Applying the burden of proof rules in gender discrimination cases: the Croatian experience

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APPLYING THE BURDEN OF PROOF RULES IN GENDER DISCRIMINATION CASES: THE CROATIAN EXPERIENCE

ABSTRACT

All EU anti-discrimination directives contain basically identical provision on the burden of proof in anti-discrimination cases: Member States are to take the necessary measures, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because of the principle of equal treatment has not been applied to them establish 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. The wording of the two main anti-discrimination laws in Croatia, the Anti-Discrimination Act and the Gender Equality Act, on the burden of proof slightly differs, which may lead to inconsistent interpretation. The aim of this article is to explore the current Croatian gender discrimination case law concerning the application of the burden of proof rules and to investigate whether the required standard has been correctly applied in practice, as well as whether further legislative amendments are needed.

***Keywords**: burden of proof, EU anti-discrimination law, gender equality, Anti-Discrimination Act, Gender Equality Act*

1. INTRODUCTION

In the Croatian civil procedure law, it seems that the burden of proof rules are marginalized. In general, each party is obliged to provide facts and present evidence on which his or her claim is based or to refute the statements and evidence of his or her opponent.[1] In other words, to win the case, claimant will have to provide enough evidence to prove his/her claim. To repudiate the claim, respondent will have to provide enough evidence to the contrary. The court shall decide, at its discretion, which facts it will find proved, after conscientious and careful as-

[1] Article 219(1) Civil Procedure Act (*Zakon o parničnom postupku*), Official Gazette No. 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 123/08, 57/11, 148/11, 25/13, 89/14. This obligation falls upon both parties, and includes the duty to present facts on which their request is based (*onus proferendi*), as well as the duty to present evidence substantiating those facts (*onus probandi*). See Triva, S.; Dika, M., *Građansko parnično procesno pravo*, Narodne novine, Zagreb, 2014, p. 498.

sessment of all the evidence presented individually and as a whole and taking into consideration the results of the entire proceedings.[2]

That is why the obligation to provide facts and present evidence is considered not as an obligation towards the court or the opposing party, but as a specific obligation towards oneself – an obligation which enables the party to succeed in litigation.[3]

Lawyers tend to intuitively recognize the burden of proof rules as the rules determining which party has to prove what facts in order to succeed in litigation ('subjective burden of proof').[4]But the burden of proof rules may also refer to the method the court is obliged to follow in order to prevail the situation of uncertainty about the facts ('objective burden of proof').[5]The latter understanding seems to prevail in the Croatian civil procedure law.

The main provision regarding the burden of proof in the Civil Procedure Act is contained in its Article 221.a:[6]if the court cannot establish a fact with certainty on the basis of the evidence proposed, it shall rule on the existence of the fact applying the burden of proof rule. Specific burden of proof provisions are to be found in legislation governing certain fields of law.[7]In order to resort to the burden of proof rules and reach a conclusion on the existence of certain facts, two requirements have to be met: 1. all evidence has been presented; and 2. based on the evidence presented, the court cannot establish a decisive fact with certainty.[8]In other words, this provision becomes applicable and relevant only at the end of evidentiary proceedings, as an instrument to overcome uncertainty about relevant facts. According to Dika, the standard of 'certainty' as to the existence of a fact means that there is no reasonable doubt in the regularity of the court's conclusion about its

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2 Article 8 Civil Procedure Act.

3 Triva, Dika, *op. cit.* note 1, p. 498.

4 Uzelac, A., *Teret dokazivanja*, doktorska disertacija, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 1998, p. 70.

5 *Ibid*, p. 69; Triva, Dika, *op. cit.* note 1, p. 499.

6 Article 221.a was inserted into the Civil Procedure Act of 1976 in 1990 (Službeni list SFRJ No. 27/90 of 16 May 1990). See more on the reasons for introducing this provision in Uzelac, *op. cit.* note 4, p. 278 -279. The purpose of this provision is basically to instruct the judge how to proceed when he/she is not certain as to the existence of a decisive fact, taking into account all evidence presented and the margin of appreciation in the decision-making process. The allegation of the party which is not substantiated with sufficient evidence cannot be taken as true. It is based on the maxim *idem est non esse aut non probari* (not to be proved and not to exist is the same). Triva, Dika, *op. cit.* note 1, p. 499. This boils down to the objective understanding of the burden of proof rules.

7 For example, Article 135 Labour Act (*Zakon o radu*; Official Gazette No. 93/14) regulates the burden of proof in labour disputes.

8 Supreme Court of the Republic of Croatia, Rev-1276/2007, Judgement of 4 June 2008.

(non)existence.[9] The standard of 'probability', on the other hand, requires a lower degree of the court's conviction and is therefore an exception for rendering a decision on the merits.[10] This consideration is particularly important when assessing the burden of proof rules (and consequently, the shifting of the burden of proof) in anti-discrimination cases.

