



REMEDIES AND SANCTIONS IN DISCRIMINATION CASES

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Remedies and Sanctions in Discrimination Cases

- ▶ Why the need for remedies and sanctions in discrimination cases?
- ▶ The requirements of EU law
- ▶ Effective, proportional and dissuasive remedies as a component of access to justice
- ▶ The risks wrought by ineffective, non-existent and persuasive remedies (the Swedish case)
- ▶ The way forward

Why the Need for Remedies and Sanctions with Discrimination Cases?

- ▶ Lawful and unlawful discrimination – Society has drawn a line
- ▶ The line with respect to unlawful discrimination tends to be regarding those things necessary to participate fully as citizens in society: Employment, housing, public services, private services
- ▶ The line also tends to demarcate where actions negatively impact another person's integrity or dignity
- ▶ The end goal is an inclusive society where everyone can participate on the same terms equally
- ▶ This struggle is historically evidenced within and outside of Europe

Why the Need for Remedies and Sanctions with Discrimination Cases?

- ▶ Bias is a part of being human, no one is without bias
- ▶ Conscious-raising – Psychologists Kenneth and Mamie Clarke designed already in the 1940's the doll tests, which were used as evidence in *Brown v. Board of Education* (1954): "To separate [African-American children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."
- ▶ Chief Justice Earl Warren, US Supreme Court in responding to the invidious view held then by many that you can't wipe out racial discrimination by law, only through changing the hearts and minds of men: "False credo. True, prejudice cannot be wiped out, but the infliction of it upon others can." Cray Ed (1997) Chief Justice: A biography of Earl Warren, Simon and Schuster 524.
- ▶ The end goal is an inclusive society where everyone can participate on the same terms equally.
- ▶ Focus on deterrence.

The Requirements of EU Law with respect to Remedies and Sanctions in Discrimination Cases

- ▶ Creeping competence, burden of proof directive, insight that the gap between the law in books and the law in action was too wide
- ▶ Court of Justice began early to address the gap in its case law:
 - ▶ 1976: "The principle that men and women should receive equal pay, which is laid down by Article 119, is one of the foundations of the community. It may be relied on before the national courts. **These courts have a duty to ensure the protection of the rights which that provision vests in individuals...**" Judgment of the Court of 8 April 1976, *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*, Case 43-75, ECLI:EU:C:1976:56
 - ▶ 1989: "Finally, it should be noted that under Article 6 of the Equal Pay Directive Member States must, in accordance with their national circumstances and legal systems, take the **measures necessary to ensure that the principle of equal pay is applied and that effective means are available to ensure that it is observed**. The concern for effectiveness which thus underlies the directive means that it must be interpreted as implying adjustments to national rules on the burden of proof in special cases where such adjustments are necessary for the effective implementation of the principle of equality." Judgment of the Court of 17 October 1989, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, Case 109/88, ECLI identifier: ECLI:EU:C:1989:383

The Requirements of EU Law with respect to Remedies and Sanctions in Discrimination Cases

- ▶ "[T]he **full effectiveness of that rule of Community law requires that there should be a right to reparation where three conditions are met**, that is to say, first, that the result prescribed by the directive should entail the grant of rights to individuals; secondly, that it should be possible to identify the content of those rights on the basis of the provisions of the directive; and thirdly, that there should be a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties", Judgment of the Court of 19 November 1991, *Andrea Francovich and Danila Bonifaci et al., v. Italian Republic*, joined cases C-6/90 and C-9/90, ECLI:EU:C:1991:428CJEU.
- ▶ "The procedures ... **shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive**. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible." Judgment of the Court (Grand Chamber) of 8 November 2016, *Lesoochránárske zoskupenie VLK v. Obvodný úrad Trenčín*, Case C-243/15, ECLI:EU:C:2016:838

The Court in its jurisprudence has articulated an access to justice approach with respect to rights that the treaties, directives and regulations have incorporated.

The Requirements of EU Law with respect to Remedies and Sanctions in Discrimination Cases

Constitutional provisions

- ▶ Article 119 (now Article 157 TFEU), equal pay between women and men principle
- ▶ Charter of Fundamental Rights, Chapters III Equality (Arts. 21-26) and VI Justice (Arts. 47-50)

- ▶ Article 47 Right to an effective remedy and to a fair trial:

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.. right to an effective remedy

The Requirements of EU Law with respect to Remedies and Sanctions in Discrimination Cases

Member states initially were given great discretion in choosing how to implement Union law requirements under the discrimination directives in the 1970's.

A shifted burden of proof was set out in the Burden of Proof Directive 97/80/EC.

- ▶ Directives today (Racial Equality Directive 2000/43/EC, Employment Equality Directive 2000/78/EC, Equal Treatment (Gender) Directive 2006/54/EC and Equal Treatment in Services and Goods Directive 2004/113/EC): Now there is also a heightened requirement of effective, proportionate and dissuasive compensation to persons injured as a result of discrimination. Another requirement is for the Member States to have enforcement bodies as to these rights.

