DISCRIMINATION IN WORKING LIFE
REMEDIES AND ENFORCEMENT

TOWARDS THE UNIFORM AND DYNAMIC IMPLEMENTATION OF EU ANTI-DISCRIMINATION LEGISLATION: THE ROLE OF SPECIALISED BODIES.
REPORT OF THE FOURTH EXPERTS' MEETING, HOSTED BY THE SWEDISH OMBUDSMAN AGAINST ETHNIC DISCRIMINATION, 14-15 OCTOBER 2003

Discrimination in Working Life: Remedies and Enforcement is the fourth in a series of seven publications under the project 'Towards the uniform and dynamic implementation of EU anti-discrimination legislation: the role of specialised bodies', which is supported by the European Community Action Programme to Combat Discrimination (2001-2006). The other publications in this series are
Proving Discrimination (ISBN no. EN: 2-9600266-7-5; FR: 2-9600266-8-3)
Protection against discrimination and gender equality - how to meet both requirements (ISBN no. EN: 2-9600266-9-1; FR: 2-930399-00-7)
Equal Pay and Working Conditions (ISBN no. EN: 2-930399-01-5; FR: 2-930399-02-3)

The partners in this project are:

Equal Treatment Commission
Commissie Gelijke Behandeling
P.O. Box 16001
NL-3500 DA Utrecht
Tel. +31 30 888 3888
Fax +31 30 888 3883
info@cgb.nl
www.cgb.nl

Ombud for Equal Employment Opportunities
Anwältin für Gleichbehandlungsfragen
Judenplatz 6
A-1010 Vienna
Tel. +43 1 532 0244
Fax +43 1 532 0246
gaw@bmsg.gv.at

Centre for Equal Opportunities and Opposition to Racism
Centre pour l'égalité des chances et la lutte contre le racisme / Centrum voor gelijkheid van kansen en voor racismebestrijding
Rue Royale 138
B-1000 Brussels
Tel. +32 2 212 3000
Fax +32 2 212 3030
centre@cntr.be
www.antiracisme.be

Equality Authority
Clonmel Street
Dublin 2, Ireland
Tel. +353 1 4173333
Fax +353 1 4173366
info@equality.ie
www.equality.ie

Commission for Racial Equality
St Dunstan's House
201-211 Borough High Street
London SE1 1GZ, UK
Tel. +44 20 7939 0000
Fax +44 20 7939 0001
info@cre.gov.uk
www.cre.gov.uk

Equality Commission for Northern Ireland
Equality House
7-9 Shaftesbury Square
Belfast BT2 DP, UK
Tel. +44 28 90 500 600
Fax +44 28 90 248 687
information@equalityni.org
www.equalityni.org

Ombudsman Against Ethnic Discrimination
Ombudsmannen mot etnisk diskriminering
Katarina Bangata 79
SE-116 42 Stockholm
Tel. +46 8 556 095 00
Fax +46 8 556 095 01
do@do.se
www.do.se

Migration Policy Group
205 Rue Belliard, Box 1
B-1040 Brussels
Tel. +32 2 230 5930
Fax +32 2 280 0925
info@migpolgroup.com
www.migpolgroup.com

Project manager: Marcel Zwamborn, Alternate Member of the Dutch Equal Treatment Commission
Views expressed in this publication are not necessarily shared by all partners of the project.

Editor: Janet Cormack, Migration Policy Group
ISBN No.: 2-930399-03-1
This publication is also available in French: ISBN No.: 2-930399-04-X

INTRODUCTION

ANNA THEODÓRA GUNNARDSDÓTTIR, DEPUTY OMBUDSMAN AGAINST ETHNIC DISCRIMINATION

Among the most important provisions of the EC Racial Equality Directive (2000/43/EC) and Framework Directive (2000/78/EC) are those dealing with enforcement of the principle of equal treatment and remedies for breaches thereof. This fourth experts' meeting under the project *Towards the uniform and dynamic implementation of EU anti-discrimination legislation: the role of specialised bodies*, hosted by the Swedish Ombudsman against Ethnic Discrimination (DO) on 14-15 October 2003, examined remedies and enforcement in the context of discrimination in working life.

The aim of the first day of the meeting was to highlight issues relating to the role and work of specialised bodies in terms of how they organise their work, both nationally and regionally, and how they co-operate with other non-governmental actors in enforcing anti-discrimination law. On the second day emphasis was placed on discussing the appropriateness of remedies for the effective enforcement of anti-discrimination law in working life, as well as the specific requirements of the Directives with regard to sanctions.

The discussions on enforcement took as a starting point Article 7(2) of the Racial Equality Directive, Article 9(2) of the Framework Directive, and Article 13 of the Racial Equality Directive, focusing on the sharing of enforcement activities between specialised bodies and other actors, such as NGOs, on the basis of the directives, and the Swedish model of the shared enforcement role of the Ombudsman and the trade unions. Under Swedish law, the role of the specialised body in employment related cases is secondary to that of the trade union, that is, only where the trade union refuses to bring a case on behalf of a member, or where an employee is not a member of a trade union, can the Ombudsman play a role.

This particular situation gives rise to important questions relevant to all European countries, such as what the policy of the specialised body should be where the trade union is not willing to act on an anti-discrimination issue, or where the trade union fails to bring action in court within the time limits set, and, from the point of view of the victim, whether there should be a choice of seeking redress through the trade union or the specialised body. Our thanks go to Katri Linna, Chief Legal Advisor at the Swedish SIF Union and former Deputy Ombudsman against Discrimination, Ingemar Hamskär, lawyer at the TCO trade union, and Ebrima Mboob from the Network of Trade Union Active Immigrants (Fackligt Aktiva Invandrare – FAI), who, by presenting their views and concerns in relation to these questions and more, greatly contributed to our first day's session.

Advantages and disadvantages of taking cases to court and other alternatives such as mediation and voluntary settlements were also discussed. Conciliation and mediation can work as an alternative to litigation to allow the specialised body and the discriminator to deliberate the issues.

The debate on remedies and sanctions discussed the implications of Article 15 of the Racial Equality Directive and Article 17 of the Framework Directive, which provide that Member States shall lay down the rules on 'effective, proportionate and dissuasive' sanctions applicable to infringements of the national provisions adopted pursuant to the directives. Sanctions may comprise the payment of damages and compensation to the victim; they may also include a court order to reinstate an employee, to change a recruitment policy or to develop and implement positive measures, or even for respondents to work with the specialised body. A comparison of the practice in the different EU Member States and an overview of that in the United States made for some very interesting reflections. The high level of debate can largely be attributed to the excellent presentations by Barbara Cohen, independent consultant on discrimination and equality law in the UK, of the practice in Great Britain, and Paul Lappalainen, US and Swedish lawyer, legal adviser at the Equal Rights Unit of the Swedish Integration Board, and currently special investigator in the Swedish Government Inquiry into Structural Discrimination.

On behalf of the Ombudsman against Ethnic Discrimination (DO), it was a great pleasure for me to welcome participants from specialised bodies from all over Europe to Stockholm. We were very pleased that so many of our distinguished colleagues were able to be present. The fact that the participants represented different societies and different legal traditions helped to stimulate the debate and inspire others to test new approaches on how to tackle problems in the field of anti-discrimination that we may not have been aware of before.

THE ROLE OF THE SPECIALISED BODIES AND OF TRADE UNIONS

KATRI LINNA, CHIEF LEGAL ADVISOR,
SIF UNION AND FORMER DEPUTY OMBUDSMAN AGAINST ETHNIC DISCRIMINATION

I worked for the Swedish Ombudsman (DO) office for four years from 1999, when the first 'real' legislation against racial discrimination in working life was introduced in Sweden, 'the law on measures against ethnic discrimination in working life', until the beginning of 2003, when I returned to work for the Swedish trade unions. I now work as the chief legal advisor for Sweden's leading white-collar union, SIF, which currently has some 370,000 white-collar employees in the technical and knowledge-based sectors of the labour market. In total there are 1.2 million members of the central organisation, the Swedish Confederation of Professional Employees. The degree of unionisation in Sweden is some 80 per cent of the white-collar work force; for blue-collar workers it is 90 per cent. This means at least one thing as regards the topic of this meeting: you can reach almost any employee – and employer – through the trade unions, something that is important to bear in mind when we are thinking about enforcement issues.

However, my introduction today is more about my experience from the specialised body's point of view, in particular about the sharing of enforcement activities and possible co-operation with the trade unions or any other relevant organisations.

In Sweden we have several Ombudsmen – our specialised bodies – dealing with specific areas related to human rights. These are the Equal Opportunities Ombudsman, who has the aim of combating discrimination on grounds of sex, the Disability Ombudsman, the Ombudsman against discrimination on grounds of sexual orientation, and the Ombudsman against Ethnic Discrimination. They are all governmental agencies.

The Ombudsmen's work in the area of working life is based on law. According to the law, the Ombudsmen shall investigate and, as a final measure, bring cases before Labour court, when complaints have been submitted by individuals. The Equal Opportunities Ombudsman and the Ombudsman against Ethnic Discrimination shall also see to it that employers work towards equal opportunities at the workplace in an active manner.

If the complainant is a union member, the Ombudsman must ask the union whether it is willing to take the case. If – and only if – the union decides not to take the case can the Ombudsman investigate the complaint and bring it to court. The trade unions thus have the primary responsibility for legal action.

The Ombudsman may bring a lawsuit on behalf of the employee or job applicant concerned, if the individual agrees, and the Ombudsman finds that a court judgement in the dispute would be of importance for the application of the law or there are other special reasons for bringing the case before the court. The proceedings are provided to the complainant free of charge. So far only a few court judgements have applied the ethnic discrimination legislation from 1999. Five to be exact, and the Ombudsman against Ethnic Discrimination brought all of them. For that reason you could say that most cases are still important for the application of the law. Trade Unions must act in the same way on behalf of their members, thus also without any legal costs for the complainant/trade union member.

The individual can of course also bring the lawsuit on his/her own by instructing his/her own lawyer using restricted financial aid from the State or private insurance. In such cases the proceedings start in the county court instead of the Labour Court, which then will be the court of appeal.

The Ombudsman and the trade union also both have an enforcement role concerning the duty on employers to take active measures. They are able to apply to a specific body, the Board Against Discrimination, for an order, subject to a civil fine, with regard to an employer who has failed to fulfil his duty to undertake active measures. But also in other ways, the trade union can or could in fact play an important role in the prevention of, for example, harassment in the work place. This could be through their participation in the development and implementation of policies and procedures, through their information and training services, and through the collective bargaining process.

So what does this mean in practice? Does Sweden fulfil what the Racial Equality Directive demands as regards defence of rights? Sweden has indeed a body for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. But how far are individuals in fact able to enjoy protection under the discrimination laws? To what extent does the Ombudsman office depend on the co-operation with the trade unions and to what extent do the trade unions carry out their responsibilities? Is it necessary to involve additional actors such as NGOs?

During the five years of existence of what we still call the "new law", there has been a huge increase in the number of complaints submitted to the Ombudsman against Ethnic Discrimination. In 2002 the Ombudsman received some 300 complaints, which is almost double the number received in 2000 and four times that in 1998. During the same period, the Ombudsman office grew from six to some twenty persons, although more and more resources are also going into investigating complaints from other areas than working life. DO's budget is 2 million Euros, with 5 lawyers investigating the complaints concerning working life, compared with some 4 million persons in the workforce around the country.

However, the number of complaints as such may not be that important. We know (or believe) that it is still only a few of those cases actually occurring that come to the attention of the Ombudsman. And the question is whether it is possible to cope with the issue simply by enlarging the Ombudsman's office. I would answer in the negative. The Ombudsman's work is and has always been dependent on the work of the trade unions, exactly as the legislator had meant it to be. Lots of cases are brought to and are solved by the local trade union representatives without any involvement of the Ombudsman.

As regards the complaints to the Ombudsman office, 68 per cent of the cases that came to an end last year were investigated by the trade unions. 72 per cent of the settlements were reached by the trade unions, the numbers thus corresponding quite well to the degree of unionisation among complainants.

