

Burden of proof in discrimination cases – Polish practice

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EU Anti-Discrimination Directives 2000/43 and 2000/78

Art. 8 (10): 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.



Polish Labour Code

Art. 18^{3b} § 1 of Polish Labour Code states that violation of the rule of equal treatment takes place when one employee is treated differently than other employees on the grounds given in the code (inter alia sex, age or ethnic origin) unless the employer proves that there were objective reasons of the differentiation in the treatment of the employee.

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Theory

- Polish legal doctrine and NGO representatives agreed that this regulation introduced a rule upon which the claimant is obliged to show only the facts from which it may be presumed that there has been discrimination (balance of probabilities). Then the respondent should prove that s/he hasn't discriminated.
- However, the other interpretations are possible especially such as that it lies on the employee to prove discrimination (then employer would have to prove that there were objective reasons for discrimination)



Practice

- Polish courts still very rarely refer to the EU secondary law, especially when the implementation to the Polish legal system took place
- It can be of decisive importance in case of the rule on reversal of burden of proof in the discrimination cases
- The practice of *amicus curiae* brief prepared by NGOs is limited to few cases
- Supreme Court judgement (III PK 30/06) – the claimant should show only the probability of the differentiation; then the burden of proof should be shifted (judgement was based on ICJ judgement C-196/02 Nikolouki)



M.H. Case – discrimination based on the ethnic origin

- **Facts**
- **Small Polish town/court - Bytów**
- **The burden of proof was not shifted despite claimant and HFHR clear opinion during proceedings as well as some of the witnesses' statements**
- **Court in fact decided at the very beginning that this is not a discrimination case for not to shift a burden of proof; the claimant was expected to prove the discrimination**

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B.K. case – discrimination based on sexual orientation

- **Facts**
- **The burden of proof was not shifted**
- **The suit was rejected. The court decided that low quality of work of the claimant was a reason for the dismissal.**

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Mirosław Sielatycki case (Compass Handbook)

- **Facts**
- **The court in Warsaw did not shift the burden of proof**
- **However, the discrimination was found by the court (it has been proven) and damages were awarded**



Conclusions

- **Need for change in Poland in discrimination cases**
- **Enforcement of EU directives is not sufficient**
- **Courts in practice expects the differentiation in treatment to be proven by the employee – they do not apply the standard of the balance of probabilities**
- **The court should clearly inform the parties when the fact of differentiation in treatment was shown to be probable and when the burden of proof is considered to be shifted.**

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Thank you for attention

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