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- **Sanctions and means of defending rights in sex discrimination cases**
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2006/54/EC

Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered. (Article 18).

Other grounds/areas:

- 2000/43/EC (Racial Equality Directive)
 - 2000/78/EC (Employment Equality Directive)
 - 2004/113/EC (Goods and Services Directive)
 - 2010/41/EC (Self-employed Individuals Directive)
- Member States shall introduce effective, proportionate and dissuasive sanctions for breaches of commitments envisaged in the Directives.
- Member States shall establish rules and take all measures for breaches of sanctions in relation to national provisions accepted under the Directive that are essential for ensuring compliance with the sanctions. The sanctions that can constitute grounds for payment of compensation must be effective, proportionate and dissuasive.

- General rule from the Directives: the autonomy of national courts is recognised.
- At the same time, Member States are required to implement EU law effectively, on the basis of established criteria ensuring the effectiveness of sanctions, their functionality and their dissuasive effect.
- **How to establish what measures will be effective, proportionate and dissuasive in the specific case of a specific employer committing a specific breach?**

For example:

2008 case concerning refusal to employ a Romany woman

In civil case no. 2A-1020-464/2008, the Vilnius District Court awarded the plaintiff, who was refused employment as a dishwasher because of her ethnic origin, 864.98 LTL for monetary loss – wages not earned due to enforced absence – and 2,000 LTL compensation for non-material damage.

2014 concerning dismissal of pregnant woman from employment

In civil case no. 3K-3-199/2014, the Lithuanian Supreme Court awarded the plaintiff, a pregnant woman who was dismissed from employment at the Romanian Embassy during a trial period, 50,000 LTL for monetary loss – wages not earned due to enforced absence – and 10,000 LTL compensation for non-material damage.

National regulations/problems:

- Article 96 of the Labour Code of the Republic of Lithuania
- Confirms the prohibition on refusing to accept a person for employment on the grounds mentioned in the Labour Code, Article 2, Part 1, Paragraph 4: because of his/her sex, sexual orientation, race, nationality, language, origin, citizenship and social position, faith, marital and family status, age, beliefs or outlooks, membership of political parties and community organisations, or circumstances not connected with the particular qualities of the employee. Articles 2 and 3 of the Lithuanian Labour Code provide that refusal to accept a person for employment can be contested in court not more than a month after the date of occurrence. If the court establishes that the refusal is unlawful, the employer shall be obliged by a court order to accept the individual for employment from the date of the individual's employment application and to pay the plaintiff compensation at the minimum wage for the time lost.
- Article 96 of the Lithuanian Labour Code does not provide alternative sanctions for an individual who has suffered discrimination in the employment process , and it associates it with the Minimum Monthly Wage.
- (A possible alternative way of defending violation of rights (c.b. No. 2A-1020-464/2008)
- Law on Equal Opportunities, Law on Equal Opportunities for Women and Men.
- Article 300 (formerly Article 297) of the Labour Code of the Republic of Lithuania

Although the Directives, while requiring suitable implementation of their provisions, do not demand any particular form of sanctions to be applied for violations of equal opportunities, they oblige Member States to impose sanctions that guarantee *real and effective legal protection*.

The Supreme Court of Lithuania in case 3K-3-199/2014 stipulated in its judgement that it is essential to consider whether the compensation ordered for the plaintiff is adequate and effective in discouraging employers from future discrimination and whether it helps achieve the basic goal of Directive 2006/54/EC – transposed into national legislation – namely, to ensure the implementation of the principle of equal opportunities and equal treatment of women and men in matters of employment and occupation.

When deciding on the amount of non-pecuniary damages, it is necessary to take account of the amount of work-related benefits awarded to the applicant in order to avoid any violation of the principle of proportionality specified in the EU Directives and in ECJ rulings and so that the party engaging in discrimination is subjected to sanctions that are effective and functional in discouraging discrimination.

- The amount of material damages is also taken into account.

ECJ case C-177/88 *Dekker*

For sanctions to be effective, any instance of prohibited discrimination needs to be punished without exception.

Directive No. 76/207/EC allows Member States freedom to choose their own sanctions, appropriate for achieving their purpose. They must have a **real deterrent effect**.

- If a Member State decides to apply the rules on civil liability to discrimination, any infringement of the prohibition of discrimination suffices in itself to make the person guilty of it fully liable, and no regard may be had to the grounds of exemption envisaged by national law.

Case C-409/95, *Hellmut Marschall v Land Nordrhein-Westfalen*.

