

EU Gender Equality Law -

Remedies and Sanctions in Sex Discrimination cases

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Florence 5th October 2017



This training session is funded under the "Rights, Equality and Citizenship Programme 2014-2020" of the European Commission.

Legislative Context

- Art 18 Directive 2006/54/EC (Recast Directive)
 - *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*
 - *It must be dissuasive and proportionate*
 - *Cannot be restricted by an upper limit*
- Article 288 TFEU requires Member States to achieve result envisaged by a Directive

Legislative Context

- Article 25 Recast Directive:
 - Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive.
 - The penalties, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive.

National Procedural Autonomy

- In the absence of harmonization EU does not provide a scheme of procedures and remedies
- Rights conferred by EU law must be exercised before national courts through national procedural rules
- Remedies available for infringement of EU rights are those prescribed in the national legal order

Effectiveness and Equivalence

- The jurisprudence of the CJEU has qualified the principle of National Procedural Autonomy
- National rules must comply with the principles of effectiveness and equivalence, or non-discrimination
- This applies to: -
 - Procedures,
 - Choice of Courts having jurisdiction,
 - Remedies

Principle of Effectiveness

- Von Colson:
 - Member States are free to choose between different options for redressing discrimination
 - Member States are not required to provide for mandatory orders
 - Where compensation is the option chosen it must have a deterrent effect and must in any event be adequate in relation to the damage sustained

Effective Sanctions cont..

- Dekker: -

“Although full implementation of the Directive does not require any specific form of sanction for unlawful discrimination, it does entail that that sanction be such as to guarantee real and effective protection”

Effective Sanctions cont...

- Marshall II:
- The fixing of an upper limit on compensation cannot, by definition, constitute proper implementation of the Directive,
- It is not consistent with the requirement of ensuring real equality of opportunity through adequate reparation for the loss and damage sustained as a result of discriminatory dismissal.
- Also held that the awarding of interest on an award cannot be excluded

Equivalence

- *Pontin v T-Comalux*
 - Less favourable rules cannot be applied in cases based on EU rights than those applying in equivalent domestic actions
 - However, Member States are not required to extend their most favourable rules to all actions brought in the field of employment law

Equivalence

- *Camacho*

Article 25 of Directive 2006/54 allows, but does not require, Member States to provide for punitive damages.

Where a Member State decides to adopt measures allowing the award of punitive damages it can set the criteria for determining the extent of the penalty, provided that the principles of equivalence and effectiveness are respected

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)

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

Conclusion

- The selection of a mode of redress is a matter for the national legal order
- Discretion is not unfettered. It must be adequate to redress the wrong suffered
- Remedies may not be less favourable and procedures cannot be more stringent than corresponding provisions in national law

Conclusion Cont..

- It could never be acceptable for the advantage which accrued from an act of discrimination to outweigh the cost of redress.
- 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