MAKING THE RACE AND FRAMEWORK DIRECTIVES REAL: REMEDIES AND SANCTIONS FOR UNLAWFUL DISCRIMINATION

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Introduction

1. The Preambles of both the Race and Employment Framework Directives[2] make plain that they are intended to provide practical and significant remedies to the victims of discrimination, including, but not limited to, the payment of compensation. The aim is clearly to ensure that the remedies available are so valuable to the victim that they act as an effective and significant sanction for those who perpetrate discrimination, and implicitly a deterrent against future such conduct by them or others.

2. This paper will explore the means by which the Member States can interpret the need to provide remedies and sanctions under the Directives, with specific reference to the way in which the British domestic courts have done so under their

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[2] 'The Race Directive': Council Directive of 29 June 2000, 'implementing the principle of equal treatment between persons irrespective of racial or ethnic origins' (2000/43/EC); The Employment Framework Directive': Council Directive of 27 November 2000, 'establishing a general framework for equal treatment in employment and education' (2000/78/EC)

own sex, race and disability legislation (age, religious and sexual orientation discrimination not being introduced into the UK until the date for implementation of the Employment Framework Directive).

The requirements of the Directives to provide remedies and sanctions

3. Chapter II, Article 7(1) of the Race Directive and Chapter II, Article 9(1) of the Employment Framework Directive set out the fundamental obligation on Member States to ensure that the victims of discrimination have access to an effective legal procedure for the exercise (or, in the words of the Directives, "defence") of their rights. Both require Member States to:

> **"…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…"**.

4. Article 7(2) and 9(2) respectively acknowledge the particular difficulties litigants may have in representing themselves in discrimination proceedings, and indeed the particular complexities inherent in proving discrimination, by requiring Member States to ensure that appropriate **"associations, organisations or other legal entities"** may **"engage, either on behalf or in support of the complainant, with his or her approval…"** in those judicial or administrative proceedings.

5. Chapter IV, Article 15 of the Race Directive and Chapter IV, Article 17 of the Employment Framework Directive require Member States to **"…lay down rules on sanctions…"** applicable to infringements of the national provisions adopted pursuant to the Directives, and to **"…take all measures necessary to ensure that they are applied…"**. The sanctions **"…*may* comprise the payment of compensation to the victim…"**. However, whatever form the sanctions take, they must be **"…effective, proportionate and dissuasive…"**. The additional requirement in the draft Directives that the sanctions also be **"adequate"** has been removed. The Preambles at paragraph (19) and (29) respectively nevertheless make plain that the victims of discrimination should have **"…adequate means of legal protection…"**. Member States are required to notify their sanctions provisions to the Commission by 19 July 2003 (for the Race Directive) and 2 December 2001 (for the Employment Framework Directive), and thereafter without delay of any subsequent amendment affecting them.

6. It is perhaps obvious that the ability of the victims of discrimination, as of any wrongdoing, to challenge their treatment is restricted if they do not know what their rights are and how to exercise them. Accordingly the requirements in Article 10 of the Race Directive and Article 12 of the Employment Framework Directive that Member States ensure that information about the national provisions implemented in compliance with the Directives, and any other discrimination legislation is **"…brought to the attention of the persons concerned by all appropriate means throughout their territory…"** should impact directly on the ability of victims to access their rights, and thereby their remedies, as appropriate.

7. Allied to this is the requirement in Chapter III, Article 13 of the Race Directive that Member States **"…designate a body or bodies for the promotion of equal treatment of all persons without discrimination on grounds of racial or ethnic origin…"**. While the Directive provides that these bodies may form part of the bodies charged with the defence and safeguard of rights (under Article 7), it is clear that the Article 13 bodies must also be competent in **"…providing independent legal assistance to victims of discrimination in pursuing their complaints of discrimination…"**[3]. There is no mirror provision to this in the Employment Framework Directive.

