# Proving discrimination:

## Shifting the burden of proof and access to evidence

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**APPLYING EU ANTI-DISCRIMINATION LAW**

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## Outline of this webinar

1. Some key points.
2. Caselaw on why the shift in the burden of proof?
3. Caselaw on a prima facie case and the burden of proof.
4. Caselaw on access to evidence, disclosure and inferences.
5. What happens in practice ? What to look for?

## A few key points.

1. Discrimination is a recognised reality. It impacts us all.

   Just consider the range of protected characteristics.
2. It affects our most fundamental human rights – rights as to dignity, respect, equality.
3. And yet, it can be (very, very) **difficult to prove**. The complainant may simply not have the evidence or be able to access the evidence.
4. Our laws must therefore be applied in a way that combats and safeguards against the hidden social evil of inequality and discrimination.

⇒ **That is why the burden of proof in discrimination cases = a key tool**



## Recognising it is hard to prove – see *Meister*

"Discrimination has the **reputation of being particularly hard to substantiate**. This is **even truer** in respect of discrimination in employment. Aware of this **problem**, the European Union legislature has adopted **measures to assist** applicants claiming to be victims of discrimination on the grounds of, in particular, sex, age or origin. The European Union legislature has **thus provided for a shift in the burden of proof**, without, however, going so far as to uphold its complete reversal since the long-standing freedom of employers to recruit the people of their choice must not be completely disregarded."

Opinion of Advocate General Paolo Mengozzi 12/1/2012

***Meister v Speech Design Carrier Systems GmbH*** Case C-415/10

## Why can it be hard to prove?

""It has long been recognised that proving discrimination claims **may pose great difficulties** for claimants. ……" *Igen v Wong* [2005] EWCA Civ 142

"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**." *King v Great Britain – China Centre* [1992] ICR 516



## Principle of effectiveness– *Danfoss*

"[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**."

***Danfoss*** *C-109/88*

## How to address this difficulty? - *Danfoss*

[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**."

***Danfoss*** *C-109/88*



## Burden of proof - generally

The burden of proof refers to the obligation or the responsibility to prove, the claim.

Who does the burden of proof generally fall on?

Generally, the burden of proof will lie with the party who makes the allegation.

## So what happens in discrimination? - *Enderby*

[13] It is normally for the person alleging facts in support of a claim to adduce proof of such facts. Thus, in principle, the burden of proving the existence of sex discrimination as to pay lies with the worker who, believing himself to be the victim of such discrimination, brings legal proceedings against his employer with a view to removing the discrimination.

[14] However, it is clear from the case law of the Court that **the onus may shift** when that is necessary to avoid depriving workers who appear to be the victims of discrimination of any **effective means of enforcing** the principle of equal pay.

***Enderby v Frenchay Health Authority*** C-127/92



## *Enderby* continued.

[13] continued …

Accordingly, when a measure distinguishing between employees on the basis of their hours of work has in practice **an adverse impact** on substantially more members of one or other sex, that measure must be regarded as contrary to the objective pursued by **Article 119** EEC, **unless** the employer shows that it is based on **objectively justified** factors unrelated to any discrimination on grounds of sex.

Similarly, where an undertaking applies a system of pay which is **wholly lacking in transparency**, it is **for the employer to prove** that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men.

## What do the Directives require? – 1. The Recitals

"The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, 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."
Recital (31) of the Framework Directive and (21) of the Race directive – identical wording.

"However, it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief , has a particular disability, is of a particular age or has a particular sexual orientation"
(Recital (31) Framework Directive 2000/78)



## 2. The Articles – Art 8 of the Race Directive/ Article 10 Framework Directive

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

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.

## So how does it work? Prima facie case?

***Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV***
C-54/07

The facts - In ***Firma Feryn*** Belgian employer advertised would not recruit immigrants and made public statements:
"…So people often say: 'no immigrants'…I must comply with my customers' requirements. If you say 'I want a particular product or I want it like this and like that', and I say 'I'm not doing it, I'll send these people', then you say 'I don't need that door'. Then I'm putting myself out of business. We must meet the customers' requirements. This isn't my problem. I didn't create this problem in Belgium. I want the firm to do well and I want us to achieve our turnover at the end of the year, and how do I do that? I must do it the way the customer wants it done!"



### *Firma Feryn – prima facie case*

There was no individual complainant, the complaint was brought by a Belgian body for the promotion of equal treatment.

The judgment - The CJEU found that a public statement is enough to establish a prima facie case.

"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" [34]

## *Asociatia ACCEPT* C-81/12

The facts - In *ACCEPT*, a shareholder in Steaua Bucuresti football club made statements in an interview that the football club would not hire gay footballers. He was seen as associated with the club but had no legal capacity to act for them BUT the club did not distance themselves from the statements.