2. SHIFTING THE BURDEN OF PROOF: ANTI-DISCRIMINATION CASES

Without going further into the theoretical considerations regarding the burden of proof,[11] it is safe to say that the Croatian courts are not normally (too) (pre)occupied with the role and significance of the burden of proof rules. However, when it comes to anti-discrimination law, the burden of proof rules play a pivotal role and have to be adequately applied from the outset of the proceedings. Croatian anti-discrimination legislation is based on and implements the EU anti-discrimination law.[12] All of the main equal treatment directives contain a standard clause on burden of proof in anti-discrimination cases.[13] Member States have to take adequate

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9 Dika, M., *Sudska zaštita u diskriminacijskim stvarima*, in Crnić, I. *et al.*(eds.), *Primjena anti-diskriminacijskog prava u praksi*, Centar za mirovne studije, Zagreb, 2011, pp. 69-95, p. 84.

10 *Ibid*, p. 84.

11 Primarily concerning the legal nature and different theoretical conceptions of the burden of proof in continental and Anglo-Saxon legal theory, as well as differentiation of burden of proof as the burden of persuasion or burden of production of evidence, among other. For the most comprehensive and in-depth account of the burden of proof rules in the Croatian legal theory in comparative perspective see Uzelac, *op. cit.* note 4. See also Triva, Dika, *op. cit.* note 1, pp. 498-501.

12 Primarily Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), [2006] OJ L 204/23 (Gender 'Recast' Directive), Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] OJ L 180/22 (Race Directive), Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16 (Framework Directive) and Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, [2004] OJ L 373/37 (Goods and Services Directive). For the sake of simplicity, this paper will refer to all four directives collectively as "EU anti-discrimination directives", without prejudice to other directives and instruments forming the corpus of EU anti-discrimination law.

13 The standard clause reads as follows: "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." See Article 19(1) of the Gender 'Recast' Directive, Article 10(1) of the Race Directive; Article 9(1) of the Goods and Services Directive and Article 10(1) of the Framework Directive.

measures 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. In other words, the burden of proof in discrimination cases is shifted, but not completely reversed. The claimant is still required to establish the facts from which it may be presumed that direct or indirect discrimination occurred. Theoretically, this shift is justified by the need to assist the persons claiming to be the victims of discrimination in court proceedings.[14] After all, to use the words of Advocate General Mengozzi, "discrimination has the reputation of being particularly hard to substantiate".[15]

From the wording of the burden of proof clause in EU anti-discrimination directives, it is evident that only a *prima facie* evidence of discrimination is needed to shift the burden to the opposing party. *Prima facie* evidence (known as *Anscheinsbeweis* in German legal theory) is a legal standard which has not been known or applied in the Croatian legal theory and practice.[16] Uzelac identifies *prima facie* evidence in the German legal theory as a concept adjacent to the burden of proof, but excluded from its field by the dominant theory, because it does not require a *non liquet*situation.[17]To put it more simply, *prima facie* evidence is oriented towards the standard of probability. Its function is precisely to avoid *non liquet* situations,[18]i.e. to allow the judge to draw conclusions from the facts which are taken as probable, based on experience. On the other hand, the burden of proof in its objective understanding cannot be triggered without the *non liquet* situation. *Prima facie* evidence involves the creation of a preliminary standpoint on the existence of discrimination, based on typical developments, which, according to the rules of experience, refer to a causal connection with the discriminatory behaviour or liability for such behaviour.[19] The facts will therefore have to show, objectively and in line with the typical life experience, predominant probability that less favourable treatment occurred

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14 See e.g. Ellis, E.; Watson, P., *EU Anti-Discrimination Law*, 2nd ed., Oxford University Press, Oxford, 2012, p. 157; Potočnjak, Ž.; Grgurev, I.; Grgić, A., *Dokazivanje prima facie diskriminacije*, in: Uzelac, A.; Garašić, J.; Maganić, A. (eds.) *Liber Amicorum Mihajlo Dika*, Pravni fakultet u Zagrebu, Zagreb, 2013, pp. 323-347.

15 Opinion of Advocate General Mengozzi in Case C-415/10 *Galina Meister v Speech Design Carrier Systems GmbH* [2012] EU:C:2012:8, par. 1.

16 Dika, *op. cit.* note 9, pp. 85-86.

17 Uzelac, *op. cit.* note 4, p. 59. *Non liquet* refers to a situation in which a judge cannot establish a certainty of a fact even after presentation of all the evidence.

18 Uzelac, *op. cit.* note 4, p. 60.

19 Dika, *op. cit.* note 9, p. 86.

because of discrimination.[20]By lowering the required standard for presentation of evidence, the task of the party bearing the (initial) burden of proof is facilitated.[21]

Let us transfer these theoretical considerations to the practice and reality of anti-discrimination case-law.

3. EU ANTI-DISCRIMINATION CASE-LAW

The Court of Justice of the EU (hereinafter: CJEU or the Court) has interpreted the burden of proof clause in EU anti-discrimination directives basically in line with the theory of *prima facie* evidence.[22]This is evident even from the early case-law which precedes the explicit introduction of the burden of proof clause in the EU anti-discrimination legislation.[23] In case *Danfoss*,[24]where the claim was about gender pay discrimination, the initial burden of proof was on claimants to prove

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[20] Similarly recent German jurisprudence, see e.g. BAG, Judgement of 17 August 2010, 9 AZR 839/08; BAG, Judgement of 17 December 2009, 8 AZR 670/08: "Dies ist der Fall, wenn die vorgetragenen Tatsachen aus objektiver Sicht nach allgemeiner Lebenserfahrung mit überwiegender Wahrscheinlichkeit darauf schließen lassen, dass die Benachteiligung wegen der Behinderung erfolgte." It is not about whether a certain allegation is 'true', but whether it is 'suspected true'.

