SUMMARY

2013/3 Pay discrimination claimants entitled to see colleagues’ contracts, pay slips, bonus awards, despite privacy objections (FR)

<p>Employees who feel discriminated against in terms of remuneration can bring a claim before a summary trial judge – prior to any trial on the merits of the case - and obtain disclosure of the pay slips of other employees to whom they compare themselves.</p>

Summary

Employees who feel discriminated against in terms of remuneration can bring a claim before a summary trial judge – prior to any trial on the merits of the case - and obtain disclosure of the pay slips of other employees to whom they compare themselves.

Facts

Two female employees were hired on 1 January 1987 by Radio France as production managers. They claimed that numerous colleagues (of both sexes), who were in the same situation performing the same job, received higher pay and were classified in a higher category and they brought an action before a summary trial judge (based on Article 145 of the Code of Civil Procedure) to obtain production by their employer of evidence relating to twelve other employees of the company to whom they compared themselves, including their pay slips, in order to demonstrate that the way they were treated was discriminatory.

Judgment

On 27 July 2009, the Industrial Tribunal of Paris dismissed the employees' request.

The Court of Appeal of Paris overruled the decision of the Industrial Tribunal and ordered the Company to produce (under penalty of a daily fine) the employment contracts, addendums and pay slips of the other employees in the Company to whom the claimants compared themselves, as well as the amounts of bonuses distributed since 2000, along with advancement and promotion charts. The Court of Appeal held that the disclosure of such documents was not in breach of those other employees' personal life, as professional activity was a public issue.

Radio France appealed this decision before the Supreme Court on two grounds: that the Court of Appeal had violated (i) Article L.1134-1 of the French Labour Code by reversing the burden of proof in a case of discrimination and (ii) Article 9 of the Civil Code, L.1121-1 of the Labour Code and Article 2 of the Declaration of Human Rights, as the disclosure of employment contracts and payslips of twelve other employees, who were not a party to the dispute, was a clear breach of the privacy of those employees and a breach of business confidentiality.

The Supreme Court dismissed the appeal, holding that: "respect of an employee's personal life and the protection of business secrets are not, per se, obstacles to the application of Article 145 of the Code of Civil Procedure, where the judge finds that the measures requested have a legitimate purpose and are necessary to protect the rights of the party who has requested them. Further, Article 145 of the Code of Civil Procedure is not limited to the preservation of evidence but may also assist with its production and therefore the Court of Appeal rightly and within its power of discretion held that the employees had a legitimate reason to obtain access to documents necessary for the protection of their rights, which were in the sole possession of their employer but he had refused to produce".

Commentary

The Supreme Court's decision comes as a big surprise, especially given its longstanding position of protecting employees' personal lives and data.

Here, the judges ordered the production of documents containing personal information relating to third party employees, not party to the dispute, based on Article 145 of the Code of Civil Procedure. That Article provides that the court may, at the request of any interested party, order investigative measures before actual court proceedings begin, where there is a 'legitimate reason' for them. This may result in the production of evidence that influences the outcome of a dispute.

The Supreme Court's decision is a complete reversal of the burden of proof, as set out in Article L.1134-1 of the French Labour Code, in discrimination cases. Indeed, Article L.1134-1, which transposes Article 8 of EU Directive 2000/43/CE[1] on equality of treatment provides

that *"(...) the employee presents facts suggesting the existence of direct or indirect discrimination (...).Given these elements, it is upon the defendant to prove that his decision is justified by objective factors, unrelated to any discrimination. The judge will make his decision after ordering, if necessary, all investigative measures he deems necessary."*

Here, the Court of Appeal and the Supreme Court reversed the burden of proof by relying on Article 145 of the Code of Civil Procedure. According to the judges the 'legitimate reason' was the fact that only the employer possessed the information on the amount of wages – and therefore the claimants had no other way of obtaining it.

The Supreme Court's decision contradicts the current position held by the ECJ. In two recent decisions[2] the ECJ held that: *"Directive 97/80[3] does not provide a specific right for a person - who is victim of violation of the principle of equal treatment - to have access to information which could help to establish facts that could infer the existence of direct or indirect discrimination."* Yet according to the ECJ: *"it cannot be ruled out that a defendant's refusal to grant any access to information may be a factor to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination"*. The Supreme Court's decision breaks the fine balance between protection of victims of discrimination and the protection of personal life.

