ERA – APPLYING EU ANTI-DISCRIMINATION LAW : THE BURDEN OF PROOF

SPEAKING NOTE

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1. I have **two** objectives today: firstly, to summarise how & why EU law devised a formal approach to the burden of proof in cases concerning non-discrimination; and, secondly, to provide some practical guidance to those of you with responsibility for determining claims of unlawful discrimination.

2. Equality and respect for human rights is a core element of the EU's aims, legislation and institutions. The non-discrimination principle was a founding principle of the EU. The *Treaty of Rome* in 1957 required equal pay between men and women. Since then, various EU Directives have been enacted to outlaw discrimination, principally in the field of employment & occupation, on grounds of sex, age, disability, race & ethnicity, religion & belief and sexual orientation.

3. Despite its central importance, however, substantive equality has not been achieved across the EU as a whole.

4. First, then, some statistics…..

   - In the most recent figures published for all **27** EU member states, women's gross hourly earnings were still, on average, 14.8% below those of men, with the gender pay gap varying by nearly 20 percentage points from 3% in Romania up to 22.7% for Estonia. For Lithuania, the gender pay gap is 14% (so it's in line with the EU average).
   - There is a 20% differential in employment rates between disabled and non-disabled people across the EU (it's as high as 30% in Poland, with the UK not far behind at 28%).
   - 54% of Europeans believe that being over 55 is a disadvantage when applying for a job.
   - 27% of Europeans from an ethnic minority reported experience of discrimination; the same number as reported experience of discrimination on grounds of sexual orientation.

Background and Context

5. So what is "the Burden of Proof"? And why is it important?

6. The burden of proof is a rule of evidence which requires a party in judicial proceedings to establish the facts in a case to the required standard in order to prove their case.

7. In civil, as opposed to criminal, proceedings the general rule is that the person making the allegation or claim has the legal burden to prove their case. It seems only right and fair that the burden is on the person making the allegation. Otherwise, it would give the person making the claim an unfair advantage if all they needed to do was to make an allegation in order for the person defending it to have to disprove it.

8. However, the problem with discrimination is….how do you prove that discrimination has taken place, particularly when the psychology of discrimination is that few admit it, even to themselves!

9. Nowadays, discrimination is typically neither obvious nor explicit. In fact, it is often covert. Even more often, the perpetrator of the discrimination doesn't even realise that they are discriminating because they are acting on the basis of unrecognised prejudices or unconscious biases.

10. The other key difficulty for a claimant who believes they have been discriminated against is that the information they need to prove the discrimination is often in the hands of the wrongdoer.

11. In the case of both direct and indirect discrimination, a claimant must point to a comparator to prove discrimination – someone who doesn't share the protected characteristic but whose circumstances are otherwise the same or not materially different. This might be an <u>actual</u> comparator, in which case the claimant will need evidence of how *that* person was actually treated; or it is possible to rely on a <u>hypothetical</u> comparator, in which case the claimant will need evidence to show how someone would have been treated in the same situation.

12. Who has this evidence? Well, generally, it isn't the claimant but, rather, the wrongdoer.

13. So, how has the EU responded to these challenges?

14. Well, put simply, it has recognised that EU substantive rights to equality are meaningless unless they are underpinned by rules of evidence & procedure that assist individuals to enforce those rights. That is referred to as the **principle of effectiveness** and is enshrined in Article 47 of the *European Charter of Fundamental Rights.* Arguably, the most important rules pertain to the Burden of Proof and access to evidence.

15. It is for member states to establish rules of protection for EU rights in accordance with the principle of procedural autonomy. However, the doctrine of **effectiveness** means that domestic procedural law must not make it impossible or excessively difficult to enforce rights derived from EU law.

16. The European Court of Justice (ECJ) began to recognise the difficulties in proving discrimination caused by the burden of proof being fully on the complainant. In two seminal cases, ***Danfoss*** and ***Enderby*** the court began to develop a jurisprudence of a **"***shifting burden of proof***".** Both were equal pay cases.

17. In ***Danfoss***, the Employer operated a pay system by which workers in the same pay grade were paid the same basic minimum pay but the employer also made additional payments based on an employee's "flexibility", vocational training & length of service. Whether these supplements were awarded or not was up to the discretion of an individual employee's line manager.

18. Statistics showed that women's average pay was **6.85%** less than men within the same pay grades. However, the processes by which individual additional payments were awarded meant that a female worker wasn't able to identify the precise causes of the difference in pay between her and a male worker carrying out the same work. The ECJ held that, where the pay system is lacking in transparency:

> *"….female employees can establish differences <u>only</u> 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 <u>not</u> to impose upon the employer the burden or proving that his practice in the matter of wages is not in fact discriminatory."*

19. In ***Enderby*** the ECJ considered the concept of <u>disparate impact</u> in relation to a pay system.

20. The Employer Health Authority employed speech therapists (a mainly female group of workers) as well as pharmacists & clinical psychologists (both mainly male groups). Dr Enderby – a speech therapist – claimed that, although she was employed on work of equal value with male pharmacists and clinical psychologists, she was paid less. The Health Authority sought to justify the difference in pay by arguing that the pay rates had resulted from different collective bargaining processes, each of which was free from any sex bias.