The Equality Directives

	Racial Equality Directive 2000/43/EC	ET Employment Directive 2000/78/EC	ET WM Services Goods Directive 2004/113/EC	Equal Treatment – WM Directive 2006/54/EC	ET WM Self-Employment Directive 2010/41/EU
Effective, proportionate, dissuasive remedies	Art. 15 - The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive.	Art. 17 - The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive.	Art. 8(2) – "such measures as are necessary to ensure real and effective compensation or reparation... in a way which is dissuasive and proportionate to the damage suffered."	Art. 18 – "such measures as are necessary to ensure real and effective compensation or reparation... in a way which is dissuasive and proportionate to the damage suffered."	Art. 10 – "such measures ...as are necessary to ensure real and effective compensation or reparation... such compensation or reparation being dissuasive and proportionate to the loss or damage suffered."
Shifted Burden of Proof	Art. 8	Art. 10	Art. 9	Art. 19	-
Equality body	Art. 13	-	Art. 12(1)	Art. 20	Art. 11
Reprisals/victimization	Art. 9	Art. 11	Art. 10	Art. 24	-
Defence of rights - Judicial/administrative procedures	Art. 7	Art. 9	Art. 8	Art. 17	Art. 9

Effective and Dissuasive Remedies as a Component of Access to Justice in Discrimination Cases

- ▶ The EU treaties, legislation and jurisprudence have created an access to justice platform in which effective, proportionate and dissuasive remedies are in integral component.
- ▶ FRA – Access to justice in Europe (FRA Handbook 2016)
 - ▶ Fair and Public Hearing before an Independent and Impartial Tribunal
 - ▶ Legal costs and legal aid, the right to be advised, defended and represented
 - ▶ Right to an effective remedy
 - ▶ Procedural limitations barring access to justice: Court fees, formalism, evidence barriers, limitation periods, immunities, standing, length of proceedings

Effective and Dissuasive Remedies as a Component of Access to Justice in Discrimination Cases

- ▶ Distinctions between civil and criminal actions (burden of proof, legal persons, intent, seldom successful criminal prosecutions)
- ▶ Distinction between monetary and equitable/injunctive remedies important here.
- ▶ Monetary remedies are damages, which can be compensatory, nominal or punitive. Each has a different function.

Effective and Dissuasive Remedies as a Component of Access to Justice in Discrimination Cases

Equitable/injunctive remedies important here. Example from EEOC 2004 case, *Gonzola et al. v. Abercrombie & Fitch*, consent order in effect until 2011, with provisions related to the recruitment, hiring, job assignment, promotion, and training of A&F employees.

Equitable/injunctive remedies:

- ▶ "Benchmarks" for hiring and promotion of women, Latinos, African Americans, and Asian Americans. These benchmarks are goals, rather than quotas, and Abercrombie will be required to report on its progress toward these goals at regular intervals.
- ▶ A prohibition on targeting fraternities, sororities, or specific colleges for recruitment purposes.
- ▶ A new Office and Vice President of Diversity, responsible for reporting to the CEO on A & F's progress toward fair employment practices.
- ▶ EEO and Diversity Training for all employees with hiring authority.

Effective and Dissuasive Remedies as a Component of Access to Justice in Discrimination Cases

Equitable/injunctive remedies (cont..)

- ▶ Revision of Performance Evaluations for managers, making progress toward diversity goals a factor in their bonuses and compensation.
- ▶ A new Internal Complaint Procedure.
- ▶ The hiring of 25 recruiters who will focus on seeking out women and minority employees. A & F will also advertise employment opportunities in media that target minorities of both genders.
- ▶ The Consent Decree also requires that A&F marketing materials reflect diversity by including members of minority racial and ethnic groups.
- ▶ An appointed Monitor will regularly evaluate and report to the court on A&F's compliance.

Effective and Dissuasive Remedies as a Component of Access to Justice in Discrimination Cases

EEOC 2004 case, *Gonzola et al. v. Ambercrombie & Fitch*, consent order, monetary relief:

- ▶ A&F will create a \$40 million Settlement Fund for distribution to individual class members. Notice will be placed on the Internet and in major magazines.
- ▶ A Claims Administrator will determine class member (or "claimant") awards based on the number of claimants that come forward, and by assigning "points" for such factors as the type of discrimination the class member suffered and the length of employment at A&F.
- ▶ A&F also pays attorneys' fees and costs associated with monitoring compliance during the time that the Consent Decree is in effect (4.5 to 6 years depending on A&F progress). This will amount to approximately \$10 million.

