



## STRATEGIC LITIGATION



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**Equinet** brings together 46 organisations from 34 European countries which are empowered to counteract discrimination as national equality bodies across the range of grounds including age, disability, gender, race or ethnic origin, religion or belief, and sexual orientation. Equinet works to enable national equality bodies to achieve and exercise their full potential by sustaining and developing a network and a platform at European level.

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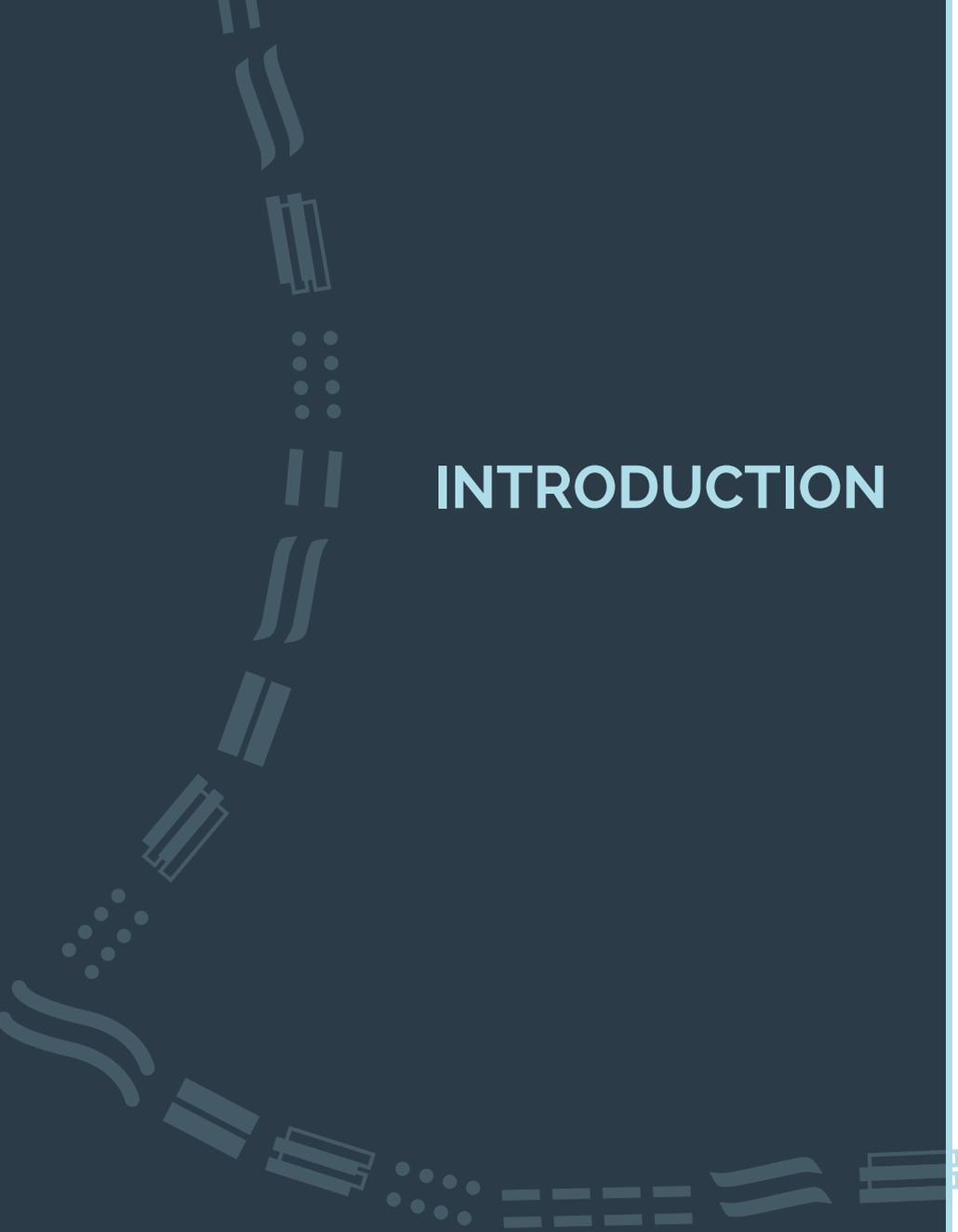
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# INTRODUCTION



This Handbook on strategic litigation was produced by Equinet, the European Network of Equality Bodies. Equinet brings together 46 organizations from 34 European countries, which are empowered to promote equality and counteract discrimination as national equality bodies across a range of grounds including age, disability, gender, race or ethnic origin, religion or belief, and sexual orientation.

National equality bodies are independent organisations established on the basis of EU equal treatment directives<sup>1</sup> with a mandate to provide independent assistance to victims of discrimination, conduct independent surveys concerning discrimination, publish independent reports and make recommendations on any issue relating to discrimination in their country. While equality bodies exist in all EU Member States, candidate countries and beyond, their mandate, powers and resources vary greatly. Notably, some of them focus on legal advice and support, while others are mandated to investigate and decide the merits of discrimination cases as impartial state institutions.

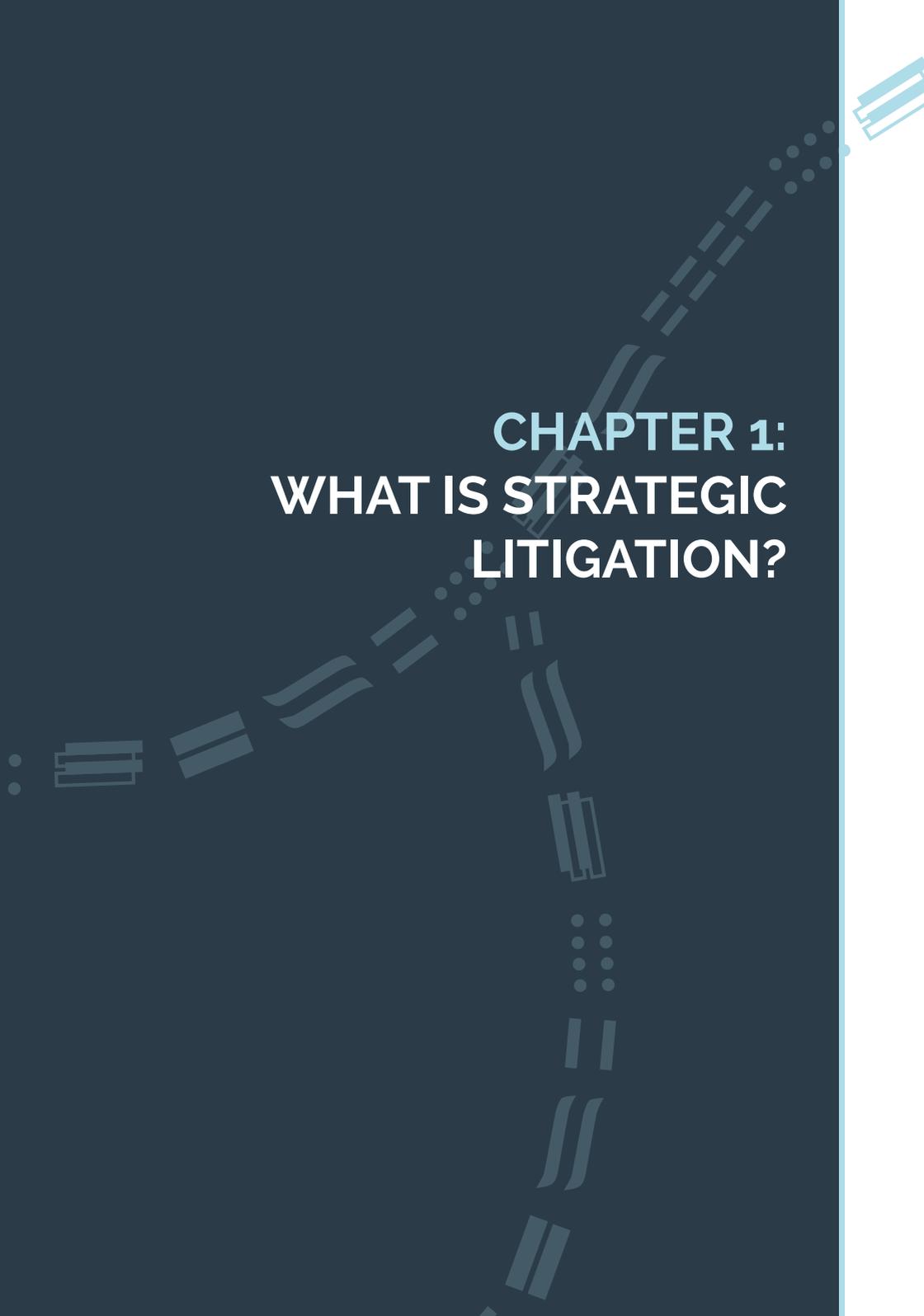
Throughout 2015-2016, a members-led thematic Cluster within Equinet brought together legal experts from equality bodies with an interest in strategic litigation in discrimination cases. This was followed up by an Equinet training on strategic litigation organised in December 2017, hosted in Warsaw by the Polish Commissioner for Human Rights.

Strategic litigation is already used by some equality bodies, while others currently consider experimenting the use of this tool to take up cases that can result in important clarifications and adjustments of the applicable law and positive changes going beyond the particular case. The Cluster and the training provided a space for interested equality bodies as part of an expert group to discuss the advantages, disadvantages and challenges of strategic litigation, share and discuss criteria for strategic litigation and analyse successful examples of court cases.

