

Remedies and sanctions in sex discrimination cases

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Overview

- I. Introduction
- II. EU regulations
- III. Interpretation by the CJEU
- IV. Individual aspects
- V. Summary

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I. Introduction

1. Title and content of my lecture
2. Sanction certainty

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I. Introduction

1. Title and content of my lecture

"**Remedies and sanctions** in sex discrimination cases".

- Remedies
- Sanctions (penalties)

-> means: legal consequences

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I. Introduction

2. Sanction certainty

- ECJ 10. 4. 1984, Case 14/83, *von Colson and Kamann*
"(para 22) ... true equality of opportunity (cannot) be achieved **without** an appropriate **sanction regime** ..."
- Directive 2006/54/EC
"(Rec 29) The ... **enforcement of the obligations** under this Directive is **essential for the effective implementation of the** principle of equal treatment."

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II. EU rules

1. **Contracts**
 - Treaty on European Union (TEU)
 - Treaty on the Functioning of the European Union (TFEU)
2. **Charter of Fundamental Rights**
 - Charter of Fundamental Rights of the European Union (CFR)
3. **Directives**
 - 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 (recast) (RL 2006/54/EC)

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II. EU rules

1. Contracts

- **Treaty on European Union (TEU)**

Art 2 and 3 (contain commitments to non-discrimination and equality between women and men).

Art 19

"(1) ... Member States shall provide the necessary legal remedies to ensure **effective judicial protection** in the areas covered by Union law. ..."

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II. EU rules

1. Contracts

- **Treaty on the Functioning of the European Union (TFEU)**

Art 19 (ex-Art 13 TEC)

"(1) ... the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate **action**, within the limits of the powers conferred by the Treaties upon the Union, **to combat discrimination based on sex, ...**".

Art 157 (ex-Art 141 TEC)

"3. The European Parliament and the Council shall adopt ... **measures to ensure** the application of the principle of **equal opportunities and equal treatment between men and women ...**".

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II. EU rules

2. Charter of Fundamental Rights (CFR)

Art 47 (Right to an effective remedy and to a fair trial)

"Any person whose rights or freedoms guaranteed by Union law have been infringed shall have the **right to an effective remedy before a tribunal in accordance with the conditions laid down in this Article.**

Everyone has a **right to have** his or her case heard by an independent and impartial **tribunal** previously established by law, in a **fair trial**, in public and within a reasonable time. ..."

II. EU rules

3. Directives

Directive 2006/54/EC *)

Recitals 6 and 35

Art 17, 18, 19, 25

- *) Replaced, as of 16 August 2009, Council **Directive 76/207/EEC** of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

II. EU rules

3. Directives

First, a brief review of **Directive 76/207/EEC**:

Art 6

"Member States shall introduce into their **national legal systems such measures as are necessary to enable persons** who consider themselves wronged because the principle of equal treatment as defined in Articles 3, 4 and 5 has not been applied to them to pursue **their claims by judicial process** after possible recourse to other competent authorities."

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II. EU rules

3. Directives

DIRECTIVE 2006/54/EC

(**Rec 6**) Harassment of a person and sexual harassment constitute a breach of the principle of equal treatment between men and women and are therefore to be considered discrimination on grounds of sex within the meaning of this Directive. ... These forms of discrimination should therefore be prohibited and provision should be made for **effective, proportionate and dissuasive sanctions**

(**Rec 35**) Member States should lay down **effective, proportionate and dissuasive sanctions** to be imposed in the event of a breach of the obligations under this Directive.

(in the English version: "**effective, proportionate and dissuasive penalties.**")

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II. EU rules

3. Directives

DIRECTIVE 2006/54/EC

Art 17 (Legal protection)

"1. Member States shall ensure that all persons ... **may pursue** their claims under this Directive ... through the **courts**

(Member States shall ensure that **associations, organisations or other legal entities**, ... may engage in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive."

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II. EU rules

3. Directives

On Art 17 CFR, the CJEU said (20. 6. 2019, Rs C-404/18, *Hakelbracht and Vandebon*, para 32):

"Against the background of this Directive, that provision constitutes a **specific expression of the principle of effective judicial protection which derives from the** constitutional traditions common to the Member States and is enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950. ... This principle has now been reaffirmed in Article 47 of the Charter of Fundamental Rights of the European Union."

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II. EU rules

3. Directives

DIRECTIVE 2006/54/EC

Art 18 (Compensation or damages)

"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, and such compensation or reparation shall be dissuasive and proportionate to the damage suffered**".

In this regard, such compensation or indemnity may be limited by a pre-determined **ceiling** only in cases where the employer can prove that the harm suffered by an applicant as a result of discrimination within the meaning of this Directive consists solely in the refusal to take into account his or her application".

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II. EU rules

3. Directives

DIRECTIVE 2006/54/EC

Art 19 (Burden of proof)

...

There has already been a separate presentation on this.

