SUMMARY

2013/22 Presumptive gender discrimination in rejecting job applicant disproved (NL)

<p>A female job applicant was rejected for a university professorship, for reasons that she felt to be gender discriminatory. The fact that the search committee consisted entirely of men, combined with other circumstances, made the court accept that there was <i>prima facie </i>evidence of discrimination. However, the university provided sufficient evidence to rebut the presumption.</p>

Summary

A female job applicant was rejected for a university professorship, for reasons that she felt to be gender discriminatory. The fact that the search committee consisted entirely of men, combined with other circumstances, made the court accept that there was *prima facie* evidence of discrimination. However, the university provided sufficient evidence to rebut the presumption.

Facts

The plaintiff was employed by the University of Amsterdam, in the Economics Faculty. She earned a PhD in 2001 and in 2004-2007 she did research for a department of the Faculty called History and Methodology of Economics ("HME"). Her employment with the university ended on 1 February 2008.

On 18 March 2008 the university published a vacancy for the position of Assistant Professor ("UD") in the HME department. The publication included the following text:

"Requirements are a PhD in economics […], the proven ability to initiate and implement research to international standards, the ability to stimulate and encourage the research of others, demonstrated teaching excellence, and the ability (or stated intention) to teach in both Dutch and English. Shortlisted candidates will be asked to present one of their papers at a seminar."

There were 25 applicants, of whom seven were women. One of those seven women was the 48 year-old plaintiff, who sent the search committee her CV and a letter of application that included the following text:

"My research in the field of history and philosophy of economics addresses the role of gender in the history and philosophy of economics; how gender has been constructed in economics in relation to its historical context, and how notions of gender have been structuring economic concepts and economics as a science. […] As such this research can contain a valuable addition to the research conducted at the HME."

The search committee shortlisted four candidates, all men. Contrary to the original plan, these four candidates were not asked to present a paper at a seminar. This was because all of the members of the committee knew all four candidates and skipping this step in the procedure would save a great deal of time and money. In the end a 31-year old man was selected for the vacant position. The plaintiff was informed, "*Yours was a very good application, and the search committee regarded it very highly. But the competition was also very strong, and we were emphasizing experience in teaching history of economic thought* […]".

The plaintiff requested a clarification as to why she was not selected for the vacant position. This resulted in extensive and detailed email correspondence, which included the following exchange:

"The information I am trying to get at is why I have not been selected and why this young man who has considerably less publications and experience than I, has been selected instead. That I was not the best is not enough of an answer. […]

The criteria you put on the table (quality of publications, letter of reference, teaching experience and evidence of teaching performance) are not gender neutral, but not only that, they seem to change, they are not consistent with the advertisement and they do not cover the needs of the group. […]

When feminist economics is not recognized as a field of research, but even stronger when feminist economists are being punished for their activities in the field or leave because of the unfriendly and uncooperative environment what else to expect than that feminist economists leave economics? (…) Are you not concerned that your whole group consists of men right now? How do you explain that?

You have done the history of economics and feminist economics no favour by excluding me from the field of the history of philosophy of economics."

and:

"your publication list is not very strong in my view. (i) The UD position at Amsterdam is in history of economics. You have no publications in any of the leading history of economics journals. (…) (ii) You have no publications in any of the main methodology and philosophy of economics journals. (iii) Nine of your publications are in Dutch and German journals which are not widely read, not highly ranked, and not related to our fields. […]

So basically from the point of view of the Amsterdam UD position your publication record is weak. You do not publish in our field, nor do you publish in competitive, refereed locations. […]

I am not aware of your having teaching experience with respect to history of economics. […] I also have no indication that you are familiar with most of the history of economics. […] I had no reason to think you would be prepared to teach the course the new UD needs to teach in the field. […]

Contrary to your belief we are well aware of the small number of women in science and in our field, and we all wish to promote women whenever we can. In my view, however, this does not imply that one should promote a woman over a more qualified candidate when that candidate is a man, and advance the woman only because she is a woman. […]"

In November 2008, the plaintiff applied to the Equal Treatment Commission. In an Opinion dated 20 October 2009, following a detailed investigation, the Commission held that the plaintiff had presented a *prima facie* case of gender discrimination, which the university had not managed to rebut.

