DOWNLOAD PDF THE BURDEN OF PROOF AND INDIRECT DISCRIMINATION

Chapter 1 : In on the act: Indirect Discrimination and Burden of Proof Regulations - Personnel Today

In my view, they support a conclusion that before a Tribunal can properly reverse the burden of proof in a claim of indirect discrimination, it must be satisfied of the primary facts which would enable it to do so, and that these are for the Claimant to prove.".

On 29 Jan in Indirect discrimination , Personnel Today Our continuing series of quick guides to major employment legislation puts key information at your fingertips and brings you up to date with the latest developments. This week Jane Brown, senior solicitor with the employment team at Manches, looks at changes to sex discrimination law, with the recent introduction of the Indirect Discrimination and Burden of Proof Regulations Most employers are all too familiar with the provisions of the Sex Discrimination Act SDA. However, not everyone will be as well acquainted with the recent changes to sex discrimination law in the Sex Discrimination Indirect Discrimination and Burden of Proof Regulations the Regulations , which came into force on 12 October and implement the EC Burden of Proof Directive. Since it is principally women who benefit from the sex discrimination laws, this article will refer to them as the claimants, although of course the law also applies to men. A common area where the SDA applies is where an employer turns down a request from a female employee with young children to work part-time. She can usually show that the requirement to work full-time adversely affects more women than men, since women are more likely to be primary carers for children. Even so, a woman still has to satisfy several criteria before she can prove she has been discriminated against, but these have been relaxed by the Regulations. Indirect discrimination Prior to the Regulations, indirect discrimination was defined as occurring where an employer applies a requirement or condition to a female employee which it applies equally to men, but is such that: Women will undoubtedly find it easier to satisfy this test by challenging non-contractual practices, such as a long hours culture, or recruitment criteria which are desirable but not essential. Again, this will make it easier to prove discrimination. If an employer refuses a request from a woman with young children to move from full-time to part-time work, for example, she will have to demonstrate that working full-time is to her detriment, but she will no longer have to show she could not comply with it. In the past this has proved an obstacle to bringing a successful claim for high-earning women. For example, in Sykes v JP Morgan unreported , the tribunal said that because Sykes could afford childcare, she could comply with the requirement to work full-time although this case is being appealed. Under the Regulations, as previously, even if an employee manages to prove that discrimination has occurred, the employer can still defeat her claim by proving the discrimination was justified. In the example of a woman with children requesting part-time work, the employer would need to demonstrate why the job cannot be done on a part-time basis. Burden of Proof Until now, employment tribunals have had some discretion over the question of whether inferences of discrimination should be drawn in cases where the employer has not provided an adequate explanation for its behaviour. The Regulations have amended the SDA so that where an employee has established facts which point to discrimination, tribunals are now obliged to infer discrimination unless the employer can prove otherwise. At first sight it may look as if this is not a significant change â€" this is certainly the view the Government takes in its guidance to the Regulations. In the past for example in Sidhu v Aerospace Composite Technology, , ICR CA tribunals have not always so found because they have had absolute discretion in this respect. A further development From April , legislation is due to provide both mothers and fathers of children under six or of disabled children under 18 with a legal right to request flexible working hours. Workers will be entitled to a full explanation in writing from an employer who chooses to reject such a request, with a right, as a last resort, to go to an employment tribunal. This will be separate from and in addition to any rights under the SDA. It is becoming easier for employees to bring discrimination claims. This means employers must deal carefully with requests for part-time work from female employees, in particular, and it is likely their only hope will be to rely on justification arguments. Decisions concerning recruitment, promotion, requests for part-time work and so on,

must also be handled and documented scrupulously. If not, employers face costly discrimination cases.

Chapter 2 : The Burden of Proof and Indirect Discrimination Â» Brill Online

(Indirect Discrimination and Burden of Proof) Regulations (the Regulations), which came into force on 12 October and implement the EC Burden of Proof Directive.