In almost all of the cases in which the trade union refused to take a case to court, the DO made additional investigations. However, the information the trade union has about the case is very valuable to the Ombudsman. She has no local representatives, which is significant for example as regards the possibility of checking witnesses. She operates in the whole country from Stockholm. She has no natural access to workplaces.

The question then is whether it really is necessary for the Ombudsman to investigate all of these cases. Can we afford it? Should DO concentrate on non-trade union members and the trade unions on their members?

In the last four judgements, the labour court has rejected the DO's claims. Two of the cases involved union members. Does this mean that the DO is uneconomical with her resources? Or is it the responsibility of the Ombudsman to set the boundaries for the application of the law by bringing lawsuits also on behalf of the union members? I want to raise this question but I do not know the answer, and I do not put the blame on anyone. I myself brought cases before the court whilst working for the DO.

The problem then would rather be the situation for those 20 per cent of workers who are not union members. Is it enough to have the Ombudsman institution and what are the alternatives? The possibility for an individual to bring a lawsuit on his/her own is clearly not sufficient, given the problems and cost of county court proceedings and the lack of powers to obtain appropriate evidence and information.

Another possibility would be to give NGOs the same possibility to act as the DO and the trade unions. France has extended legal standing to trade unions, as well as organisations of at least five years existence that have the aim of promoting the interests of persons affected by discrimination. This is not the case in Sweden, and we should ask ourselves if these kinds of variations are in accordance with Article 7(2) of the Racial Equality Directive.

On the other hand, even if the national legislation provides legal standing for all relevant organisations, some questions still remain. For the organisation the main problems besides the legal costs, would be the problem of having appropriate powers to obtain evidence and information in pursuance of its functions. It might be necessary to address this with further legislation.

The above comments concerned methods of enforcing obligations that are available to persons who are discriminated against. Another question is the promotion of equal rights in working life. While I consider the trade union activities sufficient as regards assistance to members who are victims of discrimination in pursuing their complaints, I am not convinced about the success of the role of the trade union when it comes to the promotion of equal rights in the workplace. There are a lot of different explanations for this. Some studies say this is the result of the Swedish policy-making corporate model that is derived from the conflict between workers and capital, a class-based model for class politics. Even if the model is theoretically open to other interests, these have generally been subservient to those of class. There is also the problem of inadequate immigrant representation within the trade unions.

Further, it is a fact that the legislation against ethnic discrimination did not originate from within the Swedish corporate model itself, but outside the country in the form of pressure from international organisations and agreements. I believe there are more explanations. I also believe there are some activities going on, but if we look back to the experience of work for equal rights and equal pay between men and women, we cannot be proud. It just takes too much time.

The question then is who else would be responsible for this area of work. Are independent bodies like the Ombudsmen appropriate to deal with all types of work promoting equal treatment? To me it seems that there is a lack of organisational framework to manage the task. I would rather see other governmental bodies, such as the Swedish government institution for working environment, which has local offices, carry out this task.

My conclusion thus is that it is necessary to have something more than the Ombudsman and the trade unions for effective promotional work.

DISCRIMINATION IN WORKING LIFE: REDRESS FOR VIOLATIONS AND THE MAINTENANCE OF EFFECTIVE NATIONAL PROTEC-TION AGAINST DISCRIMINATION – A TRADE UNION'S POINT OF VIEW

INGEMAR HAMSKÄR, CHIEF LEGAL ADVISER AT TCO –
THE SWEDISH CONFEDERATION OF PROFESSIONAL EMPLOYEES

INTRODUCTION

The development of legislation in the EU, with the development of protection against discrimination and an emphasis on human rights, has helped to strengthen these rights in Sweden too. It is however important that the legislation on discrimination should complement, not replace, the national regulatory system which, in Sweden's case, is highly effective in preventing discrimination and rapidly taking legal action against discrimination when it does arise, and which, moreover, can be developed further still.

In order to describe how we, that is the trade union movement in Sweden, try to combat all forms of discrimination in working life, I will particularly focus on four points:
1. The trade union organisations in Sweden
2. The Swedish labour market model from an EU perspective
3. The role of the trade unions in counteracting and taking legal action against discrimination
4. Conclusions – the effective incorporation of EC legislation on discrimination

I will do so in the belief that a description of the Swedish labour market model with its strong trade union organisations, its binding collective agreements, its general protective labour legislation, complemented by legislation on discrimination and State supervisory authorities such as the Ombudsman for Ethnic Discrimination, may provide a source of inspiration for further discussion.

Although much remains to be done to counteract discrimination, I believe that Sweden stands on sound institutional foundations and that we are experiencing positive development.

1.THE TRADE UNION ORGANISATIONS IN SWEDEN

Sweden has the strongest trade union movement in the world – the degree of unionisation is approximately *85 per cent.* This means that 3.8 million workers out of a total labour force of 4.4 million (between the ages of 16 and 64) are members of a trade union organisation. Also as high is the degree of coverage of collective agreements. The regulations in collective agreements on pay and terms and conditions of employment set the norm in Sweden for all workers within the areas in which the agreements apply, i.e. they also apply to non-union members at the workplace. They are also important outside their areas of application in that they set the norm for the sector concerned when the courts address the question of whether a signed agreement is unreasonable or invalid according to general contract law. There are several reasons for the strong position of the trade unions in Sweden. One very important reason for the high degree of unionisation is that the Swedish trade union movement shoulders a major social responsibility for industrial peace and for operational development and economic growth at the same time as it represents the interests of its members. It is simultaneously active on three levels:
- the company or public sector organisation level through local branches or their equivalent
- the industry or sector level through federations/bargaining cartels
- the national or supranational level (EU), mainly through central organisations

A few thousand full-time or part-time staff are employed directly by a trade union organisation at each one of these three levels, while there are around *400 000 elected trade union representatives*. The latter are to be found at the local level, i.e. at the workplace. Their rights – for example the right to leave on full pay for trade union work relating to the workplace – are regulated in a special law, the Trade Union Representatives Act (1974:358).

The social partnership between employer and employee organisations is also well developed in Sweden. The employers' side is also well organised. This is naturally very important as two parties are of course required to implement bipartisan measures at the workplace or to conclude collective agreements.

There are three central trade union organisations – or federations – at the national level. Their main tasks relate to influencing legislation and to informing and influencing public opinion. Collective agreements are normally concluded at the lower level – the trade union or cartel level. LO, the Swedish Confederation of Trade Unions, represents 16 affiliated trade unions in the blue-collar area. LO co-operates politically with the governing Social Democratic party. LO is organised regionally and locally through 19 LO districts and 258 LO sections. LO has around 1.9 million members, 46 per cent of whom are women. There are two federations in the white-collar area. My own organisation TCO, the Swedish Confederation of Professional Employees, is independent in party-political terms and has 18 affiliated trade unions. These unions have 1.3 million members, 59 per cent of whom are women. The fact that so many white-collar workers are trade union members is unique in comparison with the rest of the world. The trade unions usually have branches at the workplace level. It is thus the trade unions themselves that conclude collective agreements on pay and terms and conditions of employment. SACO, the Swedish Confederation of Professional Associations, which, like TCO, is politically independent, organises university or college graduates. SACO consists of 26 professional associations that have a total of 540,000 members.

TCO, LO and SACO are all members of the European Trade Union Confederation (ETUC). As we all know, the ETUC has concluded collective agreements within the framework of the EU's labour market dialogue which have been, and will be, important to the national protection against discrimination for those employed on a part-time/temporary basis and, most recently, for those who telecommute. TCO, LO and SACO have a joint office in Brussels to monitor labour market issues at the EU level. These issues are also monitored in the ongoing consultation that the central trade union organisations have with the various ministries prior to decisions being taken by the various EU bodies.

2. THE SWEDISH LABOUR MARKET MODEL FROM AN EU PERSPECTIVE

All democratic states have legal rules and regulations that aim to protect job seekers and employees.
Essentially, it is possible to discern three different models:
1. Collective agreements and the collective resolving of disputes (collective systems with strong parties)
2. Individual agreements and court action between individuals (individual systems with weak partners)
3. Supervision by the State (systems based on legislation)

A combination of these models is most common, however. The Swedish model, like that of Denmark and Norway for example, can be said to belong to *the first model*, in that the regulation of the labour market has largely been left to the social partners. *The second model* is characterised by the fact that working conditions are regulated in agreements between individual employers and employees. This model is applied, for example, in the UK and the USA. *The third model* is represented by a number of countries in the EU, for example in Belgium, where the State plays a more active role in ensuring that regulations in the field of working life are also applied in reality.

The "Swedish model"

All of these regulation models comprise a combination of the above, so what exactly is the "Swedish model"? The following are characteristics of the Swedish labour market model:

- The degree of unionisation is high and organisational splits are limited on both sides of the negotiating table. The Swedish white-collar workers' movement is regarded as the strongest in the world.
- Established trade union organisations, i.e. those with collective agreements, have a privileged position in the legislation.
- Collective agreements are an important regulatory instrument for the central organisations on both sides. Collective agreements are binding and have an extensive degree of penetration and coverage.
- The scope for industrial action is extensive when no agreement exists, but as soon as an agreement is signed there is an absolute obligation to maintain industrial peace.
- Public employees have a strong position with the right to bargain collectively, conclude collective agreements and take industrial action – their position is almost as strong as that of employees in the private sector.
- Legislation on the working environment, which forms part of public law, is well developed and there is a special supervisory authority.
- There is a strong welfare system covering regulation of the labour market through, for example, unemployment benefit funds and employment offices – these systems interact in various ways with the labour law systems.

3. THE ROLE OF THE SWEDISH TRADE UNIONS IN COUNTERACTING AND TAKING LEGAL ACTION AGAINST DISCRIMINATION

Discrimination in working life has devastating consequences for the individual and the company or public sector organisation concerned, but also for society at large. The responsibility of the trade unions to prevent the occurrence of discrimination and to quickly take legal action against it when it arises is fundamental and extremely important. The trade union movement is an important resource for counteracting and taking legal action against discrimination in all the nations of Europe – in a country like Sweden where the trade unions are strong, this potential is very clear. The view of democracy represented by the trade unions is embodied in the principle that everyone is of equal value and has equal rights in working life. This is not simply an expression of their view of humanity – it is a working method. The concept of trade unionism is based on all the members promising each other not to sell their labour at a lower price or for poorer conditions than the price or conditions agreed upon. If someone is forced to do so, not only the individual concerned but all those doing similar jobs will be affected. Our fundamental tool for upholding these principles has been and still is the collective agreement. The rules and regulations of a collective agreement apply irrespective of gender, ethnic background, disability or sexual orientation.

The trade unions as organisations – their employees and members – have a fundamental responsibility to counteract and take action against any discrimination that arises or exists in working life. Discrimination presents a threat to the principle that everyone should be treated equally, and thus to the basic concept of trade unionism. The tools used to tackle discrimination must, however, vary depending on the type of discrimination involved. Sometimes new legislation is required, sometimes the legislation needs to be amended, and sometimes – quite often in a country such as Sweden – collective agreements are the right method. Ultimately, however, it is always a question of influencing the structurally inherent discrimination that exists in the world around us and the values on which this discrimination is based, irrespective of whether it is overt or hidden.

Counteracting discrimination largely consists of *influencing attitudes and perspectives*. In this respect, the trade unions have a particular responsibility for their area of operations – working life. The tools required are training and measures aimed at informing and influencing public opinion.

The trade unions have a responsibility *in their own operations* as employers and as open democratic organisations to prevent and take action against discrimination within their own organisational structures. The trade unions should set a good example. Attitudes and perspectives are important here too, but it is also important that the statutes of the trade unions reflect a democratic approach and the principles of universal values and universal rights. The statutes of the white-collar unions have recently been tightened up in this respect. The principle that everyone should be treated equally has, however, always applied – morally and legally – in the relationship between the trade unions and their members.

The trade unions have a number of tasks with regard to the discrimination of job seekers and employees that arises, or is at risk of arising, at the workplace.

3.1. Trade union presence and feedback

The extensive presence of the trade unions at the individual workplaces is one of the reasons for the high degree of unionisation in Sweden. It is, in my view, also in itself an important structural factor in the combating of discrimination in working life. Trade union work also fosters comradeship. The promotion of free, democratic and independent trade unions as part of the efforts to counteract discrimination is thus an overriding social interest.

