

Netherlands Institute for Human Rights



COLLEGE VOOR
DE RECHTEN
VAN DE MENS

Burden of proof

- “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” (General Framework Directive 2000/78/EC)

Burden of proof

- Equal Treatment Act:

Section 10

1. If a person who considers that he is a victim of discrimination within the meaning of this Act adduces before a court facts from which it may be presumed that such discrimination has taken place, the other party is required to prove that the action in question was not in breach of this Act.



Practical experiences I

Fokker-case:

The contract of a pregnant woman is renewed until the date of her pregnancy leave. She files a complaint.



Facts that establish a presumption of discrimination

- Sequence of events in chronological order
- Points for improvement *after* employer confirmed extension
- Custom to either renew for a year, or as an exception, 6 months
- The extension is exactly until the date of pregnancy leave
- No intention to evaluate performance again: replacement had been found and was starting a month before pregnancy leave. Job advertisement said: contract for a year with possibility of permanent contract



Practical experiences II

ING-case:

A woman has a contract for a year with the bank as a consultant. Her contract is renewed for a year, but after that one, it is not renewed. She suspects that her pregnancy has played a role in the decision not to renew her contract and she files a complaint.



Facts that establish a presumption of discrimination

- Sequence of events in chronological order
- February 2012 she tells her employer she is pregnant, April 4th her employer tells her her contract will not be renewed
- (No criticism on her performance before she told she was pregnant)
- During two meetings on April 2nd and 4th her absence (pregnancy leave) was mentioned
- Not until complainant asked was the reason for not renewing the contract made known to her by letter.



Guidelines

- The presumption needs to be objectified
- The facts a complainant puts forward need to be facts
- Be strict when judging the arguments that refute the presumption
- Discrimination is established when it is one of the factors that played a role in the decision
- Chronology of facts is important
- Refusal to give reasons for decisions



QUESTIONS?

