

SUMMARY

2015/3 Sex discriminatory decision not to rehire does not lead to reinstatement (CZ)

<p>The burden of proof of alleged discrimination in Czech labour law cases is distributed between the parties in compliance with the relevant EU Directives. The plaintiff must first present facts based on which it can be presumed that he or she was subject to discrimination and only then is the defendant required to try to prove that the principle of equal treatment was not breached. In cases where the alleged discrimination was caused by a selection procedure in which another candidate was successful and was offered the job, in order to have a chance of success, the plaintiff must also claim that the selection procedure itself was discriminatory.</p>

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Facts

The plaintiff in this case had been a female employee of the Charles University in Prague since December 1997. Her initial three-year contract had been extended in 2000 by two more years, until the end of 2002. In October 2002 the Defendant started a selection procedure to find a new employee for the plaintiff's position. The plaintiff participated in the selection procedure but was not successful and lost to another candidate.

In November 2005 (just before the expiry of the three-year time-bar for a monetary claim), the plaintiff filed an action with the court, seeking cancellation of the selection procedure and its results, an order for the employer to reconsider her candidacy and damages for non-pecuniary harm amounting to CZK 1,200,000 (approximately EUR 41,000, based on exchange rate as of the date on which the action was filed). The plaintiff claimed in particular that during her employment with the defendant she had been subject to mobbing and sexual harassment by her direct superior. In May 2002 she had informed the defendant about this, but was merely given a letter in July 2002 informing her that the defendant felt free to exercise its right to start a selection procedure for her position.

The employment contracts with male employees were extended without any selection procedure. Therefore, the plaintiff felt that she was subject to discrimination and unequal treatment on grounds of sex.

The court of first instance dismissed the action because there was insufficient evidence that the selection procedure had been started either as retaliation for her complaint about harassment or that the results of the selection procedure were rigged in order to harm her. Therefore, no discrimination or unequal treatment was proven. The appellate court confirmed the decision of the court of first instance, stating (i) that the plaintiff did not prove that she was treated in an unfavourable way and (ii) that the defendant did prove that it had not breached the duty of equal treatment, as specified in Article 4(1) of EU Directive 97/80/EC (the directive on burden of proof in sex discrimination cases, repealed in 2006 by the Recast Directive 2006/54).

The plaintiff then filed an extraordinary appeal to the Supreme Court, arguing that she was subject to direct discrimination on grounds of sex, as provided in the EU Directive 76/207 (as amended by Directive 2002/73/EC). The plaintiff also argued that according to Czech procedural regulations, a statement that a participant was directly or indirectly discriminated against because of gender shall be considered proven by the court in labour law cases unless it is proved to the contrary in the proceedings.

Judgment

The Supreme Court dismissed the extraordinary appeal, so confirming the decisions of the

courts of first and second instance. Regarding the individual claims of the plaintiff, the Supreme Court explained that:

The positions of the academic staff of a public university are occupied based on a selection procedure. A selection procedure does not have to be held in the case of repeated employment of the same employee in the same position. In such cases, it is up to the university to decide whether to hold a selection procedure. The Supreme Court also explained that in this case, cancellation of the selection procedure and its results would not remedy the alleged discrimination, as the plaintiff's employment would still have terminated by the end of 2002 due to the expiration of her definite term contract.

The employment contract had been entered into in 1997 and extended in 2000, which was before the alleged discrimination started. Therefore, the fact that the plaintiff was employed on the basis of a fixed-term contract and not on a permanent contract was not, in itself, discriminatory. The plaintiff must have been aware that she had no right to an extension of her contract. Moreover, an employer cannot unilaterally decide on questions of employment that are subject to the agreement of both parties.

The plaintiff cannot be awarded the claimed compensation simply on the basis that she did not carry the burden of proof. The Supreme Court explained that the Czech procedural regulations implementing the provisions of EU Directive 97/80/ EC must be interpreted to mean that the plaintiff must present facts from which it can be presumed that discrimination took place. However, the plaintiff did not claim that the selection committee voted in a discriminatory way. The mere fact that there was a selection procedure and that it had certain outcomes cannot of itself be considered as revenge against the employee. By contrast, the defendant proved that about half of all the successful candidates in its selection procedures are female. Therefore, no discrimination on grounds of sex was proven.

Commentary

The judgment of the Supreme Court once again confirms that in labour law cases of alleged discrimination, the preponderance of the burden of proof is with the defendant, but not from start to finish of the proceedings. The plaintiff must first present facts based on which it can be presumed that the plaintiff was subject to discrimination. Only if sufficient facts are presented must the defendant prove that it did not breach the principle of equal treatment.

The judgment went further. The Supreme Court explained that in cases where a plaintiff claims he or she was discriminated against by a selection procedure, the plaintiff must also present facts showing that the selection procedure itself was discriminatory and that either the selection criteria or voting of the selection committee was discriminatory. Otherwise, an

action to remedy discrimination cannot succeed.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): The judgment, as reported above, does not reveal why the plaintiff had to undergo a competitive selection procedure in order to have her contract extended, whereas her male comparators did not. Did the courts not ask the employer to explain this? The courts seem to have accepted the employer's claim to have discretion to decide whether to extend the plaintiff's contract provided she could not prove the decision to make the extension conditional on a selection procedure was not in retaliation for her complaint and the selection was not rigged.

Subject: discrimination, unequal treatment

Parties: MUDr. K. G. – v – Univerzita Karlova v Praze (Charles University in Prague)

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