Proving Discrimination: The Shift of the Burden of Proof and Access to Evidence in an Employment Context

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Introduction

1. People bringing claims of discrimination face particular challenges in proving their claim.

2. The challenges are additional to those which people face bringing a claim of, say, breach of contract or for damage to their land. In a discrimination case a person needs to prove not only that they were treated unfavourably but also that the reason for their treatment was because of a protected characteristic (such as national origin, disability etc).

3. Whilst it is relatively easy to prove unfavourable treatment, it is much more difficult to prove the reason for that treatment. Often the person who has imposed the less favourable treatment will not admit his or her motivation (even to him or herself) and very rarely is there direct evidence that a particular act was, say, because of a person's national origin.

4. The difficulty is illustrated in the case where a person applies for a job but her application is rejected. She is not told why she was rejected but believes that it may be because of her sex, origin or age. Without the evidence which the potential employer holds, it will be almost impossible for her to prove her claim. She cannot show why the employer did not give her the job, it might be because of her sex, but it could be for any number of other reasons.

5. Likewise, a woman who believes she has been paid less than her male colleague will not ordinarily have access to the details of his pay or the reason why he is paid what he is (his performance, qualifications etc).

6. This problem came before the European Court of Justice in October 1989[1]. An employee's union claimed that Danfoss A/S had a wage practice which involved discrimination on the grounds of sex. The union was able to demonstrate a difference in pay of 6.85% between men and women and submitted that it should be able to rely upon that statistical data to support its allegation of discrimination. The national court (an arbitration board) referred to the ECJ the question of where the burden of proof lay in proving whether the differentiation in pay was attributable or not attributable to considerations determined by sex.

7. The ECJ held

> [13] It should next be pointed out that in a situation where a system of individual pay supplements which is completely lacking in transparency is at issue, female employees can establish differences only so far as average pay is concerned. They would be deprived of any effective means of enforcing the principle of equal pay before the national courts if the effect of adducing such evidence was not to impose upon the employer the burden of proving that his practice in the matter of wages is not in fact discriminatory.
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> [14] Finally, it should be noted that under Article 6 of the Equal Pay Directive member-States must, in accordance with their national circumstances and legal systems, take the measures necessary to ensure that the principle of equal pay is applied and that effective means are available to ensure that it is observed. The concern for effectiveness which thus underlies the directive means that it must be interpreted as implying adjustments to national rules on the burden of proof in special cases where such adjustments are necessary for the effective implementation of the principle of equality.
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> (emphasis added)

8. That concern for effectiveness led, ultimately, to Council Directive 97/80/EEC which, within its recitals, stated

[1] C-109/88, Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss

(17) Whereas plaintiffs could be deprived of any effective means of enforcing the principle of equal treatment before the national courts if the effect of introducing evidence of an apparent discrimination were not to impose upon the respondent the burden of proving that his practice is not in fact discriminatory.

(18) Whereas the Court of Justice of the European Communities has therefore held that the rules on the burden of proof must be adapted 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.

9. Article 4 then provided

Burden of proof

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

2. This Directive shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

3. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case

10. Thus the modern day provisions on the burden of proof in discrimination claims were born.

The Current Legislative Position

11. The current provisions on burden of proof are found in

- Article 19 of the recast EU Equal Treatment Directive (No.2006/54), which relates to 'the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation'

- Article 10 of the EU Equal Treatment Framework Directive (No.2000/78), which sets out a general framework for eliminating employment or occupational inequalities based on age, disability, religion or belief, and sexual orientation

- Article 8 the EU Race Equality Directive (No.2000/43), which implements the principle of equal treatment between persons irrespective of racial or ethnic origin.

12. They are largely in identical terms, the central wording being:

> 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.
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> Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

(Emphasis added).

13. The shift in the burden of proof does not apply to criminal cases nor, necessarily, to cases in which courts have an investigative role.

14. It will be noted that although the Directives are in clear and strong terms, it remains for member states to take the measures to ensure that the burden of proof shifts in the way required.

15. Thus there is no uniform method across the European Union of how the burden of proof provisions have been implemented. The most recent survey on how the burden of proof provisions have been applied is found in "A comparative analysis of non-discrimination law in Europe 2019"[2]

[2] file:///C:/Users/gbv71k/Downloads/DSBE20001ENN.en.pdf

but a more full analysis is found in the document “Reversing the burden of proof: Practical dilemmas at the European and national level” (2015).[3]

16. Whilst member states can introduce rules which are more favourable to people bringing claims, they cannot introduce rules which are less favourable.