The relationship between remedies and sanctions

8. The Directives therefore require, in summary, (i) access to an effective judicial or administrative system for the victims of discrimination; and (ii) "effective, proportionate and dissuasive" sanctions to be imposed on the perpetrators of discrimination. Yet the wording of the "sanctions" provisions makes clear that these sanctions may include the payment of compensation to victims. Accordingly it is anticipated that there may well be a clear link between the two, in the sense that it is the imposition of a financial penalty on the discriminator which is intended to be a sanction; and the payment of that financial penalty to the victim which is intended to be his or her remedy.

[3] in addition to conducting independent surveys concerning discrimination and publishing independent reports and making recommendations on any issue relating to such discrimination, all of which provide indirect assistance to victims.

9. It is nevertheless clear that the Member States may equally choose to impose systems of sanctions which do not involve the victim (provided that the victim's rights of access to administrative or judicial proceedings are protected by another means). These may include, for example, the use of the criminal law rather than civil law, and/or a system of punitive financial penalties where the monies paid are used other than to compensate the victim (perhaps to fund the discrimination organisations required by the Directives?).

10. It may be, however, that Member States consider that the most straightforward means of complying with the Directives is one in which the remedy and sanction are inextricably linked. This "mixed" system is the one that the British discrimination legislation uses. The principal discrimination statutes, the Sex Discrimination Act 1975 ("the SDA"), the Race Relations Act 1976 ("the RRA") and the Disability Discrimination Act 1995 ("the DDA") are all civil law statutes, operating within the judicial (as opposed to administrative) system, from which the principal (albeit not only) means by which they operate is to provide financial compensation to victims, which of itself is the sanction on the discriminator.

Remedies/sanctions for discrimination in British law

(i) Procedure

11. An individual who complains of discrimination under either the SDA, the RRA or DDA generally enforces their rights by lodging a complaint with the Employment Tribunal (in workplace cases) or the County Court (in non-employment cases, such as those relating to housing, education, the police, health care or other public bodies). The Employment Tribunal is made up of one legally qualified Chair, and two wing members (one of whom traditionally has employee-focussed experience, such as in a trade union, and one of whom traditionally has equivalent employer-based knowledge). A tribunal hearing a complaint of racial discrimination usually includes at least one member who has had practical experience of race relations, although there is no formal requirement that the tribunal should be so constituted[4]. Where a tribunal is composed of three members its decision may be taken by a majority; and if a tribunal is composed of two members only, the chairman shall have a second or casting vote[5].

12. In straightforward cases the "liability" element of the case (ie. whether the alleged discrimination has in fact taken place) will be considered by the tribunal or court at the same time as the "quantum" issue (ie. what award of compensation, or other remedy should be made). In more complex cases, only when a decision on liability has been made will there be a hearing on quantum (assuming the parties cannot reach agreement among themselves). If a quantum hearing is necessary, it may involve consideration of documents dealing with the financial aspects of the

[4] In any event a certificate from the President of the Employment Tribunals that one of the members of the tribunal did in fact have such experience will normally be accepted as conclusive (*Habib v Elkington & Co* [1981] IRLR 344, [1981] ICR 435, EAT).
[5] see the Employment Tribunals Rules of Procedure 2001, Rule 12(1)

case (salary, benefits, pension etc), the calling of medical or family evidence as to injury to feelings/psychiatric injury, and the analysis of expert employment evidence as to when the victim can expect to find comparable work in the future.

(ii) Statutory powers in relation to remedies/sanctions

13. Under the SDA, section 65, the RRA, section 56 and the DDA, section 8 once a complaint of discrimination is found to be well-founded, the court must make any of the following orders which it considers **"just and equitable"**:

(i) A declaration that the victim has been discriminated against;

(ii) An order for financial compensation;

(iii) A recommendation as to what steps the perpetrator should take to obviate or reduce the adverse effect of the discrimination on the victim.

