

Remedies and Sanctions in Anti-Discrimination Cases

Jean-François Neven
Judge at the Higher Labour Court in Brussels
Guest lecturer at the University of Louvain (U.C.L.)



ERA - Anti-Discrimination - 10 February 2014

Introduction and General Framework

- Texts:
 - Articles 7 to 15 of Directive 2000/43
 - Articles 9 to 14 + 16 and 17 of Directive 2000/78
- Principles derived from the case-law on gender equality (C-14/83, *von Colson and Kamann*; C-271/91, *Marshall*, ...)
- Concern for effectiveness: *"It is impossible to establish real equality of opportunity without an appropriate system of sanctions."* (C-14/83, *von Colson*, para. 22...)
- Major role played by general principles of law ("good faith", "equivalence", "effectiveness", ...)
- Potential impact of ECHR (Arts. 6 and 13) and the Charter of Fundamental Rights (Art. 47)

ERA - Anti-Discrimination - 10 February 2014

Introduction and General Provisions

	Directive 2000/43 (race)	Directive 2000/78 (general framework – employment)
Individual right to remedy	+	+
Right of associations to bring an action	+	+
Inequality	+	+
Effective, proportionate and dissuasive sanctions	+	+
Protection from victimisation	+	+
Social information and dialogue	+	+
Equality body	+	○

1. Individual Right to Remedy

Articles 7(1) (2000/43) and 9(1) (2000/78)

Member States shall ensure

- a judicial and/or administrative procedure
- available to all persons who consider themselves wronged by discrimination
- even after the employment relationship has ended
- possibly a conciliation procedure

But “*without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment*” (para. 3)



Member States have procedural autonomy over their arrangements for remedies, but they must respect the principles of equivalence and effectiveness.

Principle of equivalence:

- infringements of Union law must be penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance
- it is, in principle, for national courts to ascertain whether the procedural rules intended, in domestic law, to safeguard rights derived by individuals from the law of the Union comply with the principle of equivalence

ERA - Anti-Discrimination - 10 February 2014



Principle of effectiveness:

- procedural rules must not be framed in such a way as to make it impossible or exceedingly difficult in practice to exercise the rights conferred by Union law

Example: deadlines for filing complaints and limitation periods for action (C-63/08, *Pontin*).

ERA - Anti-discrimination - 10 February 2014




2. Right of Associations to Bring an Action

Articles 7(2) (2000/43) and 9(2) (2000/78)

- “Member States shall ensure that **associations, organisations or other legal entities** which have, in accordance with the criteria laid down by their national law, a **legitimate interest** in ensuring that the provisions of this Directive are complied with, may engage, either **on behalf or in support of the complainant**, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.”

ERA - Anti-Discrimination - 10 February 2014

- 
- In the view of the CJEU, “*the directive does not preclude Member States from laying down, in their national legislation, the right for associations with a legitimate interest in ensuring compliance with that directive (...) to bring (...) proceedings to enforce the obligations resulting therefrom without acting in the name of a specific complainant or in the absence of an identifiable complainant*” (Feryn, C-54/07 and *Accept*, C-81/12)
 - In some countries, domestic legislation recognises the “*actio popularis*” or *class action* (for a comparison of national legislation, see *Developing Anti-Discrimination Law in Europe 2012*, <http://www.non-discrimination.net>).

3. Invalidity

Articles 14 (2000/43) and 16 (2000/78)

Member States must ensure that they *abolish/declare null and void/amend* any statutory provisions, rules, contracts, collective agreements, internal rules of undertakings, professional statutes etc. which are at odds with the principles of equal treatment.

Courts are also bound by the principle of interpretation in conformity with Union law: “*where a situation falls within the scope of a directive, national courts are obliged, when applying national law, to interpret the latter as far as possible in light of the wording and the purpose of the directive concerned in order to achieve the result envisaged by it*”

ERA - Anti-Discrimination - 10 February 2014

4. Effective, Proportionate and Dissuasive Sanctions

4.1. General characteristics

- Articles 15 (2000/43) and 17 (2000/78)
- Autonomy for Member States to establish their own penalties (civil, criminal, administrative; restorative or “as a lesson”; pecuniary, non-pecuniary ...)
- Respect for the principle of equivalence (see *supra*)
- Respect for the principles of proportionality and effectiveness (dissuasive nature of penalties)
- The particular circumstances of each case must be taken into account (C-271/91 *Marshall*, II, para. 25)

