

EU Gender Equality Law – Remedies and Sanctions in Sex Discrimination Cases

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Introduction

This paper will consider the general principles of Union Law applicable to the provision of redress where the right to equal treatment has been infringed. It is proposed to trace the development of these principles and their application in cases involving sex discrimination in the case law of the CJEU. The current state of the law applicable to the awarding of redress will then be considered.

Legislative Provisions

Article 18 of Directive 2006/54/EC of 5th July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) provides as follows: -

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 because 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.

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Article 25 of that Directive is also relevant. It provides: -

Penalties

Member States shall lay down the rules on penalties 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 penalties, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 5 October 2005 at the latest and shall notify it without delay of any subsequent amendment affecting them.

National Procedural Autonomy

These provisions require the Member States to prescribe the sanctions applicable for contraventions of national law adopted to transpose the Directive. Within the principle of national procedural autonomy, it is for the national legal systems to designate the courts having jurisdiction and to determine the means of enforcing rights derived from the law of the Union². Thus, in the absence of harmonizing measures, matters of procedure and remedies for a breach of Union law are primarily within the competence of the Member States.

Principles of effectiveness and Equivalence

The Union law requirements of proportionality and adequacy, embodied in the principles of effectiveness and equivalence, are also relevant. They further limit the parameters within which Member States are free to act in prescribing the range of remedies available for breaches of Union law. What is clearly required

² See Case C-6/60 Humblet v Belgium [1960] ECR 559,

by the application of these principles is that the remedy granted is adequate and effective and in proportion to the wrong suffered.

Adequacy of Redress.

The purpose of redress for actionable civil wrong in most jurisdictions is to place the plaintiff in the position that he / she would have been in had the wrongdoing not occurred. Often, this objective can only be achieved by providing redress by way of mandatory orders. Where a worker is dismissed in circumstances amounting to discrimination the most effective form of redress is an order requiring his or her reinstatement. Likewise, where a job applicant is rejected on discriminatory grounds the best remedy is an order directing the employer to offer the victim of discrimination a contract of employment.

In many cases, mandatory orders may not be feasible for a variety of reasons. The complainant worker may no longer wish to work for the employer who discriminated against him or her. In the case of dismissal, the employment relationship may have so broken down as to render an order for reinstatement impracticable. Further, for reasons of policy, some Member States do not provide for the making of such mandatory orders in employment cases.

Mandatory Orders

The question of whether Member States are required to provide for mandatory orders by way of redress was considered by the Court of Justice in Case C-14/83 *Von Colson and Kamann v Land Nordrhein – Westfalen*³.

This case concerned the refusal of the German prison authorities to employ two women on grounds of their gender. They had applied for two posts as social workers at an all male prison. Two male candidates were appointed although

³ [1984] ECR 1819

they were less qualified than the Complainants. They brought proceedings against the prison administration claiming that they had suffered discrimination on grounds of their sex. By way of redress they sought to be appointed to the posts at issue or, in the alternative, compensation in an amount equal to six months' salary.

The Labour Court which heard the case found that discrimination had occurred but found that the transposing legislation under which the claim was brought did not allow for the remedies sought. Rather, in the circumstances of the particular case, it only allowed for the reimbursement of expenses incurred in travelling to the interview. The National Court sought a preliminary ruling on whether the Directive specifically required that the discrimination suffered by the Complainants be remedied by an order directing their appointment to the posts at issue. The CJEU held that it did not. But it did rule that the limitation on compensation to an amount equal to the expenses incurred was inconsistent with the Directive.

In dealing with the question of whether Member States are required to introduce provisions allowing for mandatory orders the Court said: -

Article 6 requires member states to introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by discrimination to pursue their claims by judicial process. It follows from the provision that member states are required to adopt measures which are sufficiently effective to achieve the objective of the directive and to ensure that those measures may in fact be relied on before the national courts by the persons concerned. Such measures may include, for example, provisions requiring the employer to offer a post to the candidate discriminated against or giving the candidate adequate financial compensation, backed up where

necessary by a system of fines. However, the directive does not prescribe a specific sanction; it leaves member states free to choose between the different solutions suitable for achieving its objective. ⁴

Effectiveness

However, in dealing with the adequacy of the compensation available, the Court emphatically rejected the notion that Member States had an unfettered right to determine the rules applicable in deciding on quantum. The Court said the following: -⁵

It is impossible to establish real equality of opportunity without an appropriate system of sanctions. That follows not only from the actual purpose of the directive but more specifically from article 6 thereof which, by granting applicants for a post who have been discriminated against recourse to the courts, acknowledges that those candidates have rights of which they may avail themselves before the courts.

