

Why the shift in the burden of proof is essential to equality law

Every time our country discusses equality law, as happened over the past weeks during the debate on establishing a Human Rights and Equality Commission, someone inevitably raises the issue of the shift in the burden of proof, presenting it as a criticism of equality legislation.

This is a rather peculiar criticism because the shift in the burden of proof has long been firmly established in both equality law and employment law, for reasons given below.

But before examining those reasons, it is important to understand what the burden of proof is and what shifting it actually entails. Whenever there is an alleged offence, regardless of its nature, the claimant, that is, the person alleging that an offence has occurred, must produce evidence showing that the alleged offence took place.

In equality law, and only in civil rather than criminal proceedings, this responsibility shifts to the respondent, that is, the person against whom the allegation is made, once the claimant establishes facts from which discrimination may reasonably be presumed. This is what is known as establishing a *prima facie* case.

Including a provision on the shift in the burden of proof in equality legislation is not a matter of political choice but a clear legal obligation arising from European Union (EU) Directives. Since the 1980s, the Court of Justice of the European Union (CJEU) recognised that legal protection against discrimination and harassment would be largely ineffective if people alleging discrimination were required to produce all the evidence from beginning to end. In many cases there is a clear imbalance of power, making it impossible for a person who has experienced discrimination to possess all the relevant evidence. More often than not, that evidence is in the hands of the person or organisation alleged to have discriminated.

The best-known judgment establishing this principle is the 1989 Danfoss case, which concerned alleged gender discrimination in pay. The claimant was able to show that women were being paid less than men, thereby establishing a *prima facie* case. However, only the employer possessed the information relating to the pay structure and the criteria used to determine salaries. It was therefore for the employer to provide that information so that the Court could determine whether the difference in pay resulted from gender discrimination or from legitimate factors unrelated to sex.

In other words, while the claimant still had to establish facts indicating the possibility of discrimination, the respondent then had to produce evidence demonstrating that those facts did not amount to unlawful discrimination.

As this process clearly shows, the shift in the burden of proof has absolutely nothing to do with a presumption of guilt. The respondent continues to benefit from the presumption of innocence, and a finding of discrimination can only be made after all the evidence has been examined. The shift in the burden of proof simply allows the court, tribunal or equality body, to consider evidence that the person alleging discrimination could never reasonably be expected to possess because it is under the control of the respondent.

Following this and other judgments of the CJEU, the European Union incorporated this principle into its legislation, initially through the Burden of Proof Directive and subsequently by including it directly in equality Directives. More recently, the same principle was also incorporated in the Pay Transparency Directive.

The shift in the burden of proof is what makes anti-discrimination rights genuinely accessible. Without it, many victims of discrimination would simply be unable to enforce the rights granted to them by law.

Consider another example.

A woman applies for a job vacancy. She satisfies all the requirements for the position but is not selected. Instead, a man who appears to have fewer qualifications is appointed. While these facts suggest that discrimination may have occurred, they do not in themselves prove it. The information necessary to assess the recruitment process, such as the evaluation criteria, interview notes, or the reasons for selecting the successful candidate, is in the employer's possession, not hers. Once she establishes a *prima facie* case, the burden of proof shifts and the employer is required to explain why she was not selected.

The employer may be able to demonstrate that the successful candidate possessed relevant skills, experience, or personal qualities that she did not, in which case the difference in treatment would not amount to discrimination. Or the employer may fail to provide a convincing explanation for the decision, in which case it may be concluded that unlawful discrimination has occurred.

The shift in the burden of proof in equality law has been part of our legal framework since the coming into force in 2003 of Chapter 456 *Equality for Men and Women Act*, and it is here to

stay. It exists because it makes the right to non-discrimination meaningful in practice and because it is a legal obligation arising from the case law of the CJEU and from EU Directives. What our country needs is not misplaced criticism of this principle, but a better understanding of what it means, why it exists, and how it should operate in practice within judicial proceedings.

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