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REMEDIES AND SANCTIONS IN DISCRIMINATION CASES TRIER 8-9 DECEMBER 2014

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The principles set out in Directives 43/2000 and 78/2000: means for recourse

- Art. 7(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.

THUS:

- **RIGHT TO TAKE COURT ACTION**
- **RIGHT TO PROCEDURES “FOR THE ENFORCEMENT OF OBLIGATIONS...” (therefore special?)**
- **RIGHT TO TAKE ACTION AFTER THE END OF THE RELATIONSHIP**



continued

- ▶ Art. 7.2. 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.

THEREFORE

- ▶ **Obligation to recognise legal standing, but only where there is a “legitimate interest” and only “on behalf or in support”**
- ▶ so is there an obligation to recognise the right of associations to act on their own initiative?



continued

- ▶ It appears **not** – see Feryn ruling 2008, point 27: even though discrimination may still have occurred without an identifiable complainant, it is “**solely for the national court**” to assess whether national legislation provides for the right of an association to take legal action in its own name
- ▶ **However** the Commission launched proceedings against Italy for over-restrictive criteria (legal standing for trade unions only – case 2006/2441)
- ▶ **The paradox of the Italian situation:** 4 different criteria for empowerment of collective bodies depending on the grounds of discrimination (gender – nationality – ethnicity – other factors)



Sanctions. Art. 15 of Directive 2000/43/EC and Art. 17 of Directive 2000/78/EC

- ▶ *"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**".*
- ▶ **These are the Community's three key principles, to which should be added a fourth drawn from case law: the principle of equivalence:**
- ▶ **protection must be provided which is not inferior to that provided by national law for comparable offences. This should be applied to both the facts (Commission v. Greece, judgment of 21.9.89) and the procedure (REWE judgment of 16.12.76)**



First principle: **proportionality**

- ▶ Case law from before the directives:
- ▶ the Member State can choose how to penalise a breach of the directive, but if it chooses compensation this must be “**adequate in relation to the damage sustained**”; it must therefore “**amount to more than purely nominal compensation**” (Von Colson 10.4.84) and “**enable the loss and damage actually sustained ... to be made good in full**”: an upper limit may not be fixed a priori (Marshall 2.8.93)
- ▶ But now that the right to equality is a “general principle of Community law” (Mangold 2005) and has reached the status of a fundamental human right, how should “proportionality” be understood?



Second principle: Effectiveness = “*all means possible*”

- In the event of a conflict between national law and a directive “***courts are required to set aside that discrimination, using all the means at their disposal, and in particular by applying those provisions for the benefit of the class placed at a disadvantage, and are not required to request or await the setting aside of the provisions***” (CJEU Kutz-Bauer 20.3.2003)
- “observance of the principle of equality can be ensured only by ***granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category***” (CJEU Caballero 12.12.2002)



continued

- ▶ *“In such a case the national court is required to strike down any discriminatory national provision, and are not required to request or await the setting aside of the provisions by the legislator **and must apply the same regime as that reserved to persons in the more favoured category to those in the less favoured group**” (CJEU Molinari 16.1.2008)*
- ▶ **However** *“EU law does not, provided that the general principles of EU law are respected, preclude **measures to re-establish equal treatment by reducing the advantages of the persons previously favoured**” (CJEU Landtová 22.6.2011)*



continued

In conclusion:

- ▶ Protection favours **effectiveness and reinstatement** and is NOT merely a matter of compensation
- ▶ victims of discrimination must be put in the **same position** (of ownership of property or of an opportunity) in which they would have been had they not suffered discrimination;
- ▶ **As far as the role of the court is concerned,** effectiveness thus requires “levelling upwards” rather than “levelling down” (“Nimz principle”)
- ▶ This also responds to the reasoning behind the antidiscrimination law which was not established to affirm a formal equality, but to guarantee a different distribution of assets to the benefit of the excluded groups
- ▶ The state however retains the right to intervene.
- ▶ THIS APPLIES TO EU/MEMBER STATE RELATIONS
- ▶ BUT WHAT HAPPENS WHEN DISCRIMINATION IS TRIGGERED BY A PRIVATE INDIVIDUAL OR BY AN ADMINISTRATIVE ACT?



Effectiveness.

Problem cases. 1) Failure to hire

- ▶ **Refusal of admission to selection process or competition** for discriminatory reasons = order to admit the victim of discrimination on the same basis as the others
- ▶ In Italian law it continues to be a subjective right – ***“protection against discrimination is always guaranteed in accordance with the subjective rights model and the relevant jurisprudential protection”***
Cass. 7186/11
- ▶ Possible conflicts where selections have already been made



continued

- **Failure to hire by an individual – conflict with freedom of contract** – the possible solutions:
- **A)** Compensation for damage only because it is not certain that, in the absence of discrimination, its victim would have been hired; therefore an order to employ would violate the employer's freedom to negotiate (**FIAT case, judgment at first instance**)
- **B)** Establishing the relationship as a means of completely removing the discrimination, in the absence of proof to the contrary (**FIAT case, judgment at second instance**)
- **C)** Employer obliged to make an offer analogous to that made to those not discriminated against



continued: 2) Social security benefits for foreigners and conflicts with budgetary restrictions

- ▶ A major issue at present because of the equal treatment requirements established in Community law (e.g. Art. 12 Directive 2011/98/EU) and by the ECHR (see Dahabi ruling 8.4.2014)

Possible outcomes:

- ▶ A) Simple acknowledgment of the discrimination and possible compensation for damage;
- ▶ B) Awarding of the benefit and irrelevance of the spending limit;
- ▶ C) Awarding of the benefit with the facility to reorganise the benefit to allow for spending limits and the higher number of recipients.

