



## PROVING DISCRIMINATION

SOPHIE LATRAVERSE SEPTEMBER 2025



1

## DEFINITIONS OR WHAT SHOULD BE PROVEN

- Direct discrimination article 2 par 1 a) Directives 2000/43, 2000/78 and 2006/54:
  - Where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on grounds of [one of the prohibited grounds]
- Indirect discrimination article 2 par 1 b) Directives 2000/43, 2000/78 and 2006/54:
  - Where an apparently neutral provision, criterion or practice would put persons of [one of the prohibited grounds] at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary

2

## 3 CUMULATIVE ELEMENTS

---

- Unfavourable treatment against a person or a group of persons
- Based on one or many grounds prohibited by EU law – ethnic origine, religion, age, sexual orientation, sex, pregnancy...
- In a domain specified by law :
  - Ethnic origine /race: Education, housing, access to goods and services , employment ....
  - Sex : Access to goods and services, social security , employment
  - Other grounds: Employment- Pay, hiring, career evolution, retirement benefits....

That is not otherwise authorized through an exception provided by the directive **and** national law

3

## THE BURDEN OF PROOF ARTICLE 10 DIRECTIVE 2000/78 ARTICLE 8 DIRECTIVE 2000/43 ARTICLE 19 DIRECTIVE 2006/54

---

- **2 steps:**
  - 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.
- **Not applicable** to criminal procedure par. 5, or proceedings in which it is for the court or competent body to investigate the facts of the case par. 3.

4

## « FACTS FROM WHICH IT MAY BE PRESUMED »

---

- Recitals 30 of Directive 2006/54; Recital 21 Directive 2000/43 and Recital 31 Directive 2000/78: ...
  - 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.

5

## HOW TO ESTABLISH « FACTS FROM WHICH IT MAY BE PRESUMED »

---

- The Approach of EU Law:
  - Comparative analysis of results or situations : data in employment / situation testing for access to goods and services
  - Based on elements of facts, many of which are in possession of Defendant
  - Unequal situation in fact of persons linked to a prohibited ground
  - Leads to a transfer of the burden of proof
  - Plaintiff does not have to introduce particular evidence that the prohibited ground is the basis of the decision
- Two strategic issues central to effective implementation :
  - Access to evidence of unfavourable situation or results that is in the possession of Defendant
  - Convince the Court without the necessity of specific evidence of fault

6

## ELEMENTS OF THE PRESUMPTION

### **I- Public statements:** CJEU, FERYN, C-54/07, 18 July 2008

- An employer declared on TV that he would not hire persons of North African origine to install garage doors in private persons homes.
- The Court decides that this declaration allows the court to presume that the employer has applied the policy he has publicly announced and shift the burden of proof

See as well on sexual orientation: Case C-81/12 *Asociația Accept* ECLI:EU:C:2013:275 ;Case C-507/18 *NH* ECLI:EU:C:2020:289

7

## II- ADMISSIBILITY OF PUBLIC STUDIES AND STATISTICS

- Impact of apparently neutral rule on a particular group can be established by taking in consideration national statistics and public studies
  - Recital 15 Directives 2000/43;and 2000/78; Recital 37 Directive 2006/54.
- CJEU, 08/05/2019, Praxair MRC SAS C-486/18
  - (Par. 82) Considering the greater proportion of women taking parental leave according to national statistics, compensation for redundancy in the context of part time parental leave is discriminatory on the gorund of sex if it takes in consideration the remuneration received during this parental leave (Par 65 – 81 – 83)
- CJEU 16/07/2015, CHEZ Razpredelenie Bulgaria AD, n° C-83/14
  - Taking in consideration public statistics of the population residing in a neighbourhood to conclude to evidence of a neutral practice that has adverse impact on a population of a particular origin.