This is another of the reasons why the Swedish trade union movement seeks to defend and uphold its position and to combat any moves that would undermine its strength. We organise new members and strive to ensure that collective agreements are signed – ultimately with the help of the right to take industrial action. We are not always successful. Not all of the workplaces in Sweden have trade union members or branches, nor are they all covered by collective agreements. In such cases, the national Ombudsmen act as an important complement and resource at workplaces in which we are weak or where our work needs to be developed.

Shortcomings in the legislation or in the collective agreements are reported to higher levels of the trade union pyramid, where the experience gained is assimilated and action plans are drawn up. These reports come to my organisation, TCO, if they relate to legislation, or go to an individual trade union or cartel if they relate to a collective agreement.

3.2. Trade union tools

3.2.1 Collective bargaining/negotiations

The Swedish Co-determination Act (1976:580) divides collective bargaining/negotiations into three different types:

1. The general right to bargain collectively (for example on measures to prevent discrimination), which provides the right to negotiate on all issues concerning the relationship between employers and employees (article 10 Co-determination Act).
2. Co-determination negotiations (articles 11-13 Co-determination Act): ahead of important changes in the operations concerned or for an individual employee, the employer must take up negotiations with the relevant trade union. The Co-determination Act also gives trade unions with collective agreements a preferential right of interpretation in order to protect members in disputes concerning pay or the obligation to work until the courts have ruled on the case. This means that the trade union's view prevails until the court presents its judgement; an employee that an employer wants to transfer or move on suspected discriminatory grounds will therefore not need to move if he or she has the support of the union. Today, a large amount of the discrimination issues and the related disputes are resolved in the ongoing contacts between the social partners within the framework of negotiations between the employers and the trade unions (1-2 above).
3. Negotiations in the event of disputes (article 64 Co-determination Act). A small but increasing number of legal disputes concerning discrimination or closely related issues are brought before the court that in Sweden ultimately rules on disputes between employers and employees, the Labour Court.

The Co-determination Act stipulates that before a case is brought to court, the parties involved, i.e. the employer and the trade union, must have negotiated the dispute at least one level, i.e. locally. The trade union has the legal power of attorney to represent its members before the court. We should not underestimate the importance of this, especially in discrimination cases where the individual's counterpart may be his or her employer. The trade union thus acts as a 'shield' between the employee or job seeker and the employer accused of discrimination, and also meets all of the legal costs.

In Sweden, the trade unions have a so-called preferential right of representation in discrimination disputes. This means that the national Ombudsman can only represent an individual if the trade union concerned declines to do so. In my view, such a rule is an important social signal that discrimination is a matter for the trade unions, and it is certainly also important for the self-image of the unions. If, after carrying out a thorough investigation, the trade union concludes that a dispute cannot be pursued legally, it is important that the union clearly informs the member of the reasons for this, of the action that the member can take on his or her own behalf to protect his or her rights, and of the time limits that apply.

The co-operation between the trade unions and the national Ombudsmen – for example in cases in which an Ombudsman is sitting on a case while awaiting the results of a trade union investigation[1] – is very important. The right of trade union members to represent themselves or to employ a representative other than their trade union is of course a right that the trade unions respect. The right to be represented by, and receive legal aid from, a trade union is regulated in the union's statutes. Legal aid is not normally granted if the chances of success in the legal process are non-existent or minimal – the unions also have a responsibility to their other members to use their resources wisely.

[1] *The law prescribes a first hand, optional, right for the union to investigate a case that is filed with the DO. While an investigation is carried out by the union, normally at the concerned workplace, the DO awaits the outcome of this investigation and the answer from the union as to whether it will proceed or not.*

With regard to financing, the basic principle in Sweden is that the trade unions meet all the costs in connection with a dispute. The public system of legal aid does not cover labour disputes – or only to a very limited extent for a normal wage-earner – and never provides compensation for legal costs in the event that the case is lost. Furthermore, the national Ombudsmen only bring cases before the courts that concern important principles, or cases where special circumstances apply. If a trade union initiates an action too late, i.e. if an objection is raised that the time limit has expired, and the member concerned suffers a loss because of this, the member may be entitled to compensation from the trade union. This applies generally in all legal labour disputes where a trade union represents an individual member.

3.2.2 Other important tools for counteracting and taking action against discrimination

Employment protection

The Employment Protection Act (1982:80) provides that reasonable grounds are required for notice or dismissal.

The Working Environment Act

The public law Working Environment Act (1977:1160) stipulates minimum requirements relating to the physical and mental work environment. The Act is complemented by extensive regulations, including provisions governing victimisation at work (AFS 1993:17), which relate to discrimination. The Swedish Working Environment Authority has supervisory responsibility for this Act.

Collective agreements

There are a number of regulations in mandatory collective agreements that afford protection against arbitrary behaviour and discrimination on the part of employers, irrespective of the reasons for such behaviour or discrimination.

Practice of the Labour Court

According to a Swedish legal principle stipulated by the Swedish Labour Court and referred to as *good practice in the labour market*, discriminatory or otherwise improper or unreasonable working conditions can be declared invalid or modified. The Labour Court, for example, applied this principle in situations relating to discrimination before Sweden became a member of the EU (AD 1983 no. 107).

Legislation on discrimination

We have three labour laws on discrimination: an act on measures to counteract ethnic discrimination (1999:130), an act that prohibits the discrimination in working life of people with functional disabilities (1999:132), and an act that prohibits discrimination in working life on the grounds of sexual orientation (1999:133). Amendments to these acts came into force on 1 July 2003 following the incorporation of EC Directives 2000/43/EC and 2000/78/EC. A further Act banning discrimination on the grounds of ethnicity, religion or belief, sexual orientation and disability transposing the directives (2003:307) also entered into force on the same date. These laws on discrimination, and the Act Concerning Equality between Men and Women (1991:433) form part of labour law.

As trade union representatives, we believe that it is important that collective agreements and general labour law are complemented by legislation on discrimination. On the other hand, we do not believe that legislation on discrimination can fill gaps in the protection that should be provided by collective agreements and general labour law.

4. CONCLUSION – THE EFFECTIVE INCORPORATION OF EC LEGISLATION ON DISCRIMINATION

The incorporation of the EU's legislation into the legal systems of the Member States is carried out in different institutional environments. All Member States have a fundamental responsibility to ensure that these regulations are incorporated and applied nationally.

The methods used to protect citizens against discrimination vary, however, according to our different labour market models. Incorporation cannot therefore be carried out in the same way, and is not perhaps equally effective, in all the countries. This means that it is not always possible to transfer the experience gained in one country directly to another country where conditions are partly or entirely different. I am among those who believe that, in the future, the EU should focus more on what the Member States should achieve than on regulating the legislation governing how this should be done in the smallest detail.

In a country like Sweden, the trade unions play a major role in the incorporation and maintenance of protective regulations such as those we are discussing here – but they are not alone. The basic tools that the trade unions have at their disposal – our trade union strength, our collective agreements and our labour law – do not mean that we no longer need national discrimination Ombudsmen and other national supervisory authorities. We are all needed in the effort to achieve our common goals, that is, workplaces that are open and free from discrimination and effective legal means that we can use when basic rights are violated.

We also need each other in Europe. We need not less but more co-operation between countries. We need collaboration and the exchange of experience at all levels and in various constellations. The Swedish trade union movement has a direct interest in – and is working towards – an EU in which minimum rights in the field of labour law and basic rights are guaranteed and ensured in all the Member States. I am grateful for having been given the opportunity to come to this important European conference. My vision of a social and democratic Europe includes, as I am sure you have understood, strong, democratic, free and independent trade unions in all countries and at all levels.

REMEDIES AND SANCTIONS FOR DISCRIMINATION IN WORKING LIFE UNDER THE EC ANTI-DISCRIMINATION DIRECTIVES

BARBARA COHEN, CONSULTANT ON DISCRIMINATION AND EQUALITY LAW

While most EU Member States and accession countries are now engaged in drafting or amending legislation to transpose the most recent anti-discrimination directives, it may take some time to assess whether they will successfully meet the requirement within these directives that sanctions for discrimination should be "effective, proportionate and dissuasive".

In Great Britain (GB) we have had race relations legislation since 1965; the law currently in force is the Race Relations Act 1976 (RRA) (which was amended by the Race Relations (Amendment) Act 2000 and amended again by the Race Relations Act 1976 (Amendment) Regulations 2003). Since 1965 we have tried three different systems of enforcement. Since 1977 we have had in place a specialised body – the Commission for Racial Equality (CRE), which has been generally well-resourced, with powers to advise and assist victims; workplace discrimination claims are heard in the employment tribunal, which is less formal than the civil court and relatively accessible even to litigants in person; employment tribunals have awarded very substantial sums as compensation for discrimination or harassment; yet we still face very high rates of race discrimination in employment. For example, the rates of unemployment in 2001 were: 5% of white men, 13% of Black African men, 16% of Pakistani men and more than 20% of Bangladeshi men. Or, looking at who is in work, 76% of working age white men and women were working compared to only 58% of working age ethnic minority men and women. Wages earned by people from ethnic minorities are, overall, significantly lower than those earned by their white counterparts. Additionally, some employers are repeat respondents, challenged again and again for discrimination, despite having been required to pay large sums in compensation.

So, using GB as an example, it is certainly right to review the remedies and sanctions that have been applied, and to measure them against the standard of the directives: are they effective? Are they proportionate? Are they dissuasive?

A number of variables need to be considered when seeking to assess the quality and effectiveness of either existing or proposed remedies and sanctions. These include the judicial or administrative arrangements within each jurisdiction, the circumstances in which the discrimination occurs and the different interests involved.

The EC anti-discrimination directives[2] prohibit discrimination in 'working life'. This includes discrimination at the point of recruitment, during the course of employment or in relation to dismissal or even after dismissal. Discrimination during the course of employment can, of course, include harassment as well as discrimination in access to training, promotion, wages, other benefits, disciplinary action etc. The circumstances are clearly relevant to the loss or damage suffered by the victim.

It is beyond the scope of this short article to discuss in detail the range of structures that exist or will be established to deal with complaints of discrimination in working life. The anti-discrimination directives leave Member States free to choose how each directive is implemented, although clearly require that, within the framework of their national legal systems, Member States adopt all the measures necessary to ensure that the directives are fully effective. The different procedures for enforcement that are adopted will, of course, influence the remedies and sanctions that are possible. Among the arrangements for enforcement are the following:

- specialist institutions, such as ombudsmen, that investigate, and conciliate and/or recommend resolution (recommendations may or may not be legally binding)

[2] *Equal Treatment Directive76/207/EEC, Racial Equality Directive 2000/43/EC and Employment Framework Directive 2000/78/EC.*

- administrative procedures that may involve criminal sanctions to enforce breach of anti-discrimination provisions in labour codes;
- civil proceedings, either in normal civil courts or in specialised discrimination tribunals or specialised labour/employment courts/tribunals that deal with the full range of employment related complaints;
- criminal proceedings (more likely for complaints of racial discrimination than for complaints of discrimination on other grounds);
- trade unions resolving workplace discrimination.

The third variable is from whose perspective will remedies or sanctions be assessed, as there are a number of different, possibly conflicting, interests. These include:

- complainant (victim): what harm has been caused to the victim's physical and mental health, career prospects, reputation, income, pension rights etc.
- others affected by discriminatory act: certain practices could disadvantage a number of people, not all of whom will have come forward to complain
- potential future victims: discriminatory practices exposed in one case, if not curtailed, will affect others in comparable situation in the future
- corporate discriminator: the company, establishment, trade union, qualifying body responsible for the act of discrimination. (In Great Britain the anti-discrimination legislation states the vicarious liability of employers for the discriminatory acts of their employees in the course of their employment)
- individual discriminator/harasser: the employee who committed the act of discrimination or harassment
- other employers/qualifying bodies/associations etc.: other organisations carrying out similar work or within the same sector - will they be dissuaded from discriminating by sanctions imposed on a parallel organisation?
- specialised body: central part of its mandate
- courts/tribunals: do they have the necessary powers? If so, do they exercise their powers to ensure effective, proportionate, dissuasive sanctions?
- trade unions: how do they use their role within the workplace, in supporting their members and in ensuring lessons are learned?
- general public: generally assumed that the public wants a society based on equal treatment; racism is divisive and harmful to society as a whole.
- public authorities: having committed themselves to equal treatment as provided by the directives, as well as to CERD, CEDAW, ICCPR, ILO Convention 111 and other international instruments, the governments of Member States and accession countries have a vested interest in eradicating discrimination. This should mean not wanting public money spent to support discriminatory practices in either the public or private sector.