(iii) A declaration

14. The decision of an employment tribunal may be given orally at the end of a hearing or be reserved, but must be recorded in a written document signed by the Chairman[6]. There is a right in discrimination cases before the tribunal to "extended reasons" for the tribunal's decision (unlike other employment cases

[6] see the Employment Tribunals Rules of Procedure 2001, Rule 12(2)

where such reasons may be applied for but do not have to be given)[7]. In the decision and extended reasons the tribunal traditionally sets out the relevant law, the issues it had to consider between the parties, the findings of fact it has made, and then its reasoning as to whether it finds the discrimination proven or not. County Court judges would normally also give a judgment setting out their reasoning. Assuming the complainant has succeeded he or she will therefore be in possession of a written document setting out that he or she has been the victim of discrimination and why. The tribunal or court may then go on to make a formal declaration (which is normally relatively short) to that effect. Complainants frequently find that obtaining such extended reasons and a declaration valuable in themselves, quite aside from any monetary compensation they may receive, and the law recognises this.

(iv) Compensation

(a) Basic principles

15. Where compensation is ordered, it is to be assessed in the same way as damages for a statutory tort[8]. This means that in discrimination cases, unlike in cases of unfair dismissal, the court cannot simply assess compensation according to what is

[7] see the Employment Tribunals Rules of Procedure 2001, Rule 12(4)

[8] see the SDA, section 65(1)(b), RRA, section 56(1)(b) and the DDA, section 8(3)

considers "just and equitable" (by, for example, awarding less than the full amount lost on the basis of the victim's own conduct). Rather the individual is entitled to the full measure of damages recoverable in tort for the statutory tort of unlawful discrimination (*Hurley v Mustoe (No 2)* [1983] ICR 422, EAT). Where compensation is awarded, it is on the basis that:

> **"as best as money can do it, the applicant must be put into the position she would have been in but for the unlawful conduct of [the discriminator]…"**

(*Ministry of Defence v Cannock* [1994] IRLR 509, EAT, per Morison J at 517). Therefore although the tribunal is not obliged to make an order for compensation if it does not consider it just and equitable to do so; but, having decided to make such an order, it must adopt the usual measure of damages. Compensation must enable the loss actually sustained to be made good in full (*Marshall v Southampton and South West Hampshire Area Health Authority (Teaching) (No 2)*: C-271/91 [1993] ICR 893 at 932)), and it is generally accepted that the ordinary principles of causation of damage apply to determining what loss has been "sustained". The amount of compensation which can be awarded is now unlimited.

16. However, tribunals must only seek to compensate for losses which are attributable to the specific act(s) which have been held to constitute discrimination, and not to other acts showing discrimination of which complaint has not been made. Not infrequently, allegations of unlawful behaviour are made by way of general background to specific complaints, in order to establish character, motive, etc;

even if the truth of these allegations is upheld, and even if they can be shown to have caused loss, no compensation should be made in respect of these allegations (see by analogy *Chapman v Simon* [1994] IRLR 124, CA). Therefore, if, for example, a woman is dismissed for a reason related to her sex, she will be entitled to compensation for all the loss that flows from that dismissal.

(b) Lost income, benefits and pension in employment cases

17. The largest aspect of an award in an employment-related discrimination cases is normally for reasonably incurred lost income, as the following examples show:

- **Anne** was not recruited to a post as a car mechanic on grounds of her sex. It took her 3 months to find comparable work. She could expect to recover compensation equivalent to the 3 months' loss of income from the job for which she applied[9].

- **Joseph** was consistently given poor, unjustified appraisals and was not promoted on racial grounds. His career did not "catch up" for the next 18

[9] note that in *Draehmpaehl v Urania Immobilienservice ohG*: C-180/95 [1997] IRLR 538, ECJ - which confirmed that it would be contrary to the Equal Treatment Directive to make reparation of damage suffered as the result of discrimination in the making of an appointment subject to the requirement of fault – it was held that it was not necessarily unlawful for Member States to impose ceilings on the amount of such compensation, such as a limit of three months' salary on the compensation payable to individuals who would not have been appointed even if the selection procedure had been free of discrimination.

months. He would be likely to recover the difference in pay between the job to which he should have been promoted and the pay he actually received for the job he did for those 18 months instead.

- **William** was dismissed from his job by reason of his disability. He alleges that the specialist nature of his job is the reason why he has not similar work for 2 years. He will have to work for a further 1 year in his new job for his salary to be the same. He could expect to recover compensation equivalent to the 2 years' salary lost by the dismissal, plus the difference between the old and the new job for the additional 1 year. If, however, his former employers were able to show that he had not really been trying to find a new job he may be held to not have reasonably "mitigated his loss" which would result in a reduction from the award made.

