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The Shifting Burden of Proof in Discrimination Cases

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The Burden of proof in Discrimination Introduction



- The EU rules on Burden of Proof are contained in the Discrimination Directives
 - Article 19 of the recast Equal Treatment Directive (2006/54) on gender
 - Article 10 of Council Directive 2000/78/EC on religion or belief; disability; age or sexual orientation
 - Article 8 of directive 2000/43 on race

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The Burden of proof in Discrimination Introduction



- Council Directive 97/80/EC
 - when there is a prima facie case of discrimination and that, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought*

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The Burden of Proof provisions



when person 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 discrimination or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment

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Burden of Proof – Why is it needed?



- Importance of anti discrimination measures in EU ;aw
- Importance of the measures being effective
- Recognition of the difficulties faced by claimants in proving WHY they have been adversely treated
- Discriminators do not advertise their prejudice or admit to discriminatory reasons

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The problem of Unconscious Bias



- Lack of awareness of the causes of discrimination
- Lack of awareness of ones own prejudices;
- May not be ill intentioned or deliberate;
- Assumptions about who fits in
- Selection of those who are most like ones self and the eisting workforce
- Availability of many excuses or potentially valid, and hard to disprove reasons for Not selecting

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The Burden of Proof - Who can prove discrimination?



- Without the shift burden rests on the person making the allegation
- The person making the decision, or potentially discriminating does not ahve to justify or explain their decision
- Decision maker or organisation has access to and possession of much relevant information
- Difficult to prove discrimination unless an admission, or discrimination where obvious on the face of it

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Maruko



- The refusal to pay a survivors pension to a same sex civil partner
- Payment of a survivors pension to a heterosexual married partner
- ECJ rule that discrimination is proven because the provision of the scheme restricts the payment of the benefit by reference to a requirement linked to sexuality
- *But see David L. Parris v Trinity College Dublin c-443/15*

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The Approach to Burden of Proof From Directives



- Assume that an organisation or an individual can demonstrate a non discriminatory reason for choices in selection recruitment etc
- Should not have to do so in all cases,
- BUT where the complainant establishes facts from which it *may* be presumed that discrimination has taken place;
- Then organisation must prove that discrimination has not taken place
- None whatsoever - the protected characteristic must not be a factor in decision making at all

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The First Stage - Facts from which is may be Presumed.....



The person making the allegations must at least be able to show

- That they have suffered some adverse treatment
- That they possess a protected characteristic which is known to the person or organisation responsible for the treatment
- That they have been treated less favourably than another person has been treated or would be treated

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Difference in treatment and difference in protected characteristic?



- The words of directive are not prescriptive about what the facts may be
- Assume that to be able to presume discrimination at least need to show that you have the protected characteristic,
- And treated differently from another who does not (or a hypothetical other)
- Does the complainant need to prove any reasons why?

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Coleman and Associated discrimination



- The Protected characteristic can, in some cases be that of another ;
- Probably not in pregnancy cases
- Less favourable treatment must still be shown, but comparator will be a person not caring for a disabled child, for example,
- May compare with person caring for children;
- ECJ refer back to the wording of directive regarding the nature of the facts required to be established

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What information or facts can be used?



- *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding Firma Feryn NV*
- Clearest set of question to CJEU
- Unusual and no typical case
- recognition that racist statements of intent will be sufficient;
- Customer preference is no excuse/ defence for discrimination
- Recruitment of staff from one ethnic or racial group may be evidence of a wider discrimination

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What information or facts can be used?



- *The precondition of the obligation to adduce evidence in rebuttal which thus arises for the alleged perpetrator of the discrimination is a simple finding that a presumption of discrimination has arisen on the basis of established facts.*
- *public statements by which an employer lets it be known that under its recruitment policy it will not recruit any employees of a certain ethnic or racial origin are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory*

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What information or facts can be used?



- Public Statements may be express
- Might they also be implied from actions? Recruitment practices?
- Workforce breakdown may be statements?
- Gender Pay gap information/
- Existence of an Equal Opps policy?

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Indirect Discrimination



- *where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary*

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Indirect Discrimination



- What must the complainant establish?
- Their own protected status?
- The presence of a PCP?
- Their own disadvantage?
- That disadvantage caused by PCP?
- That the PCP also causes disadvantage to others who share the protected status?
- That the PCP does NOT disadvantage those who do not share the status

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Indirect Discrimination



- Does a claimant have to prove that the reason why the PCP puts them at a particular disadvantage is the membership of a protected group
- That is, do they need to explain why a particular process causes apparent discrimination?

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Establishing the facts - using statistics



- Katharina Rinke v Ärztekammer Hamburg
- Courts can rely upon common understandings where there is statistical support;
- If no statistics exist about the particular situation , evidence of other, similar situations may help to establish the facts necessary
- A requirement of full time practice is less favourable to women
- The ability to work part-time appears indisputably to improve the opportunities for a large group of women to participate in work.

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Using Statistics



- Workforce Stats showing numbers of groups in present and past workforce
- Workforce stats showing the type of work done and the grades of particular groups
- Statistics which seem to indicate a glass ceiling
- Facts known about a particular manager or a particular team over time
- Data about who is disciplined, who is dismissed by age, gender race etc

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Common Knowledge



- women tend to care for children more often than men, and will therefore find part time working harder;
- Christians will find it harder to work on Sundays;
- A requirement for a language as ones birth language will be harder for people of different nationalities or ethnic origin

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The respondents explanation



- No discrimination what so ever
- Full and cogent
- Genuine and provable - mere assertions will not be enough
- The Bad employer
- Never had a woman
- We had a fair process

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