ERA - Anti-Discrimination - 10 February 2014



4.2. Guidelines for Assessing Dissuasive Effect

- A remedy is not dissuasive if victims might be reluctant to assert their rights (*Accept*, para. 67)
- Repeat offences might also be an indication that the sanction is not having a dissuasive effect (*idem*)
- A dissuasive sanction must be laid down in law even for cases where there is no identifiable victim (*Feryn*, paras. 38 and 40, *Accept*, para. 62)
- Sanctions must not be purely symbolic, but they do not necessarily have to be pecuniary.
- Is a simple warning likely to be dissuasive? (*Accept*)

ERA - Anti-Discrimination - 10 February 2014



4.3. Dissuasive effect when the Member State uses “legal liability” as a penalty regime

- Discrimination is a tort: “*when the sanction chosen by the Member State is contained within the rules governing an employer’s civil liability, any breach of the prohibition of discrimination must, in itself, be sufficient to make the employer liable*” (C-177/88, *Dekker*, para. 25)
- A discriminatory dismissal can be repaired by reintegration into the workplace or by financial compensation that 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*” (C-271/91, *Marshall*, II, para. 26).

ERA - Anti-Discrimination - 10 February 2014



- A lump sum (or “upper limit fixed *a priori*”) is not in essence dissuasive (C-271/91, *Marshall*, para. 32) unless the adverse measure (such as not being given the job) would have happened anyway, regardless of the discrimination that took place (C-180/95, *Draehmpaehl*, para. 33)
- When reparation is to be made for a past situation, interest must be awarded (C-271/91, *Marshall*, para. 32)

ERA - Anti-Discrimination - 10 February 2014



4.4. Penalties for multiple discrimination

- No explicit solution
- Dissuasive effect might require the sanction to be greater than what it would have been if the discrimination had related to just one of the prohibited grounds
- The sanction must at all events remain proportionate (and the damage suffered is not necessarily greater in cases of multiple discrimination...)

ERA - Anti-Discrimination - 10 February 2014



4.5. Examples of specific sanctions adopted under the national legislation of some countries

- Publication of the ruling (in the press or within the company)
- Temporary closure of the company
- Temporary suspension of the right to exercise a profession or carry out an activity requiring a public permit
- Cuts in grant or subsidy
- Confiscation of goods
- Order to cease trading (on pain of penalty)
- Exclusion from public procurement contracts....

ERA - Anti-Discrimination - 10 February 2014

5. Protection from Victimisation

Article 9 (2000/43) and Article 11 (2000/78)

- Objectives recognised by the CJEU (in the context of gender equality):
 - ensure protection from any measures an employer might take to deter workers who considered themselves the victims of discrimination from pursuing their claims by judicial process (C-185/97, *Coote*, para. 24)
 - including protection from any retaliatory measures inflicted after dismissal, such as a refusal to provide references (C-185/97, *Coote*, para. 27)

ERA - Anti-Discrimination - 10 February 2014



- Wording of Directive 2000/43 > Directive 2000/78
- Member States must ensure such measures as are necessary to protect:
 - individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings (Directive 2000/43),
 - employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings (Directive 2000/78)

ERA - Anti-Discrimination - 10 February 2014



- Can this protection also be offered to witnesses and to those who defend the victim... (Directive 2000/78, if they are also workers)
- The legislation of a number of countries (still) needs to be made compliant with the law of the Union
- Member States have scope for discretion with regard to how protection is enforced (but the principles of equivalence and effectiveness apply)
- Is there a shift in the burden of proof for allegations of victimisation?

ERA - Anti-Discrimination - 10 February 2014

6. Equality Body

Article 13 of Directive 2000/43

- “Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.”
- No such provision in Directive 2000/78
- Remit (Art. 13(2)):
 - provide assistance to victims in pursuing their complaints
 - produce independent surveys and reports
 - power to make recommendations

ERA - Anti-discrimination - 10 February 2014

- European Commission (2010) notes obstacles to the independence and effectiveness of equality bodies (especially since the crisis)
- Network of equality bodies (EQUINET): “*Equality Bodies – Current Challenges*” (October 2012)
- Guarantees of independence fall short of recommendations by the United Nations (“Paris Principles” of 1993) and Council of Europe (ECRI – General Policy Recommendation No. 2 - 1997)
- Is the European Commission going to launch a new initiative?

ERA - Anti-Discrimination - 10 February 2014



Thank you!

jean-francois.neven@uclouvain.be

ERA - Anti-Discrimination - 10 February 2014