The plaintiff's next step was to hold the university liable for the loss she had sustained and to ask the university to explain what it was planning to do to prevent gender discriminatory hiring practices in future. The university declined liability, whereupon the plaintiff, supported by the *Clara Wichmann Foundation* (an organisation that supports and finances gender-based test cases) took the case to the District Court of Amsterdam.

Judgment

The court began by assessing whether the plaintiff had established sufficient facts from which it may be presumed that there had been gender discrimination. The court referred to remarks the government had made in Parliament in 2000 regarding the Bill that led to the provision in question (Article 3(1) of the Act on Equal Treatment of Men and Women). The government

had explained that a presumption of discrimination can be adduced from "*intermediary facts*". The burden of proving such intermediary facts rests on the plaintiff.

The court reviewed seven intermediary facts that the plaintiff had advanced:

1.the search committee consisted entirely of men;

2.it did not include any outsider, such as an HR manager;

3.the committee had changed and added to the requirements for the vacancy as it went along, meaning the procedure lacked transparency;

4.the committee did not play by its own rules, skipping the announced requirement of presenting a paper at a seminar, which fact indicated that the search committee's members' personal networks had played a role;

5.given that seven out of the 25 candidates, i.e. 28% of the candidates were female, statistically speaking at least one of the four shortlisted candidates should have been a woman;

6.the successful candidate was inferior to the plaintiff, since he had no teaching experience and was not able to lecture in English and Dutch;

7.women were underrepresented in academic positions in The Netherlands as a whole and in the Economic Faculty of the university in particular.

The university admitted points 1, 4, 5 and 7, denied points 2, 3, 4 and 6 and defended its position as follows.

Although the arguments it had used in the course of the correspondence with the plaintiff had not been identical, they were logically related to the requirements published in the job advertisement. The argument that the search committee had not asked the shortlisted candidates to present a paper at a seminar was irrelevant, seeing that this was something that occurred after the plaintiff's candidacy had been rejected. Furthermore, the university explained in detail how the plaintiff's expertise simply did not match what was needed for the job.

The court accepted that the plaintiff's arguments 1, 2, 4, 5 and 7, combined, were sufficient to find, *prima facie*, that the university had discriminated. As for point 4, although what happened after the plaintiff had not been shortlisted was strictly irrelevant, the fact that the search committee decided not to require presentation of a paper at a seminar could give credence to the impression that the procedure was not transparent and objective.

The next step was to determine whether the university had presented sufficient evidence to disprove the *prima facie* presumption. The court found that this was the case. Basically, it accepted that the plaintiff's academic credentials did not match the qualifications required according to the advertised vacancy. Among many other things, two things contributed to this finding. One was that all members of the search committee, independently of one another, had given each of the four shortlisted candidates, a "1" score, the highest score, which the plaintiff had not been given. Another was that the plaintiff had to admit that her specific field of expertise, feminist economics, was not part of the core of the MHE department's focus, given that in her letter of application she had written that "this research can contain a valuable **addition** to the research conducted at [MHE]" '[emphasis added].

Commentary

Article 19 of Directive 2006/54 (gender discrimination), Article 8 of Directive 2000/43 (race) and Article 10 of Directive 2000/78 (religion, belief, disability, age and sexual orientation) provide that "*Member States shall take all 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*". I will refer to these provisions as the "reversal rule", although a more precise description of the provision would be the "partial reversal of the burden of proof rule".

The reversal rule already existed under the ECJ's case law prior to 1997. It was codified in that year by Directive 97/80 (initially, for gender discrimination only). As for the rationale behind the rule, the recitals to Directive 97/80 merely state that "plaintiffs could be deprived of any effective means of enforcing the principle of equal treatment before the national courts if the effect of introducing evidence of an apparent discrimination were not to impose on the respondent the burden of proving that his practice is not in fact discriminatory". The recitals are silent on the reason why the reversal rule is considered to be reasonable. Presumably the thinking is that the employer, not the employee, is the party making decisions (to hire, promote, fire, etc.) and therefore it is the employer that has, or should have, the information regarding the reason for the decision. Put a different way, it is as a rule easier for the respondent to prove non-discrimination than it is for the plaintiff to prove discrimination. That, at least, seems to be the theory. In practice, the reversal rule can be hard on employers.

