

Redress for Acts of Discrimination – A Community Law Prospective.

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Introduction

This paper will consider the general principles of Community Law applicable to the provision of redress where the right to equal treatment, has been infringed. It is proposed to trace the development of these principles and their application in cases involving sex discrimination in the case law of the ECJ. The current state of the law applicable to the awarding of redress will then be considered.

Legislative Provisions

Article 17 of Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupations², provides as follows: -

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.

This provision requires the Member States to prescribe the sanctions applicable for contraventions of national law adopted to transpose the Directive. Within the principal of national procedural autonomy it is for the national legal systems to designate the courts having jurisdiction and to determine the means of enforcing rights derived from the law of the Community³. Thus, in the absence of harmonising measures, matters of procedure and remedies for a breach of Community law is primarily within the competence of the Member States.

That prerogative of the Member States must, however, be exercised having regard to their obligations under the Treaty and in line with the general principles of Community law. Article 10 of the Treaty sets out the general obligation of Member States to ensure fulfilment of the obligations imposed by the Treaty as follows: -

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² [OJ 2000, L303/16] hereafter “the Directive.”

³ See Case C-6/60 Humblet v Belgium [1960] ECR 559.

Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

Article 249 of the Treaty, which set down the obligations of Member States to achieve the result envisaged by a Directive, is also relevant. The third paragraph of this Article provides: -

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

The Community law requirements of proportionality and adequacy are also relevant. They further delimit the parameters within which Member States are free to act in prescribing the range of remedies available for breaches of Community law. What is clearly required by the application of these principles is that the remedy granted is adequate and effective and in proportion to the wrong suffered by a victim of discrimination.

Adequacy of Redress.

The purpose of redress for actionable civil wrong in most jurisdictions is to place the plaintiff in the position that they would have been in had the wrongdoing not occurred. Often, this objective can only be achieved by providing redress by way of mandatory orders. Where a worker is dismissed in circumstances amounting to discrimination the most effective form of redress is an order requiring his or her reinstatement. Likewise, where a job applicant is rejected on discriminatory grounds the most effective remedy is an order directing the employer to offer the plaintiff a contract of employment.

In many cases mandatory orders may not be feasible for a variety of reasons. The complainant worker may no longer wish to work for the employer or, in the case of dismissal, the employment relationship may have so broken down as to render an order for reinstatement impracticable. Further, for reasons of policy, some Member States do not provide for the making of such mandatory orders in employment cases.

The question of whether Member States are required to provide for mandatory orders by way of redress was considered by the Court of Justice in Case C-14/83 *Von Colson and Kamann v Land Nordrhein – Westfalen*⁴. This case

⁴ [1984] ECR 1819

concerned the refusal of the German prison authorities to employ the female complainants on grounds of their gender. They had applied for two posts as social workers at an all male prison. Two male candidates were appointed although they were less qualified than the Complainants. They brought proceedings against the prison administration claiming that they had suffered discrimination on grounds of their sex. By way of redress they sought to be appointed to the posts at issue or, in the alternative, compensation in an amount equal to six months salary. The Labour Court which heard the case found that discrimination had occurred but found that the transposing legislation under which the claim was brought did not allow for the remedies sought. Rather, in the circumstances of the instant case, it only allowed for the reimbursement of expenses incurred in travelling to the interview. The national court sought a preliminary ruling on whether the Directive specifically required that the discrimination suffered by the Complainants be remedied by an order directing their appointment to the posts at issue. The ECJ held that it did not. But it did rule that the limitation placed on compensation to expenses incurred only was inconsistent with the Directive.

In dealing with the question of whether Member States are required to provide for mandatory orders the Court said: -

*Article 6 requires member states to introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by discrimination to pursue their claims by judicial process. It follows from the provision that member states are required to adopt measures which are sufficiently effective to achieve the objective of the directive and to ensure that those measures may in fact be relied on before the national courts by the persons concerned. Such measures may include, for example, provisions requiring the employer to offer a post to the candidate discriminated against or giving the candidate adequate financial compensation, backed up where necessary by a system of fines. However the directive does not prescribe a specific sanction; it leaves member states free to choose between the different solutions suitable for achieving its objective.*⁵

However, in dealing with the adequacy of the compensation the Court emphatically rejected the notion that Member States had an unfettered right to determine the rules applicable in deciding on quantum. The Court said the following: -⁶

It is impossible to establish real equality of opportunity without an appropriate system of sanctions. That follows not only from the actual purpose of the directive but more specifically from article 6 thereof which, by granting applicants for a post who have been discriminated against recourse to the courts, acknowledges that those candidates

⁵ At paragraph 18 of the Judgment

⁶ At Paragraphs 22, 23 and 24 of the Judgment.

have rights of which they may avail themselves before the courts .