- As a preliminary question, the ECJ was asked to explain whether Directive 76/207/EC permits **an upper limit for compensation for discrimination** to be established in national law. The ECJ stated that establishing an upper limit for compensation pay-outs would go against EU directives.

Case C-271/91, *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority*.

- Therefore, it is up to national courts to decide what sanctions are effective, but in doing so they must keep in mind the ECJ's reasoning in the *Marshall II* case, in which the court specified that the effective, proportionate and dissuasive sanction in a discrimination case should be **restitution of the violated right: acceptance into or return to employment, or an order for adequate compensation in lieu of return to employment.**

ECJ case C-14/83 *Von Colson*

Proportionality of the sanction: compensation paid to make up for damage sustained shall be proportionate to the nature of the violation and the extent of the damage.

Directive No. 76/207/EEC does not impose any specific sanctions, but it allows Member States to set for themselves appropriate penalties for discrimination which achieve their intended outcome. Nevertheless, measures appropriate for restoring real equal opportunities must ensure real and effective legal protection and must have a real deterrent effect on the employer.

ECJ case C-180/95 *Draehmpaehl*

Compensation for damage sustained due to discrimination on the grounds of sex cannot be conditional on proof of fault on the part of the employer. Such damage must be compensated in all cases, without establishing civil liability for the fault.

The court also reasoned that compensation equal to three months' salary is not sufficient, i.e. it has no deterrent effect.

Example:

- A woman of Romany ethnic background was about to start work, but the women employed in the firm gathered and objected to her employment. There was public discussion and then a vote on Saicha's employability. The female employees unanimously confirmed that they did not want to work with a Romany woman and said that if the Manager employed her, they would all leave. The Manager tried to defend Saicha, but when he saw how determined the other employees were, he apologised to Saicha, but told her he could not employ her.
- The motive in a discrimination case is not important: the case is assessed from the point of view of the victim of discrimination.

ECJ case C-54/07 *Firma Feryn*

Public declarations by an employer that he will not employ people of a certain ethnic background or race shall be considered discrimination against employment seekers. Even if there is no identifiable victim of discrimination, the appropriate legally constituted body can demand acknowledgement that discrimination is taking place and that the perpetrators be penalised. Any sanctions applied need to be effective, proportionate and dissuasive. Where deemed appropriate under the circumstances, sanctions may consist of a finding of discrimination in court, with an adequate level of publicity, the cost of which would have to be covered by the employer; of imposing a fine on the employer, in line with national guidelines, if necessary in order to end the discriminatory practices; or of an award of compensation for damages to the institution bringing the proceedings.

ECJ case C-81/12 *Accept*

Directive 2000/78 is not fairly and effectively implemented if it imposes a purely symbolic sanction. EU law forbids national legislation that makes it possible to apply a simple warning as the sanction in cases where discrimination on grounds of sexual orientation has been established. The sanction does not essentially have to be pecuniary, but in accordance with the principle of proportionality, it must match the severity of the breach, and it must constitute an effective, proportionate and deterrent measure.

ECJ case C-383/92 *Commission*

In order to achieve an effective deterrent effect from sanctions, employer must be penalised with a fine that exceeds the amounts that were not paid to the employees and form the basis of the damage sustained.

ECJ joint cases C-231/06 and C-233/06 (pension issues)

If a person has suffered discrimination on grounds of sex, equal treatment is restored when such a person is placed in the same situation as the employees of the other sex. From this it follows that a Member State can choose to restore equal treatment toward individuals by requiring that they be paid an amount equivalent to the difference between the sum the person discriminated against was originally paid, as a result of discrimination, and the higher amount paid at that time to people of the other sex. Furthermore, in seeking to remedy the situation, interest may be paid on these adjustment payments as a reasonable adjustment for purchasing power.

Important:

- How can we determine what kind of action will be dissuasive to a specific employer in a specific case?
- Does the requirement to determine what kind of action will be dissuasive to a given employer exceed the compensatory function of civil liability?
- The function of civil liability is compensatory, which means that in taking civil action there is no intention to penalise the person who has committed the violation. The intention is rather to compensate the injured party for damage sustained in such a way that, through a careful calculation of the extent of the damage, this party can be restored to the position existing before the breach of their rights, so that they are compensated neither too much, nor too little, but just exactly for the amount of loss that was actually sustained. However:

ECJ case C-407/14 *Camacho*

The purpose of paragraph 18 of Directive 2006/54 is to create an obligation to ensure compensation or reparation for the injured party. This gives Member States scope to institute measures designed to penalise those who discriminate on the basis of sex and to compensate the injured party. In addition, Member States are **permitted to design provisions for awarding punitive damages** to victims of sexual discrimination, but EU law does not oblige them to do so.

