

# Remedies and Sanctions in Discrimination Cases

23 February 2015 – ERA Academy of European Law

**Me François MOYSE – Avocat à la Cour (Barrister)  
Luxembourg**

DSM Di Stefano Moyses  
[www.dsmlegal.com](http://www.dsmlegal.com)

1

## SUMMARY

- I. General framework for equal treatment  
between men and women**
- II. Reference texts for remedies and sanctions**
- III. Remedies**
- IV. Sanctions in case of discrimination**

2

## I. General framework for equal treatment between men and women

### A. Primary law

#### 1. Treaty on the Functioning of the European Union

##### a. Art. 8 TFEU (former Art. 3(2) TEC):

*"In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women."*

##### b. Art. 10 TFEU:

*"In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."*

3

##### c. Article 157 TFEU (former art. 141 TEEC):

*"Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied."*

Including

*"...maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers."*

4

## 2. Charter of Fundamental Rights

**a. Art. 20** = Principle of equality:

*"Everyone is equal before the law".*

**b. Art. 21** = Principle of non-discrimination:

*"1. Any discrimination based on any ground such as sex..."*

**c. Art. 23** = Principle of equality between men and women

*"Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex."*

5

## Charter of Fundamental Rights (cont)

**d. Art. 47** = Right to an effective remedy and to a 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.[...] ».

6

## **B. Secondary law**

Directive 2000/43/EC "race"

and

Directive 2000/78/EC "employment"

=> No reference to gender discrimination.

7

## **II. Reference texts for remedies and sanctions:**

- **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
- **Directive 2006/54/EC 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)

8

## II. Reference texts for remedies and sanctions (cont.) :

- **Directive 2010/41/EU of 7 July 2010** on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity
- **Directive 79/7/EEC of 19 December 1978** on the progressive implementation of the principle of equal treatment for men and women in matters of social security

9

### A. Defence of rights

(Art. 17 Recast Directive; Art. 8(1) Dir. 2004/113/EC; Art. 9 Dir. 2010/41/EU)

- Member States shall ensure that **judicial procedures** are **available** to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them
- Member States shall ensure that **associations, organisations** or other legal entities may engage, either on behalf or in support of the complainant in any judicial and/or administrative procedure.

Aim: support of the victim or of action in public interest

10

### B. Compensation or reparation

Art. 18 Recast Directive; Art. 8(2-3) Dir. 2004/113/EC; Art. 10 Dir. 2010/41/EU

- Member States shall introduce into their national legal systems such **measures as are necessary** to ensure real and **effective compensation or reparation**.
- 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 is the refusal to take his/her job application into consideration.

11

### C. Burden of proof

Art. 19 Recast Directive; Art. 9 Dir. 2004/113/EC

- No reversal but adjustment of the **burden of proof**.
- persons who consider themselves wronged must establish facts from which it may be presumed that there has been direct or indirect discrimination
- it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

12

#### D. Victimization

Art. 24 Recast Directive; Art. 10 Dir. 2004/113/EC

- **such measures as are necessary** (provided for by national law and/or practices) to protect employees, including their representatives
- against any **dismissal**
- or any other **adverse treatment** by the employer
- **as a reaction to a complaint** within the undertaking **or to any legal proceedings** aimed at enforcing compliance with the principle of equal treatment

13

### III. Remedies

- Conciliation  
(staff representative, equality officer...)
- Mediation (conventional or judicial)
- Equality bodies
- Ombudsman / State mediator
- Judicial remedies:
  - criminal
  - civil / employment tribunal

14

## Access to judicial process : case-law (1)

**Case C-185/97, Belinda Jane Coote / Granada Hospitality Ltd:** Member States are required to introduce into their national legal systems such measures as are necessary to ensure judicial protection for workers whose employer, after the employment relationship has ended, refuses to provide references as a reaction to legal proceedings brought to enforce compliance with the principle of equal treatment

15

## Access to judicial process : case-law (2)

**Case C-222/84, Johnston / Chief Constable of the Royal Ulster Constabulary:** Article 6 of Council Directive No 76/207 does not allow a certificate issued by a national authority stating that the conditions for derogating from the principle of equal treatment for men and women for the purposes of protecting public safety are satisfied to be treated as conclusive evidence so as to exclude the exercise of any power of review by the courts.

