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Distribution of the burden of proof in identifying harassment based on gender in an employment termination dispute (LT)

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Summary

On 3 October 2023, the Supreme Court of Lithuania adjudicated on a case under a claim brought by the claimant (the employee) against an international freight transport company (the respondent employer) for a declaration that his dismissal from employment was unlawful. The case concerned the distribution of the burden of proof in identifying the fact of harassment based on gender. In these proceedings, the employee disputed the lawfulness of his dismissal on the grounds of his failure to pass the probation. The employer, on the other hand, justified the termination of the employment contract by the fact that the employee had harassed another female employee on grounds of her gender. The latter had not complained about the harassment based on gender at court or to any other competent authority. The employer argued in the proceedings that the fact of harassment based on gender by the claimant had been presumed and, therefore, was considered to be established and that the employer did not have to prove that fact.
The court held that the conditions for a presumption of discrimination did not exist in the present case and that the fact of harassment on grounds of gender by the claimant could not be presumed under the law. This fact was to be proved in accordance with the general rule on the distribution of the burden of proof – the burden lies with the party who asserts the claim.

Facts

The contract of employment of the claimant was terminated under Article 36 of the Labour Code of the Republic of Lithuania – unsatisfactory results of probation. One of the circumstances indicated by the employer was that the employee had behaved unethically, destructively, and had threatened and harassed another female employee of the employer on grounds of gender, e.g. by implying that the transport sector was a male-only sector.

The court of first instance held that, first of all, it was relevant in this case to find out the content of the conversation between the claimant and the respondent's employee and then determine whether the content of that conversation constituted grounds for the respondent to dismiss the claimant for the failure to pass the probation. In the light of all the circumstances, the court held that the employer had not proved and the court had not identified that there had been any indications of harassment on grounds of gender in the actions of the claimant. However, since the fact of improper unethical communication was established, it was sufficient for the court to find that the employment contract had been terminated lawfully.

The court of appeal rendered a new decision whereby it upheld the claim and declared the claimant's dismissal from work unlawful. The court noted that the use of diminutives, such as 'babe' and 'tiddler' did not amount to harassment on grounds of gender. In the court's view, the statements that only men work in the transport industry and that women may not understand the transport business could not be regarded as extremely disrespectful or offensive to allow the conclusion that the claimant was, in general, not fit to work as a driver.

The employer lodged an appeal in cassation to the Supreme Court of Lithuania (the 'Court').

Judgment

The Court stressed that in the present case the employer supported the lawfulness of the employment contract termination by the fact that the claimant had harassed another female employee on grounds of gender and that the latter, who was questioned as a witness in the proceedings at issue, had not complained about the harassment on grounds of gender at court or to any other competent authority.

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The Court took into consideration the relevant provisions of national and EU law. First of all, in the proceedings concerning dismissal from employment, it is the employer who must prove the lawfulness of the dismissal. Where the employer lawfully relies on facts which are presumed under the law in order to prove this, such facts are considered to be established unless the party against whom the presumption is invoked refutes them in accordance with the procedure laid down by the law (Article 217 of the Labour Code). Article 19(1) of Directive 2006/54/EC (on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)) provides that Member States shall take 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. Paragraph 2 of this Article regulates that paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to claimants. The Court has held in relation to Article 19(1) of Directive 2006/54/EC that this provision establishes the obligation of the State to allocate the burden of proof in such a way that, if a person who has been subjected to discrimination (including harassment based on gender) provides prima facie evidence that discrimination (harassment based on gender) has taken place, it is for the respondent to prove that there has been no infringement. Article 3 of the Law on Equal Opportunities for Women and Men of the Republic of Lithuania establishes the presumption that the fact of direct or indirect discrimination has occurred and sets out the conditions under which such fact may be presumed to have occurred. The presumption of discrimination has been established in law in order to ease the burden of proof for the person complaining of discrimination, as proving the fact of discrimination can be difficult in practice. The conditions set out in this Law for recognising such fact as presumed – the hearing of complaints and applications from natural persons and disputes concerning discrimination on grounds of gender at courts or other competent authorities.

In the light of the above-mentioned provisions as a whole, the Court held that this case did not concern any complaints and applications from natural persons, as well as disputes between persons concerning discrimination on grounds of gender. The dispute heard in the present case, having regard to the cause and subject matter of action as well as the respondent's replies, should be classified by its nature not as a dispute concerning discrimination on grounds of gender but as an employment dispute concerning the lawfulness of termination of the employment contract made between the parties. It should also be taken into consideration that the case-file data did not allow the conclusion that the respondent in this case was not acting as an independent subject of the legal relationship at issue, but rather as the legal representative of the person who claimed to have been subject to the harassment on grounds of gender. Therefore, it was concluded that the conditions for the presumption of the fact did not exist in the present case. Thus, the circumstance invoked by the respondent concerning the alleged harassment of another employee based on gender by the claimant was not presumed under the law and was to be proved in accordance with the general rule of the burden of proof.

