ERA

17 February 2014

“Remedies and Sanctions in Anti-Discrimination Law”
Remedies & Sanctions

• **Overview:**
  – Fundamental rights
    • “Sanctions”
      – Ineffectiveness
      – Directives
      – Law, contracts
  – Directives
    • Procedural requirements
    • “Sanctions”
      – Ineffectiveness
      – Damages etc.
  – Ineffectiveness issues
  – Compensation issues
  – Prescription
  – Responsibility of Courts
Fundamental rights

- Art 157 TFEU – Equal pay
- Charter of Fundamental Rights
- Art 16 Freedom to conduct a business
- Art 21 Non-discrimination
- Art 23 Equality between women and men
- Art 28 Right of collective bargaining and action
Basic legal entitlement pleas
ECJ C-555/07

- It is for the national court, hearing a dispute involving the principle of non-discrimination on grounds of age as given expression in Directive 2000/78, to ensure effectiveness, disapplying if need be any provision of national legislation contrary to that principle (rule that only periods of employment after age of 25 are taken into account when calculating periods of notice); this is not dependent on obtaining a preliminary ruling.
Fundamental rights – secondary Community law – C-236/09

• General rule requiring unisex premiums and benefits established by Article 5(1) of Directive 2004/113
• Article 5(2) grants certain Member States – those in which national law did not yet apply that rule at the time when Directive 2004/113 was adopted – the option of deciding before 21 December 2007 to permit proportionate differences in individuals’ premiums and benefits where the use of sex is a determining factor in the assessment of risks based on relevant and accurate actuarial and statistical data.
• Given that Directive 2004/113 is silent as to the length of time during which those differences may continue to be applied, Member States which have made use of the option are permitted to allow insurers to apply the unequal treatment without any temporal limitation.
Fundamental rights – secondary Community law – C-236/09

• Such a provision, which enables the Member States in question to maintain without temporal limitation an exemption from the rule of unisex premiums and benefits, works against the achievement of the objective of equal treatment between men and women, which is the purpose of Directive 2004/113, and is incompatible with Articles 21 and 23 of the Charter.

• That provision must therefore be considered to be invalid upon the expiry of an appropriate transitional period (21 December 2012).
Conform interpretation C-426/11

- Directives must be interpreted in a manner consistent with the fundamental rights.
- Here: Directive on the transfer of undertakings in consistency with Article 16 of the Charter (freedom to conduct a business).
• (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.
Art 9 Defence of rights

• (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.
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.

Art. 24 2006/54/EC, Art. 9 2000/43/EC
Anti-Racism Directive 2000/43/EC

• Essentially the **same substance** to the provisions of Art 7 (Defence of rights), Art 9 (Victimisation), Art 14 (Compliance) and Art 15 (Sanctions).

• Article 13 - (1) Member States shall designate a **body or bodies for the promotion** of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights. Art. 20 2006/54/EC.
Anti-Racism Directive 2000/43/EC Art 13

• (2) Member States shall ensure that the competences of these bodies include:
• - without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their **complaints** about discrimination,
• - conducting independent **surveys** concerning discrimination,
• - publishing independent **reports** and making **recommendations** on any issue relating to such discrimination.
Requirements for Remedies in the Directive

• Claims – **judicial** and/or **administrative channels**, or at least conciliation procedure

• **Associations** – participation
  – on behalf of the aggrieved person
  – or in support and with consent

• Burden of proof – Presentation (Kenny C-427/11)

• Few requirements all in all – MS retain autonomy on procedural law

• But basic principle that effective judicial defence of rights is necessary and procedural rules must be no less favourable (MS duty of loyalty).
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.
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. Member States shall notify those provisions to the Commission by 2 December 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.

