

The Burden of Proof in discrimination cases

ERA, Trier,
22 November 2010

Richard de Groot

Introduction

EU law and non-discrimination

Lisbon Treaty:

- Commitment to non-discrimination
- Mainstreaming (art. 10 TFEU)
- ‘MS may take appropriate action’ (art. 19 TFEU)
- Directives 2000/43 and 2000/78

Developments burden of proof

- Difficulties in proving discrimination:
 - Equal pay: issue of comparison
 - *Danfoss* and *Enderby* cases: burden of proof shifts to employer,
 - If no transparent pay system exists
 - If statistics indicate an adverse impact on women
 - Burden of Proof Directive [1997] / Recast Directive [2006]

EC Directives

- Treaty of Amsterdam: Art. 13 TEC (now: art. 19 TFEU)
- Racial Equality Directive and Framework Directive included the BoP:
 - If claimants ‘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.’

Claimant's duty

- *Establish facts* from which a presumption of discrimination follows.
- Direct discrimination:
 - Prove the facts or circumstances on the balance of probability: substantiate the facts, e.g. witness statements

Claimant's duty

Example 1:

- *CGB 2010-51* Woman works through a job agency. Employer tells her she will get a fixed contract. She becomes pregnant and the employer now says there is no place at the department she works for. In a message to the agency, the employer quotes 'pregnancy' as the reason for termination.
- Q: are these facts to presume discrimination?

Claimant's duty

Example 2:

- *CGB 2010-45* Woman works on a temporary contract. She becomes pregnant. She states that the employer made a remark from which she assumed that the contract would not be renewed because of her pregnancy. The employer proved that the remark was made in a different context, and also proved that she did not perform well.
- Q: are facts established to presume discrimination?

Claimant's duty

- Indirect discrimination:
 - Preamble Directive: 'by any means including on the basis of statistical evidence'
 - Common knowledge, e.g. language requirement in job announcement
 - Statistical evidence: to conclude that the measure has a disparate impact, e.g. women have lower salaries for the same work.

Claimant's duty

Example 3:

- *CGB 2009-35*: an NGO complains about a football club, who stated in the press they want to have a 50/50% membership of Dutch/migrant members. Current division is 20/80% Dutch/migrant. The club states that it wants to reach a balance that mirrors the local society. It also proves that they never excluded migrants from membership.
- CGB: no facts established.

Respondent's duty

- If the burden is shifted, the respondent needs to prove there was no violation of the law:
 - present facts that *explain* and *justify* the measure, practice or incident
 - *Feryn case* [ECJ 2008]: show that ‘actual recruitment practice does not correspond to those statements’.

Conclusion

- Previously: difficult to deliver proof of discrimination, as a result of difference in access to information
- EU law introduced tools that create a balance between plaintiff and employer/service provider



Commissie **Gelijke** Behandeling

r.de.groot@cgb.nl