total Pool</b>	<b>350</b>	<b>350</b>	<b>1:1</b>
<b>Disadvantaged as % of Pool</b>	<b>57.1%</b>	<b>14%</b>	<b>4:1</b>
<b>Advantaged as % of Pool</b>	<b>42.8</b>	<b>85.6%</b>	<b>1:2</b>

It can thus be seen in this example that whereas the workforce is equally divided between men and women, almost twice as many men as women can meet the requirement of >10 years service and thus qualify for promotion. On this statistical evidence it would appear clear that the PCP in issue (the

requirement to have > 10 years service) places women at a particular disadvantage and is thus indirectly discriminatory.

In certain circumstances the identification of the appropriate pool can be problematic. It has been held by the UK Court of Appeal in *Grundy v British Airways PLC*<sup>27</sup> that the correct principle is that the pool must be one which suitably tests the particular discrimination complained of: but that is not the same thing as the proposition that there is always a single suitable pool for every case. In conducting an exercise of this nature the question which the Court will always be concerned to answer is whether the impugned PCP constitutes an obstacle in the way of men or women. If the answer to that question is in the affirmative the PCP is unlawful unless it is objectively justifiable on grounds unrelated to the protective characteristic at issue.

It must further be bourn in mind that it is unnecessary to establish that the Complainant is incapable of meeting the impugned PCP although in many cases, as in the example used above, this will, in fact, be the position. The now standard definition of indirect discrimination refers to a PCP which puts persons having the protected characteristic “*at a particular disadvantage*” relative to those who do not have that characteristic. This has brought about a change in earlier statutory provisions in Ireland and the UK which provided that indirect discrimination arose where the number of persons of one gender who could *comply* with a particular requirement was significantly lower than those of the other gender. The change now makes superfluous consideration of such interesting questions as whether women with sufficient financial resources can comply with work requirements which impinge on their child care responsibilities by paying for professional child-care services<sup>28</sup>. Rather than concentrating on the inherent ability of one group or another to comply which the PCP the new provision directs attention to the question of its effects on the different genders or groups.

## **Other means of identifying disparate impact.**

Statistics are often an important evidential tool in finding indirect discrimination but they are not the only basis upon which such a finding can be

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<sup>27</sup> [2008] IRLR 74

<sup>28</sup> See also the interesting UK case of *Turner v Labour Party and Labour Party Superannuation Society* [1987] IRLR 101. This case concerned a provision in the Respondent’s pension scheme to the effect that a married person’s spouse would receive a survivors pension but there was no provision for a single or divorced person’s pension to continue after their death. The Court of Appeal of England and Wales held that the alleged discriminatory condition could not be held to be to the respondent’s “detriment” because she “cannot comply with it” within the meaning of s.1(1)(b)(iii) of the Sex Discrimination Act. The conditions for benefit from a pension fund have to be satisfied at a future date and not at the date at which a particular contribution is paid. It cannot be said of a single woman that she “cannot” marry. She may not want to marry and cannot be compelled to marry, but she can marry. Therefore, it cannot be said that she “cannot” comply with a condition of being married at a future date. It followed that it could not be said that the respondent “cannot” comply with a condition of leaving a surviving spouse at a future date.

made. In C- 237/94, *O’Flynn v Adjudication Officer*<sup>29</sup> the Court of Justice was concerned with a rule which made a funeral grant dependant on the burial or cremation taking place within the territory of the Member State whose legislation provided for the payment. This was found to be indirectly discriminatory unless objectively justified<sup>30</sup>. Advocate General Lenz thought that the decisive question was “whether it is more probable for nationals of other members states than for nationals of the UK that they or their relatives will be buried in another member state”. The CJEU considered the matter in terms of provisions that were intrinsically liable to affect migrant workers more than workers who are nationals of the Member State.

Many cases arise in which statistics are either unavailable or would involve a claimant in unnecessary expense in proving what is obvious to the Court or Tribunal by relying on its own knowledge and experience. In the Irish case of *Inoue v NBK Designs*<sup>31</sup> an issue arose as to whether single women with children find it more difficult to work full-time than single men with children or single women without children<sup>32</sup>. It was held that it would be alien to the ethos of the Labour Court to oblige parties to undertake the inconvenience and expense involved in producing elaborate statistical evidence to prove matters which are obvious to the members of the Court by drawing on their own knowledge and experience<sup>33</sup>.