Continued: The ban on victimisation

➤ There are however **two limits** to the various options:

A. Established positions (= services already performed; positions already filled)

B. The ban on victimisation:


➤ Art. 9 Directive 2000/43/EC

“Member States shall introduce into their national legal systems such measures as are necessary to protect 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.”

Any “levelling down” following a court ruling is an adverse consequence for those who obtained the benefit. Brescia and Adro cases

Effectiveness: “extensive” general rulings

- ▶ Can the court, in order to ensure the effectiveness of the remedy, also remove discrimination from persons who are not parties to the case?
- ▶ **In Italy** this often occurs, following action by associations granted legal standing.
- ▶ However, Cassation 3670/11 suggests that this power should not apply to the public authorities: the court may only award the benefit to the claimants, and not extend it to all those suffering from the discrimination;
- ▶ This hypothesis does not respect the principle of effectiveness and is inconsistent with the empowerment of associations for collective discrimination: that empowerment would be useless
- ▶ **Cassation ruling 3670 has not been acted on:** the courts have passed orders to pay all affected, to alter the web site to give correct information, to amend the terms of a competition, to make provisions, etc.



Continued: In the absence of an identifiable victim, what measures may the court take?

- ▶ In the event of “discriminatory statements” on employment policies, directives 2000/43 and 2000/78 are applicable even in the absence of an identifiable victim, even if the hiring process is not formalised, even if no staff selection procedure is under way: the “disadvantage of discouragement” constitutes discrimination (CJEU judgments Feryn 2008 and Accept 2013. The Taormina case in Italy.)
- ▶ But what measures may the courts take in these cases?


continued

- “sanctions may ... include a **finding of discrimination** by the court ... in conjunction with an adequate **level of publicity**, the cost of which is to be borne by the defendant. They may also take the form of a prohibitory **injunction**, in accordance with the rules of national law, ordering the employer to cease the discriminatory practice, and, where appropriate, a **fine**. They may ... take the form of the **award of damages** to the body bringing the proceedings.” (Feryn ruling)
- Even when proceedings have been taken by the collective body alone “The severity of the sanctions must be commensurate to the seriousness of the breaches for which they are imposed, in particular by ensuring a **genuinely dissuasive effect** ... while respecting the general principle of proportionality. In any event, a purely symbolic sanction cannot be regarded as being compatible with the correct and effective implementation of Directive 2000/78. (Accept ruling)



Third requirement: dissuasiveness

- The purpose of the **payment of compensation** is:
- To fully compensate the party discriminated against, including for non-financial damage
- To reflect the seriousness of the offence
- But it must have the effect of dissuading any repetition of the discrimination: this relates to the perpetrator and not to the victim; it is not linked to the damage incurred – it is a **punitive function**;
- Is it inadmissible for legislation to fail to provide for “punitive damages”?
- Is it applicable to the public authorities?
- Italian case law: little consideration given to the requirement for dissuasiveness.



Continued: Italian cases

- ▶ Italian case law: little consideration given to the requirement for dissuasiveness, particularly against the public authorities. **But** some positive cases:
- ▶ “Retaliatory signs” (€2500–6000)
- ▶ Failure to organise alternative education to the Catholic religion (€2500)
- ▶ Lack of teaching support for pupils with disabilities (€500–1000)
- ▶ Retaliation in the course of social security provision (Brescia – €15000)
- ▶ Statement about hiring policy and homosexuality (€100000)

A “presumption of damages”?

- The ‘softening’ of the burden of proof (art. 8 of Directive 2000/43 and 10 of Directive 2000/78) concerns the proof of discrimination **but not** the proof of damages.

BUT

- See the CGE case-law about the violation of the Directive 1999/70/CE (on fixed-term work): when there is no right to transform wrongful fixed-term contracts into open-ended contracts, compensation is aimed to discourage further violations of the directive (Angelidaki 2009, Affatato 2010, Mascolo 2014)
- CGE Papalia 12.12.2013 outpoints that, **according to the Italian law**, in case of breach of the Directive 1999/70/CE, the worker “*does not enjoy the presumption of damages and, consequently, has to prove them*”.

A “presumption of damages”?

- ▶ National courts “*have to examine whether the national procedural law makes excessively difficult the exercise of rights provided by the EU legislation to EU nationals*”.
- ▶ **“It cannot be excluded”** that the lack of presumption **“makes the exercise of the rights provided by the EU law practically impossible or excessively difficult”**
- ▶ Right to non-discrimination is also provided by the EU law
- ▶ Then, it can be argued that this principle requires to recognize a compensation “*in re ipsa*” (without specific proof) for damages arising from discrimination, as dissuasive sanction, above all when the discrimination cannot be completely removed anymore.



Thank you for your attention