NB:

- Paragraphs 18 and 20 of the UN General Assembly Resolution on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law establish that **damage must be compensated in full.**

“In full” means:

- This concept encompasses **restoration of the former situation as was it before the violation, with compensation awarded and ensuring that non-repetition of the illegal actions.**

- Compensation must be adequate and proportionate to the severity of the violation, and the circumstances under which the violation was committed must be considered. The compensation must make up for physical and psychological damage, lost opportunities (work productivity), and loss of earnings, including potential income, moral damage, and the cost of litigation.
- For the compensation of damage sustained, the important criteria include the nature and length of time of the unlawful discrimination, the suffering of combined psychological and physical abuse, the violation of several non-material values, the deliberate and cruel behaviour of the individual who inflicted the damage, negative behaviour on the part of the accused after inflicting the harm, any particularly painful, long-lasting and not readily remediable effects of the illegal behaviour that will affect the victim for the rest of his/her life, the motivation for and purpose of the behaviour, the length of employment relations, the employer's financial situation and other general and individual criteria.
- (Resolution adopted by the General Assembly 60/147 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law [2006] UN General Assembly A/RES/60/147 A/RES/60/147).

- The relevant literature also mentions a form of non-material compensation, whereby employers known for discrimination are recorded in “blacklists”, which prevent such employers from receiving orders and subsidies from Government agencies: Alenfelder, K.M., Remedies and Sanctions, p. 29; Office of Federal Contract Compliance Programs (OFCCP) [interactive]. [seen: 11-03-2011].
<<http://www.dol.gov/ofccp/index.htm>>.

Adequate: the concept of adequacy in relation to non-pecuniary damages is interpreted as the level of compensation, which, if it cannot be equal to the amount of damage, must at least be in keeping with it. This means determining what amount of monetary compensation would satisfy the victim on the basis not of detailed and mathematically precise calculations of the amount of damage, but simply following the principle that the more severe the non-pecuniary damage and the ordeal suffered is, the higher the monetary compensation, and vice versa (e.g. R. Volodka: *Neturtinės žalos atlyginimas Lietuvoje* (Non-pecuniary damages Lithuania). Vilnius: State Enterprise Registers Centre, 2010, p. 175).

Proportionate: Legal doctrine and in case law consider that remedies established by the State in response to breaches of the law must be proportionate (adequate) to the violation of the law, and they must meet legitimate and universally important objectives, without imposing greater restrictions than is necessary to achieve those objectives. There needs to be a fair balance (proportionality) between the desired objective of punishing offenders and ensuring prevention of violations of law and the means chosen to achieve this. In other words, the principle of proportionality may also be called the principle of prohibition of unreasonable coercion (e.g.: Lithuanian Constitutional Court, judgement of 6 December 2000.).

The amount of compensation must be proportionate to the loss incurred by the injured party (employee) and at the same time it must present a proportionate constraint for the employer. See: Judgement of 2 January 2008 of the panel of judges in Lithuanian Supreme Court, Civil Cases Division, civil case D.L. v. UAB „Fleming baldai“, case no. 3K-3-82/2008; et al.

- In employment cases, employees generally ask the court to declare illegal their dismissal, the employer's refusal to accept the employee's return to work or some other breaches of employment rights, and to restore the previous situation, i.e. to employ or reinstate the employee. They may also seek an order for pecuniary damages (in the form of payment for direct losses or wages foregone: Civil Code, Article 6.249) and for non-pecuniary damages, the basis for which is provided in Article 250 of the Labour Code, Civil Code 6.250 and Article 24¹ of the Law on Equal Opportunities for Women and Men.

- It may be that the rule established through case law, whereby an employee unlawfully dismissed is awarded his/her average wages until the effective date of the court judgement, is an insufficiently effective measure for the victim of workplace discrimination, since the examples from some countries and ECJ case law show that compensation for unlawful dismissal from employment is not subject to a time limit.
- In Germany the Kattenstein formula is used to calculate damages. It assumes that an employee who works for an employer “sells” his skills and productivity, and if these goods are damaged, he/she suffers a loss of economic worth: he/she may not find another job, and even if he/she does, it may be for a lower wage. These financial losses can be assessed by experts and they may increase the amount of pecuniary and non-material damages for the injured party. (Alenfelder, K.M. Materieller Schaden wegen Diskriminierung. *Zeitschrift für Arbeits- und Antidiskriminierungsrecht (ZAD)*, 2007, 2:5-8).

