Proving Discrimination: the shift of the burden of proof and access to evidence

Rakesh Patel, Thompsons Solicitors LLP

Introduction

1. The purpose of this presentation is to provide a summary of the burden of proof in EU discrimination law and to provide some practical guidance to those with responsibility for determining claims of unlawful discrimination.

2. Following the Lisbon Treaty (which came into force on 1 December 2009), two Treaties form the principal sources of EU law: the Treaty on the Functioning of the European Union (TFEU) (which started life as the Treaty of Rome) and the Treaty on European Union (TEU) (which is often referred to as the Maastricht Treaty). These are supplemented by the Charter of Fundamental Rights of the European Union and a large number of Directives and Regulations that govern specific areas over which the EU has legislative competence, e.g. equality between men and women.

3. With the exception of the principle of equal pay, which is set out in Article 157 TFEU, most employment law measures have taken the form of a Directive.

4. 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 of 1957 required equal pay between men and women. Since then various EU Directives have been issued to outlaw discrimination, principally in the

employment field, on grounds of age, disability, race and ethnicity, religion and belief and sexual orientation.

5. Despite its central importance, substantive equality has not been achieved in member states and across the EU as a whole. For example, across the EU, women still earn less per hour than men do overall. For the economy as a whole, in 2017, women's gross hourly earnings were on average 16.0 % below those of men in the EU. Across Member States, the gender pay gap varied by 22 percentage points, ranging from 3.5 % in Romania to 25.6 % in Estonia.[1]

6. A survey in 2017 by the EU Agency for Fundamental Rights, showed that around a quarter of black people experienced racial discrimination at work or when looking for work. Young black people are especially vulnerable; in some countries, up to 76% are not in work, education or training compared to 8% of the general population.[2]

Background and Context

7. The Burden of Proof is the obligation on a party to establish the facts in a case to the required standard in order to prove their case. 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 right and fair that the burden is on the person making the allegation. Otherwise it would give the person making the allegation an unfair advantage if all that was required was for an allegation to be made in order for the person defending the allegation to have to prove that discrimination had not taken place.

8. The problem is, how do you prove that discrimination has taken place? Nowadays discrimination is not obvious and explicit. It is often disguised and subtle. As Lord Browne-Wilkinson put it in the UK case of ***Glasgow City Council v Zafar*** [3] "*those who*

[1] https://ec.europa.eu/eurostat/statistics-explained/index.php/Gender_statistics#Earnings
[2] Second European Union Minorities and Discrimination Survey, https://fra.europa.eu/en/publication/2017/eumidis-ii-main-results
[3] [1998] ICR 120, House of Lords

discriminate on the grounds of race or gender do not in general advertise their prejudices: indeed they may not even be aware of them". Difficulties in proving discrimination include:

- the covert nature of some discrimination;
- unbiased or unrecognised discrimination;
- the bulk of evidence is often in the employer's hands;

9. The European Court of Justice (ECJ) began to recognise the difficulties in proving discrimination caused by the burden of proof being on the complainant. In two seminal cases, ***Danfoss***[4] and ***Enderby***[5] the court began to develop a jurisprudence of a **"***shifting burden of proof***".** Both were equal pay cases.

10. In *Danfoss*, the pay system came from a collective agreement between a trade union and an employers' association. Under the agreement, *Danfoss* paid the same basic minimum pay to workers in the same pay grade. However, the agreement allowed the employer to make two sets of additional payments. The first set was based on "flexibility"; the second set was paid on the basis of the employees' vocational training and length of service. Whether supplements were awarded was a matter for determination by individual employees' line managers. The statistics showed that women's average pay was 6.85% less than men within the same grades. The mechanisms of individual increases applied to the basic wage were operated in such a way that a female worker was incapable of identifying the 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, there is little that employees can do to establish a prima facie case of discrimination other than by reference to the average pay of men and women. In such cases, the burden must then fall on the employer to show there has been no discrimination.