Although, as has been stated in the reply to question 1, 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 judicial protection. Moreover it must also have a real deterrent effect on the employer. It follows that where a member state chooses to penalize the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained. ⁶

⁴ At paragraph 18 of the Judgment

⁵ At Paragraphs 22, 23 and 24 of the Judgment.

⁶ The import of this passage is now incorporated in the text of Article 17 of the Directive.

In consequence, it appears that national provisions limiting the right to compensation of persons who have been discriminated against as regards access to employment to a purely nominal amount, such as, for example, the reimbursement of expenses incurred by them in submitting their application, would not satisfy the requirements of an effective transposition of the directive.

The effectiveness of available remedies arose again in case C-177/88

*Dekker v Stichting Vormingscentrum voor Jonge Volwassenen*⁷

This case concerned the refusal of an employer to employ a woman who was pregnant at the time that she applied for employment. She was found suitable by the employer but was nonetheless refused employment because the employer could not recover from their insurers sums they would have to pay her whilst she was on maternity leave, as her absence was foreseeable at the time her employment would begin.

The Dutch court upheld her claim of discrimination but she was refused compensation by application of a provision of national law under which the employer could claim that the position which it adopted was justified.

The CJEU confirmed that the refusal to employ Ms Dekker on grounds of her pregnancy constituted direct discrimination on grounds of her sex. In dealing with the question of redress, the court pointed out that although the Directive allows member states the freedom to choose one of various methods of achieving its objective in relation to sanctions for breach of the prohibition of discrimination, it nevertheless requires that where a member state uses a civil law remedy, it must be sufficient to impose full liability on the discriminator and that no account can be taken of grounds for justification provided under national law.

⁷ [1990] ECR I-3941

Equivalence

Remedies available for a contravention of a right derived from the Law of the EU cannot be less favourable than those available in domestic law for corresponding causes of action. Case C-63/08 *Pontin v T-Comalux SA*⁸ concerned a provision of Luxemburg law which provided that a woman dismissed on grounds of pregnancy could obtain a declaration of nullity and an order for reinstatement but not compensation. Compensation could be ordered in cases of wrongful dismissal where the action was based on domestic law. An issue also arose as to whether a requirement that the action be initiated within 15 days of the dismissal was compatible with EU law.

The Court first pointed out that a short time limit within which to submit a claim of discriminatory dismissal must be submitted (15 days) offended against the principle of effectiveness in that it made it excessively difficult to bring a claim in certain circumstances. In finding that the restriction on the right to recover damages offended against the principle of equivalence, the Court said:

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The principle of equivalence requires that the national rule at issue be applied without distinction, whether the infringement alleged is of Community law or national law, where the purpose and cause of action are similar

The Court went on to point out that the principle of equivalence did not require Member States to extend their most favourable rules to all actions brought in the field of employment law

⁸ [2009] ECR I-10467

Capping of Awards

The question of whether Member States could place a monetary cap on awards of compensation arose in case C-271/91 *Marshall v Southampton and South West Area Health Authority II*⁹. Mrs Marshall had claimed that a rule in the UK which required women to retire at an earlier age than men was discriminatory. She succeeded in her claim and it was held that her forced retirement amounted to a discriminatory dismissal. The Tribunal which heard the case at first instance assessed compensation at GB£18,405, which included interest of £7,710.

However, the relevant UK legislation capped the amount of compensation which could be awarded by the Tribunal at £6,250. Moreover, it was unclear whether the Tribunal had power to award interest. The UK Supreme Court (House of Lords) sought a preliminary ruling on whether a Complainant was entitled to full reparation for the loss which she suffered in consequence of the discriminatory dismissal. In its judgment, the Court answered this question as follows: -

In the event of discriminatory dismissal contrary to Article 5(1) of the Directive, a situation of equality could not be restored without either reinstating the victim of discrimination or, in the alternative, granting financial compensation for the loss and damage sustained.

Where financial compensation is the measure adopted in order to achieve the objective indicated above, it must be adequate, in that it must enable the loss and damage actually sustained as a result of the

⁹ [1993] ECR I – 4367.

