PROVING DISCRIMINATION

THE SHIFT OF THE BURDEN OF PROOF

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SHIFTING THE BURDEN OF PROOF

- **The purpose**

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

Article 10 - Burden of proof

1. 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.

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

3. Paragraph 1 shall not apply to criminal procedures.

4. Paragraphs 1, 2 and 3 shall also apply to any legal proceedings commenced in accordance with Article 9(2).

5. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

SHIFTING THE BURDEN OF PROOF

§ 133a of the Czech Code of Civil Procedure

If the plaintiff would state the facts from which it may be presumed that there has been direct or indirect discrimination

a) on the basis of sex, racial or ethnic origins, religion, belief, disability, age or sexual orientation in the area of labour relations including the access to to labour, job relations, entrepreneurship or other private business activities, membership in trade unions or employers' organizations and professional chambers,

[…]

c) on the basis of sex with regards to the access to goods and services,

it shall be for the defendant to prove that there has been no breach of the principle of equal treatment.

Cf. Germany, General Equal Treatment Act (AGG), § 22:

If in the event of a dispute, one party proves evidence that suggests discrimination on a reason mentioned in § 1, the other party bears the burden of proof that there has been no violation of the provisions on protection against discrimination

WHAT MUST BE PROVEN BY PLAINTIFF?

In relation to **indirect discrimination cases**, Article 4 of Directive 97/80 sets out the rules concerning the allocation of the burden of proof as between the employer and the employee. A complainant who makes an allegation of indirect discrimination must adduce proof that the contested provision actually produces a disparate impact on women. The burden of proof at this initial stage of procedure thus rests on the employee. The requirement for the employer or the legislature to produce justification for a practice or a policy that is neutral on its face will arise only if such proof is provided. Once such evidence has been produced, the employer or the legislature, depending on the origin of the measure, will have to demonstrate that the measures concerned pursue a legitimate aim, are strictly necessary to achieve this legitimate aim and are proportionate.

- Para 25 of the opinion of GA Maduro of 8 May 2006, *Cadman* (C-17/05).

Statistics as a typical example of the disparate impact

WHAT MUST BE PROVEN BY PLAINTIFF?

- **Direct discrimination**: necessary to distinguish two situations:
  - (1) Everyone has the right to a certain service or another fulfilment (being served in a bar, restaurant, getting a room in a hotel, equal pay at job etc.)
  - (2) Other decisions make by their very nature a choice among a plethora of candidates; the fact that one person was chosen among many is not suspicious by itself (e. g. promotion of one employee to a higher position, hiring a new employee to a single job vacancy etc.).

What Must Be Proven By Plaintiff?

Southern Health Board v Mitchell **[2001] E.L.R. 201 (Ireland)**

" The first requirement is that the claimant must establish facts from which it may be presumed that the principle of equal treatment has not been applied to them. This indicates that a claimant must prove, on the balance of probabilities, the primary facts on which they rely in seeking to raise a presumption of unlawful discrimination.

It is only if those primary facts are established to the satisfaction of the Court, and they are regarded by the Court as being of sufficient significance to raise a presumption of discrimination, that the onus shifts to the respondent to prove that there is no infringement of the principle of equal treatment.".

What Must Be Proven By Plaintiff? – Equal Pay Cases

CJEU: Judgment of 26 June 2001, *Susanna Brunnhofer*, C-381/99

"as a general rule, it is for employees who consider themselves to be the victims of discrimination to prove that they are receiving lower pay than that paid by the employer to a colleague of the other sex and that they are in fact performing the same work or work of equal value, comparable to that performed by the chosen comparator; the employer may then not only dispute the fact that the conditions for the application of the principle of equal pay for men and women are met in the case but also put forward objective grounds, unrelated to any discrimination based on sex, to justify the difference in pay".

What Must Be Proven By Plaintiff? – Hiring New Employees

CJEU: Judgment of 19 April 2012, *Galina Meister*, C-415/10 (disclosure of information)

Some sort of deficiency in the recruitment process, some sort of suspicion is crucial!!!!

44 Among the factors which may be taken into account is, in particular, the fact that, … the employer in question in the main proceedings seems to have refused Ms Meister any access to the information that she seeks to have disclosed.

45 Moreover, … account can also be taken of, in particular, the fact that [employer] does not dispute that Ms Meister's level of expertise matches that referred to in the job advertisement, as well as the facts that, notwithstanding this, the employer did not invite her to a job interview and she was not invited to interview under the new procedure to select applicants for the post in question.

46 [Directives do not entitle] a worker who claims plausibly that he meets the requirements listed in a job advertisement and whose application was rejected to have access to information indicating whether the employer engaged another applicant at the end of the recruitment process.

47 Nevertheless, it cannot be ruled out that a defendant'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. It is for the referring court to determine whether that is the case in the main proceedings, taking into account all the circumstances of the case before it.