Although, as has been stated in the reply to question 1, full implementation of the directive does not require any specific form of sanction for unlawful discrimination, it does entail that that sanction be such as to guarantee real and effective judicial protection. Moreover it must also have a real deterrent effect on the employer. It follows that where a member state chooses to penalize the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained.

In consequence it appears that national provisions limiting the right to compensation of persons who have been discriminated against as regards access to employment to a purely nominal amount, such as, for example, the reimbursement of expenses incurred by them in submitting their application, would not satisfy the requirements of an effective transposition of the directive.⁷

Capping of Awards

The question of whether Member States could place a monetary cap on awards of compensation arose in Case C-271/91 *Marshall v Southampton and South West Area Health Authority II*⁸. Ms Marshall had claimed that a rule in the UK which required women to retire at an earlier age than men was discriminatory. She succeeded in her claim and it was held that her forced retirement amounted to a discriminatory dismissal. The Tribunal which heard the case at first instance assessed compensation at £18,405, which included interest of £7,710. However the relevant UK legislation capped the amount of compensation which could be awarded by the Tribunal at £6,250. Moreover, it was unclear whether the Tribunal had power to award interest. The House of Lords sought a preliminary ruling on whether a Complainant was entitled to full reparation for the loss which she suffered in consequence of the discriminatory dismissal. In its judgment the Court answered this question as follows: -

As the Court held in the judgment in Case 14/83 Von Colson and Kamann v Land Nordrhein-Westfalen 1984 ECR 1891, at paragraph 18, Article 6 does not prescribe a specific measure to be taken in the event of a breach of the prohibition of discrimination, but leaves Member States free to choose between the different solutions suitable for achieving the objective of the Directive, depending on the different situations which may arise.

However, the objective is to arrive at real equality of opportunity and cannot therefore be attained in the absence of measures appropriate to

⁷ The import of this passage is not incorporated in the text of Article 17 of the Directive.

⁸ [1993] ECR I – 4367.

restore such equality when it has not been observed. As the Court stated in paragraph 23 of the judgment in Von Colson and Kamann, cited above, 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. In the event of discriminatory dismissal contrary to Article 5(1) of the Directive, a situation of equality could not be restored without either reinstating the victim of discrimination or, in the alternative, granting financial compensation for the loss and damage sustained.

Where financial compensation is the measure adopted in order to achieve the objective indicated above, it must be adequate, in that it must enable the loss and damage actually sustained as a result of the discriminatory dismissal to be made good in full in accordance with the applicable national rules.⁹

In addressing the specific question of whether a provision on capping was permissible, the Court ruled as follows: -

It also follows from that interpretation that the fixing of an upper limit of the kind at issue in the main proceedings cannot, by definition, constitute proper implementation of Article 6 of the Directive, since it limits the amount of compensation a priori to a level which is not necessarily consistent with the requirement of ensuring real equality of opportunity through adequate reparation for the loss and damage sustained as a result of discriminatory dismissal.¹⁰

On the question of interest on the award the Court had this to say: -¹¹

With regard to the second part of the second question relating to the award of interest, suffice it to say that full compensation for the loss and damage sustained as a result of discriminatory dismissal cannot leave out of account factors, such as the effluxion of time, which may in fact reduce its value. The award of interest, in accordance with the applicable national rules, must therefore be regarded as an essential component of compensation for the purposes of restoring real equality of treatment.¹²

⁹ At Par 23,24,25 and 26

¹⁰ Paragraph 30

¹¹ At Paragraph 30

¹² It should be noted that in Case C-66/95 *R v Secretary of State for Social Security ex parte Eunice Sutton* [1997] ECR I –2163, the Court of Justice ruled that the same considerations do not apply in the case of arrears of social security payments. The Court held that in that case arrears of social security payments were not compensatory in nature and so the reasoning in *Marshall* did not apply and there was no requirement to pay interest on the basis of either Directive 76/207 or Directive 79/7.

Procedural rules affecting remedies must not be less favourable than those available in domestic Law.

The aforementioned cases make it clear that remedies for discrimination must be both adequate and dissuasive of future infractions of the principle of equal treatment. Another line of authorities have applied the principles of equivalence and effectiveness to rules or procedures applicable in determining redress where a right derived from the law of the Community has been infringed. The Court has held that such rules must not be less favourable than those available in actions grounded on the breach of a corresponding provision of domestic law, nor can they make the exercise of Community law rights excessively difficult or impossible to pursue. .