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II. EU rules

3. Directives

DIRECTIVE 2006/54/EC

Art 25 (Sanctions)

"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 implemented. The sanctions, which *may include the payment of compensation to victims*, shall be **effective, proportionate and dissuasive. ...**"

Excursus: Relationship between Art 18 (must) - Art 25 (can)?

See ECJ 17. 12. 2015, C-407/14, *Camacho*, para 39 f.

III Interpretation by the CJEU

Selected decisions:

1. 10. 4. 1984, Rs 14/83, by *Colson and Kamann*
2. 8. 11. 1990, C-177/88, *Dekker*
3. 2. 8. 1993, C-271/91, *Marshall II*
4. 22. 4. 1997, C-180/95, *Draehmpaehl*
5. 11. 10. 2007, C-460/06, *Paquay*
6. 29. 10. 2009, C-63/08, *Pontin*
7. 17. 12. 2015, C-407/14, *Camacho*
8. 20. 6. 2019, C-404/18, *Hakelbracht and Vandenberg*

III Interpretation by the CJEU

1. 10. 4. 1984, Rs 14/83, *by Colson and Kamann*

- (D) Employment discrimination on grounds of sex.
- Directive 76/207/EEC does **not** require a **specific sanction** for violations of the prohibition of discrimination, especially in the case of recruitment discrimination.
- sanction must, however, be suitable to ensure **actual and effective legal protection**.
- It must also have a real **deterrent** effect on the employer.
- If the Member State chooses to award compensation in the sanction, it must be **proportionate** to the harm suffered.
- A **purely symbolic compensation** such as the limitation to the reimbursement of application costs does **not** do justice to the Directive.

III Interpretation by the CJEU

2. 8. 11. 1990, C-177/88, *Dekker*

- (NL) Employment discrimination on grounds of sex (pregnancy).
- Directive 76/207/EEC does **not** require a **specific sanction** for violations of the prohibition of discrimination.
- sanction must, however, be suitable to ensure **actual and effective legal protection**.
- It must also have a **real deterrent effect** on the employer.
- The Directive provides for certain exceptions to the principle of equal treatment,*) but does **not** make the liability of the author of a discrimination conditional on proving **fault** or **the absence of a justification**.
- (*) e.g. where sex is a sine qua non of employment; cases of positive discrimination.

III Interpretation by the CJEU

3. 2. 8. 1993, C-271/91, *Marshall II*

- (UK) "Marshall I" (25. 2. 1986, Rs 152/84) concerned termination discrimination on grounds of sex. In "Marshall II" dispute about limitation of damages in English law (upper limit, interest).
- In the event of a violation of (gender) equality of opportunity, the measures must guarantee **real and effective legal protection** and have a **real deterrent effect** vis-à-vis the employer.
- In the case of discriminatory dismissal, equality cannot be restored without **reinstatement** of the person discriminated against **or** without **financial reparation** for the damage caused to that person.
- If financial reparation is chosen as a measure, the discriminatory dismissal must be **compensated in full for the damage actually suffered**.
 - Continued .\.

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III Interpretation by the CJEU

3. 2. 8. 1993, C-271/91, *Marshall II*

- (UK) "Marshall I" concerned termination discrimination on grounds of sex. In "Marshall II" dispute about limitation of damages in English law (cap, interest).
- Continued:
- The setting of a **ceiling does** not constitute a proper implementation of Directive 76/207/EEC, as it sets the amount of compensation from the outset at a level which does not necessarily correspond to the need to ensure real equality of opportunity by providing adequate compensation for the damage caused by the discriminatory dismissal.
- The award of **interest** shall not be dependent on circumstances that may reduce the actual value of the reparation.

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III Interpretation by the CJEU

4. 22. 4. 1997, C-180/95, *Draehmpaehl*

- (D) Recruitment discrimination against a male applicant on the grounds of sex.
- If a member state opts for compensation, then this sanction must be suitable for ensuring **real and effective legal protection**, have a **genuinely deterrent effect vis-à-vis the employer** and be **proportionate to the damage suffered**.
- Member States must ensure that infringements of Community law are punished according to similar substantive and procedural rules **as infringements of national law of the same nature and gravity**.
- **Damages of up to three months' salary, limited in amount**, or cumulatively of six months' salary in the case of several discriminated applicants, are not sufficient if this leads to lower compensation being awarded and the aggrieved applicants being deterred from asserting their rights.

