

BURDEN OF PROOF IN SEX DISCRIMINATION CASES

ZDENĚK KÜHN



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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.

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).

WHAT MUST BE PROVEN BY PLAINTIFF?

- **Direct discrimination:** necessary to distinguish two situations:
 - Everyone has the right to a certain fulfilment (service in a bar, restaurant, a certain pay at job etc.)
 - Other decisions make a selection among a plethora of candidates; the fact that one person was selected 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.).

STATISTICS I

- Czech Constitutional Court's Judgment of 30 April 2009 no. II. ÚS 1609/08

STATISTICS II

- Czech Constitutional Court's judgment of 12 August 2015 no. III.ÚS 1136/13, para 50 (referring to the ECHR grand chamber judgment of 13 November 2007, no. 57325/00, *D. H. v Czech Republic*, § 188).

INTERPRETATION OF § 133A BY THE CZECH SUPREME COURT

- Judgment of the Supreme Court of 11 November 2009, no. 21 Cdo 246/2008, no. 108/2010 Sb. rozh. civ. (*Čaušević vs. Pražská teplárenská a.s.*)
- X but see the Constitutional Court's judgment of 8 October 2015 no. III.ÚS 880/15, *Mgr. Jiří Kužela vs. Dětský domov Uherské Hradiště*

SHIFTING THE BURDEN OF PROOF IN HARASSMENT CASES

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

SHIFTING THE BURDEN OF PROOF IN HARASSMENT 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

PRIVATE TAPES AND VIDEOS

- New Civil Code no. 89/2012 Sb.
- § 88 para. 1: the use for the protection of rights
- § 90 : proportionality
- See judgment of the Constitutional Court of 9 December 2014, no. II.ÚS 1774/14 (*Miroslav Kmoch*).