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ERA 2019

## Remedies and Sanctions in discrimination cases

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



This training session is funded under the 'Rights, Equality and Citizenship Programme 2014-2020'  
of the European Commission.

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## Overview

- I Fundamental rights
  - a. "Sanctions" Ineffectiveness
    - » Law, contracts
    - » Directives
  - b. Interpretation
- II Directives
  - a. Procedural requirements
    - Victimization
  - b. "Sanctions" – Ineffectiveness - Damages, etc.
- III Retroactive effect
- IV Invalidity - Adaptation
- V Sanction compensation - Attribution
- VI Cooperation – Statute of limitation
- VII Responsibility of Courts

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# I Fundamental rights

- Art 157 TFEU – Equal pay
- Charter of Fundamental Rights – in 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)
- 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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## la 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.

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## **Ia 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).

## **Ia 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.

## **Ia 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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## **Ib 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 - direct**
    - **Infringement proceedings**

### **Ila 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.

## **Ila Directive – Procedures - 2000/78/EC**

### **Art. 9 similar Art 17 2006/54/EC**

- (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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## **Ila Procedures**

### **Race Directive 2000/43/EC -**

- 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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## Ila Race **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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## Ila **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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## Ila Victimisation C-404/18 Hakebbracht

- Article 24 of Directive 2006/54/EC must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which, in a situation in which a person considers himself a victim of discrimination on grounds of sex, an employee who has assisted him in that regard is protected from victimisation by the employer **only if** he has **appeared** as a **witness** in the investigation of that complaint and his testimony complies with the formal requirements laid down by that legislation.

## Ila 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.

## **IIb Directive – Sanctions**

### **Art 16 – 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.

Art 23 2006/54/EC plus approval ban

Art 14 2000/43/EC.

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## **IIb 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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### III Retroactive effect C-432/17 O`Brien

- **Rules of procedure** are generally deemed to apply from the date of their entry into force (Commission/Spain, C-610/10, EU:C:2012:781, Para. 45).
- Substantive rules will normally be interpreted as applying to situations arising **before their entry into force** only if it is clear from their wording, objective or structure that they have such an effect. (Molenbergatie, C-201/04, EU:C:2006:136, Para. 31).

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### III Retroactive effect C-432/17 O`Brien

- A new rule is applicable from the date of entry into force, but normally **not to legal positions created and finally acquired** before the entry into force, **but to the future effects** of legal positions **created** under the old law. Subject to the prohibition of the retroactive effect of legal acts, something else only applies if special provisions are enacted which specifically regulate the conditions for their validity in time. (Commission/Moravia Gas Storage, C-596/13 P, EU:C:2015:203, Para. 32).
- The question of this retroactive effect must be **distinguished** from the question of the **temporal effects** of a judgment of the CJEU. (limited e.g. Barber C-262/88, EU:C:1990:209).

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### III Retroactive effect

C-432/17 O'Brien C-614/11, 8 ObA 63/10p

- If the accrual of **pension rights** extends to periods both before and after the deadline for the transposition of Directive 97/81 (part-time), it must be assumed that the provisions of the Directive also apply to the determination of these rights with regard to the **periods of service completed before** the entry into force of the Directive (differently, if in retirement before the deadline for the transposition of the Directive has expired).
- Article 3(1)(a) and (c) of Directive 76/207/EEC preclude legislation under which the termination of an individual contract of employment on the basis of a **fixed-term contract** of employment concluded **before the entry into force** of that directive (accession of Austria) is effected exclusively by the **lapse of time** on reaching retirement age, where that retirement age is different according to sex. 21

### III Change after legal force

C-258/17 EB

- Article 2 of Directive 2000/78/EC must be interpreted as meaning that, after the expiry of the period prescribed for transposition of that directive, it is applicable to the **future effects** of a **disciplinary decision** which has acquired the authority of a final decision and was adopted **before the entry into force** of that directive ordering an official to take early retirement with a reduction in his retirement pension.
- Although the national court is required, for the period from 3 December 2003, not to review the final disciplinary penalty by which the official concerned was placed in early retirement, but to review the reduction in his pension in order to determine the amount which he would have received if he had not been discriminated against on grounds of sexual orientation.