21. It was accepted by Dr Enderby that the relevant negotiations had not been conducted with the intention of disadvantaging women but – she said – the salaries of speech therapists were artificially depressed because of the profession's predominantly female composition. The Tribunal dismissed the complaint. The case was ultimately referred to the ECJ which found that there was *prima facie* indirect discrimination that needed to be justified.

The Court said:

> "*If the pay of speech therapists is significantly lower than that of pharmacists and if the former are almost exclusively women while the latter are predominantly men, there is a prima facie case of sex discrimination, at least where the two jobs in question are of equal value and the statistics describing that situation are valid……"* (para 16)
>
> "*Where there is a prima facie case of discrimination, it is then for the employer to show that there are objective reasons for the difference in pay. Workers would be unable to enforce the principle of equal pay before national courts if evidence of a prima facie case of discrimination did not shift to the employer the <u>onus</u> of showing that the pay differential is not in fact discriminatory*" (para 18)

22. During this period, national courts in some member states were also looking at the difficulties caused to claimants by the usual burden of proof. The UK is a good example. In ***King v Great Britain-China Centre [1991] IRLR 513*** the court said:

> *"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'".*

The Directives

23. The first Directive explicitly to address the BOP was the ***Burden of Proof Directive*** (97/80) (dealing only with the burden of proof in cases of sex discrimination).

24. It was replaced by:

i. **Race Directive** (2000/43/EC) (implementing the principle of equal treatment between persons irrespective of racial or ethnic origin)

ii. **Framework Directive** (2000/78/EC) (establishing a general framework for equal treatment in employment & occupation in relation to religion or belief, disability, age or sexual orientation)

iii. **Recast Directive** (2006/54/EC) (addressing the equal treatment of men and women)

25. In the original BOP Directive, the Recitals emphasised that the aim of the Burden of Proof doctrine was to ensure effective judicial protection for the principle of equal treatment.

26. Article 10 of the **BOP Directive** (as replicated in the later Directives) provides that:

> *"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."*

27. We can see, therefore, that the wording of the Directives contemplates a ***two-stage*** approach.

28. At **Stage 1** the claimant must establish sufficient facts from which it may be presumed that that there has been discrimination, i.e. the claimant must establish a *prima facie* case of discrimination. It is important to note that **at stage 1**, the requirement is to establish facts from which it may be presumed that discrimination has taken place; and not facts from which it would be concluded definitively that

discrimination has taken place.

29. This issue was considered by Advocate General Kokott in her opinion in the Bulgarian case of ***Belov v CHEZ Elektro Balgaria AD*** (which was linked to the case – 3 years later – of ***Nikolova v CHEZ*** (C-83/14) which you will also hear about today).

30. Both cases concerned the supply of electricity in a predominantly Roma region. The company that supplied the electricity to the region decided to locate the electricity meters at a height of 7 metres, as opposed to the usual 1.7 metres at which the electricity meters were placed in other districts. The company apparently did this because of the amount of meter tampering which occurred in this particular district, which was a Roma district. However, the height of the meters meant that customers could not check the amount of electricity they actually used which meant they were often billed for more electricity than they consumed. Mr Belov is Roma while Ms Nikolova is not, but she owned a shop in the Roma district and so was also adversely affected by the height of the meters.

31. The reference to the ECJ in ***Belov*** asked for a ruling on the extent to which the facts established must allow for a *conclusion* that there had been discrimination, or whether the mere presumption that there had been discrimination was sufficient. The query arose in part from different language versions of the relevant Directive.

32. AG Kokott concluded that it was not necessary, in order for the burden of proof to shift, for the claimant to demonstrate anything more than a "presumption" of discrimination. Requiring the claimant to show facts from which a court should "conclude" that there had been discrimination would be too high a demand and have the effect of frustrating the aim of the two-stage burden of proof.

33. So, once the claimant has established facts from which it may be "presumed" that there has been discrimination, **it shall be for the respondent to prove that there has been <u>no</u> breach of the principle of equal treatment**.

34. What type of evidence is required to "*establish facts from which it may be presumed*" that discrimination has taken place?

35. National courts grapple with this question on a daily basis: it is normally the Judge's role to hear the evidence and make findings of fact based on that evidence

(including to decide what inferences it is reasonable to draw on the basis of those facts).