8

### III- ACCESS TO COMPARABLE EVIDENCE : THE IMPACT OF RULES OF PROCEDURE

---

#### **A Common Law Model**

- Directives have been framed on a procedural model coming from Common Law countries
  - Based on comparative analysis of employees information
- In Common Law Countries Plaintiff's access to evidence is part of the rules of procedure

#### **In Civil Law countries:**

- The burden of proof rests on Plaintiff
- No automatic procedural access of Plaintiff to evidence that is in possession of Defendant
- Substantive equality law has an impact on procedural law

9

### PRESUMPTION CJEU, CHEZ RB, C-83/14, 17 JULY 2015

---

- Refusal by Defendant to communicate elements relating to the case, must not alter access to rights of Plaintiff
- In such case, the Court may shift the burden of proof (CJEU 2012, MEISTER C-415/10)

10

## ACCESS TO EVIDENCE = ACCESS TO RIGHT

---

- Implementing an obligation to communicate information on the situation of co-workers
  - In possession of Defendant
  - In possession of third parties
- CJEU/ECJ : Implementing impact of refusal to communicate on the part of Defendant (underlying right to access):
  - Access to information must be assured and be consistent – Non- transparency justifies the transfer of the burden of proof : ECJ 1989, DANFOSS C-109/88
  - Refusal by Defendant to communicate elements relating to the case , must not alter access to rights, in such case the Court may shift the burden of proof (CJEU 2012, MEISTER C-415/10)

11

## THE GDPR CJEU, 2 MARCH 2023, NORRA STOCKHOLM BYGG AB, C-268/21

---

### Plaintiff's right to have access to evidence VS Data protection and GDPR

- Par 17: Defendant was requested to produce staff register over 15 months.
- Objection of Defendant on the grounds that it would violate the protection of employees personal data under article 5 (1) (b) of the GDPR.

Par 53 « ... In order to ensure that individuals can enjoy a right to effective judicial protection and, in particular, a right to a fair trial, within the meaning of the second paragraph of Article 47 of the Charter, the parties to civil court proceedings must be in a position to access the evidence necessary to establish to the requisite standard the merits of their complaints, which may possibly include personal data of the parties or of third parties. »

12

## THE FRENCH DECISION OF PRINCIPLE COURT OF CASSATION, 2<sup>ND</sup> CIVIL CHAMBER 3 OCTOBER 2024, NO. 21-20979

- The context after 20 years of judicial guerrilla
- It follows from Recital 4 of the GDPR that the right to protection of personal data is not an absolute right and must be considered in relation to its function in society and balanced against other fundamental rights.
- In particular the right to an effective remedy and to access to an impartial tribunal.
- In application of Articles 6 and 8 of the ECHR, the right to evidence can justify the production of information infringing on the personal life of other employees provided that this evidence is indispensable to the exercise of a legal right and that the violation is proportionate to this objective.
- Overreaching data must be contained and controlled by the judge,
- Claimant must manage the data and ensure protection of the data and compliance with the constraints imposed by the judge.

13

## THE RIGHT TO PRESENT CLAIMANT'S ANALYSIS DATA AND THE GROUND OF ORIGIN

- **Comparable Data** : Evidence of discrimination based on quantitative comparison with other employees in a comparable situation
- The claimant can use all available information to present his case in support of a *prima facie* case of discrimination
- **On the ground of origin**- In France surname is used as a proxy of origin
  - Cass.Soc. 14 February 2022 no 21-19.628 – facilitated evidence of origin
- If the discrepancies presented show a *prima facie* case, it is for the Defendant, who has all the data, to contradict the presumption he is facing and « provide an analysis refuting the claimant's demonstration »

14

## EXAMPLE OF PRIMA FACIE CASE

### ECJ, 17 OCTOBER 1989, DANFOSS C-109/88

---

- Collective agreement foresees salary by categories
- Scales can be increased by the employer on the basis of :
  - flexibility,
  - professional training, and
  - seniority
- The average salary of men is 6,85 % higher
- No information on how these rules are implemented

15

### ECJ DANFOSS C-109/88

---

- A remuneration system characterised by a lack of transparency resulting in average inferior remuneration of women is presumed to be discriminatory
- The lack of transparency precludes access to evidence
- The employer has the burden to prove that his practice is not discriminatory
- Must establish how the grounds were applied:
  - Objective
  - Non discriminatory
  - Proportionate

16

## OTHER ELEMENTS OF EVIDENCE

---

- Medical records (Harassment)
- Colleagues statements
- Answers given to questions of union representatives

17

## DEFENDANT'S BURDEN OF PROOF

---

Article 10 Directive 2000/78 ; Article 8 Directive 2000/43 ; Article 19 Directive 2006/54

It shall be **for the respondent to prove that there has been no breach** of the principle of equal treatment.