- 2000/73/EC Art. 15; 2006/54/EC Art. 18.
Directive Requirements on **Sanctions**

- Adverse provisions in contracts, collective agreements etc. are **null and void**

- **Sanctions** – Choice
Ineffectiveness
C-614/11, 8 ObA 63/10p

• Article 3(1)(a) and (c) of Directive 76/207/EEC, as amended by Directive 2002/73/EC, precludes a national legislation under which discrimination on grounds of sex in connection with the termination of an employment relationship which is effected solely by lapse of time pursuant to a fixed-term individual employment contract entered into before the entry into force of the above directive (Austria’s accession), which differs depending on whether the employee is a man or a woman, where the employee concerned reaches that age after the accession.
Ineffective adverse provisions

- Case-law on Art 141 TEC (now 157 TFEU) implies some leeway (ECJ C-28/93) when it comes to how adverse provisions must be set aside.
- It is inadmissible to persist with the discrimination – even if only in the form of transitional measures (ECJ C-408/92).
- Until due and proper implementation, members of the disadvantaged group are entitled to the same treatment and to the application of the same arrangements as other workers (ECJ C-33/89)
Ineffective adverse provisions

- For the **period prior** to the judgment, the advantages obtained from equalising cannot be withdrawn from the favoured group, even if it were possible to deprive the favoured group of their superior status (ECJ C-28/93).

- **After** the judgment, these **advantages may be effectively set aside**. The court must separately examine whether its national law permits this lowering of standards – constitutional requirements. Under Community law, transitional measures favouring the previously favoured group are not necessary (ECJ C-408/92).
C-444/09 et al – Statute may not override retrospective effect

- Even though the national legislation transposing Directive 1999/70 (Fixed-Term Contracts) contains a provision which, whilst recognising the right of interim civil servants to be paid the three-yearly length-of-service increments, excludes the retrospective application of that right, the competent authorities of the Member State concerned are obliged, under European Union law and in relation to a provision of the framework agreement on fixed-term work, annexed to Directive 1999/70, having direct effect, to give that right to payment of the increments retrospective effect to the date by which the Member States should have transposed Directive 1999/70.
Adaptation – Transition C-297/10

- Articles 2 and 6(1) of Directive 2000/78 and Article 28 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding a measure in a collective agreement, which replaces a system of pay leading to discrimination on grounds of age by a system of pay based on objective criteria while maintaining, for a transitional period limited in time, some of the discriminatory effects of the earlier system in order to ensure that employees in post are transferred to the new system without suffering a loss of income.
Is Article 21 of the Charter of Fundamental Rights, in conjunction with Articles 7(1), 16 and 17 of Directive 2000/78/EC to be interpreted as meaning:

(a) that an employee for whom the employer initially sets an incorrect increment reference date based on an age-discriminatory accreditation of previous periods of service as prescribed by law is in any event entitled to payment of the difference in salary based on the non-discriminatory increment reference date,

(b) or that the Member State has the option of eliminating the age-based discrimination by way of a non-discriminatory accreditation of previous periods of service even without financial compensation (by setting a new increment reference date and at the same time extending the period for advancement to the next salary step), in particular where such a solution, having a neutral effect on pay, is intended to preserve the employer’s liquidity and avoid an unreasonable effort involved in recalculation?
Pay grades from 18 – Claim for Performance – ECJ C-88/08; 9 ObA 83/09k

• Section 26 Law on Contractual Public Servants does not allow any consideration of job experience prior to the age of 18 when assessing pay grades. This has an impact on pay. The Austrian legislator sought, by excluding consideration of professional experience gained prior to attaining full legal capacity at the age of 18, to avoid placing pupils in general education at a disadvantage as compared to apprentices in vocational education.
Pay grades from 18 – Claim for Performance – ECJ C-88/08; 9 ObA 83/09k

• However, this excludes accreditation both of experience acquired before the age of 18 by a person who has pursued a general education and of that acquired by a person with a vocational education. That criterion may therefore lead to a difference in treatment between two persons with a vocational education or between two persons with a general education based solely on the criterion of the age at which they acquired their professional experience. In those circumstances, the criterion of the age at which the vocational experience was acquired does not appear appropriate for achieving the aim of not treating general education less favourably than vocational education.
Scope of ineffectiveness
Preliminary Ruling 8 ObA 20/12t

• Is Article 28 of the Charter of Fundamental Rights to be interpreted as meaning that where, in a system of employment law in which substantial elements of minimum employment standards are established in accordance with the agreed social policy assessments of specially selected and qualified parties to a collective agreement, a point of detail in a collective agreement (albeit a point that breaches the European Union law principle of non-discrimination) – in this case, the proportionate grant of child allowance in the case of part-time working – is invalid (according to national practice), the penalty of invalidity extends to all the provisions of the collective agreement relating to that area (in this case, child allowance)?
Pay grades from 18 – Claim for Performance – ECJ C-88/08; 9 ObA 83/09k

