

The sanctions regime in discrimination cases and its effects

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Sanctions and Remedies in discrimination cases

Sanctions in discrimination cases have to be

- ▶ Effective
- ▶ Dissuasive
- ▶ Proportionate

BUT HOW?

AND WHAT DOES THIS MEAN?

Sanctions and Remedies in discrimination cases

Sanctions in discrimination cases should

- Be adequate in relation to the damage sustained (*von Colson* C-14/83)
- Not be mere symbolic (ACCEPT C 81/12)
- Not be made dependant on a proof of fault (*Decker* C-177/88)
- Have a real deterrant effect (*Decker* C-177/88)
- Not have any upper limits (*Marshall* C-271/91)
- Not be dependant on the existance of an individual victim (*Feryn* C-54/07)
- Might include punitive damages, that are really additional (*María Auxiliadora Arjona Camacho v Securitas Seguridad España, S.A.*, C-407/14, pending)



National Case Law

- Guidelines on how to calculate damages – the *Vento bands*
- Awards should not be too low in order to give respect to the injury to feelings and not run the risk of diminishing respect for anti-discrimination legislation (*Buxton v Equinox Design*, UK)
- Personal motivation of perpetrator irrelevant (Supreme Court Judgement, CZ)
- Gravity and length of discriminatory treatment has to be taken into account (Labour Court, DE)
- Preventive effects of compensation payments? (Diverging judgements, Commercial Court, AT)

Questions brought forward at court by EBs

- What to take into account when determining the amount of compensation (D)
- Can intersectional discrimination lead to cumulative compensation? (BE)
- Can discriminatory treatment be sanctioned twice? (CZ)
- How to calculate damages in a concrete case (S)

Remedies and sanctions in discrimination cases

- Compensations for material and immaterial damages
- Administrative and criminal fines
- Obligations/recommendations to stop discriminatory treatment
- (Re-)instatement into a situation without discrimination
- Publication of a decision
 - Recommendations/orders to install equality polices
 - Warnings
 - Property sanctions for legal entities

Differences in sanctions and remedies

- Criminal law vs civil law
 - Criminal sanctions apply for hate crimes
 - Aggravating factor of discriminatory motivation
 - Limitation to grounds related to racism and xenophobia
 - No shift of the burden of proof
- Different standards for different grounds
- Different standards for different fields of discrimination
- Dependancy on the competences of bodies in charge

How to calculate a sanction

For the decision on the amount of a compensation or a fine national legislations take into account various factors, like for example:

- Financial capacities of the perpetrator
- Status of the perpetrator (public or private entity)
- Numer of discriminatory acts (repeated discrimination)
- Dimension of discrimination (multiple discrimination)

Which sanctions are the most effective ones?

- Administrative fines, if punitive character
- Publications of the decision
- Compensations with amounts of dissuasive character
- Obligations/Recommendations to stop discriminatory practises/ structures/ procedures
- Reinstatement in situation without discrimination
- Imposing the obligation to fulfil community services
- Obligations/Recommendations to implement anti-discrimination policies and/or plans, if they can ensure change in the workplace
- Warnings, if potential to damage an image

The victim's perspective

A person affected by discrimination may want

- Have the problem solved, achieve what he/she wanted before discrimination started
- Compensation for damage suffered
- Money
- Have the perpetrator punished
- Statement/judgement that a discrimination has taken place
- Systemic change

Enforcement of sanctions and remedies

- Non-compliance penalties (BE)
- Take court action in case money is not paid (UK)
- Return to tribunal for enforcement action (UK)
- Inform the public about non-fulfilment (RS)
- Formal monitoring procedures
- Enforcement of EB's decision at court (HU)
- Issuance of fines (NO)
- Publish reports, require actions plans, make recommendations (UK)

Sanctions in discrimination cases – proposal for a typology

- ▶ **Sanctions with a predominantly compensatory character**
 - ▶ Compensations
 - ▶ (Re-)instalment into situation without discrimination
- ▶ **Sanctions with a predominantly punitive character**
 - ▶ Criminal/administrative fines
 - ▶ Publications of the decision
- ▶ **Sanctions with a predominantly preventive character**
 - ▶ Suspension of licences and business activities
- ▶ **Sanctions with a predominantly socio-preventive character**



Obstacles and challenges

- There is no ideal sanction for each and any case
- Fear of retaliation as a barrier to seek redress
- ▶ Complexity, lengthiness and costs of procedures, lack of legal aid
- ▶ Lack of knowledge about rights and remedies, lack of legal certainty
- ▶ Low levels of compensation
- ▶ Non-binding decisions issued by some quasi-judicial equality bodies
- ▶ Insufficient powers to remedy a situation, such as to reinstate people to their pre-discrimination situation, or to issue a sanction when there is no individual victim
- ▶ Low chances to achieve adequate compensation, specifically for immaterial damages
- ▶ Lack of experience in and sensitivity for discrimination cases on the side of the judiciary
- ▶ Difficulty to prove the facts of discrimination and the effects thereof
- ▶ Lack of structured and efficient monitoring procedures

Enhance effectiveness, proportionality and dissuasiveness


- ▶ Take into consideration all circumstances of the case as well as the individual wants of the person or group affected by discrimination
- ▶ Seek justice, where those making the decision are experts for discrimination cases (specialised tribunals, tribunal type equality bodies)
- ▶ Seek justice, where costs of procedures are low (most specialised tribunals and tribunal type equality bodies do not request any fees)
- ▶ Seek justice with a body that has a certain (legal) standing
- ▶ Seek justice with a body that can issue legally binding decisions
- ▶ Improve access to relevant information for (potential) victims of discrimination, making also relevant case law easily accessible

Enhance effectiveness, proportionality and dissuasiveness

- ▶ Support judges in understanding and applying the shift of burden of proof and in developing further sensitivity to issues of diversity and discrimination, in understanding and applying the concepts of immaterial and aggravated damages and of multiple discrimination
- ▶ Encourage widening the range of sanctions available so that the one most suitable to the case can be applied
- ▶ Make wider use of alternatives to compensations and fines, like court orders to stop the discrimination, revocation or annulment of the discriminatory act, reinstatement of an employee – when applicable in the national context
- ▶ Make public a decision, a judgement and/or a concrete sanction issued, especially in order to enforce a judgement and/or take care that a sanction is complied with
- ▶ Monitor enforcement of decisions

The role of equality bodies

- Make the rights choice
- Be THE source of expertise
- Be THE source of knowledge
- Be drivers for change
- Litigate strategically
- Name and shame
- Monitor and enforce sanctions and remedies
- Be innovative



**Thank you for your
attention!**

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