

REMEDIES AND SANCTIONS FOR UNLAWFUL DISCRIMINATION

Nicholas Toms¹

Introduction

1. The Preambles of both the Race and Employment Framework Directives² 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. It is clear from the Preambles that the aim of the Directives is to ensure that the remedies available are so valuable to the victim that they act as an effective sanction against those who perpetrate discrimination and, implicitly, a deterrent against any such future conduct by them or others.
2. This paper will explore the means by which Member States can interpret the need to provide remedies and sanctions under the Directives. Specific reference will be made to the way in which British law (both in the relevant legislation and through the courts) approaches this issue but other jurisdictions in the EU will also be considered.

The provisions of the Directives relating to remedies and sanctions

3. Chapter II, Article 7(1) of the Race Directive and Chapter II, Article 9(1) of the General Framework Directive set out the fundamental obligation on Member States to ensure that the victims of discrimination have access to an effective legal procedure

¹ Barrister, Doughty Street Chambers, 53-54 Doughty Street, London WC1N 2LS. Tel: 020 7404-1313; Fax: 020 7404-2283; Email n.toms@doughtystreet.co.uk. Nicholas Toms specialises in discrimination and employment law in the United Kingdom and internationally. He regularly represents claimants who complain of discrimination in the workplace and in relation to the provision of services.

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 General Framework Directive': Council Directive of 27 November 2000, 'establishing a general framework for equal treatment in employment and education' (2000/78/EC)

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. Articles 7(2) and 9(2) respectively acknowledge the particular difficulties litigants may have in representing themselves in discrimination proceedings, and the 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 General 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..."
6. 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. Nevertheless, the Preambles at paragraphs (19) and (29) respectively make plain that the victims of discrimination should have "...adequate means of legal protection..."
7. Clearly, the ability of victims of discrimination, as of any wrongdoing, to challenge their treatment is restricted if they are unaware of rights and how to exercise them. Article 10 of the Race Directive and Article 12 of the General Framework Directive

provide that Member States should ensure 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...".

8. 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 General Framework Directive.

The relationship between remedies and sanctions

9. From the above it can be seen that the Directives require,
 - (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. The wording of the "sanctions" provisions also makes clear that these may include the payment of compensation to victims.
10. However, the Directives contain no specific guidelines as to the form and extent of the remedies to be applied in discrimination cases. As can be seen from paragraph 5 above, this is left to the individual member states.

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.

11. It is clear that the Directives allow for a possible link between sanction and remedy. Thus, the imposition of a financial penalty on the discriminator which is intended to be a sanction can also form the victim's remedy if it is paid to them as compensation.
12. 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 other means). These may include 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?).

Individual remedies

13. In practice, most enforcement systems appear to be based on providing remedies to aggrieved individuals who bring complaints⁴ although this is not exclusively the case. For instance,
 - (a) in Cyprus the Commissioner for Administration, which is the specialised anti-discrimination body, communicates reports to the Attorney General who then advises on the adoption of appropriate administrative and legislative measures;
 - (b) in Portugal administrative sanctions can be imposed including censure, confiscation of property, removal of the right to participate in trade fairs, suspension of licences and other authorisations, removal of the right to benefits granted by public bodies etc;
 - (c) the power to remove the right to benefits granted by public bodies also exists in the laws in Italy, France and Austria⁵.

⁴ Greek anti-discrimination law appears to be an exception as it does not provide for compensation, only for fines which are payable to the state in some circumstances. However, damages may be awardable under the Civil Code.