Effective, Proportionate, Dissuasive: concepts developed in ECJ case law

In two cases in 1984, *von Colson*[3] and *Harz*[4], the ECJ made clear that while "full implementation of the Directive does not require any specific form of sanction for unlawful discrimination, it does entail that that sanction be such as to guarantee real and effective judicial protection. Moreover it must also have a real deterrent effect on the employer."

[3] *14/83 von Colson and Kamann v Land Nordhein-Westfalen, [1984] ERC 1891*
[4] *79/83 Harz v Deutsche Tradax GmbH, [1984] ERC 1921*

To be *effective*, remedies and sanctions must achieve the desired outcome; to be *proportionate*, they must adequately reflect the gravity, nature and extent of the loss and/or harm; and to be *dissuasive*, sanctions must deter future acts of discrimination. Whatever may be written into national laws or procedures, sanctions will be none of these if there are not effective, simple, swift and sustained mechanisms for enforcement.

Fur purposes of example, I will explore, briefly, some of the sanctions currently applied in the UK and elsewhere.

Financial compensation for the victim

The basic principle in the award of financial compensation by UK courts and tribunals is that the victim should be put in the same position s/he would have been in if the discrimination or harassment had not occurred. The rulings by the ECJ in v*on Colson* and *Harz* and the later ECJ ruling in *Marshall (No.2)*[5] have been significant in shaping the approach in discrimination cases. The ECJ has stated clearly that if a Member State chooses to penalise a breach of the prohibition of discrimination by award of compensation, that compensation must in any event be adequate in relation to the damage sustained. This requirement of adequate compensation for loss and damage suffered could not be met by limiting the compensation payable. In *von Colson* and *Harz* the ECJ ruled that it would not be adequate compensation in an access to employment case merely to compensate the victim for the cost of her job application; or, in *Marshall (No.2)*, which concerned a discriminatory dismissal, to fix a statutory maximum limit for compensation awards.

In the UK financial compensation can include
- compensation for past and foreseeable future loss
- compensation for injury to feelings
- aggravated damages
- exemplary (punitive) damages
- damages for personal injury

It should be noted that in GB, litigation in the employment tribunal[6] is the only way in which victims of employment-related discrimination can seek legal redress. The success rate of race discrimination cases in the employment tribunal is extremely low. For example in GB in 2001 only 16% of complainants won their cases after a tribunal hearing. A significant proportion of cases are 'settled' without a hearing, but a high proportion are heard and lost. Some discrimination lawyers are concerned that employment tribunals may be unduly reluctant to make findings of racial discrimination.

The statutory limit on compensation payments for race as well as sex discrimination was removed following the ECJ ruling in the *Marshall No. 2* case. So, looking at how compensation has been awarded in the UK:

- compensation for past and foreseeable future loss

Statute, case law and rules of the employment tribunal provide a fairly elaborate formula for calculating past and future loss plus interest; the amount depends on circumstances of the victim, with the highest awards for high earners who will have lost large salaries, rights to generous pensions and other benefits.

In 2001, the median award for race discrimination was £5,000, approximately the same level for sex discrimination and £7,000 for disability discrimination, and in 2002 the median award for race discrimination was £7,500, for

[5] C-271/91 Marshall v Southampton and South-West Hampshire Area Health Authority, (Teaching) (No.2), [1993] ERC I-4367

[6] In Northern Ireland (NI) the industrial tribunal hears complaints of employment-related discrimination on grounds of race, sex, disability and, now, sexual orientation; complaints of employment-related discrimination on grounds of religious belief or political opinion are heard by the fair employment tribunal. For simplicity, generally in this article I will refer to the "employment tribunal"

sex discrimination £5,000 and £5,666 for disability discrimination[7]. In 2002, the maximum total award for race discrimination was £814,877 in *Chaudhary -v- British Medical Association (BMA)*[8]; in this case damages were awarded against the BMA as a professional body for their indirect discrimination in failing to provide legal assistance to challenge new training regulations. The main element was compensation for the loss of the complainant's medical career; he also recovered the costs of funding his own cases as well as compensation for injury to feelings, aggravated damages and interest.

- compensation for injury to feelings

The RRA says that damages for discrimination may include an award for injury to feelings whether or not any other compensation is awarded. Case law over many years has established some guidelines for courts and tribunals:

In December 2002 the Court of Appeal[9] set bands for compensation for injury to feelings (which is to be distinguished from compensation for psychiatric injury that should be dealt with as personal injury – see below):
- £500 - £5,000: no award should be less than £500 as this would not give proper recognition of injury to feelings
- £5,000 - £15,000
- £15,000 - £25,000 appropriate only in the most serious cases, for example after a lengthy campaign of racial harassment (or harassment on any of the other prohibited grounds).

- aggravated damages

Aggravated damages are awarded where the respondent is found to have behaved in a high handed, malicious, insulting or oppressive manner in their treatment of the victim or in the conduct of case. Aggravated damages can add £5,000 or more to an award for injury to feelings.

- exemplary damages

Exemplary, or punitive, damages are a separate head of damages. Exemplary damages are not to compensate for any loss or harm suffered by the victim but to punish the discriminator. Case law has established that exemplary damages may be awarded where there has been oppressive, arbitrary or unconstitutional action by a public authority or where the conduct of the respondent/defendant was calculated to make a profit for himself which may exceed the compensation he could be liable to pay to the victim. Decisions of the UK courts leave some doubt as to whether exemplary damages can be awarded in discrimination cases but discrimination lawyers representing complainants believe that awards of exemplary damages are essential as they could serve as a strong deterrent which respondents could not ignore.

- damages for personal injury

In recent years employment tribunals have been asked to award damages for personal injury resulting from acts of discrimination; often this will relate to psychiatric damage or depressive illness, where there may also be adverse physical side effects of medication. Awards are to compensate for pain, suffering, or loss of amenity. In cases of race discrimination awards have been in the region of £5 – 17,000; in cases of disability discrimination awards have been significantly higher.

An issue that cannot be overlooked in the context of awards of compensation is how such payment can be enforced. Various means may be used by the wily respondent to avoid payment. Generally the burden of enforcement falls on the victim or his/her representative. This could involve further time, money and, in some cases, further litigation.

[7] *Equal Opportunities Review No. 124 December 2003 page 7.*
[8] *Upheld by the Employment Appeal Tribunal, 24 March 2004.*
[9] *Chief Constable West Yorkshire Police –v- Vento reduced injury to feelings award from £50,000 to £18,000*

Other remedies for the victim

Financial compensation is, of course, important, but careers can be ruined by discrimination. It is necessary therefore to consider remedies beyond awards of financial compensation, when assessing effectiveness and proportionality from the perspective of the victim.

- interim relief

Interim relief refers to an order by the court or tribunal in advance of the full hearing to preserve position. Such orders can be essential to prevent an unlawful discriminatory dismissal; otherwise by the time the litigation takes place, the victim has, in reality, already lost. Currently in the UK trade unions and discrimination lawyers are urging changes to employment tribunal procedure to permit interim relief, which is currently available in the civil courts.

- Obligation on respondent to take action to prevent or reduce adverse effects of the discrimination on the victim

The UK law permits employment tribunals, after a finding of discrimination, to make recommendations; in GB the power to make such recommendations is solely to protect the complainant; thus, if, as is often case, the complainant has left the organisation – possibly due to the circumstances that gave rise to the complaint – then currently the tribunal has no power to make a recommendation. If a recommendation is made and not complied with the only sanction is an order for (further) financial compensation to be paid to the victim.

In contrast, UK civil courts, for non-employment discrimination, can impose injunctions, both mandatory and prohibitory. Lawyers argue that the employment tribunal should be able to order remedial action, for example to revoke the effect of a discriminatory dismissal by reinstating the employee where discrimination is at the recruitment stage, or to make an order requiring the employer to offer the victim the next available suitable post. It is argued that such orders are necessary so that employers are not able to conclude that to discriminate was "cheap at the price".

In Northern Ireland (NI), under the fair employment legislation outlawing discrimination on grounds of religious belief or political opinion[10] the sanction for non-compliance with a recommendation by the tribunal can include reference to the High Court, which can make a mandatory order, and non-compliance with that order would be a contempt of court ultimately punishable by a fine/imprisonment. However, I believe this rarely, if ever, happens.

Whatever may be in legislation or procedural guidelines, so long as the recommendation or the order is for the purpose of protecting only the victim, then responsibility for enforcement is that of the victim.

Sanctions for protection of other persons

As mentioned above, in many situations the courageous person who challenges discrimination is not the only victim, it is only that others have not come forward. It is therefore desirable that remedies and sanctions imposed following a finding of discrimination in a particular case should be capable of protecting others in similar circumstances. Currently in GB, however, there is no power for an employment tribunal to impose sanctions for the purpose of protecting persons other than the complainant.

[10] *Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO)*

What has been proposed by the CRE and others is that tribunals should be able to make an order/recommendation for action within a specified time that would:
- reduce the adverse effect of the discrimination on persons other than the complainant
- restrain future unlawful acts
- contain sanctions for non-compliance.

There is potentially more scope in NI where FETO enables the fair employment tribunal to make recommendations to prevent or reduce adverse effect of discrimination on persons other than the complainant, with the same scope for enforcement by the High Court, but I understand this power is rarely, if ever, used.

The anti-discrimination legislation in the Republic of Ireland provides that where evidence indicates that a discriminatory practice has adverse effect on others, the Tribunal can make order requiring remedial action, which is not limited to protecting the complainant. Such measures have included establishing a harassment policy, and adopting a code of practice on the treatment of customers. It appears that such orders are more often made in non-employment cases.

Once an order is intended to have a wider benefit, the problem arises as to who should monitor compliance. Generally courts or tribunals have not seen this as their role. Where a specialised body has been involved they would be expected to monitor compliance, and possibly could be brought in to do so in other cases. There is also scope for trade unions to become involved, especially if the measures will benefit their members.

Resolving individual complaints outside of the courts/tribunals

In many jurisdictions, the majority of cases never reach the courts but are resolved by ombudsmen, equality commissions or other types of specialised body or through dedicated mediation schemes. The legislation may, or may not, prescribe possible outcomes.

In GB, the Advisory Conciliation and Arbitration Service (ACAS), a government agency, has a statutory mandate to try to get parties in all types of employment disputes to reach settlement without litigation. Of the cases referred to ACAS, 80% are resolved. In the Republic of Ireland, the anti-discrimination legislation provides for referral to mediation, and in recent years approximately 20% of employment-related cases have been referred and 10% of other cases.

In the UK, the complainant's representative – his/her trade union, the specialised body or other organisation – often negotiates a settlement. Once terms have been agreed, the parties can sign a statutory form which gives the terms of settlement status equivalent to order of tribunal.

In any settlement, the first consideration (often the sole consideration) is likely to be financial compensation. (Settled cases have involved payments in excess of £5 million). To settle means that, without an admission of liability, both sides are able to avoid the risks of litigation (which may mean the complainant must accept a slight discount from his/her calculated loss) but both sides save costs, and the respondent saves public exposure. The complainant is spared having to give evidence and to be cross-examined in public, which could involve questioning on personal, sensitive matters, his/her credibility could be at issue and his/her capability as a worker could be publicly undermined.

Settled cases or cases resolved by a specialised body can produce outcomes that are effective, proportionate and dissuasive: terms agreed out of court will rarely be restricted to financial compensation, and can therefore incorporate requirements that the respondent take appropriate remedial action. If a trade union or a specialised body is involved, they should maximise the opportunity to get the respondent to agree to a suitable range of measures to eradicate discrimination, for example to adopt an equal opportunities policy, to train staff involved in selection, management, discipline etc. If such terms are to have any real force in practice, then the specialised body will need to have and be prepared to allocate resources to monitor the respondent's compliance with the agreed terms and to take enforcement action where necessary.

