

# Features of the Civil Law Procedure for Protection against Discrimination

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## Abstract

The prevention and protection against discrimination shall be applicable for all natural and legal persons in the process of exercise of the rights and freedoms guaranteed with the Constitution and the legislation of the Republic of Macedonia.

The person considering that some right has been infringed because of discrimination is entitled to submit a lawsuit in front of a competent court. The provisions from the Law on litigation procedure are adequately applied for the procedure. A civil action is commenced with the filing of a complaint. The plaintiff must file the complaint with the court. The complaint must set forth the claims and the legal basis for discrimination.

In the procedure for protection against discrimination, besides the court for general local jurisdiction, the court in whose area is the seat, or the residence of the plaintiff, also has local jurisdiction.

**Key Words:** Protection, Court, Discrimination, Procedure, Law.

## 1. Basic review

Merit-based trial of a contested case of equality and non-discrimination is closely related to the validity of facts resulting from a series of procedural actions taken by the

parties and the court itself. The parties shall notify the court of the decisive facts. The court shall encourage the parties to submit proof and evidence. Substantial facts and their proving may be part of procedural actions of the court itself.

The contested procedure over protection against discrimination shall initially be focussed on presenting *prima facie* evidence of discrimination by the victim of discrimination itself. It suffices that the plaintiff submits facts and proving means to presume discrimination. This legal concept is motivated by the idea that discrimination victims should be encouraged to demand judicial protection against discrimination. The burden of proof belongs to the responding party, and it has to prove that there was no discriminatory action, or namely the action disputed as discriminatory was justifiable due to legitimate aims.

Nevertheless, considering the fact that parties in a contested procedure are entitled to a series of procedural actions of defence and accusation, in various stages of a judicial proceeding, they need to support such claims on substantial facts. The burden of proof for such claims shall pertain to the party which proposes such facts, or makes such claims.

## **2. Proving substantial facts**

In a court proceeding over an alleged discriminatory action, seeking the truth is of major importance. The quality truth, the truth corresponding to an objective reality, renders the court ruling on such discriminatory action sustainable and fair. The court must reach an all-encompassing consent of stance, or the knowledge on facts over which the truth is built. The truth is closely related to the understanding the knowledge of an occurrence, thereby creating a subjective perception of the court related to the factual situation, thereby determining the credibility of such occurrence. The factual situation is not conditioned by the belief of the court, but the process of understanding facts consisting the whole of such knowledge.<sup>1</sup>

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<sup>1</sup> The European Court for Human Rights at Strasbourg, in the case *I.B. v Greece* (Application no. 52/10), a case of a leave of an employee due to HIV infection, found that the national courts had grounded their rulings of the matter on facts, or scientifically ungrounded assumptions over the HIV-positive status. The applicant had received worse treatment in comparison to another colleague. No negative influence of the relevant disease to perform the concrete job has been proven before court procedure in national courts, for the termination of contract to be found grounded. The European Court for Human Rights at

The judge follows on objective facts of a certain reality, and thereby creates a feeling of credibility of consequences of such discriminatory action. The facts are verified as related to the real situation. This in fact consists the so-called material truth. In a civil proceeding, the judge is bound to exercise the principle of truth-seeking. He/she shall make efforts to prove disputed facts, which consist the decision on the grounds of the claim against discrimination. Each party is bound to present facts and propose evidence over which such party shall ground its claim, or by which such party shall repudiate the allegations and evidence of the opposing party. When evaluating whether facts and evidence are required for a fair resolution of the dispute, the civil court shall proceed with a forewarning on legal obligations to present facts and proposals, and propose evidence. Such evidence includes all facts that are important to the rendering of a merit-based ruling. Nevertheless, the court decides itself which of the proposed evidence shall be heard to determine the decisive facts. Therefore, the court considers the facts, which are to be proven within a court procedure based on a truthful and cautious evaluation of each piece of evidence, individually and collectively, and of all proof in a view of having a successful proceeding. The judge shall decide what proofs are to be heard to identify critical facts, with the sole objective of obtaining a credible overview of the objective reality in the highest degree possible, thereby reaching the moment of absolute truth.