⁵ In the case of Austria this does not extend to exclusion from public procurement

14. Britain uses the individual remedy approach where the sanction and remedy are linked together. The principal (albeit not only) remedy under the various discrimination statutes⁶, is to provide financial compensation to victims, which can, of course, act as a sanction on the discriminator.
15. However, the emphasis in the British legislation is very much on compensation and not punishment. Consequently, whilst awards of compensation can act as a sanction, the extent to which this is the case depends on the amount of compensation awarded. Whether it operates as an effective sanction can be considerably blunted where the sum awarded as compensation is small and this is often the case due the limitations on compensation imposed by tribunals and courts.
16. The difficulties can be seen from the UK figures relating to compensation. The compensation awarded by tribunals in sex, race and disability discrimination claims in the last two reported years was as follows:

2005-6

<u>Type of claim</u>	<u>Maximum</u>	<u>Median</u>	<u>Average</u>
Race discrimination	£984,465	£6,640	£30,361
Sex discrimination	£217,961	£5,546	£10,807
Disability discrimination	£138,650	£9,021	£19,360

2006-7

<u>Type of claim</u>	<u>Maximum</u>	<u>Median</u>	<u>Average</u>
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⁶ the Sex Discrimination Act 1975, the Race Relations Act 1976, the Disability Discrimination Act 1995, the Employment Equality (Sexual Orientation) Regulations 2003 and the Employment Equality (Religion or Belief) Regulations 2003, the Employment Equality (Age) Regulations 2006.

Race discrimination	£123,898	£7,000	£14,049
Sex discrimination	£64,862	£6,724	£10,052
Disability discrimination	£138,648	£8,232	£15,059

17. It can be seen that large awards are the exception rather than the rule. Most cases result in far more modest awards. As explained below, it should also be noted that the costs incurred in bringing a successful claim cannot be recovered from the employer. Instead, they are borne by the Claimant save in very limited circumstances.
18. The figures from elsewhere in the EU show a similar problem with, if anything, an even more conservative approach. According to the report *‘Developing Discrimination Law in Europe – a Comparative Analysis’* prepared in July 2007 by the European Network of Independent Experts in the non-discrimination field,

“In France legal practice is still very conservative in calculating pecuniary loss and amounts awarded remain rather low. This is also the case for compensation awards in Ireland where the Equality Authority officers have stated that they feel constrained by the maximum level of compensation they can award. In Ireland the average award in employment cases was 12,798 euros and in goods and services cases the average award was 594 euros for the first nine months of 2005 in cases heard before the Equality Tribunal. In Sweden damages for violations of non-discrimination legislation range from between 4,450 to 11,110 euros, depending on the circumstances. In Slovakia the financial compensation awarded shows an unstable and varying approach. Dutch courts are generally reluctant to grant damages for non-pecuniary damages. In Hungary in a number of initial cases concerning discrimination in access to services, the amount of compensation was consistently around 400 euros. This is double the monthly minimum wage, so not very dissuasive. Recently however, average amounts have risen with discrimination based on racial or ethnic origin being sanctioned with non-pecuniary damages of around 2,000 euros in recent cases. Punitive damages do not exist, but a so-called ‘fine to be used for public purposes’ may be imposed by the court if the amount of the damages that can be imposed is insufficient to mitigate the gravity of the actionable conduct. This fine is however payable to the state and not the victim.”

19. The report goes on to comment:

“On an initial examination, with the exception of perhaps the UK, these figures seem relatively low. This, coupled with the length of time it can take to get a

decision - for instance in Ireland it takes 3 years for cases to be heard by the Equality Tribunal - questions the effectiveness of the remedy and even whether it in actual fact makes good the damage. The question equally arises about its dissuasiveness, in particular whether such sums will deter larger employers. In this regard, the bill presently before the Spanish Parliament under which company turnover would be a criterion in determining the level of sanction imposed presents an interesting development.”