This decision echoed a similar approach taken by the Court of Appeal for England and Wales in *London Underground v Edwards (No.2)*<sup>34</sup> where it was acknowledged that [tribunals] do not sit in blinkers and are entitled to make use of their own knowledge and experience in the industrial field. Similarly in the Northern Ireland case of *Briggs v North Eastern Education and Library Board*<sup>35</sup>, the Court of Appeal held that Tribunals are not debarred from taking account of their own knowledge and experience and that it is most undesirable that, in all cases of alleged indirect discrimination, elaborate statistical evidence should be required before the case can be found proved.

## Objective Justification

Where it is found that a PCP is *prima facie* indirectly discriminatory the impugned measure can be saved by the Respondent showing that it is

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<sup>29</sup> [1996] ECR –I 2617

<sup>30</sup> This case was decided on the grounds that the provision offended against Article 7(2) of Regulation 1612 which required that migrant workers enjoy the same social security benefits as national workers. It could now be decided on the basis that the provision is indirectly discriminatory on grounds of race.

<sup>31</sup> [2003] ELR 14 98

<sup>32</sup> The claim was grounded on both the prohibition of gender discrimination and discrimination based on family status under the Irish Employment Equality Act 1998.

<sup>33</sup> The Irish High Court recently reaffirmed the entitlement of the Labour Court, as an expert tribunal, to bring to bear its own expert view to cases that come before it (*Benedict McGowan and ors v The Labour Court, Ireland and the Attorney General and Ors* [2010] 21 E.L.R. 277)

<sup>34</sup> [1998] IRLR 364

<sup>35</sup> [1990] IRLR 181

objectively justified on grounds unrelated to the gender or other protected characteristic of the complainant. A plea of objective justification is, essentially, a defence. It is, therefore, for a Respondent who seeks to rely on that defence to prove each of the elements which it contains.

Article 2(1)(b) of Directive 2006/54/EC provides that an indirectly discriminatory PCP is unlawful unless: -

*“[T]hat provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary”*

The application of these formulae is left to the national courts. This has been criticised by *Craig and De Búrca*<sup>36</sup> who contend that what exactly can constitute objective justification remains unclear. The learned authors say that this is, in part, because it results in inconsistencies between Member States as to when an indirectly discriminatory PCP can be justified. There is, however a significant body of authority on how the question should be approached.

The formulae now contained in the recast Directive is derived from the jurisprudential criteria established by the CJEU against which indirect discrimination may be justified<sup>37</sup>. This approach was first applied in Case C-170/84 *Bilka-Kaulhaus GmbH v Karin Weber von Hartz*<sup>38</sup>.

In this case the Court set out a three-tiered test by which an indirectly discriminatory measure may be justified. It said that the measure must firstly meet a “*real need*” of the employer; secondly the measure must be “*appropriate*” to meet the objective which it pursues and finally the measure must be “*necessary*” to achieve that objective.

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<sup>36</sup> Craig, P. De Búrca, G. (2003) EU Law, Text Cases and Material 3rd Ed. New York, Oxford University Press

<sup>37</sup> The test for objective justification is similar to the so called “rule of reason” developed by the ECJ in relation to indirect restriction of imports contrary to article 28 of the Treaty. This rule was formulated in *Rewe-Zentrale v Bundesmonopolverwaltung Branntwein* [1979] ECR 649, known as the “Cassis De Dijon” case. It involved a German rule which prohibited the sale of liqueur of the type at issue unless the alcohol content was at least 32%. Cassis De Dijon, which was produced in France had an alcohol content of between 15 and 20%. A prospective importer was consequently advised by the German authorities that while cassis could be imported into Germany it could not be marketed as liqueur unless the alcohol content was increased to the level required by German law. It was claimed that this restriction was necessary to protect consumers who would assume that a product advertised as liqueur contained alcohol up to the mandatory level. The Court held that a technical rule which could indirectly restrict trade could be saved if it was “necessary in order to satisfy a mandatory requirement”. The Court went on to hold that the measures must be “proportionate to that end and must be the least restrictive measures available”. On the facts of the case it was suggested that what amounted in effect to a ban on imports was disproportionate to the aim being pursued and that less restrictive measures were available (for example a requirement that the alcohol content be displayed on the label)