In all situations in which the court cannot verify any fact based on evidence heard, it shall exercise the rules of the burden of proof to verify such fact.

The court panel shall assess evidence during the main hearing of the case. There is a possibility that certain pieces of evidence are presented before the Presiding Judge or the single judge of the court, for major reasons. In such cases, the minutes of such evidentiary hearing by the presiding judge or the judge of the court shall be read during the main hearing session of the case.

When entrusted with the hearing of evidence, the Presiding Judge or single judge of the court is authorized to obtain other evidence if he/she deems appropriate, and also if such evidence is proposed by the parties. When the trial panel decides that any piece of evidence is brought before

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Strasbourg found that the applicant was victim of discrimination on the basis of health status.

the asked judge, in the request for producing evidence, one shall describe the stage as per the main hearing, and specific notes on the circumstances to be considered cautiously during the production of evidence. For the evidentiary hearing before the presiding judge or the single judge, one must inform the parties if they have not stated that they shall not be present in the session. The presiding judge or the asked judge has all authorities of the court panel, or the Presiding Judge in main evidentiary hearing session.

It is worth mentioning that the stance taken when assuming that a piece of evidence cannot be produced, or cannot be produced within reasonable time, or if such piece of evidence must be obtained abroad the country, the court, in its ruling over evidence, shall set a timeline for the evidence to be produced. With the expiry of such timeline, the discussion continues further, even if such evidence has not been produced.

The Court finds discrimination over a factual basis. The factual grounds consist of a plenitude of facts that are decisive to the grounds of the claim of discrimination. Factual claims consist of any circumstance which legal provisions link with a certain quality. Therefore, circumstances are events which have occurred or currently exist. In a discrimination proceeding, the court shall verify the existence of facts relevant to the ruling.<sup>2</sup> The court in its free conviction derives such existence. The Court shall not be bound to the facts that are produced by parties if such parties, according to the court's opinion, have no influence on the position on alleged discrimination.

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<sup>2</sup> In the case of *Mata Estevez v. Spain* (Application no. 56501/00), the European Court of Human Rights deliberated on the fact that the applicant had cohabited with another man, Z.G.C., for more than ten years (homosexual relationship). During that period the applicant and Mr G.C. ran a joint household, pooling their income and sharing their expenses. It also tried the fact that on 13 June 1997 Mr G.C. died in a road accident. The applicant claimed the social-security allowances for the surviving spouse, arguing that he had cohabited with the deceased for many years. The national authorities refused to grant him a survivor's pension on the ground that since he had not been married to Mr G.C., he could not legally be considered as his surviving spouse. In the concrete case, the European Court of Human Rights at Strasbourg found that the Spanish legislation relating to eligibility for survivors' allowances does have a legitimate aim, which is the protection of the family based on marriage bonds. The Court considered that the difference in treatment found, can be considered to fall within the State's margin of appreciation. The case was not considered to be discriminatory.

### **3. Claimed fact**

In a discrimination proceeding, the Court takes into consideration facts found and facts claimed. The court shall address such facts based on the reply to the claimed discrimination, referring to a certain factual basis. By communicating the claim of discrimination to the responding party, in a certain manner, the court also asks the party whether he/she admits or objects the claims of the party alleging to have been discriminated against. By a reply to the discriminatory action claimed, the party may also express its opinions against all allegations of the party initiating such procedure. This does not mean that this occurs regularly. The party may also not object to the claim of discrimination. In this case, the court has an even more difficult job, because it shall need to assess whether the claim of the party has been admitted or objected. That must be concluded by free assessment and appreciation of the court. The claim of a factual assumption by an opposing party may be partial and full, as may be the objection against such factual assumption. In such cases, the court assesses whether the claim corresponds to the situation of fact or not. The claim of a fact by a party is for the court a statement of knowledge over the circumstances, by which the credibility of allegations of the other party is assessed.