So evidence does not have to be conclusive. Often there will not be direct evidence as to whether an employer discriminated. The tribunal may make inferences from the facts that are proved or not disputed. As regards the objective justification defence , the burden is on the employer or service provider etc to show the defence applies. Shift in burden of proof There is a rule that the burden of proof shifts to the employer or service provider etc if the claimant makes out a prima facie case. For the precise wording of the rule, which is important, see EqA s. It is not an easy area. It is often said based on the Madarassy case below that simply showing there has been a difference in treatment between eg. The landmark Court of Appeal decision of Igen v Wong in February gave guidance on what the provision means. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other. However the Court of Appeal held in Ayodele v Citylink bailii. There is still an initial burden of proof on the claimant. The court said the change in wording makes clear as had been held by the courts that what should be considered at the first stage is all the evidence, from whatever source it has come, and not only the evidence adduced by the claimant. The Court of Appeal thereby overruled the Employment Appeal Tribunal decision in Efobi v Royal Mail Group bailii,org earlier the same year which had thought the new Equality Act wording did change the law. The burden remains on the claimant to show this, on a balance of probabilities. Prohibited enquiries on health or disability Where there is a claim that an employer is liable for direct discrimation, the legislation specifically says that the burden of proof shifts under s. Here, the claimant need not show a prima facie case. The burden of proof shifts if an individual claims that conduct by the employer e. Reasonable adjustment claims may be easier Whilst the rules on burden of proof apply generally, they are most likely to be important where the issue is why a person was treated less favourably - was it because of something to do with their disability that they were turned down for a job or promotion, for example. However, showing the reason why one was turned down is not a precondition to a claim for reasonable adjustments. Asking questions Asking questions can be very useful to help a claimant decide whether it is worth bringing a case in the first place, and if so how to formulate and present a case most effectively. As well as helping formulate a case if brought, it can help avoid unnecessary litigation. A claimant may find from the responses given that their case is weak, so no claim is made or the claim is withdrawn. Alternatively, the process of answering the questions may bring home to an employer etc that there is a serious case against them, and encourage them to negotiate a resolution, again avoiding litigation. However this was repealed by the Coalition government. The procedure involved sending a form to the employer or service provider asking relevant questions. If the employer etc unreasonably failed to reply within 8 weeks or its reply is evasive or equivocal, the tribunal or court could draw inferences from that. Though that questions procedure is now repealed, claimants can still make a subject access request under the Data Protection Act to be replaced by the EU General Data Protection Regulation from May , or ask questions without relying on a legal right to do so: See for example Employee data sought in connection with potential tribunal cases must generally be handed over, says ICO link to outlaw. Asking questions without a legal right Even after the abolition of the questions procedure, claimants can write to the employer or service provider etc asking questions, and a tribunal or court may well be willing to draw inferences from failure to respond. ACAS and the government have issued new guidance on asking questions: Government Equalities office, guidance on provision of services - Asking and responding to questions of discrimination in the provision of goods and services and public functions pdf, link to gov. In the absence of section [ie the statutory questions procedure], a complainant may still raise questions of the respondent. A court or tribunal could still conclude adverse inferences from a refusal to respond or from evasive answers,

despite the lack of any provision for a statutory questionnaire. Enterprise and Regulatory Reform Bill: Supplementary notes explaining new clauses Word doc, link to archived discuss. Linked from archive of discuss. We will replace the statutory provisions, including the forms for questions and answers and the eight week time limit for businesses to respond, with an informal approach. This new approach will be set out in guidance produced by Acas and will include advice on how individuals can ask questions and why employers and service providers should respond. This will enable business to better challenge any unreasonable requests for information which they have told us they currently experience with the statutory provisions. A non-legislative approach will be simpler and fairer for all. Progress on reform link to gov. Expert evidence can be useful here, eg from a speech and language therapist SLT. Expert evidence is not always necessary though - the Presidential Guidance on General Case Management pdf , , on employment tribunals indicates: A claimant may be able to describe their impairment and its effects on their ability to carry out normal day to day activities The guidance goes on to consider use of expert evidence. Expert evidence can, however, be useful to support a case. The tribunal in that case also used the report in its decision on the reasonable adjustment duty though that aspect was overruled on appeal. As mentioned above, the tribunal in Wakefield considered the SLT report in deciding what adjustments would be reasonable. Of course, other evidence not just expert evidence can also be very important on these issues. An example of a claimant showing his stammer was a disability without expert evidence is Shirlow v Translink though the claim here failed because the tribunal decided there was no discrimination. Specialist SLT Speech and language therapists SLTs cover a broad range of different disorders, so it is desirable to have a speech and language therapist with a particular expertise in stammering. There may be a charge to obtain a report. Information on local SLTs, including those specialising in stammering, is available from the British Stammering Association helpline link to stammering. Also City Lit link to stammering. For a private speech and language therapist, go to helpwithtalking. Guidelines for employment tribunals Guidelines on expert evidence were given by the Employment Appeal Tribunal in the De Keyser case in March For example, joint instruction of a single expert is generally preferred. It may be possible to have the Employment Tribunal pay the costs of a medical report ordered by it. Links on expert evidence: Non-binding guidance issued by the President of the Employment Tribunals.

Chapter 3 : What you need to show the employment tribunal in a discrimination at work claim - Citizens Ad

2) provides: Burden of Proof â€¢ Article19 of Directive /54/EC on the implementation of the principle of equal treatment of men and women in.

