

## *Remedies and sanctions in discrimination cases*

11 July 2016 – Academy of European Law (ERA)

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

## SUMMARY

**I. General background on remedies and sanctions  
in matters of equal treatment between men and women**

**II. Legal sources relating to remedies and sanctions**

- A. Common reference elements: Defence of rights
- B. Common reference elements: Compensation and reparation
- C. Common reference elements: Burden of proof
- D. Common reference elements: Victimisation

**III. Remedies against discrimination**

**IV. Sanctions in case of discrimination**

## I. General background on remedies and sanctions (references)

### PRIMARY LEGISLATION

#### **1. TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION**

- **Article 8:** *promoting equality between men and women;*
- **Article 10:** *policy of combating any discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation*
- **Article 157:** *equal pay for male and female workers*

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#### **2. CHARTER OF FUNDAMENTAL RIGHTS**

- **Article 20** = principle of equality
- **Article 21** = principle of non-discrimination
- **Article 23** = principle of equality between men and women
- **Article 47** = right to an effective remedy and to a fair trial

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### SECONDARY LEGISLATION

- Directive 2000/43/EC ("Race Directive")
- Directive 2000/78/EC ("Employment Directive")
- Directive 2004/113/EC concerning equal treatment between men and women in access to goods and services
- Directive 2006/54/EC (recast) on equal opportunities and equal treatment between men and women on matters of employment and occupation
- Directive 2010/41/EU on equal treatment between men and women engaged in an activity in a self-employed capacity
- Directive 79/7/EEC on the implementation of the principles of equal treatment between men and women in matters of social security

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### **A. Common reference elements: Defence of rights**

(Article 17 Recast Dir.; Article 8(1) Dir. 2004/113/EC; Article 9 Dir. 2010/41/EU; Article 9 Dir. 2000/78/EC; Article 7 Dir. 2000/43/EC)

- Member States shall ensure that **judicial and/or administrative 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/**other legal entities may engage, either on behalf or in support of the complainant, in any procedure.

Aim: to support the victim or any action in the public interest

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## **B. Common reference elements: Compensation and reparation**

(Article 18 Recast Dir.; Article 8(2) and (3) Dir. 2004/113/EC; Article 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**.
- The reparation/compensation must be **dissuasive** and **proportionate** to the damage suffered.
- In principle, there is **no upper limit**.

Exception: cases when the only damage suffered is the refusal to consider an application for employment.

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## **C. Common reference elements: Burden of proof**

(Article 19 Recast Dir.; Article 9 Dir. 2004/113/EC; Article 10 Dir. 2000/78/EC; Article 8 Dir. 2000/43/EC)

- No reversal, but an adjustment or sharing 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 (simple presumption).
- It shall be for the respondent to prove that there has been no breach of the principle of equal treatment (presumption to be reversed).

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#### D. Common reference elements: Victimisation

(Art. 24 Recast Dir., Art. 10 Dir. 2004/113/EC; Article 9 Dir. 2000/43/EC; Article 11 Dir. 2000/78/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
- **in reaction to a complaint** of the company **or legal proceedings** with the aim of ensuring that the principle of equal treatment is complied with.

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### III. Remedies against discrimination

- Organisation for Equal Treatment
- Conciliation  
(staff representative, equality officer, etc.)
- Mediation (conventional or judicial)
- Ombudsman/State Mediator
- Judicial remedies:
  - Criminal/administrative proceedings
  - Civil proceedings/employment tribunals

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

**Case C-185/97, Belinda Jane Coote v 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.*

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

**Case C-222/84, Johnston v Chief Constable of the Royal Ulster Constabulary:** *Article 6 of Council Directive No 76/207 (included in the recast directive) 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.*

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## 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".*

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## IV. Sanctions in case of discrimination

(Art. 25 Recast Dir., Art. 14 Dir. 2004/113/EC, Art. 17 Dir. 2000/78/EC; Art. 15 Dir. 2000/43/EC)

- Member **States** set out a **regime** of applicable sanctions.
- Any **measure necessary** for ensuring the application of these sanctions.
- Sanctions can include **compensation payments**.
- The Directive does not impose a **type of penalty**.

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#### IV. Sanctions in case of discrimination

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

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#### IV. Sanctions in case of discrimination

##### (Cumulative) characteristics of sanctions (3):

This requirement to be fulfilled for each individual sanction (ACCEPT)

• **Effective:** *entails legal consequences*

Effectiveness: observe their impact. Absent monitoring reduces effectiveness, as well as being solely at judges' discretion

• **Proportionate:** *adapting the sanction to the offence*

• **Dissuasive:** *liable to prevent new discrimination*

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

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## Types of sanctions (1)

### Civil:

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

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## Types of sanctions (2)

### Criminal/administrative:

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

### Non-monetary sanctions:

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

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## Examples of sanctions

- Damages and interest: material and moral, including loss of income
- Re-integration into the workplace
- Annulment of contractual clauses
- Publication in newspapers: ruling or apologies
- 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, prohibiting participation in public procurement tenders, etc.
- Injunction, e.g. to present a plan to eliminate discrimination
- Letter of apology
- Confiscation of items
- Refusal of subsidies
- Closure of schools

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- **Sanctions** must, however, be **such as to ensure real and effective judicial protection** and 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 and Kamann v Land Nordrhein-Westfalen).
- **Concerning a compensation's upper limit:**  
*"The fixing of an upper limit [...] cannot, by definition, constitute proper implementation 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 v Southampton and South West Area Health Authority II).

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#### 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.*

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#### 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 the Court of Cassation.
- Prohibition on applying penalties more than 6 months after the fact
- In effect, associations do not have access to the courts and thus cannot claim damages and interest.

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## ACCEPT Case

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