

REMEDIES AND SANCTIONS IN DISCRIMINATION CASES

ZDENĚK KÜHN



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

Sources of legislation — EU law

- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation
- Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services

Sources of legislation – Czech Republic's law

- Act No. 198/2009 Coll. on equal treatment and remedies against discrimination and amending certain other acts (Anti-Discrimination Law)
- Nature of legislation – **private law**
- Autonomy of the purely personal sphere
- Relationship to the constitutional system
- Relationship to public law

Material satisfaction and CJEU case law

- As early as the beginning of the 1980s, CJEU formulated the general principle that 1) sanctions in national law for violating EU law must be effective and dissuasive as well as proportionate and that 2) obligations under Directives must not be penalized with a higher degree of severity than provided for in national law in similar cases (*principle of equivalence*).

(CJEU judgement of 10 April 1984, *Sabine von Colson*, 14/83 (26))

Directives

- **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**

Preamble (6): Harassment and sexual harassment are contrary to the principle of equal treatment between men and women and constitute discrimination on grounds of sex for the purposes of this Directive. These forms of discrimination occur not only in the workplace, but also in the context of access to employment, vocational training and promotion. They should therefore be prohibited and should be subject to effective, proportionate and dissuasive penalties.

Preamble (33): It has been clearly established by the Court of Justice that in order to be effective, the principle of equal treatment implies that the compensation awarded for any breach must be adequate in relation to the damage sustained. It is therefore appropriate to exclude the fixing of any prior upper limit for such compensation, except where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive was the refusal to take his/her job application into consideration.

Preamble (35): Member States should provide for effective, proportionate and dissuasive penalties for breaches of the obligations under this Directive.

Directives

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

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.

Relationship of the Anti-Discrimination Law to the Labour Code

- Section 16 Subsection 1 of the Labour Code: Employers shall ensure equal treatment for all employees as regards employee working conditions, remuneration for work and other emoluments of monetary value, professional training and opportunities for career advancement and promotion. Section 16 Subsection 2 of the Labour Code prohibits “**any discrimination**” in employment [similarly to Section 13 (2) (b) of the Labour Code].
- The Labour Code does not regulate any private-law remedies against discrimination available to employees. Under Section 17 it is explicitly specified that remedies against discrimination in employment are governed by the Anti-Discrimination Law.

Relationship of the Anti-Discrimination Law to the Civil Code

- *Lex specialis derogat generali* as a relationship of norms, not a relationship of entire laws (acts / codes)
- The Civil Code deals with discrimination as well (Section 2957)
- Section 82 of the Civil Code: An individual whose personality rights have been affected has the right to claim that the unlawful interference be refrained from or its consequence remedied (Subsection 1) = wording comparable to Section 10 of the Anti-Discrimination Law
- Material satisfaction is the most complicated issue – see below

Relationship of the Anti-Discrimination Law to the Civil Code 2012

- It cannot be argued that the Anti-Discrimination Law as a whole contains specific provisions on discrimination and claims arising out of it.
- Another possibility for interpretation is that Sections 2956 and 2957 would apply only in areas of discrimination that do not fall within the scope of the Anti-Discrimination Law. Section 2957 explicitly applies to the same grounds as the Anti-Discrimination Law (sex, health condition, ethnicity, creed “or other similarly serious reasons“), and thus the different scope of the Civil Code cannot be defined on the basis of discrimination grounds. The only logical argument would be that the Civil Code would apply to discrimination not falling within the material scope of the Anti-Discrimination Law, which is defined under Section 1 Subsection 1 of the Anti-Discrimination Law => absurd, such interpretation would mean that Sections 2956 and 2957 of the Civil Code would apply only to common interpersonal relationships, disputes between neighbours, physical attacks on the street by another individual (but not by security guards at a disco entrance) etc.

Two options for solving the relationship between the Anti-Discrimination Law and the Civil Code 2012

Option I

The Civil Code must be perceived as *lex specialis* with respect to the Anti-Discrimination Law to the extent to which the Civil Code regulates compensation of non-pecuniary harm in money (in particular Sections 2956 and 2957). This interpretation would mean that Section 10 Subsection 2 of the Anti-Discrimination Law would not be applicable with respect to the full scope of relationships under civil law governed by the Civil Code. As a result, Section 10 Subsection 2 of the Anti-Discrimination Law would be applicable only to claims under civil law falling outside of the scope of the Civil Code, in particular employment and civil service.

X applicants making a financial claim under Sections 2956 and 2957 of the Civil Code will be in a better position compared to e.g. applicants in relationships under employment law, making a claim under Section 10 Subsection 2 of the Anti-Discrimination Law.

Option II

Interpretation in compliance with EU law – interpretation of Section 10 Subsection 2 of the Anti-Discrimination Law comparable to the wording of Sections 2956 and 2957 of the Civil Code (also see below)

Non-pecuniary harm

- Section 10 of the Anti-Discrimination Law X Section 2956: Where a tortfeasor incurs a duty to compensate an individual for harm to his natural right protected by the provisions of Book One of this Act, he shall compensate the damage as well as non-pecuniary harm thus caused; compensation of the non-pecuniary harm shall also include mental suffering. The new Civil Code shifted the method of compensation of the non-pecuniary harm and – unlike the previous legislation – it emphasized that “satisfaction must be provided in money unless real and sufficiently effective satisfaction for the harm incurred can provide for satisfaction otherwise“ (Section 2951/2).

Increased material satisfaction

- Under Section 2957 the manner and amount of adequate satisfaction must be determined so as to also compensate for the circumstances deserving special consideration. These circumstances shall mean causing *intentional* harm, including a result of discriminating the victim with regard to the victim's sex, health condition, ethnicity, creed, or other similarly serious reasons.
 - Compare resolution of the Supreme Court of 22 August 2014, file reference 30 Cdo 3157/2013, which rejects the argument that Section 2957 introduces punitive damages to Czech law. According to the Supreme Court, this provision reflects the principle that “in case of a higher degree of culpability, the unlawfulness of any infringement of personality rights is always more severe (and so is the wrong for which satisfaction is to be provided), and therefore must result in a corresponding form and amount of satisfaction to be provided. And thus, it does not allow for punishment under private law. Instead, it provides for determining a form and amount of satisfaction corresponding to the harm caused, made more severe by special circumstances.”