Discussions in the Cluster and at the training and their conclusions served as the basis of this Equinet Handbook on Strategic Litigation which we hope will serve as a useful resource for equality bodies and their partners considering to engage in strategic litigation.

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<sup>1</sup> Directive 2000/43/EC (the so-called Race Directive), Directive 2004/113/EC (the so-called Gender Goods and Services Directive) and Directive 2006/54/EC (the so called Gender Recast Directive)



# CHAPTER 1: WHAT IS STRATEGIC LITIGATION?



**S**trategic litigation is a method used to select suitable cases ('test cases') to bring to court in order to achieve a specific outcome. The intention is that these legal proceedings will have a positive broader impact on law and policy development as well as setting a precedent for the outcome in similar cases.

The objectives of strategic litigation can be intra-legal and extra-legal. Intra-legal objectives concern the interpretation, application and content of the law in question, for example establishing whether certain treatment is direct or indirect discrimination. Extra-legal aims do not target the content of the law in this way, but instead typically serve to raise awareness and/or put pressure on relevant actors to take measures to prevent discrimination. This may be done by for example attracting media attention to shed light on a particular problem, sector, or group.

The objective of strategic litigation is commonly to achieve one or more of the results listed below:

- To clarify or establish a point of law / the meaning of a particular legal provision
- To effect a change in the law
- To obtain judicial clarity on the application of equality and non-discrimination law
- To establish that non-discrimination law covers or does not cover a particular situation
- To highlight a serious issue such as a policy or practice which has a negative effect on many people, as part of a wider campaign for legal and social change
- To ensure that non-discrimination law is upheld
- To overturn 'bad' case law
- To establish legal precedent, enabling others to enforce their rights more confidently

The specific objectives in each case must be kept in mind throughout the litigation process in order to ensure adequate adjustment in the event of a change in circumstances. This may be the case where the legal issue in question is resolved in another case, or there are legal or political developments which impact the case or media's interest in it.

The principles described in this handbook can also be applied to other functions performed by National Equality Bodies and National Human Rights Institutions (NHRI) in order to achieve the maximum possible impact of their work. These principles may be of use when deciding whether to exercise legal powers or duties, lobbying, briefing the media, and providing information or training.

## BENEFITS OF STRATEGIC LITIGATION

When successful, strategic litigation can entail widespread benefits for society in general in addition to those involved in the specific case. The outcome of these cases can lead to changes in legislation and

government policy, raise public awareness, as well as foster support for a particular issue.

Below are examples of case law which illustrate the benefits of strategic litigation.

## STRATEGIC LITIGATION IN ACTION – CASE LAW

### 1. STRATEGIC LITIGATION TO CLARIFY OR ESTABLISH A POINT OF LAW

#### **EBR Attridge Law LLP v Coleman** (Employment Tribunal, UK; CJEU C-303/06)

Ms Coleman was not herself disabled, but was the caregiver of her disabled young son. She brought a claim against her employer for unlawful discrimination on the grounds of her son's disability. The employer argued that associative discrimination was not prohibited by UK non-discrimination law, and as a result the Tribunal had no jurisdiction to hear the claim. The tribunal referred the matter to the Court of Justice of the European Union (CJEU, (C-303/06)), which ruled that Directive 2000/78/EC prohibited discrimination on the grounds of disability and that it was not necessary for the person who suffered discrimination to be disabled.

As a result, Ms Coleman's case was tried by the Employment Tribunal. This case was strategic as it clarified that Directive 2000/78/EC prohibited associative discrimination, and will affect the outcome of similar cases.

#### **Swedish Equality Ombudsman v The State Unemployment Board** (Svea Court of Appeal, T 777-16)

An unemployed man in Sweden was directed by the State Unemployment Agency to apply for a sales position in a company which mainly sold lottery tickets. When the man informed his prospective employer that his faith as a Jehova's Witness prevented him from interviewing for the job, he lost his unemployment benefits on the grounds of misconduct. The Equality Ombudsman brought a claim against the state (the Unemployment Board) for indirect discrimination on grounds of religion. Both the lower court and the Court of Appeal found that the man had been subject to unlawful discrimination. The Court of Appeal held that, when assessing whether an individual's benefits should be cancelled due to their conduct, it is disproportionate to apply a rule concerning misconduct in such a fashion that it equates religious reasons with other reasons, as religious reasons carry a particular weight.

The ruling was important since it established, as a matter of Swedish non-discrimination law, that religious unemployed persons may (within reason) refuse to take certain jobs without negative repercussions for their unemployment benefits. This applies when the nature of the job in question is such that the unemployed persons cannot reasonably be asked to perform it in light of their religion.

## 2. STRATEGIC LITIGATION LEADING TO A CHANGE IN THE LAW

Even losing a case in court can entail progress towards achieving a strategic objective. The ruling can namely be instrumental in demonstrating that a change in the law is necessary.

### **London Borough of Lewisham v Malcolm** (UK Supreme Court, [2008] UKHL 43)

Malcolm was the tenant of social housing belonging to the local authority landlord. One of the conditions of the tenancy was that sub-letting the property was not permitted. Malcolm fell ill as a result of mental health disability, his behaviour changed and he sub-let the property. The landlord sought an eviction order from the court. Malcolm argued that he had been treated less favourably than a non-disabled tenant, which entailed unlawful discrimination. The Supreme Court found that the disability discrimination law in force at the time did not prohibit the landlord's treatment of him, and thus that a change in the law was needed.

As a result, two years later, when the Equality Act 2010 replaced the Disability Discrimination Act 1995, a clause was included in the new legislation prohibiting any unfavourable (as opposed to less favourable) treatment which cannot be objectively justified arising from a person's disability. The application of this regulation does not require a comparator, making it easier for disabled people to challenge discriminatory treatment on the grounds of disability<sup>2</sup>.

### **Strategic Litigation in the Criminal Court (Finland)** (Helsinki Court of Appeal R 16/738)

In 2016 a young man was sentenced to 6 months in prison by the Municipal Court after he refused to do both military and civil service, because of his pacifist beliefs. The legal exemption in domestic law for Jehovah's Witnesses did not apply to him. The Finnish Non-Discrimination Ombudsman defended the conscientious objector in criminal proceedings in the Helsinki Court of Appeal in May 2017.

The Non-Discrimination Ombudsman argued that the current legislation, which exempts only Jehovah's Witnesses from military and civil service, is discriminatory and in contradiction with both the Finnish Constitution and International Human Rights Law .

(Note: the legal exemption for Jehovah's Witnesses was enacted in response to criticism from the UN Human Rights Committee that Finland punishes conscientious objectors, who were mostly Jehovah's Witnesses, with prison sentences. However it conflicts with the Finnish constitution, discrimination law and international human rights obligations.)

Despite repeated criticism from the (Finnish) Constitutional Law Committee, the UN Human Rights Committee periodic report on Finland, and two revisions of the Finnish constitution, the discriminatory law has remained.

The Non-Discrimination Ombudsman cited a number of decisions and judgments by both the UN Human Rights Committee and the European Court of Human Rights, in the light of which the current legislation and practice violates equal treatment provisions in the UN Covenant Civil and Political rights (articles 18 and 26) and the European Convention on Human Rights (articles 9 and 14).

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<sup>2</sup> It is important to note that the decided outcome of this case effectively undermined existing legislation which allowed protection from discrimination 'for reasons related to a disability'. In Great Britain the law was subsequently changed to ensure that protections for disabled people were not lessened. However in Northern Ireland the legislation was not similarly changed. As Northern Ireland common law follows British case precedent, the protections for disabled people in Northern Ireland remain depleted as a result of this case.

### 3. STRATEGIC LITIGATION TO OBTAIN JUDICIAL CLARITY ON APPLICATION OF THE LAW

#### **Paulley v First Group Plc.** (UK Supreme Court, [2017] UKSC 4)

Doug Paulley, a wheelchair user, attempted to board a First Group bus. The wheelchair space was however occupied by a mother with a sleeping child in a pushchair. The woman refused the driver's request to move or fold the pushchair and as a result the driver told Mr Paulley that he could not board the bus. Mr Paulley brought a claim for disability discrimination, arguing that the bus operator had failed to make reasonable adjustments for him. While the Supreme Court decided in favour of the bus company, the following landmark ruling was also made. When a non-wheelchair user refuses to vacate a wheelchair space, it is not sufficient for the bus operator to simply accept such a refusal. The operator is obliged to take steps, such as not driving further, or compelling the person to vacate the space. The court also suggested that the law should be reconsidered in order to provide clarity for bus operators and their customers.

This case is highly strategic as it potentially affects approximately 1 million British wheelchair users. In addition, the ruling provides clarity and guidance to transport operators who need to ensure the provision of their services without discriminating against women or disabled wheelchair users.

#### 4. STRATEGIC LITIGATION TO ESTABLISH THAT NON-DISCRIMINATION LAW COVERS A PARTICULAR SITUATION

##### **Swedish Equality Ombudsman v IF Skadeförsäkring AB** (Svea Court of Appeal, T 1912-13)

The conflict between non-discrimination law and insurance provisions is well known. While non-discrimination law generally prohibits unequal treatment of individuals based on statistical findings with respect to their group belonging, insurance companies operate precisely on group-based statistical assessments. In Sweden, insurance providers considered that correct decisions based on a statistical risk assessment, allowed under the Swedish Insurance Act, could not be challenged as discriminatory. A major insurance company thus had a rule that, without first having performed an individual risk assessment, children with serious illnesses and disabilities were automatically excluded from receiving coverage. The Swedish Equality Ombudsman brought a claim for a child with a hearing impairment who had been denied coverage with reference to this rule. The Ombudsman lost the case in the first instance, but the Court of Appeal later found that the insurance company had directly discriminated the child by denying her the right to the individual risk assessment afforded to children without disabilities.