18

## DIRECT DISCRIMINATION - ARTICLE 2 PAR. 2 A)

---

Where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on a ground prohibited by law

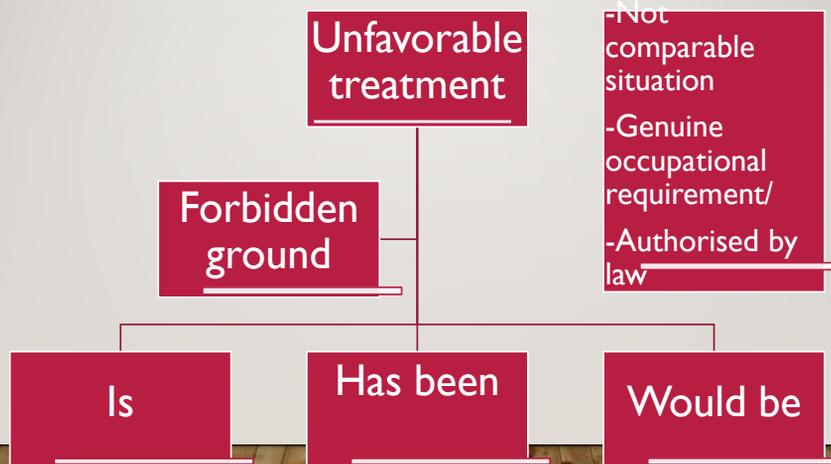
No justification possible except

- Authorisation of the law
- or
- Genuine occupational requirement

19

## DIRECT DISCRIMINATION NO JUSTIFICATION

---



20

## INDIRECT DISCRIMINATION – ARTICLE 2 PAR. 2 B)

### 2 STEPS

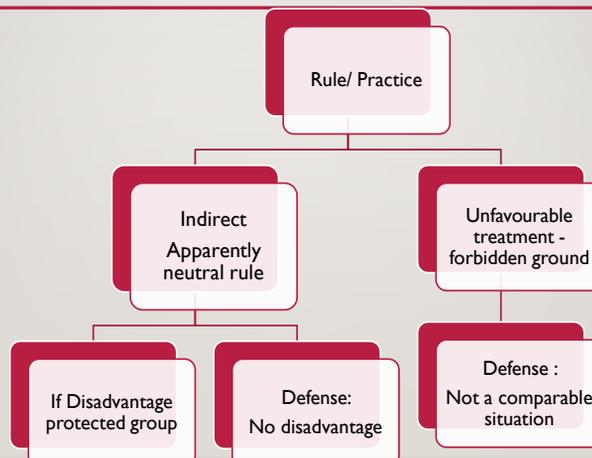
- Where an apparently neutral provision, criterion or practice would put a persons related to a prohibited ground at a particular disadvantage compared with other persons