11. In *Enderby* the ECJ considered the concept of disparate impact. The respondent Health Authority employed speech therapists (a mainly female group) and pharmacists and

[4] Handels- og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening Ex p. Danfoss A/S (109/88) EU:C:1989:383 (17 October 1989)
[5] Enderby v Frenchay Health Authority, Case C-127/92 [1993] ECR I-05535

clinical psychologists (both mainly male). Dr Enderby, a speech therapist, claimed that she was employed on work of equal value with male pharmacists and clinical psychologists. At the relevant time, her annual pay was less than that of a comparable pharmacist and psychologist. The Authority denied that the work was of equal value, but also contended, in any event, that the variation in pay was genuinely due to a material factor unrelated to sex: the Authority sought to justify the difference in pay by showing that the pay rates had resulted from different collective bargaining processes, each of which was free from any sex bias. It was accepted by Dr Enderby that the the negotiations had not been conducted with the intention of disadvantaging women, but the salaries of speech therapists were artificially depressed because of the profession's predominantly female composition. The Tribunal dismissed the complaints. It held that the employers had established a material factor defence by showing that the variation in pay "arose because of the bargaining structure and its history which was non-discriminatory, and from the structures within their own professions which were also non-discriminatory". 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 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 onus of showing that the pay differential is not in fact discriminatory*" (para 18)

12. During this period national courts were looking at the difficulties caused to Claimants by the burden of proof. The UK is a good example. In ***King v Great Britain-China Centre [1991] IRLR 513***, approved by the House of Lords in *Glasgow City Council v Zafar,* the court said that the outcome of a case will usually depend on what inferences it is proper

for the tribunal to draw from the primary facts. K was Chinese but had been educated in Britain. She brought a claim of racial discrimination after she was not short-listed for a job which required "first-hand knowledge of China and fluent spoken Chinese". All applicants placed on the short-list were white and the successful candidate was an English graduate in Chinese. K's claim was upheld by the majority of the tribunal on the grounds that the respondent had failed to demonstrate that K had not been treated less favourably. The Employment Appeal Tribunal (EAT) allowed an appeal on the ground that the tribunal had erred in placing the burden of proof on the respondent. The Court of Appeal allowed K's appeal. In cases of alleged racial discrimination concerning recruitment or promotion, it is for the claimant to make out the case, but it is unusual for the tribunal to be faced with direct evidence of discrimination. Therefore the tribunal has to make its findings on the primary facts and draw inferences from them. Where the employer cannot supply good reasons for its decision, the tribunal is entitled to find discrimination proved. Of the eight applicants for the post, four were ethnic Chinese but none was called for interview, nor had any ethnic Chinese ever been employed. As GBCC could not explain, to the tribunal's satisfaction, why this was the case its original decision could stand. The Court made it clear that there was no official "shifting burden of proof": a tribunal faced with such facts could infer discrimination but could equally decide that the claimant had failed to prove the case on the balance of probabilities. The Court (Neil LJ) held:

> *(1) It is for the applicant who complains of … discrimination to make out his or her case. …if the applicant does not prove the case on the balance of probabilities he or she will fail.*
>
> *(2) … it is unusual to find direct evidence of … 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 …*

(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 [prohibited] … grounds, a finding of discrimination and a finding of a difference in [protected characteristic] … will often point to the possibility of … 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 grounds [of the protected characteristic]. This is not a matter of law but…"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 both 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."

Doctrine of Effectiveness

13. The doctrine of effectiveness is a fundamental tenet of EU law. Article 47 of the European Charter of Fundamental Rights says: "*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article"*

14. It is for the national states to establish rules of protection for EU rights in accordance with the principle of procedural autonomy. However domestic procedural law must operate in the same way for rights derived from domestic law and their EU law equivalents ("doctrine of equivalence"). For example, EU law does not permit domestic law to have different limitation periods for domestic law rights and similar EU law rights.

15. The doctrine of effectiveness means that domestic procedural law must not make it impossible or excessively difficult to enforce rights derived from EU law. In practice, this means that national procedural rules must respect the principle of proportionality: they

will be lawful as long as they do not hinder the operation of EU law so much that they cannot be justified. It also means that domestic law must give ***full effect*** to EU directives. Otherwise the rights to equality are meaningless unless they are underpinned by rules of evidence and procedure that assist individuals to enforce those rights.

The Directives

16. The first Directive was adopted in 1997, Council Directive 97/80 ("the Burden of Proof Directive"), on the burden of proof in cases of sex discrimination. Article 10 provided:

> *"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."*** *[emphasis added]*

17. Article 10 of the Burden of Proof Directive has been replaced by identical wording in Article 19 of the Recast Directive (2006/54). Identical wording is also found at Article 8 of the Race Directive (2000/43) and Article 10 of the Framework Directive (2000/78).