The ruling established that business-motivated risk assessments in insurance provisions were not exempt from non-discrimination law. This was later confirmed by a governmental inquiry citing the case as an authority.

##### **Swedish Equality Ombudsman v Keolis Sverige AB** (Swedish Labour Court, A 73/15, A 75/15 and A 76/15)

Under Swedish law, an employer may lawfully dismiss a person from permanent employment without due cause at the time when the person turns 67. This so-called 67-year rule has been deemed a legitimate exception from the prohibition against discrimination on grounds of age by the European Court of Justice. As a consequence of the rule, and as a matter of consistency, Swedish employers considered it lawful to uphold upper age limits for employment. A major bus operator thus practiced a 70-year age limit for bus drivers applying for fixed term (one year) employment. Despite the fact that drivers could show through rigorous annual health checks that they were fit to drive, they were excluded from fixed term employment possibilities after having turned 70. The Swedish Equality Ombudsman brought a case to the Swedish Labour Court (a court of last instance) for three drivers. The Labour Court held that the exception to age discrimination provided for in the 67-year rule did not apply to fixed term employment and that the age limit prescribed by the bus operator was discriminatory and could not be justified by occupational demands.

The case has had significant impact in Sweden by providing fixed term employment possibilities to persons above the age of 67.

## 5. STRATEGIC LITIGATION TO HIGHLIGHT A SERIOUS ISSUE

### Howe v Wetherspoons (UK County Court 2015)

After attending the annual Roma and Irish Traveller conference in London, a large group of Roma and Irish Travellers, including a senior police officer, were refused entry to Wetherspoons bar. The security staff on duty would not let them in as they assumed that the group would cause trouble because they were Irish Travellers and Roma. The group brought a successful claim of direct race discrimination against Wetherspoons, which was ordered to pay a total of £24 000 to the group.

This case did not raise any strategic points of law. It highlighted the blatant and frequent race discrimination experienced by Roma and Irish Travellers and generated widespread national publicity. As a result, it sent out a strong message to other service providers that direct race discrimination is unlawful and can result in negative publicity and an obligation to pay compensation to the victim.

### Case anonymised (Poland)

In this case the court was asked to consider placing a victim of domestic violence in a mental facility, upon her husband's (the offender) motion. The court had before it an 'expert' opinion, which the Polish Commissioner considered unprofessional and biased. The Polish Commissioner joined the proceedings in order to draw public attention to the poor quality of court experts' opinions.

This case was notified to the Polish Commissioner for Human Rights by an NGO operating in the locality of the victim. Without the NGO's assistance, the Commissioner would not have known about this highly strategic and important case, or would not have known about it in good time to participate in it. Once the Commissioner joined the proceedings, the husband withdrew his motion and the litigation was discontinued.

### L.I. and Ž.B. v Company B. ltd and B.J. (the company's director), (Croatia)

L.I. and Ž.B. were high school students and within their school education program they had to complete a certain number of hours of practical work outside of school. Their school had already established a successful cooperation with the private company B. ltd where students were sent for their practical work. L.I. and Ž.B. were also sent by their teacher to make the arrangements with the company's director. However, when they appeared at the company's premises and after the company's director realized they were of Roma ethnicity, she told them to telephone the company the following day since the director is not available (pretending she is not the company's director). The following day, after L.I. and Ž.B. telephoned the company, the director claimed there were no more places available since the arrangements have already been made with another two students. Students brought a claim and the Croatian Ombudsman intervened in the case highlighting the seriousness of discrimination against Roma in Croatia that is particularly harmful in the field of education and work.

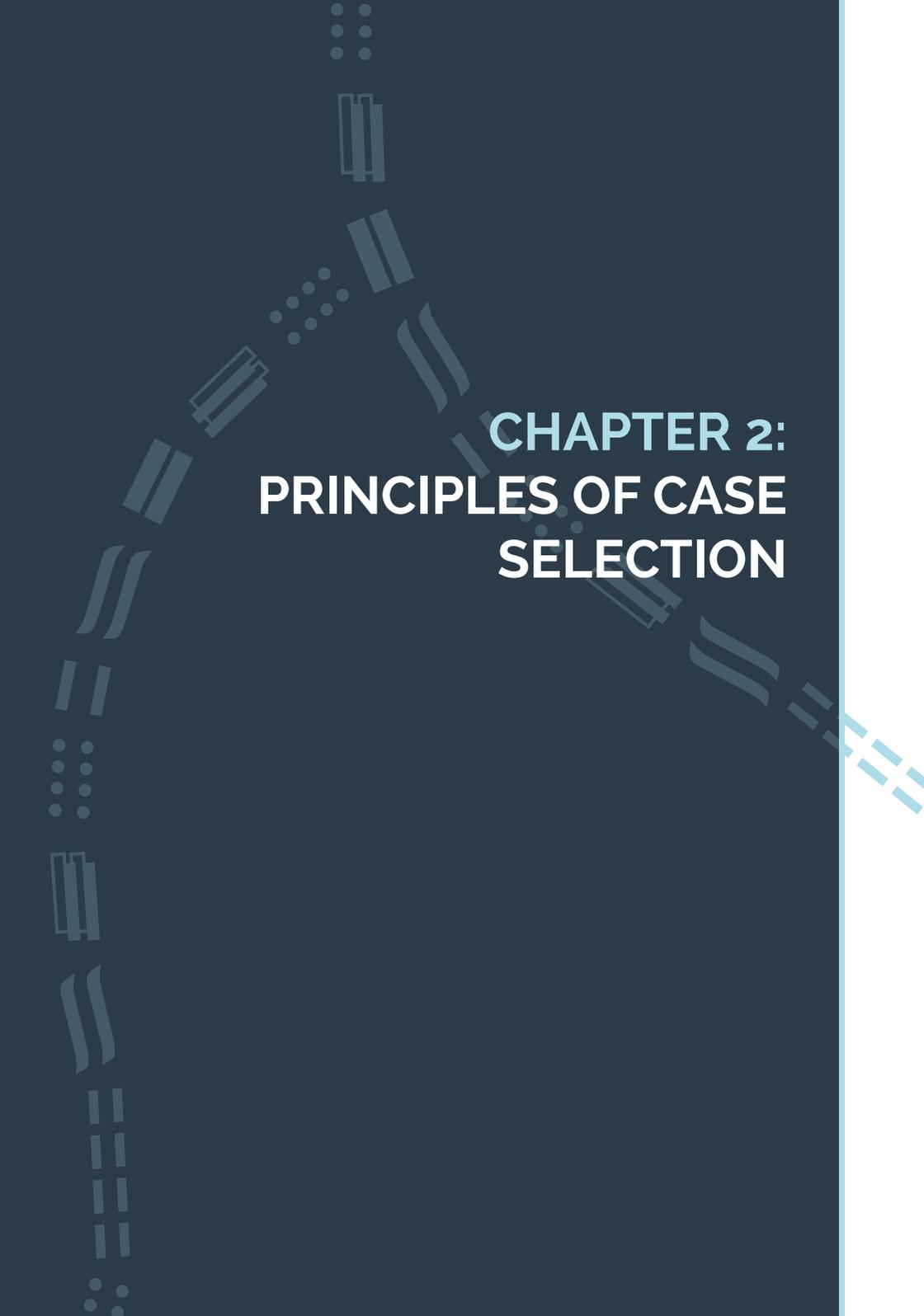
## 6. STRATEGIC LITIGATION TO ENSURE THAT NON-DISCRIMINATION LAW IS UPHELD

### Swedish Equality Ombudsman v Western Union Financial Services GmbH

(Stockholm District Court T 9176-08)

Certain legal measures taken post 9/11 required companies to block money transfers from persons who could be suspected of being on the so-called UN terror lists. As a consequence of these legal measures, a financial institution blocked all transactions from persons whose names matched those on the terror lists. The Equality Ombudsman brought a claim against the institution on behalf of certain individuals whose transactions had been blocked, claiming the practice of the institution to be indirectly discriminatory on grounds of ethnicity since it overwhelmingly affected persons with Arab or Muslim names. The main charge was that the institution in question did not collect other relevant data regarding the individual (date of birth, etc.) before blocking the transaction. The court found in the Ombudsman's favour and held that the institution's practice amounted to indirect discrimination.

The case was important to ensure the respect for non-discrimination law in the context of anti-terrorism measures. Specifically, it limits the permissibility of cut-and-dry measures liable to negatively affect certain persons based on their ethnicity and/or religion.



# CHAPTER 2: PRINCIPLES OF CASE SELECTION

## STRATEGIC LITIGATION POLICY

**D**rafting and publishing a strategic litigation policy can facilitate equality bodies' success in this area. The policy should clarify the selection criteria and describe current strategic objectives, thus informing stakeholders, victims and others that the equality body will only consider cases that can be expected to further these objectives and in which there is a clear public interest. In order to pre-empt critique of subjectivity and lack of transparency, the policy should be published and the reasons

underpinning it explained. Preferably, the complexity of the assessment should be stressed.

