
Remedies and Sanctions in anti-discrimination cases

Sophie Latraverse
ERA – ENM october 2015

Two principles

- Remedies must be implemented in such a way as to protect implementation of protected rights by national jurisdictions
 - Sanctions must be effective, proportionate and dissuasive
-

Effective remedy

- Recital 19 directive 2000/43 and 29 directive 2000/78
 - adequate means of legal protection
 - associations or legal entities should also be empowered to engage in proceedings
- Recital 21 + article 8 directive 2000/43/
- Recital 31 + article 10 directive 2000/78
 - Shift of the burden of proof
 - Exception, court or competent body to investigate the facts (articles 8(5) et 10 (5))

Requirements of the ECJ

- Von Colson (C-14/83 par 22)
- *IT IS IMPOSSIBLE TO ESTABLISH REAL EQUALITY OF OPPORTUNITY WITHOUT AN APPROPRIATE SYSTEM OF SANCTIONS . THAT FOLLOWS NOT ONLY FROM THE ACTUAL PURPOSE OF THE DIRECTIVE BUT MORE SPECIFICALLY FROM ARTICLE 6 THEREOF WHICH , BY GRANTING APPLICANTS FOR A POST WHO HAVE BEEN DISCRIMINATED AGAINST RECOURSE TO THE COURTS , ACKNOWLEDGES THAT THOSE CANDIDATES HAVE RIGHTS OF WHICH THEY MAY AVAIL THEMSELVES BEFORE THE COURTS .*

Requirements of the ECJ

- Marschall (C-271/91 II par 25 - 26)

Such requirements necessarily entail that the particular circumstances of each breach of the principle of equal treatment should be taken into account. In the event of discriminatory dismissal a situation of equality could not be restored without either reinstating the victim of discrimination or, in the alternative, granting financial compensation for the loss and damage sustained.

Marshall II par 26

- 26 *Where financial compensation is the measure adopted in order to achieve the objective indicated above, it must be adequate, in that it must enable the loss and damage actually sustained as a result of the discriminatory dismissal to be made good in full in accordance with the applicable national rules.*

Accept C-81/12 (par 62)

- In proceedings in which an association empowered by law to that effect seeks a finding of discrimination, within the meaning of Article 2(2) of Directive 2000/78, and the imposition of a sanction, the sanctions that Article 17 of Directive 2000/78 requires to be laid down in national law must also be effective, proportionate and dissuasive, regardless of whether there is an identifiable victim (see, by analogy, *Feryn*, paragraphs 38 and 40).

Effective remedy

- Recital 24 directive 2000/43 / Article 13 (2)
Creation in each state of an Equality body that can provide independent assistance to victims in pursuing complaints
- Recital 20 + article 9 directive 2000/43
And Recital 30 + article 11 directive 2000/78
Protection against victimisation

Delay to file a claim and time limitation

- Accept C81/12, par 65

A system of claims that imposes a time limitation that is inferior to the delay to present a claim or to the proceedings before the national Equality body does not meet the requirement of providing an effective remedy.

Time limitation

- Pohl C-429/12 par 25 à 28

Each state must determine time limitations for recourse within its own legal framework /
A thirty years delay cannot be considered as inadequate

Effective remedy

- Reference for a preliminary ruling
 - Leone (CJUE 2014)
 - Large discretion of national jurisdiction
- Impact of fundamental rights principles
 - ECHR (6 et 13)
 - Fundamental rights Charter (47)

Non transposition

- Direct effect of directives
 - Napoli (C-595/12)
 - In France the Perreux case,
Conseil d'Etat 30 octobre 2009
- Responsibility of the State
 - Francovich (C-6/90 and C-9/90)
 - Specht ([C-501/12](#))
 - Pohl (C-429/12)

Sanctions: Effective, Proportionate and Dissuasive

- Recital 26, Article 7, Article 15 directive 2000/43
- Recital 35, article 9, article 17 directive 2000/78,

Sanction de la nullité des dispositions

- Article 14 b) directive 2000/43
- Article 16 b) directive 2000/78

In contracts, collective agreements, In-house rules , NGO regulations, etc...

Hay, C-267/12 , sexual orientation
Hennings et Berlin, (C-297/10 et 11) age

Frédéric Hay c. Crédit agricole C-267/12, par 47

- Article 2(2)(a) of Directive 2000/78 must be interpreted as precluding a provision in a collective agreement, under which an employee who concludes a PACS with a person of the same sex is not allowed to obtain the same benefits, such as days of special leave and a salary bonus, as those granted to employees on the occasion of their marriage, where the national rules of

Hay (suite)

- the Member State concerned do not allow persons of the same sex to marry, in so far as, in the light of the objective of and the conditions relating to the grant of those benefits, that employee is in a comparable situation to an employee who marries.

Hennings et Berlin, (C-297/10 et 11)

- The Collective agreement provided that basic remuneration for each category of employee had to be calculated in accordance to the employee's age group;
- Par 68 When they adopt measure that come within the scope of application of directive 2000/78, which implements the principle of non discrimination on the ground of age, social partners must comply with requirements of the directive

Quand l'effectivité du recours rejoint l'effectivité de la sanction

- La portée du recours pour la victime

Von Colson par 23

ALTHOUGH , FULL IMPLEMENTATION OF THE DIRECTIVE DOES NOT REQUIRE ANY SPECIFIC FORM OF SANCTION FOR UNLAWFUL DISCRIMINATION , IT DOES ENTAIL THAT THAT SANCTION BE SUCH AS TO GUARANTEE REAL AND EFFECTIVE JUDICIAL PROTECTION . MOREOVER IT MUST ALSO HAVE A REAL DETERRENT EFFECT ON THE EMPLOYER . IT FOLLOWS THAT WHERE A MEMBER STATE CHOOSES TO PENALIZE THE BREACH OF THE PROHIBITION OF DISCRIMINATION BY THE AWARD OF COMPENSATION , THAT COMPENSATION MUST IN ANY EVENT BE ADEQUATE IN RELATION TO THE DAMAGE SUSTAINED .

Von Colson (suite) par 24

- *IN CONSEQUENCE IT APPEARS THAT NATIONAL PROVISIONS LIMITING THE RIGHT TO COMPENSATION OF PERSONS WHO HAVE BEEN DISCRIMINATED AGAINST AS REGARDS ACCESS TO EMPLOYMENT TO A PURELY NOMINAL AMOUNT , SUCH AS , FOR EXAMPLE , THE REIMBURSEMENT OF EXPENSES INCURRED BY THEM IN SUBMITTING THEIR APPLICATION , WOULD NOT SATISFY THE REQUIREMENTS OF AN EFFECTIVE TRANSPOSITION OF THE DIRECTIVE .*

Accept, C 81/12 par 63

- Non compulsory recommendations

The rules on sanctions must in particular ensure, real and effective legal protection of the rights deriving from it. The severity of the sanctions must be commensurate to the seriousness of the breaches for which they are imposed, in particular by ensuring a genuinely dissuasive effect , while respecting the general principle of proportionality.

Severity of the sanction

- Autonomy of States in choosing civil, penal, compensatory actions or financial compensation.

- Exemples:
 - Recommandations
 - Publication
 - Cessation (Class action)
 - Exclusion from procurments