What Must Be Proven By Plaintiff? – Hiring New Employees

CJEU: Opinion of AG Mengozzi of 12 January 2012, *Galina Meister*, C-415/10

32. … given that the employer refused to disclose information, it is not unlikely that that employer can, in that way, make his decisions virtually unchallengeable. … the employer continues to keep in his sole possession the evidence upon which ultimately depend the substance of an action brought by the unsuccessful job applicant and, therefore, its prospects of success. In the context of a recruitment procedure, it should also be borne in mind that the position of the applicant — inevitably external to the undertaking in question — makes obtaining evidence or facts from which it may be presumed that there has been discrimination even more difficult than if the applicant sought to prove that the employer applies discriminatory measures in respect of conditions of employees' pay, for example. The job applicant is therefore entirely dependent on the good will of the employer with regard to obtaining information capable of constituting facts from which it may be presumed that there has been discrimination and may experience genuine difficulty in obtaining such information which is, nevertheless, essential in order to trigger the lightening of the burden of proof. …

35. … the referring court must not overlook important evidence such as that in the present case deriving from, first, the applicant's qualifications match the post to be filled is not disputed by the employer even though the latter did not wish to call Ms Meister for a job interview, despite the fact that he called other applicants to such an interview, and, second, the fact that Ms Meister responded to the publication of a job vacancy and did not submit a spontaneous application. For the sake of clarity, the refusal of disclosure by the employer must be assessed differently, … where the applicant clearly does not fit the required profile, has been called for an interview or submitted a spontaneous application.

36. A third factor might also be considered. …first, the defendant in the main proceedings rejected the applicant's application by letter dated 11 October 2006 and, second, after the defendant had published a new advertisement on the internet with the same content, the applicant re-applied for the job on 19 October 2006 but her application was once again rejected without her being invited for an interview. When asked at the hearing about the reasons for publishing that second advertisement, the representative of the defendant in the main proceedings was unable to explain clearly the chronology of the recruitment process.

Access to information: the view of domestic jurisdictions

France: „the Defendant cannot argue the insufficiency of the Plaintiff's evidence if he failed to communicate the documents ordered by the court. The corollary consequence of the right to have access to the evidence held by the opposing party is that failure to comply transfers the burden of proof to the Defendant".

(Court of Appeal, Montpellier, No 0200504, 25 March 2003)

SHIFTING THE BURDEN OF PROOF IN HARASSMENT CASES

What is similar and what is different when compared with regular discrimination cases ?

- 61 With regard to the burden of proof which applies in situations such as that in the main proceedings, it must be observed that, since harassment is deemed to be a form of discrimination within the meaning of Article 2(1) of Directive 2000/78, the same rules apply to harassment as those set out in paragraphs 52 to 55 of this judgment.
- 62 Consequently […] the rules on the burden of proof must be adapted when there is a prima facie case of discrimination. **In the event that Ms Coleman establishes facts from which it may be presumed that there has been harassment**, the effective application of the principle of equal treatment then requires that the burden of proof should fall on the respondents, who must prove that there has been no harassment in the circumstances of the present case.
- Judgment of the Court of Justice of 17 July 2008, *Coleman*, C-303/06

SHIFTING THE BURDEN OF PROOF IN HARASSMENT CASES
SAMPLE CASE

Sex harassment at the work place

A bizarre example:

- In a lawsuit, the allegedly harassed employee "must not only allege, but also prove, that he or she has actually been treated in an adverse manner; if he or she fails to prove this allegation, he or she cannot succeed in the lawsuit. […] it is sufficient for the employee to allege that the adverse treatment (if proved) was motivated by one of the statutory discriminatory grounds, without being obliged to prove such motivation, since it is presumed, but rebuttable if the contrary is proved in the proceedings"

Judgement of the Czech Supreme Court of 3 July 2012, no. 21 Cdo 572/2011

PRIVATE TAPES AND VIDEOS

- New Czech Civil Code no. 89/2012 Sb. (§ 88 para. 1: the use of private recordings for the protection of rights, § 90 : proportionality)
- See judgment of the Czech Constitutional Court of 9 December 2014, no. II. ÚS 1774/14: "Under normal circumstances, the arbitrary recording of private conversations without the knowledge of the participants is a gross invasion of their privacy. [...] The Constitutional Court is firmly opposed to the unfair practice of electronic surveillance and covert recording of private and professional meetings, which, as a rule, not only contravenes the law but, judged from the social and ethical point of view, spreads an atmosphere of suspicion, fear, uncertainty and distrust in society. However, a completely different approach must be taken in cases where the secret recording of an audio recording of a conversation is part of the defence of the victim of a crime against the perpetrator or where it is a means of obtaining legal protection for a significantly weaker party to a significant civil and, in particular, employment dispute. The interference with the right to privacy of the person whose speech is recorded is fully justified here by the interest in protecting the weaker party to the legal relationship who is at risk of serious harm (including, for example, loss of employment)."