Further, this decision contrasts with the position of the ECtHR, which considers that personal life should be protected at all times even in professional relations[4], and that any violation of such right should be justified and accompanied by sufficient and adequate measures against any abuse[5].

The consequences of the decision are dire for employers: firstly, if it is justified by the circumstances, the judges could decide that the procedure under Article 145 of the Code of Civil Procedure can take the form of a non-adversarial process. This would mean that the employer would never be given the opportunity to be heard before the court takes its decision and a court order to produce evidence would be unilaterally imposed on the employer.

Secondly, given the general wording of the ruling, one cannot exclude the risk that in the future the judges may adopt the same approach in other types of litigation such as differential treatment and moral and sexual harassment. This means that employees will not be required to make any effort to gather and produce compelling evidence to support their claims, as the employer will be obliged to do it for them.

Comments from other jurisdictions

Finland (Johanna Ellonen): Finnish procedural legislation also allows for the possibility that a

party can request the court to order another party to produce a document, although the Finnish system appears to differ from the French one. The purpose of the obligation to produce a document is to enable the parties to gather all necessary evidence. The conditions on which the court will make an order are, however, strictly regulated. For example, it must be deemed that the content of the document has significance as evidence, and the party requesting it must be able to specify the document requested (including the issue to be evidenced, the type of document and when the document was created). A request for production of a document is usually handled in a preparatory hearing so that all relevant evidence is at hand for the main hearing. A court cannot order a party ex parte to produce a document.

The rules regarding the burden of proof in discrimination cases do not, as such, prevent the court from ordering a party to produce a document. What matters is whether the conditions described above have been fulfilled. Those conditions are aimed at preventing a party from having to make too broad a disclosure of documents. The question of burden of proof may be significant if the employee is requesting documents in order to prove something that is within the employer's burden of proof. Further, as the employer may be heard and may provide evidence before the production of a document can be ordered, the employee may not need to request documents, as the employer may already have provided them voluntarily.

The Netherlands (Peter Vas Nunes): This judgment is indeed surprising, for several reasons.

First, there is the procedure. The plaintiffs asked the court in injunction (référé) proceedings to order their employer to give them copies of documents evidencing their 12 colleagues' remuneration, and the court issued such an order. Although in this particular case a debate took place in which the company participated, the terms of Article 145 of the Code of Civil Procedure would have allowed the court to decide to issue the order without hearing either the employer or the colleagues. In The Netherlands, there is a somewhat comparable 'pre-trial discovery' procedure (although nowhere near as strong as American- style discovery), but it is not an ex parte procedure. On the contrary, the procedure involves litigating against the party that has the documents - and that party has ample opportunity to present its view.

Dutch law provides that a party that has documents relevant to another party's legal position need not provide copies thereof if that is not reasonably necessary for an adequate assessment of that other party's (potential) claim. In a case such as that reported above, a Dutch court would most likely have accepted such a defence. This has to do with the burden of proof in equal gender pay cases, which brings me to my second observation.

Suppose a female employee identifies a male colleague who performs "the same work or work

to which equal value is attributed" within the meaning of Article 4 of Directive 2006/54 and that she alleges that that comparator is paid a higher salary without good reason. Which party bears the burden of proof of which elements? In "EU Employment Law" (4th edition 2012, pages 314-316), Catherine Barnard distinguishes between two schools of thought. One, which she calls the "discrimination model", requires the claimant to show (i.e. to prove, if challenged) the three equal pay criteria, namely: (1) equal work/work of equal value, (2) different pay and (3) same establishment **and** an element of discrimination. The other "equal pay model" merely requires the claimant to show the three said criteria, in which case the burden shifts to the employer to show objective reasons for the pay differential unrelated to sex.

My interpretation of Dutch law is the following. An employee who alleges sex discrimination in pay bears, in principle, the burden of proof

(i)that the comparator performs equal work/work of equal value, (ii) that the comparator is employed in the same establishment and (iii) that the comparator is paid more. However, the employer cannot simply deny these claims without offering any substantiation of its denial. For example, if the employer denies that the comparator is paid more, it will need to substantiate its denial, for example by submitting a statement by a chartered accountant to the effect that there is no pay differential. Once the claimant has provided sufficient (*prima facie*) evidence of items (i), (ii) and (iii), it is up to the employer to demonstrate that the pay differential is objectively justified.