[21] Dika, *op. cit.* note 9, p. 86.

[22] Accordingly, all EU anti-discrimination directives refer to *prima facie* evidence as a prerequisite for shifting the burden of proof in their recitals. Compare e.g. Gender 'Recast' Directive, Preamble, Recital 30: "The adoption of rules on the burden of proof plays a significant role in ensuring that the principle of equal treatment can be effectively enforced. As the Court of Justice has held, provision should therefore be made to ensure that the burden of proof shifts to the respondent when there is *prima facie* case of discrimination…" It is interesting to note, however, that the official Croatian translations of the four EU anti-discrimination directives, contain four very different translations of the same part of the sentence "…when there is *prima facie* evidence…" used in the recitals. For example, in the Race Directive (OJ Special Edition in Croatian, Chapter 20 Volume 001, p. 19 – 23) the Croatian translation is "…*u slučaju pretpostavke postojanja diskriminacije*…", in the Goods and Services Directive (OJ Special Edition in Croatian, Chapter 05 Volume 001 p. 101-107), the Croatian translation is "…*ako se radi o očitom slučaju diskriminacije*…", in the Framework Directive (OJ Special Edition in Croatian, Chapter 05 Volume 001, p. 69 – 75) it reads „…*kod očite diskriminacije*…" and in the Gender Recast Directive (OJ Special Edition in Croatian, Chapter 05 Volume 001, p. 246-259) „…*u slučajevima gdje postoji pretpostavka diskriminacije*…". One does not have to be a language purist to note this striking inconsistency, which is not just completely unnecessary and frustrating, but can also lead to false conclusions. This is especially true for the translation of prima facie case evidence as "*očita diskriminacija*" (Eng. 'obvious discrimination'), because it may lead to conclusion that only direct discrimination is caught by the burden of proof rules.

[23] The first directive specifically dedicated to the burden of proof was the Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, [1998] OJ L 14/6. This Directive was repealed with effect from 15 August 2009 by virtue of Directive 2006/54 (Gender 'Recast' Directive), but the identical wording of its provision on the burden of proof (Article 4(1) Directive 97/80) is kept in all EU anti-discrimination directives in force.

[24] Case C-109/88 *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] EU:C:1989:383.

that a relatively large proportion of women received lower remuneration than men. 'Thanks' to a complete lack of transparency of the pay system, claimants were unable to prove their assertion with certainty, but this was enough for the court to conclude that the burden of proof has shifted to employer/respondent to show that there was no discrimination.[25]In *Enderby*,[26] claimants established a *prima facie* case by showing that speech therapists, predominantly female, were paid less by the British NHS system (National Health Service) than pharmacists, a predominately male profession. This relatively clear occupational segregation along gender lines allowed the burden of proof to be shifted to the respondent.[27] On the other hand, in a line of cases concerning a pay disparity between part-time and full-time employees, the court held that there is no *prima facie* case, unless it is first established that there is different treatment for part-time and full-time employees, and that this difference affects considerably workers of one sex only.[28]

Other cases pre-dating the explicit burden of proof clauses in the EU anti-discrimination directives concerned primarily equal pay cases, but the principles established therein were later extended to all other aspects of sex discrimination.[29]Therefore, the burden of proof clause was formulated and established in accordance with the principles developed in case-law. The rationale behind the Court's interpretation is found in the principle of effectiveness: the need to guarantee the alleged victims of discrimination effective means of enforcing the principle of equal treatment before the national courts.

Subsequent case-law offers further important guidelines for the interpretation of the burden of proof rules. An important segment of the judgement in case *Brunnhofer*[30] is devoted to the interpretation of the burden of proof. The Court

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25 "In those circumstances, […] the Equal Pay Directive must be interpreted as meaning that where an undertaking applies a system of pay which is totally lacking in transparency, it is for the employer to prove that this practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than for men." *Danfoss*, par. 16.

26 Case C-127/92 *Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health* [1993] EU:C:1993:859.

27 "[…] at least where two jobs in question are of equal value and the statistics describing that situation are valid". *Enderby*, para. 16.

28 See, e.g. Joined Cases C-399/92, 409/92, 34/93, 50/93 and 78/93 *Stadt Lengerich v Angelika Helmig and others* [1994] EU:C:1994:415, par. 23; Case C-297/93, *Rita Grau-Hupka v Stadtgemeinde Bremen* [1994] EU:C:1994:406; see also, Ellis, Watson, *op. cit.* note 14, pp. 160-161.

29 *Ibid*, p. 161; see also Joined Cases C-63/91 and 64/91 *Sonia Jackson and Patricia Cresswell v Chief Adjudication Officer* [1992] EU:C:1992:329; and Case C-189/91 *Petra Kirsammer-Hack v Nurhan Sidal* [1993] EU:C:1993:907.

