

The ECJ's case-law from the time before Directives 2000/43 and 2000/78

“Von Colson” 10 April 1984, case C 14/83

Directive no. 76/207/EEC does not require discrimination on grounds of sex regarding access to employment to be made the subject of a sanction by way of an obligation imposed on the employer who is the author of the discrimination to conclude a contract of employment with the candidate discriminated against.

Although directive no. 76/207/EEC, for the purpose of imposing a sanction for the breach of the prohibition of discrimination, leaves the member states free to choose between the different solutions suitable for achieving its objective, it nevertheless requires that if a member state chooses to penalise breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application.

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“Commission v. Greece” 21 Sept. 1989, case C- 68/88

It should be observed that where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law.

For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive...

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◎ “Marshall” 2 August 93, case, C- 271/91

Although Directive 76/207, the purpose of which is to put into effect in the Member States the principle of equal treatment for men and women as regards the various aspects of employment, in particular working conditions, including the conditions governing dismissal, leaves Member States, when providing a remedy for breach of the prohibition against discrimination, free to choose between the different solutions suitable for achieving the objective of the directive, it nevertheless entails that if financial compensation is to be awarded where there has been discriminatory dismissal in breach of Article 5(1), such compensation 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.

Accordingly, the interpretation of Article 6 of Directive 76/207 must be that reparation of the loss and damage sustained by a person injured as a result of discriminatory dismissal may not be limited to an upper limit fixed a priori (...)

Codification of the principles contained in Directives 2000/43 and 2000/78

REMEDIES

ART.7.1 - Member States shall 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.

In other words:

RIGHT TO TAKE LEGAL ACTION

RIGHT TO A PROCEDURE “FOR ENFORCEMENT”

(i.e. a special procedure ?)

RIGHT TO ACT AFTER THE RELATIONSHIP HAS ENDED

Art.7.2. *Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.*

In other words:

a) COLLECTIVE STANDING

B) “LEGITIMATE INTEREST” APPRAISED ON THE BASIS OF NATIONAL LAW

C) “ON BEHALF OF OR IN SUPPORT OF...” AND THUS NOT THE ASSOCIATIONS’ AUTONOMOUS INTEREST AND NOT AUTONOMOUS ACTION BY THEM

Art.7.3: *“Paragraphs 1 and 2 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment”.*

In other words:

- A) THE MEMBER STATE IS PERMITTED TO INTRODUCE A TIME LIMIT**
- B) BUT THE PRINCIPLE OF EQUIVALENCE STILL REMAINS: ECJ JUDGMENT IN “REWE”, 16 DECEMBER 1976 C-33/76**

“In the present state of Community law there is nothing to prevent a citizen who contests before a national court a decision of a national authority on the ground that it is incompatible with Community law from being confronted with the defence that limitation periods laid down by national law have expired, it being understood that the procedural conditions governing the action may not be less favourable than those relating to similar actions of a domestic nature.”

Codification of the principles contained in Directives 2000/43 and 2000/78 (continued)

SANCTIONS (Articles 15 and 17)

“Member States shall lay down the rules on sanctions applicable to infringements (...) 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.”

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In other words: compensation must be:

- ⦿ not necessarily the only form envisaged;
- ⦿ adequate for **compensating** the discrimination victim for the loss and damage suffered;
- ⦿ proportionate, in the sense that it reflects the seriousness of the loss and damage; and
- ⦿ suitable for having **dissuasive** effect.

Is this a call for punitive damages?

Proportionality versus dissuasiveness?

Note: Directives 2000/43 and 2000/78 do not contain a provision equivalent to Article 18 of Directive 2006/54 (discrimination on grounds of sex):

“Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered.

A NUMBER OF UNANSWERED QUESTIONS:

1st question

Is a national legal system compatible with Community law if it provides for nothing apart from compensation for loss and damage?

Considering the three judgments quoted (Von Colson, Greece and Marshall) the answer is **YES**, but provided that it complies with the conditions indicated above.

But there are also two lines of argument in the opposite direction:

A) ECJ “*Bauer*” case C – 187/00

“In the case of a breach of Directive 76/207 by legislative provisions or by provisions of collective agreements introducing discrimination contrary to that directive, the national courts are required to set aside that discrimination, using all the means at their disposal, and in particular by applying those provisions for the benefit of the class placed at a disadvantage, and are not required to request or await the setting aside of the provisions (...)”