The Act included a provision codifying the prohibition on disparate-impact discrimination. Under the disparate-impact statute, a plaintiff establishes a prima facie violation by showing that an employer uses "a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin. He may offer direct evidence, e. Direct evidence of discrimination is rarely available, given that most employers do not openly admit that they discriminate. Facially discriminatory policies are only permissible if gender, national origin, or religion is a bona fide occupational qualification for the position in question. Race or color may never be a bona fide occupational qualification. He may offer any of three types of circumstantial evidence: This type of circumstantial evidence is substantially the same as the evidence required by the McDonnell Douglas method described below. Indirect method â€" burden-shifting[edit] In the majority of cases, the plaintiff lacks direct evidence of discrimination and must prove discriminatory intent indirectly by inference. The analysis is as follows: In the Seventh Circuit, courts generally analyze disparate treatment cases using this method, though attorneys may also use the direct method described above. The elements of the prima facie case are: Hicks , U. Establishment of a prima facie case creates an inference that the employer acted with discriminatory intent. Although establishing a prima facie case used to be fairly routine, the courts have begun scrutinizing the second element of the test more rigorously. Fusibond Piping Systems, Inc. It is the role of the judge, not the jury, to determine whether the plaintiff has stated a prima facie case. To rebut the inference of discrimination, the employer must articulate, through admissible evidence, a legitimate, non-discriminatory reason for its actions. For example, in Collier v. In his deposition, the plaintiff disputed that these employees were better qualified. The court said that the resulting credibility decision was best left for the trier of fact, and reversed a summary judgment ruling for the employer. On the other hand, in Russell v. Statistics are admissible in individual disparate treatment cases, but their usefulness depends on their relevance to the specific decision affecting the individual plaintiff. Although direct evidence of discrimination can be very powerful, courts often give little weight to discriminatory remarks made by persons other than decision makers, "stray" remarks not pertaining directly to the plaintiffs, or remarks that are distant in time to the disputed employment decision. Glenbrook Security Services, Inc. If the case goes to a jury, the elaborate McDonnell Douglas formula should not be part of the jury instructions. If the employer proves that it had another reason for its actions and it would have made the same decision without the discriminatory factor, it may avoid liability for monetary damages, reinstatement or promotion. Nashville Banner Publishing Co. In general, the employee is not entitled to reinstatement or front pay, and the back pay liability period is limited to the time between the occurrence of the discriminatory act and the date the misconduct justifying the job action is discovered. Pattern or practice discrimination[edit] In class actions or other cases alleging a widespread practice of intentional discrimination, plaintiffs may establish a prima facie case using statistical evidence instead of comparative evidence pertaining to each class member. A disparate impact violation is when an employer is shown to have used a specific employment practice, neutral on its face but that caused a substantial adverse impact to a protected group, and cannot be justified as serving a legitimate business goal for the employer. The Fair Housing Act prohibits disparate treatment in the housing market due to race, color, religion, national origin, sex, family status, and disability. It receives and investigates any discrimination complaints that are filed.

Chapter 4 : Indirect Sex Discrimination

The burden of proof thus shifts to the employer once a presumption of direct or indirect discrimination is established by the employee in all claims of unequal pay or unequal treatment in conditions of work, coming within the scope of Article 3 of the Directive on the Burden of Proof

This is the original version as it was originally made. This item of legislation is currently only available in its original format. Explanatory Note This note is not part of the Regulations. Article 2 2 of the Directive sets out the definition of indirect discrimination for the purposes of the principle of equal treatment referred to in Article 2 1. Article 4 of the Directive requires every Member State to take such measures as are necessary, in accordance with their national judicial systems, to ensure that in complaints of sex discrimination, before a court or other competent authority, the burden is on the complainant initially to establish facts from which the court or competent authority may presume there has been direct or indirect discrimination. Thereafter, the burden shifts to the person who has allegedly discriminated against the complainant, the respondent, to prove that there has been no such discrimination. The Directive is only applicable to situations concerning equal treatment of men and women as regards employment and vocational training. The amendments come into operation on 20th August , subject to transitional provisions regulation 1. Regulation 2 provides for the substitution of Article 3 of the Order. The sole change made to paragraph 1 of Article 3 is that it will now apply only in respect of the provisions of the Order other thanâ€" Part III discrimination in the employment field , or any provision of Part IV, so far as it relates to vocational training. The new paragraph 2 of Article 3 sets out what constitutes direct and indirect discrimination for the purposes of the following provisions of the Orderâ€" Part III, and any provision of Part IV, so far as it relates to vocational training. Under new paragraph 2 a of Article 3, direct discrimination will occur when a person treats a woman less favourably than he treats or would treat a man on the ground of her sex. This is identical to the new paragraph 1 a and to the old paragraph 1 a which regulation 2 replaces. Paragraph 2 b provides that in circumstances relevant for the purposes of a provision to which the new paragraph 2 of Article 3 applies indirect discrimination will occur where a person applies an apparently neutral provision, criterion or practice to the detriment of a woman and to a substantially higher proportion of women than men, unless that criterion, provision or practice can be justified by objective factors unrelated to sex. Regulation 3 substitutes a new Article 5 in the Order discrimination against married persons in the employment field. The only change of substance is in sub-paragraph 1 b which relates to indirect discrimination. This reflects the provisions of new Article 3 2 b as substituted by regulation 2. Regulations 4 and 5 insert two new Articles into the Order. These Articles provide that the burden of proof will shift from the complainant to the respondent if the complainant can prove facts from which an industrial tribunal or county court respectively could, apart from the Article in question, conclude in the absence of an adequate explanation that discrimination has occurred. In those circumstances the burden of proof shifts to the respondent to prove that no such discrimination occurred. Regulation 6 inserts a new paragraph 3A into Article 66 of the Order. The amendment enables a county court to award damages in respect of an unlawful act of discrimination in respect of vocational training, falling within the new Article 3 2 b as substituted by regulation 2 whether or not the discrimination is intentional or unintentional. Regulation 7 makes consequential amendments to other provisions of the Order.

