

**THE ANTI-DISCRIMINATION DIRECTIVES
2000/43 & 2000/78 IN PRACTICE**

**REMEDIES AND SANCTIONS FOR
DISCRIMINATION**

Barbara Cohen

Discrimination Law Consultant, UK

November 2011

remedies and sanctions under the anti-discrimination directives

Art.15 Directive 2000/43 - Art. 17 Directive 2000/78

Member States shall

- lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and
- 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.**

sanctions...must be:

- **effective:** successful in achieving desired outcome
- **proportionate:** balanced, in terms of the gravity, nature and extent of loss and/or harm
- **dissuasive:** deters, or serves as persuasive argument against, future acts of discrimination by discriminator and other employers/providers of goods/services

Who has an interest?

- the victim
- other victims/potential future victims
- the (corporate) discriminator
- (individual discriminator/harasser)
- other employers or providers of goods/services
- the State and relevant state institutions
- courts
- civil society

compensation paid to the victim

- to put victim in same position s/he would have been in if the discrimination had not occurred
- for example, in UK compensation can include:
 - compensation for past and foreseeable future loss
 - compensation for injury to feelings
 - aggravated damages
 - separate claim for damages for personal injury
- No upper limit – case law and requirements under EU gender equality directives

compensation for discrimination: EU gender equality directives

- Case C-271/91 *Marshall v Southampton Area Health Authority (No. 2)* [1993] :

Art. 6 of the Equal Treatment Directive 76/207 requires that “... financial compensation for discriminatory dismissal ...must ...enable the loss and damage actually sustained ... to be made good in full” and therefore no upper limit to compensation could be imposed by national law.

compensation for discrimination: EU gender equality directives

- Case C-180/95 *Draehmpaehl v Urania Immobilienservice ohG* [1997] - limited exception to *Marshall (No.2)*

Equal Treatment Directive 76/207 does not preclude imposition of an upper limit of compensation where the employer can prove that, because the person engaged had superior qualifications, the unsuccessful applicant would not have obtained the vacant position even if there had been no discrimination in the selection process.

compensation for discrimination: EU gender equality directives

- Directive 2006/54/EC (Recast) Art. 18

“...compensation..for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex ... dissuasive and proportionate to the damage suffered....may not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination is the refusal to take his/her job application into consideration.”

other remedies for the victim

What does the victim want/need?

- interim relief - protection against further discrimination and victimisation
- apology
- obligation on respondent to take action within specified time to remedy unlawful act and to refrain from future unlawful acts related to the complaint
- sanctions for non-compliance

resolving individual complaints outside of the courts

- investigation and determination by specialised body
- conciliation
- terms negotiated between the parties
 - what remedies/sanctions are possible?
 - imposed or agreed? does this matter?
 - are they binding on the parties?
 - who monitors compliance?
 - are there sanctions for non-compliance?

remedies/sanctions for future protection of victim and other persons

- court/competent authority/specialised body imposing non-discrimination requirement/recommendation
 - on its own initiative, in response to an individual complaint or on application (by trade union/NGO)?
 - on what evidential basis?
 - who would monitor and/or enforce compliance?

sanctions for discrimination: bodies with statutory powers to inspect or investigate

- enforcement powers defined by law
- powers to require production of evidence
- penal sanctions for breach of the law and/or for non-compliance with directions
- limited role/remedy for individual victim
- potential deterrent impact

examples of other sanctions to deter discrimination

- court/specialised body:
 - recommendation to licensing authority to suspend/revoke licence
- negative publicity
- public contracts:
 - recent finding of discrimination could be grounds to disqualify from tendering under EC rules
 - non-discrimination contract conditions

wider sanctions: to promote equal treatment

- Could court/specialised body impose obligations not only to avoid discrimination but to promote equality of opportunity?
 - on own initiative or on application?
 - on what evidential basis?
- Who would monitor and/or enforce compliance?