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Remedies and Sanctions in discrimination cases



Organisiert im Rahmen des Programms Rechte, Gleichstellung und Unionsbürgerschaft (2014–2020) der Europäischen Kommission.

All cited decisions of the Supreme Court can be retrieved at
<https://www.ris.bka.gv.at/Jus>

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Overview

I Fundamental rights

- “Sanctions”
 - Ineffectiveness
 - » Law, contracts
 - » Directives

II Directives

- Procedural requirements
- “Sanctions”
 - Ineffectiveness
 - Damages, etc.

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Overview

III Ineffectiveness issues

IV Compensation issues

- Liability

V Prohibition of retaliation (victimization)

VI Prescription

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I Fundamental rights

- Art 157 TFEU – Equal pay
- Charter of Fundamental Rights – in field of application – Article 51
- Art 16 Freedom to conduct a business
- Art 21 Non-discrimination
- Art 23 Equality between women and men
- Art 28 Right of collective bargaining and action

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Field of application

- Article 51 EU Charter of Fundamental Rights widely understood
 - Implementation and supplementation of directive and regulation, and application of EU law
 - Restriction of fundamental freedoms
 - Sufficient correlation with EU law (Akerberg Fransson; Siragusa)

Fundamental rights – National law ECJ C-555/07

- It is for the national court, hearing a dispute involving the principle of non-discrimination on grounds of age **as given expression in Directive 2000/78**, to ensure effectiveness, **disapplying if need be any provision of national legislation contrary to that principle** (rule that only periods of employment after age of 25 are taken into account when calculating periods of notice); this is not dependent on obtaining a preliminary ruling.

Fundamental rights – National law

ECJ C-441/14 Dansk Industri

- EU law is to be interpreted so that a national court must, if necessary, disapply all provisions of national law, which run counter to the general prohibition of discrimination on the basis of age. **Neither** the principles of **legal security** and **protection of confidence** nor the possibility for the individual, who believes, that he will be harmed by a national provision that runs counter to EU law, so as to hold the Member State concerned responsible for violation of EU law (**State liability**), can challenge this obligation (concerning age discrimination between individuals, compensation claim).

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Fundamental rights – secondary

Community law – C-236/09

- General rule requiring unisex premiums and benefits established by Article 5(1) of Directive 2004/113
- Article 5(2) grants certain Member States – those in which national law did not yet apply that rule at the time when Directive 2004/113 was adopted – the option of deciding before 21 December 2007 to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risks based on relevant and accurate actuarial and statistical data.
- Given that Directive 2004/113 is silent as to the length of time during which those differences may continue to be applied, Member States which have made use of the option are permitted to allow insurers to apply the unequal treatment without any temporal limitation.

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Fundamental rights – secondary Community law – C-236/09

- Such a provision, which enables the Member States in question to maintain without temporal limitation an exemption from the rule of unisex premiums and benefits, works against the achievement of the objective of equal treatment between men and women, which is the purpose of Directive 2004/113, and is incompatible with Articles 21 and 23 of the Charter.
- That provision must therefore be considered to be invalid upon the expiry of an appropriate transitional period (21 December 2012).

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Interpretation of secondary law in conformity with Fundamental Rights C-426/11

- Directives must be interpreted in a manner consistent with the fundamental rights.
- Here: Directive on the transfer of undertakings in consistency with Article 16 of the Charter (freedom to conduct a business).

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II Effect of the provisions of the Directive

- **Shortcomings in the implementation in general:**
 - Interpretation **in line with the directives**
 - If not possible:
 - **Public** sector: **direct effect** (C-174/16)
 - **Private** sector: **no direct effect** (C-98/09) only **claims for damages** against the State (C-160/14), but also **appeal to fundamental rights**
 - **Infringement proceedings**

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Directive - Procedures

Art. 9 2000/78/EC similar to Art. 17
2006/54/EC

- (1) Member States shall ensure that **judicial and/or administrative procedures**, including where they deem it appropriate **conciliation procedures**, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.

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Directive - Procedures - 2000/78/EC – Art. 9 - Remedies

- (2) Member States shall ensure that **associations, organisations** or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.
- (3) Paragraphs 1 and 2 are without prejudice to national rules relating to **time limits** for bringing actions as regards the principle of equality of treatment.