### **4. Notorious facts**

The circumstances which appear in a certain social circle, location or any other premises, such as media, sports events, political rallies, legal decisions and acts, books, brochures, etc., and which are related to discriminatory conduct or action, are considered to be notorious facts. These facts need no proving before the court. It is important to underline that for a circumstance to be considered notorious, it is necessary that such circumstance is recognized by the court.

Notorious facts represent grounds for proceeding of discrimination *ex officio*. In this context, of material importance are also facts which are known for the court due to activities undertaken within its own jurisdiction.

## **5. Making a prima facie case**

Making a prima facie case is a duty of the person claiming discrimination. Such a person needs to build the case on the facts related to a difference in treatment as a result of discriminatory grounds. The making of a prima facie case includes both direct and indirect discrimination. Making of a prima facie case must have factual grounds. The presentation of the facts shall support the allegation of the party claiming discrimination. They must indeed refer to circumstances or events from which the outcome derives. In this manner, the allegation of discrimination is grounded. Therefore, the prima facie case represents the factual grounds of the claim. The claim suit, as a procedural action, in the field of protection against discrimination must include the prima facie case.

In filing the claim suit, the claimant must propose means of proving for the facts claimed. Since the party claiming discrimination has decided to demand judicial protection against discrimination, it is such party that will need to make the prima facie case. In this context, the burden of proving the facts presented by claim suit is shifted to such claiming party. The claimant shall propose the proving means, and that is its duty in the stage of filing claim suit. The claimant must also prove the prima facie case of discrimination. By filing a claim suit with the court, the claimant must prove exclusion, limitation or preferences based on any discrimination grounds. In cases of direct discrimination, the prima facie case should refer to a less favourable treatment compared to another person or a group of persons in similar or same situations. In cases of indirect discrimination, the prima facie case would have to refer to the provision, criterion or practice which places a person or a group of persons in less favourable conditions compared to another person or another group of persons, on any of the discrimination grounds.

If the claimant manages to prove the prima facie case, the burden of proof may then shift to the alleged discriminating party – the responding party. The latter will then have to prove that the prima facie case is ungrounded.

## **6. Utilization of comparison**

In relation to the principle of equality and non-discrimination, utilizing a comparison plays an important role. In making the prima facie case, the person requiring protection against discrimination will have to use a

comparison. He shall make a comparison with another person or a group, which in a similar situation enjoys different treatment, an excluding or differentiating treatment.<sup>3</sup> The treatment of discrimination is determined by use of a comparison. In the procedure of protection against discrimination, the party making a claim of inequality and discrimination must find an appropriate comparison. Such a thing is not easy. There are situations in which no appropriate comparison is found to make the *prima facie*. In cases when no comparison is found, a claim suit for protection against discrimination must not be rejected by the court if the claimant has made the *prima facie* case by comparing his treatment within the framework of essential standards referring to equality and non-discrimination, respectively own rights, political, economic, social and cultural rights guaranteed by the Constitution, international treaties and applicable legislation.<sup>4</sup>

## 7. Justified and legitimate aim

Actions that cause direct discrimination cannot be justified. In a difference from direct discrimination, in reviewing claims for indirect discrimination, the instant action or criterion may be objectively justified with a legitimate aim. The means for achieving the legitimate aim in concrete cases may be necessary and appropriate. The burden of proving justifiable objective aim belongs to the person alleged to be the discriminator. The nature of justification to be provided by the responding party is aimed at repudiating the presumption of indirect discrimination.

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<sup>3</sup> In the case of *Gas and Dubois v France*, (Application no. 25951/07), the European Court of Human Rights at Strasbourg took a comparative element into consideration. It found that the same-sex couple which is in partnership and wanting to adopt the child of the other partner, by not terminating legal bonds of the mother with her child does not represent a similar or same situation with a married couple, where one spouse wishes to adopt the child of another spouse.