*discriminatory dismissal to be made good in full in accordance with the applicable national rules.*¹⁰

In addressing the specific question of whether a provision on capping was permissible, the Court ruled as follows: -

*It also follows from that interpretation that the fixing of an upper limit of the kind at issue in the main proceedings cannot, by definition, constitute proper implementation of Article 6 of the Directive, since it limits the amount of compensation a priori to a level which is not necessarily 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.*¹¹

On the question of interest on the award the Court had this to say: -¹²

*With regard to the second part of the second question relating to the award of interest, suffice it to say that full compensation for the loss and damage sustained as a result of discriminatory dismissal cannot leave out of account factors, such as the effluxion of time, which may in fact reduce its value. The award of interest, in accordance with the applicable national rules, must therefore be regarded as an essential component of compensation for the purposes of restoring real equality of treatment.*¹³

¹⁰ At Par 23,24,25 and 26

¹¹ Paragraph 30

¹² At Paragraph 30

¹³ It should be noted that in C-66/95 *R v Secretary of State for Social Security ex parte Eunice Sutton* [1997] ECR I –2163, the Court of Justice ruled that the same considerations do not apply in the case of arrears of social security payments. The Court held that in that case arrears of social security payments were not compensatory in nature and so the reasoning in *Marshall* did not apply and there was no requirement to pay interest on the basis of either Directive 76/207 or Directive 79/7.

Time Limits

The principles of effectiveness and equivalence also apply to rules or procedures applicable in determining redress where the right to equal treatment has been infringed. The CJEU has held that such rules must not be less favourable than those available in actions grounded on the breach of a corresponding provision of domestic law, nor can they make the exercise of Union law rights excessively difficult or impossible to pursue.

This approach is illustrated by the decision in *Levez v T.H. Jennings (Harlow Pools) Ltd.*¹⁴ in which the imposition of statutory time limits on the bringing of claims was at issue. Here the Complainant had been employed by the Respondent as a betting shop manager in February 1991 at a salary of £10,000 per annum. In December 1991, she was appointed manager of another shop replacing a man who had been paid £11,400 per annum. On being appointed to manage this shop the Complainant's salary was increased to £10,800. The Respondent falsely told the Complainant that this was the salary paid to her male predecessor. However, in April 1992 the Complainant's pay was increased to £11,400 per annum.

On leaving the job in 1993 the Complainant discovered that until April 1992 she had been paid less than her male predecessor. The Complainant referred a claim for equal pay in respect of the period between February 1991 (when she commenced employment with the Respondent) to April 1992 when her salary was brought into line with that of her predecessor. Her claim was lodged on 17th September 1993.

¹⁴ [1998] ECR I – 7835.

The relevant UK legislation provided that a successful claimant for equal pay could not be awarded arrears of remuneration in respect of a time earlier than two years before the date on which the proceedings were initiated. On that basis Ms Levez could only recover arrears accruing after 17th September 1991. The rule at issue applied to claims for equal pay but not to other claims in domestic law. Moreover, the relevant legislation did not give the Court discretion to extend the time limit in cases of fraud or misrepresentation.

In considering the questions raised the CJEU first referred to its established case law on the question of national procedural autonomy and the principles of equivalence and effectiveness. The Court went on to say that it is compatible with Union law to prescribe reasonable limitation periods in the interest of legal certainty, provided that they are not less favourable than those applicable to similar actions in national law or make the exercise of Union law rights virtually impossible or excessively difficult.

While holding that a two-year limitation period was not in itself objectionable, the Court went on to consider if it offended against the principle of effectiveness case. In holding that on the facts of the instant case the rule at issue did offend against the principle of effectiveness the Court said the following: -

In short, to allow an employer to rely on a national rule such as the rule at issue would, in the circumstances of the case before the national court, be manifestly incompatible with the principle of effectiveness referred to above. Application of the rule at issue is likely, in the circumstances of the present case, to make it virtually impossible or excessively difficult to obtain arrears of remuneration in respect of sex discrimination. It is plain that the ultimate effect of this rule would be to facilitate the breach of Union law by an employer whose deceit caused

*the employee's delay in bringing proceedings for enforcement of the principle of equal pay.*¹⁵

In defence of the impugned provision the UK Government had pointed out that the Complainant could have brought proceedings for breach of contract in domestic law before the County Court where she could have claimed full damages by reason of the fact that her employer's deceit had prevented her from bringing her claim earlier. The Court pointed out that the principle of equivalence requires that the rule at issue be applied without distinction, whether the infringement alleged is of Union law or national law where the purpose and cause of action are similar. The Court of Justice then left over to the National Court responsibility for deciding if the impugned rule was applicable to similar domestic actions.¹⁶

In *Nils Draehmpaehl v Urania Immobilienservice OHG*¹⁷, an issue arose concerning the imposition of a limit of either three months' salary or six months' salary on an award of compensation for sex discrimination. Here the Order for Reference expressly stated that other provisions of civil domestic law did not impose such a ceiling.

In ruling that the ceiling at issue did offend against the principle of equivalence the Court said the following: -¹⁸

In choosing the appropriate solution for guaranteeing that the objective of the Directive is attained, the Member States must ensure that infringements of Community law are penalized under conditions, both

¹⁵ Paragraphs 30, 31, and 32 of the Judgment.

