

REMEDIES & SANCTIONS

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Introduction

1. The aim of the legislation surrounding European law is establish and maintain a Europe free from discrimination regarding certain protected characteristics:

“Discrimination based on [protected characteristics] may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and quality of life, economic and social cohesion and solidarity, and the free movement of persons” – Recital (11) of Directive 2000/78;

“Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential” – Recital (9).

2. In the workplace, employees must be hired, paid, promoted and dismissed according to objective facts rather than basing decisions on bias. Such a fundamental basis for decision-making:
 - (a) makes economic sense, since by doing so, an employer will recruit and retain the best employee for the position;
 - (b) provides human dignity, for discrimination is degrading, immoral and inefficient.

Legal framework as to remedies and enforcement in employment and occupation

3. By **Article 9 ‘Defence of Rights’**, Ch. II of Directive 2000/78/ EC (Equality Directive)¹:

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.

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.

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. [Emphases added]

4. By **Article 11 ‘Victimisation’** of the Equality Directive:

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. [Emphases added]

¹ In relation to religion or belief, disability, age or sexual orientation. See the corresponding provisions of Directive 2000/43/EC for racial or ethnic origins and Directive 2006/54/EC for sex (gender).

5. By **Article 16 ‘Compliance’**, Ch. IV of the Equality Directive:

Member States shall take the necessary measures to ensure that—

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;

(b) any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations are, or may be, declared null and void or are amended.
[Emphases added]

6. By **Article 17 ‘Sanctions’**, Ch. IV of the Equality Directive:

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... [Emphases added]

7. The directives therefore require member states to:

- (a) ensure that judicial and/or administrative procedures for the enforcement of obligations under the Directives are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them;
- (b) ensure that associations, organisations or other legal entities which have a legitimate interest in ensuring that the provisions of the Directives are complied with, may engage in such procedures; and
- (c) lay down rules on sanctions, which must be effective, proportionate and dissuasive.

Case law

8. **Unibet (London) Ltd. v Justitiekanslern** Case No. 432/05 per The Advocate General (E. Sharpston):

*32. The starting point to my mind must be the principle, first laid down in **Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland** (Rewe I), that it is for the domestic legal system of each member state to determine the procedural conditions governing actions at law intended to ensure the protection of Community law rights, provided that those conditions are not less favourable than those relating to similar actions of a domestic nature (principle of equivalence) and do not make it impossible in practice to exercise those rights (principle of effectiveness). That approach was confirmed in **Rewe-Handelsgesellschaft Nord GmbH v Hauptzollamt Kiel** (Rewe II), where the court stated that the Treaty was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law and that the system of legal protection established by the Treaty implies that it must be possible for every type of action provided for by national law to be available for the purpose of ensuring observance of Community provisions having direct effect.*

*33. Similarly the **Simmenthal** case, which established the duty of national courts to set aside national rules which conflict with Community law, expressly limits that duty to cases within the jurisdiction of the national court concerned, or to courts having jurisdiction to apply the Community law concerned.*

*34. Those principles have been constantly reiterated by the court; see for example **Peterbroeck Van Campenhout & Cie (SCS) v Belgium**, where it was stated that, in the absence of Community rules governing a 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 the direct effect of Community law, subject to the proviso that such rules must not be less favourable than those*

governing similar domestic actions nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law.

35. It is implicit in those formulations that national legal systems are not immune from Community judicial oversight. First, domestic rules must observe the principles of equivalence and effectiveness. Second, although it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection. Thus, in certain circumstances Community law may require a new remedy where that is the only way to ensure that a Community law right can be protected.

9. Thus, it is for the domestic legal system of each Member State to determine the procedural conditions governing actions at law intended to ensure the protection of Community law rights, provided that those conditions are not less favourable than those relating to similar actions of a domestic nature and do not make it impossible in practice to exercise those rights. These are the principles of equivalence and effectiveness respectively.
10. ***Marshall (No. 2) v Southampton and South-West Hampshire Area Health Authority***
Case No. 271/91 *per* the Judgment of the ECJ:

25 ...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.

26 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.

30 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.

11. Thus, it is contrary to the Equal Treatment Directive for national provisions to lay down an upper limit on the amount of compensation recoverable by a victim of discrimination in respect of the loss and damage sustained.
12. Real equality of opportunity cannot be attained in the absence of measures appropriate to restore such equality when it has not been observed. In the event of a discriminatory dismissal, where financial compensation is the measure adopted in order to restore equality, 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.
13. ***Coote v Granada Hospitality Ltd.*** Case no. 185/97 per the Judgment of the ECJ:

*22 By virtue of Article 6 of the Directive, interpreted in the light of the general principle stated above, all persons have the right to obtain an effective remedy in a competent court against measures which they consider to interfere with the equal treatment for men and women laid down in the Directive. It is for the Member States to ensure effective judicial control of compliance with the applicable provisions of Community law and of national legislation intended to give effect to the rights for which the Directive provides (**Johnston** [1986] IRLR 263, paragraph 19).*

*23 As the Court has also held (case C-271/91 **Marshall** [1993] IRLR 445, paragraph 34), Article 6 of the Directive is an essential factor for attaining the fundamental objective of equal treatment for men and women, which, as the Court has repeatedly held (see, inter alia, case C-13/94 **P v S and Cornwall County***

Council [1996] IRLR 347, paragraph 19), is one of the fundamental human rights whose observance the Court has a duty to ensure.