Since a strong motive of the respondent is generally to avoid publicity, it is the experience in the UK that the respondent will normally seek settlement on confidential terms. If publicity is an effective deterrent – and there is some evidence from big US discrimination cases that it is – then where a specialised body is supporting a victim, my personal view is that they should seek to resist settling on confidential terms. Often some compromise can be agreed, so that the total sum to be paid is not publicised but the parties, the allegations and other terms can be publicised.

Sanctions imposed by UK specialised bodies: formal investigations

The lawmakers involved in enactment of the RRA and the 1975 Sex Discrimination Act recognised that to eradicate discrimination would take a very long time if it relied solely on individual victims to bring complaints. So the legislation gave the specialised bodies a power of formal investigation in additional their power to advise and assist victims. Formal investigations enable the CRE and the other specialised bodies to expose discriminatory practices or patterns of discrimination within a single organisation or across a wider sector.

An investigation can be triggered by a series of complaints or one successful case or by press exposure or representations by trade unions or NGOs. The procedure that the CRE must follow is set out in considerable detail in the legislation, which has been clarified as a result of legal challenges by respondents.

Where the specialised body makes a finding of unlawful discrimination it is able to serve a notice requiring such practice to cease and requiring the organisation to notify the steps it intends to take to prevent future acts of discrimination. The statutory procedure includes opportunities for the respondent to make representations and to appeal against the issuing of a non-discrimination notice. Once any appeal rights have been exhausted, then the notice is binding and enforceable, by the specialised body through the courts.

Other sanctions to deter discrimination

If a Member State wants to adopt sanctions that are truly dissuasive then it is useful to consider what discriminators or potential discriminators least want to lose. This could be money or reputation. Most private sector organisations do not want to lose business or opportunity to do business.

In NI, where an urgent priority has been to secure equal employment opportunity for Roman Catholics, a statutory scheme of workplace monitoring operates under FETO and the earlier fair employment legislation. The specialised body, the Equality Commission for Northern Ireland (ECNI), can serve a notice of disqualification on employers who are convicted of offences relating to non-registration and failure to submit workforce monitoring reports. The ECNI must notify public authorities that particular employers are disqualified, and it is then unlawful for a public authority to enter into a contract with them. The specialised body can seek an injunction to prevent such contracts.

Without a statutory scheme, it is still appropriate for public authorities to state publicly how they will screen potential contractors (within EC procurement rules), and to make clear to all potential contractors they will require all companies working under contracts with public authorities to comply with non-discrimination contract conditions (to which there are no restrictions under EC procurement rules).

In looking at additional sanctions it is useful to note the work that the CRE describes as 'legal follow-up'. After a respondent has been found to have committed acts of discrimination, whatever sanctions have been imposed by the court or tribunal, the CRE would contact the respondent and advise on the need to implement change – to avoid future litigation and/or to avoid CRE formal investigation. In some instances, the CRE has been able to use the findings in one case to encourage all organisations within a particular sector to take measures to avoid discrimination.

Wider sanctions to promote equal treatment

Looking beyond how to deter discrimination and to protect an identifiable victim, if the aim is to have equal treatment in all activities covered by anti-discrimination legislation, are there ways that either courts/tribunals or specialised bodies can impose a positive equality regime on employers, trade unions, qualifying bodies etc.? This could include employers or vocational training bodies or trade unions or professional associations adopting and implementing equal opportunities policies, training for managers and staff at all levels, monitoring/reviewing recruitment, promotion or training opportunities, or taking positive action to overcome disadvantage of particular groups.

The best example, in legislation, is FETO in NI, where there continue to be strong political imperatives to achieve equality in the workplace between Roman Catholics and Protestants. The ECNI has powers to give directions to employers on action to promote greater equality of opportunity, and the fair employment tribunal can enforce with financial penalty if employers do not comply with these directions.

Legislation in the UK[11] now imposes on public authorities a positive equality duty; thus public authorities in GB are required, in carrying out their functions, to have due regard to need to eliminate race discrimination and promote equality of opportunity and good relations between persons of different racial groups; in NI public authorities are required to promote equality of opportunity on 9 different grounds. Such a duty has the potential to build equality considerations into all of the decision-making, service delivery and employment practices of central and local government, police, health service, education services etc. The legislation gives the specialised bodies a limited enforcement role. The statutory audit and inspection agencies monitor compliance, and the courts can be asked to enforce compliance under particular statutory provisions or as part of their normal, public law, supervisory role.

Some discrimination lawyers have proposed that courts/tribunals could be given power to order positive measures to secure equal treatment, as appears to be true in the Republic of Ireland. This may require new procedures to ensure that a respondent could know what was proposed and could make representations before being obliged to take action that might have significant implications - financial or operational. Legislation might provide that such orders could only be made on the application of a specialised equality body or trade union or other body with proven relevant interest and experience. As I have stated throughout this article, it would only be worth seeking such an order if the specialised body or other applicant had the resources and commitment to monitor whether the positive equal treatment measures are taken or unless the courts/tribunals were prepared to take a more pro-active monitoring role.

[11] Section 75 and Schedule 9, Northern Ireland Act 1998; Section 71 and Schedule 1A Race Relations Act 1976 as amended by the Race Relations (Amendment) Act 2000.

Conclusions

Transposition of the Racial Equality Directive and the Employment Framework Directive requires more than enacting new or amended national anti-discrimination laws. These directives state plainly the duty of Member States to ensure that sanctions for infringement of such national laws are effective, proportionate and dissuasive. Specialised bodies have a key role. The outcomes of complaints of discrimination and the impact of the remedies and sanctions that are imposed or applied will need to be monitored, having regard to the different interests involved. Where it appears that sanctions are failing to meet the standard required under the directives, then it will be necessary to consider what further measures should form part of national procedures for enforcement.

US ANTI-DISCRIMINATION LAW – REMEDIES AND SANCTIONS: LESSONS AND PITFALLS FOR THE EU

PAUL LAPPALAINEN, JUR KAND, JD (US), SPECIAL INVESTIGATOR,
SWEDISH GOVERNMENT INQUIRY INTO STRUCTURAL DISCRIMINATION,
LEGAL ADVISOR, EQUAL RIGHTS UNIT, SWEDISH INTEGRATION BOARD

INTRODUCTION: WHAT CAN WE LEARN FROM THE US EXPERIENCE?

Concerning remedies and sanctions, the US experience with anti-discrimination law indicates the importance of:
- focusing on behaviour and not just "attitudes"
- the idea that the more discrimination costs, the more diversity pays
- the need for the public sector to be at the forefront of anti-discrimination work
- having a driving force in the non-governmental sector (public interest attorneys and private attorneys) which empowers victims
- damages that compensate for the economic loss involved and not just "injury to feelings"
- class actions (combining the claims of many plaintiffs) in terms of total damage claims, negotiating power and publicity
- the effectiveness of anti-discrimination clauses that can lead to the cancellation of public contracts
- concrete and practical measures such as the notices that employers must display that point out the anti-discrimination laws and where to obtain help

1. CHANGING BEHAVIOUR

On a more general level, concerning the issue of anti-discrimination law, the comments of Earl Warren, the Chief Justice of the US Supreme Court during the racially turbulent 1950s and 1960s, are very relevant concerning the use of law in relation to discrimination:

'There was "an invidious view which is now held by many: you can't wipe out racial discrimination by law, only through changing the hearts and minds of men."

Warren disdained that as "false credo. True, prejudice cannot be wiped out, but infliction of it upon others can." [12]

Much of continental European thinking seems, at least until recently, to have been based on the concept that Warren mentions above. For many years the general idea seems to have been to try to change attitudes, change prejudices. At least that provides some explanation as to why the continental European countries have had either little modern legislation or have basically lacked legislation concerning race and ethnic discrimination, at least up until the 1990s. To the extent that legislation has been in place, it has been used more as a moral yardstick rather than as an effective means for changing behaviour. This is one reason why criminal law was used in some countries to ban discrimination by merchants. This was a way to put the moral weight of the government and society behind a ban against race and ethnic discrimination. This was also a way for a state to indicate its formal compliance with the requirements of the UN Convention on the Elimination of All Forms of Discrimination. The problem was that the use of criminal law would prove to be an ineffective deterrent basically because criminal law, in general, is used to control the deviant behaviour of a few. There was little realisation in Europe that discrimination is a behaviour not limited to the "ideologically bad" criminal type that was in focus (skinheads, nazis etc.), but that the issue should be focussed on a broader target group that may discriminate not on the

[12] *Chief Justice, A Biography of Earl Warren, author Ed Cray, 1997*

basis of an expressed ideology, but due to more or less accepted social norms and behaviour patterns among persons with power. In other words, the society itself reproduces discrimination through the norms that are established and passed on from one generation of those with power to the next.

It should be noted that discrimination requires conscious or sub-conscious prejudices combined with the power to transform the prejudices into action. This basically means that those who could discriminate constituted a much larger group than originally envisioned. And criminal law is a very difficult instrument to use to reach the actions of those with the power to discriminate.

In the US, the pattern that emerged was that while affecting prejudices and other attitudes through education and other means was not disregarded, in legal terms the approach used was to affect the behaviour of those who discriminate, among other things, by making discrimination a costly proposition. By ensuring that discrimination carries with it a risk of substantial costs, there is a greater chance of affecting the behaviour of employers regardless of whether or not they have a consciousness about the prejudices they carry. While equal rights and non-discrimination are not necessarily issues of high priority for most employers, costs and potential costs are. Thus it is possible to imagine even some more or less racist employers employing minorities, even if they have not changed the prejudicial attitudes. The realization that discrimination can be carried out within broader circles of e.g. employers or merchants is difficult to achieve when laws have at best a symbolic value and little chance of being implemented.

2. THE MORE DISCRIMINATION COSTS, THE MORE DIVERSITY PAYS

During the past 5-10 years there has been much discussion in Europe and particularly Sweden about the idea that "diversity pays". To a large extent this thinking has been stimulated by certain ongoing processes in the US, where work with "diversity" has a longer history. One of the unfortunate issues here is that the ideas can be borrowed without understanding the background.

As I see it, the more recent discussion among employers, civil servants and others in the US cannot be separated and isolated from the tools and history that formed and continue to form the basis of the work with diversity in the US. The earlier work with diversity was stimulated by the anti-discrimination provisions of the Civil Rights Act of 1964 as well as the requirement of affirmative action plans and anti-discrimination clauses that were placed in federal public contracts during the 1960s. During the 1970s the ideas about diversity were mainly defensive and negative in terms of companies trying to determine what minimal steps had to be taken in order to satisfy the requirements of the law and the contract clauses. In other words, how do you avoid the cost risks associated with discrimination?

I believe that a shift came about during the 1980s, a shift toward a more offensive diversity strategy. And this focus is becoming increasingly dominant – presumably even stimulated by increasing globalisation along with the core stimulants (the anti-discrimination laws and clauses). This was based partly on the recognition of changing demographics – it became increasingly obvious that businesses in the future would be finding a much larger part of their employees, associates and customers among women and minorities. In addition, and possibly more

importantly this trend was encouraged by businesses turning a negative factor instead into a productive or profit factor. When first introduced, laws tend to be dealt with in a defensive or negative manner. The first environmental laws and regulations were dealt with in this manner by businesses. After a number of years however many businesses, while still complying with the law, have turned to promoting the environmental benefits of their products and their company. This type of factor presumably played an important role in the development of today's work concerning "managing diversity".

Quite often you can hear from businesspeople in Sweden who say that when they meet US diversity managers, the diversity managers never talk about the role of the law or contract compliance in their work. This often gives Swedes the comforting idea the law and/or contract compliance is unimportant or irrelevant. While I agree that it is unusual for US business managers to discuss these types of requirements, I disagree with the conclusions drawn with regard to such silence. At least when I have asked those responsible for diversity work in the US (e.g. Roberta Gutman of the Motorola Corporation) whether or not the law has been important to their work, they have all answered that it has been key to the work they do. They believe that diversity work would have come about due to sheer necessity, but that the law and contract compliance have had vital role in stimulating the work that they do today, that the work would have been at least 10-15 years behind where it is today without the legal tools, and that they still play a key role in today's work even if it is not an issue that they generally discuss in conferences and other reports concerning diversity.