16



### Access to judicial process : case-law (3)

#### Case C-231/06, Jonkman:

*“Where discrimination infringing Community law has been found, for as long as measures reinstating equal treatment have not been adopted, the national court must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature, and apply to members of the disadvantaged group the same arrangements as those enjoyed by the persons in the other category.”*

17

### IV. Sanctions in case of discrimination

Art. 25 of Recast Directive; Art. 14 of Directive 2004/113/EC

- MS set out a regime of applicable sanctions
- Every measure necessary to assure the application of these sanctions
- Sanctions may comprise the payment of compensation
- Directive does not impose a type of penalty

18

#### IV. Sanctions in discrimination cases

- In principle, not purely punitive, but including means of recourse to compensate and assist victims of discrimination
- ACCEPT case, C-81/12 §61: States' responsibility for sanctions confirmed with reference to Article 17 of Directive 2000/78
- A purely symbolic penalty is not compatible with a correct transposition of the directive
- Focus of sanctions:
  - Civil sanctions: violation of personal rights
  - Criminal or administrative penalties: handled more with reference to the public interest

19

#### IV. Sanctions in case of discrimination

- Cumulative characteristics of sanctions (3):  
Characteristics to be fulfilled for each individual sanction (ACCEPT)
  - **Effective:** *involving legal consequences*
  - **Proportionate:** *sanction adapted to the offence*
  - **Dissuasive:** *liable to avoid new discrimination*

Case law example: C-177/88 Dekker v Stichting Vormingscentrum voor Jong Volwassenen (liability not conditional on proof of fault)

20

## Classification of sanctions (1)

### Civil:

- Aim: to put an end to discrimination
- Legal basis:
  - General legislation on civil liability, specific legislation on discrimination
  - Labour code, laws on disability or consumer protection laws

21

## Classification of sanctions (2)

### Criminal/administrative

- Aim: suppression and educating the public
- But often limited by few victims/structures in a position to act or lack of response by authorities
- Luxembourg: judge responsible in court
- Administrative: often limited to work/employment, sometimes body levying fines (less effective than court)

### Non-monetary penalties:

- Tend to lead to systemic change and educate the public (prevention, raise awareness)
- See FERYN §39
- E.g. the courts in the UK and Ireland can order the adoption of anti-discrimination policies or impose training requirements

22

### Examples of sanctions

- Damages and interest: material and moral, including loss of income
- Reinstatement in original job
- Annulment of contractual provisions
- Publication in newspapers: ruling or apology
- Public warning
- Exercising a profession or public activity
- Loss of rights: benefits, commercial rights (participation in trade fairs, etc.), closure of commercial premises, suspension of authorisations or permits, ban on tendering for public contracts, etc.
- Injunction, e.g. present a plan to eliminate discrimination
- Letter of apology
- Confiscation of items
- Refusal of subsidies
- Closure of schools

23

- Sanctions must be such as to guarantee real and effective judicial protection and it must also have a real deterrent effect on the employer  
*"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 "* (Case C-14/83, von Colson et Kamann / Land Nordrhein-Westfalen).
- **Concerning the upper limit of a compensation:**  
*"The fixing of an upper limit 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."* (Case C-271/91, Marshall / Southampton ans South West Area Health Authority II).

24

## IV. Sanctions in case of discrimination

- CJEU case C-588/12 of 27 February 2014, Lyreco Belgium NV v Sophie Rogiers

*On a proper construction of clause 2.4 of the framework agreement on parental leave concluded on 14 December 1995, which is set out in the annex to Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, as amended by Council Directive 97/75/EC of 15 December 1997 read in the light both of the objectives of that Framework Agreement and of clause 2.6 thereof, it is contrary to that provision for the **fixed-sum protective award** payable to a worker on part-time parental leave, where the employer unilaterally and without compelling or sufficient reason terminates that worker's full-time contract of indefinite duration, to be determined on the basis of the reduced salary earned by that worker at the date of the dismissal.*

25

## ACCEPT case

- Sexual orientation, but solution applicable *mutatis mutandis* to gender
- Romania, football club, oral statement
- Sanctions by court or other body: decision whether it was an administrative offence, thus leading to a fine or written warning (by application of general law on administrative penalties)
- Body made recommendations, but no provision in law and practice sanctioned by court of cassation
- Prohibition on applying penalty more than 6 months after the fact
- In effect, associations have no access to the courts and thus cannot claim damages and interest

26

## ACCEPT case

- CJEU: sanctions must allow an association to make a practical intervention, even if there is no identifiable victim
- Thus a more general than individual, proactive approach
- There are 2 faults in the system:
  1. Symbolic punishments are inadequate
  2. The 3 criteria need to be respected for each sanction: an action for damages and interest is not sufficient
- Proportionality: means that sanctions need to be in relation to the gravity of the offence, particularly to achieve a real dissuasive effect
- Principle of equivalence: national sanctions must not be less effective than the criteria for European law