



Legal Seminar – Enforcement of equality and anti-discrimination law

28 November 2014

CASE STUDY

Workshop 4 – Burden of proof

Mrs Tigmiza is a graduate of a business school in Belgium. She has been working as a chief executive in a meat processing company (Vianderoon) for 5 years. She sees an advertisement in one of the financial news papers seeking a managing director for Rurecuts, a meat processing company in Belgium.

She does some background research and discovers that there are 4 directors at present, who are all men. She makes contact with Mr Appé, the founding director of the company. Having reviewed her curriculum vitae and finding her to be a suitable candidate, she is invited for an interview. The Company says that it wants to consolidate its position in the meat market.

Mrs Tigmiza is 55, weighs 101 Kilograms (16 Stone) and is overweight for her height. She is Moroccan.

The interview is informal. The candidates must meet the directors at their favourite country club. She is asked how she would handle a series of marketing, investment and personnel issues. The directors tell her that there is one other candidate for the position. They say they want a managing director who will be able to lead the company as a director in about 5 years' time. They also want someone with "fresh thinking" about the company's structure and personnel management.

There is a cocktail reception that weekend which is part of the series of interviews. Rurecuts has a longstanding client and is anxious to ensure that the successful candidate can form a good rapport with this client (Callus Butchers).

Mrs Tigmiza did not get the job. Mr André, who is 30, is the successful candidate. He graduated at the same time (and with the same qualification) as Mrs Tigmiza, and is about the same height and build as her (and he is also 104 Kilograms). He has been Mrs Tigmiza's deputy at Vianderoon for the last 3 years. He used to work at J Morgane (financial advisers) for two years before that at the associate level.

The themes explored in the interview include:

1. The greatest management challenge that the candidate has faced in their career;
2. How to resolve team conflicts;
3. How the candidate would propose to introduce new business to the company;

4. How would the candidate deal with existing customers and encourage new ones.

The remarks of the Director of Callus come to the attention of Mrs Tigmiza. These include: 'Oh, he worked at J Morgane, did he know X? Oh, a lovely man, he knows the right sort'. 'he has a certain gravitas' and 'I can see people responding well to his presence'. "That young man has what it takes". "He is one of us alright".

Remarks about Mrs Tigmiza include: "looks uncomfortable; not sure how people will respond to her". "I don't think she will command respect". "She seems a bit stale".

She comes to know about these remarks because a female employee of Rurecuts, in personnel, tells her about what she has seen in the interview records. She also says that the company has no female sales representatives or managers and that no one appears to be over the age of 50 in middle management. However, when Mrs Tigmiza asks for feedback on her interview, the company does not respond.

Remarks:

- a. Civil Code countries such as France are familiar with the principle that << Il incombe à chaque partie de prouver conformément à la loi les faits nécessaires au succès de sa prétention>>. Or in Belgium: "Chacune des parties a la charge de prouver les faits qu'elle allègue". One way it has been put which may help Civil Code lawyers is the way in which the Dutch writer PA Stein put it in *Introduction to Dutch law for foreign lawyers* (1978) at p 246: if the rules of law which attach to a case "attach a certain legal consequence to the existence of certain facts, he who claims to be entitled to this consequence must prove the facts". Similarly, in Germany, a party is obliged to prove the facts which give rise to a defence on which they rely.
- b. The ECJ case law makes clear from gender cases onwards that some situations require an explanation before the court can be satisfied that they do not offend the principle of equal treatment. *C-54/07 Feryn* clarifies the concept of facts from which discrimination can be inferred. The CJEU was asked whether earlier acts of discrimination can constitute facts from which discrimination can be inferred. The court noted that public statements refusing to recruit those from a particular ethnic group are sufficient to create an inference that there is a discriminatory recruitment policy. It is then for the employer to show that that actual practice of recruitment did not offend the principle of equal treatment. Questions of the sufficiency of proof of those facts are for the national court.
- c. The Directives intervene to state what legal consequences flow from facts from which it *can* be inferred that discrimination has taken place, thus the Claimant must, in a direct discrimination claim, show certain facts: (a) the relevant protected characteristic (here sex or age (or both)); (b) that the Defendant treated the Claimant less favourably than a comparator (real or hypothetical) whose circumstances do not include that characteristic (c) that the comparator's circumstances are the same or not materially different from those of the

Claimant save for the protected characteristic. In those circumstances it is not necessary for the Claimant to show that the treatment is caused by the protected characteristic. The Directives state that this will be inferred unless the Defendant establishes the contrary, namely that an unlawful act of discrimination did not take place.

Questions:

1. What does Mrs Tigmiza have to prove against Rurecuts before the company has to give an explanation to show that it has not discriminated against her under the relevant directive?
2. How could Mrs Tigmiza prove that there has been discrimination in practical terms?
 - a. What documents could assist her?
 - b. What can she do if the national law will not let her demand production of those documents?
3. What (if any) significance does the statement of the customer have in this context? Do such statements constitute facts from which discrimination can be inferred? Does the company need to distance itself from the attitudes of the customer?
4. What use can a lawyer make of stereotypes used by the Defendant in trying to prove facts from which discrimination can be inferred? How could you go about to establish that whether stereotyping has led to unlawful discrimination?
5. Would it make a difference to your answer if the stereotype was **true** of a gender or age?