The strategic litigation policy outlines the general basis of case selection. The policy could be supplemented with a list of the specific types of cases currently being sought, amended from time to time. In order to maintain flexibility and discretion in selection, the criteria should be expressed in general terms, for example:

### **Strategic criteria:**

- The case presents an opportunity to clarify or strengthen the law
- The case presents an opportunity to increase compliance with the law
- The case presents an opportunity to shed light on a particular problem
- The case concerns a serious infringement of the law with regard to its nature or scale
- The case concerns a widespread infringement of the law

### **Practical criteria:**

- The case tests whether national legislation or practice complies with EU law, ECHR or applicable international law obligations
- The equality body is the most appropriate body to take action in the case. (is for example other funding available or could another regulator or body be more appropriate?)
- The required resources are available and proportionate to expected results
- Would it be appropriate for the equality body to act in partnership with others?

Ideally, the equality body's prioritizations and assessments of the severity and frequency of a given breach, as well as the impact on affected groups, should be supported by research or other evidence. The presence of such evidence can in some instances justify choosing one case or type of case over another (see Chapter 5 for how such information can be obtained). Naturally, one should be very careful drawing conclusions regarding the presence or absence of discrimination from the relative absence of research/evidence. Some forms of discrimination are notoriously difficult to pinpoint in research, some groups are for various reasons not able to draw attention to the discrimination they face, and, finally, discrimination on certain grounds is simply more likely to receive research funding than others.



**Example:** *Taking a case concerning racial discrimination in the insurance sector, could be justified by the presence of evidence indicating a problem.*

## CASE SELECTION

The strategic objectives will guide the selection of a certain type of case. It is important to note that there will always be an element of subjectivity involved in deciding whether one issue is more important and strategic to pursue than another. A certain degree of subjectivity is thus inevitable, but the quality of the assessment can be raised by establishing fixed decision-making structures and procedures within the body. While the form may vary, such structures usually involve a permanent group composed of management and senior lawyers, supplemented by persons with the relevant expert knowledge.

If the objective is to clarify a point of law, it is prudent to choose a case where the facts are

not in dispute. Otherwise, there is a risk that the court will focus on the factual dispute, and find a way to resolve the case without trying the contentious point of law.



**Example:** *In a case concerning whether a refusal of service was lawful or not, it is helpful if it is not in dispute that the claimant was in fact refused service.*

If the objective is to raise awareness or create media publicity concerning a particular problem, the circumstances of the case must serve to clearly illustrate that problem.

In situations where the aim is to push for a change of the legal, political, or societal status quo, the case must in addition have a strong moral dimension where there are good chances a court (or the media) will find it reasonable to condemn the perpetrator of discrimination and find for the victim.

Considering the difficulties and the potential negative impact of losing strategic cases, equality bodies should not become involved in litigation until the four questions below have been fully answered:

1. What happened?
2. What was the reason for the treatment in question?
3. Why is what happened problematic from a legal standpoint?
4. What are the relevant policy considerations?

An additional question which should be answered affirmatively is whether the equality body has sufficient resources to cover the litigation costs?

## 1. What Happened?

It is essential to have an accurate account of the facts. Simply relying on the victim's story is not sufficient. The facts should always be verified against the opposing side's story, and this should preferably be done prior to initiating a claim (there are however instances where suit needs to be filed before they are fully investigated due to time limit issues).

There is always a risk that the victim's experience of what happened has been coloured by prior negative experiences, entailing that their perception of what happened may be inaccurate or exaggerated. Sometimes those accused of discrimination may have legitimate non-discriminatory motives for their actions which the victim may be unaware of. As a general rule, there can only be one version of events, and that version must be supported by evidence if it is to withstand scrutiny in court. Advancing more than one theory of what took place will damage the credibility of the equality body as well as the victim, will likely lead to failure in court and incur costs.

**Example:** *A man alleged he was harassed and refused service in a cafe on the grounds of his race. During a fact checking exercise, it became clear that he had ordered food and stayed in the café after the alleged incident. The restaurant's staff alleged that he had been aggressive towards them and that they had not harassed him. As there was insufficient evidence to establish what had actually taken place, the case was excluded from further strategic action.*

*By contrast, a group refused service at a restaurant on the basis of their ethnic background had recorded the incident on their mobile phones. These recordings made it possible to prove the facts in evidence of their claim of direct race discrimination. The equality body considers this case to be*

*strategic due to the quality of the evidence and as it highlights a widespread practice of open discrimination against the group.*

## 2. Proving Discrimination: What was the Reason for the Treatment?

Poor treatment of a person belonging to a particular group does not necessarily mean they have been discriminated against. In order to win in cases of direct discrimination and harassment (less so in cases of sexual harassment), it is essential to show that discrimination is at least one of the causes of the treatment in question.

**Example:** *It is not sufficient to successfully claim discrimination in a case where a woman was not called for an interview where all those called were men. The woman must show that she was equally qualified for the position as the men who were interviewed, and that there is no apparent reason why she was not called for an interview. If the employer can show that the men called for an interview were all more qualified for the position than the woman, there is no case. If they are not able to show this, however, then the burden of proof to show that there was no discrimination will shift to the employer.*

*Similarly, in a harassment case, if X, who belongs to an ethnic minority has been called 'stupid' by his employer, X will need to provide evidence from which it is reasonable to presume that he has been singled out for reasons connected to him belonging to that ethnic minority in order to shift the burden of proof to the employer.*

In indirect discrimination cases there is a risk that the defendant will provide a number of reasons to justify a rule as neutral. Prior to initiating litigation it is advisable to try to

"lock" the alleged discriminator into stating what the legitimate aim of the rule is and why a less discriminatory means of achieving the aim would be insufficient. Having this documented will make it more difficult for them to provide a different, and potentially lawful, reason later on in the litigation in order to defeat the case.

### 3. Why Is What Happened Problematic from a Legal Standpoint?

It must be possible, as a matter of law, for the court to reach the desired strategic outcome of the case. Applicable rules must allow for a particular interpretation, and preferably, other courts or instances (the higher the better) have argued similarly in other cases. The desired outcome should be one that the court can reach easily. In any event, the court should be provided with a clear, safe, and persuasive path of legal arguments to justify the desired outcome. The mere use of rhetoric on the necessity to protect human rights and vague references to international conventions rarely provides the court with the clarity and authority it needs in order to give a judgement that will achieve the strategic objective of the litigation.

If the case concerns a point of law, generally speaking, there must be a supportive legal argument for reaching the strategic outcome in question. Legally weak cases, however unfair the facts or the impact on the victim, should be avoided for this reason.

There are however rare cases which the equality body may be likely to lose, but are nevertheless strategic as they are likely to result in a shift in public attitudes or a change in the law. (See Malcolm and Paulley cases in chapter 1)

### 4. What Are the Policy Considerations?

A good understanding of the social, political and economic factors affecting the issues in the case and the outcome sought are essential to determine whether the case is strategically strong or weak. Discrimination cases often raise a conflict between opposing interests, and although the law has already established that the balance should tip in favour of the right not to be discriminated, it is not always that simple in practice. For example, a court may very well prima facie consider it unreasonable to find against an insurance company for using group based statistics to determine a higher premium for an individual, sympathize with a small employer who cannot afford to hire a pregnant woman, or consider it justified to protect younger employees in dismissal cases considering that they have families to support.

The court may also be unsympathetic to the case. For successful strategic litigation, the policy considerations and the individual case itself must both be analysed carefully. The facts and circumstances of the case should favour the policy outcome sought considering the structural or systemic discrimination at issue.

For example, should employers typically have to carry the costs/risks/inconvenience for accommodating religious dress in a particular type of occupation? Answering this question is necessary to determine how or whether the case should be argued. Successful litigation typically requires 'selling' a particular outcome as attractive to the court, and for that to happen, the policy case must be strong. In any event, the individual circumstances should not work against the desirable outcome.

In addition to developing a theory of the case based on the four questions listed above, it is critical to analyse the alleged discriminator's case and determine whether their case is

stronger, weaker or equally strong in one or more of these aspects. By performing this analysis, it is often possible to predict and outline the lines of conflict and opposing arguments in advance. Thereby a sober risk assessment can be performed, preparations to neutralise the opposing party's arguments can be made, or alternatively it may be decided that it is better not to pursue that particular case.

## 5. Considering the Costs

Litigation costs can be prohibitively high, especially when cases are in appellate courts. When considering whether to pursue a strategic case, the equality body should determine whether it has sufficient funds and internal resources to cover the costs of the other parties (as well as its own) if the case is

lost. Furthermore, it should be established that the possible benefit from successful litigation justifies the possible costs. Where funding is limited, it is better to focus on cases with little or no factual dispute in order to reduce costs and avoid poor settlement agreements which do not require the perpetrator to admit guilt or rectify a policy or behaviour.

Complex discrimination cases involve all aspects described above and, in addition, tend to entail a mix of law, politics and morality. Such cases require careful analysis and decision making prior to initiating legal proceedings.

### Checklist for Selecting Cases:

- Does the case fit the equality body's strategic litigation policy?
- Are the facts of the case clear and strong?
- Is there sufficient evidence of discrimination?
- Are there sound and strong legal arguments (or even precedents) supporting the desired outcome?
- Is the social-political-economic environment supportive or are there particular sensitivities and risks?
- What will the impact be if litigation is successful?
- What will the impact be on the affected group if litigation is unsuccessful?
- Are the possible costs justified by the potential legal-policy gains?
- Will progress towards the strategic objective sought be set back/harmed if the case is lost or the intervention/amicus curiae is not successful?
- How can the case be publicised in order to influence public opinion to further the strategic objective sought?
- Is there a better way to tackle the issue than through litigation?



