

Applying Anti-Discrimination Law Seeking Effectiveness: remedies and sanctions

Trier 10-11 June 2013

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Right to Equality is a Fundamental Human Right

- Recognised by:
 - Universal declaration of human rights
 - U.N. convention on elimination of discrimination against women
 - U.N. Convention on Civil and Political Rights
 - European Convention on Human Rights
 - ILO Convention No.111 prohibits discrimination in field of employment and occupation

Content

- Right and Obligation in Equality Law
- Directives / Treaty Provisions
- Case law
- Principles of National Procedural Autonomy
- Principle of Equivalence
- Principle of Effectiveness

Procedural Autonomy, Effectiveness, Equivalence

- Procedural Autonomy
 - Member States are free to prescribe procedural rules and remedies
 - Over time the jurisprudence of the CJEU has qualified this principle
- Effectiveness
 - Procedural requirements cannot render the exercise of EU rights impossible or excessively difficult
- Equivalence
 - Provisions of national law giving effect to EU rights must be no less favourable than those applicable in similar domestic causes of action.

Legislative Context

- Article 10 of TFEU:
 - *In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation*
- Directive 2000/78/EC (Framework Directive)
- Directive 2000/43/EC (Race Directive)
- Directive 2006/54/EC (Recast Directive)
- Each Directive requires Member States to:
 - Provide for real and effective redress
 - Where compensation is provided it must be effective, proportionate and dissuasive
- Article 288 TFEU requires Member States to achieve result envisaged by a Directive

Adequacy of Redress

- Purpose of redress is to place a plaintiff in the position that they would have been in had they not suffered a wrong.
- Mandatory orders are often the most effective form of redress
- Member States are not required to make mandatory orders available
- Where they are not available and compensation is provided it must be effective, proportionate and effective (*Von Colson and Kamann*)

Effectiveness and Equivalence

- *Von Colson*
 - National law provided an inadequate remedy (breach of principle of effectiveness)
- *Pontin v T-Comalux*
 - National law provide that compensation could not be ordered for a discriminatory dismissal although it was available for wrongful dismissal (breach of principle of equivalence)
- *Marshall*
 - Capping of awards and limitation on power to award interest (breach of principle of effectiveness)

Time Limits

- Most jurisdictions have time limits within which claims must be brought. They also limit the redress that may be ordered.
- *Levez*
 - Time limit did not take account of deception by the Respondent although limitation periods in national law did not operate where delay was due to fraud (breach of principle of equivalence)
- *Nils Draehmpaehl*
 - Upper limit on arrears recoverable in an equal pay claim. No similar limit on claims to recover debt in national law (breach of principle of equivalence)

Jurisdiction of Courts

- National procedural autonomy allows Member States to determine the courts having jurisdiction in EU law cases.
- *IMPACT*
 - National Law provided for specialist Labour Courts to determine employment law claims arising under domestic law but not where direct effect of Directive is relied upon (breach of principles of effectiveness and equivalence)

Rules of Domestic Law that Limit Redress

- *Cotter and McDermott*
 - National law provided that redress could not be recovered if it amounted to unjust enrichment. CJEU held that this rule allowed the Member State to benefit from its own unlawful conduct and deprive the Directive of its effectiveness

Where there is no Identified Victim

- Situations can arise where there is discrimination but no identified victim claiming redress
- *Firma Feryn*:
 - The firm fitted windows. It was recruiting fitters. A Director made a statement that it would not employ 'immigrants' because its customers would not like them working in their homes.
 - Finding of discrimination. A question of arose as to what form of sanction was available

Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn

- CJEU ruled: -
 - Art 15 of Directive 2000/43 requires Member States to introduce measures necessary to achieve the aim of the Directive
 - Judicial protection must be real and effective
 - Directive does not prescribe a specific sanction but leaves Member States to choose between different solutions
 - Even where no identified victim, a sanction must be available which is effective, proportionate and dissuasive
 - Sanctions may include publishing a finding of discrimination at the perpetrator's expense, an injunction, a fine or an award of compensation in favour of the prosecuting authority

Conclusion

- The selection of a mode of redress is a matter from the National Court.
- Discretion is not unfettered. It must be adequate to redress the wrong suffered
- In cases of discriminatory dismissal reinstatement is the most effective remedy.
- If that is not available there must be full reparation for the damage suffered

Conclusion (cont....)

- It could never be acceptable for the advantaged which accrued from an act of discrimination to outweigh the cost of redress.
- Hence, redress must, at a minimum, provide full reparation *and* contain a dissuasive element
- Special rules which don't apply generally in national law cannot be applied so as to limit the quantum of compensation awarded
- Where there are special rules of this nature they should not be followed by the national courts.