20. Since *Marshall v Southampton and South West Hampshire Area Health Authority (Teaching) (No 2)*: C-271/91 [1993] ICR 893 at 932 upper limits on compensation in sex discrimination cases have been unacceptable. There appears to be no reason why this approach should not also apply to other forms of discrimination. However, upper limits on discrimination compensation (other than for sex) still appear to be imposed in a number of jurisdictions⁷.
- (a) in Estonia there is an upper limit for pecuniary damages of six months salary in the case of a discriminatory termination of an employment contract where the victim of discrimination waived reinstatement;
 - (b) in Hungary there is a limit of twelve months average earnings in addition to reinstatement in the case of discriminatory dismissal;
 - (c) in Ireland in dismissal cases there is a maximum of two years salary and 6,348.69 euro under the Equal Status Act;
 - (d) in Sweden the limit is 32 months' wages in cases of dismissal after 10 years of employment; 48 months if the victim of discrimination is aged 60 years or older;
 - (e) in Finland there appears to be an informal upper limit of 15,000 euro which can be exceeded for special reasons;

⁷ Source: 'Developing Discrimination Law in Europe – a Comparative Analysis' prepared in July 2007 by the European Network of Independent Experts in the non-discrimination field

- (f) there seems to be a statutory upper limits on compensation for non-pecuniary damages seem to apply in Malta of 200 Liri, which is equivalent to 465 euro;
 - (g) in Latvia there is no maximum amount for damages under the civil law. However the Law on Reparation of Damages caused by the State Administrative Institutions sets maximum amounts of non-pecuniary damages for personal harm at 5,000 Lats (around 8,000 euros), or 7000 Lats (around 10,000 euros) in cases of grave personal harm, and 20,000 Lats (around 24,000 euros) if harm has been caused to life or grave harm has been caused to health. The maximum amount of damages for moral harm is set at 3000 Lats (around 4,800 euros) or 5,000 Lats (around 8,000 euros) in cases of grave moral harm and 20,000 Lats (around 24,000 euros) if harm has been caused to life or grave harm has been caused to health;
 - (h) Austrian law provides for an upper limit of 500 euro in cases of non-recruitment or non-promotion if the employer proves that the victim would not have been recruited or promoted even in the absence of discrimination;
 - (i) the UK now has a court imposed limitation on compensation for injury to feelings as detailed below.
21. There appear to be no limits either in relation to pecuniary or non-pecuniary damages in the national laws of the Czech Republic, Denmark, Italy, Luxembourg, the Netherlands, Poland, Portugal, Slovakia, Slovenia or Spain.

Remedies/sanctions for discrimination in British law

(i) procedure

22. An individual who complains of an unlawful form of discrimination generally

enforces his/her 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 an employment judge and two 'wing' members (one of whom has employee-focused experience, such as in a trade union, and one of whom has equivalent employer-based knowledge).

23. In straightforward claims 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 remedy (ie. what award of compensation, or other remedy should be awarded). In more complex cases (or where lack of time prevents the tribunal or court dealing with remedy) a separate remedy hearing may be held at a later date (assuming the parties cannot reach agreement among themselves).
24. If a remedy hearing is necessary, it may involve consideration of documents dealing with financial matters (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

25. Under each of statutes or regulations dealing with discrimination, once a complaint of discrimination is found to be well-founded, the court can 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.

(a) declaration

26. The tribunal or court may and usually will go on to make a formal declaration (which is normally relatively short) to the effect that the Claimant has been subject to unlawful discrimination. Claimants frequently find that simply winning a claim and obtaining a declaration is valuable in itself, quite aside from any monetary compensation they may receive, and the law recognises this.

(b) Compensation

(i) basic principles

27. Where compensation is ordered, the individual is entitled to the full measure of damages recoverable for the statutory tort of unlawful discrimination⁸. Compensation is awarded 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]..."⁹

28. Therefore, although the tribunal is not obliged to make an order for compensation unless it considers it just and equitable to do so, once it decides 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 full¹⁰ and it is generally accepted that the ordinary principles of causation of damage apply to determining what loss has been

⁸ *Hurley v Mustoe (No 2)* [1983] ICR 422, EAT

⁹ *Ministry of Defence v Cannock* [1994] IRLR 509, EAT, per Morison J at 517

¹⁰ *Marshall v Southampton and South West Hampshire Area Health Authority (Teaching) (No 2): C-271/91* [1993] ICR 893 at 932

"sustained". As above, the amount of compensation which can be awarded is unlimited by any statutory cap.

