

## International Labor Rights Case Law\_Template for Commentaries

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Decision-making body:	United Nations Committee on the Elimination of Discrimination against Women
Date of Decision:	7 November 2016
Case/Decision name:	<i>D.S. v Slovakia</i> , Communication No. 66/2014
Primary legal issues:	Burden of proof in discrimination cases, discrimination on grounds of gender and marital-family status, right to an effective remedy
Applicable legal provisions:	Article 2(a), (c) and (e) UN Convention on the Elimination of Discrimination against Women (CEDAW) in conjunction with Article 1 CEDAW and Article 11(1)(a) CEDAW
Hyperlink to case:	<a href="https://www.poradna-prava.sk/en/documents/views-adopted-by-the-cedaw-committie-in-the-case-of-d-s/">https://www.poradna-prava.sk/en/documents/views-adopted-by-the-cedaw-committie-in-the-case-of-d-s/</a>
Related cases, if any:	

Paragraph/page numbers to be extracted from decision/case:	7.4 7.5
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Summary of decision: facts/arguments of the parties/ final decision/ motivation (approx. 250 words; opinions about the judgment must be avoided):	<p>The claimant argued that the termination of her employment from the Slovak National Library (SNK) and the way it was carried out caused her to suffer psychological stress and humiliation. A reorganization within the SNK, she asserted, was used as a pretext to hide the discriminatory nature of her dismissal. Employed by SNK between September 1995 and March 2008, she went on maternity and parental leave in December 2001. On returning to work in January 2008, she was ordered to take her accrued annual leave. During this time, the SNK was reorganized. The claimant was notified that her position would be made redundant. The decision to dismiss her, she claimed, was due to the fact that as the mother of two small children she might not find a balance between work and family life. No other SNK position was deemed suitable for her according to her employer. The claimant initiated judicial proceedings, claiming that her dismissal was discriminatory on grounds of gender and marital and family status. Shortly after her termination, the SNK engaged two other persons to perform the tasks the claimant had performed. Domestic courts—district, regional, and constitutional—found that the claimant had failed to establish a prima facie case of discrimination. The United Nations Committee for the Elimination of Discrimination against Women found that the evidence on record was sufficient for national courts to make more than a “reasonable assumption” that the principle of equal treatment had been violated and, hence, to reverse the burden of proof. The Committee concluded that, by not shifting the burden of proof to the defendant, the State party violated the claimant’s rights under Article 2 (a), (c) and (e) read in conjunction with Articles 1 and 11</p>
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	(1) (a) of the UN Convention on the Elimination of Discrimination against Women.
Title of Commentary:	Reversing the Burden of Proof in Discrimination Cases: A Losing Battle?

## Introduction

*D.S. v Slovakia*<sup>1</sup> is a textbook example of how the two-stage burden of proof test in discrimination cases should not be applied.<sup>2</sup> A female employee returns from maternity and parental leave, is made redundant shortly thereafter, and brings a complaint before national courts that she was dismissed because of her gender and her family and marital status. In doing so, she establishes several relevant facts, many of which are not disputed by her employer.<sup>3</sup> These include a letter of apology to her from her employer's general manager regarding the insensitive conduct of her line managers in communicating her redundancy. This conduct, she claims, included condescending remarks as well as an outright confirmation that the actual reason for her dismissal was that she had two small children. Further, while her case was pending before national courts in 2010, the employer continued to use two "temporary" workers hired shortly after the 2008 organizational changes to perform "practically the same" tasks as the claimant before her employment was terminated.<sup>4</sup>

Against this backdrop and to fully appreciate how critical the correct allocation of the burden of proof is for the effective protection from discrimination, it is useful to take a step back and consider the issue within the wider normative context of EU equality law.

## Burden of Proof in European Equality Law

The question of discharging the evidentiary burden in discrimination claims is a notoriously difficult one. Requiring victims of discrimination to produce hard evidence of what was discussed or decided behind closed doors or in internal memos and confidential emails is bound to render the protection of equality legislation little more than dead letter. Respondents would effectively be able to escape liability in one of two ways. First would be to simply refuse to disclose relevant information.<sup>5</sup> Second would be to provide a "colourable story" that shrouds the claimant's version of events in doubt, eliminating the need to provide even a shred of evidence.<sup>6</sup>

This is why the reversal of the burden of proof in discrimination cases has arguably been one of the cornerstones in the development of European equality law and one of the crowning achievements of the Court of Justice of the European Union (CJEU). In the late 1980s and in the context of equal pay litigation, the CJEU came up with an innovative solution to what was an age

<sup>1</sup> United Nations Committee on the Elimination of Discrimination against Women, *D.S. v Slovakia*, Communication No. 66/2014, 7 November 2016 [*D.S. v Slovakia*].

