

# Proving discrimination

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## *Topics*

- How to establish a presumption of discrimination
- Shifting the burden of proof to the other party
- Examples, CJEU case law

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## **Evidence**

US Supreme Court case *Murel v. Baltimore City Criminal Court*, Judge William O. Douglas stated:

"The nature of the legal claims involved in an action thus determines the allocation and degree of the burden of proof and, consequently, the party who bears the risk of error in the fact-finding process"[\[2\]](#).

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## **Evidence**

When will a party be considered to have met its burden of proof?

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## What is a reasonable belief?

The renowned proceduralist Michele Taruffo has argued that the reasonable belief standard can resemble a black box due to its vague content and requirements[6].

Questions - 1) how should this black box be filled?;

2) When will we consider that the box is actually full, i.e. reasonable assurance is achieved?

<https://www.teise.pro/index.php/2024/02/17/j-bartkus-irodinejimo-sunkenybes-ir-standartai-arba-kaip-lietuvos-auksciausiasis-teismas-laikosi-tradiciju/>

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## Evidence

The answer is when the court **is satisfied that a fact exists**.

This belief is revealed by the **standard of proof**, which is usually defined **as the degree of conviction** that the judge must form in the course of the proof[4].

It is like the degree of certainty which, once the judge has reached it, entitles the party with the burden of proof to win the case or to have a fact established in his favour.

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## **Evidence**

When will that degree of certainty be reached **in discrimination cases?**

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## ***Discrimination***

In principle, a person is free insofar as he or she is equal with others.

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## ***Discrimination***

The Court of Justice of the European Union has ruled that discrimination is discrimination where **similar situations are treated differently and different situations are treated the same**, unless such treatment is objectively justified. See Case C-177/10 *Francisco Javier Rosado Santana v Consejera de Justicia y Administración Pública de la Junta de Andalucía* [2011] ECR I-177/10, paragraph 65, and the case-law cited therein.

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## ***Discrimination***

Discrimination - there must be a difference in treatment between persons in similar/comparable situations. Such unequal/different treatment is considered discriminatory if it **does not have an objective and reasonable justification**; in other words, if it does not pursue a **legitimate aim, or if there is no reasonable relationship of proportionality** between the means employed and the aim pursued. The State exercises its margin of appreciation in assessing whether and to what extent differences in similar situations justify unequal treatment.

See the judgment of the European Court of Human Rights in *Burden v. the United Kingdom*, petition No 13378/05, of 29 April 2008; *Schalk and Kopf v. Austria*, petition No 30141/04, of 24 June 2010; *Vallianatos and Others v. Greece*, petition Nos 29381/09 and 32684/09, of 7 November 2013, etc.

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## ***Discrimination***

Difficulties in proving discrimination:

1. The hidden nature of discrimination (How to prove what someone thinks?)
2. Bias and unrecognised/unacknowledged discrimination
3. The vast majority of the evidence is with the employer.

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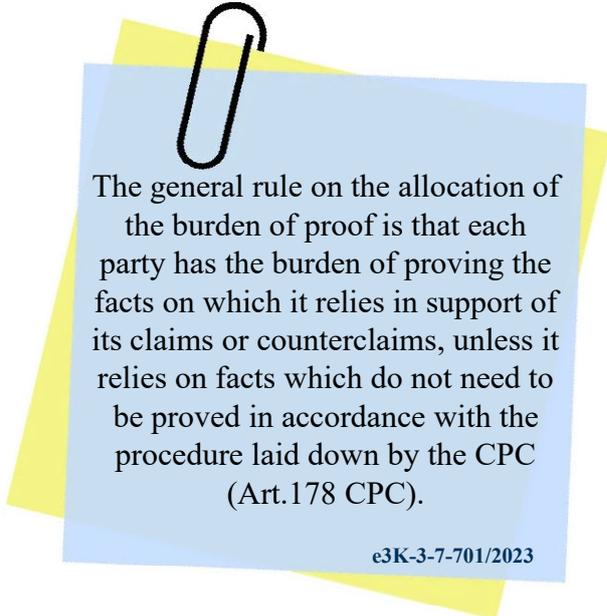
## ***Discrimination***

In general, there are two main reasons why EU law regulates the reversal of the burden of proof:

1. to protect the weaker party to the legal relationship and
2. provide access to information based on the principle of equality of arms.

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The general rule on the allocation of the burden of proof is that each party has the burden of proving the facts on which it relies in support of its claims or counterclaims, unless it relies on facts which do not need to be proved in accordance with the procedure laid down by the CPC (Art.178 CPC).

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## ***Presumption***

A presumption is the assumption that something has happened or is true until proven otherwise.

They "exempt" the parties to a legal proceeding from proving certain facts that the law deems to exist on the basis of a certain degree of probability of those facts.

