Remedies and sanctions in discrimination cases

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Overview

Issues discussed

• General context (enforcement of EU law)
• More specifically, direct effect: The effect of EU law in the national legal orders in favour of individuals
• Specific enforcement provisions in secondary law (using the example of the Recast Directive)
• Judicial and substantive remedies
General context

Overview

• Starting point: principle of sincere cooperation (pacta sunt servanda), Art. 4(3) TEU.

• Some specific elements:
  – Indirect effect: EU conform interpretation.
  – Direct effect of the provision granting an individual right [see later].
  – Right to an effective, proportionate and dissuasive remedy.
  – Right to damages from the Member State.
Fundamental Rights Charter

Binding provisions since the Lisbon revision

• In particular Art. 47 (effective remedy and 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.

• Also Art. 48 (presumption of innocence and right of defence).
Direct effect of primary law

EU law on equal pay for men and women: *Defrenne II* (1976)

- **Background:**
  Treaty provisions may be directly effective if they meet certain conditions; *van Gend en Loos* (1963).
- **Vertical and horizontal direct effect of Art. 119 of the EEC Treaty (now Art. 157(1) and (2) TFEU).**
- **Though limitation in time of the effect of the judgment.**
- **[Confusing element:**
  - Direct effect only for 'direct and overt discrimination'.
  - Note: different terminology than today. 'Direct and overt' meant discrimination that could be identified without any need for further explanatory legislation, as opposed to discrimination that could not so be identified.]
Direct effect of secondary law

Direct effect of the equal pay principle under secondary law

• Background:
  – Remember: different from Art. 119 of the EEC Treaty, the Equal Pay Directive did mention work of equal value.

• Court of Justice in *Jenkins* (1981):
  – Directive does not add to the Treaty in terms of substance.
  – In other words: Treaty provision even at that time included the prohibition of pay discrimination in relation to work of equal value.
  – Avoids the problem of the lack of horizontal direct effect of provisions of directives.

• Art. 4 Recast Directive: presumably the same applies.
Recast Directive: specific provisions

Overview

- The Recast Directive contains specific provisions relating to remedies and sanctions.
- In particular ‘Chapter 1. Remedies and Enforcement’:
  - Art. 17: defence of rights (right to a judicial procedure).
  - Art. 18: compensation or reparation.
  - Art. 19: burden of proof.
- Plus, in the Chapter with general horizontal provisions:
  - Art. 24: victimisation.
  - Art. 25: penalties.

- Note:
  Most of this is codified case law, originally developed in the context of Art. 6 of the Second Equal Treatment Directive.
Remedies (1)

Procedural remedy

- Particularly important elements are judicial access and the burden of proof, both shaped by ECJ case law.

- Right to judicial access:
  - Art. 47 of the Charter of Fundamental Rights as the general starting point.
  - Art. 17 of the Recast Directive as the specific provision.
  - Remember: right to legal aid under the Charter.

- Burden of proof rules for the procedure (shifting of the burden away from the victim of discrimination).
Remedies (2)

Substantive remedy in cases of discrimination

• Preamble of the Recast Directive: Member States should provide for effective, proportionate and dissuasive penalties for breaches of the obligations under this Directive (see also provisions).

• Concrete cases:
  – Levelling up or levelling down? I.e., does the victim of discrimination have a right to the better treatment?
  – The ECJ in Jonkman (2006), an equal pay case:
    – Levelling up as long as the criterion for determining the pay has not been changed; i.e. the same higher pay for the person/group that so far has been discriminated against.
    – When the criterion is changed, then both is possible: levelling up or levelling down, i.e. either higher pay for all or lower pay for all.


**Jonkman (1)**

**Facts and issues**

- The case concerns three former stewardesses of the Belgian airline Sabena who claim retirement pensions. The claims are directed to the National Pensions Office (NPO), they concern statutory pensions.
- The NPO grants them a pension, subject to a single large adjustment payment and interest of 10%.
- The former stewardesses go to courts in Belgium and argue that this is discriminatory. They should receive a pension calculated under the same rules as those applicable to male cabin crew.
- The national court turns to the ECJ for a preliminary ruling on the interpretation of EU sex equality law (Directive 79/7/EEC).
Jonkman (2)

Background

• This case - which arrived at the ECJ in 2006 - really goes back to the 1960s ... !!!