It was argued that those statements should not be considered sufficient to shift the burden of proof in a claim for sexual orientation discrimination when they had been made by a person who, in law, could not bind the company in relation to the recruitment of employees.

Judgment - CJEU held public statements sufficient to establish a prima facie case.



## *Asociatia ACCEPT* C-81/12

[48] The mere fact that statements such as those at issue in the main proceedings might not **emanate directly from a given defendant is not necessarily a bar** to establishing, with respect to that defendant, the existence of 'facts from which it may be presumed that there has been ... discrimination' within the meaning of Article 10(1) of that directive.

[49] It follows that a defendant employer **cannot deny the existence of facts from which it may be inferred** that it has a discriminatory recruitment policy merely by asserting that statements suggestive of the existence of a homophobic recruitment policy come from a person who, while claiming and appearing to play an important role in the management of that employer, is **not legally capable of binding** it in recruitment matters.

[50] In a situation such as that at the origin of the dispute in the main proceedings, the fact that **such an employer might not have clearly distanced itself from the statements** concerned **is a factor** which the court hearing the case **may take into account in** the context of an overall appraisal of the facts.

## What to consider in assessing a prima facie case?

The facts - Within a district with a much higher number of Roma people than in other districts, electricity meters were installed at a greater height (6-7 metres) than the other districts (1.7 metres). It was common knowledge that this was because of prejudices against Roma. Previous assertions by CHEZ that damage and unlawful connections were mainly by Bulgarian nationals of Roma origin, suggesting their actions were based on ethnic stereotypes or prejudices.

The judgment - CJEU held that the national court can

"take account of **all the circumstances surrounding the practice** at issue, in order to determine whether there is sufficient evidence for a finding that the **facts from which it may be presumed** that there has been direct discrimination on grounds of ethnic origin have been established."

***CHEZ Razpredelenie Bulgaria AD* C-83/14**



## Another essential tool – Drawing adverse inferences

- Key concept particular to discrimination
- Drawing inferences

"Appreciation of the facts from which it may be **inferred** that there has been direct or indirect discrimination is a matter for the national judicial or other competent bodies … including statistical evidence."

See Recitals (15) from both the Framework and Race Directives.

## Access to evidence, disclosure and inferences

***Patrick Kelly v National University of Ireland (University College, Dublin)*** C-104/10

The facts - Mr Kelly, teacher, was refused his application to attend a University vocational training course and complained of sex discrimination. He argued that he was better qualified than the least qualified female candidate offered a place. He asked for **copies of the other applications and scoring sheets** to prove his claim. He was given **limited information** which had details redacted.

The judgment - CJEU held there was no entitlement to the unredacted documentation BUT refusing to provide documentation may compromise the effectiveness of the burden of proof, and it is for the national court to assess.

[Then applicable Article 4(1) of previous Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex]



### *Kelly* continued

[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.

[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.

[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 Case C-61/11 PPU El Dridi [2011] ECR I0000, paragraph 55).

## *Kelly* continued

[38] Accordingly, the answer to the first question is that art.4(1) of Directive 97/80 must be interpreted as meaning that **it does not entitle an applicant** for vocational training, who believes that his application was not accepted because of an infringement of the principle of equal treatment, **to information** held by the course provider on the qualifications **of the other applicants** for the course in question, in order that he may establish "facts from which it may be presumed that there has been direct or indirect discrimination" in accordance with that provision.

[39] Nevertheless, **it cannot be ruled out 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, in particular, art.4(1) thereof of its effectiveness. **It is for the national court to ascertain** whether that is the case in the main proceedings



## Assessing the balance

***Galina Meister v Speech Design Carrier Systems GmbH*** C-415/10

The facts – Ms Meister, a Russian national, with a Russian degree in systems engineering, considered equivalent to a similar German degree, applied to Speech Design's newspaper advertisement for an experienced software developer.
1st time - her application was rejected without an interview, even though she met the criteria.

The post was advertised for a second time 2 weeks later - Ms Meister applied.
2nd time – she was rejected again, without interview.

No information why her application was rejected. Disclosure refused entirely.

## Assessing the balance - *Meister*

The judgment - Not entitled to disclosure BUT may be a factor of establishing facts.

**Refusing to disclose means –**

"it is not unlikely that that employer can, in that way, make his decisions **virtually unchallengeable**. In other words, the employer continues to keep in his sole possession the evidence upon which ultimately depend the substance of an action brought by the unsuccessful job applicant and, therefore, its prospects of success. "

"Indeed, such a case also raises the question of rights of any third parties referred to in the documents or information submitted."