¹⁶ On this same point see the decision of the Court of Justice in *Preston and Others v Wolverhampton Health Care NHS* [2000] ECR I 3201

¹⁷ [1997] ECR I-2197

¹⁸ Paragraphs 28, 29 and 30.

procedural and substantive, which are analogous to those applicable to infringements of domestic law of a similar nature and importance (Case 68/88 Commission v Greece 1989 ECR 2965, paragraph 24).

It follows from the foregoing that provisions of domestic law which, unlike other provisions of domestic civil law and labour law, prescribe an upper limit of three months' salary for the compensation which may be obtained in the event of discrimination on grounds of sex in the making of an appointment do not fulfil those requirements.¹⁹

Punitive Damages

In case C-407/14 *Arjona Camacho v Securitas Seguridad Espana SA*²⁰ the CJEU gave a preliminary ruling, at the request of a Spanish Court, on whether the requirement to provide a sanction that was dissuasive in addition to real, effective and proportionate obliged a court to provide for punitive damages. The reference arose in the context of a claim by a victim of discrimination for reasonable punitive damages in addition to compensation amounting to full reparation for the loss and damage suffered. The concept of punitive damages did not exist in Spanish law.

In its ruling the Court held that Member States are allowed, but not required, to provide from an award of punitive damages. The Court said: -

In those circumstances, in the absence of a provision of national law making possible the payment of punitive damages to a person injured by discrimination on grounds of sex, art.25 of Directive 2006/54 does not

¹⁹ It should also be noted that the Court went on to hold that in cases where because of his or her qualification the Complainant would not have obtained the post even in the absence of discrimination, a ceiling of three months pay on the quantum of compensation was permissible.

²⁰ [2016] 2 CMLR 34

provide that a national court can on its own require the person responsible for the discrimination to pay such damages²¹.

The Court went on to hold that where a Member State provides for an award of punitive damages it is for the national legal system to set the criteria for establishing the extent of any award having regard to the principles of equivalence and effectiveness²².

Limits on the Right to Redress.

As has been seen, rules of domestic law which limit the right to redress and are applicable solely to actions grounded on Union law rights will be struck down as infringing the principle of equivalence. What, however, is the position if rules of domestic law of general application are invoked in order to limit or deny a right to redress for a breach of a Union law right?

In case C-286/ 85 Cotter and McDermott v Minister for Social Welfare and the Attorney General²³ the CJEU had to decide if a rule of Irish law which precludes unjust enrichment could be invoked to defeat the Complainant's claim for equal social security benefits as provided for in Directive 79/7/EC.

Under the Irish social welfare code married men were automatically paid an additional allowance for their spouse without having to prove dependency. Married women could only obtain the additional allowance on proof of dependency. Moreover, married women were paid at a lower rate than married men and the benefit was payable for a shorter period. Ireland had failed to implement the Directive on time and continued to apply the discriminatory regime. In reliance on the direct effect of the Directive the Complainants

²¹ Par 43

²² Par 44

²³ [1991] ECR I - 1155

sought the same treatment as men and in particular sought payment of the additional allowance in respect of their spouses.

The Irish High Court held that to pay the Complainants an allowance for their husbands who were not actually dependant on them would be unfair and would offend against the common law doctrine of unjust enrichment. It therefore held that they were not entitled to the redress which they sought. The Complainants appealed to the Supreme Court which made a referral to the Court of Justice for a preliminary ruling on whether that doctrine could be relied upon in the instant case.

The Court of Justice emphatically rejected the Irish Government's arguments on this point. It said: ⁻²⁴

According to the Irish Government, to grant such a right to married women could, in certain circumstances, result in double payment of the same increases to the same families, in particular, where both spouses received social security benefits during the period at issue. Such payments would be manifestly absurd and would infringe the prohibition on unjust enrichment laid down by national law.

To permit reliance on that prohibition would enable the national authorities to use their own unlawful conduct as a ground for depriving Article 4(1) of the directive of its full effect.

The reply to the first question must therefore be that Article 4(1) of the directive must be interpreted as meaning that if, after the expiry of the period allowed for implementation of the directive, married men have

²⁴ At Paragraph 20, 21 and 22.