17. The interaction between the principle that it is for member states to take the measures necessary and the principle of effectiveness was discussed *in Kelly v National University of Ireland (University College, Dublin)*, (Case C-104/10) ECJ

> 32. In consequence, it is for the national court, or some other competent Irish body, to assess, in accordance with Irish law and/or national practice, whether Mr Kelly has established the facts from which it may be presumed that there has been direct or indirect discrimination.
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> 33. Nevertheless, it must be stated that Directive 97/80 , pursuant to article 1 thereof, seeks to ensure that the measures taken by the member states to implement the principle of equal treatment are made more effective, in order to enable all persons who consider themselves wronged because the principle of equal treatment has not been applied to them to have their rights asserted by judicial process after possible recourse to other competent bodies.
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> 34. Thus, although article 4(1) of that Directive does not specifically entitle persons who consider themselves wronged because the principle of equal treatment has not been correctly applied to them to information in order that they may establish “facts from which it may be presumed that there has been direct or indirect discrimination” in accordance with that provision, the fact remains that it cannot be excluded that a refusal of disclosure by the defendant, in the context of establishing such facts, could risk compromising the achievement of the objective pursued by that Directive and thus depriving that provision in particular of its effectiveness.
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> 35. In that regard, it must be borne in mind that member states may not apply rules which are liable to jeopardise the achievement of the objectives pursued by a Directive and, therefore, deprive it of its effectiveness: see Criminal

[3] file:///C:/Users/gbv71k/Downloads/DS0614238ENN.en.pdf

proceedings against El Dridi (Case C-61/11PPU) [2011] All ER (EC) 851 , para 55.

18. Perhaps because of the fact that it is for member states to introduce the relevant methods, there is limited caselaw at the ECJ level. What there is, is however instructive.

Establishing Facts from Which it May be Presumed that there has been Discrimination

19. It is not, generally, regarded as sufficient for a complainant to show a possibility of discrimination. It must be possible for the court to presume discrimination from the facts which have been established.

20. In *Belov v CHEZ Elektro Balgaria* AG C-394/11 the advocate general gave a helpful summary of what the complainant must prove as follows:

> AG88. The language versions of art.8(1) of Directive 2000/43 which I have compared all require only a "presumption" that there has been discrimination, and not a definite "conclusion" that such discrimination exists. In addition, recital 21 in the preamble to the directive states that the burden of proof is reversed "when there is a prima facie case of discrimination"…
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> AG89. This is also consistent with the legal situation in cases of discrimination based on sex. With regard to art.4(1) of Directive 97/80 , which is almost identical with art.8(1) of Directive 2000/43 —and with art.10(1) of Directive 2000/78 61 —the Court has ruled that the burden of proof is reversed whenever there is a prima facie case of discrimination.
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> AG90. This case law can be applied without any problem to the provision at issue here. Any other, stricter interpretation of art.8(1) of Directive 2000/43 would jeopardise its practical effectiveness and mean that the rule on the reversal of the burden of proof would be practically redundant. Without such a reversal of the burden of proof, however, the normal rules on the burden of proof would be applicable with the result that anyone who believed that they were a victim of discrimination would be required to adduce and prove all the necessary facts which support their claim and indicate that discrimination has occurred with a sufficient degree of certainty.
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> AG91. Specifically to avoid such difficulties and to improve the situation of the potential victim of discrimination, however, the reversal of the burden of proof

was introduced. It strengthens the position of the presumed victim. A national practice like that described by the KZD would be diametrically opposed to that purpose, since the requirement to adduce and prove facts which allow a definite conclusion as to discrimination ultimately corresponds to the normal distribution of the burden of proof. Article 8(1) of Directive 2000/43 would not then improve the procedural position of presumed victims of discrimination at all.

AG92. My understanding of art.8(1) of Directive 2000/43 also does not constitute a breach of the principle of a fair hearing at the expense of CEB and CRB. Rather, with the rules on the reversal of the burden of proof in all the anti-discrimination directives, the legislature made a choice which maintained a fair balance between the interests of the victim of discrimination and the interests of the other party to the proceedings. In particular, those rules do not completely remove the burden of proof from the presumed victim of discrimination, but merely modify it.

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AG94. All in all, it is thus sufficient for a reversal of the burden of proof under art.8(1) of Directive 2000/43 that persons who consider themselves wronged because the principle of equal treatment has not been applied establish facts which substantiate a prima facie case of discrimination.