I have thus drawn the conclusion that while the clear profits in diversity are not always easy to establish, the avoidance of the risk of substantial costs for discrimination is a "cost" that is clearer for businesspeople. If discrimination carries the risk of substantial costs (related to damages for lawsuits and the cancellation of public contracts), then diversity can be said to pay in terms of the avoidance of those costs. Thus my claim that *the more discrimination costs, the more diversity pays.*

It is thus important to see the development of effective laws and other tools (including remedies and sanctions) in this light. They are the foundation for the development of "diversity work and/or management" that is effective and meaningful. Thus far, in Sweden, the work with diversity has too often been a means for avoiding the difficult issues related to an analysis and counteracting of discrimination, as opposed to being a more effective and more developed means of dealing with discrimination. One of these days, businesses in Sweden and Europe may even start adopting the current saying that holds sway in many US companies. Diversity pays is passé today. The issue now is expressed in more dramatic terms – DIVERSITY OR DIE.

3. THE PUBLIC SECTOR VS. THE PRIVATE SECTOR

Another important experience to note from the US is that once meaningful anti-discrimination laws are in place, it is often the public sector that bears the brunt of the accusations of discrimination.

This is not necessarily because discrimination is more rampant in the public sector, but probably a result of the fact that information is more readily available concerning the public sector. It is also possible that discrimination in the public sector can generate a greater level of moral indignation.

At least these are some reasons why it is important for the various levels of the public sector to develop a clear understanding of the laws in place, as well as the discrimination process as a human phenomenon.

4. PROCEDURAL ISSUES AND DAMAGES

Are the damages awarded in the US substantial and effective? They are quite often not as high as believed in Europe, but damage awards are substantial particularly in comparative terms – and particularly in comparison with Sweden.

4.1 Class actions

There are also other tools that are available procedurally in the US that raise the cost risk associated with discrimination. In a class action the claims of the entire group of plaintiffs can be combined into one major lawsuit. This is one reason why the Texaco settlement a few years ago was one of the largest, if not the largest, ever related to discrimination claims. This case is discussed below. The ability to combine the legal claims of many persons into the same case gives the claimants greater clout in terms of focus on the legal issues, negotiating power and publicity. This in turn raises the cost risks related to discrimination and should thus encourage preventive anti-discrimination behaviour, either in advance or in the future.

In June 1994 a discrimination lawsuit was brought against Texaco on behalf of at least 1,500 African American employees who worked at the company between 1991 and 1994. In August 1994 a Texaco executive secretly recorded executives discussing destroying documents linked to the suit. In November 1996 the plaintiffs' attorneys released partial transcripts of the tape and claimed a racial epithet was used by former Texaco Treasurer Robert Ulrich. Later, enhancements of the poor-quality tapes showed the alleged slur to not in fact have been spoken. In November 1996, Texaco suspended two executives and cut off the retirement benefits of its former treasurer, as the company responded to a racial and legal scandal that even led to a criminal investigation into possible destruction of documents that could be used as evidence. On 15 November 1996 Texaco agreed to pay $176.1 million to settle the discrimination suit. Part of the amount related to damages and pay increases - $115 million. The rest related to the formation of a seven-member "equality and tolerance task force" that would give the plaintiffs a say in hiring and promotion policy at the giant oil company.

The damages paid were substantial, but a great deal was also devoted the future diversity work in the company. Due the circumstances, it can be assumed that something more than lip service in regard to the issue of diversity was involved.

4.2 Private or non-government lawyers are a key

In the US, private lawyers (i.e. non-government lawyers) are a key complement to the anti-discrimination work carried out by public authorities. One stimulus in this regard is the fact that contingent fees are allowed and that the US procedural system is based on the general rule that each party pays his own attorney's fees.

In bringing a case, a plaintiff does not usually have to worry about paying the other party's costs – even if he loses. This means that if he knows what his attorney will charge, that is the risk he is running.

The risk may be minimal if the attorney has agreed to take a contingent fee. This means that the attorney will receive a percentage of the damages awarded in a settlement or a trial. If no damages are awarded there will be no fee. Such arrangements are unethical and not allowed in, e.g., Sweden.

In other cases, a lawyer may agree to waive his fees. Thus the plaintiff pays nothing. These cases are the type that interest public interest law firms.

Here you can see the involvement of the civil society in the enforcement and realization of the aims of the law. Quite often there are various public interest law firms that employ activist lawyers. One of the pioneers in bringing such cases was the National Association for the Advancement of Colored People (NAACP) which has mainly focused on issues of concern to African Americans. On a broader basis such cases have also been brought by local legal aid offices which have a mandate to bring cases that will have a broader impact on behalf of the disenfranchised.

The role of non-governmental lawyers may also have been important as a way of empowering those who were discriminated. These lawyers have often been responsible for the cases that led to expanded interpretations of the law, as well as possibly inspiring and encouraging discrimination victims in ways that are difficult for government attorneys.

4.3 US Equal Employment Opportunity Commission (EEOC)

The EEOC is the federal government body to which claims under the Civil Rights Act are to be submitted. If no reasonable settlement is reached the plaintiff may want to turn to a private attorney.

5. WHAT REMEDIES ARE AVAILABLE WHEN DISCRIMINATION IS FOUND?

5.1 Remedies

The "relief" or remedies available for employment discrimination, whether caused by intentional acts or by practices that have a discriminatory effect, may include: back pay, hiring, promotion, reinstatement, front pay, reasonable accommodation, or other actions that will make an individual "whole" (in the condition s/he would have been but for the discrimination).

This last factor is of particular importance in relation to Sweden and Europe. Making the individual "whole" is a factor that can increase the value of an award. This means that if discrimination is proved, the plaintiff may have a right to damages until he or she gets a new job. In Sweden, the damages in a job applicant case, even if discrimination is clearly proved, are limited to the indignity suffered, which is often a much smaller amount than the damages suffered in a continued unemployment situation. Naturally, both in the US and Sweden a plaintiff is under an obligation to mitigate his damages.

In the US the remedies also may include payment of attorneys' fees, expert witness fees, and court costs.

5.2 Punitive damages.

Punitive damages may be available as well if an employer acted with malice or reckless indifference. These are not available in Sweden. On the other hand the concept should possibly be considered as an additional means of trying to affect particularly "bad" behaviour, even though civil law is the means used as opposed to criminal law.

5.3 Corrective action

An employer who is found to have discriminated may also be required to take corrective or preventive actions to cure the source of the identified discrimination and minimize the chance of its recurrence, as well as discontinue the specific discriminatory practices involved in the case.

6. THE FEDERAL LAWS PROHIBITING JOB DISCRIMINATION

- Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employment discrimination based on race, color, religion, sex, or national origin;
- the Equal Pay Act of 1963 (EPA), which protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination;
- the Age Discrimination in Employment Act of 1967 (ADEA), which protects individuals who are 40 years of age or older;
- Title I and Title V of the Americans with Disabilities Act of 1990 (ADA), which prohibit employment discrimination against qualified individuals with disabilities in the private sector, and in state and local governments;
- Sections 501 and 505 of the Rehabilitation Act of 1973, which prohibit discrimination against qualified individuals with disabilities who work in the federal government; and
- the Civil Rights Act of 1991, which, among other things, provides monetary damages in cases of intentional employment discrimination.

7. POSTING NOTICES

One very practical requirement in the US is that employers are required to post notices to all employees advising them of their rights under the laws, contact information regarding the EEOC and their right to be free from retaliation. Also, such notices must be accessible, as needed, to persons with visual or other disabilities that affect reading.

8. CONTRACT COMPLIANCE

8.1 Anti-discrimination clauses in public procurement contracts

Anti-discrimination clauses were initially introduced into federal defense contracts in the US in 1942 through a presidential executive order. The order was later expanded to cover all federal contracts. After the adoption of the 1964 Civil Rights Act sex discrimination was included. The idea of affirmative action was introduced into the clauses during the 1960s. Today these clauses also apply to disability discrimination.

Similar clauses are used on a state and local level. Therefore most public procurement contracts can be said to be subject to such provisions. Basically these clauses require the contractor to undertake affirmative action to ensure that discrimination does not occur. Their purpose is preventive, but if necessary the sanctions available include cancellation of the contract and a ban on participation in future public procurement contracts. The Office of federal contract compliance programs (OFCCP) is the supervisory government agency (http://www.dol.gov/esa/ofccp/).

8.2 Effective

Major studies in the US show that companies that were subject to such clauses tend to increase the rate of employment of women and minorities faster than similar companies without such contracts.

8.3 The EU and Sweden

It is worth noting that the EU has indicated approval and encouragement of the use of such clauses – assuming of course that other basic EU principles are complied with, such as non-discrimination against companies from other EU Member States. This could be seen in, for example, the European Commission Communication of 11 March 1998.

The ongoing policy process in Sweden should also be noted. The government has in principle indicated that such clauses will be introduced into all national contracts as from 1 January 2005. Furthermore, a number of local governments, particularly Stockholm and Malmö, are on their way to placing such clauses into their public contracts.

Finally, the following press releases concerning recent settlements were handed out to illustrate the work of the EEOC. These cases involved discrimination due to gender and due to religion.

Affirmative action plans
October 9, 2003.
EEOC Resolves Sex Discrimination Lawsuit Against NBA's Phoenix Suns and Sports Magic for $104,500

The US Equal Employment Opportunity Commission (EEOC) today announced the resolution of a sex bias lawsuit against the Phoenix Suns Limited Partnership and Sports Magic Team, Inc. (SMT), an Orlando, Florida, based sports entertainment firm, for over $100,000 and other relief on behalf of a former female employee, Kathryn Tomlinson, and other women who were discriminated against on the basis of gender when they were deprived of the opportunity to compete for positions with the Phoenix Suns' "Zoo Crew" entertainment troupe. The agreements are memorialized in two separate Consent Decrees, one for each Defendant, submitted to the United States District Court for Arizona for its approval.

According to the EEOC, Charging Party Tomlinson performed well during her employment as a Zoo Crew member during the 1998-1999 season. The EEOC's suit alleged that in 1999-2000 the Phoenix Suns and SMT adopted new sex-restrictive hiring policies for the Zoo Crew, limiting positions to "males with athletic ability and talent." This hiring policy was disseminated in the form of job announcements posted around the Phoenix Metropolitan area and in a newspaper advertisement in several newspapers, including The Arizona Republic, Mesa Tribune, and The New Times.

Kathryn Tomlinson said, "I am disappointed that a well-known employer would engage in blatant discrimination. I know that standing up for myself and other women will make me a better person. I'd like to thank the EEOC." EEOC Trial Attorney P. David Lopez stated that "under the terms of the Consent Decrees between the EEOC and the Suns and SMT, the Phoenix Suns will pay $82,500 to resolve claims brought on behalf of Kathryn Tomlinson and two other women and SMT will pay $22,000 to Kathryn Tomlinson and two other class members." He also said, "The Phoenix Suns also agreed to strengthen its policies prohibiting sex discrimination, to provide training to employees, supervisors, and management, to establish safeguards to ensure sex-restrictive advertisements are not disseminated in the future, and to send a letter of apology to Kathryn Tomlinson. The term of the Consent Decree with the Phoenix Suns is for three years."

"By entering into Consent Decrees, the Phoenix Suns and SMT have committed to equal employment opportunity. The Decrees should ensure that the Phoenix Suns will not disseminate gender-based advertisements which, on their face, deprive women of equal employment opportunity," said Charles Burtner, District Director of the Phoenix EEOC office.

Regional Attorney Mary Jo O'Neill remarked that, "The Commission is very pleased with the resolution of this case. Title VII prohibits sex-based recruitment and hiring practices unless the employer can demonstrate the sex restriction is a bona fide occupational qualification. The Commission will continue to combat antiquated sex restrictive policies that do not meet this requirement."

EEOC and Electrolux reach voluntary resolution in class religious accommodation case

Commission Applauds Employer Cooperation, Commitment to Religious Diversity

ST. CLOUD, Minn. The US Equal Employment Opportunity Commission (EEOC) and the Electrolux Group today announced the voluntary resolution of a major religious accommodation case filed under Title VII of the 1964 Civil Rights Act on behalf of 165 Somali workers who were allegedly subjected to unlawful employment discrimination based on their religion and national origin. Electrolux is the world's largest producer of appliances and equipment for kitchen, cleaning and outdoor use. Its factory in St. Cloud produces food freezers for sale throughout the United States.