30 Case C-381/99, *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG* [2001] EU:C:2001:358; par. 51-62.

highlights the importance of providing *prima facie* evidence on 'comparability' of work performed by a female and male worker: "If the plaintiff in the main proceedings adduced evidence to show that the criteria for establishing the existence of a difference in pay between a woman and a man and for identifying comparable work are satisfied in this case, a *prima facie* case of discrimination would exist and it would then be for the employer to prove that there was no breach of the principle of equal pay."[31]Comparability is therefore an important issue in equal pay cases. However, where a job classification system exists and the length of service criterion is applied, employer does not have to justify recourse to that criterion, because it is considered to be appropriate to attain the legitimate objective of rewarding experience of the worker.[32] Therefore, it is the worker who will have to provide evidence capable of raising serious doubts in that regard – length of service criterion cannot serve as *prima facie* evidence of discrimination.

In more recent cases *Meister*[33] and *Kelly*,[34] the Court addressed the difficult issue of access to information, as the lack of relevant data can seriously undermine the claimant's attempt to show even the probability that discrimination occurred. In *Meister*, a job applicant claimed discrimination on grounds of sex, age and ethnicity, her application for the same job having been rejected twice within a relatively short time period, without even being invited for an interview. In *Kelly*, a male applicant claimed that he was discriminated on grounds of sex, his application for a master's degree course having been rejected in the selection process. In both cases, claimants sought access to information about successful applicants, because otherwise they had nothing but their allegations. In both cases the Court clearly stated that the burden of proof clause does not create an entitlement to disclosure of documents or access to information. However, the refusal of disclosure or refusal to grant access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination.[35] Otherwise the provisions on the burden of proof might be rendered completely ineffective and their objective compromised.

Statistical evidence plays a particularly important role in proving *prima facie* case of indirect discrimination.[36]

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31 *Brunnhofer*, para. 60.

32 See Case C-17/05 *B. F. Cadman v Health & Safety Executive* [2006] EU:C:2006:633, par. 38 and *Danfoss*, par. 24-25.

33 Case C-415/10 *Galina Meister v Speech Design Carrier Systems GmbH* [2012] EU:C:2012:217.

34 Case C-104/10 *Patrick Kelly v National University of Ireland (University College, Dublin)* [2011] EU:C:2011:506.

35 *Kelly*, para. 34; *Meister*, para. 47.

36 See, e.g. Case C-171/88 *Ingrid Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co. KG* [1989]

Case-law concerning racial discrimination also contains important pointers as to the shifting of the burden of proof. Thus, a homophobic statement by a third party (majority shareholder of a football club) may shift the burden of proof on the club to prove that it does not have a discriminatory recruitment policy.[37] Even where there is no actual individual person claiming less favourable treatment, employer's statement that he will not employ persons of a certain ethnic origin presents a *prima facie* evidence of discriminatory recruitment policy.[38]

4. CROATIAN LEGISLATION AND CASE LAW

So, what have we learned from the EU anti-discrimination case law? Croatia has implemented the EU anti-discrimination directives as part of its obligations during the process of accession to the EU primarily through the general Anti-Discrimination Act and through the Gender Equality Act.[39]

EU:C:1989:328; Case C-184/89 *Helga Nimz v Freie und Hansestadt Hamburg* [1991] EU:C:1991:50; Case C-33/89 *Maria Kowalska v Freie und Hansestadt Hamburg* [1990] EU:C:1990:265; Case C-343/92 *M. A. De Weerd, née Roks, and others* [1994] EU:C:1994:71; Case C-196/02 *Vasiliki Nikoloudi v Organismos Tilepikoinonion Ellados* [2005] EU:C:2005:141; Joined Cases C-4/02 and C-5/02 *Hilde Schönheit v Stadt Frankfurt am Main and others* [2003] EU:C:2003:583. See also *Handbook on European non-discrimination law*, European Union Agency for Fundamental Rights, 2010, URL=http://fra.europa.eu/sites/default/files/fra_uploads/1510-FRA-CASE-LAW-HANDBOOK_EN.pdf, p. 129-133. Accessed 15 February 2017.

37 Case C-81/12 *Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării* [2013] EU:C:2013:275.

38 Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] EU:C:2008:397. One has to draw a parallel here to a recent Croatian case, in which a member of the Executive Board of the Croatian Football Association publicly declared that "gays could never play in his national football team". It was only in the revision procedure that the Supreme Court of the Republic of Croatia reversed all previous judgements of lower and appellate courts, which found that the statement was not discriminatory because it represented merely a value judgement by a person who is not in a position to have any influence on the choice of players in a national football team, and that there was no less favourable treatment. The judgement in the revision proceedings determined the statement as discriminatory on grounds of sexual orientation. There was no mention of the burden of proof, because there was never any dispute as to whether and what the respondent actually said and whether any less favourable treatment actually occurred, but the Supreme Court's reasoning relies heavily on the *Feryn* judgement (mistakenly identified by the Supreme Court as the judgement of the European Court of Human Rights). Supreme Court of the Republic of Croatia, Rev-300/13, Judgement of 17 June 2015.