The Court upheld the decision of the court of appeal, however, it pointed out that some reasoning (content) of the court of appeal concerning the fact of discrimination (see Facts, above) teetered on the brink of (in)correctness.

Commentary

The main dispute in this case concerned the distribution of the burden of proof in employment disputes that indirectly concern potential discrimination (harassment based on gender). It should be noted that the Court has clearly distinguished the disputes according to their nature and parties. The presumption of discrimination and the burden of proving that there has been no discrimination applies only where the dispute at issue is directly related to discrimination, i.e. where the presence/absence of discrimination is an essential element of the claim. Meanwhile, in disputes where the existence/absence of discrimination is not the direct subject matter, the general rules on the burden of proof apply.

Comments from other jurisdictions

Germany (Andre Schüttauf & Rebekka Barthold, Luther Rechtsanwaltsgesellschaft mbH): The case at hand is of interest to us for two reasons: Firstly, it deals – at least as far as we understand – with a dismissal during the probation, and secondly, it is about the distribution of the burden of proof in cases of discrimination.

As far as dismissal in general is concerned, there is general protection against dismissal in Germany if the employment relationship has existed for more than six months and operational requirements (thresholds of employees employed) have been met. If an employee is in the probation period (which may not last longer than six months in Germany), there is no general protection against dismissal. The consequence is that practically the employer does not need a reason for dismissal as long as its decision is not based on arbitrariness. It can therefore be assumed that the main issue of the decision – the distribution of the burden of proof regarding the existence of discrimination – would not have had such

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significance if the case would have to be decided in Germany. This is because, on the one hand, the employer – irrespective of possible discrimination – invokes other reasons, namely unethical and destructive behaviour on the part of the employee, and on the other hand, the employer's belief that the employee simply did not meet the expectations placed on them would already be sufficient grounds for dismissal within the probationary period if the employer refers to them.

As far as the question of a discrimination and the distribution of the burden of proof is concerned, in Germany the so-called General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, 'AGG') applies. According to Section 12(1), the employer is obliged to take the necessary measures to protect against discrimination. If employees behave in a discriminatory manner, the employer must, according to paragraph 3 of this provision, take the appropriate, necessary and reasonable measures in the individual case to prevent the discrimination, such as a warning, redeployment, transfer or dismissal. However, that does not stipulate an independent reason for termination. The legal requirements for a termination must still be observed. Even before the AGG came into force, the Federal Labour Court (*Bundesarbeitsgericht*, 'BAG') had already determined (judgment of 8 June 2000, 2 ABR 1/00) that the protective measures to be taken by the employer against sexual harassment at the workplace do not entitle the employer to dismiss an employee accused of harassment if the relevant act cannot be proven. This has not changed since the AGG came into force and Directive 2006/54/EC was transposed into German law. The lowered burden of proof to assume discrimination in the case of indications – as it is mentioned in the Lithuanian decision – also exists in German law, but would not be applicable in the case of a termination.

Italy (Ornella Patané, Toffoletto De Luca Tamajo): In Italy, during the probationary period, either party can freely terminate the employment contract without reasons and without a notice period or payment in lieu of it. The employer's termination must be based on the evaluation of the employee's abilities and professional behaviour during the probationary period, which also includes discriminatory behaviour against colleagues.

In any case, in the case of termination for failing the probationary period, in Italy, the employer does not have to justify the dismissal and is not required to give a notice period to the employee.

Given the above, in the case, if the employer had pointed to the employee's discriminatory behaviour against colleagues as grounds for the failure of the probationary period, the court would have examined the existence of the gender discrimination. The burden of proof would be on the employee who raised the claim. Whenever the judge finds the discrimination proven, certainly the dismissal would have been considered lawful. On the other hand, in case discrimination was considered unproven and the employee also proved to have passed the trial, the dismissal would be considered unlawful.

The Netherlands, (Peter Vas Nunes, former lawyer and editor-in-chief of EELC): An employer terminates the contract of an employee on the ground that the latter has sexually harassed a colleague. The employee denies the allegation. May the employer benefit from the 'reversed burden of evidence' rule under (national legislation implementing) the discrimination directives, in this case Article 19 of Directive 2006/54? In other words, is it sufficient for the employer to establish facts from which the harassment may be presumed, following which it falls upon the employee to disprove the presumption? The most obvious answer is: no. Article 19 is there for the benefit of the (alleged) victim, not for third parties such as the victim's employer. At least two Dutch courts have given this negative answer (Arnhem Court of Appeal 9 June 2022 and Hague Court of Appeal 24 January 2023). However, a leading expert on Dutch employment law, Professor Ruben Houweling, attempts to argue otherwise (*Arbeidsrechtelijke themata*, 7th Edition, page 455). He invokes the ECJ's 'Coleman doctrine', which holds that the discrimination directives do not prohibit discriminating certain *persons*, but rather prohibit discrimination on certain *grounds*. By extension, one could argue that the prohibition is there not only for the benefit of (perceived) victims of discrimination, but also for the more general purpose of preventing discrimination (including harassment) in the workplace. Personally, I do not subscribe to this theory.

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