<sup>2</sup> The two-stage burden of proof test that requires a reversal of the burden once a prima facie case of discrimination has been established is a standard feature of EU equality law.

<sup>3</sup> For the full list of the relevant facts that the Committee accepts as having been established see *D.S. v Slovakia*, para. 7.4.

<sup>4</sup> *D.S. v Slovakia*, para. 2.8.

<sup>5</sup> This continues to be an issue of contention in the recent CJEU rulings in *Kelly* and *Meister* on the reversal of the burden of proof.

<sup>6</sup> Evelyn Ellis and Philippa Watson, *EU Anti-Discrimination Law* (Oxford: Oxford University Press, 2012), 157.

old problem: when a claimant establishes “facts from which it *may be presumed* [emphasis added]” that discrimination may have occurred, then the burden shifts to the defendant.<sup>7</sup> Since then, this rule—rather simple at its core—was enshrined first in the Burden of Proof Directive and is now contained in Article 19 of the Recast Directive, which is materially significant for the decision under review here.<sup>8</sup> Substantively identical provisions on the reversal of the burden of proof are now contained in all EU equality law instruments, including the Racial Equality Directive, the Framework Directive (or Employment Equality Directive), and the Goods and Services Directive.<sup>9</sup>

That the reversal of the burden of proof should be counted as a standard feature of equality litigation in EU Member States has been the case for two decades.<sup>10</sup> National courts apparently continue to struggle with it, however. This is true even in factual settings when the application of the reasonable presumption test seems entirely straightforward. Such reluctance to shift the burden in accordance with the relevant EU legal framework removes the possibility of further judicial scrutiny and ipso facto deprives claimants from an effective remedy. *D.S. v Slovakia* is a case in point on both counts.

### **How National Courts (Mis)apply the Burden of Proof Test**

Faced with an abundance of facts all pointing in the same direction, it is difficult to see how national courts failed to acknowledge that the claimant in *D.S. v Slovakia* had clearly established a prima facie case of discrimination. The first stage of the burden of proof test requires nothing more than establishing facts from which an *inference of discrimination* can be made. In other words, even when an inference has been made, an employer will still be able to provide a nondiscriminatory explanation<sup>11</sup> or an objective justification, wherever this is permissible.<sup>12</sup> The rationale of the reversal of the burden under EU law is intrinsically connected to the principle of effectiveness, especially in relation to the obligation to provide effective remedies

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<sup>7</sup> Case C-109/88 *Danfoss* (1989), ECR I-3199. Article 19(1) of the Recast Directive reads as follows: “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.” It should be noted that Article 19(1) is materially relevant here, as the national law in question, the Slovakian Anti-Discrimination Act (including its Section 2 on the burden of proof), incorporates the Recast Directive into the domestic legal order.

<sup>8</sup> Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

<sup>9</sup> Article 8, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Article 10, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Article 9, Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

<sup>10</sup> Or, more accurately, three decades, as the birth of this legal innovation dates back to 1989 and *Danfoss*.

<sup>11</sup> In the context of an equal pay claim, for instance, by proving that the claimant and the comparator perform materially different tasks and, hence, the difference in pay is not linked to sex. See Case C-381/99 *Brunnhöfer v Bank der Osterreichischen Postsparkasse AG* (2001), IRLR 571, paras. 62, 63.

<sup>12</sup> Direct discrimination, except on grounds of age, cannot be justified under EU primary and secondary law. See Ellis and Watson, *EU Anti-Discrimination Law*, pp. 171–74.

and the principle of effective judicial protection.<sup>13</sup> It is obvious, therefore, that the threshold to prove a prima facie case cannot be too high without defeating the very purpose of the reversal. The *raison d'être* of the first stage of the test is to filter out manifestly ill-founded, unsubstantiated, or frivolous complaints.

