

Applying EU Anti-Discrimination Law

The role of the national judge in judging a discrimination case:

Remedies and sanctions¹

“It is impossible to establish real equality of opportunity without an appropriate system of sanctions.”²

1. The Council Directives enacted to combat discrimination in accordance with Art 19 TFEU (ex Art 13 TEC) give Member States a wide discretion as to the enforcement of the EU’s objectives of equal opportunities and equal treatment irrespective of sex, racial or ethnic origin, religion, disability, age or sexual orientation.³
2. Under the Framework and Race Discrimination Directives:

“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 them⁴

...

*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.**”⁵*

3. The ECJ made clear in Von Colson & Kamann v Land Nordrhein-Westfalen⁶ that Member States were free to choose between the different solutions suitable for

¹ This paper addresses private law actions and does not address public law actions nor actions by national equality bodies.

² *Von Colson & Kamann v Land Nordrhein-Westfalen*, ECJ, C-14/83 [22]

³ Council Directive 2003/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the “**Race Discrimination Directive**”); Council Directive 2000/78 establishing a general framework for equal treatment in employment and education (the “**Framework Directive**”); Council Directive 76/207/EEC (the “**Equal Treatment Directive**”), which has been recast by Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (the “**Sex Equality Directive**”)

⁴ Art 9 Framework Directive & Art 7 Race Discrimination Directive

⁵ Art 17 Framework Directive & Art 15 Race Discrimination Directive

⁶ ECJ, C-14/83

guaranteeing real and effective judicial protection of rights derived from the Equal Treatment Directive. In that case, a German prison refused to engage two female social workers in favour of less qualified men. The German Civil Code restricted compensation for discrimination in recruitment to reimbursement of the costs of pursuing their application. The ECJ found that such a remedy was inadequate, but stated that there is no directly effective right to a *specific* sanction (thus no obligation for employers who discriminate in access to employment to conclude a contract of employment with the discriminated applicant by way of sanction as the claimants suggested). The ECJ suggested as possible sanctions available to Member States in such a scenario:

“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 its objective.”⁷

The role of the national judge

4. At the remedies stage of a discrimination case, the national judge remains under an obligation to interpret and apply national legislation adopted for the implementation of the relevant Directives in conformity with the requirements of EU law.⁸
5. Where such national provisions do not conform with the Directives, they can be disapplied by national courts in claims brought by individuals against the state/emanations of the state, as the ECJ held in *Marshall v Southampton and South West Hampshire AHA*⁹. Miss Marshall successfully brought a sex discrimination against her former employer. When determining remedy, the Industrial Tribunal disapplied the statutory cap limit on compensation set by the Sex Discrimination Act 1975 as it found that it breached Art 6 of the Equal Treatment Directive. The ECJ held that it was entitled to rely upon Art 6 in this manner.

⁷ ECJ, C-14/83 [18]

⁸ ECJ, C-14/83 [28]

⁹ ECJ, C-271/91

Equivalence

Introduction

6. National courts must also have regard to the principle of equivalence. Measures giving effect to EU rights must be no less favourable than those applicable to equivalent national rights.
7. The first question is whether the EU claim and the domestic claim are sufficiently similar to permit a comparison to be made between them. If they are sufficiently similar, the court will go on to consider whether the EU claim has less favourable rules.
8. In *Levez v TH Jennings (Harlow Pools) Ltd*¹⁰ the ECJ was asked to consider whether a two-year time limit on arrears of payment of damages under the UK Equal Pay act breached the principle of equivalence given the fact that other breach of contract claims could be brought within six years. It decided that the national court “*must consider both the purpose and the essential characteristics of allegedly similar domestic actions.*”¹¹
9. It held that:

*“In principle, it is for the national courts to ascertain whether the procedural rules intended to ensure that the rights derived by individuals from Community law are safeguarded under national law comply with the principle of equivalence.”*¹²

10. For a more recent discussion of the principle of equivalence, see *Pontin v T-Comalux SA*¹³, in which the ECJ considered whether Luxemburg law restricting the remedies available to dismissed pregnant workers to an action for nullity and reinstatement subject to 15 day time limit fulfilled the objectives of EU law.¹⁴ The ECJ held that it was a matter for the national court to determine. If the national court found there to have been an infringement of the Directive, it would have to interpret domestic legislation in a way that, wherever possible, it contributed to

¹⁰ ECJ, C-326/96

¹¹ ECJ, C-326/96 [43]

¹² ECJ, C-326/96 [39]

¹³ ECJ, C-63/08

¹⁴ Directive 92/85

the attainment of the objective of ensuring effective judicial protection of an individual's rights under EU law.