This approach is illustrated by the decision in Case C-326/96 *Levez v T.H. Jennings (Harlow Pools) Ltd.*¹³ in which the imposition of statutory time limits on the bringing of claims was at issue. Here the Complainant had been employed by the Respondent as a betting shop manager in February 1991 at a salary of £10,000 per annum. In December 1991 she was appointed manager of another shop replacing a man who had been paid £11,400 per annum. On being appointed to manage this shop the Complainant's salary was increased to £10,800. The Respondent falsely told the Complainant that this was the salary paid to her male predecessor. However, in April 1992 the Complainant's pay was increased to £11,400 per annum.

On leaving the job in 1993 the Complainant discovered that until April 1992 she had been paid less than her male predecessor. The Complainant referred a claim for equal pay to an Industrial Tribunal in respect of the period February 1991 (when she commenced employment with the Respondent) to April 1992 when her salary was brought into line with that of her predecessor. Her claim was lodged on 17th September 1993.

The relevant UK legislation provided that a successful claimant for equal pay could not be awarded arrears of remuneration in respect of a time earlier than two years before the date on which the proceedings were initiated. On this basis the Complainant could not recover arrears accruing up to 17th September 1991. The referring Court¹⁴ noted that the rule at issue applied to claims for equal pay but that more favourable time limits applied to other claims in domestic law. Moreover, the referring Court pointed out that the relevant legislation did not give the Court discretion to extend the time limit in cases of fraud or misrepresentation.

¹³ [1998] ECR I – 7835.

¹⁴ The Employment Appeals Tribunal

In considering the questions raised the Court first referred to its established case-law on the question of national procedural autonomy and the principles of equivalence and effectiveness, the Court said the following: -

The first point to note is that, according to established case-law, in the absence of Community 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)¹⁵

The Court went on to say that it is compatible with Community law to prescribe reasonable limitation periods in the interest of legal certainty provided that they are not less favourable than those applicable to similar actions in national law or make the exercise of Community law rights virtually impossible or excessively difficult. While holding that a two year limitation period was not in itself objectionable the Court went on to consider if, in the instant case, it offended against the principle of effectiveness. In holding on the facts that the rule at issue did offend against the principle of effectiveness the Court said the following: -

As the Commission rightly pointed out, even though, in the present case, only part of the plaintiff's claim is affected, in a different case and in similar circumstances, the whole of a claim might be excluded by the operation of the rule at issue.

Where an employer provides an employee with inaccurate information as to the level of remuneration received by employees of the opposite sex performing like work, the employee so informed has no way of determining whether he is being discriminated against or, if so, to what extent. Consequently, by relying on the rule at issue in that situation, the employer would be able to deprive his employee of the means provided for by the Directive of enforcing the principle of equal pay before the courts (see, mutatis mutandis, Case 109/88 Danfoss 1989 ECR 3199, paragraph 13).

¹⁵ see, to that effect, Case 33/76 *Rewe v Landwirtschaftskammer Saarland* 1976 ECR 1989, paragraph 5; Case 45/76 *Comet v Produktschap voor Siergewassen* 1976 ECR 2043, paragraphs 13 and 16; Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen v SPF* 1995 ECR I-4705, paragraph 17; Case C-261/95 *Palmisani v INPS* 1997 ECR I-4025, paragraph 27; Case C-246/96 *Magorrian and Cunningham* 1997 ECR I-7153, paragraph 37; and paragraph 16 of the judgment of 15 September 1998 in Joined Cases C-279/96, C-280/96 and C-281/96 *Ansaldo Energia and Others* 1998 ECR I-5025).

*In short, to allow an employer to rely on a national rule such as the rule at issue would, in the circumstances of the case before the national court, be manifestly incompatible with the principle of effectiveness referred to above. Application of the rule at issue is likely, in the circumstances of the present case, to make it virtually impossible or excessively difficult to obtain arrears of remuneration in respect of sex discrimination. It is plain that the ultimate effect of this rule would be to facilitate the breach of Community law by an employer whose deceit caused the employee's delay in bringing proceedings for enforcement of the principle of equal pay.*¹⁶

In defence of the impugned provision the UK Government had pointed out that the Complainant could have brought proceeding for breach of contract in domestic law before the County Court where she could have claimed full damages by reason of the fact that her employers deceit had prevented her from bringing her claim earlier. The Court pointed out that the principle of equivalence requires that the rule at issue be applied without distinction, whether the infringement alleged is of Community law or national law where the purpose and cause of action are similar. The Court of Justice then left to the national court responsibility for deciding if the impugned rule was applicable to similar domestic actions.¹⁷

In Case C- 180/95 *Nils Draehmpaehl v Urania Immobilienservice OHG*¹⁸, an issue arose concerning the imposition of a limit of either three months salary or six months salary on an award of compensation for sex discrimination. Here the Order for Reference expressly stated that other provision of civil and domestic law did not impose such a ceiling.

