



REMEDIES AND SANCTIONS

Catherine Casserley



Protection from discrimination

- A fundamental human right recognised in the European Convention for the Protection of Human Rights and the Universal Declaration of Human Rights, amongst others.
- First Sex Equality Directive, Article 6, Member States shall ensure that “effective means are available so that the principle of equal pay is observed”.



Council Directive 2006/54/EC Employment and Occupation (recast)

Article 18:

- 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.



- Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services
- 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 within the meaning of this Directive, in a way which is dissuasive and proportionate to the damage suffered. The fixing of a prior upper limit shall not restrict such compensation or reparation.



Von Colson & Kamann v Land Nordrhein-Wesfalen ECJ C-14/83, ECJ made clear that member states free to chose between the different solutions available but Member states are required to adopt measures that are sufficiently effective to achieve the objective of the Directive. They must “guarantee real and effective judicial protection” (effectiveness) and have a “real and deterrent effect on the employer” (dissuasiveness”). If compensation is chosen “it must be in any event adequate in relation to the damage sustained” (proportionality”)



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Effectiveness

Sanctions must:

- (a) Not render impossible or excessively difficult the exercise of rights conferred;
and
- (b) Ensure real equality of opportunity through adequate reparation for the loss and damage sustained

Three obligations

- Ensure that judicial and/or administrative procedures exist to enable enforcement of obligations under the Directives;
- Ensure that interested third parties may act on behalf of, or in support of, those with potential claims; and
- Provide for effective, proportionate and dissuasive sanctions.



- Directives do not set out the specifics of the procedure governing potential actions – left to Member States to develop these.
- Provided that those conditions are not less favourable than those relating to similar actions of a domestic nature - *the Principle of Equivalence*
- And do not make it impossible or excessively difficult in practice to exercise rights - *the Principle of Effectiveness*



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“... the Treaty was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law and that the system of legal protection established by the Treaty implies that it must be possible for every type of action provided for by national law to be available for the purpose of ensuring observance of Community provisions having direct effect.”



“...it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law ...”

- The member states obligation to implement Community law does not require specific legislation if before the date of the Directive there already exist in the national legal order provisions that are sufficient to ensure the effective achievement of the Directive's objectives, see Case No. 29/84 [1985] ECR 1661 (Federal Republic of Germany) at §29.



- Preston v Wolverhampton Healthcare NHS Trust (No. 2) Case No. 78/98, 16 May 2000.
- Community law does not preclude a national procedural rule, such as that contained in s.2(4) of the Equal Pay Act, which requires that a claim for membership of an occupational pension scheme must be brought within six months of the end of the employment to which the claim relates, provided that that limitation period is not less favourable for actions based on Community law than for those based on domestic law.



Impact v Minister for Agriculture and Food and others (Case C-268/06).

- ECJ held : community law, in particular the principle of effectiveness, required that a specialised court which was called upon to hear a claim based on an infringement of transposing legislation, would also have jurisdiction to hear claims which arose directly from the Directive itself if it was established that the obligation to bring a separate claim before an ordinary court would involve procedural disadvantages which were liable to render excessively difficult the exercise of the rights conferred on him by Community law.



- Any provision of a national legal system or any legislative, administrative or judicial practice which might impair the effectiveness of Community law, by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect, is incompatible with the principle of effectiveness, see *Amministrazione delle Finanze dello Stato v Simmenthal SpA* Case No. 106/77.

- The choice of sanction is also left to member states. In Marshall (No 2) the ECJ said (in relation to Directive 76/207) that:

“[the Directive] does not prescribe a specific measure to be taken in the event of a breach of the prohibition of discrimination, but leaves Member States free to choose between the different solutions suitable for achieving the objective of the Directive, depending on the different situations which may arise.”



“ However, the objective is to arrive at real equality of opportunity and cannot therefore be attained in the absence of measures appropriate to restore such equality when it has not been observed. As the Court stated in paragraph 23 of the judgment in Von Colson and Kamann, cited above, those measures must be such as to guarantee real and effective judicial protection and have a real deterrent effect on the employer.”

- Both civil and criminal sanctions permissible.
- But criminal sanctions alone will not be sufficient.
- Conciliation a possibility but not compulsory.

- Compensation
- remedial orders (mandatory injunctions)
/ restraint orders (prohibitory
injunctions)
- Declarations of discrimination



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- UN Document: ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’
- Compensation should include any economically assessable damage, including:



- Physical and mental harm;
- Costs associated with expert assistance, medicine and medical services etc.
- Loss of opportunity including lost employment;
- Loss of earning potential.



- In 1993 UK legislation limited, or ‘capped’, compensation at £6250 (c. 7,800 euros).
- Mrs. Marshall retired at 62.
- Different retirement ages for men and women.
- Loss assessed at £15,500 (c.25,000 euros)
- Employment Tribunal set aside limit imposed by UK legislation and awarded full amount of loss.
- ECJ affirmed decision of Employment Tribunal (then known as Industrial Tribunal)
- The ECJ said:

“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 discriminatory dismissal to be made good in full in accordance with the applicable national rules.”

- At remedy stage, national judge can disapply national provisions if do not comply with directive in claims brought against emanations of state – see Marshall



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- Note also that an award of interest, in accordance with applicable national rules, must be regarded as an essential component of compensation for the purposes of restoring full equality of treatment.

Measuring loss

- Compensation awarded for economic loss - e.g. loss of earnings as a result of discriminatory dismissal.
- Includes past and future loss.
- Compensation also awarded for non-economic loss, such as compensation for loss of dignity and injury to feelings.
- And loss arising from actual physical or mental injury e.g. psychiatric damage.
- Aggravated damages where perpetrator behaves in high-handed, malicious or oppressive manner.
- Exemplary / punitive damages where oppressive / unconstitutional conduct by the state.

- Initially very low sums awarded for non-economic loss
- *Alexander v Home Office* [1988]: minimum for injury to feelings should be £500 (c. 700 euros)
- When ‘cap’ removed (following *Marshall (No. 2)*) awards increased significantly e.g. *Crofton v Yeboah*
- *Vento v Chief Constable of West Yorks Police*. Total award £257,000 (c. 325,000 euros) including £65,000 (c. 93,000 euros) for non-economic loss.
- Court of Appeal allowed appeal. Three bands suggested: £500 to £5000; £5000 to £15,000; and £15,000 to £25,000
- Increased to take account of inflation
- In goods and services cases, minimum now £750

- Claims for discrimination in the workplace are brought in the ‘Employment Tribunal’.
- Time limit for presentation of claims is generally 3 months.
- Legal aid may be available for preparation, but unlikely for representation.
- Claims for discrimination in relation to goods and services are brought in the ordinary civil courts.
- Time limit generally 6 months.
- ‘Just and equitable’ extension of time in both cases.



Preventative and Remedial

- Injunction - an order requiring a person to do something or to refrain from doing something.
- Very useful in goods and services cases.



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