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Chapter 5 : Applying the Statutory Burden of Proof in Indirect Discrimination Claims | Old Square Chamber

Burden of proof and race discrimination. The Court of Appeal has confirmed in Oyarce v Cheshire CC that the reverse burden of proof applies in cases of direct and indirect race discrimination and.

Search Indirect Sex Discrimination Indirect discrimination is where there are rules or conditions which apply to everyone, but which affect one group of people more than the others, where there is no good reason for the rule. It is aimed at conduct or practice which, on surface, appears to be neutral or innocuous, rather than discriminatory, but which in effect, has an adverse impact on a particular sex or race. In the fictional case of Mary Smith, she was indirectly discriminated on sex that is unlawful under s 1 2 b b Sex Discrimination Act Before this, both the burden of proof and the definition of indirect discrimination were the same in cases of sex and race discrimination. Section 63A of the SDA changes the burden of proof. Now, where a complainant proves fact from which the tribunal can conclude, in the absence of an adequate explanation from the employer, that an act of discrimination has occurred, the tribunal must uphold the complaint unless the respondent proves he did not commit the act. Thus, the Regulations impose a statutory duty on the tribunal to shift the burden of proof where the facts establish a prima facie case of discrimination. Mary was an employee for seven years, who use to work full time as a personal assistant for Mr. Cohen before she had the baby and now she wanted a job share, to do part time work. Cohen has told her that the job is not open to part time staff or can it be job shared. Although there is no automatic right for women returning from maternity leave to job share as held in British Telecommunications plc v Roberts and Longstaff3. The EAT concluded that where the employer turned down this request, there is still a possibility of indirect discrimination. The test for determining whether an act was discrimination is objective and not subjective. The basic right to request flexible conditions has been introduced by s of the Employment Act , which will amend Employment Act Section 17 2 c EA substitutes a new S. This dependency right will take effect on April Cohen, will not be able to refuse request like this because he has no clear business reason. In Perera, it was held that a requirement or condition could only be said to exist when it amounted to a complete bar if not met. This means that the practices which are decisive in a particular situation but which are not absolute bars cannot form the basis of a claim. Perera had created a loophole whereby employers can simply relegate all job requirements to "mere preferences" and escape the domestic discrimination legislation. Thus full time working would be classed as a condition or requirement pre and most certainly would be a provision, criterion or practice under the amended section. There are few authorities on what constitutes a detriment10 in indirect discrimination. In Coker v Lord Chancellor11 the tribunal considered that to demonstrate detriment the appellant has to show that, for the objectionable requirement, Mrs Coker would have been qualified to be considered for the appointment. Mary had suffered a detriment in being deprived of the financial benefits. She could properly have done so with some prospect that her application would receive consideration. Detriment means being subjected to a disadvantage MoD v Jeremiah It affected her status of work, longer hours, less chances of promotion and less pay.

Chapter 6 : Disparate treatment - Wikipedia

burden of proof laid down in Article 8(1) of Directive /43 to a situation in which the existence of a discriminatory recruitment policy is alleged by reference to remarks made publicly by an employer concerning its recruitment policy.