21. Helpful though that analysis is, it still leaves the question of what is a prima facie case.

22. There is no definite answer to that point and each case will depend on its facts.

23. In *Firma Feryn NV (C-54/07)* the ECJ held that a public statement that an employer would not employ immigrants would move the burden of proof.

24. At the other end of the scale, and by way of an example, it can probably be said with a degree of confidence that if the only thing which can be proved is that a person of a particular characteristic (say age) did not get a job that they applied for, but they could prove no more than they were of a different age to the person who got the job, that would not be sufficient. Whilst the complainant has established facts which show that discrimination is possible, discrimination could not be presumed from

those facts. The failure to get the job could just as easily be because of other reasons, such as the fact that the applicant was less qualified or performed less well in interviews,

25. However, not much more would be needed to move the burden of proof. If the complainant could show that they were better qualified than the person who got the job and in other respects the same as that person (apart from their age), then that may well be evidence from which it could be presumed that there has been discrimination. Whilst discrimination is not the only possible explanation for the failure to be given the job, in the absence of any explanation, the tribunal could presume discrimination. Thus it is the respondent who must then show that there has been no discrimination.

26. In a case where an employee complained that he had been discriminated against on the grounds of his race, in circumstances where he said that he had been bullied, an English tribunal found that the manager indiscriminately treated all subordinates in an abrupt fashion. On those facts the tribunal found a prima facie case of discrimination had not been raised. It may have been different if the tribunal had found that only the black employee was bullied[4].

27. The ECJ in *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* considered the question of the burden of proof in the following circumstances. The complainant ran a shop in a district of Bulgaria inhabited mainly by persons of Roma origin. There had been instances of damage and unlawful connections to electricity meters. The electricity supplier installed metres for all consumers at a height of between 6 and 7 m rather than the normal 1.7 m. The complainant asserted that was discrimination. In considering the burden of proof the ECJ indicated that the following factors could be taken into account.

[4] On this point the United Kingdom courts have reached a point of asserting that unreasonable treatment combined with a difference in characteristic, does not of itself reverse the burden of proof, but unreasonable treatment without an explanation may do so (*Glasgow City Council v Zafar; Igen v Wong)*

81. The matters which may be taken into consideration in this connection include, in particular, the fact, noted by the referring court, that it is common ground and not disputed by CHEZ RB that the latter has established the practice at issue only in urban districts which, like the "Gizdova mahala" district, are known to have Bulgarian nationals of Roma origin as the majority of their population.

82. The same applies to the fact relied on by the KZD in its observations submitted to the Court that, in various cases that were brought before the KZD, CHEZ RB asserted that in its view the damage and unlawful connections are perpetrated mainly by Bulgarian nationals of Roma origin. Such assertions could in fact suggest that the practice at issue is based on ethnic stereotypes or prejudices, the racial grounds thus combining with other grounds.

83. Matters that may also be taken into consideration include the fact, mentioned by the referring court, that, notwithstanding requests to this effect from the referring court in respect of the burden of proof, CHEZ RB failed to adduce evidence of the alleged damage, meter tampering and unlawful connections, asserting that they are common knowledge.

84. The referring court must likewise take account of the compulsory, widespread and lasting nature of the practice at issue which, because, first, it has thus been extended without distinction to all the district's inhabitants irrespective of whether their individual meters have been tampered with or given rise to unlawful connections and of the identity of the perpetrators of that conduct and, secondly, it still endures nearly a quarter of a century after it was introduced, is such as to suggest that the inhabitants of that district, which is known to be lived in mainly by Bulgarian nationals of Roma origin, are, as a whole, considered to be potential perpetrators of such unlawful conduct. Such a perception may also be relevant for the overall assessment of the practice at issue (see, by analogy, judgment in *Asociaţia ACCEPT v Consiliul National pentru Combaterea Discriminarii (C-81/12) EU:C:2013:275; [2013] 3 C.M.L.R. 26* at [51]).

(emphasis added).

28. In *Asociaţia ACCEPT,* an individual was a shareholder in the club and was widely regarded as playing a leading role in it. He did not, however, have the legal capacity to bind it or to represent it in recruitment matters. In a media interview about the possible transfer of a player, he said that

he would rather hire a player from a junior team than one who was homosexual.

29. The ECJ held that it was not necessary that the person who made the statements at legal capacity to define policy or bind or represent the club in recruitment matters. It was insufficient for the club, therefore, simply to assert that the statements were not legally capable of binding it if they statements came from a person who appear to play an important role in the management of the club.