# CHAPTER 3: METHODS

This chapter describes the different methods that can be used in legal casework to achieve a strategic legal objective or a policy aim such as awareness raising.

National legislation determines an equality body's mandate, powers and duties as well as what legal tools it has at its disposal. An equality body's ability to select cases and tactical approach may thus be limited by applicable regulations where it lacks discretionary powers or available courses of action are otherwise restricted. Information regarding the different powers and duties of European equality bodies can be found in the European Directory of Equality Bodies on the Equinet website<sup>3</sup>.

The following legal powers are commonly granted to equality bodies. A thorough analysis should be conducted in each individual case, evaluating all pros and cons of available methods, prior to selecting a course of action.

- Alternative Dispute Resolution (ADR)
- Prosecution of a case where the discriminatory act is a crime
- Litigation through quasi-judicial bodies
- Discretionary power to intervene in legal proceedings
- Discretionary power to provide legal assistance to victims
- Provide funding for external lawyers/a private law firm to represent a victim in legal proceedings
- The equality body's own initiative procedures, injunctions and judicial reviews

### ALTERNATIVE DISPUTE RESOLUTION (ADR)

ADR can, if used strategically, often achieve the same objectives as litigation. This is especially true in cases where the discriminating party is a state, municipal body or large enterprise. The chances of ending systemic discrimination can be higher if the end result is an "amicable" settlement rather than a court decision, especially if the settlement includes an obligation for the discriminating party to take pro-active measures aimed at promoting equality and avoiding discrimination.



**Example:** *Following an amicable settlement facilitated by the Finnish Non-Discrimination Ombudsman, a municipality agreed to change its policy on providing emergency shelter: Previously the municipality sent all customers to a Christian service which demanded all inhabitants regardless of their faith to participate in morning prayers.*

<sup>3</sup> <http://www.equineteurope.org/-Members-Directory->

A key factor for the equality body to consider when deciding whether to recommend dispute resolution in a particular case, is whether the discriminating party will admit to having committed a discriminatory act. If the discriminating party will not make such an admission, there is a risk that the settlement procedure may be seen as “buying the victim’s silence”. This is particularly the case where the discriminating party also requires the inclusion of a confidentiality clause in the settlement agreement. Some equality bodies have a clear policy not to promote or partake in dispute resolution unless the settlement includes admission of a discriminatory act and/or is not subject to confidentiality. Another parameter to consider during settlement discussions is whether the

discriminating party could be willing to offer a formal apology to the victim for their experience of discrimination, regardless of whether a written admission of guilt is finally included in the settlement agreement.

One of the main advantages of dispute resolution can be a perception of a “win-win” end result for both parties, unlike litigation where one party commonly loses the case and is left unsatisfied. Litigation is also commonly a lengthy, work intensive and emotionally taxing process for the victim, which is avoided through a swift settlement process. If the settlement agreement is not subject to confidentiality, media reporting can also be used to promote ripple-effects of good practice in the sector concerned.

#### **CASE STUDY | Swedish Equality Ombudsman v Mälarsalen AB (Swedish Labour Court, A 72/13)**

In order to raise awareness regarding the prohibition of sexual harassment in the work place, the Swedish Equality Ombudsman decided to bring a case concerning sexual harassment of two young women applying for work at a well-known conference centre in Stockholm, Sweden. The women in question had been subjected to sexualised jargon and covert suggestions with regards to sexual services by a senior manager at the conference centre. The case attracted considerable media interest and the Ombudsman managed in several instances to raise interest among journalists in the general issue of sexual harassment, providing them with data and details on the legislative requirements. Before the main court hearing, the company admitted to the allegations and paid the full claimed amount to the women.

The case resulted in wide media coverage, notably in HR, industry and trade union journals, which highlighted the problem for employers, and informed employees of their rights.

#### **CIVIL PROCESS V CRIMINAL PROCESS**

In some Equinet member states discrimination is both a civil and criminal offence. When a case appears to fulfil the criteria for both a civil and a criminal offence, one of the first questions to arise is which litigation path to choose. Can the equality

body initiate its own investigation or would it be preferable to file a criminal complaint with the police? A number of factors to consider under these circumstances are mentioned below.

In criminal cases, the burden of proof lies with the prosecutor and it is necessary to prove beyond reasonable doubt that a certain action has been committed. The equality body should therefore consider whether the police and prosecutor are likely to have a genuine interest in investigating the case thoroughly and what the chances are of a conviction. One advantage of pursuing criminal litigation is that there is usually no risk of incurring financial costs, even if the investigation does not ultimately lead to the prosecutor bringing charges against the discriminating party.

By contrast, a significant advantage of civil litigation is that once a prima facie case of discrimination has been established, the burden of proof shifts to the discriminating party to prove that no discriminatory act took place. However, civil litigation entails a considerable financial risk for the losing party, who can be ordered to pay both their own and the winning party's costs. The equality body thus needs to consider whether it can carry all costs if a case is lost. Costs may be lower if the equality body itself is able to represent the victim in court either as an intervening party or as an 'attorney' for the victim.

#### **CASE STUDY | Mayor of Sirča, Serbia (Higher Court of Belgrade, 8П. 5p 577/14)**

The mayor of Sirča organized a protest against the settlement of internally displaced Roma families and issued a statement including the words 'We cannot mix with them.' Following civil action by the Serbian Commissioner for the Protection of Equality, the mayor was forbidden from making future statements and propounding views which are discriminatory to the Roma minority. In addition, he was ordered to publicly apologize to the Roma national minority. His apology and the court's ruling were published in a daily newspaper with national circulation at his own expense.

The Serbian Commissioner for the Protection of Equality also filed criminal charges against the mayor for inciting racial hatred. The mayor was found guilty and sentenced to six months' house arrest.

#### **CASE STUDY | Finnish Non-Discrimination Ombudsman Presenting a Statement in a Criminal Discrimination Case (Helsinki District Court 01.02.2016 (R 15/8331))**

A hearing impaired student was denied admission to an education program in design . This occurred after the student's request for a sign language interpreter to be present in the classroom was refused by the director of the program and owner of the company offering the education program. The Ombudsman presented written and oral submissions in Helsinki Municipal Court. The Ombudsman argued that while the accommodation requested had been reasonable and easy for the company to implement, the company had not even tried to find out what would be needed to comply with the request before denying the student admission.

The court fined the director and ordered the company to pay compensation to the victim in the amount of EUR 8 000.

After the verdict, the Ombudsman issued a public statement that the compensation serves as a deterrent in accordance with requirements in EU-law and will hopefully effectively prevent future discriminatory acts.

## LITIGATING THROUGH QUASI-JUDICIAL BODIES

In many European countries protection from discrimination includes a "light" version of litigation through quasi-judicial bodies. The benefits of choosing this method are that it is usually both faster and cheaper than normal civil law proceedings. There is usually no need for the victim to pay for a lawyer as such cases are investigated *ex officio* by the quasi-judicial body, and the offender cannot claim repayment of litigation costs from the victim. Important strategic questions to consider before choosing this method are:

- How effective is a decision made by a quasi-judicial body in practice?
- Is the decision legally binding and authoritative?
- Can the quasi-judicial body award compensation?
- Is there a risk that the litigation process may in fact be further prolonged through a subsequent appeal?
- Can the outcome assist in achieving a strategic legal objective?

### CASE STUDY | Finnish Non-Discrimination Ombudsman Referring a Case to a Quasi-Judicial Body claiming that the open display of the Nazi-flag is harassment (case number VVT-Dno-2016-712)

The Finnish Non-Discrimination Ombudsman referred a case to the National Non-Discrimination and Equality Tribunal requesting that the Tribunal prohibit a student from displaying a Nazi flag in the window of his student apartment. The Nazi flag had been clearly visible in the student apartment window for more than 8 months. The landlord had asked the student to remove the flag several times, but the student had refused.

The Ombudsman argued that the public display of the Nazi flag constituted unlawful harassment under the Non-Discrimination Act (1325/2014) because it created a degrading or humiliating, intimidating, hostile or offensive environment. Among others, Jewish persons confirmed they felt threatened and intimidated by the flag. The Ombudsman further argued that demanding the removal of the Nazi flag does not violate freedom of expression as such freedom does not protect hate speech or other expressions which deeply offend the dignity of other persons.

This case is strategic in a time when hate speech and racism have increased in society throughout Europe.

## AMICUS CURIAE, INTERVENTION AND OTHER STATEMENTS GIVEN TO COURTS OF LAW

Some equality bodies have discretionary power to submit variations of *amicus curiae* written statements to courts or 'intervene' in discrimination and/or human rights cases on their own initiative. Other equality bodies may

have a more general mandate in this regard, where courts and even prosecutors when handling cases concerning discrimination are obliged to provide the equality body the opportunity to give a written statement and/

or to make oral submissions during court proceedings.

Both of these possibilities can be effective methods for equality bodies to contribute to the dynamic evolvement of case law, including the interpretation of central EU directives and other international legal instruments.

## CASE STUDY | POLISH COMMISSIONER FOR HUMAN RIGHTS INTERVENING IN A CASE

**Gonzalez v Ministry of Interior Affairs** (Polish Supreme Administrative Court: II OSK 2982/14)

In Poland, foreigners need consent to buy property, and must prove they have a link or connection with the country. According to the authorities such links exist where a foreigner is married to a Pole. A foreign homosexual man was unable to obtain consent to buy an apartment because he was not married to his long term Polish partner, with whom he had lived for many years. Nor could he marry him because marriage between homosexuals is not permitted under Polish law. The Polish Commissioner for Human Rights joined the case before the Supreme Administrative Court, after the referral of this case by the Polish Helsinki Foundation for Human Rights. The Court agreed with the Commissioner's argument that the prerequisites for the consent (to buy property) should be understood broadly and encompass informal partnerships. This strategic case resulted in a major advance in establishing certain rights for LGBT couples in the jurisprudence.