#### Possible justification:

- Unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary

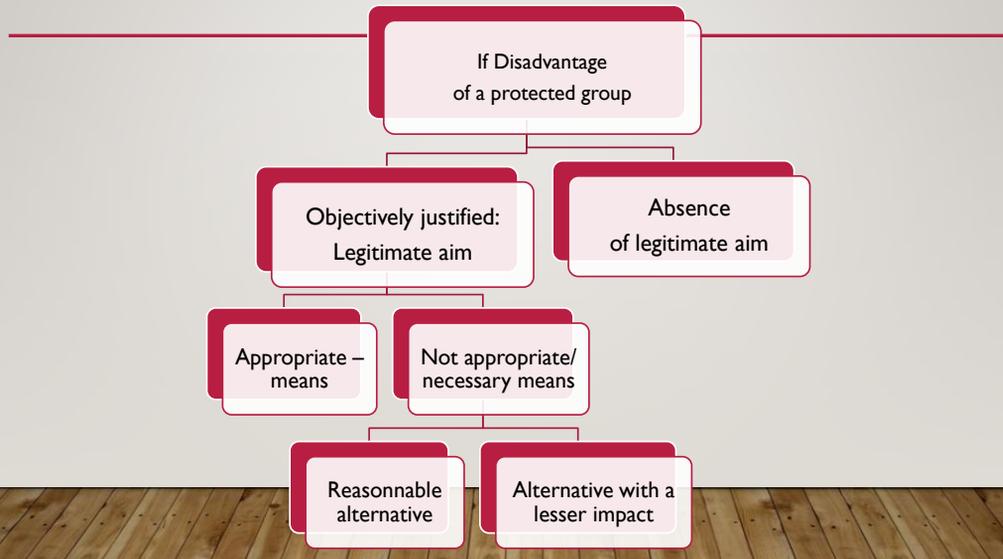
21

## REASONING CHART DIRECT AND INDIRECT DISCRIMINATION



22

## BURDEN OF JUSTIFICATION INDIRECT DISCRIMINATION



23

## JUSTIFICATIONS PRECISE EVIDENCE REQUIRED OF THE EMPLOYER

### - Onus is on Defendant :

- Absence of justification is a lack of transparency ; CJEU, 2012, Meister C-415/10; ECJ, 1989 Danfoss C-109/88

Legitimate and objective justifications

Motivation unrelated to discrimination ground

Proportionate and reasonable

24

## INADMISSIBLE JUSTIFICATIONS

---

- Economical justifications are irrelevant: CJEU, Kutz-Bauer, 20/03/2003, C- 187/00)
- Client's requests are irrelevant : CJEU, FERYN, CJEU Bougnaoui, 14/03/2016, C-188/15
- The labour market is not a justification unless one establishes labour shortages : ECJ Enderby, 27/10/ 1993 C-127/92
- Collective bargaining without intention to discriminate is not a justification: Enderby, supra
- Individual negotiation is not a justification : CJEU, Brunnhofer, 26/06/2001, C-381/99
- Performance after employment is not a justification for unequal pay at the time of hiring : Brunnhofer, supra

25

## ECJ, 17 JUNE 1998, HILL & STAPELTON C-243/95

---

- In a case where part time workers faced slower career evolutions, the majority of which were women, the court replied to the employer's economic argument that :
  - The cost of implementing equal treatment, and economic considerations in general cannot be presented by the employer as a justification for maintaining unequal treatment

26

## ECJ, 27 OCTOBER 1993, ENDERBY C-127/92

---

- Difference of remuneration between two jobs of comparable value related to salary levels and classifications in a public health collective agreement:
  - Speech Therapist (female)
  - Pharmacists (male)
- Apparent discrimination on the basis of statistics of the presence of male and female in each job category and salary differential

27

## ENDERBY – COLLECTIVE BARGAINING

---

- Employer must show that objective reasons justify the difference in remuneration
- The fact that they are the result of collective bargaining is not a justification since collective agreements must respect the principle of equal treatment
- The fact that each bargaining process did not take into account discriminatory considerations is not a justification either

28

## ENDERBY – TENSIONS ON THE LABOUR MARKET

---

- The insufficient number of professionals explaining their high value on the market cannot be presumed
- The employer has the burden to justify the reality of the pressure of the labour market and the court must appreciate the proportionality of its impact in each situation

29

## ECJ, 26 JUNE 2001, BRUNNHOFER C-381/99 §43

---

- Definitions of comparable situations:  
Test: taking into account of a number of factors such as the nature of the work, the training requirements and the working conditions, whether those persons can be considered to be in a comparable situation (see Article 19 of Directive 2023/970)

Each component must be established

30

## CJEU, BRUNNHOFER, 26/06/2001, C-381/99

---

- Plaintiff complains that a male colleague hired one year after her at the same level, benefits from a higher premium, negotiated at the time of his employment.
- She was dismissed after 4 years because of problems that had appeared before her male colleague was even hired
- The bank invokes the quality of plaintiff's work

31

## BRUNNHOFER

---

- The Bank cannot invoke the quality of plaintiff's work or elements related to the performance of the employment contract to justify unequal pay fixed at the time of hire

32

