EU ANTI-DISCRIMINATION LAW

Remedies and sanctions
discrimination cases

EU anti-discrimination law
Academy of European Law, Trier, 24/09/2018
Katrin Wladasch

EU legal framework

Directive 2006/54 – Equal treatment Dir. Art. 25

Sanctions in discrimination cases must be

› effective
› proportionate AND
› dissuasive

› may include damages
EU legal framework

Arrangements for sanctions and legal remedies are in principle left to the national legislator

BUT: Requirement for proportionality, dissuasiveness and effectiveness

AND: Measures required to ensure that they are applied

BUT HOW?
AND WHAT DOES IT MEAN?

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EU legal framework – Case Law

Proportionality von Colson C-14/83

- Recruitment as social workers for a prison (D) by 2 women, jobs given to men, court established discrimination, only DM 7.20 travel costs awarded as compensation.

- CJEU:
  - even if the relevant directive (76/207/EC) does not specify a particular form of penalty, it is still required to ensure that it is effective and has a dissuasive effect
  - compensation must in any event be proportionate to the damage suffered

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EU legal framework – Case Law

‣ Proportionality ACCEPT C 81/12

‣ discriminatory statement regarding homosexuality in a discussion on a possible player transfer by someone recognised as an official of a football club. Reported to the Consiliul Național pentru Combatererea Discriminării, which acknowledged harassment, but under Romanian law the only penalty available was a warning.

‣ CJEU:

‣ confirmed case law also in “non-gender” cases

‣ penalty must not be purely symbolic

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EU legal framework – Case Law

‣ No requirement for fault Decker C-177/88

‣ Recruitment as trainer, notification of pregnancy, selection committee proposes candidate as most suitable, but she is not appointed. Under national law (NL) the sickness fund refused maternity benefits on the grounds that she was already pregnant during recruitment. Employer could not afford to employ temporary cover. Justification?

‣ CJEU:

‣ a breach of a prohibition of discrimination must be met with a sanction which is “such as to guarantee real and effective judicial protection”.

‣ must have a real deterrent effect

‣ a fault needs to be established or the absence of grounds would significantly compromise practical effectiveness

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EU legal framework – Case Law

• No upper limits *Marshall C-271/91*

  • Redundancy at the age of 62, an age at which a woman was already entitled to pension payments (UK), although she wished to continue to work to age 65. Discrimination on basis of sex. National law sets an upper limit on compensation, the actual losses incurred (difference between pension and income) not covered.

  • CJEU:

    • Not permissible since *reparation of the loss and damage sustained by a person injured as a result of discriminatory dismissal may not be limited to an upper limit fixed a priori or by excluding an award of interest to compensate for the loss sustained by the recipient of the compensation as a result of the effluxion of time until the capital sum awarded is actually paid.*

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EU legal framework – Case Law

• No upper limits *Draehmpaehl, C-180/95*

  • Advertisement for female management assistant. No response to an application by a male candidate. Discrimination on basis of sex. National law (D) set an upper limit of three months’ earnings in recruitment discrimination cases.

  • CJEU:

    • sanction must *have a real deterrent effect on the employer and must in any event be adequate in relation to the damage sustained.*

    • Upper limit of three months’ earnings is insufficient if the applicant would have been the most suitable candidate.

    • possibly appropriate if the applicant would not have got the job even without discrimination.

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EU legal framework

Directive 2006/54 - the Equal Treatment Directive

Article 18: real and effective compensation or reparation for the loss and damage sustained

‣ in a way which is dissuasive and proportionate to the damage suffered

‣ Predetermined upper limit only permitted for cases where demonstrably damage suffered was “only” failure to consider job application.

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EU legal framework – Case Law

‣ Also without a party affected Feryn C-54/07

‣ Manager of a company stated that no Moroccans would be employed as his clients did not want them. Appeal by Belgian equal opportunities body. No actual affected party.

‣ CJEU:

‣ sanctions must be effective, proportionate and dissuasive, even if there is no identifiable victim.