The case, initiated by a charge filing with the EEOC by the Somali Community Center in Minneapolis, is being hailed by the Commission as a prime example of how employers should work cooperatively with the federal agency when subjected to a Charge of Discrimination. According to the charge filing, Electrolux was denying religious accommodations to Somali employees who are Muslim and treating them differently than similarly-situated Somali employees with regards to the terms and conditions of their employment.

Pursuant to the tenets of the Islamic faith, Muslims, male and female, must offer at least five daily prayers. Two of these prayers, the early morning prayer or Salatu-l-Fajr and the Sunset Prayer or Salatu-l-Maghrib must be observed within a restricted time period of between one and two hours.

Muslim employees of the Electrolux Home Products plant in St. Cloud alleged that they were discriminated against due to their religious beliefs and observance when they were disciplined for using an unscheduled break traditionally offered to line employees on an as needed basis to observe their sunset prayer.

Electrolux expressed a desire to work with the EEOC to resolve the case in a manner that would respect the needs of its Muslim workers without creating a business hardship. The resulting agreement affords Muslim employees with an opportunity to observe their sunset prayer. It also provides for a Somali translator at specified occasions and for policies and procedures to be available in Somali. Diversity training will be held for corporate managers, line leaders and supervisors. The company will also make a monetary donation to the Islamic Center in St. Cloud, Minnesota to provide needed services to Somali families in the St. Cloud area.

"The voluntary resolution of this case represents a significant victory for both the employees and the employer," said Chester V. Bailey, Director of the EEOC's Milwaukee District Office, which has jurisdiction for Minnesota.

"We applaud Electrolux for being a model employer and for going beyond what is legally required to create a better work environment for all of its employees. I am pleased that we were able to work cooperatively to resolve this matter in a fair, efficient, and cost-effective manner without the need for further investigation. The settlement is a win-win because it respects the important business interests of the employer as well as the faith-based interests of the Muslim employees. With the growth of religious diversity in the 21st century workplace, all employers should pay attention to the cooperative manner in which this case was resolved and view it as a model example of how to interact with the EEOC."

The Commission noted that over the past decade, religious discrimination charge filings with EEOC offices nationwide have increased by 85% from 1,388 in fiscal year 1992 to 2,572 in FY 2002.

COMMENTS AND DISCUSSION

Interaction between specialised bodies and other actors

Collaboration with trade unions, employers' organisations, non-governmental organisations (NGOs) and other organisations dealing with discrimination can greatly enhance the effectiveness of specialised bodies' work. All of these have a central role in enforcement of equality laws and specialised bodies should balance their own enforcement work with taking action to enable others to undertake enforcement work, thus facilitating better access to justice for more people. Sharing this task is logical, given that specialised bodies' resources are finite and free legal advice cannot be provided to all. Cooperation must also extend to educating the public and awareness-raising. NGOs and the social partners can provide specialised bodies with information on the pressing problems experienced by minority groups.

Each of the bodies represented at the meeting have different experiences in working with partners. The Dutch Equal Treatment Commission (ETC) has structural cooperation with the 25 regional Anti-discrimination Agencies in the Netherlands. These agencies assist victims in their complaints before the ETC. The ETC also has regular meetings with employers' branch organisations, trade unions and several Ministries on specific subjects. The ETC is working with service providers such as nightclub and cafe owners on developing codes of conduct for entry into such premises. The nightclub and cafe owners' branch organisations are also involved in this process along with local authorities, the council, the police and public prosecutors.

The Austrian Ombud for Equal Employment Opportunities handles many of the sex discrimination cases it receives together with trade unions and the chamber of labour, institutions which can represent clients at court. Since 2003, the Belgian Centre for Equal Opportunities and Opposition to Racism has had the mandate to work not only on racism but also on other discrimination grounds. There is a movement to create networks at regional level, and to create thematic networks, for example with disability NGOs and gay and lesbian organisations. There is also a movement to reconsider the existing agreements with trade unions, in order to give the trade unions an enhanced role in combating discrimination and bringing cases to court. In Flanders employers can receive subsidies to start positive action programmes for ethnic minorities, disabled people and older workers. Since this commenced in 1999, ca.300 employers have implemented such programmes.

In Sweden the Ombudsmen, trade unions and other actors in the discrimination field also work together. Trade unions have the primary role in assisting their members in discrimination cases relating to employment, with the Ombudsmen intervening only when the trade union fails to act. This exclusive power of the trade unions in employment cases is sometimes questioned, as it is argued that legislation should not prevent a victim seeking assistance from whom they chose. From the perspective of a victim of discrimination, there needs to be a broad range of alternatives, including trade union support, the specialised body, and support from other civil society organisations. The Ombudsmen have a supervisory role vis-à-vis the social partners. To this end, for example, the Disability Ombudsman sent questionnaires to employers' organisations asking how they inform their members of anti-discrimination law.

The Swedish Integration Board is working on developing regional anti-discrimination bureaux, to some extent following the example of the Anti-discrimination Agencies in the Netherlands. Such bureaux would provide advice to the public on discrimination, and funnel cases to the Ombudsman against Ethnic Discrimination. The Integration Board is also developing an NGO Centre and promoting education on anti-discrimination law in law schools.

In Great Britain, the Commission for Racial Equality (CRE) tries to persuade the trade unions to deal with complaints, and has even brought cases against trade unions for failing to take a case. One of the CRE Commissioners represents the Trades Union Congress (TUC), the organisation with which most trade unions are affiliated. There are good practice examples of the CRE regional offices formally working with the trade unions in bringing cases. The trade unions are key partners in monitoring what is going on.

The extent to which trade unions work towards combating discrimination varies considerably across Europe. In Belgium, on the national level trade unions are willing to address the problem of discrimination, but there is a lot more resistance on the shop steward level. To address this, the Flemish regional government has subsidized trade unions to work on awareness building within their organisations. The British TUC has its own black workers conference which puts recommendations to the main Trades Union Conference, and in 2002 an equality clause was added to the constitution of the TUC. All organisations affiliated with the TUC now have to take measures to ensure equality and they must report back every two years on their equality achievements. The CRE is encouraging these organisations to follow codes of practice in their own work, for example in collective bargaining. That trade unions are often faced with having to represent both parties in a dispute can give rise to difficulties.

The potential impact of trade union efforts to combat discrimination depends on the level of membership. 90% of the Danish workforce are organised in trade unions, but 70-80% of ethnic minorities are not members and therefore do not enjoy trade union protection. It is consequently especially important to monitor situations that particularly affect minorities and ensure protection against discrimination in such cases, for example in Denmark the recent rise in fixed-term contracts which is thought to affect the disadvantaged groups most. In Sweden, only around 20% of immigrants are members of trade unions (this figure includes everyone with a parent who was born outside Sweden). The non-governmental organisation the Network of Trade Union Active Immigrants (Fackligt Aktiva Invandrare (FAI)) takes responsibility for immigrants who are not members of traditional trade unions. It educates immigrants and refugees on how to become members of a trade union and moreover become active members. Today FAI has 72 executives and 2200 local affiliates all over Sweden.

The importance of trade unions educating their members on equality and non-discrimination principles was stressed. Education on discrimination issues should be combined with other working environment issues.

Trade unions and employers should be taking proactive measures such as devising and implementing policies to deal with harassment and other discriminatory behaviour among colleagues. Under Swedish law (1999 Act on Discrimination in Working Life and under collective agreements) employers have a duty to take measures to stop an employee discriminating against a colleague.

How can trade unions be persuaded to treat discrimination as a priority issue to which they devote sufficient resources and develop policies? To do this successfully it was said that trade union workers at all levels must be targeted, putting the issue on the agenda of the chair, as well as lower in the hierarchy to ensure that a coherent policy and practice is developed. All too often commitment is expressed from higher up, but those actually implementing the policies do not have sufficient time or resources to effectively achieve the goals. It was recommended that trade unions should use their influence to address discrimination in recruitment and integrating minorities in the work-force, as traditionally trade unions focus on protecting members once they are already in the workforce.

Enforcement Methods

The enforcement powers of specialised bodies differ significantly. Usually, one of two main functions is exercised: there are those specialised bodies whose focus is on providing legal assistance including in the form of court representation, and there are others whose core function is the hearing of complaints and the issuing of opinions or decisions (usually non-binding). Other enforcement tools are designed to tackle structural discrimination. The need for specialised bodies to develop strategic proactive approaches in addition to the reactive individual justice approach was stressed.

The focus of the work of the Dutch ETC has been on giving its opinion on discrimination complaints. However, it is gradually developing a more proactive approach to complement the quasi-judicial approach. The Commission can inform ministers about cases in which it has given an opinion to encourage change and can inform consumer organisations about goods and services cases. The ETC also has the power to go to court to enforce its opinions, but it has never exercised this power. It can furthermore investigate sectors in which there is suspected discrimination. Currently the ETC cannot investigate single companies but it is expected that the rules around such investigations will soon be extended to allow this.

The British Commission for Racial Equality, the Irish Equality Authority and the Equality Commission for Northern Ireland (ECNI) – all specialised bodies that can provide legal representation – have similar powers to conduct formal investigations into organisations that are suspected to be discriminating. The CRE used its power, for example, to conduct a formal investigation into the British Army's Household Cavalry and their recruitment measures. As a result, the latter entered into an agreement with the CRE to change their practices not only for the Household Cavalry but the whole army, navy and air force. Among the measures were the collection of statistics and the monitoring of minorities in recruitment and outreach work. Often the threat of effective enforcement tools is enough to spur employers to change their practices, especially when s/he sees a parallel employer being found to have discriminated and being sanctioned. Frequently in such cases employers will request advice from the specialised body on how to change their policies to ensure they are complying with equal treatment rules.

The CRE can furthermore go to court in its own name under certain circumstances - in cases of a discriminatory advertisements and in cases of instruction to discriminate - and it would like to further extend the circumstances in which it can bring cases in its own name without there necessarily there being a victim. Another power allows the CRE to enforce the statutory duty on public bodies to promote equality through a compliance notice which is enforceable in the county courts. At the CRE, law enforcement and promotional work used to be institutionally separate, but now these tasks are mixed internally, which allows strategies to include elements of both. Some staff work separately on the issues, e.g. legal case workers, whereas some work on both, e.g. a policy worker implementing legal strategy.

In Northern Ireland the enforcement possibilities are much stronger in cases of discrimination on the grounds of religion and political opinion than for other grounds. Employers are required to monitor the religious make-up of their workforce and the Equality Commission for Northern Ireland (ECNI) enforces this duty. A hierarchy of discrimination grounds has thus developed in the enforcement tools, reflecting society's views, and reinforced by legislation. ECNI wants to see the differences evened out and levelled up in a single piece of legislation.

In Austria complainants chose whether to go to court or to submit their complaint to the Equal Treatment Commission (ETC), which issues non-binding opinions, or both. Any procedures before the ETC postpone but do not preclude the possibility of going to court; indeed often the expert opinion of the ETC is used to pursue the matter in court. The Ombud for Equal Employment Opportunities assists victims in bringing their cases before the ETC, and also act as expert to it. In practice, many cases are settled by the Ombud before they reach the ETC. One of the most important functions of the Ombud is to gather information to provide to the Equal Treatment Commission to assist its decision-making.

It is normal for cases before the Austrian ETC to be conducted confidentially. Similarly, although hearings before the Dutch ETC are public, for reasons of privacy the Dutch ETC seldom publishes the names of parties when it publishes opinions on its website or in the media. In Sweden the whole process is public, from the complaint to the Ombudsman's opinion.

The advantage of specialised bodies that can make decisions or give opinions is that they provide efficient, fast decisions. On the other hand usually such decisions are non-binding. Moreover, such bodies must avoid being seen as promoting only the victims' rights or partial and ensure their decisions are well respected among all stakeholders.