30. Moreover, the fact that the club had not clearly distanced itself from the statements was also a factor which the court could take into account in the context of an overall appraisal of the facts and in deciding whether the burden of proof had been discharged,

Gaining Access to Evidence

31. The question, then, arises as to whether the courts should order an employer to disclose documents which might assist a complainant to prove a primer facing case where the evidence, without those documents, is insufficient.

32. This was the point which arose in *Meister v Speech Design Carrier Systems GmbH.* The complainant in the case applied for a job but was unsuccessful. She sought the file for the person who was employed instead of her.

33. The referring court noted in making the reference that Ms Meister had not been able to establish that it was on the grounds of her sex, age or ethnic origin that she suffered less favourable treatment. German law, it said, required the applicant who alleged discrimination to establish the facts and to produce evidence, and not just mere allegations, to support a presumption of discrimination

34. The advocate general gave the following analysis:

AG14. Pursuant to the relevant provisions of the AGG, and in particular art.22 the objective of which is to transpose art.8 of Directive 2000/43 and art.10 of Directive 2000/78 into German law, the referring court states that a candidate who considers that he has been discriminated against on the grounds of his sex, age and/or ethnic origin does not meet his obligation to adduce evidence merely by submitting that he had applied for the job, that his application had been unsuccessful and that he fits the required profile set out in the advertisement, doing no more than mentioning his sex, age and origin. Ms Meister should thus give more details of the circumstances on the basis of which it could be possible to establish, to a high degree of probability, the reasons for the discriminatory treatment, as the fact that she was not called for a job interview may be explained by many other factors. She is also required, pursuant to art.22 of the AGG, to adduce evidence. However, the failure of the employer to provide information when rejecting the application is precisely the reason why she is unable to fulfil that obligation. The referring court therefore asks whether Directives 2000/43 , 2000/78 and 2006/54 provide for a right to information enabling an unsuccessful job applicant to force the employer to tell him whom he has engaged and for what reasons.

AG22. It is also apparent from the overall scheme of those provisions that the choice made by the legislature was clearly that of maintaining a balance between the victim of discrimination and the employer, when the latter is the source of the discrimination. Indeed, with regard to the burden of proof, those three directives opted for a mechanism making it possible to lighten, though not remove, that burden on the victim. In other words, as the Court has already held in its judgment in *Kelly [2011] 3 C.M.L.R. 36* , 13 the mechanism consists of two stages. First of all, the victim must sufficiently establish the facts from which it may be presumed that there has been discrimination. In other words, the victim must establish a prima facie case of discrimination. Next, if that presumption is established, the burden of proof thereafter lies on the defendant. Central to the provisions referred to in the first question referred for a preliminary ruling is therefore the *burden* of proof that, although somewhat reduced, nevertheless falls on the victim.

AG24. In the light of the foregoing, I propose that the answer to the first question should be that art.8(1) of Directive 2000/43 , art.10(1) of Directive 2000/78 , and art.19(1) of Directive 2006/54 are not to be interpreted as meaning that a job applicant must, if his application was unsuccessful, be

able to force the employer to tell him whether, and on the basis of what criteria, he has engaged another applicant, even if it transpires that the unsuccessful applicant shows that he fits the required profile set out in the advertisement published by the employer

AG37. In direct line with the method suggested by the Court in *Kelly [2011] 3 C.M.L.R. 36* , I propose that the answer to the second question should be that, under art.8(1) of Directive 2000/43 , art.10(1) of Directive 2000/78 and art.19(1) of Directive 2006/54 , the referring court must assess the attitude of an employer, consisting in a refusal to disclose the information requested by the unsuccessful job applicant as to the outcome of the recruitment process and as to the criteria on the basis of which one of the applicants has been engaged, not only by considering the failure of the employer to respond but, on the contrary, also by taking account of the wider factual context in which that occurred. In that regard, the referring court may also take into account such evidence as the fact that the applicant's qualifications clearly match the post to be filled, the failure to call her for a job interview and the fact that the employer persisted in refusing to call her for an interview when he ought to have conducted a second selection process for that same job vacancy.

35. The Court agreed with the decision of the Advocate General

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

47. Nevertheless, it cannot be ruled out that a defendant's refusal to grant any access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination. It is for the referring court to determine whether that is the case in the main proceedings, taking into account all the circumstances of the case before it.

