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The Burden of Proof

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Problems

- Unusual to find direct or explicit evidence.
- "… those who discriminate on the grounds of race or gender do not in general advertise their prejudices: indeed they may not even be aware of them." (Lord Browne-Wilkinson in *Zafar*)

United Kingdom

Before the Burden of Proof Directive:

- Court or Tribunal made findings of primary fact;
- Then considered what inferences can be drawn from those facts;
- Court was entitled, but not obliged, to find unlawful discrimination.

European Developments

C-109/88 *Danfoss* (1989)

- Female workers earned on average 7% less than male co-workers
- ECJ: if the system of pay is totally lacking in transparency and statistical evidence reveals a difference in pay between male and female workers the burden of proof shifts to the employer to account for the pay difference by factors unrelated to sex.

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Enderby v Frenchay Health Authority: Case C-127/92 [1993] ECR I-5535

"… if the pay of speech therapists is significantly lower than that of pharmacists and if the former are exclusively women while the latter are predominantly men, there is a *prima facie case of sex discrimination* …."

Enderby

- “Where there is a *prima facie* case of discrimination, it is for the employer to show that there are objective and non-discriminatory reasons for the difference in pay.”

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Royal Copenhagen C-400/93

- Burden of proof normally on worker
- May be shifted where necessary to avoid depriving workers of effective means of enforcing equal pay principle

Social Charter

"(…) action should be *intensified* to ensure the implementation of the principle of equality for men and women as regards, in particular, access to employment, remuneration, working conditions, social protection, education, vocational training and career development."

Council Directive 97/80/EC

- employees could be deprived of any effective means of enforcing the principle of equal treatment before national courts if the effect of introducing evidence of an apparent discrimination were not to *impose* upon the employer the burden of proving that his practice is not in fact discriminatory

Article 1

‘The aim of this Directive shall be 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.’

Article 4(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*.’

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- Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 8(1)
- Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (covering discrimination on grounds of religion or belief, disability, age or sexual orientation), Article 10(1)

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- Council Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (also known as the Recast Directive) (Article 19(1))
- Repeals Directives 75/117/EEC, 76/207/EEC, 86/378/EEC and 97/80/EC from 15 August 2009 (Article 34)

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Note, however, that the shifting of the burden of proof need not apply to proceedings in which it is for the court or competent body to investigate the facts to the case itself i.e. to proceedings that are *inquisitorial* rather than *adversarial* (see Art. 4(3) of Directive 97/80; Art. 8(5) of Directive 2000/43; Art. 10(5) of Directive 2000/78 and Art. 19(3) of Directive 2006/54.).

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Brunnhofer C-381/99

- Direct discrimination
- Fact that comparators are in same job category is insufficient
- Therefore the burden does not shift
  - C must establish lower pay and that she really does like work or work of equal value
  - Once there is a *prima facie* case, R must prove that the jobs are not comparable or justify the pay differential

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Feryn C-54/07

- Public statements may establish a presumption of discrimination
- R must then prove that this actual recruitment practice did not reflect the public statements made

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Meister C-415/10

- Advocate General's opinion
- No duty to disclose information about successful candidate
- But all the evidence (including failure to provide information) relevant in considering whether a prima facie case is established

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- Burden of proof does not shift simply on proof of a difference in race (or sex, etc.) and a difference in treatment.
- So the mere fact that a person of a particular race was not appointed to a particular job coupled with the fact that the job was given to a person of a different race will not normally be enough to shift the burden of proof.

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- Once the burden of proof has shifted the respondent is required to provide a cogent explanation by adducing the necessary evidence to discharge the burden of proof
- The weight of the burden imposed at the second stage will depend on the strength of the prima facie at the first stage

Indirect discrimination

- Where an apparently neutral provision, criterion or practice puts a group at a particular disadvantage compared with other persons that provision, criterion or practice must be objectively justified by a legitimate aim and the means of achieving that aim must be both appropriate and necessary, see Art. 2(2(b) of Directive 2000/43, Art. 2(2)(b) of Directive 2000/78 and Art. 2(1)(b) of Directive 2006/54.

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15th recital to 2000/43 and 2000/78:

> "The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of *statistical evidence.*"

Indirect discrimination

- It is for the national court to say whether the statistics cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena and whether, in general, they appear to be significant.
- ***R v Secretary Of State For Employment, ex parte Nicole Seymour-Smith & Laura Perez*** [1999] ECR I-623
- Disparate impact shown by a minor but persistent and relatively constant disparity over a long period.

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Standard court / tribunal procedures include the right to request:

- ‘Additional information’ about a pleaded case;
- Written answers to questions; and
- Disclosure of documents

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How to use evidence

- Lack of equal opportunities policies or training
- Failure to follow own procedures (e.g. disciplinary or grievance procedures)
- Failures to follow Codes of Practice / good industrial practice.
- Previous instances of discrimination or pattern of conduct.

Questionnaires

- Questions must be set out on a prescribed form but otherwise a complainant may ask the respondent *any* question relevant to the alleged discrimination.
- It is common to ask questions about the make-up of the workforce ('Please give the race, ethnic and national origin of all employees employed at a particular place or in a particular grade').
- Although not bound to answer the Questionnaire, the questions asked are admissible in evidence and a court or tribunal may draw an adverse inference from a failure to reply or from an evasive or equivocal reply, including an inference that the respondent has behaved unlawfully.

FIGHTING DISCRIMINATION CASES AND SHIFTING THE BURDEN OF PROOF

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