Presumptions are important to simplify the burden of proof when the certainty of certain facts is in doubt. They seem to distribute the burden of proof between the parties so that each can prove the facts best known to him in order to establish the truth as objectively as possible.

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## ***Presumptions***

There is no unanimous opinion on the system of presumptions, but it is possible to identify **presumptions that are common to the law as a whole** and on which there is no difference of opinion among lawyers:

- the constitutionality of the legislation;
- knowledge of the law;
- integrity;
- the legality of the judgment.

There are many special presumptions. They can be divided into several types: **existence of a fact**, knowledge of a fact, legality of conduct, unfairness of conduct, performance of an obligation.

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## ***The meaning of presumptions***

The presumption of certain circumstances in the law does not change the general rules on the allocation of the burden of proof, but merely **facilitates the process of proof for the party in whose favour the presumption is established**.

Order of the Panel of Judges of the Civil Cases Division of the Court of Appeal of Lithuania of 8 September 2009 in c. b. UAB "Argela" v. M. G., No 2A-597/2009

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## ***Shifting the burden of proof to the other party***

Reasons for shifting the burden of proof:

1. The principle of effectiveness - that the rights enshrined in law are actually enforced. If the burden of proof in discrimination cases were to be applied according to the general rule, it would be difficult, if not impossible, for the plaintiff to prove discrimination, since the defendant has to prove most of the evidence. This obvious obstacle was first identified in the Danfoss case.
2. Principle of effective legal defence.

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## ***Shifting the burden of proof to the other party***

Council Directive 97/80/EC on the burden of proof in cases of discrimination based on sex was adopted on 15 December 1997 in order to ensure the implementation of human rights and to solve practical problems in discrimination cases. However, the practice of reversing the burden of proof has been introduced in other directives and was repealed in 2009.

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## ***Evidence***

Evidence can be direct or indirect.

**Circumstantial evidence is a challenge for the court to resolve.**

Discrimination cases use statistics, video and audio recordings, expert reports or situational checks (mystery shoppers, etc.) For example, the latter is used to determine whether bar and restaurant patrons, tenants, etc. are discriminated against.

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## ***Form of discrimination***

*Direct discrimination* - where a person is treated less favourably than another person in a similar situation **because of a protected characteristic** (e.g. gender, race, age, religion, disability, sexual orientation).

*Indirect discrimination* occurs when **an apparently neutral law, criterion or practice** has the effect of disadvantaging a certain group of people compared with others, unless the law, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

*Harassment* is defined as behaviour that has the purpose or effect of violating a person's dignity by creating an intimidating, hostile, degrading or offensive environment.

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## ***Form of discrimination***

Harassment is a type of direct discrimination, where less favourable treatment of a person with a protected characteristic is **independent of the treatment of others** without the protected characteristic. **Therefore, in the case of harassment, no comparison is required**, as the bias is determined by the victim's dignity.

EU law does not distinguish harassment as an independent form of discrimination, whereas international law distinguishes harassment as a separate form of discrimination.

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## ***Actions/behaviour***

EU law does not define the forms of prohibited conduct. Both acts and omissions can lead to discrimination.

Behaviour can cause harm. Discrimination can cause both tangible (direct discrimination) and intangible (inferiority caused by harassment) harm.

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## ***Protected grounds/values***

Article 21(1) of the EU Charter of Fundamental Rights:

All discrimination is prohibited, in particular on the grounds of a person's sex, race, colour, national or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age, sexual orientation.

The list of protected values is not exhaustive, whereas the European Convention on Human Rights only protects against discrimination on the grounds of sex, sexual orientation, race and origin.

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## ***Comparison***

The principle of comparison is used to define discrimination, i.e. that the claimant is disadvantaged or treated less favourably than another person in similar circumstances or conditions.

Comparisons can be made not only between specific individuals or groups, but also hypothetical comparisons. However, when constructing a hypothetical comparison, one should not be too creative. The hypothetical comparison must correspond to a hypothetical situation in which the minimum requirements of expected non-discriminatory behaviour are embedded.

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## **Comparison**

Comparison is an evidentiary tool for establishing a causal link between the facts alleged by the applicant and the presumption of discrimination. When the court finds a comparison/similar situation, discrimination is presumed.

If there are difficulties in finding a comparison, the discrimination is likely to be indirect.

There may be situations where no comparable situation can be found in the case. In such cases, the question is what would happen in a hypothetical situation where minimum standards of behaviour are ensured.

However, where the defendant publicly admits its bias or discriminatory attitude, there is no need to look for a comparison.

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## **Belonging to a particular group**

Stephen Lustgarten has observed that "discrimination is not a response to a person's character or personal qualities; it is a negative response to their identity or the social group to which they belong". This idea emphasises that discrimination is not based on objective assessments of a person's behaviour or personal characteristics, but rather stems from prejudices or stereotypes related to certain social, racial, religious, gender or other characteristics. Such discrimination undermines the dignity of the individual and the principles of justice, as it is based on unfounded and unfair assumptions about a person on the basis of his or her membership of a particular group.