In ruling that the ceiling at issue did offend against the principle of equivalence the Court said the following: -¹⁹

Moreover, it is clear from the order for reference, from the answers given to the questions put by the Court and from the explanations given at the hearing that the provisions of German law applicable in the case before the national court place on compensation a specific ceiling which is not provided for by other provisions of domestic civil and labour law.

In choosing the appropriate solution for guaranteeing that the objective of the Directive is attained, the Member States must ensure that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to

¹⁶ Paragraphs 30, 31, and 32 of the Judgment.

¹⁷ On this same point see the decision of the Court of Justice in Case C- 78/98 *Preston and Others v Wolverhampton Health Care NHS* [2000] ECR I 3201

¹⁸ [1997] ECR I-2197

¹⁹ Paragraphs 28,29 and 30.

infringements of domestic law of a similar nature and importance (Case 68/88 Commission v Greece 1989 ECR 2965, paragraph 24).

It follows from the foregoing that provisions of domestic law which, unlike other provisions of domestic civil law and labour law, prescribe an upper limit of three months' salary for the compensation which may be obtained in the event of discrimination on grounds of sex in the making of an appointment do not fulfil those requirements.²⁰

Applicability of rules of domestic law which limit the Right to redress.

As has been seen rules of domestic law which limit the right to redress and are applicable solely to actions grounded on Community law rights will be struck down as infringing the principle of equivalence. What, however, is the position if domestic rules of law of general application are invoked in order to limit or deny a right to redress for a breach of a Community law right?

In Case C-377/89 *Cotter and McDermott v Minister for Social Welfare and the Attorney General*²¹ the Court had to decide if a rule of Irish law which precludes unjust enrichment could be invoked to defeat the Complainant's claim for equal social security benefits as provided for in Directive 79/7.

Under the Irish Social Welfare code married men were automatically paid an additional allowance for their spouse without having to prove dependency. Married women could only obtain the additional allowance on proof of dependency. Moreover, married women were paid at a lower rate than married men and the benefit was payable for a shorter period. Ireland had failed to implement the Directive on time and continued to apply the discriminatory regime. In reliance on the direct effect of the Directive the Complainants sought the same treatment as men and in particular sought payment of the additional allowance in respect of their spouses.

The High Court held that to pay the Complainants an allowance for their husbands who were not actually dependant on them would be unfair and would offend against the common law doctrine of unjust enrichment. It therefore held that they were not entitled to the redress which they sought. The Complainants appealed to the Supreme Court which made a reference to the Court of Justice for a preliminary ruling on whether that doctrine could be relied upon in the instant case.

²⁰ It should also be noted that the Court went on to hold that in cases where because of his or her qualification the Complainant would not have obtained the post even in the absence of discrimination, a ceiling of three months pay on the quantum of compensation was permissible.

²¹ [1991] ECR I - 1155

The Court of Justice emphatically rejected the Irish Governments arguments on this point. It said: -²²

According to the Irish Government, to grant such a right to married women could, in certain circumstances, result in double payment of the same increases to the same families, in particular where both spouses received social security benefits during the period at issue. Such payments would be manifestly absurd and would infringe the prohibition on unjust enrichment laid down by national law.

To permit reliance on that prohibition would enable the national authorities to use their own unlawful conduct as a ground for depriving Article 4(1) of the directive of its full effect.

The reply to the first question must therefore be that Article 4(1) of the directive must be interpreted as meaning that if, after the expiry of the period allowed for implementation of the directive, married men have automatically received increases in social security benefits in respect of a spouse and children deemed to be dependants without having to prove actual dependency, married women without actual dependants are entitled to those increases even if in some circumstances that will result in double payment of the increases.²³

Conclusion

In Von Colson and Marshall II the Court addressed what could properly be described as the principles of adequacy and proportionality. That is to say the requirement that a remedy must be adequate to redress the damage suffered by the Complainant. In *Marshall II* Advocate General Van Gerven defined adequate compensation as that which “is sufficiently high to act as an effective, proportionate and dissuasive sanction”.²⁴ This, he suggested, must be distinguished from full reparation²⁵. However the Court departed from this analysis and held that, in the case of discriminatory dismissal, only full reinstatement of the person discriminated against or, alternatively, full reparation for the damage suffered can restore a situation of equality and meet the requirements underlying the notion of an adequate sanction²⁶.