29. Thus, for example, a man dismissed for a reason related to his race will be entitled to compensation for all the loss that flows from that dismissal.

30. However, as alluded to above, there are a number of serious limitations in the approach of the British legislation. First, tribunals must only award compensation for losses which are attributable to the specific act(s) which have been held to constitute discrimination and which formed the subject matter of the claim. Compensation cannot be awarded for other acts of discrimination of which complaint has not been made. Not infrequently, allegations of discrimination 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 awarded respect of these allegations¹¹.

31. More importantly, it must be emphasised that compensation is just that – compensation. It is not meant to be or supposed to be punitive (except in certain limited cases). Consequently, as stated above, the ability of compensation to act as a sanction will be effected by any limitations on the amount of compensation that can be awarded.

32. Each head of possible compensation and the various restrictions imposed upon tribunals and courts in calculating awards will now be considered in turn.

¹¹ see by analogy *Chapman v Simon* [1994] IRLR 124, CA

(ii) financial loss in employment cases

33. The largest aspect of an award in an employment-related discrimination cases is normally compensation for financial losses flowing from the discriminatory act. This can include,
- (a) loss of earnings to date of hearing (generally where dismissal or failure to promote);
 - (b) future loss of earnings
 - (c) loss of other employment related benefits such as company car, health care provision, life insurance, luncheon 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);
 - (d) loss of pension (this can form a substantial, and complex, part of the award of compensation)
 - (e) cost of obtaining alternative employment.
34. It is likely that a substantial award of financial compensation will act as a sanction against a discriminatory employer. However, the impact of compensation for financial loss and, consequently, its ability to act as a sanction can be seriously limited for two reasons:
- (a) clearly, there will be no compensation for financial loss where none has been sustained by the victim. This is often the case where the victim remains working for the discriminatory employer;
 - (b) although there is now no statutory cap on discrimination compensation, there is a limitation imposed by tribunals and courts through the duty imposed on

the successful complainant to mitigate their loss. This means, for instance, where someone has lost their job they have to take reasonable steps to obtain alternative work.

- (c) where someone successfully mitigates their loss by finding another job with an equivalent salary quite quickly, this will have the effect of limiting their compensation for financial loss to, perhaps, a few weeks loss of pay. The effectiveness of this as a sanction against a discriminatory employer is likely to be quite limited (see below re injury to feelings).

(iii) personal injury

- 35. Victims of discrimination can 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 satisfied¹². A medical report is normally necessary for the applicant to show the extent of his or her injuries (it is essential where there is a psychiatric injury) and that they were caused by the discriminatory act.

- 36. Tribunals and courts are provided with guidance as to the appropriate awards for personal injury in the form of the Judicial Studies Board Guidelines. These contain "bands" of descriptions of typical injuries with indications of the award which is appropriate. They also set out the factors to be taken into account in valuing claims of this nature. For psychiatric injury (the most likely type of injury) these include:
 - (i) the injured person's ability to cope with life and work;

¹² see *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] IRLR 481, CA

- (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.

37. Awards for psychiatric injury 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).

(iv) 'injury to feelings' awards

38. The discrimination statutes and regulations make specific provision for compensation to the victim to include an award for "injury to feelings". This is separate from any compensation for personal injury.
39. 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 his or 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 cases¹³.

¹³ see, for example, *Murray v Powertech (Scotland) Ltd* [1992] IRLR 257, EAT, per Lord Mayfield

40. Awards for injury to feelings in early discrimination cases were quite limited, particularly, whilst the statutory cap was in place up to 1993. In the race discrimination case of *Noone v North West Thames Regional Health Authority* [1988] IRLR 195, [1988] ICR 813 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". 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 injury to feelings for mainly verbal abuse suffered by a woman who had worked for twelve weeks as an apprentice mechanic.
41. Gradually awards for injury to feelings increased and in some cases substantial sums were awarded occasionally reaching £20,000 to £30,000. In a few cases even higher awards were made. For example:
- In *Eccles v Seventh Day Adventist Church* (May 2002, *Equal Justice Review*, Spring 2003, p.25) £47,500 was awarded for injury to feelings including aggravated damages where the applicant's life was made a "living hell" through victimisation.
 - 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.
42. At the end of 2002 the Court of Appeal stepped in to try and control what they saw as excessive awards under this head of compensation¹⁴. They provided guidance in the form of three broad bands for awards for injury to feelings. These are,

