

## SUMMARY

# 2015/4 Burden of proof in mobbing, dignity and discrimination cases (CR)

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## Summary

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## Facts

The plaintiff in this case was a highly qualified manager. He held a university degree in Civil Engineering and Architecture. His position within the construction company that employed him (the defendant) was Manager I. In the recent past the defendant had tried to dismiss him, but he had brought legal proceedings and in 2001 the dismissal was nullified and he was awarded compensation. The legal proceedings did not help to improve the working relationship between the parties.

In 2002, the defendant demoted the plaintiff to the level of Manager II and relocated him to another workplace. There, he allegedly experienced harassment and discrimination. He was instructed to do things that were not included in his job description, such as driving

employees to construction sites (even though he lacked the appropriate driving licence and the company had drivers for that purpose); he was given a room without a telephone whereas all of his colleagues had telephones; and he was subjected to behaviour that he found humiliating. The situation became so bad that he had to seek psychiatric help.

In 2006, the plaintiff brought legal proceedings against his employer. He claimed damages on the grounds that his personality rights had been violated and that his mental health had suffered on account of harassment by his employer (mobbing), as a result of which he had lost dignity, honour and reputation and his health had been impaired. This claim was based on the Croatian Labour Act as it stood at that time (the Labour Act 2004).

In the course of the proceedings an expert witness concluded that the plaintiff suffered from anxiety disorder, that this disorder was caused exclusively by the situation at his workplace, that his feelings of degradation, humiliation and isolation were caused by the type of work he was instructed to perform and that his condition was related to the fact that he had been treated differently (unequally) to other employees in similar positions.

The court of first instance drew a distinction between mobbing and violation of dignity. The relevance of the distinction lay in the different rules on burden of proof. According to the court, an employee who brings a claim based on mobbing, which in essence is a discrimination claim, bears the burden of proof that he has been mobbed. By contrast, an employee who claims that his dignity has been violated by the employer only needs to allege the violation, following which, the employer bears the burden of disproving it.

The plaintiff failed to adduce sufficient evidence of mobbing and the mobbing claim was therefore dismissed. Mobbing is a type of discrimination defined in the Labour Act 2004. That Act contains an exhaustive list of discrimination grounds. The fact that an employee is more (or less) highly educated than his colleagues is not listed and it does not entitle him to preferential treatment.

The plaintiff appealed to the Court of Appeal, but without success. He then appealed to the Supreme Court.

## **Judgment**

The Supreme Court held that the distinction made by the lower courts between mobbing and violation of dignity was a false one. The Labour Act 2004 obliges employers to protect the dignity of their employees. This includes protecting them against harassment (mobbing) by the employer. Therefore, the lower courts should have applied the burden of proof rules that apply to violation of dignity. In other words, the employer should have been required to prove

that the plaintiff's dignity had not been violated.

Secondly, the Supreme Court held that the plaintiff's claim was based on the fact that his level of education was different from that of his comparators. The Labour Act prohibits discrimination on the following grounds: race, skin colour, gender, sexual orientation, marital status, family responsibilities, age, language, religion, political or other opinion, national or social origin, wealth, birth, social status, membership or non-membership of a political party or trade union and physical or psychological disability.

The lower courts correctly held that this is an exhaustive list (*numerus clausus*) and that it does not include discrimination on grounds of education. However, discrimination on that ground is prohibited by the Constitution, which provides that "everyone" has rights and freedoms regardless of race, skin colour, gender, language, religion, political or other opinion, national or social origin, wealth, birth, education, social status and other characteristics. The Constitution is of a higher order than other legislation and therefore discrimination on the basis of a person's education is prohibited even though the Labour Act 2004 is silent on it.

For these two reasons, the Supreme Court nullified the lower courts' judgments and ordered a retrial by the court of first instance. Unfortunately we have no information about what has happened since the Supreme Court's judgment.

### **Commentary**

This case was litigated on the basis of the Labour Act 2004, which predated Croatia's accession to the EU. In 2008, Croatia transposed the EU directives that apply to discrimination in employment.

The Labour Act 2004 contained similar burden of proof rules in respect of discrimination as apply under the EU directives. In other words, the employee needs to establish facts from which discrimination may be presumed, following which the burden of proof shifts to the employer.

However, the Labour Act 2004 also contained special rules for claims based on violation of dignity, which is a sub-species of discrimination. All the employee needed to do in this type of proceedings was allege violation of dignity and the burden of proof would shift to the employer. This special arrangement was abolished in 2010.

The Labour Act 2004 talks of "harassment at work" and this is known by the general public as "mobbing". The term "mobbing" does not appear in the legislation. Mobbing is considered to have always existed, but is only recently being recognized as having a distinct and negative

impact on employment relations. Since mobbing is not defined in law, it is interwoven with discrimination and harassment. There was an attempt in 2007 to define mobbing specifically by means of a special Act and provide appropriate protection against it, but this has not resulted in new law.

The reason why the lower instance courts erred may be because of lack of experience of the subject matter. According to information from the Municipal Court in Zagreb, between 2005 and 2010, there have only been 89 first instance cases where discrimination was claimed. Of these, only 21 have been completed within those five years. There have been verdicts in only eight of them, the rest having been either withdrawn or rejected.

### **Comments from other jurisdictions**

*Germany (Dagmar Hellenkemper):* Unfortunately, it is not clear why the plaintiff in this case was discriminated against or had been a victim of mobbing because of his “higher education”. However, Directive 2000/78/EC and its German transposition, the AGG (*Allgemeines Gleichbehandlungsgesetz*) currently only prohibits discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation. This list is seen as exhaustive in Germany and German Courts for example rejected claims for damages when a plaintiff argued she had been discriminated against because of her weight (cf. *Schreiner/Hellenkemper*, Being Overweight does not constitute a disability, EELC 2014/55) and ruled that the employers’ behaviour could only be seen as discrimination if the plaintiff was overweight to the point where it presented a disability.

The legal aspect of the burden of proof follows the general rule in Germany that the burden of proof lies with the person who brings forth the claim. The burden of proof in mobbing cases therefore lies with the victimized employee. He has to outline all actions of the mobbing, German Courts often require the victim to present some kind of “mobbing diary”.

**Subject:** Other forms of discrimination; harassment

**Parties:** V.B. – v – C.K. Plc

**Court:** Vrhovni sud Republike Hrvatske (Supreme Court of the Republic of Croatia)

**Date:** 2 March 2011

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**Creator:** Vrhovni sud Republike Hrvatske (Supreme Court of the Republic of Croatia)

**Verdict at:** 2011-03-02

**Case number:** VSRH Revr 1648/2009-2