Emphasis added

36. Thus, although the Directives cannot necessarily be used to force an employer to disclose the reason why the applicant did not get the job, the failure by the employer to disclose the reason is a fact which can be taken into account in considering whether or not a prima facie case has been established. Thus the court can ask itself whether the combination of the fact that the complainant met the requirements in the job description and the refusal by the employer to explain why the complainant did not get the job in preference to the appointed candidate (or to disclose documentation) does establish facts from which discrimination can be presumed.

37. The Advocate General also referred to other facts, in that case, which the referring court might take into account including the fact that although the complainant satisfied the job description, the job was re-advertised without appointment, without even calling the complainant for interview.

The 2nd Stage

38. If a complainant establishes facts from which it may be presumed that there has been discrimination, it falls to employer to show that there has been no breach of the principle of equal treatment.

39. The first question that arises is the standard to which the employer must prove that there has been no breach.

40. In the original Directive on burden of proof (97/80/EC), Article 4 ended by stating that "it shall be for the respondent to prove that there has been no breach of the principle of equal treatment".

41. In Article 2 of that Directive the principle of equal treatment was defined as meaning "that there shall be no discrimination whatsoever based on sex, either directly or indirectly."

42. Reading the two articles together, therefore, the employer had to show that there was no discrimination whatsoever in its treatment of the complainant. Thus it was not sufficient to show that the primary reason

for the treatment was non-discriminatory, the employer must show there was no discrimination at all.

43. Subsequent Directives have not had the same definition as article 2 in 97/80 but, instead, state that “there shall be no direct or indirect discrimination on[the protected ground]”.

44. It is submitted that it is unlikely that the recast directive and subsequent directives intended to regress from the level of protection offered and, therefore, an employer will still need to show that there was no discrimination whatsoever.

45. How that will be done will vary from case to case.

46. In the case of *Asociatia Accept* the ECJ held

> 56. In that context, defendants may refute the existence of such a breach before the competent national bodies or courts by establishing, by any legally permissible means, inter alia, that their recruitment policy is based on factors unrelated to any discrimination on grounds of sexual orientation.
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> 57. In order to rebut the non-conclusive presumption that may arise under the application of art.10(1) of Directive 2000/78 , it is unnecessary for a defendant to prove that persons of a particular sexual orientation have been recruited in the past, since such a requirement is indeed apt, in certain circumstances, to interfere with the right to privacy.
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> 58. In the overall assessment carried out by the national body or court hearing the matter, a prima facie case of discrimination on grounds of sexual orientation may be refuted with a body of consistent evidence. As Accept has, in essence, submitted, such a body of evidence might include, for example, a reaction by the defendant concerned clearly distancing itself from public statements on which the appearance of discrimination is based, and the existence of express provisions concerning its recruitment policy aimed at ensuring compliance with the principle of equal treatment within the meaning of Directive 2000/78 .
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> Emphasis added

47. In *Firma Feryn NV (C-54/07)* the ECJ held “[the employer] can do so by showing that the undertaking's actual recruitment practice does not

correspond to those statements. It is for the national court to verify that the facts alleged are established and to assess the sufficiency of the evidence submitted in support of the employer's contentions that it has not breached the principle of equal treatment."

48. A distinction must, however, be drawn between the employer's motivation and the reason for the treatment. An employer may act with non-discriminatory motivation but still, as a matter of fact, discriminate. Examples include employers who have allowed women to leave the office early to avoid the general crush when the office closes. The motivation may be honourable but there has still been discrimination.

Indirect Discrimination

49. The same legal principles apply to indirect discrimination as set out above.

50. In a claim of indirect discrimination the complainant must establish a provision criterion or practice which puts him or her at a disadvantage.

51. The first stage is that the complainant establishes a prima facie case that there is a provision criterion or practice which exists and puts people of a protected characteristic at a particular disadvantage.

52. If it does so, it falls to the employer to either disprove the PCP or the disadvantage or to show justification. That is the 2nd stage of the burden of proof.

Conclusion

53. The provisions on the reversal of the burden of proof are intended to bring a balance between enabling an alleged victim of discrimination to claim his or her right to equal treatment but preventing proceedings against an employer being successful solely on the basis of assertions.

54. It is for member states to implement measures which give effect to the shift the burden of proof and it is for member states to evaluate the evidence placed before them in accordance with those measures.

55. What is required is a two-stage process whereby the court decides whether the complainant has established evidence from which it can presume discrimination and, if so, whether the respondent can prove there has been no breach of the principle of equal treatment.

56. Whilst it is not necessary that court hearings are conducted in 2 stages it is helpful if judges can show, in their judgment, that they have gone through the two-stage process and, therefore, correctly applied the burden of proof provisions.