<sup>4</sup> In the case of *Horvath and Kis v Hungary* (Application no. 1146/1), the European Court of Human Rights at Strasbourg found that cultural differences influence the systematic diagnosing of mental disabilities in children of the Roma community, and as a consequence, the Roma children were erroneously placed in “special schools” in Hungary and other European countries. Such a fact represents indirect discrimination. Therefore, the principles of equality and non-discrimination refers also to the diversity between social groups.

In this context, it is important to mention the existence of a reasonable relation of proportionality of means or criterion used and the aim to be served.<sup>5</sup> In cases in which such relation does not exist, there cannot be any justification or legitimate aim.<sup>6</sup>

## 8. Burden of proof

The party which has filed a claim of equality and discrimination with the court is bound to present facts and propose concrete evidence to prove that equal treatment has been breached. In filing the claim suit, the claimant, in making a *prima facie* discrimination case, must submit facts and propose means of proving. That party has the burden of making the *prima facie* discrimination case. Therefore, the burden of proof is with the

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<sup>5</sup> In the case of *Glor v Switzerland* (Application no. 1344/04) The European Court of Human Rights at Strasbourg, in a case of the liability of payment of a tax of military service exemption for medical reasons, independently of the fact that the person had always expressed the readiness to do military services, assessed the existence of differential treatment of persons in similar situations. The court suggested that such persons are offered alternative possibilities of serving military service, which would require physical engagement suitable to the individual's disability. There cannot be equal treatment for persons unfit for military service who do not pay such tax with the persons who are partially unfit for military service who are bound to pay tax, despite the readiness of doing military service.

<sup>6</sup> In the case of *Rasmussen v Denmark* (Application no. 8777/79), The European Court of Human Rights at Strasbourg tried the existence of a discriminatory action, based on the concept that a difference of treatment is discriminatory if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised".

In this instant case, the Court, in accordance with the circumstances, found that there was a difference in treatment between Mr. Rasmussen and his former wife, in relation to the initiation of procedure to object the paternity of the child. The court did not consider the reasoning of the Danish authorities, which was based on the following: a.) (i) the respective interests of the husband and of the mother in paternity proceedings were different: unlike the husband's interests, the mother's generally coincided with those of the child, and the interests of the child would prevail; (ii) the legislature had also regarded it as necessary to lay down time-limits for the institution of paternity proceedings by a husband because of the risk that he might use them as a threat against the mother, in order to escape maintenance obligations; the differential treatment in terms of deadlines for initiating procedure to object paternity, when it is claimed by father or mother, has no reasonable relation of proportionality between means used (only determined for the father) and the aim. The case presents discrimination.

claimant. This is a procedural matter. Meanwhile, the respondent, the claimed discriminator, is burdened to prove that the prima facie discrimination case is ungrounded. Such party must repudiate the claims of the claimant, or otherwise bear the liability of discrimination. Facts and proof to be presented by the responding party must refer to the concept that the action taken is not discriminatory, and that there was a legitimate aim pursued. In no way should the responding party guide its defence in the existence of the aim for non-discrimination.<sup>7</sup> The existence or not of the aim of discrimination has no effect on the discrimination case. Therefore, the burden of proving that there was no discrimination lies with the responding party.<sup>8</sup>

If one considers the principle of review and principle of adversariality in contested procedure, one may say that there is no division of burden of proof between the claimant and respondent. Each party must support their allegations in a civil court on facts. The claimant files facts and means of proof to prove its allegation. The responding party shall object the allegations of the claiming party by filing its own facts and proof. Therefore, each of the parties has a burden of proof for its own allegations. The court has interest to encourage statements of allegations by each party. The issue of dividing the burden of proof is not procedural but it is material. Filing facts and evidence is enabled by undertaking procedural actions, such as the claimant filing the claim suit, the respondent filing a reply to such claim, preparatory session, the main hearing session, the use of challenging remedies, etc. The content of a fact presented by any of the parties in a judicial procedure must be proven by such party itself. On the