<sup>38</sup> [1986] ECR 1607

In Barton v Investec Henderson Crosthwaite Securities Ltd<sup>39</sup> the UK Employment Appeals Tribunal particularised this test more expansively as follows: -

- (1) *that there were objective reasons for the difference;*
- (2) *unrelated to sex;*
- (3) *corresponding to a real need on the part of the undertaking;*
- (4) *appropriate to achieving the objective pursued;*
- (5) *it was necessary to that end;*
- (6) *that the difference conformed to the principle of proportionality;*
- (7) *that was the case throughout the period during which the differential existed.*

This more expansive version of the test was adopted by the Irish Labour Court in Department of Justice, Equality and Law Reform (respondent) v Civil Public and Services Union<sup>40</sup>

In essence the case law of the CJEU equates reliance on objective justification of a discriminatory practice with a derogation from the obligation to apply the principle of equal treatment. In Case 476/99 Lommers v Minister van Landbouw, Natuurbeheer en Visserij<sup>41</sup> the CJEU pointed out that: -

*“ [A]ccording to settled case-law, in determining the scope of any derogation from an individual right such as the equal treatment of men and women laid down by the Directive, due regard must be had to the principle of proportionality, which requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued (Johnston, paragraph 38; Sirdar, paragraph 26, and Kreil, paragraph 23).*

In Case 171/88 Rinner-Kuhn v FWW Spezial-Gebaudereinigung GmbH & Co. KG<sup>42</sup> it was held that mere generalisations in relation to the effect of a measure can not be sufficient to make out a defence of objective justification<sup>43</sup>. In order

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<sup>39</sup> [2003] IRLR 332

<sup>40</sup> [2008] 19 ELR 140

<sup>41</sup> [2002] IRLR 430 paragraph 39,

<sup>42</sup> [1989] ECR 2743

<sup>43</sup> See also the decision in Nimz v Freie und Hansestadt Hamburg [1991] ECR 297

to make out the defence it is for the Respondent to identify a real need and to show that the less favourable treatment is effective in meeting that need. The Respondent must then go on to prove that the affect of the less favourable treatment on the employee is proportionate to the need of the employer which it is intended to achieve. This requires the Court to balance the detriment suffered by the worker against the benefit accruing to the employer. The Respondent must then establish that there are no alternative means by which the objective in view could be achieved which have a less discriminatory effect.<sup>44</sup> This would normally require the Respondent to establish that alternative means of achieving the objective were considered and rejected for cogent reasons.

It is also clear from recent pronouncements of the CJEU that the reason advanced in justification of the impugned measure must relate to the employment concerned rather than to broad policy or legislative provisions of the Member State. In case C-212/04, *Adeneler and others v Ellinikos Organismos Galaktos* (ELOG)<sup>45</sup> the CJEU held that cl 5(1)(a) of the framework agreement on fixed-term work is to be interpreted as precluding the use of successive fixed-term employment contracts where the justification advanced for their use is solely that it is provided for by a general provision of statute or secondary legislation of a Member State. The Court went on to say that the concept of 'objective reasons' within the meaning of that clause requires recourse to this particular type of employment relationship, as provided for by national legislation, to be justified by the presence of specific factors relating in particular to the activity in question and the conditions under which it is carried out.

While that decision was handed down in a case involving the interpretation of the Framework Agreement on Fixed-Term Work annexed to Directive 1999/70/EC, the general principle enunciated by the Court is applicable in cases involving the principle of equal treatment in employment and training.

Thus it must be shown that the PCP at issue is justifiable in the circumstances of the case at hand and that there are no alternative measures having a less discriminatory affect which could be employed to meet the particular objective which the Respondent is seeking to pursue.