The burden of proof then shifts to the employer to prove otherwise. If the nondiscriminatory explanation is not adequate, the tribunal has to find the discrimination proven. The Court of Appeal has now confirmed - in Wong v Igen Ltd and ors, Emokpae v Chamberlin Solicitors and anor, and Webster and ors v Brunel University - that the shifting burden of proof requires tribunals to adopt a two-stage approach. Thompsons were instructed in the Webster case by the AUT. What was the central issue? Although the facts in these conjoined appeals were very different, they all raised questions about how to interpret and apply the shifting burden of proof in race and sex direct discrimination cases. The same principle also applies to disability, sexual orientation and religious and belief discrimination cases. What did the courts decide? Wong v Igen Ltd: She complained of race discrimination, harassment and victimisation. The tribunal dismissed two of her claims, but held that it could infer discrimination in the absence of an adequate explanation for her third claim. Emokpae v Chamberlin Solicitors: Emokpae a Nigerian claimed she had been dismissed because of rumours that she was having a relationship with the office manager. She argued this would not have happened had she been a man. Again, the tribunal went through a two stage process, relying on the Barton guidance. The Court of Appeal concluded that the tribunal had failed to establish the facts from which it could have concluded there had been an unlawful act of discrimination. The case therefore failed at the first stage. Webster v Brunel University: Ms Webster who was of Asian origin was having a telephone conversation with another employee when she heard someone else in the background use the term "Paki". It was not clear whether that person was an employee. The tribunal said that she had not established facts from which it could conclude that there had been discrimination. It said that she had to show, on the balance of probabilities, that the respondent had done the unlawful act. It was not enough, as the EAT had suggested, that there was a possibility that the unlawful act was done by the respondent. It was for Ms Webster to show that the alleged discriminator had treated her less favourably. Revised guidance The Court of Appeal also revised the guidance in Barton as follows, to establish a two-stage test Stage one 1. The claimant has to prove, on the balance of probabilities, facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an unlawful act of discrimination. At this stage a tribunal should consider what inferences could be drawn from them, and must assume that there is no adequate explanation for them. If the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably, then the burden of proof moves to the respondent. It is then for the respondent to prove, on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of race, sex, disability, religion or belief or sexual orientation.

Chapter 7 : The Burden of Proving Direct and Indirect Discrimination | Analitika

burden of proof under Article The traditional tendency to place the burden of proof on the party who takes a case to court and seeks a change in the status quo would justify the fact that the applicant bears the burden of proof for prima.

Title VII, the PDA, the ADEA and the ADA allow plaintiffs to bring claims based on disparate impact, meaning that the employer has policy or practice which is neutral toward the protected class on its face, but has a greater statistical impact on a protected class in practice. Rather, this article will only address issues of proof in disparate treatment cases, meaning cases where the employee is intentionally subjected to adverse employment action or a harassment based on his or her membership in a protected class. This article assumes that you have read the article pertaining to the law under which you wish to proceed and that you have confirmed that 1 your employer is subject to that law and 2 you qualify for protection under that law. While these events are not mutually exclusive, the second category includes only claims where no tangible employment action was taken against the employee. Part 2 of this article discusses workplace discrimination claims based on harassment. Tangible employment action is a fairly easy concept to understand. You suffer tangible employment action when: Proving Workplace Discrimination When Tangible Employment Action is Taken When an employee alleges workplace discrimination involving tangible employment action, he or she is claiming that the employer intentionally subjected him or her to an adverse employment action due to his or her membership in a protected class. In rare cases, an employee can prove this through direct evidence, such as an employer specifically stating that its motive is discriminatory, or by applying a policy that is discriminatory on its face. In most cases, however, this will need to be proven through indirect evidence circumstantial , which involves a series of shifting burdens that the employee and employer must meet to prove or disprove the claim. This will depend on the type of adverse employment action taken by the employer. Under the indirect method in a hiring case, the plaintiff must allege: Under the indirect method in a firing case, the plaintiff must allege: Under the indirect method in an other adverse employment action case, the plaintiff must allege: You will notice that in hiring and firing cases, the employee does not need to specifically allege that he or she was treated differently from employees not in his or her protected class, and in most courts the employee does not even need to allege that the job at issue was ultimately given to someone outside the protected class. It is enough at this stage of proof to show that the protected employee was qualified to performed the job and was not hired or was fired. Note that this is purely a burden of production, not a burden of proof. In other words, the employer must simply produce a non-discriminatory reason for its actions â€" it need not prove that this is the actual reason it took the adverse employment action the burden of proof always remains with the plaintiff. In cases based on hiring, an employer could state that it hired a more qualified applicant. In cases based on firing, it could state that the employee had not met its legitimate expectations or that the employee had committed a terminable offense. There is a broad range of non-discriminatory reasons from which an employer can choose at this stage. For plaintiffs, this is the most difficult element of proof, and it is highly dependent on the facts of each individual case. In cases based on failure to hire, an employee could meet this burden by proving that he or she is more qualified than the applicant ultimately hired for the position. As you might imagine, whether someone is more qualified than another applicant may not be cut and dry. Variances in education quality of schools, types of degrees, etc. If an employer claims that the plaintiff was fired for poor performance, the plaintiff must prove that other similarly situated employees outside his or her class were not terminated for similar performance. Comparing the performance of two employees can prove to be highly subjective, so it is always helpful to have other evidence of discriminatory motive, such as derogatory comments by the employer against people in the protected class e. Workplace Discrimination Based on Mixed Motives Sometimes an employer will have more than one motive for taking adverse employment action against a plaintiff. If one of these motives is to discriminate against a protected class, it presents what is known as a mixed motives case. However, if the plaintiff can only prove that improper discrimination was a