Similarity

11. It is clear that there may be no similar action for the purposes of this inquiry: see *Palmisani v Istituto Nazionale della Previdenza Sociale*¹⁵ and *Levez*¹⁶. The court is not therefore driven to find the nearest comparison but has to decide whether there really is a similar action to that to enforce rights under the statute and under EU law.
12. Some distinctions between what on the surface were arguably similar claims have been accepted by the ECJ as precluding the application of the principle of equivalence. Thus in *Palmisani*¹⁷ the court said

"the measures implementing [Council Directive 80/987/EEC (OJ 1980 L 283, p 23)] contained in the [Italian] Legislative Decree [No 80] pursue an objective that differs from that of the compensation scheme established by that decree. While the former aim to provide employees, by means of specific guarantees of payment of unpaid remuneration, with protection under Community law in the event of the insolvency of their employer, the latter seeks, by definition, to make good to a sufficient extent the loss or damage sustained by the beneficiaries of the Directive as a result of its belated transposition."

13. In *Edilizia Industriale Siderurgica Srl v Ministero delle Finanze*¹⁸ the ECJ was asked to consider whether EU law permitted actions for the reimbursement of charges paid in breach of a Community law Directive (Council Directive 69/33/EEC to be subject to a time limit of three years, a period which differed from the limitation period (10 years) which Italian national law laid down for actions for the recovery of sums paid between individuals when they were not due. The court, having set out the established principles of national procedural autonomy, subject to observance of the principles of effectiveness and equivalence, went on to hold that the principle of equivalence does not oblige

¹⁵ ECJ, C-261/95 [39]

¹⁶ [50]

¹⁷ [34]

¹⁸ ECJ, C-231/96

"a member state to extend its most favourable rules governing recovery under national law to all actions for repayment of charges or dues levied in breach of Community law"

And

"37. Thus, Community law does not preclude the legislation of a member state from laying down, alongside a limitation period applicable under the ordinary law to actions between private individuals for the recovery of sums paid but not due, special detailed rules, which are less favourable, governing claims and legal proceedings to challenge the imposition of charges and other levies. The position would be different only if those detailed rules applied solely to actions based on Community law for the repayment of such charges or levies."

Less Favourable Rules

14. In *Preston and others v Wolverhampton Healthcare NHS Trust*¹⁹ the ECJ again considered how equivalence was to be analysed as between different types of proceedings. It stated at paragraph 62 that the various aspects of the procedural rules cannot be examined in isolation but must be placed in their general context. Moreover, such an examination may not be carried out subjectively by reference to circumstances of fact but must involve an objective comparison, in the abstract, of the procedural rules at issue.

Practical Example of National Court Decision

15. The analysis by the UK House of Lords in *Preston*²⁰ of this ECJ guidance is instructive. It shows the type of approach that may be taken.

16. As for similarity of action it decided:

*"The essential matter here is that moneys have not been paid to the trustees of a pension fund to purchase pension rights on eventual retirement or on reaching the prescribed age. A successful claim under article 119 obtains retroactively full access to the scheme so that the necessary contributions to obtain the appropriate pension rights for that individual have to be paid. A claim in contract would be for damages for the failure to *472 pay those sums to the trustees leading to a total or in some cases a partial loss of the pension rights. In form they are plainly different but in substance the eventual benefit to the employee is sufficiently*

¹⁹ ECJ, C-78/98

²⁰ [2001] 2 AC 455

similar for present purposes. To adopt the words of the Court of Justice [2001] 2 AC 415, 451f-g, para 57 the "right of action available under domestic law is a domestic action similar to proceedings to give effect to rights conferred by article 119 of the Treaty ..." This is so whether the contractual term is express, implied or imposed by statute."