39 Anti-Discrimination Act (*Zakon o suzbijanju diskriminacije*) entered into force on 1 January 2009 (Official Gazette No. 85/08 and 112/12; hereinafter: ADA). The first Gender Equality Act, which entered into force on 30 July 2003, was repealed for reasons of procedural deficiencies in its adoption by the Decision of the Constitutional Court (U-I-2696/2003 of 16 January 2008) with effect from 15 July 2008, when it was replaced by the Gender Equality Act (*Zakon o ravnopravnosti spolova*) currently in force (Official Gazette No. 82/08; hereinafter: GEA). The Gender Equality Act specifically aims at protection and promotion of gender equality as a fundamental value of the Croatian constitutional order and defines and regulates methods of protection against discrimination based on sex, while also

4.1. Burden of proof in the Anti-Discrimination Act

The main horizontal legislative instrument in Croatia regulating equal treatment and protection against discrimination based on 21 discriminatory grounds is the Anti-Discrimination Act. Under Article 20 ADA, if a party in court or other proceedings claims that his/her right to equal treatment has been violated, he/she shall make it probable[40] that discrimination has taken place. In that case, it shall be for the respondent to prove that there has been no discrimination.[41] Therefore, the required standard or degree of conviction is that of probability, not certainty that the discrimination occurred. The claimant has to prove the probability of facts, on which the right to equal treatment and its violation depend. These facts need not to be proven with the degree of certainty normally required from the party who bears the burden of proof.[42]Presenting *prima facie* evidence of discrimination triggers the shifting of the burden of proof: the respondent has to prove the contrary with sufficient degree of certainty. Failing this, it is considered that the right to equal treatment was violated.[43]

The 2012 Supreme court judgement in a high-profile case contributed to the interpretation of this standard in practice. Whereas the lower court found no evidence of discrimination and dismissed the claim as unfounded, the Supreme court correctly applied the required standard of probability. The case, namely, involved a statement of a then President of the Croatian Football Association that homosexual football players will not play in a national football team as long as he was the president of the national football association and that only "healthy" people play football. Several associations representing the interests of persons of homosexual orientation filed a claim against him for discrimination (representative action). Whereas the first-instance county court found that the claim was unfounded, the Supreme court in appellate procedure was of the opinion that *prima facie* evidence of discrimination exists. It concluded that the purposive meaning of that statement was self-evident: humiliation and degradation of that category of persons.

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creating equal opportunities for men and women (Article 1 GEA). The Anti-Discrimination Act is a horizontal, 'umbrella' act in the field of prohibition of discrimination and creation of equal opportunities, and includes an exhaustive list of 21 prohibited discriminatory grounds (sex, race, ethnic origin, skin colour, language, religion, political or other opinion, national or social origin, property, trade union membership, education, social status, marital or family status, age, health, disability, genetic heritage, gender identity and expression and sexual orientation; Article 1(1) ADA).

40 Cro. '…*dužna je učiniti vjerojatnim*"

41 Article 20 ADA.

42 Dika, *op. cit.* note 9, p. 85; Uzelac, A., *Postupak pred sudom*, in: Šimonović Einwalter, T. (ed.) Vodič uz zakon o suzbijanju diskriminacije, Ured za ljudska prava Republike Hrvatske, Zagreb, 2009, pp. 93-105, p. 101.

43 Supreme Court of the Republic of Croatia, Gž-25/11 of 28 February 2012.

In such case, it was for the respondent to prove that he did not discriminate that category of persons, which he failed to do.[44]The Supreme court ordered the respondent's apology to be published together with the complete text of the judgement in daily newspapers, so hopefully this standard will in the future be applied by lower courts as well.

Therefore, the two conditions for satisfying *prima facie* evidence of either direct or indirect discriminations are that the claimants have to establish existence of a comparable situation and existence of a disadvantage.[45] In a case involving a claim of unequal treatment based on age and union membership, the County Court in Bjelovar interpreted Article 20(1) ADA, stating that a party claiming discrimination does not have to prove it with a degree of certainty, but that it suffices to make it probable that discrimination occurred. "The standard of probability presumes that the party claiming discrimination has to prove that he/she is treated less favourably and that it is possible that the less favourable treatment is the result of direct or indirect discrimination based on the grounds established in Article 1(1) ADA."[46] The claimant established that he is the Union representative and that his employment contract was not transferred to the new employer (an outcome he desired), but he did not make it plausible that he was treated less favourably on the ground of either Union membership or age. Apparently, the claimant here failed to establish the existence of a comparable situation (one of the employees whose contracts were transferred was even older than him; furthermore, he was not very assertive or active Union member). However, the courts rarely ever elaborate their reasoning by systematically analysing the presented facts in this manner, and mostly just cite the relevant burden of proof provision and presented evidence in one sentence. It is therefore extremely hard to conclude what eventually tipped or did not tip the balance of probabilities. Furthermore, the decisions of lower courts are rarely published and accessible, their reasoning is only available indirectly and in a very limited manner through the published Supreme court decisions.