- **Barbara** was dismissed from her post by reason of her race. She has now found comparable work but is confident that had she stayed in her old job she would have been promoted and entered the "management" stream. There is no such stream in her new job. She can expect to recover compensation for the loss of the "chance" of the promotion[10].

[10] She does not need to show that s/he *would* have received that promotion (*Ministry of Defence v Cannock* [1994] IRLR 509, [1994] ICR 918, EAT, Morison J).

18. The calculations of lost salary set out above would also include reference to lost benefits, such as loss of a company car scheme, health care provision, life insurance, lunch vouchers etc. For the employee who remains out of work the tribunal may feel it sensible to award an amount equivalent to purchasing the same benefits on the open market (eg. the cost of the employee buying comparable health care cover on a private basis). For the employee who has been dismissed, damage to his or her pension entitlement can also form a substantial, and complex, part of the award of compensation made.

(c) Psychiatric injury

18. Frequently, victims of discrimination suffer stress and anxiety to the extent that psychiatric and/or physical injury can be attributed to the unlawful discrimination. In that situation the employment tribunal has jurisdiction to award compensation, subject only to the requirements of causation being satisfied (see *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] IRLR 481, CA). A medical report is normally necessary for the applicant to show the extent of his or her injuries. In settling discrimination cases, the victim's right to later pursue a personal injuries claim on the basis of the alleged discrimination is likely to be curtailed by virtue of the doctrine of *res judicata*[11], and advisers need to be conscious of this when considering the terms of any settlement.

[11] ie. the doctrine which prevents multiple legal proceedings arising out of the same facts

19. Tribunals and courts are provided with guidance as to the appropriate awards for psychiatric injuries in the form of the Judicial Studies Board Guidelines. These set out "bands" of descriptions of typical injuries with indications of the award which is appropriate. Often the parties will be engaged in argument as to how serious the medical evidence suggests an injury is, and therefore how high an award is justified. The Guidelines provide that the factors to be taken into account in valuing claims of this nature include: (i) the injured person's ability to cope with life and work; (ii) the effect on the injured person's relationships with family, friends and those with whom he or she comes into contact; (iii) the extent to which treatment would be successful; and (iv) future vulnerability. In psychiatric injury cases a key distinction is often whether the injury is so grave as to be classified as post-traumatic stress disorder ("PTSD"). Awards range from "severe" (£28,500 - £60,000) for those cases where the victim has marked problems with respect to factors (i) to (iv) above and the prognosis is very poor. At the lower end of the scale, "minor" injuries which are more in the nature of temporary "anxiety", justify awards of £750 to £3,000. Cases of work-related stress resulting in a permanent or long-standing disability preventing a return to comparable employment tend to justify awards of between £15,000 and £20,000 for the injury alone (not the loss of income which is dealt with separately).

(d) "Injury to feelings" awards

20. The discrimination statutes make specific provision for compensation to the victim to include an award for "injury to feelings"[12]. The perpetrator of the discrimination must "take his victim as he finds him/her". That means that he takes the risk that s/he may be very much affected by an act of discrimination, say, by reason of her own character and psychological temperament. It is recognised that while there was no automatic right to recover compensation for injured feelings, it is "almost inevitable" that such an award will be made in discrimination cases (see, for example, *Murray v Powertech (Scotland) Ltd* [1992] IRLR 257, EAT, per Lord Mayfield). It is, however, wrong for awards for injury to feelings to be used as a means of punishing or deterring employers from particular courses of conduct (*Ministry of Defence v Cannock* [1994] IRLR 509 at 524, EAT.

21. Earlier cases showed a wide divergence of approach as to the amount of such awards. In *Cresswell v Committee of Stoke-on-Trent Community Transport* (Industrial Tribunal Case No 23968/92, 8 February 1993) a woman received nearly £5,000 compensation for sex discrimination, following a dismissal for wearing trousers to work. By contrast, in *Caledonia Motor Group Ltd v Reid* EAT/590/96, 7 November 1996, the EAT in Scotland reduced from £8,000 to £4,500 the compensation payable for mainly verbal abuse suffered by a woman who had worked for just twelve weeks as an apprentice mechanic.

