

# *Burden of proof*

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- A few case examples
- Plaintiff and Respondent
- Direct vs indirect discrimination

## Legal formulation

### **Directive 2006/54: Article 19 - Burden of proof**

1. ...[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.

## Danfoss - facts

The same basic minimum wage was paid to all workers in the same pay grade (job classification). However, the collective agreement allowed additional payments for 'flexibility', vocational training, and seniority

This resulted in a differential of 6.85 per cent between the average pay of male and female workers within the relevant pay grades

## Danfoss – Question

“...the system of individual supplements applied to basic pay is implemented in such a way that a woman is unable to identify the reasons for a difference between her pay and that of a man doing the same work. Employees do not know what criteria in the matter of supplements are applied to them and how they are applied....

Q: where an undertaking applies a system of pay which is totally 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.”

## Danfoss - ruling

‘[I]n 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.’

## Enderby - facts

Pay disparity between speech therapists (almost all female) paid less than clinical psychologists and pharmacists (mostly male)

## Enderby - ruling

- After establishing a *prima facie* case of discrimination, the burden of proof shifts to the employer who has to provide objective justification
- *prima facie* case might be made out where 'significant statistics disclose an appreciable difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men'.

AG Lenz: 'Attention should be directed less to the existence of a requirement or a hurdle by means of which women suffer a disadvantage, and more to the discriminatory result'

# How to think about burden of proof?

Prima facie – certain facts should raise the suspicion of the court – this ‘could’ be discrimination, then the burden shifts

Two elements: claim and proof – both side have to present both (for this reason, Czech courts speak about ‘sharing’ the burden of proof)

It is not a chronological matter as much as a matter of selecting the evidence giving answer to the two questions

# What questions of plaintiff and respondent?

Plaintiff – (UK) on balance of probabilities, does this look like discrimination?

- (UK) Mere difference in treatment would not be enough, ‘wrongfulness’ need to be suspected (ground), but this can be drawn from the respondent’s submissions
- (Czech Constitutional Court) The plaintiff needs to show that there was unusual/disadvantaging treatment (proof), and she has to *claim* that this was based on a ground, but no need to *prove*
- (UK) Evidence by the respondent as to whether the act occurred at all is relevant here (to challenge the *prima facie* conclusion)
- (UK) Comparator – if it’s a wrong one or none, this can damage the plaintiff’s case

Respondent – (UK) on balance of probabilities was this discrimination of the basis of sex?

- was this for other reason than sex (objective reason in DD)
- despite there being a disparity in effect, is it justified (objective justification in ID)

## Indirect discrimination

- Indirect discrimination – pay disparity often shown by statistics
  - How big a sample?
  - In job groups (Enderby), how much of a predominance in the group do we need?
  - How much of a statistical difference?
    - Previously 'measure affects a far greater number of women than men' (*Rinner-Kuhn*), currently 'particular disadvantage' (Dir 2006/54, Art 2(1)(b))

## Direct discrimination

Statements of attitude (easier)

- *Feryn* - statements by which an employer publicly lets it be known that, under its recruitment policy, it will not recruit any employees of a certain ethnic or racial origin
- *Asociata ACEPT* - homophobic public statements by someone who presented himself as having (and was considered by the public to have) a leading role in a Romanian football club, ruling out the recruitment of a player rumoured to be gay

## Direct discrimination

Two issues:

- unusual/different/worse treatment
- based on sex

Other indications

- There is lower pay (overall, part of it, such as bonuses, missing perk) than that of male comparator
- Supported by other comparators (triangulation)
- Supported by statistical evidence

## Exercise

- Those of you who have experience with applying the shift
  - How does this work in your jurisdiction
  - What are the good experiences or good practices?
  - What are the challenges?
- Discussion in groups – others present