²² At Paragraph 20, 21 and 22.

²³ For further examples of the limitations placed by the Court of justice on the principle of national procedural autonomy, see the Judgement in Case C – 177/88 *Dekker v Stichting voor Volwassenen (VJV) Plus* [1990] 1- ECR 3941 where it was held that a right to redress could not be dependant on a general provision of Dutch law which required proof of fault in civil cases. The Court made a similar finding in *Draehmpaehl.*

²⁴ Paragraph 18 of his Opinion.

²⁵ Ibid; at Paragraph 17.

²⁶ See Paragraphs 25 and 26 of the Judgment in Marshall, quoted above.

The Court has also consistently pointed out that redress must be effective in attaining the objective of the Directive which is to eliminate discrimination. Hence the sanction must have a real deterrent effect since it could never be acceptable for the advantage which accrued from an act of discrimination to outweigh the cost of any redress which might be awarded. This could be problematic in the case of large and financially strong enterprises where only a significantly large award of compensation would act as a real and effective deterrent. In such cases, it is suggested, the quantum of the award would have to be balanced by considerations of proportionality. The need for such a balance was more recently adverted to by Court of Justice in Case C- 212/04 *Adeneler and others v Ellinikos Organismos Galaktos*²⁷ (involving Directive 1999/70 on Fixed-Term Work). Here the Court said : -

Thus, where, as in the present case, Community law does not lay down any specific sanctions should instances of abuse nevertheless be established, it is incumbent on the national authorities to adopt appropriate measures to deal with such a situation. Those measures must be not only proportionate, but also sufficiently effective and a sufficient deterrent to ensure that the provisions adopted pursuant to the Framework Agreement are fully effective.

It is also clear that special rules, which are not applicable to similar domestic actions, cannot be applied to limit the quantum of compensation which can be awarded in cases of discrimination. This is of significance in many jurisdictions which place an upper limit on the monetary jurisdiction of special tribunals established to determine claims based on the breach of community law rights. This has necessitated changes in the monetary jurisdictions of such tribunals or the granting of coordinate jurisdiction in such cases to Courts with unlimited jurisdiction²⁸.

Finally, the authorities indicate that where rules of procedure or rules of domestic law operate to impair the effectiveness of Community law by limiting a right to redress such rules must not be followed by national courts and tribunals. This approach is consistent with the jurisprudence of the ECJ in cases concerning the supremacy of Community law²⁹.

²⁷ Case C-212/04

²⁸ In Ireland the Equality Tribunal is the body having first instance jurisdiction in claims under the Employment Equality Acts 1998 and 2004. The monetary jurisdiction of the tribunal is limited to the equivalent of twice the Complainant's annual salary in an equal treatment case and three years arrears in a equal pay case. In domestic law there is no upper limit on the damages which can be awarded in tort and arrears due on foot of a contract can be recovered for six years. The Circuit Court has now been given coordinate jurisdiction in gender equality cases and can exercise unlimited monetary jurisdiction in equal treatment cases and can award arrears of up to six years in equal pay cases in line with the Irish statute of limitations.

²⁹ See in particular the decision of the Court of Justice in Case C- 106/77 *Amministrazione delle Finanze Stato v Simmenthal* [1978] ECR 679

It is thus clear that rules such as those which limit compensation to economic loss are incompatible with the Directive and must be set aside by national courts³⁰. Arguably, rules or practices which require a complainant to mitigate his or her loss are also incompatible with the object pursued by the Directive if they have the effect of reducing the respondents liability for his or her wrongdoing. There is, however, no authority directly on that point.

What is now clear beyond argument is that redress must provide full reparation for the wrong suffered. If the impugned conduct involved a dismissal or a refusal to employ on discriminatory grounds the primary remedy should be an order directing engagement or re-engagement as the case may be. If this is not available in national law, is not feasible in the circumstances or if it is not desired by the Complainant, an order for full compensation should be made. This should not be confined to economic loss but should, where necessary in order to act as a deterrent, include an additional sum to mark the injury to the Complainant's feelings arising from the denial of their fundamental right not to be discriminated against. Finally where arrears of pay is ordered consideration should be given to the addition of interest so as to ensure that the award is adequate in current value terms and to avoid any residual benefit to the Respondent.

³⁰ For example at common law compensation for wrongful dismissal cannot take account of such matters as the stress and anxiety caused by the dismissal