

COUNCIL DIRECTIVE 97/80/EC
of 15 December 1997
on the burden of proof in cases of discrimination based on sex

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Agreement on social policy annexed to the Protocol (No 14) on social policy annexed to the Treaty establishing the European Community, and in particular Article 2(2) thereof,

Having regard to the proposal from the Commission (⁽¹⁾),

Having regard to the opinion of the Economic and Social Committee (⁽²⁾),

Acting, in accordance with the procedure laid down in Article 189c of the Treaty, in cooperation with the European Parliament (⁽³⁾),

- (1) Whereas, on the basis of the Protocol on social policy annexed to the Treaty, the Member States, with the exception of the United Kingdom of Great Britain and Northern Ireland (hereinafter called 'the Member States'), wishing to implement the 1989 Social Charter, have concluded an Agreement on social policy;
- (2) Whereas the Community Charter of the Fundamental Social Rights of Workers recognizes the importance of combating every form of discrimination, including discrimination on grounds of sex, colour, race, opinions and beliefs;
- (3) Whereas paragraph 16 of the Community Charter of the Fundamental Social Rights of Workers on equal treatment for men and women, provides, *inter alia*, that 'action should be intensified to ensure the implementation of the principle of equality for men and women as regards, in particular, access to employment, remuneration, working conditions, social protection, education, vocational training and career development';
- (4) Whereas, in accordance with Article 3(2) of the Agreement on social policy, the Commission has consulted management and labour at Community level on the possible direction of Community action on the burden of proof in cases of discrimination based on sex;
- (5) Whereas the Commission, considering Community action advisable after such consultation, once again consulted management and labour on the content of

the proposal contemplated in accordance with Article 3(3) of the same Agreement; whereas the latter have sent their opinions to the Commission;

- (6) Whereas, after the second round of consultation, neither management nor labour have informed the Commission of their wish to initiate the process — possibly leading to an agreement — provided for in Article 4 of the same Agreement;
- (7) Whereas, in accordance with Article 1 of the Agreement, the Community and the Member States have set themselves the objective, *inter alia*, of improving living and working conditions; whereas effective implementation of the principle of equal treatment for men and women would contribute to the achievement of that aim;
- (8) Whereas the principle of equal treatment was stated in Article 119 of the Treaty, in Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (⁽⁴⁾) and in Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions (⁽⁵⁾);
- (9) Whereas Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (⁽⁶⁾) also contributes to the effective implementation of the principle of equal treatment for men and women; whereas that Directive should not work to the detriment of the aforementioned Directives on equal treatment; whereas, therefore, female workers covered by that Directive should likewise benefit from the adaptation of the rules on the burden of proof;

(¹) OJ C 332, 7. 11. 1996, p. 11 and OJ C 185, 18. 6. 1997, p. 21.

(²) OJ C 133, 28. 4. 1997, p. 34.

(³) Opinion of the European Parliament of 10 April 1997 (OJ C 132, 28. 4. 1997, p. 215), Common Position of the Council of 24 July 1997 (OJ C 307, 8. 10. 1997, p. 6) and Decision of the European Parliament of 6 November 1997 (OJ C 358, 24. 11. 1997).

(⁴) OJ L 45, 19. 2. 1975, p. 19.

(⁵) OJ L 39, 14. 2. 1976, p. 40.

(⁶) OJ L 348, 28. 11. 1992, p. 1.

- (10) Whereas Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC⁽¹⁾, is also based on the principle of equal treatment for men and women;
- (11) Whereas the references to 'judicial process' and 'court' cover mechanisms by means of which disputes may be submitted for examination and decision to independent bodies which may hand down decisions that are binding on the parties to those disputes;
- (12) Whereas the expression 'out-of-court procedures' means in particular procedures such as conciliation and mediation;
- (13) Whereas the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with national law or practice;
- (14) Whereas it is for the Member States to introduce, at any appropriate stage of the proceedings, rules of evidence which are more favourable to plaintiffs;
- (15) Whereas it is necessary to take account of the specific features of certain Member States' legal systems, *inter alia* where an inference of discrimination is drawn if the respondent fails to produce evidence that satisfies the court or other competent authority that there has been no breach of the principle of equal treatment;
- (16) Whereas Member States need not apply the rules on the burden of proof to proceedings in which it is for the court or other competent body to investigate the facts of the case; whereas the procedures thus referred to are those in which the plaintiff is not required to prove the facts, which it is for the court or competent body to investigate;
- (17) Whereas 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 upon the respondent the burden of proving that his practice is not in fact discriminatory;
- (18) Whereas the Court of Justice of the European Communities has therefore held that the rules on the burden of proof must be adapted when there is a *prima facie* case of discrimination and that, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought;
- (19) Whereas it is all the more difficult to prove discrimination when it is indirect; whereas it is therefore important to define indirect discrimination;
- (20) Whereas the aim of adequately adapting the rules on the burden of proof has not been achieved satisfactorily in all Member States and, in accordance with the principle of subsidiarity stated in Article 3b of the Treaty and with that of proportionality, that aim must be attained at Community level; whereas this Directive confines itself to the minimum action required and does not go beyond what is necessary for that purpose,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Aim

The aim of this Directive shall be to ensure that the measures taken by the Member States to implement the principle of equal treatment are made more effective, in order to enable all persons who consider themselves wronged because the principle of equal treatment has not been applied to them to have their rights asserted by judicial process after possible recourse to other competent bodies.

Article 2

Definitions

1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no discrimination whatsoever based on sex, either directly or indirectly.
2. For purposes of the principle of equal treatment referred to in paragraph 1, indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.

Article 3

Scope

1. This Directive shall apply to:
 - (a) the situations covered by Article 119 of the Treaty and by Directives 75/117/EEC, 76/207/EEC and, insofar as discrimination based on sex is concerned, 92/85/EEC and 96/34/EC;

⁽¹⁾ OJ L 145, 19. 6. 1996, p. 4.

(b) any civil or administrative procedure concerning the public or private sector which provides for means of redress under national law pursuant to the measures referred to in (a) with the exception of out-of-court procedures of a voluntary nature or provided for in national law.

2. This Directive shall not apply to criminal procedures, unless otherwise provided by the Member States.

Article 4

Burden of proof

1. 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.

2. This Directive shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

3. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

Article 5

Information

Member States shall ensure that measures taken pursuant to this Directive, together with the provisions already in force, are brought to the attention of all the persons concerned by all appropriate means.

Article 6

Non-regression

Implementation of this Directive shall under no circumstances be sufficient grounds for a reduction in the general level of protection of workers in the areas to which it applies, without prejudice to the Member States' right to respond to changes in the situation by introducing laws, regulations and administrative provisions which differ from those in force on the notification of this Directive, provided that the minimum requirements of this Directive are complied with.

Article 7

Implementation

The Member States shall bring into force the laws, regulations and administrative provisions necessary for them to comply with this Directive by 1 January 2001. They shall immediately inform the Commission thereof.

When the Member States adopt those measures they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such references shall be laid down by the Member States.

The Member States shall communicate to the Commission, within two years of the entry into force of this Directive, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of this Directive.

Article 8

This Directive is addressed to the Member States.

Done at Brussels, 15 December 1997.

For the Council

The President

J.-C. JUNCKER