One cannot fail to notice an air of exasperation in the Committee's choice of wording, when asserting that "from the evidence on record, there was more than a 'reasonable assumption' that the principle of equal treatment had been violated".<sup>14</sup> And there is evidence to suggest that the Committee is not alone in finding the approach of Slovakian courts to the burden of proof problematic. A joint report submitted to the Committee by the European Roma Rights Centre and the Slovakian Center for Civil and Human Rights specifically criticizes the lack of "legal consistency" in the application of the burden of proof rules by national courts.<sup>15</sup>

It may be that the CJEU is partly to blame for such lack of consistency, because of the inadequate guidance it provides national courts on how the burden of proof test should be applied. Contrary to the clarity and conviction with which earlier CJEU decisions such as *Danfoss*, *Enderby*, and *Brunhoffer* set out the core principles, more recent case law intended to fine-tune the relevant test sends out mixed messages.<sup>16</sup> In the controversial and much discussed *Kelly* ruling, for instance, the CJEU found that a refusal by the respondent to disclose information that may be crucial to determining whether discrimination occurred should not lead to any automatic presumptions by national courts on whether discrimination has occurred on the part of national courts.<sup>17</sup> Although such a refusal to disclose "could risk compromising"<sup>18</sup> the objectives of the original Equal Treatment Directive,<sup>19</sup> the CJEU conceded that the claimant's "entitlement to access can be affected by rules of European Union law relating to confidentiality."<sup>20</sup> In *Meister*, the CJEU confirms this rather ambivalent position: a respondent's "refusal to grant any access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination," but the final say on whether and how said refusal will be taken into account belongs to the national courts.<sup>21</sup>

What counts as a prima facie case of discrimination sufficient to shift the burden seems to be subject to different interpretations and modes of application in different EU Member States.<sup>22</sup> This is not to argue that the problem is solely judicial mis(interpretation) or (mis)application at the national level. Part of the story reduces to linguistic inaccuracies in the transposition of

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<sup>13</sup> Case 33/76 *Rewe-Zentralfinanz* (1976), ECR 1989; *Danfoss*, paras. 13-14; Case 199/82 *Amministrazione delle Finanze dello Stato v SpA San Giorgio* (1983), ECR 3595.

<sup>14</sup> *D.S. v Slovakia*, para. 7.5.

<sup>15</sup> European Roma Rights Centre and the Slovakian Center for Civil and Human Rights, "Parallel Submission for Consideration by the Committee on the Elimination of Discrimination against Women at the 62nd Session," 2015, <https://www.poradna-prava.sk/en/documents/written-comments-for-the-un-committee-on-the-elimination-of-discrimination-against-women/>, p. 4.

<sup>16</sup> Case C-127/92, *Enderby v Frenchay Health Authority and another* (1993), IRLR 591.

<sup>17</sup> Case C-104/10, *Patrick Kelly v National University of Ireland* (University College Dublin) (2011), I-06813.

<sup>18</sup> *Kelly*, para. 39.

<sup>19</sup> Directive 76/207, which was applicable at the time of the dispute,

<sup>20</sup> *Kelly*, para. 56.

<sup>21</sup> Case C-415/10, *Meister v Speech Design Carrier Systems GmbH* (2012), para. 47.

<sup>22</sup> *Milieu Ltd., Comparative Study on Access to Justice in Gender Equality and Anti-Discrimination Law* (Brussels: European Commission, 2011), p. 23, [http://ec.europa.eu/justice/gender-equality/files/conference\\_sept\\_2011/final\\_report\\_access\\_to\\_justice\\_final\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/conference_sept_2011/final_report_access_to_justice_final_en.pdf).

equality directives in national legal orders.<sup>23</sup> For instance, the relevant provision of the law transposing the equality directives in Bulgaria required the claimant to “*prove facts from which a conclusion that discrimination is at hand can be made [emphasis added]*” to shift the burden to the defendant.<sup>24</sup> This is perhaps also true to an extent in Slovakia, where the reference in Article 11(2) of the Anti-Discrimination Act to the claimant’s (initial) burden to provide “evidence” rather than to establish “facts” has been deemed problematic. In both these cases, the relevant provisions have been recently amended to better reflect the wording of the directives.<sup>25</sup>