motive, and not the substantial motivating factor for the decision, this drastically changes the types of damages available. In Section cases, a plaintiff may not be able to prevail at all â€" this is an area of unsettled law. Burden Shifting Happens Behind the Scenes in Workplace Discrimination Lawsuits In workplace discrimination cases, the jury is not instructed in burden-shifting procedures. Whether each side meets its relative burdens is usually more relevant to how the case proceeds prior to the trial. If a plaintiff fails to make out a prima facie case in his or her Complaint, the judge will dismiss the Complaint. We will discuss workplace discrimination cases based on harassment hostile work environment in Part 2 of this article. You Might Also Like -.

Chapter 8 : Burden of proof and race discrimination - Lexology

The burden-shifting framework created by McDonnell Douglas Corp. v. Green, U.S. , 93 S. Ct. , 36 L. Ed. 2d (), sometimes is referred to as an "indirect" means of proving employment discrimination.

Their likely impact has been the subject of some debate. They bring to an end a European process that began as long ago as early May , when the Commission tabled a draft Council directive on the burden of proof in the area of equal pay and equal treatment. Discussions followed and in November , 11 of the then 12 Member States reached agreement. The UK, however, exercised its veto. Then in January the European Parliament called on the Commission to submit a new draft directive, but referral to the social partners under the Social Chapter stalled the process. Finally the Commission submitted a new proposal in July The Directive The aim of the Directive is 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" Article 1. It is limited to sex discrimination in the fields of equal pay, equal treatment, pregnancy and parental leave Article 3. Equal treatment is defined as meaning that that there shall be no discrimination whatsoever based on sex, either directly or indirectly Article 2. Indirect discrimination is, for the first time in a European law measure, defined Article 2. The burden of proof is shifted to the employer in circumstances where there are facts from which direct or indirect discrimination may be presumed Article 4. Indirect discrimination Article 2. There must exist an apparently neutral "provision, criterion or practice". That apparently neutral provision, criterion or practice must disadvantage a substantially higher proportion of the members of one sex. If the first 2 elements are present, indirect discrimination will be established unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex. The regulations implement this change by way of amendment to section 1 of the Sex Discrimination Act "the Act". First, the heading for section 1 incorporates the words "direct and indirect discrimination". Secondly, whilst section 1 1 remains in substance the same, it no longer applies to employment. There is an equivalent amendment to section 3 of the Act concerning discrimination against married people. There is clearly a change in the law in so far as the Act now refers to "provision, criterion or practice" rather than a "requirement or condition". The latter made it necessary to identify a requirement or condition which operated as an absolute bar such that failure to comply with it absolutely prevented a woman obtaining the benefit in question: This rigidity is now removed, with the new definition seemingly wide enough to encompass both human resources policies and informal work practices in relation to recruitment and during employment. The amendments to the Act do not incorporate the actual words of justification used in the Directive, ie. This is no doubt because the UK courts have interpreted the Act as already incorporating the European concept of objective justification. An unfortunate side-effect of the implementation of the Directive, however, is that the statutory definition of indirect discrimination is different as between sex and race discrimination, at least until the Race Discrimination Directive is implemented, no later than 19 July This is implemented by a new section 63A of the Act which provides that where, on the hearing of a complaint, the applicant proves facts from which the tribunal could conclude in the absence of an adequate explanation that the respondent has committed an unlawful act of discrimination, the tribunal shall uphold the complaint unless the respondent proves that he did not discriminate. There is one viewpoint to the effect that this provision will not alter UK law at all. Commentators point to the settled law of King v Great Britain-China Centre [] IRLR , CA, and state that the new section does no more than codify the principle in that case that, where an applicant can demonstrate that she has been treated less favourably than a comparator, and there is a difference of sex, the tribunal looks to the employer to provide a rational explanation for the less favourable treatment. If no such explanation is forthcoming, or if the explanation is rejected by the tribunal, it may go on to infer that the real reason for the differential treatment was the fact that the applicant is a woman. However, a tribunal is not

bound to draw an inference in those circumstances: However, an alternative view is that placing the onus of proving discrimination squarely on the employer appears to go beyond the approach to inferential discrimination which permits but does not require the drawing of inferences. A tribunal will now be compelled to draw an inference of unlawful discrimination where there is no satisfactory explanation by the employer since the tribunal shall uphold the complaint unless the respondent proves that he did not discriminate. Whereas previously a tribunal would ask whether there was a satisfactory explanation and, if not, whether there was any basis for inferring that sex discrimination was the real reason, it now has simply to decide whether the respondent has shown it did not discriminate. On a separate note: The proposal extends the existing Directive to provide that sexual harassment at work constitutes a form of sex discrimination and that it is the responsibility of the employer to provide a work environment that is free from such harassment. The proposal now passes to the European Parliament for a second reading under the co-decision procedure. Specialist advice should be sought about your specific circumstances.

