

Seeking effectiveness: remedies and sanctions in discrimination cases

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The function of remedies

Earl Warren, Chief Justice of the US Supreme Court: there is "an invidious view which is now held by many: you can't wipe out racial discrimination by law, only through changing the hearts and minds of men. This is a false credo. True, prejudice cannot be wiped out, but infliction of it upon others can."

Essential role of the law in reducing the number of actions stemming from - conscious or unconscious - prejudices, fulfilled through sanctions and remedies

Two primary functions:

- to dissuade the discriminator (and other potential discriminators) from future discrimination, and
- to redresses the wrong done to the victim(s).

Legal framework I

- ▶ Article 47 of the Charter of Fundamental Rights: „Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal [...]”
- ▶ Article 15 of Directive 2000/43 and Article 17 of Directive 2000/78: “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.”

Legal framework II

- ▶ Article 18 of Directive 2006/54 (recast): “Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered. Such compensation or reparation may not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive is the refusal to take his/her job application into consideration.”
- ▶ Article 25: “Member States shall lay down the rules on penalties 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 penalties, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive.”

- ▶ Effective - capable of achieving the desired goals of sanctioning (i.e. deterrence and redressing);
- ▶ Proportionate - adequately reflecting the severity of the violation and the harm caused;
- ▶ Dissuasive - capable of deterring the discriminator from continuing and/ or repeating the violation and also of deterring other (potential) discriminators.

Case law I

- ▶ C-14/83 **Von Colson**: two female social workers not employed at all-male prison; compensation: reimbursement of costs related to job interview. ECJ:
- ▶ „It is impossible to establish real equality of opportunity without an appropriate system of sanctions” BUT
- ▶ „the Directive does not prescribe a specific sanction; it leaves member states free to choose between the different solutions suitable for achieving its objective” HOWEVER
- ▶ the Directive „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 [...] be adequate in relation to the damage sustained.

Case law II

- ▶ C-271/91 Marshall II: Helen Marshall dismissed from her job as dietician because she passed the qualifying age for a State pension, which was different for men and for women. The court awarded her compensation of 19 405 (financial loss, interest and compensation for injury to feelings), but cap on compensations (GBP 6 250), and no interests after damages suffered. ECJ:
- ▶ „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.”
- ▶ „Where financial compensation is the measure adopted [...], 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 [...]”
- ▶ „It follows „that the fixing of an upper limit of the kind at issue in the main proceedings cannot [...] constitute proper implementation of the Directive, since it limits the amount of compensation a priori to a level which is not necessarily consistent with the requirement of ensuring real equality of opportunity through adequate reparation [...].”

Case law III

- ▶ C-81/12 Accept: An NGO's complaint with the Romanian equality body (CNCD) against a football club and its patron, claiming that he would never hire a homosexual player. CNCD concluded discrimination and gave the respondent a warning. ECJ:
- ▶ “a purely symbolic sanction cannot be regarded as compatible with the correct and effective implementation of Directive 2000/78”. BUT
- ▶ “The mere fact that a specific sanction is not pecuniary in nature does not mean that it is purely symbolic, particularly if it is accompanied by a sufficient degree of publicity and if it assist in establishing discrimination [...] in a possible action for damages” .
- ▶ Rules are not dissuasive if „those with legal standing to bring proceedings [are] reluctant to assert their rights” and „any repeat offences of the defendant concerned” might raise doubts about dissuasiveness

Judicial obligations stemming from EU law I

- ▶ C-441/14 *Dansk Industri*: Mr Rasmussen was dismissed by employer, upon reaching 60 years of age. A dismissed employee is entitled to a severance payment, but Mr Rasmussen was not under Danish law, because he had joined a pension scheme run by his employer prior to reaching the age of 50. ECJ:
- ▶ „[A] national court adjudicating in a dispute between private persons falling within the scope of Directive 2000/78 is required [...] to interpret [...] provisions [of national law] in such a way that they may be applied in a manner that is consistent with the directive or, if such an interpretation is not possible, to disapply [...] any provision of national law that is contrary to the general principle prohibiting discrimination on grounds of age.”

Judicial obligations stemming from EU law I

BUT: no *contra legem* interpretation, putting aside law is possible, creating it is not

Case C-407/14 *Arjona Camacho*: Arjona Camacho was employed by as a security guard within a juvenile detention centre in Cordoba, but was dismissed. The Spanish court concluded that her dismissal amounted to gender based discrimination, and posed the question: “Must the court award the claimant damages which go beyond full compensation for the loss and damage which she sustained, in the form of punitive damages, in order to serve as an example to her former employer and others, given that the concept of ‘punitive damages’ does not exist in Spanish law?” ECJ:

“In the absence of a provision of national law making possible the payment of punitive damages to a person injured by discrimination on grounds of sex, Article 25 of Directive 2006/54 does not provide that a national court can on its own require the person responsible for the discrimination to pay such damages.”

The Kaposvár school segregation case I

- ▶ November 2010: the Supreme Court concludes the Municipal Council of Kaposvár has violated the requirement of equal treatment by failing to act against the spontaneously developed segregation of the Pécsi Street school. Putting an end to the violation is ordered without the prescription of specific action.
- ▶ No measures are taken - new actio popularis lawsuit launched by Chance for Children Foundation in 2013
- ▶ November 2015: the Kaposvár Regional Court establishes the violation, and the responsibility of the respondents, but takes the stance that it is not in the position to specifically order the implementation of the complex desegregation plan devised the plaintiff (and based on the closing of the segregating school).

The Kaposvár school segregation case II

- ▶ October 2016: the Pécs Appeals Court partly overturns the first instance judgment: it orders that the segregated school must be closed: in the 2017/18 school year, no first graders may be admitted to the school. Those cca. 20 first graders who belong to the school's catchment area must be distributed among other, non-segregated schools of the town. The court also obliges the defendants to adopt and publish a detailed desegregation plan.
- ▶ October 2017: the Curia upholds the decision of the Pécs Appeals Court. It finds that courts can go beyond concluding that a violation has taken place and ordering the defendant to put an end to the violation: they may also order that specific measures be taken in order to enforce the requirement of equal treatment.