For example, in one Supreme Court judgement it is stated that the first-instance court carried out relevant evidence after claimant presented facts and evidence which made it probable that discrimination occurred and respondent presented facts and evidence to the contrary, and concluded that there was no discrimination.[47]However, it is not clear from the presented order of facts how the

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44 Compare this to the Supreme Court case Rev-300/13, described in note 38 above.

45 Farkas, L., How to present a discrimination claim: Handbook on seeking remedies under the EU non-discrimination directives, URL=http://ec.europa.eu/justice/discrimination/files/present_a_discrimination_claim_handbook_en.pdf, p. 52-53. Accessed 15 February 2017.

46 County Court in Bjelovar, Gž-458/2012, Judgement of 3 May 2012.

47 Supreme Court of the Republic of Croatia, Revr-498/2014, Judgement of 13 May 2014.

first-instance court determined *prima facie* evidence of discrimination. It seems that the claimant substantiated his claim initially by claiming that he was transferred to a lower paid position because of his nationality. If this was the case indeed, then the standard for shifting the burden of proof was interpreted too lightly.

4.2. Burden of proof in the Gender Equality Act

Pursuant to Article 30(4) GEA a party claiming that his/her right has been violated has to present facts which justify suspicion that discriminatory behaviour has occurred;[48] the burden of proof then shifts to the opposing party who has to prove that there has been no discrimination. The syntagm 'shall present facts which justify suspicion' is a literal translation from Croatian, but also the one which describes the most accurately the meaning of this provision. Available unofficial translations of the Croatian GEA into English use the syntagm 'shall present facts from which it may be presumed',[49]probably to accommodate the wording of the burden of proof clause from the EU anti-discrimination directives. In our opinion, the latter translation of the Croatian text is not quite suitable, because 'to justify suspicion' and 'to presume' do not convey the same meaning or standard of proof.

The wording of the burden of proof provision in the GEA was probably influenced by the identical wording contained in the provision on the shifting of the burden of proof from the old Labour Act 1995, at the time when anti-discrimination provisions were contained in the labour act.[50]

Analysing the above provisions of the ADA and GEA, Potočnjak, Grgurev and Grgić do not consider that the Croatian legislation places heavier burden on the claimant in proving *prima facie* discrimination than envisaged in the EU anti-dis-

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48 Cro. '*...dužna je iznijeti* činjenice *koje opravdavaju sumnju...*'

49 See e.g. translation available on the web site of the Office for Gender Equality of the Republic of Croatia: URL=https://ravnopravnost.gov.hr/UserDocsImages/dokumenti/Letak_Zakon%20o%20ravnopravnosti%20spolova%20engl.pdf. Accessed 15 February 2017.

50 Old Labour Act of 1995 (Official Gazette No. 38/95, 54/95, 65/95, 17/01, 82/01, 114/03, 142/03, 30/04 and 137/04 – consolidated version), Article 2d (inserted by the Act on Amendments to the Labour Act in 2003, Official Gazette No. 114/03 – valid from 2003 to 2010): „If a person seeking employment or employee in case of a dispute presents facts which justify suspicion that employer acted contrary to Article 2 of this Act, employer has the burden of proof to prove that there has been no discrimination i.e. that he acted in accordance with Article 2a of this Act." Compare Dika, *op. cit.* note 9, p. 76, who states that the burden of proof provision in the GEA is "oddly" construed and repeats the same mistake from the old Labour Act.

crimination directives, despite the different wording.[51] However, they draw attention to the fact that Article 20(1) ADA uses the wording the Croatian legal system is familiar with, whereas the wording used in Article 30(4) GEA is unknown in the Croatian civil procedure law.[52]

This is debatable, because, as already mentioned the burden of proof provision in the GEA echoes the provision from the previous Labour Act of 1995, which is no longer in force. In fact, since there is no available case-law on interpretation of the burden of proof clause in the GEA, the case-law analysed here includes mostly the interpretation of the burden of proof clause from the old Labour Act of 1995. For example, in a case involving a claim of sexual harassment at work, the claimant was required to present facts which 'justify suspicion' that the employer was acting contrary to the prohibition of discrimination.[53] The court found that this standard was satisfied because the claimant provided a letter from a third party (a telecom operator) confirming her allegations that she was exposed to obscene and vulgar phone calls of sexual content at her workplace, a service which was not agreed either between her and her employer, nor between the employer and the telecom operator. The court concluded that the burden of proof that there was no discrimination was shifted to respondent.

Is the standard of 'justifying suspicion' from the GEA equal to 'probability' from the ADA?Dika argues that this wording can be interpreted to mean that it is sufficient for the alleged victim of discrimination to present facts, which, in themselves, if true, would raise the suspicion that discriminatory behaviour occurred, which is an even lighter burden than proving the probability.[54]So, unlike the ADA, the GEA would not require any link to typical rules of experience, so that a mere allegation of discrimination by claimant would be enough to shift the burden of proof to the respondent.

