

# Remedies for discrimination

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## Overview

- General rules regarding procedures to enforce Community law rights
- Four main approaches used by Member States
- Challenges in practice?
- Specific provisions of Art 13 Directives
- Particular issues for discrimination cases in practice

## Basic principles I

- Member States are obliged by the EC Treaty to ensure that Community law rights are protected in practice (Art. 10 ECT)
- Procedures for enforcing Community law rights are generally left to the choice of the Member State concerned ('procedural autonomy')
- But national procedures must satisfy some basic requirements: ('effectiveness' and 'equivalence')

*Rewe-Zentralfinanz, C-39/73; Levez, C-326/96*

## Basic principles II

*'In the absence of Community law rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction, and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided however that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness.)'*

*Levez, C-326/96*

## Court of Justice decisions

- National rules may not prevent claimants from having access to effective redress (*Coote C-185/97, Johnston 222/84*)
- But reasonable time limits may be imposed for bringing proceedings (6 months) (*Preston, C-78/98*)
- Equivalence is to be assessed by the national court. Accessibility (cost, delay..) is a relevant consideration (*Levez, C-326/98*)
- Rules which effectively prevent an employee from recovering adequate redress may breach Community law (*Levez, C-326/98; Marshall no 2, 1993 I-ECR 4367; Von Colson & Kamann, 14/83; Draehmpahl, C-180/95*)

## Four main procedural approaches

- **Administrative process** (*labour inspectors, advisory equality bodies*)
- **Industrial relations** (*collective agreements, works councils*)
- **Judicial process** (*litigation in courts*)
- ? **Specially accessible equality bodies** (*specialised quasi-judicial bodies, ombudsmen...*), often with options for alternative dispute resolution

## Challenges in practice

*The utilisation of sex equality litigation procedures in the Member States of the EC: Blom, Fitzpatrick, Gregory, Knegt, O'Hare (1995): V/782/96*

Strengths and weaknesses, but:

- Lack of awareness of equality law among workers most affected, as well as in courts and legal professions
- Low levels of enforcement (interest?) by labour inspectorates
- Litigation levels low in all MS, relative to labour law
- Almost no equality litigation in some MS
- Litigation focuses on individuals rather than on broader effect
- Judicial systems and equality law concepts not accessible enough for vulnerable workers
- Difficulties in accessing relevant evidence
- Consistent problem of victimisation
- Need for a more strategic approach to enforcement

## Article 13 Directives: procedural requirements

- Access for all to judicial or administrative redress, (option to include conciliation)
- Right of intervention, for bodies with a legitimate interest
- Protection against victimisation
- Promotion of equal treatment through social dialogue
- Bodies to promote equal treatment (race, gender)
- Sanctions must be 'effective, proportionate & dissuasive'.
- Discriminatory provisions of collective agreements = invalid

## Redress options in the Member States

- Mediation/conciliation (by consent?)
- Order for equal treatment or for equal pay
- Compensation
- Interest? (*Marshall no 2*)
- Re-employment (in dismissal cases)
- Criminal sanctions (including fines)
- Injunctions?
- Orders for reasonable accommodation?

## Measuring appropriate redress

Procedural autonomy, but:

'the objective is to arrive at real equality of opportunity, and cannot therefore be attained in the absence of measures appropriate to restore such equality when it has not been observed ... those measures **must be such as to guarantee real and effective judicial protection and have a real deterrent effect on the employer**. Such requirements necessarily entail that the particular circumstances of each breach of the principle of equal treatment should be taken into account. ... Where financial compensation is the measure adopted to achieve the objective... it must be adequate, in that it **must enable the loss and damage actually sustained as a result of the [discrimination] to be made good in full** in accordance with the applicable national rules ...'

*Marshall no 2, C-271/91*

## Particular issues in practice: compensation

- Measuring appropriate compensation?
  - No punitive damages
  - Restoration
  - Social, personal, practical, financial effects ...
  - The human rights aspect
  - Gravity of the discrimination; whether discrimination is deliberate or systematic; whether subsequent attempt to remedy
  - The need for deterrent effect
  - Legal costs?
- Is there a conflict between accessibility, and adequate redress?

## Particular issues in practice: orders for equal treatment

- Levelling-up and levelling-down  
(*Defrenne I, 80/7; Kowalska, 33/89*)
- Traditional rule: while discrimination exists, the treatment of the comparator is the only valid point of reference in ordering equal treatment
- Reasonable accommodation: will it need a different approach?
- Orders to promote equal practice in the future?

### Particular issues in practice III

- Appropriate orders in harassment cases
- More accessibility challenges (disability, language, illiteracy, availability of legal aid, alienation/fear)
- Managing volume