## CASE STUDY | CROATIAN OMBUDSMAN INTERVENING IN A CASE

**NGOs v V.M., president of the national soccer federation** (Supreme Court of the Republic of Croatia: Gž.25/11 of 28 February 2012)

Four NGOs that are actively involved in the protection of LGBT rights initiated a collective anti-discrimination claim against the president of the Croatian soccer federation for stating that homosexuals could not play for the national soccer team as long as he is the president of the federation. This media statement was given in a period when similar statements against the LGBT community were launched via media and several attacks occurred against members of the community. As a result of the seriousness of such violation of the LGBT community's rights and the successful cooperation with the NGOs initiating the court proceeding, the Croatian Ombudsman intervened in the proceeding supporting the plaintiffs' legal arguments. The Supreme Court in its final judgment ruled that by his statements V.M. discriminated against homosexuals, forbade him to make any statement to the media which could discriminate homosexual people in the same way and ordered him to publicly apologize.

## PROVISION OF LEGAL ASSISTANCE

Some equality bodies have powers to provide legal assistance to victims of discrimination. This assistance can be providing informal legal help to resolve disputes and avoid court action for example by drafting letters of complaint or helping negotiate a way

forward. Assistance can also be of a more formal nature, such as providing funding for lawyers or using the equality body's in-house lawyers to represent the victim in legal proceedings.

### CASE STUDY | EQUALITY AND HUMAN RIGHTS COMMISSION PROVIDES FUNDING FOR LAWYERS REPRESENTING THE VICTIM

#### **Pimlico Plumbers v Smith** (UK Court of Appeal: 2017 EWCA Civ 51)

Mr. Smith was an 'independent contractor' who worked exclusively for one company, Pimlico Plumbers. When Mr. Smith suffered a heart attack, he found that he could not claim disability pay as Pimlico Plumbers claimed that he was self-employed. The equality body provided Mr. Smith with funding for legal counsel in his case against Pimlico Plumbers.

The Court of Appeal found that Mr. Smith was an employee and so was entitled to present a discrimination claim. This ruling is of general assistance to employees who are incorrectly categorized as self-employed contractors by the companies they work for. The outcome will help to ensure that employers are no longer able to avoid their duty to provide employees with support, such as reasonable adjustments for persons with disabilities.

## MOTIONS FOR JUDICIAL REVIEW AND OTHER JUDICIAL INITIATIVES MADE BY THE EQUALITY BODY

Some equality bodies can bring judicial review claims or initiate other proceedings in their own name, entailing that they do not need to represent an individual victim to pursue legal action. Considering the costs and fact-related difficulties often involved in other civil proceedings, it is advisable to investigate whether these types of action are available to the equality body and can fulfil the desired strategic objective.

### CASE STUDY | EQUALITY AND HUMAN RIGHTS COMMISSION REQUESTING JUDICIAL REVIEW

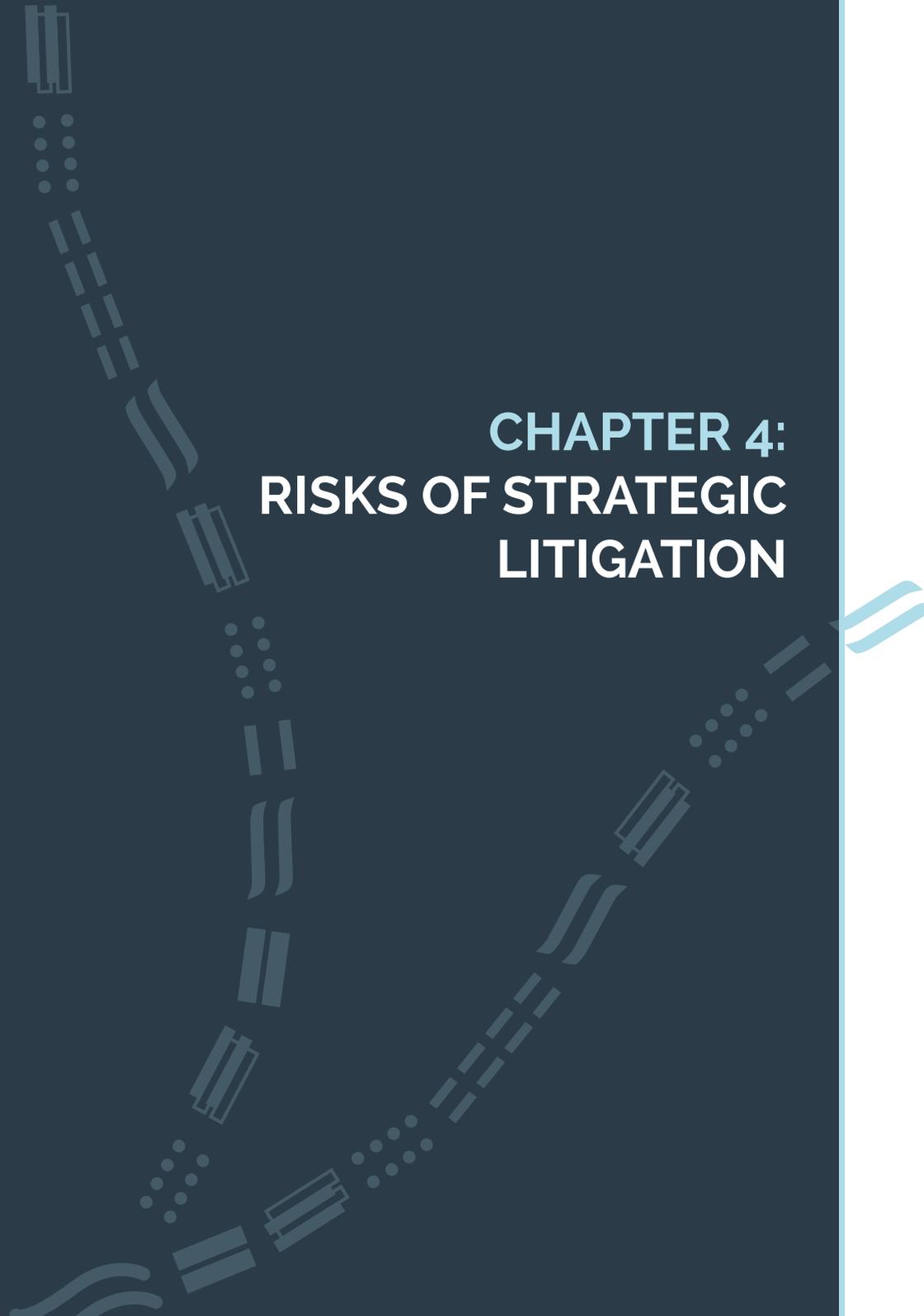
#### **EHRC v 3 Individuals (sued as officers of The British National Party) (2009 UK)**

Membership of the British National Party (BNP), a political party, was restricted to 'indigenous' British people. As most people born in the UK are white, this constituted unlawful race discrimination. The UK's EHRC used its power to apply for an injunction to stop discriminatory acts in this case. The court ordered an injunction to stop the BNP from applying the discriminatory membership policy. This litigation eventually resulted in an alteration of the BNP's discriminatory membership policy, negating the need for further legal proceedings or action against the party.

#### **CASE STUDY | Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV (Court of Justice of the EU: C-54/07)**

In this case the Belgian equality body (Centre for equal opportunities and combating racism, predecessor of Unia, the Interfederal Centre for equal opportunities) acted on the basis of public statements of the director of the company 'Firma Feryn' to the effect that his undertaking was looking to recruit fitters, but that it could not employ 'immigrants' because its customers were reluctant to give them access to their private residences for the period of the works.

The Court found that such public statements constitute direct discrimination within the meaning of Directive 2000/43/EC even in the absence of identifiable victims. Furthermore, the Court also established that such public statements are sufficient to shift the burden of proof to the employer and that it is then for that employer to prove that there was no breach of the principle of equal treatment. Finally, the Court confirmed that sanctions in discrimination cases must be effective, proportionate and dissuasive even where there is no identifiable victim.



# CHAPTER 4: RISKS OF STRATEGIC LITIGATION

All litigation carries risks, particularly in the first instance, but strategic cases involving important points of principle often carry additional risks. In some exceptional cases, there may be strategic value in rulings even where the case is lost. While considering whether a particular case is suitable to further strategic objectives, it is helpful to identify possible risks and make contingency plans to mitigate them. Below, a non-exhaustive list of such possible risks and related questions is set out.