18. The wording of the Directives contemplate a ***two stage*** approach. At Stage 1 the claimant must sufficiently establish the 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. This means that although the burden of proof remains on the claimant, it is a reduced burden. The two stage test is a balanced approach, enabling the claimant to claim the right to equal treatment but preventing the case being founded solely on the claimant's assertions.

19. 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 can be ***concluded*** that discrimination has taken place. This issue was considered by Advocate General Kokott in her opinion in the Bulgarian case of ***Belov v CHEZ Elektro Balgaria AD and others***. Belov was linked to the case of ***Nikolova v CHEZ Eletro Balgaria AD and others (C-83/14)***. Ultimately *Belov* did not proceed to a hearing by the ECJ because it was ruled that its referral was inadmissible having been made by the Bulgarian equality body rather than a court of law. 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 meters, as opposed to the usual 1.7 meters at which the meters were places in other districts. They did this apparently because of the level of meter tampering which had occurred in this particular district. Mr Belov is Roma while Ms Nilkolova is not Roma but complained of discrimination because of the district in which she lived and thus by her association with the local Roma people. The reference to the ECJ in *Belov* included a question about the standard of proof required to prove less favourable treatment had occurred. The reference asked for a ruling on the extent to which the facts established must allow 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. AG Kokott concluded that it was not necessary, in order for the burden of proof to reverse, for the claimant to demonstrate anything more than a "presumption" of discrimination. Requiring the claimant to show facts from which a court could "conclude" that there had been discrimination would be too high a demand and have the effect of frustrating the effect of the two stage burden of proof. She relied on recital 21 of the Race Directive which talks about only a reversal of the burden at the point where the victim has established a *prima facie* case of discrimination.

20. It is for national courts to verify "that the facts alleged against the employer are established and to assess the sufficiency of the evidence which the employer adduces in support of its contentions that it has not breached the principle of equal treatment" para 33 ***Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV. Case C- 54/07 ("Firma Feryn"),***

21. I will now consider how the burden of proof provisions apply to direct discrimination and indirect discrimination.

Direct Discrimination

22. Direct discrimination occurs when someone is treated less favourably on one of the protected grounds than another is, has been or would be treated in a comparable situation.[6]

First Stage

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

24. National courts grapple with this question on a daily basis. However ECJ case law is relatively scant but provides helpful and useful guidance on the burden of proof. The ECJ has mainly had to deal with unusual cases but the guidance provided in these cases is useful and shows the wide variety of factors which can determine whether the first stage has been discharged.

25. Discriminatory comments by the respondent or someone sufficiently close to the respondent may well shift the burden to the respondent. In *Firma Feryn* the Belgian Labour Court referred a number of questions to the ECJ on the application of the burden of proof. The facts were that an employer had, in 2005, publicly stated a policy of not employing certain ethnic minorities. A Director of the company had stated in the media that "*Apart from these Moroccans, no one else has responded to our notice in two weeks…but 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*

[6] See the Recast Directive at Article 2(1)(a) and the Race and Framework Directives at Article 2(2)(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."

26. The case against the respondent was not brought by an individual claimant who had applied for a post and been rejected, but by a Belgian body for the promotion of equal treatment. There was, in fact, no identifiable claimant who had applied unsuccessfully for a post, or who could be shown to have been deterred from applying by the comments. The ECJ confirmed that such statements may constitute facts of such a nature as to give rise to a presumption of a discriminatory recruitment policy, thus shifting the burden of proof. The court went on to say that it was for the employer to ***"****adduce evidence that it has not breached the principle of equal treatment****"*** and went on to give an example of what the employer might rely on in this 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 ago, would have the same effect of shifting the burden of proof.

27. In ***In Asociatia ACCEPT v Consiliul National pentru Combaterea Discriminarii 2013 ICR 938, ECJ***, *("ACCEPT")* B, who owned shares in Steau Bucharest, a Romanian football club, had made homophobic comments in an interview concerning the club's possible acquisition of a footballer (X) who was rumoured to be gay. Comments included: "*Not even if I had to close [FC Steaua] down would I accept a homosexual on the team….. There's no room for gays in my family and [FC Steaua] 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. Too much has been written in the papers about his being a homosexual. Even if [player X's current club] gave him to me for free I wouldn't have him! He could be the biggest troublemaker, the biggest drinker … but if he's a homosexual I don't want to know about him."*

28. X was not transferred to the club. A Romanian court rejected a claim of direct discrimination against the club on the basis that B could not legally bind it in recruitment matters. However, the ECJ held that, notwithstanding that someone was not legally capable of binding an employer in employment-related matters, his or her comments as a person who played an important role in its management could establish a prima facie case of discrimination against it, in that those comments suggested that the club had a homophobic recruitment policy. 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 deciding whether a prima facie case had been established. In the same way, an employer might rebut such a prima facie case by, among other things, showing that it had clearly distanced itself from such public statements. An interesting question in this case might be whether similar comments by someone less prominent and more junior would shift the burden.