## IV Invalidity

### C-396/17 Leitner, C-24/17 ÖGB

- If national provisions cannot be interpreted in accordance with Directive 2000/78, the national court is obliged, within the framework of its powers, to ensure legal protection and full effect by, if necessary, **disapplying** any conflicting national provision. Where discrimination contrary to Union law has been established, **as long as no measures to restore** equal treatment have been adopted, **disadvantaged** officials must be granted the **same advantages** as beneficiaries, both in terms of prior periods of service completed before reaching the age of 18 and in terms of advancement in the salary scales.
- **Difference to be granted.**

## IV Adaptation

### 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).

## IV Adaptation 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.

## IV Adaptation C-417/13 Starjakob C-396/17 Leitner C-24/17 ÖGB

- It is, however, **inadmissible** to provide for this unequal treatment not only as a transitional measure, but on a permanent basis **without progressive approximation** (RS Leitner, ÖGB).
- It is also inadmissible, in order to eliminate age discrimination, to take account of previous periods of service completed before the age of 18 but, at the same time, to provide for a provision actually applicable only to staff who are victims of that discrimination, which **extends by one year** the period necessary for advancement in each of **the first three salary brackets** and thus definitively establishes unequal treatment on grounds of age (Starjakob).

#### **IV Adaptation+Retroactive effect+Sanction?**

C-501/12 Specht C-482/16 Stollwitzer

- Union law does **not require** discriminated officials to be paid **retroactively an amount equal to the difference** between their actual remuneration and the remuneration at the highest level of their grade. It is for the national court to determine whether all the conditions laid down for the Federal Republic of Germany to be **liable under Union law** have been satisfied (Specht).
- Articles 2, 6 and 16 of Directive 2000/78/EC must be interpreted as meaning that it does not preclude the legislation which, in order to eliminate discrimination on grounds of age, **retroactively** abolishes that age limit for all employees, but which allows only **the crediting** of experience acquired by undertakings operating in **the same economic sector** (Stollwitzer; Starjakob).

#### **IV Adaptation Limitation Retroactive effect C-171/18 Safeway**

- Article 119 of the EC Treaty (Article 141 EC) must be interpreted as meaning that a **pension scheme** incompatible therewith (determination of a different retirement age according to sex) **cannot be retroactively** adjusted to the normal retirement age of members of the hitherto disadvantaged group for the period up to the date of adjustment .

## V Sanction - 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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## V 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.

## V 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.

## V 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)

## V 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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## V Attribution of Discrimination

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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## **VI Cooperation - Statute of limitations – C-501/12 Specht, C-417/13 Starjakob**

- Union law does not preclude provisions under which rights to cash benefits must be exercised **promptly** where those provisions do not infringe either the **principle of equivalence or the principle of effectiveness**. (Specht, also C-20/13-Unland).
- The period of **limitation** may also begin to run before the date of delivery of a judgment of the Court of Justice clarifying the legal situation in the matter in question (Starjakob OGH 8 ObA 11/15y)
- Article 16 of Directive 2000/78 does not preclude the establishment of an obligation to **cooperate**. However, it does not constitute an abuse of rights if a staff member **refuses** to cooperate in the application of a provision which is discriminatory. (Starjakob).

## **VII Responsibility of the Courts C-417/13, C-530/13, C-396/17, C-24/17**

- 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 (C-417/13, C-530/13).
- Article 47 of the GRC and Article 9 of Directive 2000/78 must be interpreted as **precluding** legislation which restricts the scope of **control** which may be exercised by the national courts by **excluding questions** relating to the basis of the **'transitional amount'** calculated on the basis of the old system of remuneration and advancement. (C-396/17, C-24/17).

## 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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## VII Example Disability

### C-335/11 C-337/11 HK Danmark

- Objective justification of the potentially indirectly discriminatory provision according to which frequent absences justify a shortening of the period of notice - inadmissible if these sickness absences are attributable to a breach of the obligation to subsidise under Art. 5 of the Directive by the employer.
- Whether the shortening of notice periods due to high absenteeism is justified overall by the **objective of recruiting sick people** had to be examined by the national courts (similar to C-270/16 Conejero for examining the necessity of simplified dismissal options in the case of frequent sick leave in order to combat "absenteeism"). .

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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



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

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