The Risks Wrought by Ineffective, Non-existent and Persuasive Remedies in Discrimination Cases (the Swedish case)

- ▶ Why the requirements of effective, proportionate and dissuasive?
 - ▶ Oliver Wendell Holmes, Jr. The Path of Law – The bad man determines what the law in action is, as the bad man only follows those laws for which the sanctions are palpable.
 - ▶ View needs to be not enriching plaintiffs, but deterring conduct. If sanctions are low, unlawful behavior is actually positively reinforced, particularly with respect to wealthier defendants who can buy their way free.

The Swedish case

- ▶ 2008 Discrimination Act introduced a new category of damages, discrimination damages, which were a hybrid between compensatory and punitive, with the functions of both reparation and deterring
- ▶ Reality is that the amount of damages awarded has decreased taking into consideration inflation
- ▶ Attorneys' costs awarded has increased by over 250 %

	Damages	Attys. Fees (x 2)
1980's (sex)	SEK 19,000	SEK 22,287
1990's	SEK 37,000	
2000's	SEK 54,600	
2010's	SEK 57,000	SEK 188,900
1980/CPI	SEK 63,437	SEK 74,438
	- 0.9%	+ 254%

The Risks Wrought by Ineffective, Non-existent and Persuasive Remedies in Discrimination Cases (the Swedish case)

- ▶ What has this led to in Sweden?
 - ▶ The labor union rarely take up discrimination cases outside of parental leave or gender issues. There is no duty of representation for labor unions in Sweden.
 - ▶ The Discrimination Ombudsman rarely takes up case, choosing instead to education (hearts over actions).
 - ▶ Individuals cannot afford to litigate discrimination claims, and the awards of attorneys fees are used as a punitive sanction. A midwife brought a case concerning freedom of religion and whether she had the employment obligation to assist in performing abortions. The Labor Court awarded the public employer attorneys' fees for both instances in the amount of SEK 925,854.
 - ▶ Individuals who do litigate often do so as small claim court, so definitively no effective, proportionate or dissuasive remedies (cap at SEK 22,000), but no risk for attorneys' fees.

The Risks Wrought by Ineffective, Non-existent and Persuasive Remedies in Discrimination Cases (the Swedish case)

- ▶ What has this led to in Sweden?
 - ▶ The end result is that there is very litigation with respect to discrimination claims
 - ▶ There are very few NGO's
 - ▶ Employers have very free hands and can calculate the odds/costs of discriminatory behavior due to the legal certainty that is protecting the status quo.



R (on the application of UNISON) (Appellant) v. Lord Chancellor (Respondent) [2017] UKSC 51 (paras. 66-69)

“The constitutional right of access to the courts is inherent in the rule of law. The importance of the rule of law is not always understood. Indications of a lack of understanding include the assumption that the administration of justice is merely a public service like any other, that courts and tribunals are providers of services to the “users” who appear before them, and that the provision of those services is of value only to the users themselves and to those who are remunerated for their participation in the proceedings...



Unison

It may be helpful to begin by explaining briefly the importance of the rule of law, and the role of access to the courts in maintaining the rule of law. It may also be helpful to explain why the idea that bringing a claim before a court or a tribunal is a purely private activity, and the related idea that such claims provide no broader social benefit, are demonstrably untenable.

Unison

At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other.

Unison

Access to the courts is not, therefore, of value only to the particular individuals involved. That is most obviously true of cases which establish principles of general importance... *Donoghue v. Stevenson*... one of the most important developments in the law of this country in the 20th century. To say that it was of no value to anyone other than Mrs Donoghue and the lawyers and judges involved in the case would be absurd. The same is true of cases before ETs... *Dumfries* concerned with the comparability for equal pay purposes of classroom assistants and nursery nurses with male manual workers such as road workers and refuse collectors, had implications well beyond the particular claimants and the respondent local authority. The case also illustrates the fact that it is not always desirable that claims should be settled: it resolved a point of genuine uncertainty as to the interpretation of the legislation governing equal pay, which was of general importance, and on which an authoritative ruling was required.

The Way Forward

- ▶ The value to society with respect to discrimination litigation:
 - ▶ *Somerset v. Stewart* (1772): slavery was not recognized within Britain as the law favoured freedom
 - ▶ *Brown v. Board of Education* (1954): Separate but equal unconstitutional with respect to education
 - ▶ *DeFrenne II* (1976): Art. 119 espousing equal pay between women and men had horizontal direct effect
- ▶ Society needs authoritative rulings from courts (Unison).

The Way Forward

- ▶ The need to view discrimination protections as fundamental rights (not simply, by way of example, employment rights)
- ▶ Without effective and dissuasive remedies, defendants can easily starve plaintiffs by delays within litigation
- ▶ Not a question of plaintiffs getting rich but rather defendant's changing conduct
- ▶ There is no deterrence where there are no effective remedies
- ▶ Questionable whether access to justice and adherence to the rule of law can truly be achieved without effective remedies