29. The ECJ has made it clear that national courts must consider all the circumstances in the claim to assess whether the Claimant has established facts from which it may be presumed that discrimination has taken place. This will include **primary facts**: what happened; who said what; how many people from an ethnic minority are employed at senior level; in what context were certain statements made etc. From these primary facts, **inferences** may be drawn. For example, employers may make a recruitment decision on the basis of which an applicant may which "fit in" with other members of staff and this could lead to discrimination. Usually the sort of background evidence from which a Tribunal may infer discrimination may be, for example, racial stereotyping, stereotypical vocabulary, showing that staff from one ethnic group were more often than white staff treated in a certain way, or even a lack of clear explanation or the provision of evidence from the respondent.

30. Inferences may be drawn not only from the specific incidents and acts detailed in the claimant's claim taken in isolation but also from the full factual background of the claim, including evidence about the conduct of the respondent before and after the act about

which the complaint is made. This could include a failure by the respondent to provide information. The extent to which an employer's failure to provide information can be used to establish a *prima facie* case of discrimination has come under the spotlight In ***Kelly v National University of Dublin CJEU C-104/10.*** Mr Kelly brought discrimination proceedings against the university when he was refused a place on a master's degree course. He sought an order in the proceedings for specific disclosure of, among other things, the application forms and scoring sheets of the other applicants. The university had already offered to provide some of the information in redacted form. The Circuit Court refused the order on the grounds that the documents sought contained confidential personal information. On appeal, the High Court of Ireland referred the issue to the European Court of Justice (ECJ), which held that the Burden of Proof Directive did not create an express right to disclosure of the unredacted information sought. However, this did not mean that in another case disclosure would not be ordered. The ECJ acknowledged that refusal of disclosure could prevent a claimant from establishing the facts required to shift the burden to the defendant, which may frustrate the objective of the Directive. The ECJ held that this would be a matter for the national court to determine on the particular facts of a case. In considering whether disclosure should made, the national court must take into account the principles of confidentiality and the protection of personal data.

31. One of the most important facts from which discrimination may be presumed are often facts establishing comparability between the claimant and another person who does not possess the protected characteristic, and has been treated more favourably in similar circumstances. In ***Meister v Speech Design Carrier Systems GmbH* C-415/10** Ms Meister, a Russian national, who held a Russian degree in systems engineering which was considered to be equivalent to a similar German degree, 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:

- Whether an unsuccessful job applicant, who meets the advertised criteria has the right to be informed whether another applicant was engaged and, if so, as to the criteria used in selection?

- Where the employer does not disclose the information, whether that fact gives rise to a presumption of discrimination?

The ECJ held that the EU Directives on discrimination in employment must be interpreted as not entitling an unsuccessful candidate, who meets the requirements listed in a job advert, 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.

32. In the *CHEZ* case referred to above, the ECJ referred to the *Meister* case and held that the national court could draw an adverse inference from the respondent'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 from the referring court.[7]

33. A UK case, ***Anya v University of Oxford*** [8], is a good example of the importance of primary fact finding and the drawing of inferences. Dr Anya, a black Nigerian permanently resident in the UK, applied for a post as a post-doctoral research assistant. He was rejected following an interview, and the post went to the other short-listed candidate, who is white. Dr Anya complained that this decision was racially