- **Not achieving the objective sought:** To what extent will the case fulfil the strategic objective identified? How can it be ensured that the case will receive widespread publicity and impact? Are the resources needed proportionate to the strategic objective sought? If not, valuable resources could be lost and the objective ultimately not achieved at the end of the process.
- **Negative effects of losing the case on the group which the litigation is intended to help:** If the case is lost, what impact will this have on those affected? Will losing set a bad precedent? If losing would set a bad precedent, particular caution is required prior to initiating litigation. Are alternative methods available that entail less risk?
- **Costs:** What costs can be expected if the case is lost? What is the likelihood of recovering costs if the case is won? What impact will this have on your organisation? Can any of these risks be overcome by working in partnership with other organisations, for example through a joint intervention?
- **Political backlash:** If the case is controversial there could be opposition to the social policy change sought. The legal proceedings could then possibly even strengthen the opposition to the strategic objective of changing social policy. Are alternative methods available that entail less risk, and is this the correct case to pursue given these risks?
- **Negative press:** Is there a risk of negative publicity of the case? Could the equality body be criticised for placing their strategic objectives above the interests of the victim? If so, how will this be managed? Could negative publicity damage the campaign for the greater issue, or the reputation of the equality body? What steps can be taken to mitigate this risk? For example, preparing press briefings in advance which deal with any negative aspects of the case, or sharing a press release with the other side in advance and giving them an opportunity to comment on it.
- **Conflicting rights:** Does the case involve a conflict of rights? Ensure that pleadings and press briefings are written in an appropriate tone and do not contain language that is likely to alienate one group or cause negative publicity. Even if such precautions are taken there is always a risk of political backlash and negative publicity in these cases, which can counteract the strategic objective. Particular care is therefore needed when dealing with conflict of interest cases.

- **Use of alternative dispute resolution:** Will the strategic objective be achieved if the case is settled? If the case may be resolved through settlement, consider publicising the case at the outset in order to stimulate debate and create public support for the issue. Explore whether the opposing party is willing to agree to joint publicity as part of the settlement agreement.
- **Lack or low awareness of legal professionals:** In the absence of specialised equality tribunals, how far can the equality body count on the awareness of judges about the specific legal provisions in non-discrimination law, such as the shift of the burden of proof? If the complainants have their own lawyers, how far will these lawyers be aware of equal treatment legislation?
- **Disagreements between the equality body as intervener and the victim or the victim's lawyer:** The victim and their lawyer might be more interested in winning the individual case or compensation for their client, while the equality body has a stake in the societal effects, going beyond the individual case. If this is clear from the outset, the equality body could decide not to support the case. However, if the situation changes later on, it might materialise in different legal strategies being pursued and/or one side willing to pull out of the case, not fulfilling their objectives any more.
- **External pressure:** As statutory public bodies, equality bodies have a strong standing and their support to cases is requested by various actors, including victims themselves, but also NGOs. In high profile cases the equality body might find itself under immense pressure to support the case. While not doing so might risk harsh criticism towards the equality body, it remains important to stick to an objective assessment based on the published and transparent selection criteria.

## CASE STUDY | EXAMPLE OF THE USE OF MEDIA AND SETTLEMENT

### Case Anonymised (Great Britain)

A wheelchair user was refused access to a bar because the premises were not accessible and there was no temporary ramp. This was not an isolated incident. The equality body knew that once legal proceedings were initiated, the service provider would try to settle the case to avoid negative publicity, which would entail that the strategic objective of raising awareness about accessibility would not be achieved. Therefore, the equality body decided to publicise the case before the trial, which was highly unusual. The case was reported in local press and subsequently settled on confidential terms. Due to the fact that it had been publicised at an early stage, however, the strategic objective of raising awareness was achieved nonetheless.

## CASE STUDY | EXAMPLE OF A CASE LOST IN COURT

### **Stott v Thomas Cook Tour Operators Limited [2014 UKSC15]**

Regulation 1107/2006/EC concerns the rights of disabled passengers when travelling by air. Mr. Stott successfully sued Thomas Cook when they breached his rights under these regulations during a flight from Greece to the UK, but the courts would not award damages. The Supreme Court ruled that Mr. Stott could not be awarded damages for his successful claim under EC Regulations because the Montreal Convention, which deals with air passengers' right to compensation, precludes compensation for discrimination and the Convention takes precedence over EU Regulations. The Supreme Court was highly critical of Thomas Cook's treatment of Mr. Stott, but declined to make a reference to the ECJ. As a result, the issue could not be pursued any further by means of litigation and the strategic objective of compensation for rights infringement was not met.

The Equality and Human Rights Commission (EHRC) was aware of the risks involved in this litigation and anticipated that substantial costs would be payable if the case was lost. The EHRC therefore made a provision for this in advance of pursuing the appeal. At every legal instance, the case was scrutinised and reviewed at a high level in the organisation to ensure that there was a plan in place to manage all risks, including that the EHRC would receive criticism due to the costs incurred. It was decided that publicity was likely to favour the victim, which also ended up being the case. Whilst the litigation was unsuccessful, the court's critical statement has been useful in pursuing the issue further with the UNCRPD Committee as part of the EHRC's treaty monitoring work.

## CASE STUDY | EXAMPLES OF CONFLICT OF RIGHTS CASES

**Eweida and Others v UK** (European Court of Human Rights: applications nos. 48420/10, 59842/10, 51671/10 and 36516/10)

These four cases, which all involved committed Christians who alleged they had been discriminated against by their employers because of their religion, were joined and heard together by the European Court of Human Rights (ECtHR). The two first cases concerned conflicts between the rights and equality of Christians and LGBTI persons, while the latter two concerned employers' uniform policies and the right to wear visible religious symbols. The EHRC intervened in the case before the ECtHR.

**Ladele v Islington Borough Council** – Ms. Ladele worked as a civil registrar for many years. After a legislative change allowing civil partnerships (marriage was at that time not possible) between homosexual couples, she would not carry out civil partnership ceremonies, and would swap duties with colleagues to avoid them. This was accepted by her colleagues until someone at the council complained, which ultimately led to Ms. Ladele's dismissal.

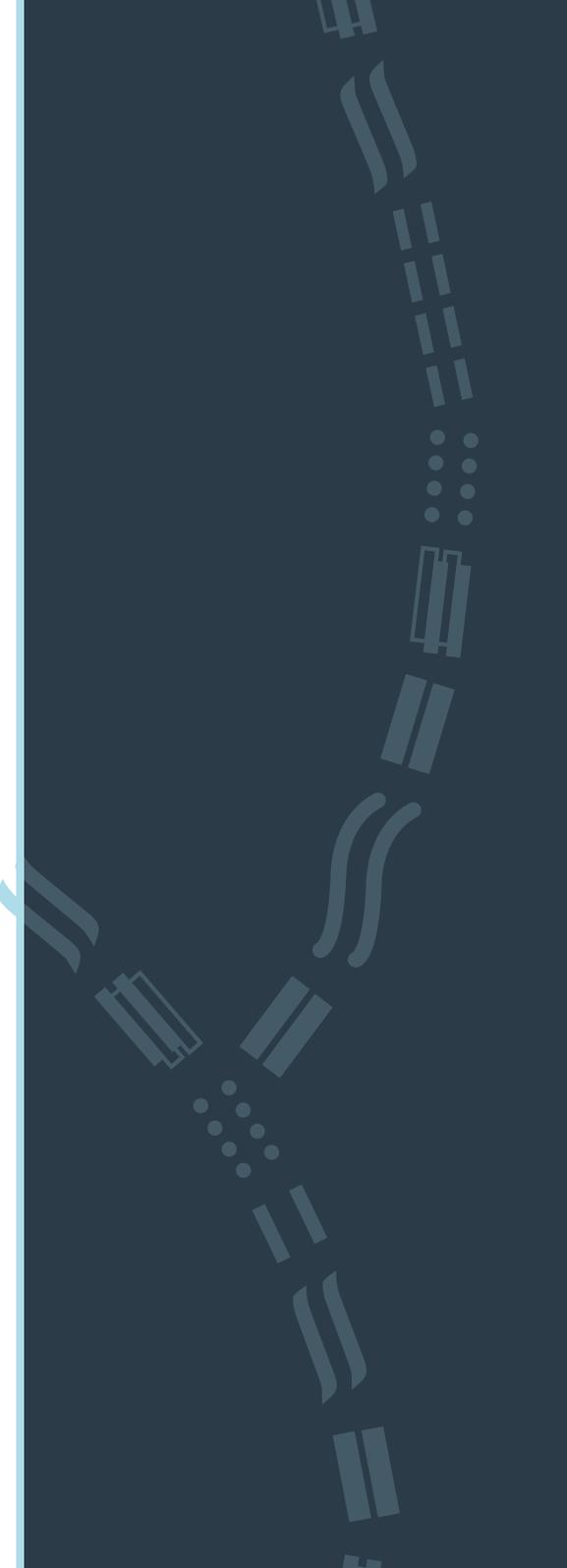
**McFarlane v Relate** – Mr. McFarlane was a relationship counsellor who had expressed concern as to whether he could reconcile providing services to gay couples about sexual issues with his faith, and was ultimately dismissed.

**Eweida v British Airways** – Ms. Eweida worked at the check-in desk and had worn a small cross on a chain all her life as a symbol of her commitment to her faith. She was removed from front line duties following a change in the airline's uniform policy, which required her to remove her necklace.

**Chaplin v Devon and Exeter NHS Foundation Trust** – Ms. Chaplin was a nurse on a geriatric ward who always wore a cross on a chain as a symbol of her faith. Due to a Health and Safety policy, her employer changed the nurses' uniform to a V-neck top and she was requested to remove her necklace. Upon refusal to conform with the request, she was removed from front line nursing duties.

The ECtHR gave judgement in all four cases, finding only in favour of Eweida. In each case the court clarified the application of Article 9 and established that restrictions imposed by private employers with regard to manifestations of religion had to be justified as proportionate and that employers are obliged to look for practical solutions.