17. As for less favourable rules it decided:

"There is still a six-year period for contract claims rather than a six-month claim for infringement of article 119. This, however, is not the end of the inquiry. Merely to look at the limitation periods is not sufficient. It is necessary to have regard to "the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts"

And

"There are thus factors to be set against the difference in limitation periods. As has already been seen the claim under a contract can only go back six years from the date of the claim whereas a claim brought within six months of the termination of employment can go back to the beginning of employment or 8 April 1976 (the date of the judgment in Defrenne v Sabena (Case 43/75) [1976] ICR 547), whichever is the later. Moreover the claimant can wait until the employment is over, thus avoiding the possibility of friction with the employer if proceedings to protect her position are brought during the period of employment, as will be necessary since the six-year limitation runs from the accrual of a completed cause of action. It is in my view also relevant to have regard to the lower costs involved in the claim before an employment tribunal and if proceedings finish there the shorter time-scale involved. The period of six months itself is not an unreasonably short period for a claim to be referred to an employment tribunal. The informality of the proceedings is also a relevant factor."

Effectiveness

18. In order to guarantee real and effective protection for individuals' EU rights, sanctions for breaches of such rights must:

- (a) not render impossible or excessively difficult the exercise of rights conferred; and
- (b) ensure real equality of opportunity through adequate reparation for the loss and damage sustained.

19. In *van Schijndel and van Veen v Stichting Pensioenfonds Voor Fysiotherapeuten* the ECJ (at para 19) formulated the principle of effectiveness in the following terms:

" ... each case which raises the question whether a national procedural provision renders application of Community Law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances."

20. Without adequate recompense from the perspective of the victim, the right has little value. The ECJ held in *Von Colson* 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."*²¹

21. Some other examples of sanctions that the ECJ has deemed to be ineffective in compensating victims of discrimination include:

- (a) Statutory upper limits for a discriminatory dismissal: *Marshall* (see above).
- (b) Refusing an award of interest: *Marshall*. The ECJ held that interest "*must be regarded as an essential component of compensation for the purposes of restoring full equality of treatment, since full compensation for the loss and damage sustained as a*

²¹ ECJ, C-14/83 [28]

*result of discriminatory dismissal cannot leave out of account factors, such as the effluxion of time, which may in fact reduce its value.*²²

- (c) A 3-month statutory limit on compensation for job applicants subjected to discrimination (though this could be justified if the employer could prove that the applicant would have been unsuccessful in any event): *Draehmpaehl v Urania Immobilienservice OHG*²³.
- (d) An aggregate 6-month statutory limit on claims brought by multiple job applicants for the same vacancy: *Draehmpaehl*.
- (e) A 2-year cut-off for retrospective claims for additional pension benefits: *Magorrian v Eastern Health and Social Services Board*²⁴.
- (f) A rule that, in the case of a stable employment relationship characterised by a succession of short-term contracts, the limitation period started to run at the end of each contract, and a rule that the entitlement of a successful claimant was limited to a period extending back no longer than two years before the commencement of the proceedings: *Preston*²⁵.

22. Application of the principle of effectiveness has arisen in various UK discrimination cases. They show the creative ways in which employees have sought to enforce their EU based rights.

23. For example, the issue has arisen whether by reason of the principle of effectiveness the implied territorial limitation on jurisdiction requires modification where a claimant is seeking to enforce rights that are directly effective under EU law. The case was *Bleuse v MBT Transport Ltd*²⁶ decided by the Employment Appeal Tribunal (“EAT”).

24. Mr Bleuse brought a claim for holiday pay under the Working Time Regulations, which in the UK implement the Working Time Directive. He worked in

²² ECJ, C-271/91 [31]

²³ ECJ, C-180/95

²⁴ ECJ, C-246/96

²⁵ ECJ, C-78/98

²⁶ [2008] IRLR 264

Germany, but for a company registered in the UK. In the UK legislation there is nothing express about territorial scope for such claims. The EAT decided that it needed to construe “*the relevant English statute, if possible, in a way which is compatible with the right conferred*” (para 56), and to modify the territorial limitations in domestic law so as to enable the right to be enforced (para 57).