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Directive - Procedures 2000/78/EC – Art. 11 Victimisation

- Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer **as a reaction to a complaint** within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.
- Art. 24 2006/54/EC, Art. 9 2000/43/EC

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Anti-Racism **Directive** 2000/43/EC - **Procedures**

- Essentially the **same substance** to the provisions of Art 7 (Defence of rights), Art 9 (Victimisation), Art 14 (Compliance) and Art 15 (Sanctions).
- Article 13 - (1) Member States shall designate a **body or bodies for the promotion** of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights. Art. 20 2006/54/EC.

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Anti-Racism **Directive** 2000/43/EC Art 13 – Surveys, Reports

- (2) Member States shall ensure that the competences of these bodies include:
 - without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their **complaints** about discrimination,
 - conducting independent **surveys** concerning discrimination,
 - publishing independent **reports** and making **recommendations** on any issue relating to such discrimination.
- Similar to Art. 20 2006/54/EC.

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Directive – Sanctions - 2000/78/EC – Art 16 – Compliance – Legal Ineffectiveness

- Member States shall take the necessary measures to ensure that:
 - a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are **abolished**;
 - b) any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations are, or may be, **declared null and void** or are amended.

Similar to Art 23 2006/54/EC plus approval ban Art 14 2000/43/EC.

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Directive – Sanctions – 2000/78/EC – Art. 17

- Member States shall lay down the rules on **sanctions** applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the **payment of compensation** to the victim, must be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by 2 December 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.
- Similar 2000/43/EC Art 15;
- 2006/54/EC Art. 18 (compensation) and Art 25.

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Directive Requirements on **Sanctions**

- Adverse provisions in contracts, collective agreements etc. are **null and void**
- **Sanctions** – Compensation, Contestability, etc. - Choice

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III - Ineffectiveness – Retrospective Effect

C-614/11, 8 ObA 63/10p

- Article 3(1)(a) and (c) of Directive 76/207/EEC, as amended by Directive 2002/73/EC, precludes a national legislation under which discrimination on grounds of sex in connection with the termination of an employment relationship which is effected solely by lapse of time pursuant to a fixed-term individual employment contract entered into **before the entry into force** of the above directive (Austria's accession), which differs depending on whether the employee is a man or a woman, where the employee concerned reaches that age after the accession.

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Ineffectiveness – Effect - Conformity

- Case-law on Art. 141 TEC (now 157 TFEU) implies some leeway (ECJ C-28/93) when it comes to how adverse provisions must be **set aside**.
- It is inadmissible to persist with the discrimination – even if only in the form of transitional measures (ECJ C-408/92).
- Until due and proper implementation, members of the disadvantaged group are entitled to the same treatment and to the application of the same arrangements as other workers (ECJ C-33/89)

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Example – Invalidity - Adaptation ECJ Case C-88/08; 9 ObA 83/09k

- The recognition of vocational experience before the age of 18 is to be excluded for achieving the goal of not putting general education at a disadvantage against vocational training inordinately.

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Example - Ineffectiveness - Conformity C-297/10 - Hennigs

- Articles 2 and 6(1) of Directive 2000/78 and Article 28 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding a measure in a collective agreement, which replaces a system of pay leading to discrimination on grounds of age by a system of pay based on objective criteria while maintaining, for a transitional period limited in time, some of the discriminatory effects of the earlier system in order to ensure that employees in post are transferred to the new system without suffering a loss of income. (Preservation of established rights legitimate aim within the meaning of Article 6(1) of Directive 2000/78).

Example Conformity C-501/12 Specht

- Articles 2 and 6(1) of Directive 2000/78 do not preclude domestic legislation laying down the detailed rules governing the reclassification within a new remuneration system of civil servants who were established before that legislation entered into force, under which the pay step that they are now allocated is to be determined solely on the basis of the amount received by way of basic pay under the old system, notwithstanding the fact that that amount depended on discrimination based on the civil servant's age, and advancement to the next step is now to depend exclusively on the experience acquired after that legislation entered into force.

