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Reversing the Burden of Proof

Working the case study

The Type of Claim and the BoP provision

- ❖ What type of discrimination, harassment or victimisation is at work for Ms Tigmiza?
- ❖ If direct discrimination, who proves which part? -
- ❖ Treatment
- ❖ Less favourable (not just detrimental - who is the comparator?)
- ❖ If harassment - what is the conduct - is it unwanted - (detrimental treatment sufficient)
- ❖ If victimization - no comparison - detriment - causation
- ❖ segregation - a type of detriment?

The normal rules and 'Double trouble'

- ❖ Assert - so prove it!
- ❖ But:
 - ❖ (i) How is the burden resting on Ms T lowered? When is the presumption created? Do the facts C proves as likely indicate that there may be a causal link between the protected ground and the conduct (prima facie case)? If so
 - ❖ (ii) Can the Respondent prove that the cause of the treatment was not in breach of the principle of equal treatment? Sometimes known as a justification defence or "an innocent explanation" defence.

Prima facie case

- What facts must Ms T prove? In practical terms these are facts which raise the question "why did that happen?" without an obvious innocent explanation. So the *prima facie* case, is raised when the facts established indicate a likeliness or more than fanciful possibility that the explanation is discrimination.
- When these facts are proved in the ordinary way bias and prejudice are 'factored in' by requiring the Respondent to show facts which demonstrate that although the facts proved by the Claimant mean that it may be presumed that direct discrimination has taken place, there is an innocent (non-discriminatory) explanation as to why the treatment happened.
- Art 8 RED, Art 10 EED requirements for Ms T:
IF establish, (age, gender, ethnicity?) - what the treatment was - that a comparator was treated more favourable despite comparable circumstances
facts from which it may be presumed: - what is the role of third party comments?
THEN the respondent must prove that there has been no breach of the principle of equal treatment (e.g. because there is an exception, or because there is an innocent explanation).

Justification defence in indirect discrimination cases

- If the facts were that the company had a neutral rule: ("we prefer people with TV and public speaking experience") Ms T would have to show that this has particular disadvantage for women and her. But if that is done, the burden of proof shifts before causation is complete. R will only not be held liable if R proves that the application of that rule was justified as an appropriate and necessary means of achieving a legitimate aim.

The comparator

- Is Mr Andre in the same or not materially different circumstances to Ms T?
- Same qualifications - same body type? - previous experience at Morgane's Financial Advisers?
- Gravitas? How well customer likes Mr A?
- Freshness?
- Practical problem: how close does the comparator need to be?
- Real question: does the comparison indicate or suggest the possibility of what the reason for the treatment in question may be?

No guidelines from the CJEU

- The CJEU unwilling to set the standard, but will say what is sufficient on particular facts. So
- The statement by Callus Butchers: what could be inferred from that?
- Is the link close enough to bring into play the principle in ACCEPT?
- Does a statement need to be as obvious as the one in Feryn?
- Igen v Wong, in UK has caused some confusion but allows R to produce their explanation and for the tribunal to consider it when determining what facts they accept as forming part of the prima facie case. (E.g. I was punished and the comparator was not - R: but the comparator did not hit anyone!).
- Rebuttal evidence must be of a particular type - innocent of any discrimination whatsoever. But the facts must be proved on the usual balance of probabilities standard.
- How could Rurecuts explain their decision? Much will depend on what the words meant but scenario does not give you an innocent explanation. However:
- If R proves that they had a marking scheme for the numbered themes, relating them to an objective specification for the job; that MrA did better on that part of the test, and that the cocktail party was to assess not their client's reaction but the ability of the candidates rather than the immediate reaction of the client, R is on the way to showing an objectively innocent explanation for the treatment.

Access to information

- +Ms T cannot call the person who told her about the comments? The lack of information from the Company. How should this be handled?
- +Is the lack of transparency of the employer's practices such as to give rise to a presumption which needs to be explained (e.g. Danfoss).
- +The same underlying approach should be adopted.
- +disclosure of a record of the comments? would that lead to disclosing confidential data of an identifiable individuals? Here Callus might be made a party? But how to deal with those who are not? Anonymising orders (UK House of Lords: Science Research Council v Nasse).
- +Failure to disclose: can an inference be drawn from such a failure?

Is Ms T defeated by lack of access?

- +Possibly - although a procedural (so a domestic court issue) access to information fundamentally undermines the BoP articles so a way of dealing with data protection and right to equal treatment needs to be found; Anonymity v 3rd party human rights.
- +Questionnaires are now abolished in the UK, but the same inferences can be drawn from failure to answer questions in writing. Something similar at EU level would be possible if the CJEU ruled that the Directives require inferences to be drawn in such circumstances to fulfil their purpose. This would not require EU level intervention in procedural issues which are generally left to the domestic courts.