Proportionality

25. In assessing the appropriate remedy, the national judge must consider proportionality.
26. The ECJ explored this principle *Enderby v Frenchay Health Authority*²⁷, in which a group of speech therapists, who were overwhelmingly female, brought an equal pay action alleging they did work of equal value to male pharmacists and clinical psychologists of the same grade. The employer alleged that the difference in pay was justified because of the shortage of candidates for the male roles, and the need to attract them by higher pay.
27. The ECJ held that it was for the national court to determine, if necessary by applying the principle of proportionality, whether and to what extent the increase in pay was attributable to market forces, and therefore an objectively justified economic ground for the difference in pay between the jobs in question.
28. Upon remittance to the national courts, a UK Employment Tribunal determined that at the relevant time Dr Enderby's work was of equal value to the male comparator's and that, accordingly, she should be entitled to the annual salary paid to him in 1987.
29. On appeal, she raised a novel point about where on the pay grading structure she should fit, as she had longer experience than the comparator and was four increments higher on the pay scale in her own role. The UK Court of Appeal rejected her argument that she should enter at a higher increment, as her length of service had already been taken into account when assessing her work as of equal value to the comparator.

²⁷ ECJ, C-127/92

Deterrence

30. The aim of the EU Anti-Discrimination legislation is primarily preventative. Sanctions must therefore encourage employers to take necessary measures to combat all forms of discrimination. It is important for the national judge to consider the impact of the remedy on the body responsible for the violation of EU law, so that it, and other potential discriminators are incentivised not to repeat the same actions.

31. The European Commission defined the principle of deterrence in *Von Colson* as:

*“for the employer a means of pressure which it would be unwise to disregard and which would prompt him to respect the principle of equal treatment.”*²⁸

32. Deterrence is closely linked to effectiveness; if an employer knows that an employee will be compensated in full for any discriminatory acts it commits, they will consider doing so more carefully. Conversely, the ECJ has held that ineffective sanctions such as those in *Draehmpaehl* set out above “*would have no really dissuasive effect on the employer, as required by the Directive.*”²⁹

Case study: how does UK law seek to give effect to these principles?

33. Under UK law, the following sanctions are available to national judges for violations of anti-discrimination legislation:

34. Declarations: for some claimants, public recognition of the wrong they have suffered is an end in itself.

35. Compensation: the aim is to put the claimant in the position they would have been but for the discriminatory act. It is important that the claimant is not under or over compensated. Loss must be attributable to the specific act which has been held to be discriminatory, and can take the form of:

- (a) Pecuniary loss: which must take account of the fact that the discriminatory act might not have been the only causative factor, the chance that the loss would have been sustained in any event, and can also

²⁸ ECJ, C-14/83 [14]

²⁹ *Draehmpaehl* [40]

include “stigma damages” in recognition of the stigma on the open labour market that can attach to those who complain of discrimination against a former employer: *Abbey National v Chagger*³⁰. Long-term future loss is assessed on a multiplier and multiplicand basis.

(b) Non-pecuniary loss:

- (i) Primarily this takes the form of an award for “injury to feelings,” the level of which is determined by reference to three bands of seriousness, using comparable cases to assist.

The bottom bracket (up to £6,000/€7,500³¹) covers one-off acts of discrimination without severe long-term consequences.

The top bracket (£18,000 - £30,000/€22,500 - €37,500) is reserved for the most serious cases, often involving a long campaign of discrimination that has seriously impacted the claimant’s health.

- (ii) Damages for personal injury can be recovered in addition, calculated under normal principles of tort law, with the exception that the damage caused may not need to be foreseeable.
- (iii) Where the act of discrimination has been motivated by malice, or conducted in a particularly offensive way, aggravated damages are available: *Armitage, Marsden and HM Prison Service v Johnson*³².
- (iv) Exemplary damages may also be awarded where the compensation is insufficient to punish the wrongdoer where 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

³⁰ [2009] EWCA Civ 1202

³¹ Figures cited in € are approximate

³² EAT, [1997] IRLR 162

well exceed the compensation payable to the applicant: *Kuddus v Chief Constable of Leicestershire Constabulary*³³.

36. Recommendations: the court can order that the discriminator perform a particular act to remedy the discriminatory act or provision, and increase compensation or award compensation in the event of failure to do so without reasonable excuse.

Conclusion

37. The key principles for a national judge to bear in mind when assessing the appropriate sanction in a discrimination case are:

- (a) What is the appropriate remedy to ensure real equality of treatment or opportunity?
- (b) Does the remedy provide no less protection than an equivalent national law provision?
- (c) Will the remedy effectively compensate the claimant in full?
- (d) Is the remedy proportionate to the act of discrimination performed?
- (e) Will the sanction deter this and other employer from committing future acts of discrimination and encourage them to take positive steps to prevent discrimination?

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³³ HL, [2001] UKHL 29