Example Conformity C-501/12 Specht

- EU law, in particular Article 17 of Directive 2000/78, does not require civil servants who have been discriminated against to be retrospectively granted an amount equal to the difference between the pay actually received and that corresponding to the highest step in their grade. It is for the referring court to ascertain whether all the conditions laid down by the case-law of the Court of Justice of the European Union are met for the Federal Republic of Germany to have incurred liability under EU law.
- EU law does not preclude a national rule which requires the civil servant to take steps, within relatively narrow time-limits – that is to say, before the end of the financial year then in course – to assert a claim to financial payments that do not arise directly from the law, where that rule does not conflict with the principle of equivalence or the principle of effectiveness (also C-20/13-Unland).

Example Conformity C-417/13 Starjakob

- EU law - in particular Articles 2 and 6(1) of Directive 2000/78/EC - must be interpreted as precluding national legislation such as that at issue in the main proceedings, which, to end discrimination based on age, takes account of periods of service prior to the age of 18, but which, simultaneously, includes a rule, applicable in reality only to employees who are subject to that discrimination, which extends by one year the period required for advancement in each of the first three salary steps and which, in so doing, definitively maintains a difference in treatment based on age.

Example Conformity C-417/13 Starjakob

- National legislation which seeks to end discrimination based on age does not necessarily have to allow an employee whose periods of service completed before the age of 18 have not been taken into account in calculating his advancement (Article 16 Directive 2000/78) to obtain financial compensation which corresponds to payment of the difference between the remuneration which he would have received in the absence of such discrimination and that which he actually received. However, as long as a system to abolish discrimination on grounds of age in a way that conforms with the provisions of the Directive has not been adopted, employees whose experience was acquired before the age of 18 must be granted the same benefits as those enjoyed by employees who have obtained, after reaching that age, experience of the same type and comparable duration, as regards recognition of those periods of service but also advancement in the pay scale.
- EU law (Art. 16 Directive 2000/78) does not prevent the national legislature from providing, in order to take into account periods of service completed before the age of 18, for an obligation of cooperation under which he (the employee) must give his employer the evidence relating to those periods. However, there is no abuse of law in an employee's refusal to cooperate for the purpose of the application of legislation which entails discrimination based on age contrary to Directive 2000/78.

Example Conformity C-427/13 Starjakob C-530/13 Schmitzer

- The principle of effectiveness does not preclude a national limitation period for claims which are founded in EU law from starting to run before the date of delivery of a judgment of the Court which has clarified the legal position on the matter. Supreme Court of Justice of Austria, 8 ObA 11/15y
- Articles 9 and 16 of Directive 2000/78 must be interpreted as meaning that a civil servant who has suffered age-based discrimination - resulting from the method by which the reference date taken into account for calculation of his advancement was fixed - must be able to rely on Article 2 of Directive 2000/78 in order to challenge the discriminatory effects of the extension of the period for advancement, even though, at his request, that reference date has been revised.

Example conformity C-482/16 Stollwitzer

- Article 45 TFEU and Articles 2, 6 and 16 of Directive 2000/78/EC are to be interpreted so that they do not oppose a regulation such as in the main proceedings, introduced to eliminate discrimination based on age, whereby only the time worked after the age of 18 is taken into account in the salary structure for the classification of workers in a company, so that this age limit is abolished for all employees with retroactive effect, and only experience acquired in companies active in the same sector is counted.

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Example Conformity Supreme Court of Justice of Austria 8 ObA 11/15y

- As long as no system to abolish discrimination on grounds of age has been adopted, the system in force for employees favoured by the previous system remains the only valid frame of reference.
- The time of the pronouncement of the ECJ judgment in the *Hütter* case, C-88/08, has no effect on the starting date of the limitation period (see also ECJ C-492/12, *Pohl*).
- Based on these principles, the plaintiff is entitled to back-payment of the asserted pay discrepancies, in so far as the period of limitation has not passed or was not pleaded.

IV Compensation

- **Sanctions – Compensation**
 - effective
 - proportionate
 - deterrent
 - ceiling only if the only damage incurred was denial of recognition (ECJ C-180/95 Draehmpaehl; similar substance already found in C-271/91 Marshall – full compensation)
- **Sanctions also include**
 - administrative penalties
 - criminal proceedings
 - exclusion from advancement

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Full compensation C-407/14

- **Article 18** of Directive 2006/54/EC is to be interpreted so that **the person injured** as a result of discrimination on the grounds of sex, **is provided**, in a way which is dissuasive and proportionate, **real and effective compensation or reparation**, as required by the Member States, which select this financial form to take measures, under the national legal systems, to pay compensation to the injured parties **that covers fully** the prejudice suffered.