Unfortunately, the ECJ has provided almost no guidance on the reversal rule. In 2008, in the *Feryn* case (C-54/-07), it dodged the issue. The Belgian referring court had asked the

ECJ, *inter alia*, "What is to be understood by "facts from which it may be presumed that there has been direct or indirect discrimination" within the meaning of Article 8(1) of Directive 2000/43? How strict must a national court be in assessing facts which give rise to a presumption of discrimination?" and, "Is one fact sufficient in order to raise a presumption of discrimination?" and, "How strict must the national court be in assessing the evidence in rebuttals?" The ECJ merely held that the national court need only rely on "a simple finding that a presumption of discrimination has arisen on the basis of established facts" and that "it is for the national court to verify that the facts alleged against that employer are established and to assess the sufficiency of the evidence which the employer adduces in support of its contentions that it has not breached the principle of equal treatment". In the recent *Meister* case (C-415/10), the ECJ had another opportunity to provide guidance on the reversal rule, but again it passed up the opportunity, the relevant question 2 having become moot, given its reply to question 1.

In this Dutch case, the court addressed both aspects of the reversal rule head on:

a)how strong must *prima facie* evidence be to qualify as "facts from which it may be presumed that there has been direct or indirect discrimination"?

b)how strong must the respondent's rebuttal be to "prove that there has been no breach of the principle of equal treatment"?

Re a

The court uses an expression I had not previously come across, namely "intermediary facts". These are facts, to be supported by *prima facie* evidence that the plaintiff needs to present in order for the reversal rule to kick in. Basically, "intermediary facts" are no more - but also no less - than what is commonly described as circumstantial evidence. The plaintiff in this case presented seven pieces of circumstantial evidence, of which the court accepted five as constituting a sufficiently strong presumption of gender discrimination: the search committee consisted entirely of men, it did not include any outsider, the committee did not play by its own rules, none of the female candidates (28% of the total) had been shortlisted and women were underrepresented. The combination of these five facts led to the establishment of a presumption. Interestingly, one of these arguments (not playing by its own rules) related to a fact that occurred after the plaintiff had been rejected. What happens after an allegedly discriminatory decision has been made can shed light on the reasoning behind the decision.

In this case, lack of transparency did not play a role. In discrimination cases it frequently does play a role. One example out of countless cases on which the Dutch Equal Treatment

Commission has ruled, and in which lack of transparency played a crucial role, concerns an advertisement for a taxi driver. The Commission considered the lack of transparency in the way the candidates were selected, in combination with the fact that during the interview the plaintiff – a female candidate

–had been asked whether she had children, to be sufficient to establish a presumption of discrimination. Transparency was found to be lacking because (i) there was no written profile for the position of taxi driver; (ii) there was no list of requirements for the position; (iii) the interviewers based their decision on subjective impressions; and (iv) the interviewers had not made and retained for future reference notes on each candidate, making comparisons between the candidates difficult. The Commission referred to the ECJ's requirement that procedures (for selecting candidates, promoting employees, determining salary, terminating staff, etc.) must be "transparent, verifiable and systematic". The taxi company could not prove that its decision to reject the plaintiff's application was not discriminatory, something that is almost impossible to prove.

In the case reported above, statistics played only a minor role, perhaps because the plaintiff alleged direct discrimination. The plaintiff's argument that the university's reasoning changed as it went along (see for comparison, the German case in EELC 2012/46) also played no role.

Re b

Directive 2006/54 provides that, where there is presumptive discrimination, it is for the respondent to prove that there has been no discrimination. The court in this case was fairly lenient in accepting the university's rebuttal of the presumption of discrimination, particularly given the fact that Dutch case law does not accept the "mixed motive" defence (i.e. if there is one discriminatory reason and there are many non-discriminatory reasons for a decision, the decision is discriminatory). The fact that all members of the search committee had given the shortlisted candidates a better score than the plaintiff, combined with the fact that her specific expertise was not part of the relevant department's focus, were sufficient to consider discrimination disproved.

Subject: Gender discrimination

Parties: X - v - University of Amsterdam

Court: Rechtbank (District Court) of Amsterdam

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

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