

SUMMARY

## **2013/41 Employee claiming harassment must prove unequal treatment and discriminatory intent (CZ)**

***&lt;p&gt;For an employee bringing a discrimination claim against an employer it is not enough to only allege discriminatory behaviour, the employee also bears the burden of proof that he or she was either treated unequally compared to other employees or in an otherwise unfair way, and must show which of the employer&rsquo;s actions and/or behaviour is evidence of such treatment. Only after the employee proves the existence of unequal or unfair treatment does the burden of proof shift to the employer, which must then prove that the unfair treatment was not motivated by discrimination.&lt;/p&gt;***

### **Summary**

For an employee bringing a discrimination claim against an employer it is not enough to only allege discriminatory behaviour, the employee also bears the burden of proof that he or she was either treated unequally compared to other employees or in an otherwise unfair way, and must show which of the employer's actions and/or behaviour is evidence of such treatment. Only after the employee proves the existence of unequal or unfair treatment does the burden of proof shift to the employer, which must then prove that the unfair treatment was not motivated by discrimination.

### **Facts**

The plaintiff had worked for the Pardubice Fire Rescue Service (FRS) since 2001 as a department manager. She was directly subordinate to the director of the regional department of the Pardubice FRS. Starting in 2003, her manager began expressing to the plaintiff his

emotional feelings for her, in a way that went beyond socially acceptable behaviour. When the manager learned that the plaintiff had a new boyfriend, he told her that she must either stop dating him or terminate her employment. When the plaintiff refused, the manager began a campaign of insulting and vilifying her, as well as complicating her work. This lasted from 2003 until 2006 and resulted in health and psychological problems for the plaintiff.

The plaintiff brought a legal action against her employer. She demanded that the employer publish a written apology on its official notice board and compensate her in the amount of CZK 150,000 (about € 6,000) for immaterial harm. Her claims were repeatedly rejected by the court of first instance, until an appellate court finally reversed the decision of the lower court. In its reasoning, the Court of the Appeal concluded that the employer, through its manager, directly discriminated against the plaintiff based on her gender. The employer appealed to the Supreme Court.

### **Judgment**

According to the Supreme Court, discrimination in employment relationships is described as either active or passive behaviour that is motivated by a discriminatory reason that leads, through ostensibly neutral behaviour, either directly or indirectly, to a disadvantage for one or more employees compared with other employees of the same employer. If this is found, an affected employee may demand that the employer cease its discriminatory behaviour and remove the consequences of the behaviour. In the event these measures are not sufficient redress, an employee may demand financial compensation for non-monetary harm, such as the loss of the employee's dignity and respect in the workplace.

In all cases the employee must prove that the employer's treatment or behaviour towards the employee was unequal or unfair, stating the specific circumstances and describing specifically the behaviour the employee considers constitutes unequal or unfair treatment. Only if the employee does so successfully does the burden of proof shift to the employer, which must then prove that the unequal or unfair treatment was not motivated by a discriminatory reason. If it cannot do so, or the court otherwise finds that the employer did not breach its obligation to treat all employees equally and fairly, the court will consider the employee's allegations of discrimination as proven. The only advantage for the employee with this system is that he or she need not prove the motivation for the employer's behaviour.

In this case, the Supreme Court reversed the decision of both lower courts for lack of evidence that the plaintiff had been treated unfairly by her manager. The Supreme Court also reproached the Court of Appeal for not basing its decision on the statements of all witnesses, i.e. ignoring testimonies of the employer's witnesses on the grounds that these witnesses were

not trustworthy because of their relationship with the employer. The Supreme Court ordered the court of first instance to retry the case focussing specifically on the issue of whether the plaintiff had been treated unfairly. If so proven, it will then be for the defendant to prove that the treatment was not motivated by any unlawful (i.e. discriminatory) reason.

