

DISCRIMINATION IN CZECH AND EUROPEAN EMPLOYMENT RELATIONS AND CASE-LAW

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PROGRAMME

- ◉ Direct discrimination
- ◉ Indirect discrimination
- ◉ Sexual harassment
- ◉ Unequal treatment
- ◉ Claims of discrimination
- ◉ Reversing the burden of proof

DIRECT DISCRIMINATION

Definitions - EU

- Article 2 (1)(a) of Directive 2000/78/EC
- Article 2 (1)(a) of Directive 2006/54/EC, Article 2 (1)(a) of Directive 2000/43/EC
- *"Where one person is treated less favourably on grounds of sex (racial or ethnic origin, religion or belief, disability, age or sexual orientation) than another is, has been or would be treated in a comparable situation"*
- Instruction to discriminate against persons (Article 2 (2)(b) of the Directive)

DIRECT DISCRIMINATION

Definitions - CZ

- Section 2 (3) of the Anti-discrimination Act
- *"Behaviour/Disregard, where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of*"

DIRECT DISCRIMINATION

Definitions - CZ

⦿ This includes:

- Instruction to discriminate against persons (Section 2 (2) of the Anti-discrimination Act)
- Where one person is treated less favourably on presumed discriminatory grounds (Section 2 (5) of the Anti-discrimination Act)

⦿ Reference to the Anti-discrimination Act:

- Section 16 (2) of the Labour Code (in employment relations)
- Section 4 (2) of the Employment Act (access to employment)

DIRECT DISCRIMINATION

Case-law - EU

⦿ Court of Justice of the EU C-177/88 (Dekker)

- If an employer refuses to enter into an employment contract with a pregnant candidate, whom they otherwise consider to be suitable, this may be considered as direct discrimination on the grounds of the possible unfavourable consequences of recruiting a pregnant woman

DIRECT DISCRIMINATION

Case-law - CZ

⦿ Supreme Court 21 Cdo 1165/2013

- A female employee for a fixed period
- A selection procedure was declared in which the female employee was unsuccessful
- The female employee alleged that no selection procedure was declared for the positions occupied by men (direct discrimination)
- She sought cancellation of the selection procedure, further the obligation of the employer to reconsider her employment contract and an award of compensation

DIRECT DISCRIMINATION

Case-law - CZ

⦿ Supreme Court 21 Cdo 1165/2013

- The measures which the employee seeks must be capable of remedying the unlawful state
- The employer cannot unilaterally decide on issues of employment relations reserved for agreement
- Nothing would be gained by cancellation of the selection procedure = employment would still finish at the end of the fixed period
- According to legislation the declaration of a selection procedure is at the discretion and within the exclusive power of the university (employer)

INDIRECT DISCRIMINATION

Definitions - EU

- Article 2 (1)(b) of Directive 2006/54/EC
- *"Where an apparently neutral provision, criterion or practice would put persons at a particular disadvantage... compared with other persons...*
- *unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary"*

INDIRECT DISCRIMINATION

Definitions - CZ

- Section 3 (1) of the Anti-discrimination Act
- *"Behaviour/Disregard, where an apparently neutral provision, criterion or practice would put persons at a particular disadvantage on discriminatory grounds"*
- *"UNLESS that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary"*

INDIRECT DISCRIMINATION

Case-law - EU

◉ Court of Justice of the EU C-77/02 (Steinicke)

- Indirect discrimination may lie in the fact that part-time work may be permitted for older employees only if they have previously worked full-time for at least 3-5 years, if significantly more women than men work part-time, so women are excluded from employment in part-time work at an older age
- Unless such a measure would be justified by objective facts without discrimination on grounds of sex

INDIRECT DISCRIMINATION

Case-law - CZ

◉ Supreme Court 21 Cdo 612/2006

- An employee demanded shorter working hours (due to child care)
- The employer failed to comply (for serious operational reasons)
- The employee claimed that two male employees were released on internships at the same time
- The employee viewed this behaviour as indirect discrimination

INDIRECT DISCRIMINATION

Case-law - CZ

⦿ Supreme Court 21 Cdo 612/2006

- Discrimination (direct or indirect) does not follow just from the contention that two male employees were released on internships at the time of application

SEXUAL HARASSMENT

Definitions - EU

⦿ Article 2 (1)(d) of Directive 2006/54/EC

- ⦿ "...where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment"

SEXUAL HARASSMENT

Definitions - CZ

- ⦿ Section 4 (1) and (2) of the Anti-discrimination Act
- ⦿ *"Unwanted conduct associated with grounds of discrimination (sex), of a sexual nature,*
 - *whose purpose / effect is violation of the dignity of a person and creation of an intimidating, hostile, degrading, humiliating or offensive environment, or*
 - *which may reasonably be perceived as a condition for decisions affecting the exercise of rights and obligations arising from legal relationships"*

SEXUAL HARASSMENT

Case-law

- ⦿ Court of Justice of the EU - practically no case-law exists
- ⦿ Supreme Court - likewise an absence of case-law, occurring at most at the level of employees' assertions, which they fail to demonstrate

SEXUAL HARASSMENT

Case-law - CZ

- ◉ Supreme Court, file ref. 21 Cdo 572/2011
 - The employee claimed she had been sexually harassed
 - The employer reportedly, among other things, forcibly dragged the employee from the counter to the corridor and knocked her over
 - The Supreme Court was unconvinced: the employee failed to demonstrate that she was actually exposed to the unwanted conduct
 - If she could have proven it, it would be sexual harassment and she would be entitled to compensation

UNEQUAL TREATMENT

- ◉ Unequal treatment, but not originating on discriminatory grounds
- ◉ Unequal treatment is permissible *if it is clear from the nature of the work that this difference in treatment is an essential requirement necessary for its performance; the objective pursued by this exception must be justified and the requirement proportionate* (Section 16 (3) of the Labour Code)

CLAIMS OF DISCRIMINATION

Definitions - EU

- Article 18 of Directive 2006/54/EC
- *"(Member States shall introduce ... measures...) to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered."*

CLAIMS OF DISCRIMINATION

Definitions - CZ

- Section 10 (1) and (2) of the Anti-discrimination Act
 - Desisting from discrimination (= continuing)
 - Reparation of the consequences of discrimination (= not continuing, but there are consequences)
 - Adequate compensation, in serious cases in monetary form
- Furthermore:
 - Damage compensation (Labour Code, Civil Code)
 - Interference with protection of person (Civil Code)

REVERSING THE BURDEN OF PROOF

Definitions - EU

- Article 19 (1) of Directive 2006/54/EC
- *"...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"*

REVERSING THE BURDEN OF PROOF

Definitions - CZ

- Section 133a of the Civil Procedure Code
- *"If the complainant establishes, before a court, facts from which it may be inferred that the defendant has committed direct or indirect discrimination on grounds of sex ... in work and other employment activities, including access to them ... the defendant is required to prove that the principle of equal treatment has not been breached"*

REVERSING THE BURDEN OF PROOF

Case-law - CZ

⦿ Supreme Court 21 Cdo 246/2008

- Employees have a duty to argue that they were put at a disadvantage by the conduct of their employer and that the motive is one of the discrimination
- Shifting of the burden of proof to the employer does not affect the whole allegation of discrimination
- Employees must prove that they have been disadvantaged
- The employer shall argue and demonstrate only that there was no breach of the principle of equal treatment (i.e. the motive behind the actions was not the alleged grounds of discrimination)

THANK YOU FOR
YOUR ATTENTION!

doc. JUDr. Petr Hůrka, Ph.D.