The impact of some enforcement powers on the independence (both actual and perceived) of the specialised body was discussed. A specialised body may encounter a conflict of interest where it gives an independent opinion in a case and then goes on to support a party in that case before the courts – it is for this reason the Dutch Equal Treatment Commission has chosen not to use its power to take cases to court. Also, the Dutch ETC is considering developing codes of conduct and recommendations, but is aware that they could end up having to give a quasi-judicial opinion in a case involving these.

The Austrian Ombud is sometimes accused of impartiality when it accompanies victims to the Equal Treatment Commission and is used as an expert by the ETC in the same case. The Ombud responds by insisting that it always advocates the human right of equality, which seems to be accepted by the employer. In Sweden it is recognised that the Ombudsmen first of all take a neutral perspective in investigating whether discrimination has taken place, but if it then decides to assist the victim in taking the case to court it is no longer neutral. Employers can sometimes be suspicious.

Whereas some delegates strongly believe a specialised body can and should combine neutrality and advocating the rights of victims, others maintained that the responsibility of specialised bodies must be to promote equality, and this implies that it is not their role to be neutral but to further the interests of victims of discrimination.

It was observed that in cases of dismissal on suspected discriminatory grounds, the employer often points to another reason for the dismissal (e.g. timekeeping) and the labour courts tend to accept this explanation on the basis of the labour law they are familiar with. Courts are sometimes slow to implement EC law and reluctant to apply newer non-discrimination norms where older labour legislation can be applied. In France the judges tend to have little knowledge of discrimination, and it is hoped that the specialised body set up at the end of 2004 will be able to help the claimant gather evidence and start an action.

The importance of having regional offices of the specialised body in order to ensure accessibility was highlighted. Victims are likely to be deterred if they have to travel far to make a complaint. On the other hand, in larger countries where the population is more spread out it can be questioned whether this is the best use of resources. The use of contract compliance as an enforcement tool was discussed. In Sweden an increasing number of public authorities are including non-discrimination clauses in their contracts. In Northern Ireland public procurement has been used in a purposive way to support the policy of overcoming discrimination on the grounds of religion and political opinion. Under European Community public procurement directives, a contractor can be disqualified from the selection process for a contract for a serious breach of equality law, including if a court or tribunal has made a finding against the company. Moreover, under EC rules, contract conditions can specify that contracts must be carried out in a way that is free from discrimination.

Sanctions and Remedies

It was suggested that specialised bodies could make recommendations on whether sanctions meet the requirement that they are 'effective, proportionate and dissuasive'. The purpose of remedies must be to change behaviour and they should be efficient and speedily enforced. Remedies may be of a civil, criminal or administrative nature. Civil sanctions including damages and orders for a change in practice or behaviour are widely viewed as most appropriate. Criminal law sanctions may have a deterrent effect and do send an important signal to society, but civil remedies can form part of a rational process of consideration of how to affect change in the company or organisation. The nature of discrimination as a broader social problem calls for constructive measures to affect change.

In some countries courts have the power to order or recommend proactive remedies and sanctions, for example to require education for personnel officers and others. It is useful if the specialised body can be proactive in suggesting remedies, as the CRE and ECNI can be. The Dutch ETC can make non-binding recommendations for proactive remedies.

In France, a person can request either to be reinstated or receive damages for future loss. A person who requests to be reinstated is probably confident of a supportive environment. Reinstatement is more likely to be successful in larger structures and more difficult in smaller organisations.

Publicising a finding of discrimination can be effective. In Belgium the judge can order the publication of a judgement in a newspaper if such a measure would be useful to avoid further discrimination. The victim of discrimination in employment in Belgium can also request reinstatement and if this is refused they can be awarded damages equal to six months salary. If the employer still does not comply, a daily fine can be imposed, enforceable by a bailiff.

Often the threat of bringing a case to court is enough to result in a satisfactory resolution of the problem, and moreover a change in practice. There is a preference in many countries for mediation and dialogue rather than sanctions. Swedish legislation provides that the Ombudsmen should seek voluntarily acceptance of suggested remedies by employers, and only if this is not reached will the Ombudsmen go to court. The Ombudsman against Ethnic Discrimination finds that the remedies that can be achieved through settlement are often more flexible than would be available through the courts.

PROGRAMME

TUESDAY, 14 OCTOBER

8.30 Registration and coffee

9.00 Welcome by Anna Theodóra Gunnardsdóttir, Deputy Ombudsman against Ethnic Discrimination

9.10 The role of the specialised bodies and of the trade unions
Katri Linna, Chief Legal Adviser, SIF Union and former deputy Ombudsman against Ethnic Discrimination
Ingemar Hamskär, lawyer at the TCO-union
Fadi Moussa, Network of Trade Union Active Immigrants (Fackligt Aktiva Invandrare – FAI). Fackligt Aktiva Invandrare (FAI)

Plenary discussion

Coffee is served at 10.45

12.00 – 13.00 Lunch

13.00 Workshops:

Exchange of experience of how specialised bodies are organised and how they co-operate with other actors. What can be learnt from each other? Are the problems similar?

Coffee is served from 14.30

15.15 Reports in the plenary on the main findings of each working group, followed by plenary discussion

End of first day's activities

19.30 Dinner

WEDNESDAY, 15 OCTOBER 2003

9.00 Remedies and sanctions under the EC Anti-discrimination Directives - what is required of the Member States?
Barbara Cohen, independent consultant

9.30 Remedies and sanctions offered in the anti-discrimination law of the United States. What experiences can be drawn for Europe?
Paul Lappalainen, legal adviser at the Swedish Integration Board

Plenary discussion

Coffee is served at 10.45

12.15 – 13.30 Lunch

13.30 Workshops:

Examples of subjects to be discussed: sanctions must be effective, proportionate and dissuasive – how can the Member States fulfil the requirements of the Directives? What different types of sanctions, damages and compensation can be found in the Member States, for example, with regard to the type of sanctions and level of damages? Which remedies are appropriate and effective in different situations (harassment at work, access to employment)? What can we learn from the US experience?

Coffee is served from 14.30

15.00 Plenary discussion

16.30 End of the seminar

PARTICIPANTS:

Austria:
Sandra Konstatzky, Ombud for Equal Employment Opportunities
Ingrid Nikolay-Leitner, Ombud for Equal Employment Opportunities

Belgium:
Bruno Blanpain, DLA Caestecker
François Sant'Angelo, Centre for Equality Opportunities and Opposition to Racism

Cyprus:
Eliza Savvidou, Office of the Commissioner for Administration (Ombudsman)

Czech Republic:
Lucie Merhautová, Ministry of Labour and Social Affairs
Martina Stepánková, Human Rights Department – Office of the Government

Denmark:
Trine Baumbach, Danish Institute for Human Rights
Mandana Zarrehparvar, Danish Institute for Human Rights

European Commission:
Anthony Lockett, DG Employment and Social Affairs

Finland:
Arto Teronen, Ministry of Social Affairs and Health, Department for Occupational Safety and Health

France:
Marie Becker, GELD (Groupe d'Etude et de Lutte contre les Discriminations)
Sophie Latraverse, GELD (Groupe d'Etude et de Lutte contre les Discriminations)
Sarah Pellet, National Consultative Commission on Human Rights

Germany:
Hildegund Ernst, Federal Ministry for Family, Seniors, Women and Youth

Greece:
Angeliki Salamaliki, Ombudsman's Office, Human Rights Department

Ireland:
Jason McCabe, Equality Authority

Netherlands:
Edith Brons, Equal Treatment Commission
A. Keirsten de Jongh, Equal Treatment Commission
Marcel Zwamborn, Equal Treatment Commission and Specialised bodies Project Manager

Slovakia:
Jana Kviecinska, Section on Human Rights and Minorities, Slovak Governmental Office

Sweden:
Sonya Aho, Ombudsman against ethnic discrimination
Torbjörn Andersson, Disability Ombudsman
Khaled Assel, Swedish Integration Board
Marco Buemi, Ombudsman against ethnic discrimination
Anna Fritshammar, Ombudsman against discrimination on the grounds of sexual orientation
Anna Theodóra Gunnardsdóttir, Ombudsman against ethnic discrimination
Ingemar Hamskär, TCO Union (Swedish Confederation of Professional Employees)
Johan Hjalmarsson, Ombudsman against ethnic discrimination
Ingrid Krogius, Disability Ombudsman
Paul Lappalainen, Swedish Integration Board
Katri Linna, SIF Union
Ebrima Mboob, Fackligt Aktiva Invandrare (FAI)
Gudrun Persson Härneskog, Committee of Inquiry on Discrimination
Emelie Rennerfelt, Ombudsman against ethnic discrimination
George Svéd, Ombudsman against discrimination on the grounds of sexual orientation

UK:
Barbara Cohen, Independent Consultant
Barry Fitzpatrick, Equality Commission for Northern Ireland
Antoinette McKeown, Equality Commission for Northern Ireland
Brenda Parkes, Commission for Racial Equality
David Zilkha, Commission for Racial Equality

Migration Policy Group:
Janet Cormack
Jan Niessen

TOWARDS THE UNIFORM AND DYNAMIC IMPLEMENTATION OF EU ANTI-DISCRIMINATION LEGISLATION: THE ROLE OF SPECIALISED BODIES

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* ('Framework Directive', prohibiting discrimination on the grounds of religion or belief, disability, age and sexual orientation) enhance the potential to combat discrimination in the European Union. These compliment the existing legislative programme on sex discrimination, which was most recently added to by *Directive 2002/73/EC amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.* All EU Member States required legislative change to ensure compliance with these Directives.

Under Article 13 of the Racial Equality Directive, a specialised body (or bodies) must be designated 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 that have a wider brief than racial and ethnic discrimination. Article 8a of Directive 76/207/EEC as amended by Directive 2002/73/EC requires the same in relation to discrimination on the grounds of sex. The bodies' tasks are to provide independent assistance to victims of discrimination, conduct independent surveys on discrimination, and publish independent reports and make recommendations on any issue relating to such discrimination. Many States have thus been faced with the challenge either of establishing a completely new body for this purpose, or revising the mandate of an existing specialised body.

The project *Towards the uniform and dynamic implementation of EU anti-discrimination legislation: the role of specialised bodies* is funded by the European Community Action Programme to Combat Discrimination (2001-2006). It creates a network of specialised bodies with the objective of promoting the uniform interpretation and application of the EC anti-discrimination directives, and of stimulating the dynamic development of equal treatment in EU Member States. It promotes the introduction or maintenance of provisions that are more favourable to the protection of the principle of equal treatment than those laid down in the Directives, as allowed under Article 6(1) of the Racial Equality Directive and Article 8(1) of the Framework Directive. The partners of the project are the Ombud for Equal Employment Opportunities (Austria), the Centre for Equal Opportunities and Opposition to Racism (Belgium), the Equality Authority (Ireland), the Equal Treatment Commission (Netherlands, leading the project), the Ombudsman against Ethnic Discrimination (Sweden), the Commission for Racial Equality (Great Britain), the Equality Commission for Northern Ireland, and the Migration Policy Group (Brussels).

The project provides a platform for promoting the exchange of information, experience and best practice. Specialised bodies from other existing and acceding EU Member States are also participating in the activities of the project.

This is the report of the fourth in a series of 7 experts' meetings conducted under the project, which was hosted by the Swedish Ombudsman against Ethnic Discrimination (DO) in Stockholm on 14-15 October 2003. The theme of the meeting was *Discrimination in Working Life – Remedies and Enforcement.* The three other publications in this series are *Proving Discrimination, Protection against Discrimination and Gender Equality: how to meet both requirements* and *Equal Pay and Working Conditions.*

CENTRUM VOOR GELIJKHEID VAN KANSEN EN VOOR RACISME BESTRIJDING
CENTRE POUR L'ÉGALITÉ DES CHANCES ET LA LUTTE CONTRE LE RACISME
MPG
OMBUDSMANNEN MOT ETNISK DISKRIMINERING DO
CGB Commissie Gelijke Behandeling
Equality Commission FOR NORTHERN IRELAND
THE EQUALITY AUTHORITY AN EQUALITY IN A DIVERSE IRELAND
COMMISSION FOR RACIAL EQUALITY
BUNDESMINISTERIUM FÜR SOZIALE SICHERHEIT UND GENERATIONEN Anwältin für Gleichbehandlungsfragen