[7] Para 83
[8] [2001] IRLR 377

discriminatory. The interview was conducted by a panel of three, including Dr Roberts, who was Dr Anya's supervisor. Dr Anya led evidence to the Tribunal of various facts which he argued enabled the Tribunal to draw an inference of discrimination. He pointed to the serious shortcomings in the recruitment process. In addition, Dr Roberts had expressed his reservations about Dr Anya to one of the other members of the interviewing panel prior to the interview, and had in the past been obstructive towards Dr Anya's career when they had worked together. The Tribunal made no findings of fact regarding this evidence. Instead the Tribunal went straight to consider evidence from Dr Roberts about why Dr Anya had not been selected for reasons related entirely to his qualities as a scientist. The Tribunal found Dr Roberts' evidence honest and genuine and therefore reasoned that Dr Anya's race did not play a part in the decision and his case failed. The tribunal failed to make findings of fact on any of those matters, let alone indicate whether they could draw any inferences from them. This was despite the fact that they noted, in the evidence on those matters, inconsistencies between the University's witnesses and also inconsistencies between their evidence and the documents. Dr Anya's appeal to the Court of Appeal was successful. The Court of Appeal reiterated the point that direct race discrimination will often be established by the drawing of inferences from facts. Those facts may well be background facts, and they may predate or postdate the acts which are the subject of the Tribunal claim. It is unlikely that the specific facts which constitute the substance of the Tribunal complaint will in themselves be sufficient to enable a Tribunal to draw a conclusion of discrimination. It is likely to be the background facts which will enable the inference to be drawn. Therefore in focussing solely on the explanation given by Dr Roberts as to why he preferred the white candidate rather than Dr Anya, and finding that explanation truthful, the Tribunal had in effect ignored the background facts. They had therefore ignored precisely those background facts which would normally enable a Tribunal to draw an inference of discrimination.

34. One issue that often arises is whether showing less favourable treatment and a difference in status is enough to shift the burden. I am not aware of any EU case law which has directly dealt with this issue. In the UK the courts have made it clear that a

mere difference of treatment is not enough to shift the burden of proof, something more is required. See for example ***Madarassy v Nomura International plc*** **[2007] IRLR 246** in which the court said "*the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination*" (as per Mummery LJ para 56). However the "more" needed to shift the burden need not be a great deal. For example, a failure to disclose information or an evasive answer to a request for information could shift the burden.

Second Stage

35. Once the burden has been shifted to the employer, it is for him or her to 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, even though the court might perceive another reason, not advanced by the employer, but nevertheless non-discriminatory.

36. It might be said that the reverse burden of proof places an unfair onus on organisations responding to discrimination claims on the basis that "proving a negative" is rarely easy and sometimes it is impossible. 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.

Indirect Discrimination

37. Indirect discrimination is defined in the various Directives cited above as occurring:

"*where an apparently neutral provision, criterion or practice would put persons [with the protected characteristic] at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary*"[9]

38. The Claimant has to establish facts from which it may be presumed that there is an apparently neutral provision, criterion or practice ('PCP') which places persons with a protected characteristic at a particular disadvantage compared with other persons. The most difficult requirement of claimants is to establish a presumption that the PCP puts the protected group at a "particular disadvantage".

39. One way of showing this disadvantage is often by way of statistics. However the importance of statistics has perhaps diminished over the last few years. The Burden of Proof Directive spoke of "substantially higher proportion of the members of one sex" being put at a disadvantage, which is a more stringent test than that contained in the current Directives. The substitution of the words "a substantially higher proportion" with the simpler requirement for "a particular disadvantage" suggests that it may not be necessary to conduct a detailed statistical analysis of the advantaged and disadvantaged groups in every case.

40. Factors that may be taken into account in shifting the burden of proof in direct discrimination claims may also be relevant in indirect discrimination claims. Thus the ECJ explicitly stated in *Meister* that a refusal to grant access to information could assist in shifting the burden in cases of indirect as well as direct discrimination[10].

41. As with direct discrimination, it is open to the employer to adduce evidence to rebut the presumption. Thus, the employer might show that even if the statistics show some form of disparate impact that it is not because of the PCP. Where the burden does shift, the

[9] See Directive 2000/43, Article 2(2)(b); Directive 2000/78, Article 2(2)(b); Directive 2006/54, Article 2(1)(b)
[10] Judgment, paragraph 47

employer could try and justify by showing that it was a proportionate means of achieving a legitimate aim.

What evidence may be considered at each stage?

42. Domestically there has been some debate about what material can be considered at each stage. One approach is to only consider the claimant's evidence at the first stage and the second stage should be reserved for the respondent's evidence and matters not canvassed at the first stage. I understand that Sweden uses this approach. The UK approach is different to this. The court is required to consider evidence from both the claimant and the respondent to see if a *prima facie* case has been made out. The court considers all the relevant evidence, including whether and if so how the act complained of occurred, comparator evidence, statistical evidence, and evidence about reasons for the differential treatment.

Conclusion

43. 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.

Rakesh Patel
Thompsons Solicitors LLP
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