[12] see the SDA, section 66(4), the RRA, section 57(4) and DDA, section 8(4)

22. More recently, however, it has become clear that injury to feelings is a wrong which can result in fairly substantial compensation. In the race discrimination case of *Noone v North West Thames Regional Health Authority* [1988] IRLR 195, [1988] ICR 813, CA, the Court of Appeal indicated that £3,000 was an appropriate sum for injury to feelings where the injury could be said to be "severe", but this is considerably below the range of rewards which would today be regarded as appropriate in such cases. For example:

- In *HMS Prison Service v Salmon* [2001] IRLR 425, EAT an award of £20,000 for injury to feelings (which included £5,000 by way of aggravated damages) was upheld in a case where a female Prison Officer had worked in a humiliating working environment for a period of some six years, and was the victim of innuendo, unacceptable sexual banter, culminating in offensive and sexually degrading remarks.

- In *Eccles v Seventh Day Adventist Church* (May 2002, Equal Justice Review, Spring 2003, p.25) £47,5000 was awarded for injury to feelings including aggravated damages where the applicant's life was made a "living hell" through victimisiation.

- In *Virdi v Metropolitan Police Commissioner* (8 December 2000, Equal Justice Review, Spring 2003, p.25), £100,000 was awarded for injury to

feelings, and £25,000 for aggravated damages, flowing from the publication of the victim's alleged wrongdoing in a national newspaper, and in which the award was reached by way of comparison with libel cases.

At the other end of the scale, *Doshoki v Draeger Ltd* [2002] IRLR 340, EAT suggests that an award of around £750 is about the minimum which is now permissible for injury to feelings.

23. In *Vento v Chief Constable of West Yorkshire Police* (judgment, 20/12/2002) [2003] IRLR 102 the victim, a female police officer, had suffered a four-year campaign of sexual harassment and bullying, which led to the shock and disappointment of not being confirmed in post at the end of her time as a probationary constable. The Employment Appeal Tribunal had indicated that £30,000 was an appropriate amount for injury to feelings (the original tribunal had awarded her £65,000 for injury to feelings, including £15,000 for aggravated damages). The Court of Appeal held that an appropriate total for non-pecuniary loss for Ms Vento would be £32,000, made up £18,000 for injury to feelings, £5,000 aggravated damages and £9,000 for psychiatric damage.

24. However in giving judgment the Court felt it would be helpful in terms of "predictability of outcome and consistency of treatment of like cases, the following guidance" to provide three broad bands for awards for injury to feelings,

as distinct from compensation for psychiatric or similar personal injury:, namely (i) the top band would normally be between £15,000 and £25,000 for the most serious cases, such as where there had been a lengthy campaign of discriminatory harassment on the grounds of sex or race. Only in the most exceptional case would an award exceed £25,000; (ii) the middle band would be between £5,000 and £15,000 and was to be used for serious cases which did not merit an award in the highest band; and (iii) awards of between £500 and £5,000 would be appropriate for less serious cases, such as where the act of discrimination was an isolated or one off occurrence. There would of course be flexibility within each band to allow tribunals to fix what it considered to be fair, reasonable and just compensation in the particular circumstances of each case.

(e) Aggravated damages

25. As a matter of principle, aggravated damages, namely those which reflect "high-handed, malicious, insulting or oppressive" behaviour in committing the act of discrimination, a lack of an apology, and which seek to compensate for hurt dignity and pride, are available for an act of discrimination (*Armitage, Marsden and HM Prison Service v Johnson* [1997] IRLR 162, EAT)[13]. In *HM Prison Service v Salmon* [2001] IRLR 425, EAT aggravated damages were held to be appropriately awarded for injury to feelings in circumstances where the employer