**Opinion of Advocate General Mengozzi**, 12/1/12 para 23 and 32



## Judgment in *Meister*

[42] Therefore, **it is for the referring court to ensure** that the refusal of disclosure by Speech Design, in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination against Ms Meister, **is not liable to compromise the achievement of the objectives** pursued by Directives 2000/43, 2000/78 and 2006/54. It must, in particular, **take account of all the circumstances** of the main proceedings, in order to determine whether there is sufficient evidence for a finding that the facts from which it may **be presumed that there has been such discrimination** have been established.

[43] In that regard, it should be recalled that, as is clear from Recital 15 of Directives 2000/43 and 2000/78 and Recital 30 of Directive 2006/54, national law or the national practices of the Member States may provide, in particular, that indirect discrimination may be established **by any means** including on the basis **of statistical evidence**.

## *Meister* continued

[44] Among the factors which may be taken into account is, in particular, the fact that, unlike in *Kelly* [2011] 3 C.M.L.R. 36, the employer in question in the main proceedings seems **to have refused Ms Meister any access to the information** that she seeks to have disclosed.

[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.



## What if no access at all to specific evidence?

***Minoo Schuch-Ghannadan v Medizinische Universität Wien*** C-274/18, Oct. 2019

The facts – The complainant alleged that Austrian legislation that allowed universities to set different maximum durations of successive fixed-term work contracts for full-time workers and part-time workers constituted indirect discrimination against women. She had **no access to specific data** on the affected workers employed by Austrian universities and **relied on general data** on the Austrian employment market that higher proportion of women working part-time.

The judgment - CJEU recognised that the unavailability or inaccessibility of specific statistical data **may compromise the achievement of the objective** of the special rule on the burden of proof.
To ensure the effectiveness of this rule, it held that **where workers alleging indirect discrimination have no access or little access** to statistics or facts on workers specifically concerned by the national legislation at stake, **they should be allowed to present general statistical** data on the employment market.

## So what about in practice?

Step 1 => Complainant establishes a prima facie case of discrimination.

Step 2 => If s/he/ they does/do this, the burden of proof shifts to the defending employer. It is no longer with the complainant.

Step 3 => The accused employer must prove that the reason for the treatment complained of is NOT caused by any discrimination whatsoever.

**Otherwise => Discrimination is made out.**



## Practical guidance and evidence

- Acting on behalf of the employee – How to prove the claim?
- Acting on behalf of the employer – How to defend allegations of discrimination?
- As the Judge – what evidence will be of assistance?

## Start with the issues. What is the actual complaint?

1. Direct discrimination - What is the *treatment* complained of? What is the specific act or omission? For example – job offer denied, promotion refused, difference in pay, access to training refused, overtime hours denied or too many hours imposed, etc.

2. Indirect discrimination - What is the *outcome* complained of? What is the disadvantage the individual is subjected to because he/she/they cannot comply with the requirement, the Provision, Criterion, Practice (PCP) imposed on all? For example – a PCP that is a set criteria for the job, a requirement to work specific hours, duties that all staff have to carry out.



## What is the evidence to support the complaint or to defend it?

1. Direct evidence/ Circumstantial evidence?
2. Documentary evidence/ Witness evidence?
3. Documentary evidence: examples of direct references in personnel files, company notes, statistics of disparate impact?
4. Witness evidence: witnesses able to support the allegations directly?
5. And/or circumstantial evidence? Considering the documentary evidence in the round, does a pattern emerge? Can inferences be drawn?

## Is there evidence of a prima facie case or from which inferences can be drawn?

1. Any remarks generally?
2. Statistics generally?
3. Past complaints – how have these been dealt with?
4. Inconsistent/ contradictory behaviour (bad/ unfair employer or discriminatory employer?)
5. How did the employee/employer handle the matter internally? Was there a formal grievance? Any delay? Conduct of the investigation?
6. Explanation? Reasonableness of explanation?
7. Degree/ Seriousness of the treatment?
8. Disclosure? Request for information? How have these been responded to?
9. What are the employer's Equal Opportunities policies?
10. What does the contract of employment set out?
11. Induction/ training on Equal Opportunities? Is this updated/ repeated?



## Good practice and prevention

- Are there systems in place to combat any discrimination?
- What is the evidence of any commitment to equality? What are the Equal Opportunities policies?
- Who is responsible for human resources? Any Equal Opportunities Officer?
- What is the training for staff? At all levels? Are there regular reviews?
- Statistics of workforce? Updated? Monitored? Analysed?
- How is this all documented? Evidenced?
- Personnel files? Properly maintained and reviewed?

## Good practice and prevention

- Internal fair, independent and timely grievance procedures?
- Past complaints – how have these been addressed? How were they tackled?
- Contracts of employment with provision as to combating discrimination? Show serious commitment?
- Compliance with statutory or best practice guidance issued by Equal Opportunity bodies?
- In specific cases, is there an explanation for the conduct complained of?
- Is there a clear paper trail?

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