‣ Proposals for suitable penalties:

‣ - discrimination established by court, connected with an order for suitable publication at the respondent’s expense.

‣ - injunction, if necessary in combination with a fine.

‣ - compensation for the body which brought the proceedings.

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EU legal framework – Case Law

▶ May include a punitive component *Arjona Camacho*, C-407/14

- Dismissal from position as security guard in a young offenders’ institution after two years. Discrimination on basis of sex. Actual damages assessed at EUR 3,000. Question raised as to whether it was sufficiently dissuasive. Are punitive damages acceptable if there is no provision for them in national law (ES)?

- **CJEU:**
  - Member States must take measures needed to ensure claims can be pursued.
  - Measures must be effective enough to achieve the aims of the directive
  - Dissuasive effect does not mean an unconditional need for punitive damages
  - Compensation with a punitive element is however permissible if provided for in national law.

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EU legal framework – case law

**Sanctions in discrimination cases must**

- be proportionate to the damage suffered (*von Colson*, C-14/83)
- not be purely symbolic (*ACCEPT*, C-81/12)
- not be made dependent on proof of fault (*Decker*, C-177/88)
- have a real dissuasive effect (*Decker*, C-177/88)
- not set any upper limits (*Marshall*, C-271/91)
- be independent of the existence of an actually affected individual (*Feryn*, C-54/07)
- can in principle also comprise an element of punitive damages over and above the damage suffered (*Maria Auxiliadora Arjona Camacho v Securitas Seguridad España, S.A.*, C-407/14)

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National transposition

- Compensation for material and immaterial damage
- Penalties and administrative sanctions
- Obligations or recommendations for ending discrimination
- Setting up or re-establishing a non-discriminatory situation
- Publication of a court or tribunal decision
  - Recommendations for implementation of equality policies
  - Warnings
  - Economic penalties for legal persons

How a sanction can be calculated

For a decision on the scale of compensation or a penalty national law takes different factors into account, such as:

- The financial resources of the perpetrators
- The status of the perpetrators (public authority or private individual/company)
- The number of discriminatory incidents (recidivism)
- The extent of the discrimination (multiple discrimination)
**National practice**

- Guidelines for the assessment of compensation – the “Vento bands” (UK)
- Compensation must not be underestimated out of respect for injury to feelings and to counter a diminishing respect for anti-discrimination law (*Buxton v Equinox Design*, UK)
- The personal motivation of the discriminatory party is irrelevant (High court judgment, CZ)
- Intensity and duration of the discriminatory behaviour must be taken into consideration (Labour court, DE)
- Preventative effect of compensation payments? (conflicting judgments, commercial court, AT)

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**Which sanctions are the most effective?**

*From the perspective of European equal treatment organizations*

- Administrative penalties if they are punitive in nature
- Publication of decisions
- Compensation at a level that has a dissuasive effect
- Requirements/recommendations to dismantle discriminatory structures/procedures
- Restoration of a discrimination-free situation
- Requirement to perform unpaid work
- Requirement to introduce anti-discrimination policies – where these are likely to lead to actual change
- Warnings – where these have the potential to damage image
From the perspective of the victims

Victims of discrimination have very different aims and ideas of what they may achieve:

• Resolving problems – to reach a situation which is the same as it was before the discrimination arose – how it would have been without discrimination

• Compensation for damage suffered

• Punishment for the perpetrator

• A judgment/decision which makes it clear that discrimination has taken place

• An institutional/systemic change

• Money

Challenges and barriers

• There is no ideal sanction for every individual case

• Concerns about revenge/victimisation

• Complexity, length and cost of proceedings, lack of help with proceedings

• Inadequate knowledge of rights and legal remedies, lack of legal certainty

• Limited level of compensation awarded

• Decisions by equal treatment bodies are insufficiently binding

• No way of establishing or restoring a discrimination-free situation

• Lack of experience and sensitivity on the part of judges

• Difficulty in establishing discrimination and its effects

• Lack of practical enforcement mechanisms
Thank you for your attention!

Katrin Wladasch
katrin.wladasch@univie.ac.at