Striking the right balance of evidence between the parties is a difficult task, as the court hearing a discrimination case needs to be aware of societal stereotypes and prejudices in order to protect the rights of those affected by stereotyping.

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## ***Causation***

In discrimination cases, causation is established at two levels:

1. the causal link between the conduct and the consequences; and
2. the causal link **between the protected ground and the behaviour.**

**It is the second stage that causes difficulties for claimants, which is why the effective operation of the principle of legal redress is essential.**

The reversal of the burden of proof occurs when a causal link between the protected ground and the effect is possible or probable.

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## ***Causation***

To summarise, shifting the burden of proof to the other party is a procedural rule that applies in discrimination cases.

This rule links evidence to proof of bias and steers the proceedings in two directions:

- i) **reduces the burden of proof** (presumption) **on the claimant** as regards the causal link between the protected ground and the conduct (prima facie), and
- ii) **shifts the remaining burden of proof on bias to the defendant** (justification defence).

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## ***The concept of the "point of no return"***

### **Prima facie importance:**

**When facts are presented that give rise to a reasonable suspicion of discrimination**, the court can apply a presumption that discrimination has taken place. This presumption becomes the basis for shifting the burden of proof to the defendant, who must provide an explanation or evidence to rebut the discrimination.

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## **Evidence**

When will that degree of certainty be reached for the **presumption to apply?**

When certainty is more likely (51%)?

Is the certainty sufficient (80%)?

The other %?

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## **ECJ decisions**

Two important ECJ judgments are commonly cited:

- **The Enderby case:** it was a case where speech therapists, mainly women, were paid less than pharmacists, mainly men, even though their work was worth the same. The statistical evidence was sufficient to presume that sex discrimination had occurred.
- **Feryn case:** the employer publicly announced that it did not want to hire a certain racial group (Moroccan). The Court ruled that such public statements can in themselves create a presumption of discrimination, even if there is no specific victim or no specific comparator has been identified.

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## ***Shifting the burden of proof and liability of the defendant***

- Where the plaintiff presents prima facie evidence, the burden of proof shifts to the defendant. This means that **the defendant has to produce evidence that refutes the discrimination or shows that its conduct was based on objective criteria.**
- Differences between direct and indirect discrimination: **for direct discrimination**, it is necessary to prove that the less favourable treatment was directly linked to the protected characteristic, while **for indirect discrimination, it is sufficient to show** that the practice disproportionately affected the protected group.

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## Files

Cases that have influenced the evolution of EU law: the presumption of discrimination and the reversal of the burden of proof.

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## ***Feryn case (C-54/07)***

**The Feryn case (C-54/07)** is important in the case law of the Court of Justice of the European Union (CJEU) because it clearly establishes the principle of reversal of the burden of proof in discrimination cases, in particular in relation to public statements by employers that may be considered discriminatory:

1. Presumption of discrimination: the CJEU has ruled that public statements by an employer that clearly show a reluctance to employ people from a particular ethnic group can give rise to a presumption that the company's employment practices are discriminatory. In this case, **the director of a Belgian company publicly announced that they would not hire employees of Moroccan origin because their clients did not want them to.** The Court held that such statements could be considered as evidence of direct discrimination.

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### ***Feryn case (C-54/07)***

2. Shifting the burden of proof: where the claimant presents facts that give rise to a presumption of discrimination (e.g. such public statements), the employer bears the burden of proving that its practices were not discriminatory. The employer must provide evidence that no discriminatory practices were used or that such practices were based on objective criteria unrelated to a protected characteristic (e.g. ethnic origin).

3. Relevance for discrimination cases: the Feryn case highlights that **the presumption of discrimination can be based not only on concrete acts, but also on public statements that give rise to allegations of discrimination.** This is very important because such statements can have a deterrent effect on certain groups seeking employment, even if there is no specific case of employment.

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### ***Patric Kelly case (C-104/10)***

#### **Patric Kelly case (C-104/10)**

The ECJ confirmed in this case that where the worker presents facts that suggest discrimination, the employer bears the burden of proving that no discrimination has taken place. The Court stressed that the employer must provide clear and specific evidence that could refute the allegations of discrimination.

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### ***Patric Kelly case (C-104/10)***

What facts has Patrick Kelly provided to trigger the presumption of discrimination?

- Kelly brought the action because **he had not been given information about the salaries of other workers doing similar work**. This raised suspicions that age discrimination might be taking place, as the failure to provide information was seen as a possible way of concealing discriminatory practices.
- **He also stated that his salary was lower than that of other colleagues doing similar work, although it was not clear why this was the case**. These facts suggested that there might be age discrimination, as no objective reasons were given for the difference in salaries.