[13] although not in Scotland, where aggravated damages are unknown as part of the law of delict (tort), and where damages for injury to feelings may include an element which reflects the way the victim was treated (*D Watt (Shetland Ltd) v Reid* EAT/424/01, 25 September 2001)).

had treated a complaint about harassment in a trivial way. In that case it was also observed that it is important for tribunals making awards where there are damages both for injury to feelings and psychiatric injury to make clear what sums are attributable to which, in order to avoid the danger of double counting. Where aggravated damages are available as a discrete head of loss, they may be awarded not just having regard to how the employer has behaved in his dealings with the applicant at work. They may also be awarded if a respondent in defending proceedings behaves in a way that is wholly inappropriate and intimidatory (*Zaiwalla & Co. v Walia* [2002] IRLR 697, EAT). This may well have included, for example, questioning the victim at trial in an attempt to portray them as lying or exaggerating about the discrimination[14].

(f) Exemplary damages

26. Exemplary damages may be awarded if compensation is insufficient to punish the wrongdoer and if the conduct is either (a) oppressive, arbitrary or unconstitutional action by the agents of government, or (b) where the defendant's conduct has been calculated by him to make a profit which may well exceed the compensation payable to the applicant. The recent House of Lords decision of *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29 changed the previous law, in that since *Deane v London Borough of Ealing* [1993] IRLR 209, EAT it

[14] Such behaviour might equally, of course, be categorised as unlawful victimisation of an applicant by reason of having brought a claim, and as such subject to the bringing of fresh proceedings.

had been thought that there could be no awards of exemplary damages in discrimination cases.

(g) Indirect discrimination

27. If the complaint is of indirect race discrimination, then the tribunal may not generally award any money compensation, unless it is shown that the respondent *intended* to discriminate on the grounds of sex or marital status (see the RRA, section 56(1)(b) and 57(3)). A similar restriction in the SDA (section 66(3)) was lifted in relation to sex discrimination so that the tribunal may award compensation for unintentional indirect sex discrimination if it considers that it would not be just and equitable to refuse to do so.

28. The meaning of "intention" in relation to indirect discrimination was considered in *J H Walker Ltd v Hussain* [1996] IRLR 11, EAT. The employer refused, on grounds of business needs, to grant his employees time off work to celebrate Eid (Muslim feast day). This was held by an industrial tribunal to constitute indirect discrimination on racial grounds. The industrial tribunal made an award of £1,000 to the individual employees on the ground of injury to feelings. In the Employment Appeal Tribunal Mummery J held that the tribunal had not erred in so doing. Intention was satisfied where an employer knew that certain consequences would follow from his acts and he wanted these consequences to

follow. The employer's motive (which was to promote business efficiency) did not mean that he had not intended to treat the claimants unfavourably on the prohibited grounds.

29. In *Enderby v Frenchay Health Authority and Secretary of State for Health* [1991] IRLR 44, EAT, Wood J appeared to accept that intentional indirect discrimination (as, for example, where an employer advertises for employees over six feet in height, with the intention of excluding women) was part of direct discrimination and should be compensated as such; but the position is not clear, and it seems to remain arguable that this lacuna in British discrimination law is incompatible with the requirements of the Directives to ensure adequate, effective, proportionate and dissuasive remedies for all discrimination.

(h) <u>The totality of compensation awarded</u>

29. The removal of any upper limit in awards of compensation has meant that tribunals are becoming accustomed to calculating awards that can reach hundreds of thousands of pounds. Aside from the general principles set out above, there is relatively little judicial guidance as to the means of calculating compensation, and concerns have been voiced over the differences of approach found in different tribunals, and the very high sums which have been awarded. For example in *Yeboah v Crofton and London Borough of Hackney* Case Numbers 56617/94,

69479/94, 23230/95, 70911/95 and 7093/96/S, Hackney Borough paid, by consent, the total sum of £380,000 (including £40,000 in respect of injury to feelings) to a senior employee who had been the victim of a campaign of racial discrimination which had disastrous effects on his well-being and health.

