



Proving discrimination

The shift of the burden of proof and access to evidence

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Statistics:

- 20% differential in employment rates between disabled and non-disabled across the EU (21% in Germany, 28% in UK, 30% in Poland)
- Women are paid on average 16.3% less than men
- ~27% of Europeans with a disability/sexual or ethnic minority report experience of discrimination
- 54% of Europeans believe that being over 55 is a disadvantage when applying for a job

- Perpetrators don't admit to discrimination, or may be unaware of it
- Information that may prove discrimination is often in the hands of the wrongdoer
- Statistics may be required
- A claimant may need to respond to a justification defence

How has the EU responded to these challenges?

- Stage 1: if a claimant proves a *prima facie* case of discrimination ...
- Stage 2: ... respondent must prove that there has been no discrimination
- Case law – *Danfoss (C-109/88)*, *Enderby (C-127/92)*
- Directives – 2000/43, 2000/78, 2006/54

Stage 1

- Comparability: *Brunhoffer (C-381/99)*
- Lack of transparency: *Danfoss (C-109/88)*
- Occupational segregation: *Enderby (C-127/92)*
- Historic discrimination: *Firma Feryn NV (C-57/07)*
- Conduct of connected / influential parties: *ACCEPT (C-81/12)*
- Prejudicial assertions: *CHEZ (C-83/14)*

Stage 2

- Proving the real reason (not disproving a discriminatory reason)
- *Firma Feryn*: showing that comments do not reflect the reality
- *ACCEPT*: denouncing discrimination and proving good recruitment practice

- *Kelly (C-104/10)*
- *Meister (C-415/10)*
- Respect for national rules
- Respect for privacy
- But not at the expense of effectiveness

- The shifting burden of proof can be a powerful tool in advancing equality
- It remains unclear how much the CJEU will be influenced by national rules relating to disclosure
- There is the potential for new, creative and interesting future legal developments



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