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### ***Patric Kelly case (C-104/10)***

- The employer refused to provide information that could explain the wage gap, which further strengthened the allegations of discrimination.

These facts were sufficient for the Court to find that there were grounds for believing that discrimination might have occurred, so the burden of proof shifted to the employer, who had to prove that there was no discrimination.

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## **Case C-415/10**

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

- Burden of proof: the court found that if the employee provides sufficient evidence to presume discrimination (e.g. **unexplained and unjustified refusal to hire**), the employer bears the burden of proving that there was no discrimination. This case established:
  1. that the burden of proof can be shifted to the employer even if the claimant does not directly possess all the necessary evidence;
  2. that **an employer's refusal to provide information can be a factor reinforcing the presumption of discrimination.**

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## **Case C-415/10**

- Presumption of discrimination: the case states that the presumption of discrimination can be based on various factors, including the employer's behaviour, such as refusing to provide information that would be necessary to rebut allegations of discrimination. The Court stated that national courts must take into account all the circumstances in order to determine whether there are sufficient grounds to presume discrimination.

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## **Case C-81/12**

**Case C-81/12** "Asociația Accept v. Consiliul Național pentru Combaterea Discriminării"

In this case, the ECJ considered **whether public statements suggesting that a company would not want to employ homosexuals could give rise to a presumption of discrimination.** The Court held that such public statements can in principle be sufficient to raise a presumption that an employment practice is discriminatory, even if there is no specific candidate in the case. This means that a presumption of discrimination may arise from public and general statements made by the employer.

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## **Case C-81/12**

This case is particularly important because public statements made by an employer can be sufficient to raise a presumption of discrimination even *in the absence of a specific victim*. **This means that even if a candidate has not been directly discriminated against, the company's conduct may still be considered discriminatory if discriminatory public statements are made.**

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## **Presumption of discrimination**

The aim is to understand what facts, circumstances and situations the ECJ examines and assesses when establishing a presumption of discrimination.

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## ***Judgment of the Court of Justice C-148/22***

Background:

- The applicant has been employed by the Commune since 11 April 2016 and since 11 October 2016 as 'office manager', a role which she performs without any contact with users of public services ('back-office'). She does not wear any symbols in the performance of her duties which might reveal her religious beliefs and did not submit any written request to that effect until 8 February 2021, when **she asked to be allowed to wear a 'head covering' at work from 22 February 2021.**
- By decision of 18 February 2021, the Council of the Commune ('the Council') rejected that request and provisionally prohibited the applicant in the main proceedings from wearing symbols reflecting her religious beliefs in the course of her professional activities, pending the adoption of general rules on the wearing of such symbols in the Commune administration.

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### ***Judgment of the Court of Justice C-148/22***

- On 26 February 2021, after hearing the applicant in the main proceedings, the Council adopted a second decision confirming the prohibition in question pending the adoption of such general rules.
- On 29 March 2021, the Commune Council amended its rules of procedure to include an obligation of "total neutrality" in the workplace, understood as a prohibition for all Commune employees to wear any visible symbol in the workplace that could reveal their beliefs, in particular religious or philosophical beliefs, whether or not they are in contact with the public.

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### ***Judgment of the Court of Justice C-148/22***

ETT:

- since anyone may profess a religion or hold religious, philosophical or spiritual beliefs, such a rule, if applied *universally and without differentiation*, does not lead to differential treatment on the basis of a criterion that is inseparably linked to religion or belief.

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### ***Judgment of the Court of Justice C-148/22***

- Unless the national court finds that, notwithstanding the fact that Article 9 of the Rules of Procedure at issue in the main proceedings is formulated as applying universally and without differentiation, the applicant in the main proceedings was *treated differently from other employees* who were allowed to express their beliefs, including religious or philosophical beliefs, by wearing a visible symbol of such beliefs or otherwise, and that she was therefore directly discriminated against on grounds of religion or belief, within the meaning of Article 2(2)(a) of the directive, it is for that national court to examine **whether the rule laid down in Article 9 of the Commune's Rules of Procedure is liable to result in a disadvantage in certain respects for persons professing a particular religion or holding a particular conviction**, and that that in fact constitutes indirect discrimination on one of those grounds, within the meaning of Article 2(2)(b) of the directive.

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### ***Judgment of the Court of Justice C-148/22***

Solution:

**A rule of procedure of the Commune Administration which prohibits its employees from wearing in the workplace, in a general and indiscriminate manner, any visible symbols revealing, inter alia, philosophical or religious beliefs, may be justified by the Administration's desire to create a completely neutral administrative environment in the light of its particular circumstances, provided **that the rule is appropriate, necessary and proportionate in the light of those circumstances and the different rights and interests at stake.****

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## ***Judgment of the Court of Justice in Case C-631/22***

Background:

- The plaintiff worked as a full-time driver of a household waste collection lorry. He had an accident at work which resulted in an open fracture of the right calcaneus.
- The authorised public authority refused to recognise permanent incapacity for work under current Spanish law.

