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Remedy for the violation of equal treatment

Theoretical questions, practical answers

Charter of Fundamental Rights

Article 47 – Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy *before a tribunal* in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the *possibility* of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

European Convention on Human Rights

- ❖ ECHR, Article 6 – Right to a fair trial, Article 13 – Right to an effective remedy concerning rights laid down in the Convention, cf. Article 47 of the Charter
- ❖ positive obligations for the government to guarantee the rights specified in the Convention – may go beyond the remedies offered under EU law, but they may not be enforced by court!
- ❖ The relationship between the Charter and the ECHR: Articles 52 and 53 of the Charter
- ❖ Level of protection: judicial interpretation may not restrict or adversely affect human rights and fundamental freedoms as recognised, in their respective fields of application (including the Equal Treatment Act and other provisions transposing the directives!), by Union law, the European Convention for the Protection of Human Rights and Fundamental Freedoms etc.

Relevant Treaty and Directive provisions

- ❖ Article 157 TFEU – equal pay and positive measures, but no provision on remedies
- ❖ Directive 2004/113/EC – gender equality regarding goods and services, Articles 8 to 11
- ❖ Directive 2006/54/EC (recast) – equal treatment directive, Articles 17 to 20, 25

Substantial considerations I.

Recast Equal Treatment Directive

◦ Article 25 Penalties

Member States shall lay down the rules on penalties, and shall take all measures necessary to ensure that they are applied. The penalties, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive.

◦ Article 18: Compensation or reparation

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. Such compensation or reparation may not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive is the refusal to take his/her job application into consideration.

- ◊ Tobler, Christa, Remedies and Sanctions in EC non-discrimination law, EC, 2005

Substantial considerations II.

- ◊ Other legal consequences
 - ◊ Review of legislation
 - ◊ *Test Achat*: conflict between the Directive and the Charter
 - ◊ **positive** measures: Member State's legislation, Article 157
 - ◊ Possible legal consequences according to the Court of Justice of the European Union regarding other protected characteristics: establishment, prohibition, provision of satisfaction, in integrum restitutio, administrative or public fine, (punitive damages?)
 - ◊ *Feryn and Associatia Accept*: Romanian courts could not 'implement' the ECJ's judgement due to retrospective effect

Substantial considerations III.

- EU law does not require national regimes to provide new legal remedies, but the equivalence of remedies afforded under EU and national law, as well as the practical applicability of rights arising from EU law must be ensured.
- The ECJ considers the effectiveness of legal remedy to be of utmost importance in sex discrimination cases. It required national courts to ignore effective pieces of legislation (both substantial and procedural provisions) that limited the claimant's ability to enforce her claim. This applied to the principle of unjust enrichment in *Cotter*, to the upper limit of damages in *Marshall II*, and to the deadline for taking legal action in *Emmott*.
- According to Craig and De Búrca, the prevailing doctrine is that the ECJ expects national courts to analyse the limiting national legal rule pertaining to the case from the perspective of proportionality, and to ignore any such provisions if necessary to ensure the application of EU law.

Substantial considerations IV.

- Remedy to level up or down? Does the discriminated claimant have a right to be treated in a more advantageous manner?
 - *Jonkman* (2006), case pertaining to equal pay:
 - Levelling up, if the criteria determining the amount of pay have not changed, i.e. more pay must be given to the discriminated person(s)
 - If the conditions have changed, any direction is possible: higher / lower pay to all workers

Substantial considerations V.

Labour Code, Article 9(1) –

Article 12(1) – In connection with employment relationships, such as the remuneration of work, the principle of equal treatment must be observed. Remedying the consequences of any breach of this requirement may not result in any violation of, or harm to, the rights of other workers.

Article 82(1) – The employer shall be liable to provide compensation for damages resulting from the wrongful termination of an employment relationship.

(2) Compensation for loss of income from employment payable to the employee **may not exceed** twelve months' absentee pay. UPPER LIMIT!

Article 83(1)(a) At the employee's request the court shall reinstate the employment relationship if it was terminated in violation of the principle of equal treatment.

Substantial considerations VI.

New Civil Code Article 2:51 [Sanctions independent of attributability] (1) A person whose personality rights have been violated shall have the right to demand within the term of limitation – based on the infringement – as appropriate by reference to the circumstances of the case:

- a) a court ruling establishing that there has been an infringement of rights;
- b) to have the infringement discontinued and the perpetrator restrained from further infringement;
- c) that the perpetrator make appropriate restitution and that the perpetrator make an appropriate public disclosure for restitution at his own expense;
- d) the termination of the injurious situation and the restoration of the previous state, and to have the effects of the infringement nullified or deprived of their unlawful nature;
- e) that the perpetrator or his successor surrender the financial advantage acquired by the infringement according to the principle of unjust enrichment.

Article 2:52(1) Any person whose rights relating to personality had been violated shall be entitled to restitution for any non-material violation suffered.

(2) As regards the conditions for the obligation of payment of restitution – such as [...] the cases of exemptions – the rules on liability for damages shall apply, with the proviso that apart from the fact of the infringement no other harm has to be verified for entitlement to restitution.

(3) The court shall determine the amount of restitution in one sum, taking into account the circumstances of the case [...].

Article 2:53 – Any person who suffers any damage from the violation of his personality rights shall have the right to demand compensation from the infringer in accordance with the provisions on liability for damages resulting from unlawful actions.

Substantial considerations VII.

Equal Treatment Act, Article 17/A – If the Authority

has established the violation of the requirement of equal treatment, it may
a) order that the situation constituting a violation of law be eliminated,
b) prohibit the further continuation of the conduct constituting a violation of law,
c) publish its decision establishing the violation of law, so that no party could not be identified, apart from the public data of the perpetrator,
d) impose a fine,
e) apply the legal consequences specified in a separate act.