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Material Compensation 9 ObA 87/15g

- **Art 18** Directive 2006/54/EC: The damage actually suffered from the discriminating termination shall be compensated **fully** in accordance with the applicable national rules.
- The **injuring** party **shall be required to contest and prove** that the damage would have occurred also in the case of appropriate conduct. The defendant would have to provide proof that the employment relationship would have been terminated within the **trial period** even if the **pregnancy** were not taken into account.

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Immaterial compensation 9 ObA 87/15g

- The **personal impairment** from the **termination** during and on account of pregnancy is **not compensated with** the compensation for material loss (**loss of earnings**) (**preventive function**).
- In each individual case, a person discriminated against is entitled to show that there are special circumstances beyond any doubt in his or her case that account for the severity and length of the prejudice suffered personally.
- Discriminating termination of the apprenticeship during the trial period on account of pregnancy: compensation of €1,700 (increased in the event of repeat violation 9 ObA 49/16w)

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Non-pecuniary **damage** – 8 ObA 11/09i

- The law prohibits any discriminatory conduct during this “process”, **even if the person has no chance of getting the job.**
- In fixing an entitlement to non-pecuniary damages, the law incorporates the “procedural” aspect of anti-discrimination protection by acknowledging the legal good that a candidate in the employment market must “not suffer discrimination” and attaching a value to it in the form of a lump sum. The aim that requires enforcing is that the group of individuals concerned should not gain the impression when applying for work that they have “no prospects” in the employment market on the grounds of a specific characteristic they possess (sex, age, ethnic origin, etc.) and hence refrain from submitting applications.

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Example – Attribution of Damage 9 ObA 118/11k

- The business owner shall always be considered to be the employer (in the case of legal entities: the organs authorised to represent the company), i.e. the person who is responsible for the undertaking as a whole and who is able to remedy the situation and to prevent defamation in the future. However, the same applies to persons who, by virtue of their authority and their position vis-à-vis the other employees, must be regarded as **representatives appointed to manage the business independently**, i.e. only persons who are authorised to manage the business independently and in particular to perform employer functions.

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V Victimisation - 8 ObA 55/13s

No Retaliatory Termination

- It is incompatible with European stipulations and those derived from national legislation, in cases of assertion of sexual harassment, to assign unreservedly to the person making the accusation the risk that exists to a particular degree of lack of demonstrability of an accusation, in connection with the realisation of grounds for dismissal or termination. This would greatly increase the risk of such assertions being made and remedial actions being sought, which would clearly run counter to the described legislative intention and be inconsistent with the principle that national legislation should neither make it impossible to assert in practice nor excessively impede the rights granted by EU law.

VI Prescription

- **Prescription or limitation periods** are admissible, if they do not deviate adversely and if they do not impair excessively or make enforcement impossible in practice (ECJ C-246/09, C-326/96; inadmissible in consecutive employment contracts, where a new one begins when the former ends, so that the employer achieves the same outcome during the upright subsequent contract of employment; ECJ C-78/98; on admissible legislative amendment - C-246/09).
- An employer can therefore not invoke a period of limitation of two years (although sufficient in itself), if the employee could not comply therewith only because the employer had **swapped** it for the remuneration paid to the employee of the other sex (ECJ C-326/96).

VII Responsibility of courts

- Article 6(1) of Directive 2000/78 must be interpreted as meaning that it does not preclude a national measure which **does not contain a precise list** of the aims justifying derogation from the principle prohibiting discrimination on grounds of age. It is for the national court to ascertain whether the legislation at issue in the main proceedings is consonant with such a legitimate aim and whether the national legislative or regulatory authority could legitimately consider, taking account of the Member States' discretion in matters of social policy, that the means chosen were appropriate and necessary to achieve that aim (C 388/07, C-341/08, C-45/09).

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Collective Labour Law Prohibitions on discrimination

- **Restriction** of possibilities of **collective assessments** where something is „exchanged.“
- Uncertainty about delimitation could **stand in the way of benefits** for individual groups.
- Level reduction beforehand as a result of C-88/08.

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The End

Thank you



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