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## ***Judgment of the Court of Justice in Case C-631/22***

- The claimant asked to be reassigned to a workplace adapted to the consequences of his accident. The employer agreed to this request; instead of driving heavy motor vehicles full-time, the claimant was assigned as a driver in the mobile assembly sector, where the physical effort required was less, the driving time was shorter and the driving time was in line with his medical condition.
- The applicant appealed against the institution's decision not to recognise his permanent incapacity to the competent Spanish court, which, by decision of 2 March 2020, recognised, in so far as the applicant's normal occupation is concerned, his permanent total incapacity to work, as that term is understood under Spanish law.

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### ***Judgment of the Court of Justice in Case C-631/22***

- This decision stated, inter alia, that 'irrespective of whether the worker has been reassigned to another post within the undertaking and is currently able to work, as he is only required to drive for about 40 minutes a day, the condition of his right ankle and foot would prevent him from being able to drive on a permanent basis if he were required to resume his full activity as a lorry driver as a normal occupation. The decision also recognises the applicant's right to a monthly allowance equal to 55 % of his daily wage.
- **The employer terminated the applicant's contract of employment on the grounds that permanent disability is a ground provided for in the Spanish Workers' Statute.**
- The claimant applied to the court, and the court to the ECJ, for a preliminary ruling.

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### ***Judgment of the Court of Justice in Case C-631/22***

ETT:

- According to the case-law, the term 'dismissal' includes, inter alia, the unilateral termination of any of the activities referred to in Article 3(1)(a) of Directive 2000/78. That concept must therefore be interpreted as covering all cases in which the contract of employment is terminated at will and without the employee's consent.

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### ***Judgment of the Court of Justice in Case C-631/22***

- On the other hand, it is also not disputed that the national provisions at issue in the main proceedings confer on the employer the right to terminate the contract of employment if, as a result of permanent total incapacity for work, the employee is prevented from carrying out his normal occupational activities in the undertaking. **The fact that the worker concerned applied for recognition of permanent total incapacity for work and was aware that those provisions of the legislation confer on his employer the right to terminate his contract of employment after such recognition does not, in that regard, mean that that worker agreed to terminate that contract.** The termination of the contract is therefore to be classified under those legal provisions as a 'dismissal' within the meaning of Article 3(1)(c) of Directive 2000/78, since it is a termination of the contract of employment which is not of the employee's own free will.

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### ***Judgment of the Court of Justice in Case C-631/22***

- The Court of Justice has already held that, where a worker's disability renders him totally unsuitable for his job, reassignment to another job may be an *appropriate means of creating suitable conditions* within the meaning of Article 5 of Directive 2000/78, since it enables him to retain his job, while ensuring his full and effective participation in working life, in accordance with the principle of equal treatment with other workers.

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### ***Judgment of the Court of Justice in Case C-631/22***

- In this context, it should be noted that Article 5 of Directive 2000/78 **does not allow an employer to be obliged to take measures that would "disproportionately burden <...> his duties"**. Recital 21 of that Directive states that, *in order to determine* whether such measures will result in a disproportionate distribution of responsibilities, account should be taken in particular of the financial and other costs involved, the size and financial resources of the organisation or undertaking, and the availability of public funding or other forms of assistance. It should also be clarified that, in any event, the possibility of reassigning a disabled person to another post exists only if there is at least one vacant post which can be filled by the employee concerned.

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### ***Judgment of the Court of Justice in Case C-631/22***

Solution:

27 November 2000 Article 5 of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, read in conjunction with Articles 21 and 26 of the Charter of Fundamental Rights of the European Union and with Article 5 of Council Directive 2000/78/EC of 13 December 2006 on equal treatment in employment and occupation. the United Nations Convention on the Rights of Persons with Disabilities, concluded in New York and approved on behalf of the European Community on 26 November 2009.

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### ***Judgment of the Court of Justice in Case C-631/22***

Council Decision 2010/48/EC, Articles 2 and 27, must be interpreted as precluding provisions of national law which provide that an employer may terminate an employment contract on the ground that a worker is unable to carry out the tasks incumbent on him under that contract because of a permanent incapacity for work caused by a disability arising out of the employment relationship, **and which do not impose a requirement on the employer either first of all to provide suitable conditions for the maintenance of the worker in question, or to maintain those conditions, or to prove, where necessary, that the provision of such conditions would impose a disproportionate burden on him.**

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### ***Judgment C-649/22***

Background:

- The claimant signed a temporary employment contract and was sent to the company as a loading specialist. According to this contract, the collective agreement on temporary work applies to this employment relationship. He suffered an accident at work. It has been recognised by the courts that he will not be able to carry out his normal occupational activities as a result of his permanent permanent total disability.
- The claimant was dismissed (Spanish law provides for the employer's right to dismiss on the grounds of total incapacity for work) and, in accordance with the Collective Agreement on Temporary Disability, the employer paid the claimant compensation of EUR 10 500 in respect of the permanent total incapacity for work which prevented the claimant from carrying out his normal occupational activities. **However, the applicant considers that he should have been paid compensation of EUR 60 101.21 in accordance**

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### ***Judgment C-649/22***

ETT:

- The referring court must therefore **first** determine the basic conditions of work and employment which would have applied to the temporary worker in question if **he had been employed directly by the temporary employment undertaking to perform the same duties as those which he actually performs and** for the same duration, and in particular, in the present case, whether he would have been entitled to compensation in respect of the permanent total incapacity to work following the accident at work, which led to the termination of his employment relationship.

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### ***Judgment C-649/22***

**Secondly**, it is for that court to compare those basic conditions of work and employment with the conditions actually applied to that temporary worker during the period of his assignment to that undertaking, in order to ascertain, on the basis of all the relevant circumstances of the main proceedings, whether the principle of equal treatment has been complied with in respect of that temporary worker.

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## ***Judgment C-649/22***

Solution:

The first subparagraph of Article 5(1) of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 concerning employment through temporary employment undertakings, read in conjunction with Article 3(1)(f) thereof, must be interpreted as follows:

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## ***Judgment C-649/22***

it **precludes national legislation**, as interpreted in national case-law, under which temporary agency workers may be paid compensation for permanent total disablement arising out of an accident at work in an undertaking using temporary agency workers in connection with their normal occupational activity, which led to the termination of their temporary employment relationship, is **less than the compensation** to which those workers would have been entitled in the same situation and on the same basis if they had been directly employed by the undertaking as temporary agency workers in the same capacity and for the same duration.

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## ***Judgment of the Court of Justice C-184/22 and C185/22***

Background:

- The applicants worked as part-time nursing assistants, under their contracts of employment, for **40 % and 80 % respectively of the normal weekly working time of a full-time employee**, which, according to the General Collective Agreement, is 38,5 hours.

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## ***Judgment of the Court of Justice C-184/22 and C185/22***

- The applicants in the main proceedings argued that, **by not paying them a wage premium for overtime** worked in excess of the working hours agreed in their employment contract and by not recording in their timesheets the accumulated time corresponding to the wage premium payable, the defendant in the main proceedings had placed the applicants in worse working conditions than full-time workers, since they were working on part-time contracts. In addition, they have been **indirectly discriminated against on grounds of sex, since the defendant employs mainly women on a part-time basis**.

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### ***Judgment of the Court of Justice C-184/22 and C185/22***

ETT:

- A person working as a part-time nursing assistant must work the same number of hours as a full-time nursing assistant in order to be entitled to the above-mentioned overtime premium, regardless of normal working hours, individually agreed in the contract of employment of the part-time nurse's assistant, so that **he is unable to reach the number of working hours required to obtain the overtime premium, or is significantly less likely to do so than a full-time nurse's assistant.**

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### ***Judgment of the Court of Justice C-184/22 and C185/22***

- Thus, part-time nursing assistants who work more hours than the normal working hours laid down in their contracts **and do not receive a pay premium are not treated in the same way as full-time nursing assistants, who are paid a premium for the hours worked in excess of the 38,5 hours per week.**
- According to settled case-law, the pay of part-time workers must be in line with that of full-time workers, provided that the *pro rata temporis* principle enshrined in Article 4(2) of the General Agreement is applied.

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### ***Judgment of the Court of Justice C-184/22 and C185/22***

- Since, in the case of persons working part-time as nursing assistants, such as the applicants in the main proceedings, the number of working hours for which they receive a pay premium is not reduced *pro rata temporis* in relation to the working time individually agreed in their contracts of employment (provided that subject to verification by the referring court), they appear to be subject to worse working conditions than persons employed full-time as nursing assistants, which is prohibited by Article 4(1) of the General Agreement, unless such a difference in treatment is objectively justified within the meaning of that provision.

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### ***Judgment of the Court of Justice C-184/22 and C185/22***

- On this point, the referring court will have to determine, in the light of all the relevant circumstances, whether the difference of treatment at issue in the main proceedings can be regarded as objectively justified.

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### ***Judgment of the Court of Justice C-184/22 and C185/22***

- The notion of "objectively justified" within the meaning of Article 4(1) of the Framework Agreement requires that the difference of treatment found to exist be justified by **precise and specific factors which characterise the working condition in question, in** the light of the particular circumstances in which it is applied, and on the basis of **objective and transparent criteria, in order to** assess whether this difference of treatment is in accordance with real needs, achieves the intended objective and is necessary to achieve it. **These circumstances may be determined, inter alia, by the particular nature and characteristics of the tasks for which the part-time contracts were concluded or, where appropriate, by the pursuit of a legitimate social policy objective of a Member State.**

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### ***Judgment of the Court of Justice C-184/22 and C185/22***

- In the present case, the question for the referring court is whether, **first**, the objective of discouraging an employer from obliging employees to work overtime in accordance with their individually agreed working time and, **second**, the objective of avoiding that full-time employees are subjected to working conditions that are worse than those of part-time employees, are capable of being objectively justified, within the meaning of Article 4(1) of the General Agreement.