My conclusion so far is that I see no need for an employee who alleges sex discrimination in pay to obtain copies of her colleagues' pay slips, because the rules on burden of proof make this unnecessary.

Finally, the contributor of this case report observes that the *Cour de Cassation*'s judgment in this case contradicts the ECJ's rulings in *Kelly* and *Meister*. Admittedly, those rulings immediately came to mind when I read this case report, but I do see a difference. Kelly and Meister were job applicants (Kelly applying for continued employment, Meister for initial employment). They claimed on the basis of equal treatment. The plaintiffs in this French case were employees who claimed on the basis of equal pay. Kelly and Meister lacked any evidence of discrimination. They needed information on other candidates in order to be able to present prima facie evidence of (presumptive) unequal treatment. The plaintiffs in the French case had a more comfortable evidentiary position.

United Kingdom (Bethan Carney): The UK currently has a system to facilitate pre-action disclosure of information in discrimination cases but the Government proposes to

abolish it this spring, leaving the position on gathering this type of information slightly confused. The current system, called the 'questionnaire' procedure, is included in the Equality Act 2010. It provides that a complainant can ask a potential respondent questions (there is a special form for this purpose, although it does not have to be used) and a tribunal can draw an inference of discrimination if there is no reply within eight weeks or an evasive or equivocal answer. For example, a potential claimant who believed she may have been overlooked for promotion because of her sex could ask questions about how many women the employer had appointed to senior positions over the last five years. Or a woman contemplating an equal pay claim could ask about the pay rates for comparators within the company. If possible, information provided would usually be anonymised to protect the confidentiality of other employees and it would not usually include copies of original documents (such as pay- slips).

Once the questionnaire procedure has been abolished, which will probably happen in April 2013, the position on requesting information will be less clear. An employee will still be able to write to an employer and ask questions. If the employer fails to answer or answers evasively, the employee might ask the tribunal to draw an inference of discrimination and shift the burden of proof to the employer to prove that it had not discriminated. However, the burden of proof will not shift unless the employee has shown facts from which (in the absence of an explanation by the employer) the tribunal could infer that discrimination had taken place. In other words, there would need to be a prima facie case of discrimination before the burden of proof would move to the employer. An employee would not be able to ask questions as part of a 'fishing expedition' – i.e. asking random questions without any justification just in case the answers disclose evidence of discrimination. Employment practitioners are waiting to see how much difference in practice the removal of the questionnaire procedure will make.

There are also several additional ways in which an employee who claims discrimination can seek to obtain further information from the employer. An employee can seek to obtain personal data about him or herself by making a data protection subject access request. This might uncover, for example, emails in which managers discussed the claimant. However, it would not reveal comparative information about other colleagues. Alternatively, once a claim has been started in a tribunal, the claimant can apply to the tribunal for an order for the respondent to provide further information if its pleadings are not sufficiently specific. The tribunal will also always make an order for disclosure, which will require the respondent to disclose copies of documents on which it intends to rely or which would help the claimant's case or harm its own case. A claimant can also request the tribunal to make an order for the disclosure of specific relevant documents.

Footnotes

1. Article 8: "Member States shall take the necessary measures, in accordance with their legal systems, so that, when a person believes is victim of violation of the

principle of equal treatment and establishes, before a court or other competent authority, facts from which it may be presumed the existence of a direct or indirect discrimination, it is upon the defendant to prove that there has been no breach of the principle of equal treatment."

2. ECJ, 21 July 2011 case C-104/10 (Kelly) and ECJ 19 April 2012 case C-415/10 (Meister).

3. Directive 97/80/CE dated 15 December 1997 on burden of proof in case of gender discrimination.

4. ECtHR 16 December 1992, NIEMIETZ - v - Germany appl. N° 13710/88 5. ECtHR 4 May 2005, ROTARU - v - Romania, appl. N° 28341/95.

Subject: Gender of discrimination, privacy

Parties: RF Company/Ms X & Ms Y

Court: Cour de cassation (French Supreme Court)

Date: 19 December 2012

Case Number: N° 10-20526

Hard copy publication: Official Journal

Internet publication: www.legifrance.gouv.fr > jurisprudence judiciaire > cour de cassation > case number

---

Creator: Cour de cassation (French Supreme Court)
Verdict at: 2012-12-19
Case number: N° 10-20526