

Legal remedies and sanctions in discrimination cases

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Difficulties in proving discrimination

- discrimination is a phenomenon (action) that in practice is extremely difficult to prove (apart from the small number of obvious cases)
- one person's word against another's, difficulties that victims of discrimination encounter in accessing evidence - personal and documentary
- the motive that resulted in different treatment is usually only known to the perpetrator of the discrimination
- fear of retaliation (according to the report of the EU Agency for Fundamental Rights an average of 20% of LGBTs has experienced discrimination in the workplace, in Denmark 13%, in Lithuania 27%, in Poland 23%, and only 10% decided to react in any way whatsoever – court, police, other authorities)

Legal remedies

- Procedures (court – civil, criminal, administrative) allowing the party to seek redress for rights that have been violated through discrimination
- Burden of proof
- Protection against retaliation

EU Regulations

Article 9, Directive 2000/78/EC and Article 7, Directive 2000/43/EC

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.

EU Regulations

Procedures

- A key element for the correct implementation of EU anti-discrimination law into the national legal system – the possibility of taking individual cases to a court of law
- The national court as a guarantor of protection against discrimination (the role of equal treatment bodies in protecting rights shaped individually by national legislation)

CJEU standard

Decisive role of the courts in the application of EU regulations. Effective procedure

Seda Küçükdeveci v Swedex GmbH & Co. KG C-555/07

“It is for the national court, hearing proceedings between individuals, to ensure (...) the principle of non-discrimination(...) disapplying if need be any contrary provision of national legislation, independently of whether it makes use of its entitlement in the cases referred to in the second paragraph of Article 267 TFEU to ask the Court of Justice of the European Union for a preliminary ruling on the interpretation of that principle”

Burden of proof

Characteristic of EU anti-discrimination law

“Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment”

Directives: 2000/43/EC, 2000/78/EC, 2004/113/EC, 2006/54/EC

Protection against retaliation

The protection of individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.

The ban on victimization is also interpreted as a ban on discouraging someone from making a complaint.

Scope – not only the victim of discrimination but also the person providing support (e.g. a trade union representative).

Polish case –sexual harassment

Protected activities:
lodging complaints (at the plant/outside the plant)
bringing an action

C – 185/1997 Belinda Jane Coote v Granada Hospitality Ltd.
Refusal to provide references to a former employee in retaliation against her bringing an action against her employer

Sanctions

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.
Article 15, Directive 2000/43/EC, Article 17 Directive 2000/78/EC

Sanctions

Effective – the sanctions must produce the desired effect both for the victim (compensation of damages) and in terms of implementing the objective of the Directive

Proportionate – appropriately expressed in the context of the severity of the infringement, the extent of the damage and loss suffered by the victim.

Dissuasive – the sanctions are to be effective not only against the given infringer, but should also dissuade others from doing likewise

Sanctions

Diversity of national solutions

Fulfilment of the requirement to implement sanctions for acts which violate the standard of equality established by law may include, amongst others, measures such as fines, imprisonment, disqualification from the performance of specific activities, the dissolution of an organization, confiscation of property, the reparation of damages or the non-awarding of a contract or signing of an agreement, and administrative sanctions.

If there are only criminal penalties, then there is a potential conflict between the principle of presumed innocence and the burden of proof.

Sanctions

Basing responsibility on fault:

“The Directive (...) does not make liability on the part of the person guilty of discrimination on grounds of sex conditional in any way on proof of fault or on the absence of any ground discharging such liability. (...) the practical effect of those principles would be weakened considerably, if the employer’s liability (...) were made subject to proof of a fault attributable to him (...)”

Dekker C-177/88, Refusal to appoint a pregnant woman

Sanctions

Basing responsibility on fault

Liability on the part of the employer on the grounds of discriminatory treatment of an employee or candidate for work cannot be dependant on proving the guilt of the former “(...) no matter how easy it would be to adduce proof of fault”. It does not matter whether this is deliberate fault, or unintended fault, or whether it is an act of negligence (concept under German law), which are easier to prove.

Draehmpaehl C-180/95, Refusal to appoint a man to the post of female assistant

Conclusion: stricter standards of protection are implemented in discrimination cases. The mere fact of violating EU standards carries with it liability

Sanctions

Compensation

Compensation cannot be symbolic!

The Court made it very clear that real and effective judicial protection of the rights of an individual is not guaranteed by sanctions in the form of an obligation to pay compensation to a female candidate for employment, who was not employed on grounds of sex, when the compensation is limited only to the reimbursement of the expenses incurred in connection with the application for work. Compensation of negative contractual interest is insufficient.

Sabine von Colson and Elisabeth Kamann C-14/83, failure to conclude a contract of employment on account of the candidate's sex

Sanctions

Compensation limits

The establishment of *a priori* upper limits of compensation for unfair treatment or exclusion of receipt of interest on the amount of time without employment in order to compensate losses incurred by the victim of discrimination does not meet the terms of effective sanctions.

This was recognised as the absence of real and effective judicial protection and the absence of the element of deterrence.

Marshall C-271/91

Sanctions

Limitation period for a claim for compensation

Issuing just a warning to the entity allowing discrimination, taking into consideration that such behaviour has been found after the six-month limitation period calculated from the date on which the facts occurred, is a purely symbolic punishment and cannot be considered compatible with true and effective implementation of the directives.

ACCEPT C-81/12

The principle of autonomy of the Member States in determining the timing for the submission of claims while maintaining the principle of equivalence to other, similar proceedings. In the case of ACCEPT this principle was not maintained.

Sanctions

Pro-EU interpretation of national law

Even in situations where a Directive does not contain any provisions concerning sanctions that are clear, precise and unconditional, national courts must, in accordance with the principle of sincere cooperation, “interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law.”

Establishment by the Court of a principle of the EU legal order – obligation of pro-EC interpretation of Community law

Sabine von Colson and Elisabeth Kamann C-14/83, failure to conclude a contract of employment on account of the candidate's sex

Legal remedies

Other aspects

- Reinstatement at work of the victims of discrimination as a legal remedy (rare in the legal systems of EU countries - Lithuania, France, Ireland, Poland - separate claim)
- Deciding the amount of compensation - what principle? Does the shifting of the burden of proof also apply in this case? Polish experience – the shifting of the burden only applies to establishing the fact of discrimination, the amount is up to the plaintiff
- Compensation for discrimination and redress - position of the Polish Supreme Court (redressing the damage to the tangible and intangible assets of an employee)
- Obligation to implement anti-discrimination policies in the business activities of the employer/service provider - can this be one of the sanctions?

Legal remedies

Dissuasive/deterring element of sanctions

-The entity's turnover/budget

-Repeated court action relating to discrimination - should this impact the level at which damages are set?

-A public entity which is alleged to be discriminatory - should the sanctions be determined in a different, more restrictive manner? The special role of public entities - expression of the state. Does a discriminatory public entity mean a discriminatory state?

Legal remedies and sanctions

The objective of the equality directives is to provide effective protection through effective legal remedies and effective sanctions against acts of discrimination.

The directives also aim to support a labour market which is favourable to social integration (Feryn C-54/07). Can such a market exist without safeguards in the form of effective legal remedies and sanctions?

Legal remedies and sanctions

Thank you for your attention

This presentation includes material from the publication: A. Zawadzka–Eojek, "Zakaz dyskryminacji ze względu na wiek w prawie Unii Europejskiej" [Ban on Age Discrimination under European Union Law]