¹⁴ *Vento v Chief Constable of West Yorkshire Police* (judgment, 20/12/2002) [2003] IRLR 102

- (i) a top band of 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 should an award exceed £25,000;
 - (ii) a middle band of between £5,000 and £15,000 to be used for serious cases which did not merit an award in the highest band; and
 - (iii) a lower band of between £500 and £5,000 for less serious cases, such as where the act of discrimination was an isolated or one off occurrence.
43. There is of course 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.
44. Perhaps some awards were excessive. However, it was always open for a party to have this corrected through an appeal. Unfortunately, the decision in *Vento* goes further than this and represents a further significant limitation on the remedy available to employees and, consequently, the sanction against discriminatory employers, particularly, in cases where there is no financial loss. In effect the Court of Appeal have re-introduced a cap in cases where the only possible compensation is for injury to feelings. It should be noted that,
- (a) cases where compensation is for injury to feelings only are likely to concern employees who are still working for the discriminatory employer;
 - (b) it can be argued that this sort of case is precisely where the sanction needs to bite firmly to prevent recurrence;

- (c) however, worryingly it has been held that awards for injury to feelings are not to be used as a means of punishing or deterring employers from particular courses of conduct¹⁵.

(v) aggravated damages

45. Aggravated damages can be awarded where the impact on the victim of discriminatory treatment has been enhanced by "high-handed, malicious, insulting or oppressive" behaviour¹⁶. The purpose of damages, however, remains compensatory and not punitive.
46. 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, but also if a respondent in defending proceedings behaves in a way that is wholly inappropriate and intimidatory¹⁷. This can include questioning the victim at trial in an attempt to portray them as lying or exaggerating about the discrimination¹⁸.

(vi) exemplary damages

47. Exemplary damages are the only element of compensation which is awarded with a punitive purpose. They have only recently become available in discrimination cases¹⁹. However, they can only be awarded in very limited circumstances and, in practice, they rarely feature as part of an employee's compensation.

¹⁵ *Ministry of Defence v Cannock* [1994] IRLR 509 at 524, EAT

¹⁶ *Armitage, Marsden and HM Prison Service v Johnson* [1997] IRLR 162, EAT

¹⁷ *Zaiwalla & Co. v Walia* [2002] IRLR 697, EAT

¹⁸ 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.

¹⁹ The House of Lords decision of *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29 changed the previous law. Since *Deane v London Borough of Ealing* [1993] IRLR 209, EAT it had been thought that there could be no awards of exemplary damages in discrimination cases.

48. 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.

(vii) indirect discrimination

49. Another limitation applies to complaints of indirect race discrimination. The tribunal may not generally award any money compensation, unless it is shown that the respondent intended to discriminate (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.
50. Intention is satisfied where an employer knows that certain consequences will follow from his acts and he wants those consequences to follow. 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 a tribunal to constitute indirect discrimination on racial grounds and they awarded £1,000 to the individual employees on the ground of injury to feelings. On appeal it was held that the tribunal had not erred in so doing. 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.
51. 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.

(viii) the totality of compensation awarded

52. 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 looking 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..."²⁰

53. 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.

