

## PROVING DISCRIMINATION: THE SHIFT OF THE BURDEN OF PROOF AND ACCESS TO EVIDENCE

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### BURDEN OF PROOF: WHO

- The rule: The Claimant must prove his or her case on the balance of probabilities.
- But: a claimant in a discrimination case faces a particular burden because:
  - (1) discriminators don't tend to advertise their prejudices; and
  - (2) employers and/or service providers are the custodians of all the relevant evidence which poses a particular problem for indirect discrimination claimants

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## BURDEN OF PROOF: WHY

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- The broad principle of effective judicial protection for community rights demands that it must not be virtually impossible for citizens to exercise their rights
  - Early ECJ jurisprudence recognised that it could be particularly difficult for claimants to prove discrimination:
  - **Danfoss** (C-109/88) Female workers earned 7% less than male workers
  - **Enderby** (C-127/92) Speech therapists (women) earned less than pharmacists (men)

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## BURDEN OF PROOF: WHERE

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- Then: [Article 4 Burden of Proof Directive 97/80/EC]
  - Now:
  - Art 8(1) 2000/43 (“Race Directive”) (race)
  - Art 10(1) 2000/78 (“Framework Directive”) (religion or belief; disability; age and sexual orientation)
  - 2006/54 19(1) (“Recast Directive”) (sex)

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## BURDEN OF PROOF: WHAT

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- “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.”
  - Identical wording across the directives (Article 8(1) 2000/43; Article 10(1) 2000/78 and Article 19(1) 2006/54)

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## BURDEN OF PROOF: WHAT

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- 2-stage test
- (1) persons who consider themselves wronged (claimants) establish facts from which it may be presumed that there has been direct or indirect discrimination
  - (2) respondent to prove that there has been no breach

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## BURDEN OF PROOF: WHAT

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- Presumption does not mean conclusion:
- [CHEZ C-394/11 AG Kokott](#) opinion
- The language of Article 8(1) of the Race Directive only requires a PRESUMPTION not a definite CONCLUSION. Any stricter interpretation would jeopardise the practical effectiveness of the burden of proof regulations making them practically redundant.
- The reversal of the burden of proof maintains a fair balance between the parties because they do not completely remove the burden of proof from the victim but merely modify it.

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## BURDEN OF PROOF: DIRECT DISCRIMINATION

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- Direct Discrimination “treated less favourably than” = comparison
- Aristotle: treating like cases alike



The comparator must be someone whose circumstances are the same or not materially different to the claimant: [MacDonald v Advocate General for Scotland](#) [2003] IRLR 512

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## BURDEN OF PROOF: DIRECT - JURISPRUDENCE

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- **Firma Feryn** (C-54/07)
- Public statements may establish a prima facie case or presumption of discrimination (Stage 1)
- The employer must then prove that its recruitment process was not discriminatory (Stage 2)
- **Kelly** (C-104/10) Claimant's belief did not entitle him to the information about other applicant's qualifications in order to establish Stage 1 prima facie case
- **Meister** (C-415/10) All the evidence (including a failure to provide information) is relevant in considering whether a Stage 1 prima facie case has been established by the claimant

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## BURDEN OF PROOF: DIRECT - JURISPRUDENCE

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- **ACCEPT** (C-81/12) Employer's failure to distance himself from discriminatory statements is relevant to establishing a Stage 1 presumption of discrimination case
- **CHEZ** (C-394/11) Is a difference of protected characteristic and a difference of treatment enough? What more is required? The service provider's actions were underscored with a pernicious belief based upon stereotypes.

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## BURDEN OF PROOF: INDIRECT DISCRIMINATION

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- Indirect Discrimination:
  - “...where an apparently neutral provision, criterion or practice would put persons [with the protected characteristic] at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”
- Article 2(2)(b) 2000/43
- Article 2(2)(b) 2000/78
- Article 2(1)(b) 2006/54

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## BURDEN OF PROOF: INDIRECT DISCRIMINATION

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- 3 stages:
  - Stage 1: Has the claimant established a prima facie case that there is a provision, criteria or practice which puts those with a protected characteristic (women etc) at a particular disadvantage and which causes them detriment?
  - Stage 2: Has the employer/service provider shown cogent evidence which disproves the existence of any of the elements of the complaint?
  - Stage 3: Can the employer justify the provision, practice or criteria?

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## BURDEN OF PROOF: INDIRECT - JURISPRUDENCE

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- Showing “particular disadvantage”
- *Bilka-Kaufhaus* (C-170/84): “much lower proportion”
- *Seymour-Smith* (C167/97): “considerably smaller percentage”
- *O’Flynn* (C-237/94): “substantially higher proportion”

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## BURDEN OF PROOF: INDIRECT - STATISTICS

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- The problem with statistics:



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## BURDEN OF PROOF: STATISTICS

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- | Example 1                      | Example 2                       |
|--------------------------------|---------------------------------|
| ▪ Total Pool = 10,000          | Total Pool = 20                 |
| ▪ Men = 9,000 Women = 1,000    | Men = 12 Women = 8              |
| ▪ Compliant men = 700          | Compliant men = 9               |
| ▪ Compliant women = 50         | Compliant women = 7             |
| ▪ %age of compliant men = 7.7% | %age of compliant men = 75%     |
| ▪ %age of compliant women = 5% | %age of compliant women = 87.5% |

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## BURDEN OF PROOF: APPLICATION

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- Direct Discrimination:
    - First Stage
      - (1) Find primary facts: central facts, background facts, statistics
      - (2) Draw any appropriate inferences
    - Second Stage (where burden has shifted)
      - Explanation

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## BURDEN OF PROOF: APPLICATION

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- Indirect Discrimination:
    - First Stage
    - Prima facie case that there is a provision criterion or practice (PCP) which puts claimant at a particular disadvantage and causes detriment
    - Second Stage
    - Has employer/service provider shown cogent evidence which disproves the existence of any of the elements of the complaint
    - Third Stage
    - Can the employer/service provider justify the PCP

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## BURDEN OF PROOF

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- In preparing my presentation I have had the benefit of reading and in some cases drawing upon previous presentations by Anna Beale (Cloisters Chambers), Philip Rostant (Employment Judge, England & Wales) and Mary Stacey (Employment Judge, England & Wales).
  - Danke für Ihre Aufmerksamkeit!

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