36. In my jurisdiction (England & Wales), in the case of discrimination in employment, the process is very adversarial:

i. The parties set out their cases at the outset in writing;

ii. There is then a formal and extensive disclosure process, by which documentary evidence is exchanged (and this may include any audio or video recordings of relevant events);

iii. After that, the parties exchange written Witness Statements for the witnesses who will attend the Tribunal in due course;

iv. There is then a full trial, at which this evidence is tested by each side's advocate, challenging that evidence by way of witnesses being asked questions in cross-examination;

v. The Judge sits with lay members who are expert in industrial relations;

vi. They may ask questions at any point;

vii. The parties' representatives then make closing submissions and the Tribunal Panel deliberates to reach a determination (by finding the relevant facts, applying the law to those facts and reaching a final conclusion).

37. Case law from the CJEU is relatively scant but provides some helpful and useful guidance and shows the variety of factors which can determine whether the first stage of the BOP has been discharged.

38. Discriminatory comments previously made by the defendant Employer or someone sufficiently close to the defendant may well shift the burden.

39. In ***Firma Feryn*** the Belgian Labour Court referred a number of questions to the ECJ on the application of the burden of proof.

40. A Director of the company had stated in the media that: "….*we aren't looking for Moroccans. Our customers don't want them. They have to install up-and-over doors in private homes, often villas, and those customers don't want them coming into their homes…It is not just immigrants who break in. I won't say that, I'm not a racist. Belgians break into people's houses just as much. But people are obviously scared. So people often say: 'no immigrants'…I must comply with my customers' requirements*."

41. The ECJ confirmed that such statements may constitute facts giving rise to a presumption of a discriminatory recruitment policy, thereby shifting the burden of proof. The Court said that it was then for the employer to ***"****adduce evidence that it has <u>not</u> breached the principle of equal treatment****"*** and went on to give an example of what the employer might rely on in such a case: by showing that the actual recruitment practice of the undertaking does not correspond to those statements; in other words, by disproving, with cogent and tangible evidence that the stated policy was inaccurate. On the facts of the case, the ECJ judgment was unsurprising: the discriminatory remarks had been made only a little over a year earlier, and there were no current employees of Moroccan origin. However, an interesting question might be whether discriminatory comments which are much older, say 10 years previously, would have the same effect of shifting the burden of proof.

42. In the ***ACCEPT*** case, a shareholder in Steaua Bucharest – a Romanian football club – had made homophobic comments in an interview concerning the club's possible acquisition of a footballer who was rumoured to be gay.

43. Comments included: "*Not even if I had to close [the Club] down would I accept a homosexual on the team……. There's no room for gays in my family and [the Club] is my family. It would be better to play with a junior rather than someone who was gay……..Even if God told me in a dream that it was 100 percent certain that X wasn't a homosexual I still wouldn't take him."*

44. The footballer in question was not transferred to the club. When the case came before the CJEU, it held that, notwithstanding that someone (here, the shareholder) was not legally capable of binding an employer in employment-related matters, his or her comments as a person who played <u>an important role</u> in its management <u>could</u> establish a *prima facie* case of discrimination against it, in that those comments suggested that the club had a homophobic recruitment policy. The Court noted that, if the employer had not clearly distanced itself from such comments, that would be a factor which the national court might take into account in determining that there was a *prima facie* case of discrimination.

Second Stage

45. Once the burden has shifted to the employer, it must then provide an explanation

which is in no sense at all connected to the protected status of the employee. The explanation must, of course, be adequate, supported by evidence and must be accepted by the court. An employer falling short of that ***must*** be found to have discriminated.

46. It might be said that the shifting burden of proof places an unfair onus on organisations responding to discrimination claims on the basis that "proving a negative" is rarely easy, if not impossible.

47. However, this would be an unfair criticism. The employer is not proving a negative so much as proving a positive, non-discriminatory explanation for its actions. For example, a claim from a woman who complains that she has been awarded a lower bonus than her male counterpart because of her gender will easily be defeated if her employer can prove that he performed to a higher standard. The more objective the factors adduced by an Employer for the treatment in question, the more likely they will be to discharge stage two of the burden of proof.

48. It is **not** an answer to a *prima facie* case of discrimination for a Defendant to argue that it had a **benign motive** or for it to rely on **stereotypical assumptions** because such motives or assumptions may well be tainted by discriminatory factors.

49. In the ***Immigration Officer at Prague Airport*** case, the British Border Authorities had an immigration entry control at Prague Airport where they could prevent people leaving the Czech Republic for the UK. The statistics were startling: of those Czech citizens who were not Roma, only 0.2% were refused entry; whilst 87% of those of Roma origin were refused entry to the UK. The explanation of the policy was that there had been an influx of asylum applicants of Roma origin and, therefore, the Authorities had decided to question those of Roma background more often than others. It was argued that this was a good reason because it was based on the need to scrutinise immigration into the UK. The Supreme Court said "no" because the explanation depended on race. Baroness Hale (in her Judgment) clarified that the object of anti-discrimination law is to ensure that each person is treated as an individual, not to see them as part of a group from which one can make stereotypical assumptions.