In many cases, however, the incorrect implementation of the burden of proof rules is attributable to sheer “low awareness”<sup>26</sup> or lack of “meaningful comprehension” of the relevant legal framework by judges and equality bodies.<sup>27</sup> A major stumbling block appears to be that many national courts do not follow the two-stage test, preferring to address all evidentiary issues at the same time.<sup>28</sup> Predictably, in such cases it becomes impossible to clearly delineate the *prima facie* burden of the claimant, which often collapses into a requirement to prove the case in *toto*.<sup>29</sup> The role of the higher courts, then, in educating their counterparts in lower courts and tribunals and in adopting a consistent (and correct) doctrinal approach is vital. Some higher courts manage this responsibility considerably better than others. Where the Slovak Constitutional Court failed, the UK Supreme Court delivered an almost exemplary judgment, providing much needed clarity in application of the burden of proof rules in cases of indirect discrimination.<sup>30</sup>

### **Reversing Is the Only Way Forward**

The successful application of the burden of proof rules, then, hinges on the willingness of national judiciaries to be bolder and embrace the two-stage test for what it is: a tool that opens up a path to effective judicial protection, places employers’ practices, policies, and behaviors under judicial scrutiny, and invites the party who typically holds all the (evidentiary) cards to put them face up on the table. The reversal of the burden is significant for both direct discrimination, as in *D.S. v Slovakia*, and indirect discrimination, when the disparate impact of a facially neutral provision, criterion, or practice on a particular group would remain impossible to diagnose without access to information usually held by the employer.<sup>31</sup>

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<sup>23</sup> Although the transposition in most Member States is thought to be relatively accurate. See Milieu, *Comparative Study*, p. 23.

<sup>24</sup> Protection Against Discrimination Act, 2003, Art. 9 (not in force). The law was amended in 2015 and the new Art. 9 now refers to “produces (presents) facts from which an inference that discrimination is at hand can be made.” See European Network of Legal Experts in the Non-discrimination field (European Network of Legal Experts), *Country Report – Non-Discrimination: Bulgaria* (Brussels: European Commission, DG Justice and Consumers, 2016), p. 68.

<sup>25</sup> For Slovakia, see European Network of Legal Experts in the Non-discrimination field, *Country Report – Gender Equality: Slovakia* (Brussels: European Commission, DG Justice and Consumers, 2016), p. 47.

<sup>26</sup> European Network of Legal Experts, *Reversing the Burden of Proof*, p. 24.

<sup>27</sup> *Country Report – Non-Discrimination: Bulgaria* (Brussels: European Commission, DG Justice and Consumers, 2016), p. 67.

<sup>28</sup> Milieu, *Comparative Study*, p. 25.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Essop and others (Appellants) v Home Office (UK Border Agency) (Respondent); Naeem (Appellant) v Secretary of State for Justice (Respondent)* (2017), UKSC 27.

<sup>31</sup> This is the common definition of indirect discrimination across the EU equality directives. For a more detailed discussion of the three forms in which indirect discrimination may occur see: European Network of

*D.S. v Slovakia* could become an important point of reference in the development of equality and antidiscrimination law nationally and internationally for two reasons. First, it reveals succinctly and eloquently what is at stake when the burden of proof test is misconstrued. Failure by national courts to reverse the burden when they should do so will automatically amount to a violation of the claimant's right to an effective remedy under the CEDAW. Second, and even more important, this apparently symbiotic relationship between burden of proof and the right to an effective remedy seems to extend the scope of application of the relevant EU rules beyond the EU's jurisdictional borders. In other words, national courts in non-EU Member States may be deemed to not provide effective judicial protection from discrimination if they fail to apply the two-stage burden of proof test and shift the burden to the respondent once a prima facie case has been established.<sup>32</sup> It may still be too early to gauge whether this sui generis extra-territoriality will have any real bite, especially given the problems in applying the test that courts in EU Member States face. Still, if the message is loud, clear, and consistent both in and outside the European normative territory cautious optimism is warranted.

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Legal Experts, *The Prohibition of Discrimination under European Human Rights Law: Relevance for the EU non-discrimination directives - an update* (Brussels: European Commission, DG Justice and Consumers, 2011), p. 23.

<sup>32</sup> The European Court of Human Rights seems to have adopted a similar position—and with specific reference to the EU Equality Directives—recognizing the need to adapt evidentiary rules with a view to lowering the evidentiary burden of the claimant. See *Nachova and Others v Bulgaria* (Appl. nos 43577/98 and 43579/98), 26 February 2004.