- K.M. Alenfelder provides the example of an employee dismissed from employment at the age of 45, because he is “too old”. If he had not been dismissed, he could have worked until pension age – 65 years. Average annual wage – €60,000. Maximum loss could be construed as €1,200,000, which he could have earned over the next 20 years. The author also suggests that if he finds another job, the wages from the new job would have to be deducted from the amount of compensation. The employee is entitled to receive the whole sum at once, or on an annual or monthly basis. The author bases his remarks on the case of *Vento v Chief Constable of West Yorkshire* [2003] IRLR 102, in which the court reckoned that the employee’s likelihood of having worked to pension age was 75%. (Alenfelder, K.M. *Remedies and Sanctions*, p. 29).

Why are stricter criteria applied to sanctions?

- Discrimination offends against **human dignity**. Many international legal documents speak about protection of human dignity – the Universal Declaration of Human Rights, the EU Charter of Fundamental Rights and other international documents. The importance of human dignity as the highest constitutional value is highlighted by both legal theoreticians and practitioners.

- The defence of human dignity is the duty of every democratic country, and it cannot be excused on the grounds of the common good. Dignity is a universal human right, which everyone has without exception, regardless of race, nationality, religion, sex, personal attributes, education and public achievements. (A. Vaišvila)

C-303/06 Coleman v Attridge Law and Steve Law

- Advocate General P. Maduro, commenting in the Coleman case, defined the philosophical values of equality of rights, stressing the importance of inviolability of human dignity and the private life of individuals. Maduro states that the concept of these values means that the rights protected by the Directive should be interpreted particularly broadly, and cover discrimination by association with a person who could be the subject of discrimination. “Human dignity entails the recognition of the equal worth of every individual. One’s life is valuable by virtue of the mere fact that one is human, and no life is more or less valuable than another. Therefore, individuals and political institutions must not act in a way that denies the intrinsic importance of every human life .”

- By treating people belonging to these groups less well because of their characteristic, the discriminator prevents them from exercising their autonomy. In essence, by valuing equality and committing ourselves to realising equality through the law, we aim at sustaining for every person the conditions for an autonomous life.” Therefore, sanctions for discrimination must be very strict and effective, because we are talking about breaches of intrinsic human rights and freedoms, and human dignity. For more: Opinion of Advocate General Poiares Maduro, delivered in case 303/06 *Coleman v Attridge Law and Steve Law*.

European Court of Human Rights case law

Cudak v Lithuania, 2010

When an individual is disadvantaged due to a breach of the right to a fair hearing of his case, he or she can request a retrial, representing in principle an appropriate way of redressing the violation .

However, in this case the plaintiff had experienced non-pecuniary damage which the finding of a violation of the Convention in this judgment does not suffice to remedy. The European Court of Human Rights, in assessing the matter on the grounds of justice, ordered payment to the plaintiff of €10,000 compensation for total damages.

European Human Rights Court case law

García Mateos v Spain, 2013

Every country must provide a mechanism, under which victims of discrimination may demand damages and other legal remedies for loss of income. Any legal regulation that blocks the approach of general or administrative courts when issues of redress are not resolved, are in contravention of the EHRC.

Since Spain did not ensure effective protection against discrimination, the EHRC ordered the payment of €16,000 for non-material damages.

European Court of Human Rights case law

Danilenkov and others v Russia, 2009

Every country must ensure the presence of an effective legal system, for both criminal and civil cases, enabling its citizens to defend their rights in the event of discrimination. Individuals who have experienced discrimination must be able to defend their infringed rights in court and to seek damages and other redress.

United Nations Committee on the Elimination of All Forms of Discrimination Against Women – case law

V.K. v Bulgaria, 2011

L.C. v Peru, 2011

I.A. v Belarus, 2011, etc.

Compensation for damage must be proportionate to the violations committed. Where it is established that the prohibition on discrimination has been breached, the victim must receive adequate monetary compensation.

- Measures for defending Rights:
- Court, DGK (Labour Disputes Commission), LGKT (Office of the Equal Opportunities Ombudsman), etc.
- Penal, administrative, civil, etc.

Case law of the Constitutional Court of the Republic of Lithuania

The Constitutional Court of the Republic of Lithuania has stressed more than once that human rights must be defended not pro forma, but for real, against the unjustified actions of both private individuals and governmental institutions. When a victim of discrimination is awarded a **formal amount for pecuniary and non-pecuniary damage, this is formal redress, which is inconsistent with the objectives of the EU directives.**

(e.g. judgement of the Constitutional Court of the Republic of Lithuania, 8 May 2000.)

The effectiveness of sanctions enables the objectives enshrined in the Directives to be genuinely achieved, not just as wishful thinking, but as real redress for transgressions against human rights.