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### ***Judgment of the Court of Justice C-184/22 and C185/22***

As regards the first of those objectives, it should be noted that, in the application of the national legislation at issue in the main proceedings, the hours worked by part-time workers in excess of the normal working hours laid down in their contracts of employment, and up to the limit of the normal working time for a full-time worker, i.e. 38.5 hours per week, impose a lesser financial burden on the employer than the same amount of overtime worked by a full-time employee, since **those hours do not give rise to the payment of a wage premium**. As regards part-time workers, that legislation has the opposite effect to that sought, since, as the referring court points out, **it effectively imposes an obligation on the employer to work overtime on part-time workers rather than on full-time workers**.

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### ***Judgment of the Court of Justice C-184/22 and C185/22***

- It follows that setting the same threshold for part-time workers and full-time workers in terms of the overtime premium **cannot achieve the objective of discouraging employers from imposing an obligation on workers to work overtime**, in the case of part-time workers.

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### ***Judgment of the Court of Justice C-184/22 and C185/22***

As regards the second objective, it should be noted that it is aimed at avoiding the allegedly unfavourable treatment of full-time workers compared to part-time workers. The arguments in support of this objective are based on the assumption that to oblige an employer who requires a part-time worker to work overtime to pay that worker a wage premium for that overtime, calculated from the first hour of that worker's work in excess of the working hours individually agreed in the employment contract, as is the case for full-time workers, is to put the latter at a disadvantage in terms and conditions of work. **However, this assumption is erroneous, since in that case full-time workers would be treated in the same way as part-time workers as far as overtime is concerned, applying the principle of *pro rata temporis*.**

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### ***Judgment of the Court of Justice C-184/22 and C185/22***

- In the light of the foregoing, the answer to Questions 4 and 5 is that Article 4(1) and (2) of the Framework Agreement must be interpreted as meaning that national legislation under which the overtime premium for part-time workers is paid only for the hours of work, for hours worked in excess of the normal working hours provided for full-time workers in a similar situation, means that part-time workers are subjected to less favourable working conditions within the meaning of Article 4(1) of that article, and that such an assessment cannot be justified by the aim

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### ***Judgment of the Court of Justice C-184/22 and C185/22***

- firstly, to discourage employers from obliging employees to work overtime beyond the hours individually agreed in their employment contract and, secondly, to prevent full-time employees from being subject to worse working conditions than part-time employees.

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### ***Judgment of the Court of Justice C-184/22 and C185/22***

In order for an apparently neutral measure to be considered to constitute indirect discrimination within the meaning of these provisions, it must, in practice, put persons of one sex at a disadvantage compared to persons of the other sex. In that regard, it is apparent from recital 30 of Directive 2006/54 and the case-law of the Court of Justice that the circumstances in which indirect discrimination may be presumed to have occurred are a matter for the national judicial authorities to assess, in accordance with national law or practice, which may provide, in particular, that indirect discrimination may be proved by any means and not merely by statistical evidence.

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### ***Judgment of the Court of Justice C-184/22 and C185/22***

- As regards the statistical data, it should be recalled, first of all, that it is for the national court to assess the relevance of the data submitted to it describing the labour situation and whether they are relevant and can be taken into account, in particular, whether they reflect merely incidental phenomena or phenomena that have arisen in the circumstances, and whether, taken as a whole, they are relevant.
- Where the national court has such information, it is clear from the established case-law, first, that it must take into account all the workers who are covered by the national legislation containing the unequal treatment and, second, that the best method of comparison is to compare what proportion of male and female workers are affected by the legislation in question and what proportion are not.

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### ***Judgment of the Court of Justice C-184/22 and C185/22***

In the present case, it is apparent from the preliminary ruling orders, which refer to the statistics provided by the defendant in the main proceedings, **that the defendant employs more than 5 000 persons in all of its branches, 76.96% of whom are women. 52,78 % of these employees work part-time. 84,74 % of the part-time workers are women and 15,26 % are men; of the full-time workers 68,20 % are women and 31,80 % are men. Thus, female workers are in the majority both in the group of 'advantaged' workers and in the group of workers who are disadvantaged by the application of the national provision in question.**

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## ***Judgment of the Court of Justice C-184/22 and C185/22***