According to the available case-law, however, there is no fear that the Croatian courts might take this provision too lightly. Quite the opposite, the real danger lies in the possibility of excessively stringent application of the standard for the shifting of the burden of proof, so that the claimants will practically have to prove that discrimination occurred right from the outset.[55]Part of the 'blame' here lies not just on the courts, but also on the parties and their legal representatives, who

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51 Potočnjak, Grgurev, Grgić, *op. cit.* note 14, p. 328-329.

52 *Ibid.*

53 County Court in Bjelovar,Gž-2000/2012, Judgement of 11 October 2012.

54 Dika, *op. cit.* note 9, p. 76.

55 See, for example, Supreme Court of the Republic of Croatia, Revr-856/2012, Judgement of 27 March 2013.

fail to make a clear and systematic allegation of discrimination in the first place. In a case involving a claim of unequal treatment in access to promotion and pay (apparently based on political belief, nationality and family status), the appellate court interpreted correctly that the burden of proof rules from the EU anti-discrimination legislation, as well as those applied before the European court of Human Rights require a person claiming discrimination to prove that he/she was placed in a less favourable position in comparison with other employees, from which it can be concluded, based on experience and basic indications that direct or indirect discrimination occurred.[56]However, applying that understanding to the facts of the case, that court concluded that *prima facie* evidence of discrimination does not exist, since internal rules of the respondent prescribe that pay is a category defined by results of actual work and responsibilities of an employee, and that "the title of the work place does not automatically grant the right to equal pay".[57]So, basically, the court concluded that pay system is not discriminatory because the difference in pay is prescribed in internal acts of the employer. There is no mention about the transparency of the pay system, which is exactly what triggered the shifting of the burden of proof in the CJEU *Danfoss* case, for example.[58]What evidence would in this case convince the court in the existence of *prima facie* discrimination? From the court's reasoning, it seems that anything shorter of the employer's acknowledgement of discrimination would miss that target.[59]

5. CONCLUDING REMARKS

The case-law on the burden of proof in anti-discrimination cases in Croatia is too scarce and practically anecdotal to draw any definite conclusions, but it does show a certain lack of consistency. This is not just due to insufficient knowledge and interpretation of *prima facie* evidence in court proceedings. The fact that the burden of proof clause in the GEA is expressed differently than the burden of proof clause in the ADA is certainly capable of contributing a great deal to this confusion. As stated above, all EU anti-discrimination directives contain almost identically worded provision on the burden of proof. There was no reason whatsoever for the two crucial Croatian acts in the anti-discrimination field to contain divergent

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56 County Court in Zagreb, Gžr-330/14, Judgement of 6 October 2014, as cited in the Constitutional Court decision U-III-7490/2014 of 13 April 2016.

57 *Ibid.*

58 See above at note 24.

59 The Constitutional Court also concluded that the claimant failed to prove discrimination, and that the burden of proof was on her, because a "subjective assessment of the claimant […] is not enough to establish unequal treatment." U-III-7490/2014 of 13 April 2016.

provisions, particularly having in mind the importance of a uniform and correct application of this standard in practice. Not only is the wording of these two provisions divergent when compared to each other, but both of them are different from the wording used in the EU anti-discrimination directives. Implementation of directives does not require literal transposition of their particular provisions. However, it defies logic to have different wording for provisions which should express the same standard. Despite of the differences in Member States regarding the approach and regulation of the civil procedure, there is no denying that the burden of proof rule from the EU anti-discrimination directives should be interpreted uniformly and in line with the CJEU case-law. This may be more readily accepted by the courts applying the GEA. The GEA, namely, expressly contains an EU-friendly interpretation clause or non-regression clause in Article 4, guaranteeing that provisions of that Act 'shall not be interpreted or implemented so as to restrict or diminish the content of warranties on gender equality enshrined in the universal rules of international law [and] the *acquis communautaire* of the European Community, […]'. This article could serve as a recourse to overcome any inconsistencies in the wording of the burden of proof clause in the GEA, which, if not interpreted correctly, might have adverse consequences not only on the position of the claimant, but also on the respondent in anti-discrimination proceedings.

Undoubtedly, a simple, clear and consistent wording would do the anti-discrimination case-law in general a better service. Not least because the relevant case-law in the field of gender equality, or better said, lack thereof, does not convey the real situation regarding the prevalence of gender (in)equality issues in the Croatian society.

REFERENCES

BOOKS AND ARTICLES

1. Dika, M., *Sudska zaštita u diskriminacijskim stvarima*, in Crnić, I. *et al.*(eds.), Primjena anti-diskriminacijskog prava u praksi, Centar za mirovne studije, Zagreb, 2011, pp. 69-95.
2. Ellis, E.; Watson, P., *EU Anti-Discrimination Law*, 2nd ed., Oxford University Press, Oxford, 2012.
3. Potočnjak, Ž.; Grgurev, I.; Grgić, A., *Dokazivanje prima facie diskriminacije*, in: Uzelac, A.; Garašić, J.; Maganić, A. (eds.) Liber Amicorum Mihajlo Dika, Pravni fakultet u Zagrebu, Zagreb, 2013, pp. 323-347.
4. Triva, S.; Dika, M.*, Građansko parnično procesno pravo*, Narodne novine, Zagreb, 2014.
5. Uzelac, A., *Teret dokazivanja,* doktorska disertacija, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 1998.
6. Uzelac, A., *Postupak pred sudom*, in: Šimonović Einwalter, T. (ed.) Vodič uz zakon o suzbijanju diskriminacije, Ured za ljudska prava Republike Hrvatske, Zagreb, 2009, pp. 93-105.