B) Post-Lisbon anti-discrimination law has now been reinforced through the inclusion of the provisions of the Nice Charter (Art. 21) and the ECHR (Art. 14) in the Treaty (Art. 6), It is recognised as a “general principle” of the Union (ECJ “*Mangold*” judgment, 2005). Faced with principles reaffirmed with such solemnity, the national legal order may not place *a priori* limits on the possibility of making good the breach.

2nd question

If the court has to award “real and effective compensation”, does that mean that it must always place the discrimination victim in the same situation as he or she would have been in if the discrimination had not occurred? Does that, therefore, mean that the only admissible judgments are “extensive” ones?

ECJ “Caballero” judgment, 12 December 2002, case C – 442/00

“Once discrimination contrary to Community law has been established and for as long as measures reinstating equal treatment have not been adopted, observance of the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category.”

- ECJ “Molinari” judgment, 16 January 2008, cases C-128/07 to C-131/07

*“Where there has been found to be discrimination contrary to Community law, **for as long as measures reinstating equal treatment have not been adopted**, a national court must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature, and apply to members of the disadvantaged category the same arrangements as those enjoyed by the persons in the other category.”*

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It follows from this that the general principle is one of equality by “levelling up” and not by “levelling down”.

This also answers the *ratio* of anti-discrimination law, which is not enacted just to affirm formal equality but to assure a change in the distribution of goods to the benefit of the excluded groups.

But what is the meaning of: “for as long as measures reinstating equal treatment have not been adopted...”? The Member State faced with a national provision incompatible with a Directive has the option of reformulating it in its entirety (see *Molinari* case); but from the point of view of remedies against discrimination, these are always reformulations to “tighten up” the provisions.

So this constitutes a central tenet of anti-discrimination law. For a specific case, refer to the conclusions of Advocate General Villalón of 3 March 2011 in the “*Landtova*” case, C-399/09.

3rd question

What conflicts may arise considering the hypotheses of “extensive” judgments?

- A number of hypotheses:
- A) No conflict of any type: examples: order to remove a discriminatory sign, order to permit the wearing of a veil at work, etc.
- B) Cases of “minor” conflicts with third-party positions: example: order to admit a candidate to a competitive examination.
- C) Cases of conflicts with other positions (of the discriminator or third parties) that enjoy protection under the legal system

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C1) Non-recruitment: The possible solutions:

- Just compensation on the basis of the probability of recruitment, given that it is not possible to impose on the employer either the dismissal of the employee actually recruited as an outcome of the discriminating criteria or to recruit a number of employees greater than his or her needs;
- Establishment of the employment relationship as a means of entirely removing the discrimination; in addition to compensation for the previous loss and/or damage
- Obligation on the employer to submit a recruitment proposal to the excluded candidate as well and to compensate for the previous loss and/or damage

C2) Grant of social-security benefits subject to discriminatory criteria: example from the ECtHR, 1st chamber, 28 October 2010, Fawsie versus Greece (social-security benefit for large families for nationals only). The Italian solutions:

- ascertainment and inadmissibility with an order for a wide application;
- ascertainment and an order to widen the application, with the possibility for the administration to recalculate the sums on the basis of the larger number of beneficiaries
- ascertainment and an order to widen the application

What is the Community rule for solving conflicts of this type?

- A) Prevalence of the right not to suffer discrimination, being a fundamental individual right and a general principle of the European Union's legal order: cf. judgments in *Caballero*, *Molinari*, etc. quoted above
- B) Article 9 of Directive 2000/43 and Article 11 of Directive 2000/78 state: *“Victimisation”*: *“Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.”*

Any reestablishment of equality by levelling down is an “unfavourable reaction” for those who already had the benefit”.

The case of the Brescia “baby bonus” (Italy)

- Decision by the city authorities to introduce a “baby bonus” but reserved only for Italian **citizens**
- Court ruling that its scope must be widened
- Subsequent decision taken by the city authorities to **cancel the bonus for everyone, Italians and foreigners, “being no longer in a position to pursue the original objective”**
- New court ruling (in accordance with Article 9 of Dir. 2000/43) ordering the reintroduction of the bonus for everyone
- The bonus had been originally introduced by a decision of the elected body (city council).