- In such a situation, the referring court asks whether indirect discrimination can be found even if the group of full-time workers who are not disadvantaged by the situation is not significantly outnumbered by men.
- In this connection, it should be recalled that the definition of 'indirect discrimination' in Article 2(1)(b) of Directive 2006/54/EC, which is worded in the same way as the definition of the term 'indirect discrimination' of 23 September 2002, does not include the following Article 1(2), second indent, of Directive 2002/73/EC of the European Parliament and of the Council amending Council Directive 76/207/EEC on the application of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions **does not contain any reference to quantitative factors to be taken into account in the assessment of indirect discrimination, nor does any other provision of Directive 2006/54. This definition takes a qualitative approach, i.e. that it is important to examine whether the very nature of the national measure in question is likely to place persons of one sex at a 'particular disadvantage' compared with persons of the other sex. It follows that the national court must examine all the relevant circumstances of a qualitative nature in order to determine whether such a disadvantage exists in relation to all the workers covered by the national legislation on which the relevant difference in treatment is based.**

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## ***Judgment of the Court of Justice C-184/22 and C185/22***

- According to the established case-law of the Court of Justice, such a disadvantage can be established, inter alia, if it is shown that the national legislation adversely affects a significantly higher proportion of persons of the same sex (5 May 2022. Case C-405/20 *BVAEB*, EU:C:2022:347, paragraph 49 and the case-law cited therein).

Solution:

1. the Framework Agreement on part-time work concluded on 6 June 1997, presented on 15 December 1997 Article 4(1) and (2) of Council Directive 97/81/EC of 15 June 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC

must be interpreted as follows:

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## ***Judgment of the Court of Justice C-184/22 and C185/22***

National legislation which, in the case of part-time workers, pays an overtime premium only for hours worked in excess of the normal working hours provided for similarly situated full-time workers means that part-time workers are subject to worse working conditions, within the meaning of Article 4(1), and such an assessment cannot be justified on the grounds of, first, discouraging the employer from obliging workers to work overtime in excess of the hours individually agreed in their employment contract, and, second, avoiding the possibility of full-time workers being subjected to working conditions that are worse than those for part-time workers.

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## ***Judgment of the Court of Justice C-184/22 and C185/22***

2. Article 157 TFEU and Article 2(1)(b) and the first paragraph of Article 4 of Directive [2006/54/EC](#) of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation

must be interpreted as follows:

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## ***Judgment of the Court of Justice C-184/22 and C185/22***

first, national legislation which, in the case of part-time workers, provides for the payment of an overtime premium only for hours worked in excess of the normal working hours laid down for full-time workers in a similar situation **constitutes indirect discrimination on grounds of sex if it is established that that legislation disadvantages a significantly greater number of women than men, and it is not necessary for the group of workers to be excluded from the disadvantaged position, that is to say, the group of workers which is not disadvantaged by the legislation, i.e. The Commission does not need to establish that the group of workers who are not disadvantaged, i.e. full-time workers, are significantly more male than female,** and, secondly, such discrimination cannot be justified on the grounds of discouraging the employer from obliging employees to work overtime in excess of the hours individually agreed in their employment contract, and to prevent full-time employees from being subjected to working conditions that are worse than those of part-time workers.

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## **The very word discrimination!**

Are we using it responsibly?

Discrimination: a zero-sum game: what works for one gender against the interests of the other gender?

W I D E N

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## Evidence

The extent to which the standard of proof rule is justified,  
whereby

the fact that is more likely to be proven?

Is a circumstance to be regarded as proven if the court is so convinced of its existence that the probability borders on the real?

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## Standard

Lithuanian civil procedure applies a reasonable belief standard, which requires the judge to be reasonably and personally satisfied as to the existence of the facts of the case.

As the Supreme Court points out, a reasonable belief forms the judge's internal certainty as to the facts of the case.

This standard does not require the removal of all doubts as to the facts of the case - the judge must have a degree of certainty that only removes substantial doubts, without removing the doubts altogether.

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## **The social model of civil procedure**

The German Federal Supreme Court has stated that "the judge must and must have a degree of certainty which is **useful in practical life**, which silences doubts without completely removing them" [\[5\]](#).

The judge must reach a reasonable belief, not just any belief. Only **when a reasonable degree of certainty has been attained** will the fact asserted by the party who bears the burden of proof have to be regarded as proved.

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## **Burden of proof**

This allows courts to resolve factual impasses where **the evidence of either party is insufficient to reach the required degree of certainty**. This impasse is resolved by the rule on the burden of proof, which answers the question of **which of the parties should lose the case.**

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## Evidence

The legal doctrine states that where the claimant or the defendant fails to convince the court, i.e. where the parties' statements of material facts are not clearly established, **the case should be decided against the party who bears the burden of proof**[\[1\]](#).

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## Evidence

When will that degree of certainty be reached, **once the presumption has been applied?**

Where a presumption applies and **neither party's evidence is sufficient to reach the required degree of certainty, i.e. 50/50, then the presumption applies?!**

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**Thank you for your attention!**



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