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III Interpretation by the CJEU

5. 11. 10. 2007, C-460/06, *Paquay*

- (B) Termination discrimination on grounds of sex (pregnancy).
- While Member States are **not obliged** under Directive 76/207 to **adopt a particular measure**, the measure chosen must be appropriate to secure **real and effective judicial protection, it must have a real deterrent effect vis-à-vis the employer**, and it must in any event be **proportionate to the harm suffered**.
- If a decision to dismiss infringes both ... Directive 92/85*) and Directive 76/207, the measure chosen by the Member State under Article 6 of the latter Directive to punish the infringement of those provisions must be **at least equivalent to the measure provided for in the national law transposing Directive 92/85**.
- (*) Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

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III Interpretation by the CJEU

6. 29. 10. 2009, C-63/08, *Pontin*

- (LUX) Termination discrimination on grounds of sex (pregnancy).
- Actions which are intended to ensure the protection of rights arising under Community law may not be structured less favourably than corresponding domestic actions (**principle of equivalence**).
- The exercise of the rights conferred by the Community legal order must not be rendered practically impossible or excessively difficult (**principle of effectiveness**).
- These requirements of equivalence and effectiveness are an expression of the general obligation of the Member States to ensure **judicial protection** of the rights conferred on individuals by Community law.

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III Interpretation by the CJEU

7. 17. 12. 2015, C-407/14, *Camacho*

- (E) Termination discrimination on grounds of sex.
- In the case of discriminatory dismissal, equality cannot be restored without **reinstatement** of the person discriminated against or **financial compensation** for the damage suffered.
- If financial reparation is chosen, it must be **adequate in the** sense that it allows for the **full compensation** of the actual damages caused by the discriminatory dismissal in accordance with the applicable state rules.
- **Genuinely dissuasive effect**, neither under Directive 76/207/EEC nor under Directive 2006/54/EC, means that a person who has suffered damage must be awarded punitive damages which go beyond full compensation for the damage actually suffered and constitute a sanction. The payment of punitive **damages may be provided for, there is no obligation**.

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III Interpretation by the CJEU

8. 20. 6. 2019, C-404/18, *Hakelbracht and Vandenbon*

- (B) Employment discrimination against a female employee on the grounds of sex (pregnancy) (*Hakelbracht*). Victimisation of a female employee (*Vandenbon*) by dismissal which confirmed the discriminatory motive of the employer.
- The effective implementation of the principle of equal treatment requires, according to Directive 2006/54, the establishment of adequate **legal and administrative procedures for the** enforcement of obligations. Such procedures must be accessible to all persons who consider that their rights have been infringed by the non-application of the principle of equal treatment.
- This is a specific manifestation of the principle of **effective judicial protection, which derives** from the common constitutional traditions of the Member States, is enshrined in Art 6 and 13 of the ECHR, and has now been reaffirmed in Art 47 of the Charter of Fundamental Rights of the European Union.
 - Continued .\.

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III Interpretation by the CJEU

8. 20. 6. 2019, C-404/18, *Hakelbracht and Vandenbon*

- (B) Employment discrimination against a female worker on the grounds of sex (pregnancy) (*Hakelbracht*). Victimisation of a female employee (*Vandenbon*) by "dismissal" which confirmed the discriminatory motive of the employer.
- Continued:
- The effectiveness of the protection against discrimination on grounds of sex required by Directive 2006/54 would not be ensured if it did not cover the measures that an employer could take against employees who have **formally or informally defended** or testified in favour of the protected person. These employees could then be deterred from speaking out in favour of the protected person for fear that they would not be protected if they did not comply with certain formal requirements, which could seriously jeopardise the achievement of the objective pursued by Directive 2006/54.

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IV. Individual aspects

1. Freedom of choice of means?
2. Deterrent, really deterrent - how does that fit with punitive damages (compensation for harm)? Punitive damages?
3. Private autonomy - hiring, promotion, reinstatement?
4. Full reparation: Compensation also for non-material damage? How to assess? .\.

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IV. Individual aspects

Continuation:

Non-material damages? How to assess?

Two examples from Austrian law:

§ 1325 ABGB

"Whoever injures someone in his body shall pay the injured person's medical expenses; shall compensate him for the loss of earnings, or if the injured person becomes incapable of earning an income, also for the loss of earnings in the future, and shall pay him, on demand, in addition, a **compensation for pain and suffering commensurate with the** circumstances raised."

→ Note: Austrian jurisprudence uses the determination of pain periods and pain intensities by medical experts.

§ 7j Disabled Persons Employment Act (amount of compensation)

"The amount of compensation for the personal impairment suffered shall be calculated in such a way that the impairment is actually and effectively compensated and the compensation is appropriate to the impairment suffered and prevents discrimination. In particular, the **duration of the discrimination, the severity of any fault, the materiality of the impairment and multiple discrimination shall be** taken into account.

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IV. Summary

1. Sanction certainty.
2. Effective, proportionate and dissuasive sanctions.
3. A certain freedom of the member states in the choice of means. However, there is no way around (full) compensation.
4. Punitive damages are possible, but not mandatory.
5. The legal consequence hiring in cases of hiring discrimination is possible, but not mandatory. Alternative: monetary compensation.
6. Full reparation of the damage, therefore also compensation for any non-material damage.
7. Principles of equivalence and effectiveness.

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Remedies and sanctions in sex discrimination cases

Thank you for your attention!

Herbert Hopf

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