Chapter 9 : Victimisation: Burden of Proof

Plaintiff's Initial Burden of Proof in Intentional Discrimination Cases With Adverse Employment Action â€" The Prima Facie Case In "indirect proof" cases, the plaintiff must first make out what is known as a prima facie case of discrimination.

That is, it is the person seeking the benefit of the law who bears the burden of persuading the court that it should exercise its authority. Like many general principles, however, this rule has its exceptions, where for reasons of justice or public policy it makes sense to require the respondent to carry the onus of proof, or at least bear the burden of bringing evidence on a particular issue, which the plaintiff must then refute. In Australian tort law, for example, while the burden of proof generally rests on the plaintiff, it has been established that the defendant bears the burden of proving contributory negligence, or proving that the plaintiff failed to take steps to mitigate damages. Where direct discrimination is alleged, for example, the plaintiff is required to prove: As Professor Gaze notes: As a result of these two factors, there have been very few successful cases in which direct racial discrimination has been proved under Australian federal law. In each of these jurisdictions, there is an onus on the defendant to give an explanation for conduct which is prima facie discriminatory, either by proving on the balance of probabilities that their actions were not racially motivated, as in the U. Interestingly, this concept of a reversed burden of proof in discrimination matters is not entirely alien to Australian federal law. It is unclear why such a different standard of proof should apply only to a limited subset of employees those covered by federal regulation and only in the narrow field of employment termination. Once this has been shown, the respondent is then obliged to provide evidence of a non-discriminatory explanation for such a difference in treatment, in order to displace the assumption that it constitutes unlawful racial discrimination. Likewise, in cases of indirect discrimination, it is difficult for the plaintiff to prove a negative that there is no objective justification for the actions which have an adverse effect , but correspondingly easier for the respondent to prove a positive justification where one exists. In such circumstances, the Tribunal will look to the employer for an explanation. If no explanation is then put forward or if the Tribunal considers the explanation to be inadequate or unsatisfactory it will be legitimate for the Tribunal to infer that the discrimination was on racial grounds. The new sections of the Act state that: Non-Directive grounds of discrimination, such as colour or national origin, continue to be governed by the pre-existing judicial approach outlined above. While it is clear that this section alters the existing law to the extent that a court is now required, rather than simply permitted, to find in favour of the plaintiff when the respondent fails to provide an adequate explanation to rebut the prima facie evidence, [21] there remains a significant degree of confusion as to what facts must be established by the plaintiff before the burden of proof is shifted to the respondent. This conclusion is born out by the finding in this case that, where the plaintiff had shown only that they belonged to a racial minority and were treated unreasonably by their white employer, it was open to the court to draw an inference of discrimination, and thus shift the burden of providing an explanation onto the respondent. This is because, when the court is assessing whether a prima facie case has been made out, it is obliged to ignore any explanation offered by the defendant. It is possible, therefore, for the plaintiff to fail at the initial stage to shift the burden of proof onto the respondent, but still ultimately succeed in proving discrimination on the balance of probabilities. For example, if the complainant asserts that she is the only racial minority employed by the respondent, and the only employee to be demoted, the respondent may reply that the reason the complainant was demoted was because she frequently failed to show up for shifts. This argument is clearly an explanation, and would be ignored by the court when assessing whether a prima facie case had been made out. The respondent might also claim, however, that the complainant was treated identically to hypothetical or actual non-minority employees, who would also be demoted if they failed to show up for shifts. In this case, it is less obvious that the employer is presenting an explanation, since the argument is phrased in terms of denying the complainant was treated differently, and disputing the relevance