*automatically received increases in social security benefits in respect of a spouse and children deemed to be dependants without having to prove actual dependency, married women without actual dependants are entitled to those increases even if in some circumstances that will result in double payment of the increases.*²⁵

Conclusion

In *Von Colson* and *Marshall II* the Court addressed what could properly be described as the principles of adequacy and proportionality. That is to say, the remedy must be adequate to redress the damage suffered by the Complainant. In *Marshall II* Advocate General Van Gerven defined adequate compensation as that which “*is sufficiently high to act as an effective, proportionate and dissuasive sanction*”.²⁶ This, he suggested, must be distinguished from full reparation²⁷. However, the Court departed from this analysis and held that, in the case of discriminatory dismissal, only full reinstatement of the person discriminated against or, alternatively, full reparation for the damage suffered can restore a situation of equality and meet the requirements underlying the notion of an adequate sanction²⁸.

The Court has also consistently pointed out that redress must be effective in attaining the objective of the Directive which is to eliminate discrimination. Hence the sanction must have a real deterrent effect since it could never be acceptable for the advantage which accrue from an act of discrimination to outweigh the cost of any redress which might be awarded. This could be

²⁵ For further examples of the limitations placed by the Court of justice on the principle of national procedural autonomy, see the Judgement in *Dekker v Stichting voor Volwassenen (VJV) Plus* [1990] 1-ECR 3941 where it was held that a right to redress could not be dependant on a general provision of Dutch law which required proof of fault in civil cases. The Court made a similar finding in *Draehmpaehl.*

²⁶ Paragraph 18 of his Opinion.

²⁷ Ibid; at Paragraph 17.

²⁸ See Paragraphs 25 and 26 of the Judgment in *Marshall*, quoted above.

problematic in the case of large and financially strong enterprises where only a significantly large award of compensation would act as a real and effective deterrent. In such cases, it is suggested, the quantum of the award would have to be balanced by considerations of proportionality. The need for such a balance was adverted to by Court of Justice in Case 212/04 *Adeneler and others v Ellinikos Organismos Galaktos*²⁹ (involving Directive 1999/70/EC on Fixed-term work). Here the Court said : -

Thus, where, as in the present case, Union law does not lay down any specific sanctions should instances of abuse nevertheless be established, it is incumbent on the national authorities to adopt appropriate measures to deal with such a situation. Those measures must be not only proportionate, but also sufficiently effective and a sufficient deterrent to ensure that the provisions adopted pursuant to the Framework Agreement are fully effective.

It is also clear that special rules which are not applicable to similar domestic actions, cannot be applied to limit the quantum of compensation which can be awarded in cases of discrimination. This is of significance in many jurisdictions which place an upper limit on the monetary jurisdiction of special tribunals established to determine claims based on the breach of Union law rights. This has necessitated changes in the monetary jurisdictions of such tribunals or the granting of coordinate jurisdiction in such cases to Courts with unlimited jurisdiction³⁰.

²⁹ Case C-212/04

³⁰ In Ireland, the Workplace Relations Commission is the body having first instance jurisdiction in claims under the Employment equality Acts 1998 and 2015. The monetary jurisdiction of the Commission is limited to the equivalent of twice the Complainant's annual salary in an equal treatment case and three years' arrears in an equal pay case. In domestic law, there is no upper limit on the damages which can be awarded in tort and arrears due on foot of a contract can be recovered for six years. The Circuit Court has now been given coordinate jurisdiction in gender equality cases and can exercise unlimited monetary jurisdiction in equal treatment cases and can award arrears of up to six years in equal pay cases in line with the Irish statute of limitations.

Finally, the authorities indicate that where rules of procedure or rules of domestic law operate to impair the effectiveness of Union law by limiting a right to redress such rules must not be followed by national courts and tribunals. This approach is consistent with the jurisprudence of the CJEU in cases concerning the supremacy of Union law³¹.

It is thus clear that rules such as those which limit compensation to economic loss are incompatible with the Directive and must be set aside by national courts³². Arguably, rules or practices which require a plaintiff to mitigate his or her loss are also incompatible with the object pursued by the Directive if they have the effect of reducing the Respondent liability for his or her wrongdoing. There is, however, no authority directly on that point.

What is now clear beyond argument is that redress must provide full reparation for the wrong suffered. Where compensation is the mode of redress provided, it should not be confined to economic loss. Where necessary, in order to act as a deterrent, it should include an additional sum to mark the injury to the Complainant's feelings arising from the denial of their fundamental right not to be discriminated against. Finally, where arrears of pay is ordered consideration should be given to the addition of interest so as to ensure that the award is adequate in current value terms and to avoid any residual benefit to the Respondent.

³¹ See in particular the decision of the Court of Justice in *Amministrazione delle Finanze Stato v Simmenthal* [1978] ECR 679

³² For example, at common law compensation for wrongful dismissal cannot take account of such matters as the stress and anxiety caused by the dismissal