(5) The amount of the fine can be from fifty thousand to six million Forints.

(6) If the Authority establishes that an employer failed to adopt the equal opportunity plan in violation of its obligations, it shall order the employer to rectify the shortfall – applying the provisions laid down in paragraphs (3) and (4) – and may apply the legal consequences specified in point (c) to (e) of paragraph (1).

Procedural considerations I.

- ❖ Access to justice: more advantageous domestic regulation in general
 - ❖ access to court or administrative procedure, Article 17(1) – Equal Treatment Authority
 - ❖ civil organisations and trade unions as representatives, intervener Article 17(1): on behalf or in support of the victim – with her approval
 - ❖ mandatory legal representation before the regional court and the Curia by non-specialized attorney? – Article 47 of the Charter and Article 6 of the ECHR?
 - ❖ length of procedure – Charter, Article 47
 - ❖ legal aid – Charter, Article 47 – domestic requirements of granting legal aid
 - ❖ limitation deadlines: Article 17(3), domestic rules
 - ❖ preliminary issue: Is the Code of Civil Procedure consistent with the TFEU

Procedural considerations II.

- ❖ Special case of access to administrative justice, transposed more advantageously in Hungary: Equal Treatment Authority
- ❖ Gender Equality (Recast) Directive, Article 20(1):
- ❖ Member States shall designate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex.

Procedural considerations III.

Representation free of problems

Equal Treatment Act, Article 18(1) Unless stipulated otherwise by law, in procedures launched due to the violation of the requirements of equal treatment – including especially personality right lawsuits and labour lawsuits – civil and interest representation organisations, and the Authority may act as legal representative with the approval of the victim. ...

Procedural considerations IV.

- ❖ Intervening is problematic, unless in an administrative review with the Equal Treatment Authority, while
- ❖ Code of Civil Procedure, Article 54(1) Persons having an interest in the outcome of a lawsuit between two other persons may intervene in the lawsuit – before the court of first instance retires to adopt its judgement – to promote the victory of the party of the same interest.

Procedural considerations VI.

The European Court of Human Rights often holds Member States liable for denying preliminary questions, if it violates the provisions of Article 267(3) TFEU. In *Schipani v Italy* (21 July 2015), the ECtHR reaffirmed the principles of its earlier judgements, arguing that rejection without any justification is inconsistent with Article 6 ECHR granting the right to a fair trial.

The ECtHR sets forth 'objective' criteria, while the ECJ may ignore the obligation in certain cases, e.g. *acte clair*.

Article 267(3) TFEU: Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

Domestic regulation is less advantageous: Article 155/A of the Code of Civil Procedure does not include the latter provision.

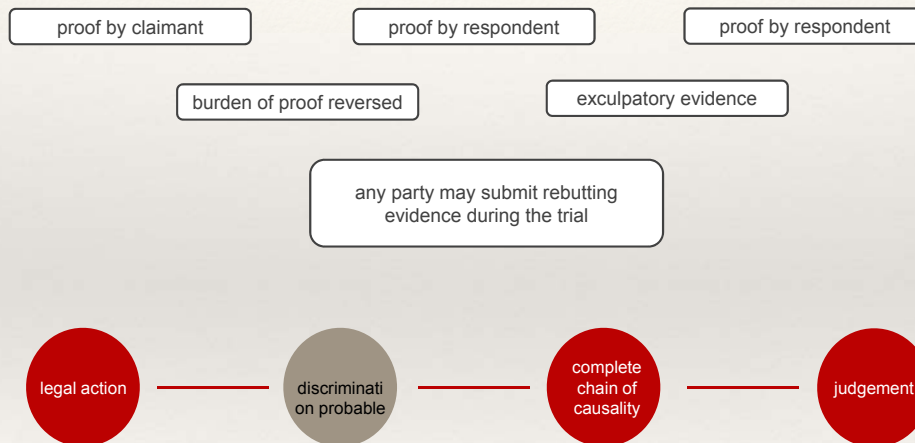
Access to information, evidence

- ❖ Most important practical problem: *Kelly* and *Meister* (intersectional)
- ❖ *Danfoss*: the lack of transparency in exercising employer's rights make judicial review impossible
- ❖ total or partial lack of information (*Kelly*: summarized data is sufficient)
- ❖ advantageous domestic legal background: Code of Civil Procedure, Article 190(2) Upon request by the party presenting evidence, the court may order the adverse party to submit a document in its possession which it would be obliged to release or issue under the rules of civil law. The adverse party shall be subject to this obligation, in particular, if the document was issued in the interest of the party presenting evidence, it certifies a legal relationship relating to that party, or relates to any negotiations concerning such a legal relationship. (3) If the document is in the possession of a person who is not a party to the lawsuit, this person shall be heard as a witness and shall be required to present the document during the hearing.

Interesting details

- Reversal of the burden of proof – Article 19
- Orlagh O'Farrell and Lilla Farkas, *Reversing the burden of proof: Practical dilemmas at the European and national levels*, EC, 2014.
- Terlouw, Ashley, et al, *Access to Justice—A Sociological Study on Cases of Discrimination in the EU* – Fundamental Rights Agency, 2011

Exculpatory system – analogous with liability for damages



Weak point: comparator person/group

- The basis for establishing causality
- Discrimination is not a response to the acts of a given person, it is an often involuntary reaction to a protected characteristic. (Laurence Lustgarten)
- Hidden direct discrimination (*Nikoloudi, Maruko*)
- Stereotype-based justification: gender roles may have negative impacts on both women and men – see case-law on affirmative actions, e.g. *Lommers, Griesmar*
- Comparison is not a required fact: pregnancy, harassment, acknowledgement / admission