Objective justification is a defence for what would otherwise be indirect discrimination. It is well settled that it cannot be relied upon to excuse direct discrimination<sup>46</sup>. This is based on the sound proposition that any reason for

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<sup>44</sup>Inoue v NBK Designs

<sup>45</sup> [2006] ECR I-6057, CJEU.

<sup>46</sup> See Opinion of Advocate General Jacobs in Case C-79/99 *Schnorbus v Land Hessen*

treating a woman less favourable than a man, because she is a woman, would have to be in and of itself discriminatory<sup>47</sup>.

While there is no closed list of reasons which may or may not be acceptable in grounding objective justification there are some established principles from which courts and tribunals can draw guidance. Firstly, a reason which in itself is discriminatory can never be accepted. In that context a reliance on the costs of rectifying a discriminatory practice cannot amount to objective justification<sup>48</sup>. To advance such a defence is analogous to saying that an employer can bear the cost of providing a benefit or a rate of pay to men but cannot bear the cost of affording the same benefit to women. Secondly, any defence which relies on past discrimination must also be rejected. This could arise where the existence of different collective bargaining arrangements are relied upon. Courts and tribunals must be alert to the possibility that such arrangements can be rooted in historic attitudes which undervalued women's work or stereotyped jobs between men and women. That said, the doctrine of objective justification does provide a full defence to a claim of indirect discrimination. However it provides a derogation from a fundamental social right and, like any derogation, must be applied strictly. It should only succeed where, on the principle of proportionately, the discriminatory effect of the impugned measure is clearly and unambiguously outweighed by the legitimate aim which it is intended to achieve.

## Conclusion

Most Court's and Tribunals now encounter far fewer cases involving overt discrimination than when equal pay and equal opportunities legislation was first introduced. Employer now know that discrimination on any of the protected grounds, and on gender grounds in particular, is both unlawful and morally reprehensible. The vast majority of employers would never countenance or condone discrimination. But some still do and people are still disadvantaged in employment by glass ceilings, opaque pay practices, stereotypical assumptions and subconscious notions about demarcation lines between men's work and women's work.

The shifting burden of proof provided for in the Directives dealing with the principle of equal treatment is a powerful weapon in the fight against this discrimination in particular. It ensures that Complainants are not required to prove facts which are beyond their capacity of proof. In essence, it allows a

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<sup>47</sup> There is, however, an exception to the general proposition that direct discrimination cannot be justified on objective grounds is contained at Article 6.1 of Directive 2000/78/EC. This Article provides, in effect, that measures which is discriminatory (directly or indirectly) can be saved if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

<sup>48</sup> See decision of the Court of Justice in C – 243/95 *Hill and Stapleton v Revinue Commissioners and Depat of Finance* [1998] ECR I-3739

Court to draw inferences from the surrounding facts of the case, and if the possibility of discrimination is within the range of inferences which can properly be drawn, to require the Respondent to provide a non-discriminatory explanation for what occurred.

The requirement for this approach is bound up with the principle of effectiveness of European law which requires that the rights and protections afforded to citizens by that body of law are real and substantial in practice and that effective redress is available where those rights have been infringed. It is based on the self-evident notion that those who discriminate rarely do so overtly. If the victims of discrimination were obliged to prove every aspect of their claim, including the motive or reason for an impugned act or decision, few cases could succeed.

The Directive does, however, stop short of placing the entire burden of proof on a Respondent. The complainant must get over the initial hurdle of proving facts from which discrimination can properly be drawn and that can be a substantial burden in many cases. If they meet that threshold the Respondent is then placed in the difficult position of having to prove a negative and many cases will succeed because that burden has been inadequately discharged. However, the overriding duty of every judicial authority is to ensure, as far as is humanly possible, that justice is done. Claims of discrimination are easy to make and difficult to defend. The law on shifting burden of proof is a vital evidential tool intended to assist victims of discrimination to obtain redress. We must, however, be vigilant to ensure that it does not operate so as to inhibit the innocent employer in mounting a full defence to misconceived or unwarranted claims.

Kevin Duffy