

## Seeking effectiveness: remedies and sanctions in discrimination cases

Employment Judge David Sneath  
Great Britain (E&W)

### General Principles

- Effectiveness
- Equivalence
- Future Effect
- Directive  
Codification

## Effectiveness

- Not impossible or excessively difficult to enforce Community rights
- Access to justice – “ *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 special features, viewed as a whole, before the various national instances*” - Pensioenfonds voor Fysiotherapeuten 1995 ECJ 1-4705

## Equivalence

- Any national rule giving effect to EU rights must not be less favourable than the rights available under national legislation in equivalent domestic proceedings. *Rewe v Landwirtschaftskammer Saarland 33/76*
- Thus time limits for bringing proceedings to enforce EU rights are permissible provided they do not infringe the principle. **UK example: out of time (6 months) equal pay claims in Employment Tribunal allowed to proceed as breach of contract claims brought in a civil court within 6 years of end of contract.**

## Levez v Jennings C-326/96

- o 6 month limitation period rendered enforcement of Community right to equal pay impossible where the employer had concealed the inequality by misrepresentation.
- o 2 year limitation on arrears of pay breached principle of equivalence where procedural rules less favourable to similar domestic actions

## Future effect

- o Transposition - when do Community rights apply?
- o New rules apply, unless otherwise specifically stated, immediately to the future effects of a situation that arose under the law as it stood before amendment. INPS v Bruno & Lotti C-396/08
- o For example, age related qualifying periods limiting service for pension entitlements would be ignored if they offend the equality principle and previously excluded periods would be treated as qualifying for periods even if they ran before the Framework Directive came into force.

## Marshall v Southampton Health Authority C-271/91

- o Real and effective judicial protection – effectiveness extends to substantive remedies
- o Real deterrent effect on employer
- o Financial compensation must enable the loss and damage actually sustained to be made good in full
- o Therefore no upper limits on compensation
- o Interest must be available where the passage of time has eroded the value of compensation

## Causation and the upper limit

- o Draehmpaehl v Urania Immobilienservice 1997 C-180/95
- o The Equal Treatment Directive 76/207 does not preclude the imposition of an upper limit where the employer can show that, because the person engaged had superior qualifications, the unsuccessful candidate would not have obtained the vacant position even if there had been no discrimination in the selection process.
- o Codified in the Recast Directive 2006/54 Art 18 and applies by parity of reasoning to 2000/43 and /78

## Incompatible national law

- *Molinari v Agenzia delle Entrate* C-128/07  
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.
- Level up not down.

## Codified Principles

- Arts 7.1 and 9.1
- Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under the 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 to which the discrimination is alleged to have occurred has ended.

## Locus standi for organisations

- Arts 7.2 and 9.2
- Member States shall ensure that associations, organisations and 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
- Firma Feryn C-54/07

## Firma Feryn

- Art7.2 is a minimum requirement. Member States can empower enforcement body to bring proceedings without having a complainant
- Even where no identifiable victim, sanction must be effective, proportionate and dissuasive
- Effective in that case can include a declaration, an injunction, a fine or damages paid to the enforcement body.

## Articles 7 & 9.3 and 15/17

- o Arts 7.3 and 9.3 preserve national rules relating to time limits for bringing actions as regards the principle of equal treatment
- o Arts 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.

## Effective, Proportionate & Dissuasive

- o Effective = successful in achieving the desired outcome
- o Proportionate = balanced, in terms of the gravity, nature and extent of the loss and/or harm
- o Dissuasive = deters, or serves as persuasive argument against future acts of discrimination by the discriminator and other employers/providers of goods and services

## Articles 9 and 11

- o 'Victimisation:'
- o 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.
- o Includes post termination victimisation. *Coote v Granada Hospitality Ltd C-185/97*

## Examples of remedies in UK law

- o Equality Act 2010
- o Declaration of the rights of the parties in relation to the matters to which the proceedings relate.
- o Unlimited compensation, pecuniary and non-pecuniary including that for injury to feeling.
- o Recommendation that the respondent within a specified time takes specified steps for obviating or reducing the adverse effect of the matter to which the proceedings relate, on the claimant or any other person.