• Compare the famous Defrenne cases (1971, 1976, 1978):
  – Ms Defrenne, a stewardess of Sabena, complained about sex discrimination in employment.
  – The issue:
    The financial consequences of the fact that stewardesses were dismissed at the age of 40 (different from men doing the same work as cabin stewards who were allowed to continue working) in terms of pension rights and pay.
  – Background: Belgian law of the 1960s.
**Jinkman (3)**

*Defrenne: the history of the case*

- Ms Defrenne went to Belgian courts several times.
- The case led to three references for a preliminary ruling of the European Court of Justice. One judgment in particular became a landmark: *Defrenne II* (1976).
- **Outcome:**
  - Even though it seems to address the Member States only, Ms Defrenne can rely on this provision, even against her private employer (horizontal direct effect).
- **Consequence:**
  Both the dismissal practice of Sabena as well as the relevant pension rules had to be changed in order to be in line with EEC (post-Lisbon: EU) law.
**Jonkman (4)**

**The Belgian pension rules**

- **Royal Decree of 10 January 1964:**
  - A special retirement pension scheme is introduced for the benefit of civil aviation air crew, from which air hostesses were nevertheless excluded.
  - Reason: the dismissal of women at the age of 40, because of which women could not complete a full career.

- **Changes following Defrenne:**
  - Royal Decree of 27 June 1980 finally integrates women into the special scheme for civil aviation air crew.
  - Royal Decree of 28 March 1984 introduces an adjustment for air hostesses in respect of the period from 1 January 1964 to 31 December 1980 - but: annulled by the *Conseil d’Etat*.
  - Royal Decree of 25 June 1997 aims to remedy the difference in treatment between air hostesses and stewards during the period from 1 January 1964 to 31 December 1980.
The Belgian adjustment rules of 1997

- Royal Decree of 25 June 1997 contains special adjustment rules concerning air hostesses who had been employed as such during the period from 1 January 1964 to 31 December 1980.
- They are now entitled to a retirement pension under the same rules as those applicable to stewards, subject however to *two specific conditions*:
  - A single payment of adjustment contributions (difference between the contributions paid by the air hostesses during the period from 1 January 1964 to 31 December 1980 and the higher contributions paid by the stewards during the same period.);
  - Plus interest at the annual rate of 10%.
Jonkman (6)

Returning to Jonkman: the issue of enforcement

• Note: the rules at issue in Jonkman were adopted in order to remedy the discrimination found in Defrenne in the 1970s.

• Accordingly: this is really an enforcement case.

• Enforcement requirements under EU law (Jonkman):
  – When it is apparent from an ECJ judgment that national legislation is incompatible with EU, „it is for the authorities of the Member State concerned to take the general or particular measures necessary to ensure that [EU] law is complied within that state“, i.e.:
    – There must be a remedy not only for individual cases such as that of Ms Defrenne (with “levelling up” effect) ...
    – ... but also: the authorities must ensure that national law is changed so as to comply with EU law as soon as possible and that the rights which individuals derive from EU law are given full effect.
  – Further: any enforcement measure must be effective.
In Belgium, was there correct enforcement following Defrenne?

- Remember: the applicants in Jonkman complained about discrimination, even under the new law.

- ECJ judgment:
  - An adjustment payment and reasonable interest are fine, BUT:
  - Requirement of a single adjustment payment:
    Given the many years that passed, the amount of adjustment payment is very large and may even surpass the amount of the annual pension. The requirement of a single payment makes the adjustments excessively difficult.
  - Interest of 10%:
    This exceeds the rate of inflation, i.e. the contributions paid by the new members are higher than those of former members. “Therefore, far from putting the air hostesses in the same position as the stewards, that interest rate has allowed the unequal treatment of the air hostesses to continue.“
Jonkman (8)

All’s well that ends well - ?

• Not in such a case. Consider e.g.:
  – The time aspect - the last aspect of the discriminatory rules of the 1960s was addressed in 1997 only (and then deficiently).
  – The courage, time, effort and money it took Ms Defrenne to fight the original discrimination.
  – Idem for Ms Jonkman and her colleagues for the continued discrimination on the level of enforcement: ECJ judgment of 2007 ...
  – The many stewardesses who suffered from the system, including those who may already have died and can no longer act.

• Accordingly:
  Jonkman is an illustrative case showing that “law is not enough”.
Thank you for your attention!

For further information

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• The Essential EU Law in Charts Project:
  http://www.eur-charts.eu