4th question:

Once a wrong has been set aside, what limitations apply?

- Situations that are over and done with and cannot be repeated (example: services performed without wearing a veil)
- Situations that are over and done with but which could be repeated (competitive examination already held)
- Legally time-barred situations (the right to a certain good in life falls under a statute of limitation)
- Situations that are legally time-barred on account of the discriminatory behaviour (the time limit contained in the announcement incorporating the discriminatory clause has passed)

5th question

Are the Directives still applicable even if there are no identifiable injured parties?

ECJ “**FERYN**” judgment, 10 July 08

Directive 2000/43 is applicable even if **no injured party can be immediately identified.**

A)

Not because the declaration per se constitutes discrimination (cf. Advocate General’s conclusions) but because the declaration has a “**dissuasive**” effect **on access to employment.**

How strictly does this effect have to be tested?

The “**Gerenzano**” case (Italy).

WHO HAS STANDING TO TAKE COURT ACTION?

- Feryn once again confronts the Member States with the question of “legal standing”. *“Paragraph 27: Article 7 of Directive 2000/43 does not preclude Member States from laying down, in their national legislation, the right for associations (...) to bring legal or administrative proceedings to enforce the obligations resulting therefrom without acting in the name of a specific complainant or in the absence of an identifiable complainant.”*
- The Directive does not, however, make it compulsory to recognise the standing of the collective party (...). **But in the absence of a collective party it would be difficult to apply the “Feryn principle”.**

What courses of action are available to the court in the absence of an injured party?

- **declaration** that discrimination has occurred
- sufficient **media coverage**
- injunction against the employer to **put an end to discriminatory practices**
- **pecuniary sanction**
- **compensation award** in favour of the body that launched the action

6th question

What should be the extent of the parties covered by a ruling establishing the occurrence of discrimination?

Must the court adopt general provisions affecting not only those who took legal action?

Order by the Bolzano court dated
24 November 2010 to refer a question in
accordance with Art. 267 TFEU

- **Object of the case:** whether, in the presence of a legal provision stipulating tougher requirements for non-Community citizens to have access to a social-security benefit (“home grant”), a long-stay non-Community citizen protected by Directive 2003/109 would, on the contrary, have the right to the same treatment as an Italian or Community citizen (the case has been initiated by a long-term immigrant).
- **The Bolzano court also mentions other forms of discrimination, in particular:**
 - discrimination between Community citizens and non-Community ones in general (including ones who are not long-term residents).
 - discrimination amongst Community citizens, in so far as all of those wishing to claim the grant must submit a statement that they belong to one of the three language groups recognised in the province of Bolzano.
 - discrimination amongst Community citizens because the five-year residence requirement causes indirect discrimination.

So it has lodged the following question with the Court:

- Must Article 15 of Directive 2000/43 in that section that makes provision for effective, proportionate and dissuasive sanctions be interpreted as meaning the inclusion, amongst the forms of discrimination ascertained and the effects to be rectified, also encompassing the aim of avoiding forms of inverse discrimination, **ALL** the breaches that have an impact on the targets of the discrimination, **EVEN IT THEY ARE NOT PARTIES TO THE CASE?**

○ OTHER POSSIBLE SOLUTIONS

- Court of Cassation: 15 February 2011 no. 3670 “*the court is called on to establish... whether the social-security contribution is nonetheless due to the plaintiff and the other non-Italian applicant and not just to restore it with erga omnes effect...*”
- Milan court: 29 September 2010: in hearing an appeal launched solely by an association, the court ordered a commune to provide the social-security benefit to all the foreigners who had originally been excluded.

Remedies other than compensation

A) Court orders to:

- apply equal-opportunity policies inside the company;
- reword the criteria for recruiting employees;
- attend anti-discrimination training courses, in particular for those individuals responsible for employee selection;
- publish its ruling.

B) Other sanctions

- prohibition on exercising the profession
- prohibition on operating in the public market
- exclusion from submitting tenders or public contracts
- payment of sums to an individual other than the discrimination victim