### **Commentary**

Disputes regarding discrimination, including harassment and sexual harassment, in employment relationships are still not very common in the Czech Republic. As a result, every Supreme Court decision sets precedents for future claims and provides information about allegations and proof within court proceedings. The main issue is still that of the reversed burden of proof, i.e. what must be stated and proven by the plaintiff and what is deemed as proven unless the defendant can show otherwise. This judgment repeatedly and expressly states that the plaintiff must not merely allege, but also prove that he or she was treated unequally compared to other employees or otherwise treated unfairly. However, the plaintiff need not prove the motivation for the behavior of the employer; the allegation that it was discriminatory is sufficient.

It is surprising that the Supreme Court, in its decision, did not specify discrimination based on harassment or sexual harassment. Neither the Supreme Court nor the lower courts mentioned that the case could be about harassment and did not determine a subjective element, which is always a part of (sexual) harassing behaviour. The word 'harassment' does not even appear in the Supreme Court's decision. Instead the Supreme Court assesses the case as one of discrimination and focuses on issues concerning breach of general principles of equal treatment of employees and prohibition of discrimination in employment relationships. By contrast, in harassment cases the court should determine amongst other things, whether the employer has a written anti-harassment policy or any other preventive measures in place, since not having these could lead to the burden of proof shifting to the employer on these grounds alone.

Under Directive 97/80/EC on the burden of proof in cases of discrimination based on sex, which was in effect at the time the court proceedings were initiated and incorporated into Czech legislation relevant at the time the behaviour in question took place, the burden of proof shifts to the employer if the employee establishes facts from which it may be presumed that there has been harassment. The Supreme Court in its decision explains this legal requirement by saying that the plaintiff must

(i) allege the existence of discrimination and (ii) prove that unequal or unfair behaviour took place.

Although Czech law has changed since 2006 and its regulations on burden of proof in employment discrimination cases are now based on Directive 2006/54/EC, the above interpretation of the Supreme Court is still relevant and continues to be used in new court cases. Czech law states - in full compatibility with EU Directive - that when an employee considers him or herself wronged because the principle of equal treatment has not been applied to him or her, the employee must establish the facts from which it may be presumed that there has been direct or indirect discrimination. Subsequently, it is for the employer to prove that there has been no breach of the principle of equal treatment.

This judgment is also important in that it describes in detail how a court should assess evidence and based on what criterion it should do so.

### **Comments from other jurisdictions**

*Klaus Thönißen (Germany):* The ruling of the Czech Supreme Court regarding the burden of proof would most likely be the same under German law. Section 22 of the German Equal Treatment Act (the (Allgemeines Gleichbehandlungsgesetz, the 'AGG') sets out the rule on the burden of proof as follows:

*“Where, in the case of conflict, one of the parties is able to establish facts from which it may be presumed that there has been discrimination on one of the grounds referred to in Section 1 [e.g. age], it shall be for the other party to prove that there has been no breach of the provisions prohibiting discrimination.”*

Therefore, in the case at hand, assuming the employee provided enough evidence to establish this presumption, the employer would have had to prove that there was no breach of the AGG's provisions.

With regard to the merits of the case reported above, I would think that the employee would have had a valid discrimination case under German law as well. No doubt the employee was treated unfairly by her supervisor and her behaviour (harassment) falls within the scope of the AGG. Her behaviour also falls within the scope of the Section 1 of the AGG, which provides that:

*“The purpose of this Act is to prevent or to stop discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation.”*

In the case at hand, the employee had probably been harassed on one of those grounds, because sexual harassment falls within the scope of the AGG. Even though the facts are not completely clear regarding sexual harassment, I believe the supervisor did sexually harass the

employee, because by showing his emotions he “*went beyond socially acceptable behaviour*”. If the termination was based on discriminatory reasons, a German court would consider the dismissal unlawful and the employee would be entitled to compensation for immaterial damages based on sexual harassment.

**Subject:** General discrimination, gender discrimination

**Parties:** P.P. - v - Fire Rescue Service of Pardubice region

**Court:** Nejvyšší soud České republiky (Supreme Court)

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**Case number:** 21 Cdo 867/2001

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**Creator:** Nejvyšší soud (Czech Supreme Court)

**Verdict at:** 2013-05-29

**Case number:** 21 Cdo 867/2001