30. It has therefore been said that Tribunals should have regard to the "totality" of the awards they make:

> **"Tribunals [should] ... not simply make calculations under different heads, and then add them up. A sense of due proportion, and look at the individual components of any award and then looking at the total to make sure that the total award seems a sensible and just reflection of the chances which have been assessed…"** (*Ministry of Defence v Cannock* [1994] IRLR 509, EAT, per Morison J at para 132).

In *Vento* the Court of Appeal similarly warned tribunals and courts to use common sense, and avoid double recovery by taking appropriate account of the overlap between the individual headings of injury to feelings, psychiatric damage and aggravated damage. It may be that in due course more agreed principles on which compensation can be calculated, as, for example, occurs in personal injury cases, evolve from litigation.

(v) <u>Recommendations as to the respondent's future conduct</u>

31. The ability of tribunals and courts to make recommendation as to what steps the perpetrator should take to obviate or reduce the adverse effect of the discrimination on the victim discrimination his is actually quite an effective remedy. That, it has been held, entitles a tribunal to recommend that a Deputy Chief Constable should discuss the findings of a serious complaint of sexual harassment, in which the police were found liable, with named officers (*Chief Constable of West Yorkshire Police v Vento (No.2)* [2002] IRLR 177, EAT), although it did not support the making of a recommendation that these named officers be invited to apologise in writing to the successful applicant.

32. Moreover non-compliance can lead to further sanctions. If the respondent without reasonable justification (as to which, see *Nelson v Tyne and Wear Passenger Transport Executive* [1978] ICR 1183, EAT) fails to comply with the recommendation, the tribunal can increase any compensation previously awarded; or if previously the tribunal could have, but did not, award compensation, then it may award compensation upon the respondent's failure to comply with the recommendation (SDA, section 65(3) and RRA, section 56(4)).

33. However the potential scope of recommendations to act as an effective curb on discriminatory behaviour has been reduced as a result of the rather restrictive judicial interpretation of the SDA, section 65 and its counterpart in the RRA section 56(1)(c). In *Bayoomi v British Railways Board* [1981] IRLR 431, for example, the industrial tribunal held that as its jurisdiction to make

recommendations was not general but particular (in that it was limited to mainly recommendations which would obviate or reduce the adverse effect *on the applicant* of the discrimination), it could not make a formal recommendation to the effect that British Rail should introduce a proper training scheme. Rather, as the complainant had by then left the Board's employment and was not likely to return, all it could recommend was that a note be placed on his personal record to the effect that he had been dismissed in circumstances which amounted to racial discrimination. That should prevent prospective employers drawing an adverse inference from his dismissal, should they seek a reference.

34. Similarly, it has been held that it is not right for a tribunal to recommend that an applicant who has been the victim of discrimination in selection for employment should be appointed to the next suitable job that becomes available, because this would be unfair to the other applicants for that post (*Noone v North West Thames Regional Health Authority (No 2)* [1988] IRLR 530, CA). If a victim of discrimination is promoted automatically in consequence of a recommendation to that effect, without consideration of merit, then other workers who are disappointed may in turn be the victims of sex or race discrimination (*British Gas plc v Sharma* [1991] IRLR 101, [1991] ICR 19, EAT). The legislation does not allow positive discrimination in such circumstances. Furthermore a tribunal should not make a recommendation that the employer increase the woman's wages, as that is a matter for money compensation (*Irvine v Prestcold Ltd* [1981] IRLR 281, CA).

(vi) Survival of the remedy after the victim's death

35. If a person who has brought a claim of unlawful discrimination dies, it is possible for that claim to be continued by his or her personal representative (*Harris (Andrews' Personal Representative) v Lewisham and Guys Mental Health NHS Trust* [2000] IRLR 320, CA and in Scotland, *Soutar's Executors v James Murray & Co. (Cupar) Ltd.; Same v Scottish Provident Institution* [2002] IRLR 22, EAT).

Conclusion

36. It is to be hoped that this overview of remedies/sanctions in British law assists participants at the seminar in considering how Member States may interpret their obligations under the Directives. It may be that other routes such as administrative remedies, more creative use of restorative justice, and additional powers to compel repeat discriminators to alter their practices, can also assist in this exercise.

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June 2003