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Discrimination of workers' representatives – burden of proof (LI)

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Summary

The Lithuanian Supreme Court has found discrimination against an employee based on his trade union activities and ruled that there was no need for the burden of proof to shift to the employer.

Background

The Lithuanian Labour Code provides in Article 2(1)(4) that unlawful discrimination in employment relations is prohibited on grounds of gender, sexual orientation, race, national origin, language, origin, citizenship and social status, religion, marital and family status, age, opinions or views, membership of a political party or public organisation or factors unrelated to the employee's professional skills.

However, with regard to the burden of proof, the Lithuanian Law on Equal Treatment provides in Article 4 that, if an employee feels discriminated against based on grounds of gender, race, nationality, language, origin, social status, belief, convictions or views, age, sexual orientation, disability, ethnic origin or religion and brings a case before the courts, if the employee can establish facts to indicate there may have been direct or indirect discrimination, these will be presumed to have occurred and the respondent will need to prove otherwise.

It should be noted that the lists set out in Article 2(1)(4) of the Labour Code and in the Law on Equal Treatment differ in certain respects – and that "membership of a political party or public organisation" is not mentioned in Article 4.

Pursuant to Article 10 of Council Directive 2000/78 of 27 November 2000: *"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."*

Article 6 of the ILO Workers' Representatives Recommendation No. 143 of 1971 stipulates that, where there are insufficient protective measures for workers in general, specific measures should be taken to ensure the effective protection of workers' representatives. These may include shifting the burden of proof to employer in cases of alleged discriminatory dismissal or unfavourable changes to the conditions of employment of a workers' representative. However, being a 'Recommendation', this instrument does not have the binding force of law.

Facts

The plaintiff was employed as an international transport driver. He said he had been discriminated against on grounds of his union activities. He brought facts before the court that, in his view, established that discrimination occurred in the period from June to September 2015. He argued that the employer had ceased to provide him with work during that period. As a result he did not receive any pay. The plaintiff demanded payment of wages.

The court of first instance and the Court of Appeal both ruled that the employee had been discriminated against, but a procedural question needed to be brought before the Lithuanian Supreme Court. The plaintiff argued that both courts had failed to apply the national and international rules relating to burden of proof, in other words, that the employer should have been required to prove that there had been no discrimination.

Judgment

The Supreme Court dismissed the appeal, finding that there had been no procedural breach in relation to the burden of proof.

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The purpose of Article 1 of the Law on Equal Treatment is to ensure the implementation of the provisions of Article 29 of the Constitution of the Republic of Lithuania. The Article enshrines equality and prohibits restrictions on human rights based on gender, race, nationality, language, origin, social status, belief, convictions or views. Article 1 also implements the aspects of EU law referred to in the Annex of the Law on Equal Treatment and other international law. The rule on the burden of proof set out in Article 4 of the Law on Equal Treatment is intended to implement relevant provisions of Directive 2000/78.

The line taken in ECJ case law is that the scope of Directive 2000/78 should not extend beyond the grounds listed in Article 1 of that Directive (see *Chacón Navas – v – Eurest Colectividades SA*, C-13/05 of 11 July 2006; *Coleman – v – Attridge Law and Steve Law*, C-303/06 of 17 July 2008; and *Fagog Arbejde (FOA) – v – Kommunernes Landsforening (KL)*, C-354/13 of 18 December 2014).

Taking this into consideration, the Supreme Court developed the following rule of interpretation: "*The redress mechanism and remedies in the case of a breach of the Law on Equal Treatment, including the rule on the burden of proof provided in Article 4 thereof, should apply directly only in respect of discrimination based on the grounds prohibited by the Law on Equal Treatment, i.e. in hearing complaints or claims from natural or legal persons about discrimination based on gender, race, nationality, language, origin, social status, belief, convictions or views, age, sexual orientation, disability, ethnic origin or religion. This means that the Law on Equal Treatment should not apply to the hearing of complaints or claims of alleged discrimination based on participation in trade union activities.*"

Article 2(1)(4) of the Labour Code provides that the regulation of relationships referred to in Article 1 of the Code shall be subject to the following principles: equality under labour law irrespective of gender, sexual orientation, race, nationality, language, origin, citizenship and social status, religion, intention to have a child (children), marital and family status, age, beliefs or views, membership of political parties and associations and factors unrelated to an employee's professional skills.

In the case at hand, the question was whether there had been a breach of the principle of equality irrespective of membership of an association (trade union). As a shift of the burden of proof did not apply to a complaint concerning membership of an association, the general civil procedures applied and the employee was required to prove his claim.

Commentary

Although Lithuania has ratified Convention No. 135 of the International Labour Organisation concerning the Protection and Facilities to be Afforded to Workers' Representatives in an Undertaking, the courts have now ruled that the burden of proof rules do not derive from this convention, but rather from Recommendation No. 143 – and, as mentioned, measures recommended are not binding upon the state.
Therefore, the burden of proof is on the worker who makes the claim.

But despite the ruling, it is still debatable whether Lithuanian civil procedure adequately reflects the principles laid down in ILO Convention No. 135 and ILO Recommendation No. 143, as these provided that states should ensure the burden of proof is on the employer in cases of any alleged discriminatory dismissal or unfavourable change to the conditions of employment of a worker.

Subject: Discrimination of workers' representatives

Parties: G.K. (Chairman of Trade Union) – v – Private Company "TRANSIMEKSA"

Court: Lithuanian Supreme Court (Instance of Cassation)

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