50. In the ***Nikolova v CHEZ*** case about electricity meters, the electricity company's defence was to say that it was justified in placing the electricity meters out of reach

because this would deter theft of electricity. However, as the Company only placed the electricity meters at a great height in Roma districts, this explanation depended on a stereotypical assumption about Roma people being thieves. The CJEU made clear that, if the explanation depended on race, this would not be capable of discharging the burden of proof.

51. The burden of proof doctrine can only work if claimants have access to evidence and information relevant to their case. The absence of such information creates another point at which the effectiveness of the substantive law on equal treatment can be undermined by national courts' procedures relating to the provision of evidence in civil cases.

52. Member States are free to implement their own procedures but a minimum standard is required in order to uphold the principle of effectiveness.

53. This can be seen from the case of ***Kelly***. Mr Kelly was rejected for a place on a course at University College, Dublin. To establish that he had been the victim of sex discrimination, he sought pretty extensive disclosure of documents relating to other individuals who had applied to go on the same course (such as application forms, scoring sheets and information about the sex of the other applicants). When his application for disclosure was refused, a question was referred to the CJEU where it was argued on his behalf that a failure to provide disclosure was contrary to the Burden of Proof Directive because it prevented him from being able to discharge the first stage of the shifting burden of proof.

54. The CJEU explained that the Burden of Proof doctrine does not create an entitlement to disclosure but that it was theoretically possible that a refusal to provide disclosure could deprive the principle of non-discrimination of its effectiveness. Accordingly (although not explicitly stated in ***Kelly***), the question for the Judge in a case is whether the refusal of the disclosure by the defendant means that the claimant cannot begin to establish the necessary facts. In such a case, the Judge may have to consider ordering disclosure or making it clear that an adverse inference *may* be drawn against the defendant (along with other factors) if it continues to refuse to provide disclosure.

55. Another key case on this point is ***Meister v Speech Design Carrier Systems.*** Ms

Meister, a Russian national, responded to Speech Design's newspaper advertisement for an experienced software developer. Her application was rejected without an interview, despite the fact that she fulfilled the criteria for the post. The post was advertised for a second time shortly afterwards, and Ms Meister again applied and was rejected without interview. No information was provided as to why her application had not been successful. The German court referred two questions to the ECJ:

i. Does an unsuccessful job applicant, who meets the advertised criteria, have the right to be informed whether another applicant was engaged and, if so, as to the criteria used in selection?
ii. Where the employer fails to disclose the information, does that fact gives rise to a presumption of discrimination?

56. The ECJ held that the EU Directives on discrimination in employment could not be interpreted as entitling an unsuccessful candidate to have access to information indicating whether the employer engaged another applicant at the end of the recruitment process. However, it made the important observation that the national court may take into account an employer's refusal to grant any access to the recruitment information as part of the wider background facts in deciding whether the burden had shifted to the employer.

57. In the ***CHEZ*** case which I referred to earlier, the CJEU referred to the ***Meister*** case and held that the national court could draw an adverse inference from the company's failure to produce evidence of the alleged damage, meter tampering and unlawful connections it said had occurred in the predominantly Roma districts, despite requests for disclosure from the referring court.

58. So, to recap:

59. First, the Judge must set about finding the primary facts – that is, those facts which are central to the complaint (which will include those relevant to any comparison).

60. Next, the Judge should consider what findings of fact should be made from any

background or circumstantial evidence. If there is any relevant statistical evidence, that should be taken into account and factual findings made on the basis of that evidence.

61. Then, the Judge should consider what, if any, inferences should be drawn from those facts.

62. Having concluded the fact-finding, the Judge should then consider whether those are facts from which it may be **presumed** that there had been discrimination (recalling that the Court doesn't need to be satisfied that the facts are such that it should be **concluded** that there had been discrimination).

63. It is not enough for a claimant to prove negative treatment and a protected characteristic; they must be able to point to something more from which it may be presumed that there had been discrimination. Evidence suggesting a stereotype or prejudice might suffice.

64. Only then will the BOP shift to the Defendant to prove that the explanation for the treatment had nothing to do with the protected characteristic. They don't need a good reason for the treatment, just one that is not discriminatory.

Conclusion

65. The shifting burden of proof is an effective tool in fighting discrimination. It means that cases which might seem to be unwinnable can at least have a chance of success. It also recognises the reality of discrimination which is that it is often subtle and covert and it is necessary to look at all the evidence in order to reach a just outcome.