of the comparator group chosen by the complainant. Those cases that attempt to distinguish between arguments regarding the appropriate comparator which may be taken into account at the first stage and explanations which are relevant only once the burden of proof has shifted to the respondent often involve a great deal of highly complex and artificial reasoning. In Laing v Manchester City Council, the court held that, since it was so difficult to distinguish between these two types of evidence, and since the allocation of the burden of proof was really only relevant when the evidence of both parties was exactly matched, it made sense in most cases to abandon the two stage test all together. To assist claimants to make out their case against such uncommunicative respondents, the U. Under the Race Relations Questions and Replies Order , a complainant may ask the respondent any question relating to the allegation of race discrimination using a prescribed form. Answers to these questions are admissible in court, and a failure to respond or an ambiguous answer may allow the court to draw an adverse inference against the party concerned. In cases where direct discrimination is alleged, [34] the deliberative process in both jurisdictions may be divided into three stages: The plaintiff establishes a prima facie case of racial discrimination. The respondent articulates a legitimate reason for the apparent difference in treatment. The plaintiff proves that the reason given by the respondent is a mere pretext, and that the real reason for the disparate treatment is race discrimination. The case of McDonnell Douglas, [37] which has been cited in both U. It is sufficient for the plaintiff to prove: Elimination of these reasons for the refusal to hire is sufficient, absent other explanations, to create an inference that the decision was a discriminatory one. The Legitimate Explanation In both the United States and Canada, once the plaintiff has established the prima facie case of discrimination, the onus falls on the defendant to provide a reasonable explanation for why the allegedly discriminatory conduct occurred. The burden, which shifts to the defendant at this stage is, however, only an evidentiary burden. Proving that Race is the Real Motivation This third stage is often described as placing an onus on the plaintiff to rebut the legitimate explanation offered by the defendant. Under both American and Canadian law, an act is unlawful if it is motivated by race, regardless of whether other factors also motivated the practice. The tribunal could conclude, for example, that the plaintiff was fired due to personal animosity or incompetence, even where these explanations are not put forward by the defence. In the United Kingdom, for example, the statutory test is as follows: An unlawful employment practice based on disparate impact is established Similarly, in the Canadian context, once the claimant has shown that a particular policy or condition has a disparate impact upon a particular racial group, the onus falls on the respondent to prove, on the balance of probabilities, that the policy is a bona fide occupational requirement or that there is a bona fide justification for imposing that condition. This approach also avoids placing an obligation on the plaintiff to prove a negative fact â€" that there is no reason why such a condition is necessary â€" placing the onus on the respondent to prove a positive justification where one exists. Merely proving that an alternative, less discriminatory approach exists, which would achieve the same effect, is not sufficient if both means could be considered rational approaches to achieving the goal in question. R easonable satisfaction is not a state of mind that is attained or established independently of the nature and consequences of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. What remains unclear, however, is whether the Briginshaw higher standard of evidence will also be required even in those cases which only raise issues of unconscious or systematic discrimination, and do not accuse the respondent of deliberate misconduct. In several instances, it appears that the Briginshaw higher standard of evidence has been automatically required whenever racial discrimination is alleged, regardless of any analysis of the seriousness of the allegation or the consequences involved. As De Plevitz notes in her article analysing the application of this test, only in the area of discrimination law has the Briginshaw test been applied as a matter of course. In Canada, the Supreme Court has adopted the comments of Justice Dixon in Briginshaw, stating that, in a civil action: Significantly, however, neither the Canadian nor the U. Instead, both jurisdictions have obliged victims of discrimination to

prove their allegation according to the ordinary standard of proof, and have accepted that such allegations will normally rely on indirect inference, as direct evidence of discrimination is unlikely to be available. As set out in the Igen v Wong guidelines: Supreme Court in Price Waterhouse v Hopkins: While all four of the national jurisdictions considered in this paper apply a higher standard of evidence or require a higher standard of proof for the most serious of civil claims, this higher standard is not commonly applied outside of Australia, to allegations of racial discrimination. The practical effect of this difference is hard to quantify. Since most discrimination cases involve complex issues of credibility and evidence, it is hard to compare outcomes across jurisdictions, and state with any degree of certainty that a case decided one way in a particular court would have been decided differently in another. Nonetheless, it seems clear that the Australian courts are alone amongst the jurisdictions considered in expressly applying a higher standard of evidence to some, if perhaps not all, allegations of racial discrimination. When this is combined with the inflexible nature of the burden of proof, which remains on the plaintiff throughout, it is unsurprising that claims of discrimination have proved difficult to establish. Houtzager D, Shifting Perspectives: Note that this section applies only to directive grounds, however the non-directive definition s 1 1 b similarly requires the respondent to show that the provision is justified on non-racial grounds. Superintendent of Motor Vehicles v B. Supplement 1 March â€" 1 July at 6. It is unlike the Briginshaw standard, however, in the sense that it is not a flexible test that might be applied to all decisions in civil cases, but rather a set standard which will be applied in particular circumstances. In this cases, the Antiterrorism and Effective Death Penalty Act of stated that any factual finding made by a State court would be assumed to be correct, and the plaintiffs were required to produce clear and convincing evidence to overturn this assumption.