COURT OF JUSTICE OF THE EUROPEAN UNION

1. Case C-109/88 Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejds-giverforening, acting on behalf of Danfoss [1989] EU:C:1989:383.
2. Case C-171/88 Ingrid Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co. KG [1989] EU:C:1989:328.
3. Case C-33/89 Maria Kowalska v Freie und Hansestadt Hamburg [1990] EU:C:1990:265.
4. Case C-184/89 Helga Nimz v Freie und Hansestadt Hamburg [1991] EU:C:1991:50.
5. Joined Cases C-63/91 and 64/91, Sonia Jackson and Patricia Cresswell v Chief Adjudication Officer [1992] EU:C:1992:329.
6. Case C-189/91, Petra Kirsammer-Hack v Nurhan Sidal [1993] EU:C:1993:907.
7. Case C-127/92 Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health [1993] EU:C:1993:859.
8. Case C-343/92 M. A. De Weerd, née Roks, and others [1994] EU:C:1994:71.
9. Joined Cases C-399/92, 409/92, 34/93, 50/93 and 78/93 Stadt Lengerich v Angelika Helmig and others [1994] EU:C:1994:415.
10. Case C-297/93, Rita Grau-Hupka v Stadtgemeinde Bremen [1994] EU:C:1994:406
11. Case C-381/99, Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG [2001] EU:C:2001:358.
12. Joined Cases C-4/02 and C-5/02 Hilde Schönheit v Stadt Frankfurt am Main and others [2003] EU:C:2003:583.
13. Case C-196/02 Vasiliki Nikoloudi v Organismos Tilepikoinonion Ellados AE [2005] EU:C:2005:141.
14. Case C-17/05 B. F. Cadman v Health & Safety Executive [2006] EU:C:2006:633

15. Case C-54/07 Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV [2008] EU:C:2008:397.
16. C-104/10 Patrick Kelly v National University of Ireland (University College, Dublin) [2011] EU:C:2011:506.
17. C-415/10 Galina Meister v Speech Design Carrier Systems GmbH [2012] EU:C:2012:217.
18. C-415/10 Galina Meister v Speech Design Carrier Systems GmbH [2012] EU:C:2012:8, Opinion of AG Mengozzi.
19. Case C-81/12 Asociaţia ACCEPT v Consiliul Naţional pentru Combaterea Discriminării [2013] EU:C:2013:275.

EU LAW

1. Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, [1998] OJ L 14/6.
2. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] OJ L 180/22.
3. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16.
4. Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, [2004] OJ L 373/37.
5. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), [2006] OJ L 204/23.

LIST OF NATIONAL REGULATIONS, ACTS AND COURT DECISIONS

1. Anti-Discrimination Act (*Zakon o suzbijanju diskriminacije*), Official Gazette No. 85/08 and 112/12.
2. Gender Equality Act (*Zakon o ravnopravnosti spolova*), Official Gazette No. 82/08.
3. Civil Procedure Act (*Zakon o parničnom postupku*), Official Gazette No. 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 123/08, 57/11, 148/11, 25/13, 89/14.
4. Labour Act (*Zakon o radu*); Official Gazette No. 93/14.
5. Labour Act of 1995, Official Gazette No. 38/95, 54/95, 65/95, 17/01, 82/01, 114/03, 142/03, 30/04 and 137/04 – consolidated version.
6. Constitutional Court, U-III-7490/2014, Decision of 13 April 2016.
7. Constitutional Court, U-I-2696/2003, Decision of 16 January 2008.
8. Supreme Court of the Republic of Croatia, Rev-300/13, Judgement of 17 June 2015.
9. Supreme Court of the Republic of Croatia, Revr-498/2014, Judgement of 13 May 2014.
10. Supreme Court of the Republic of Croatia, Revr-856/2012, Judgement of 27 March 2013.
11. Supreme Court of the Republic of Croatia, Gž-25/11 of 28 February 2012.

12. Supreme Court of the Republic of Croatia, Rev-1276/2007 of 4 June 2008.
13. County Court in Bjelovar, Gž-2000/2012, Judgement of 11 October 2012.
14. County Court in Bjelovar, Gž-458/2012, Judgement of 3 May 2012.

WEBSITE REFERENCES

1. Farkas, L.*, How to present a discrimination claim: Handbook on seeking remedies under the EU non-discrimination directives*, URL=http://ec.europa.eu/justice/discrimination/files/present_a_discrimination_claim_handbook_en.pdf, p. 52-53. Accessed 15 February 2017.
2. Handbook on European non-discrimination law, European Union Agency for Fundamental Rights, 2010, URL=http://fra.europa.eu/sites/default/files/fra_uploads/1510-FRA-CASE-LAW-HANDBOOK_EN.pdf. Accessed 15 February 2017.