²⁰ Ministry of Defence v Cannock [1994] IRLR 509, EAT, per Morison J at para 132

(c) recommendations as to the employer's future conduct

54. The ability of tribunals and courts to make a recommendation of steps the perpetrator should take to obviate or reduce the adverse effect of the discrimination on the victim is potentially an effective remedy which could alleviate some of the deficiencies in the compensatory approach – especially for employees who remain working for a discriminatory employer.
55. Unfortunately, this remedy is limited in that a tribunal cannot force an employer to comply. However, if the employer without reasonable justification²¹ 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.
56. Further, 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 relevant legislative provisions. Thus,
- (a) it has been held that the power to make recommendations is limited to measures which would obviate or reduce the adverse effect on the victim personally. Consequently, the power cannot be used to make more general recommendations about workplace practices and procedures (such as training or the introduction of an equal opportunities policy)²². Clearly, this will seriously limit the availability of the remedy where someone has left;

²¹ *Nelson v Tyne and Wear Passenger Transport Executive* [1978] ICR 1183, EAT

²² *Bayoomi v British Railways Board* [1981] IRLR 431

- (b) a tribunal cannot recommend that an applicant who has been the victim of discrimination in selection for employment should be appointed to the next suitable job because this would be unfair to the other applicants for that post²³. 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. The legislation does not allow positive discrimination in such circumstances²⁴.

- (c) a tribunal should not make a recommendation that the employer increase a woman's wages, as that is a matter for money compensation²⁵.

The availability of legal support and costs

57. A further significant factor relating to the effectiveness of the British approach relates to the availability of legal support and costs for potential claimants.

(a) legal support

58. Publicly funded legal support is very limited. Thus,
- (i) the body set up under the legislation to promote equal opportunities have limited resources and can only support a small number of cases, usually, when there is a wider issue of public importance involved.

²³ *Noone v North West Thames Regional Health Authority (No 2)* [1988] IRLR 530, CA

²⁴ *British Gas plc v Sharma* [1991] IRLR 101, [1991] ICR 19, EAT

²⁵ *Irvine v Prestcold Ltd* [1981] IRLR 281, CA

(ii) public funding is not otherwise available to bring forward cases in the employment tribunal;

59. Consequently, unless the victim is a member of a trade union or has legal expenses insurance, they may find it difficult to pursue their claim, especially, if the amount of possible compensation is small. This, again, particularly hinders employees who remain working for the discriminatory employer.

Costs

60. Employment tribunals can only order costs in very limited circumstances - where a claim has been pursued frivolously, vexatiously or otherwise unreasonably and/or where a claim or defence is misconceived (which means it has no reasonable prospects of success).

61. Consequently, costs are the exception rather than the norm in most cases. Thus, if a complainant pursues a claim privately, they will not recover their legal expenses if they win and it is likely much of their compensation will go to paying their lawyers. Again, the difficulties are emphasised by the median level of awards for discrimination.

The emphasis on the individual

63. Underlying the compensatory approach is an emphasis on providing remedies to individuals rather than collective challenges to employers' discriminatory practices. In addition to the difficulties set out above in relation to how compensation is calculated this poses the following additional problems,

- (a) it requires a brave individual to take on their employer, especially, if they are still working for the same company/organization;
- (b) if an individual does commence a claim, it is difficult to see how any sort of harmonious working relationship can be restored following a fiercely fought adversarial hearing where passions will be inflamed on both sides. Many cases result in the victim leaving as a consequence of this.

Conclusion

- 64. The British approach can provide a victim with an appropriate remedy whilst also imposing a sanction on the employer with some genuine chance of deterrence. However, it has serious weaknesses and British legislation may not fully comply with its obligations under the Equality Directives.
- 65. It is to be hoped that this overview of remedies/sanctions in British law will assist participants at the seminar in considering how Member States may interpret their obligations under the Directives. It may be that other routes as employed in Cyprus, Portugal etc. such as administrative remedies, more creative use of restorative justice, and additional powers to compel repeat discriminators to alter their practices, might also assist in this exercise.
- 66. Perhaps the whole approach of discrimination with its emphasis on the individual victim rather than allowing collective questioning on employers' discriminatory practices by organisations such as trade unions needs to be re-considered if we are to truly begin to eliminate this problem from the workplace and elsewhere.

NICHOLAS TOMS
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