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<sup>7</sup> In the case of *Koua Poirrez v. France* (Application no. 40892/98), related to the right to social benefits between French citizens and citizens of a state signatory of a reciprocity agreement and other foreign citizens, and also referred to the matter of rejecting the citizenship for a person residing in France, The European Court of Human Rights at Strasbourg has reiterated that the reasonable time of procedure of obtaining French citizenship must be assessed under the light of the circumstances of the case and by referring to the criteria defined by national legislation, and specifically the complexity of the matter and the conduct of the applicant and relevant authorities. The Court reviewed the existence of a differential treatment related to the right to social benefits between French citizens and citizens of a state signatory of a reciprocity agreement and other foreign citizens, which was not based on any "objective and reasonable justification".

<sup>8</sup> In this context, the Article 4 of the Directive 97/80 has defined that when the claimant provides facts from which it may be presumed that there was direct or indirect discrimination, the burden of proving there was no breach of principle of equality and non-discrimination pertains to the responding party.

basis of free assessment and conviction of the court on the proof presented by parties or proof obtained by the court itself, the Court establishes the conviction of the instant dispute.

### **9. Formed conviction of the judge**

The court shall review and rule on the existence of a discriminatory action by applying concrete legal norms and supporting the factual grounds, namely the decisive facts. The found factual situation must correspond to the reality. The activity of the court is aimed at finding the truth in terms of decisive fact. The truth is an essential condition in proceeding and ruling over the case. The results of proof heard are freely assessed. The factual situation must include all circumstances influencing the stance on alleged discrimination.

The party, which has initiated the procedure of reviewing alleged discrimination, in the context of the factual situation, has an active role already with the submission of the discrimination claim. The party presents circumstances in its own knowledge on material facts. The court is bound to clarify the factual situation, by demanding a reply from the opposing party in relation to the allegations of discrimination, and statements by other persons.

The truth is found by the court by means of proving. It must correspond with the conviction of the court on decisive facts and the objective situation.<sup>9</sup>

### **10. Conclusions and recommendations**

The civil proceeding over a claim of equality and non-discrimination is aimed at resolving the dispute. The resolution of the dispute is achieved by rendering a ruling. The judgment on a discrimination case represents a

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<sup>9</sup> In the case of *Marschall v Land Nordrhein-Westfalen* (Application C-409/95 [1997]), the European Court of Human Rights at Strasbourg found that a national rule which institutionalized the position that in cases where there are fewer women in leadership positions in public sectors, an advantage shall be given to female candidates, if they enjoy similar qualifications in terms of suitability with the managing position, competency and professional performance. Such action is not discriminatory, namely there is no breach of equal treatment for women and men in the fields of labour, vocational training and promotion, etc. therefore, a national provision which gives priority to women against men, when women have equal qualifications and are under-represented, is for the court a non-discriminatory measure.

legal act by which a dispute is resolved with a view of preventing and protecting against discrimination. By such an act, the court expresses its view on the contested object. According to the type of protection provided by the court, the ruling may be confirming (declaratory) and condemning (mandatory).

The civil court procedure for preventing and protecting against discrimination has its own characteristic features. The utilization of a comparison, the making of a prima facie discrimination case, justification and legitimate aim, and the burden of proof, are features of the civil court proceeding of a discrimination case.

In all cases when the claimant files with the court a claim of discriminatory action, the court shall render a confirming judgment. This ruling shall confirm the existence of a breach of the right to equal treatment.

The judgment for protection against discrimination may also be a condemning (mandatory) one. In all cases in which the party files a compensation claim, the court shall render a condemning (mandatory) ruling. The court must provide institutional protection to the discrimination victim, by condemning the responding party and ordering such party to pay, do or suffer the consequences.

The court proceeding of a discrimination case and the rendering of a court ruling is a procedural hindrance against the same proceeding before the Commission for Protection against Discrimination, because of the supremacy of the courts over the Commission in the field of providing institutional protection against discrimination.

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