



REPUBLIC OF SLOVENIA
ADVOCATE OF THE PRINCIPLE OF EQUALITY




Enforcement: remedies, sanctions and solutions in discrimination cases

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Sanctions:

- The idea that discrimination should be **punished** by sanctions is not new. In many jurisdictions it has been possible to achieve redress for the victims and punishment for the perpetrators for decades.
- **On the EU level** the non-discrimination directives 2000/78/EC and 2000/43/EC state that sanctions should be imposed in cases of established discrimination. When imposed, sanctions should be:
 - **effective,**
 - **proportionate and**
 - **dissuasive.**

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Venues for redress:

- Inspectorates
 - Labour / employment
 - Provision of goods and services
 - Education, social security, health, public sector...
- Labour dispute commissions, industrial tribunals
- Ombudspersons, national human rights institutions
- Equality bodies, equality tribunals, equality commissions, disability commissions (CRPD)
- Courts – civil, criminal, labour and social courts, administrative law cases
- Systemic discrimination: Supreme courts, Constitutional courts

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The types of redress that are available depend on the powers provided for in the law in a certain jurisdiction.

May range from:

- Injunction orders imposing immediate cessation of unequal treatment
- Orders to put an end to discrimination or avert future discrimination
- Payment of salaries, contributions to pension and social security schemes, and other work-related specific types of redress
- Compensation / Just satisfaction
- Material and immaterial damages
- Fines or conditional fines
- Publication of the judgment in the media including the disclosure of the information about the perpetrator

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The reality concerning redress and sanctions in the EU:

- No. of cases is on the rise, but still relatively low
- **Barriers to justice:** - complexity of anti-discrimination law, - lack of skilled lawyers, - mandatory legal representation, - short time limits to file a claim, - length of court proceedings, - lack of financial means of parties, - lack of free legal aid, - high court fees and - the danger of having to pay the winning parties legal costs if the case is lost;
- Some countries addressed this last problem by defining in the law that these cases are exempt from legal fees. In some countries the problem of fees was remedied by courts.

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Examples:

- UK Supreme Court ruled that the payment of fees to file discrimination cases in an employment tribunal is unlawful (case of 2017). Since that decision, individual claims before employment courts have increased by 90 %.
- In Bulgaria, the Protection Against Discrimination Act stipulates that procedures both before the general courts and before the quasi-judicial equality body are exempt from all costs, both state fees and expenses.

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When are sanctions effective, proportionate and dissuasive?

- When the perpetrator considers the payment too high to be worth discriminating
- When the sanctions send a meaningful message to the general public about what is right and what is wrong
- When they are sufficiently high to deter other legal and natural persons from discriminating
- When they are appropriate considering the damages discrimination has caused
- **Example:** If the equality body carries out an investigation and finds discrimination, and, not having the power to sanction, sends the case to the inspectorate, which issues only a warning to the perpetrator, that is probably not effective or dissuasive.

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When are sanctions effective, proportionate and dissuasive?

This also depends on the country context and the circumstances of the case:

- What is the gravity of the consequences of discriminatory treatment on the victims?
- Is a victim one individual or is it a group?
- What is the usual amount of a fine or compensation in the jurisdiction in other cases of violations of personality rights of an individual (e.g. in cases of defamation) – comparison!

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Recommendations

- Usually a mechanism used by **specialised bodies** such as the Ombudsperson or Equality bodies
- The weight of recommendations depends on the legal tradition:
 - Scandinavian model: recommendations, when issued, are respected and taken seriously, no need for enforcement
 - „Young democracies“ model: a specialised body is given the power to issue only non-binding recommendations to remain harmless

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ECRI General Policy Recommendation No. 2, Art. VI:

- Equality bodies that have decision making powers
 - Should issue legally binding decisions
 - Should have the power to impose sanctions
- Equality bodies that do not have decision making powers should:
 - Issue non-binding recommendations
 - Ensure that recommendations are fulfilled, also by publication of the findings
 - This option is accommodating those jurisdictions where the model of non-binding recommendations is functioning well

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Mediation / Conciliation / Settlement:

Most jurisdictions generally provide for a possibility of settling a case / a dispute through mediation or conciliation procedures.

Whether a settlement is an appropriate outcome in discrimination cases **depends on the type of the case.**

- Appropriate cases: denial of provision of goods and services; denial of reasonable accommodation measures in work settings; cases with no intent to discriminate.
- Less appropriate cases: e.g. harassment or incitement to discrimination, intentional discrimination cases.



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Examples of settlements reached after a complaint has been filed:

- A day care provider agrees to remove pork from the menu and/or offer alternatives to pork after receiving a complaint from a religious minority family
- An insurance company offers an accident insurance policy that it first denied to an applicant living with HIV
- An insurance company offers a life insurance to a paraplegic who was first denied their application on the grounds that „paraplegics die young“
- An employer offers to provide reasonable accommodation related to working hours to an employee who has a child with special needs



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Specific example of a remedy in Slovenia: **assessments of discriminatoriness of laws and bylaws:**

- The Slovenian equality body has been granted **a power to ask the Constitutional Court to carry out the constitutional review** of a law that the equality body assesses to be discriminatory. (Art. 38 of the Protection against Discrimination Act, Slovenia)
- In order to reach a decision **internally**, the equality body **developed a procedure** to carry out the assessment. It results in a document in which a position is taken whether or not the law is assessed as discriminatory or not. The document can be accompanied by a recommendation to amend the law.

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An example: The equality body found that in the field of pension benefits the paralympic athletes are treated less favourably than athletes without disabilities.

The latter were awarded a **bonus to their pension** if they received a medal at the olympic games or world championships, while the former received a bonus only if they won a medal at the olympic games, but not if they won a medal at the world championships.

The Advocate found discrimination on the grounds of disability and recommended that the legislature amends the law. The recommendation was **fulfilled**.

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Legal Standing: Art. 7(2) of the Racial Equality Directive and Art. 9(2) of the Employment Equality Directive:

‘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 [these Directives] 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 [these Directives].’

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Collective redress (Class actions)

- The EU recognises that collective redress is necessary where the same breach of rights under EU law affects a **large number of persons**. This is particularly important when individual actions fail to reach effective redress and are not able to stop unequal treatment and secure adequate compensation.
- However, the regulations vary significantly across the EU.
- In Slovenia: Collective Actions Act. Based on this act compensations cannot be claimed. The collective actions may only be used to request the cessation of unequal treatment. Legal standing is limited to the equality body and NGOs with a special status.

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**Actio popularis:**

- A tool that allows organizations to act in the public interest on their own behalf, without a specific victim to support or represent.
- Useful in discrimination cases when the victims do not wish to be exposed.
- This tool is not always appropriate, in particular if individual circumstances of the individual cases would have to be investigated.
- May be useful for systemic violations, hate speech, public harassment of groups, or incitement to discrimination.
- Actio popularis is permitted by national law for discrimination cases in 22 European countries.

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Thank you for your attention!

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