24 The principle of effective judicial control laid down in Article 6 of the Directive would be deprived of an essential part of its effectiveness if the protection which it provides did not cover measures which, as in the main proceedings in this case, an employer might take as a reaction to legal proceedings brought by an employee with the aim of enforcing compliance with the principle of equal treatment. Fear of such measures, where no legal remedy is available against them, might deter workers who considered themselves the victims of discrimination from pursuing their claims by judicial process, and would consequently be liable seriously to jeopardise implementation of the aim pursued by the Directive.

14. Thus, *Cooté* emphasises the need for effective victimisation provisions in order to provide discrimination legislation with real protection.

The UK experience

Implementation – Article 9(1)

15. In implementing the relevant directives, the emphasis within UK legislation has been on providing civil remedies rather than criminal penalties. Employees (and workers) within the UK bring claims in the Employment Tribunal, a court specialising in employment law. Unusually for a judicial court, the employment judge is assisted by 2 lay representatives, who both have employment experience.
16. Appropriate conciliation procedures occur in the form of Advisory, Conciliation and Arbitration Service (‘ACAS’), who assist in promoting better employer relations as well as conciliating in employment disputes.

Assistance – Article 9(2)

17. In terms of interested parties, the Equality and Human Rights Commission ('EHRC') is permitted to intervene to assist the individual or the court where, for example, a case raises significant issues of interpretation of equality legislation (including those implementing directives).

Sanctions – Article 17

18. The sanctions must be effective, proportionate and dissuasive. By section 124 of the Equality Act 2010, successful employee claimants may obtain:

- (a) A declaration;
- (b) An order for financial compensation. Such an order:
 - i. is not capped financially (see *Marshall (No. 2)* above);
 - ii. can include both financial and non-financial losses (typically injury to feelings and injury to health); and
 - iii. may also include aggravated and exemplary damages.
- (c) An appropriate recommendation.

(a) Declaration

19. Upon a successful claim of discrimination by an employee in the Employment Tribunal, the Tribunal will give written reasons as to why that claimant has succeeded. The Tribunal then may go on to make a short formal declaration. This will state that it has been found proven that the claimant has been a victim of discrimination, and will refer the reader back to the written reasons to explain why that finding has been made.

(b) Financial compensation

20. In the UK, discrimination is a statutory tort and assessed as such. The principle which underlies the award of compensation is that the person who has suffered the wrong should be put in the same position that he or she would have been in if he or she had not suffered the wrong. The victim must be compensated for actual loss i.e. loss that has already been incurred (for example lost salary up to the date of the hearing in the case of an unlawful dismissal from employment) and future loss - which will involve making a forecast as to future events so, for example, compensation for future loss can include compensation for lost promotion opportunities or loss of opportunity to earn bonus or commission. This may be significant if the discrimination has caused psychiatric damage.
21. Compensation for injury to feeling and injury to health (non-financial losses) are also recoverable. The former encompasses feelings of irritation, disappointment and other relatively short-lived emotions, and is assessed according to the *Vento*² bands or brackets according to the seriousness of the proven discrimination and its effect on the victim:
- Upper band: Was £15,000 – £25,000, now increased to £18,000 – £30,000. The most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. Only in the most exceptional case should an award of compensation for injury to feelings exceed £30,000.
 - Middle band: Was £5,000 – £15,000, now increased to £6,000 – £18,000. The middle band should be used for serious cases, which do not merit an award in the highest band.
 - Lower band: Was £500 – £5,000, now increased to £? – £6,000. Less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition or injury to feelings (must be a dissuasive sanction).

² *Vento - v - The Chief Constable of West Yorkshire Police* 2003IRLR 102, CA as increased following the case of *Da'Bell v NSPCC* UK EAT/227/09.

22. In relation to injury to health, *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] IRLR 481, the Court of Appeal confirmed that an employment tribunal has jurisdiction to award compensation by way of damages for personal injury, including both physical and psychiatric injury, caused by unlawful discrimination.
23. Aggravated damages are awarded where the wrongdoer has behaved in a ‘high-handed, malicious, insulting or oppressive manner’ (*Alexander v Home Office* [1998] IRLR 190, CA). Such behaviour usually takes place before the complaint but can courts and tribunals can also have regard to the way in which the defence is conducted for example if it was conducted in an insulting manner intended to embarrass, intimidate and deter the complainant from pursuing her case. Aggravated damages are still compensatory in that they compensate for the aggravation suffered by the complainant and as such are not supposed to be punitive.
24. In the UK ‘exemplary damages’ (otherwise known as punitive damages) may be awarded where there has been oppressive, unconstitutional conduct by servants of the state: where conduct has been calculated to make a profit which may exceed the compensation to the complainant; or where expressly authorized by legislation.

(c) Recommendation

25. Section 124(3) of the Equality Act 2010 has extended the power of the Tribunal to make recommendations in respect of the complainant *and any other person*. The recommendation will be that the employer takes specified steps for the purpose of obviating or reducing the adverse effect of any matter to which the proceedings relate.
26. Examples of recommendations include:

- (a) Sending a discriminator or victimiser to equal opportunities training (*London Borough of Southwark v Ayton*, EAT 0515/03)³;
 - (b) Continuity of employment be preserved as far as possible and back-pay be given in the case of an employee who was re-engaged after resigning due to a supervisor racially insulting him (*Savage v Liverpool City Council* ET case No.35225/86); and
 - (c) The Employment Tribunal's judgment and written reasons should be circulated to, read and digested by each member of the respondent school's governing board, and that the school should secure the services of a Human Resources professional to conduct a review of its policies (*Lycee Francais Charles de Gaulle v Delambre* EAT 0563/10).
27. Non-compliance with the recommendation can lead to further sanctions – section 124(7).

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³ With the wider power available under section 124, the Tribunal can still make such a recommendation even if the employee has left the organisation.