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Compensation

• Sanctions – Compensation
  – effective
  – proportionate
  – deterrent
  – ceiling only if the only damage incurred was denial of recognition (ECJ C-180/95 Draehmpaehl; similar substance already found in C-271/91 Marshall – full compensation)
Directive Requirements on **Sanctions**

- **Sanctions** also include
  - administrative penalties
  - criminal proceedings
  - exclusion from advancement
Discrimination – Appointment – Non-pecuniary damage – 8 ObA 11/09i

• The constitution of an employment contract is usually a lengthy process that begins with contacting a potential employer in response to an advertised vacancy. This “constitution” does not just consist of the final decision to conclude a contract, but also of the preceding application and selection procedures.

• The law prohibits any discriminatory conduct during this “process”, even if the person has no chance of getting the job.

• There should be specific statutory damages in response to any conduct that violates this prohibition of discrimination.
Discrimination – Appointment – Non-pecuniary damage – 8 ObA 11/09i

• In fixing an entitlement to non-pecuniary damages, the law incorporates the “procedural” aspect of anti-discrimination protection by acknowledging the legal good that a candidate in the employment market must “not suffer discrimination” and attaching a value to it in the form of a lump sum. The aim that requires enforcing is that the group of individuals concerned should not gain the impression when applying for work that they have “no prospects” in the employment market on the grounds of a specific characteristic they possess (sex, age, ethnic origin, etc.) and hence refrain from submitting applications.
Attribution of Damage
9 ObA 118/11k

• The business owner shall always be considered to be the employer (in the case of legal entities: the organs authorised to represent the company), i.e. the person who is responsible for the undertaking as a whole and who is able to remedy the situation and to prevent defamation in the future. However, the same applies to persons who, by virtue of their authority and their position vis-à-vis the other employees, must be regarded as representatives appointed to manage the business independently, i.e. only persons who are authorised to manage the business independently and in particular to perform employer functions.
Requirements: Time bars

- **Periods of limitation or exclusion** are admissible if they do not entail less favourable procedural rules and do not make it impossible or excessively difficult to obtain a claim (ECJ C-326/96; inadmissible within a succession of short-term contracts where each termination is followed by reappointment, with the expiry date falling within a subsequent period of employment for the same employer ECJ C-78/98).

- An employer may not plead an – in itself adequate – two-year limitation period if the worker only failed to observe it because the employer deliberately deceived her with false information about the pay received by members of the other sex (ECJ C-326/96).

- Art 8 of Dir 2000/78 must be interpreted as not precluding a national procedural rule, adopted in order to implement the Directive, which has the effect of amending earlier legislation which provided for a time-limit for claiming compensation for discrimination on grounds of sex (C-246/09).
Effect of Directive Requirements

- General shortcomings in implementation:
  - Interpretation of compatibility with Directive
  - If not possible:
    - **direct** effect in public sector
    - **private** sector only with regard to **claims for damages** against the State (C-98/09), but also **pleas founded on basic legal entitlement**
    - infringement proceedings
Responsibility of courts

• Article 6(1) of Directive 2000/78 must be interpreted as meaning that it does not preclude a national measure which does not contain a precise list of the aims justifying derogation from the principle prohibiting discrimination on grounds of age. It is for the national court to ascertain whether the legislation at issue in the main proceedings is consonant with such a legitimate aim and whether the national legislative or regulatory authority could legitimately consider, taking account of the Member States’ discretion in matters of social policy, that the means chosen were appropriate and necessary to achieve that aim (C 388/07, C-341/08).

• The implementation of an authorisation by means of a collective agreement is not, as such, exempt from any review by the courts but, in accordance with the requirements of Article 6(1) of that directive, must itself pursue a legitimate aim in an appropriate and necessary manner. (C-45/09).
Direct effect – Basic structure of labour law

• Anglo-Saxon roots. Constituted around individual rights.

• Austria attaches great importance to collective negotiation.

• Danger: collective bargaining procedures may be eroded because the outcome can increasingly be challenged by any individual worker.
Direct effect – Basic structure of labour law

• Limited leeway for collective assessments of what might be regarded as advantageous and “traded off”?
• Given that the demarcations are uncertain, at best less willingness to concede social benefits to individual groups?
• General lowering as a consequence of C-88/08. Similar issue following C-356/09.
The End

Thank you

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