Each of these cases was highly strategic and the ruling of the ECtHR settled the law in the UK, which had been uncertain for several years. There was considerable media coverage and controversy over all four cases, requiring great care in the preparation of press statements and pleadings. Following this case, the British equality body drafted guidance for employers, explaining the rulings and how to manage religion and belief issues in the workplace.



# CHAPTER 5: SOURCING CASES

## METHODS TO ENSURE THAT GOOD CASES REACH THE EQUALITY BODY

Once strategic objectives and priorities have been identified, the search for cases can begin. Equality bodies with considerable experience of conducting strategic litigation have shown that strategic cases often reach the body through non-governmental organizations, lawyers, media, other public and private entities, as well as complaints directly from individuals. These various possible sources of strategic cases are briefly discussed below.

### THE EQUALITY BODY

Depending on the size, resources and remit of the equality body, it may itself establish channels by which individuals can submit strategic cases to the body. Such channels may be a helpline, casework or external relations department which receive correspondence from the public, parliamentarians and interested organizations. For equality bodies that receive large numbers of complaints, a system of identifying and filtering out potentially strategic cases at an early stage should be established so that those cases can be managed with a view to litigation at a later stage should they not be resolved.

### NON-GOVERNMENTAL ORGANIZATIONS (NGOS)

NGOs are a very useful source of intelligence and strategic cases. They are often on the front line in the fight for rights of particular groups and have direct contact with, and have the confidence of, victims of discrimination, particularly in areas where problems may be underreported. It is

therefore important to identify relevant NGOs and maintain relationships with them, for example by specifying contact points within the equality body to ensure that the NGO has a direct line into the body should a relevant case or question arise. A one-off meeting, letter or call is unlikely to result in a lasting and mutually beneficial arrangement. Even if the NGO does not have a strategic case at present, one may come along in the future. It may also have good intelligence about current and changing issues, that can help the equality body formulate its policy and even to get cases from elsewhere.

### **LAWYERS AND LAWYERS' ORGANIZATIONS**

Lawyers within private practice are an excellent source of strategic cases. Individuals who consider themselves to have suffered from a discriminatory act will often reach out to lawyers for legal representation and guidance on available courses of action. It is recommended for the equality body to have a publicized means for lawyers to contact it about interesting cases, such as a direct line to the lawyers at the equality body or a dedicated inbox, and to communicate an interest in referrals to organizations such as bar associations.

It is also advisable to keep the process simple and not too onerous for the lawyers. A summary of the main issues in the case

and the reason why the lawyer thinks it is strategic, and the stage the case has reached, should be sufficient to weed out those which will not be strategic, so that those cases which might be strategic can be given more attention. If a lawyer refers a case or a few cases which are not strategic, the equality body could clearly explain why it did not consider the case strategic and encourage the lawyers to continue to refer cases. The experience for the lawyer should be a positive one, and not a deterrent from referring more cases in the future, otherwise the equality body may miss out on great opportunities to further its strategic aims.

### **MEDIA**

News reports in various forms of media, particularly local media, can often provide a good source of strategic cases. As it can be difficult to attract media attention to individual cases with short notice, contact and cooperation with journalists at an early stage may be beneficial for later coverage on the subject.

### **COOPERATION WITH PUBLIC ENTITIES**

In some instances, cooperation with public entities can provide a source of strategic cases. The primary advantage is that public authorities have access to data which is not publicly available or is available only with significant delay.



# CHAPTER 6: MEDIA WORK AND FOLLOW-UP ACTIVITIES

## HOW TO GAIN MAXIMUM IMPACT FROM YOUR STRATEGIC LITIGATION

### USE OF MEDIA

In earlier chapters we discussed how a case might play out in the media and how possible negative publicity should be considered when initially deciding whether a case is suitable for strategic litigation. This chapter addresses the part of the strategic litigation process where those considerations are put into practice.

As soon as the outcome of the case is known, and especially if the strategic objective has been achieved, the equality body will need to ensure that the key messages are publicized as far and wide as possible.

### COMMUNICATION STRATEGY

For each case a media strategy should be developed in good time prior to the court's delivery of its ruling. At a minimum, this strategy should include a statement that can be issued to the press as well as a statement to be placed on the front or news page of the equality body's website. A set of FAQ's (frequently asked questions) is a good way to manage queries if the case is likely to attract a lot of public and media attention, and can also be posted on the website. If possible there should also be a link to the judgement on the website so that those who are interested can easily access and read the entire judgement.

In situations when it is reasonably expected that the case might cause some amount of negative publicity, it is strategically useful for the equality body to prepare a communication plan. In such cases, time is usually of the essence and it is beneficial to have ready statements in response to potential negative proclamations of the opposing side. Often the effectiveness of

the proper reply lies in its prompt publication.

On the other hand, in certain situations the equality body might estimate that negative publicity can be avoided or at least eased by anticipating the opposite side and coming out to the public first, referring to (and refuting) the same arguments that were expected to be used against the equality body. However, such actions should be carefully planned at the early stage of the case, not to cause more damage than benefit to the equality body.

Ideally the statements will be short, punchy and easily accessible to all, to ensure that key messages are digested quickly by the readers, regardless of their background. This is especially important for those individuals who may not go on to read about the case in more detail.

## **SOCIAL MEDIA**

Social media can be a highly effective means of spreading key messages, particularly if the equality body has its own social media accounts. Otherwise or additionally, relevant NGOs, organizations and public entities can be invited to share the news through their own accounts to maximize outreach.

This is also an easy and cost efficient method of keeping a case in the public eye. For example, the equality body can post on social media informing of court dates, when the ruling will be delivered, and other developments or milestones in a given case.

## **MAILING LIST TO STAKEHOLDERS AND COOPERATING ORGANIZATIONS**

A regular mailing list to the equality body's various stakeholders, partner organizations, NGOs, etc, can be set up to share up to date information on its work, such as for example successful strategic litigation.

## **TRADE JOURNALS**

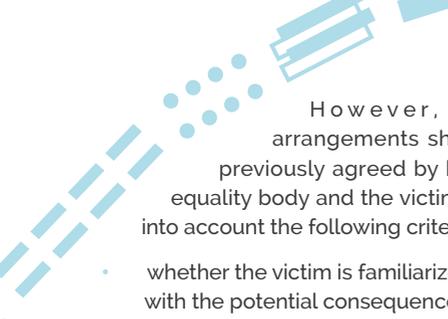
Although it is helpful to receive as much publicity as possible when the judgement is initially released, there are also later opportunities to publicize the case.

Articles can be placed in legal or trade journals months after the ruling is delivered, or whenever an opportunity arises, to maximize the impact of the case. For example, an article about a discrimination case involving a restaurant could be placed in magazines and trade journals targeted at the hospitality industry and an article about education cases could be placed in publications targeted at teachers.

Even unsuccessful litigation can result in positive gains if publicised in the right way. For example, a case which is shocking on its facts but is lost in court, may serve to increase public awareness of a legal problem, or garner support for a change in the law. Therefore, consideration should be given to whether the case should be publicized regardless of the outcome. Where the equality body wishes to keep a lower profile, a statement on its website but no press release may be an option which serves the equality body's objectives, whilst maintaining its credibility.

## **THE ROLE OF THE VICTIM OF DISCRIMINATION**

In certain strategic cases, the victim can play a significant role in communicating key messages to the public. It can be especially gainful when the case involves shocking facts and the public can relate with the victim who is often the best spokesman about certain problem. This is particularly the case if the litigation had a negative outcome but it is hoped that this way the purpose of increasing public awareness about certain legal or social problems can still be reached.



However, such arrangements should be previously agreed by both the equality body and the victim, taking into account the following criteria:

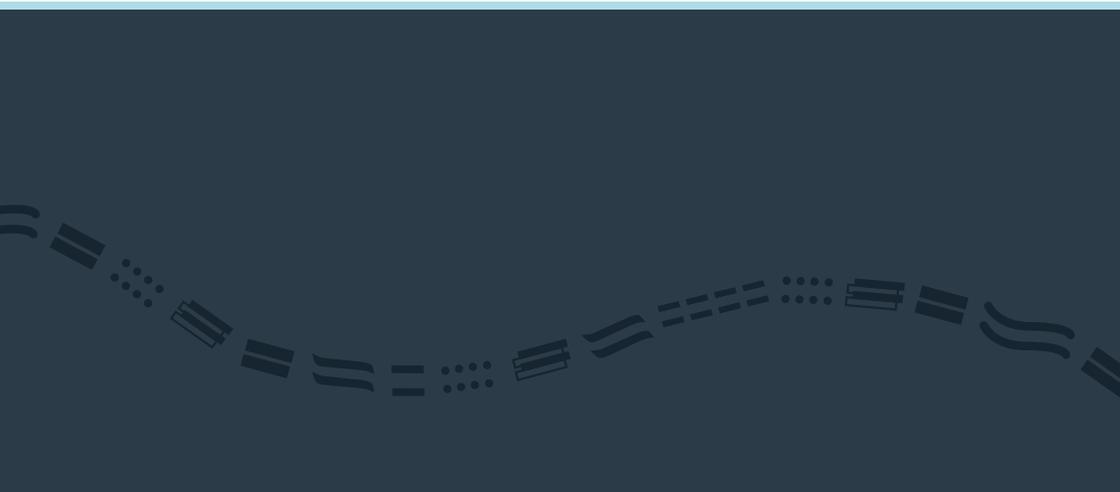
- whether the victim is familiarized with the potential consequences of such actions and is still willing to be involved in media work;
- whether the victim can deal with the psychological burden of dealing with the media and the public;
- if there is complete trust and agreement between the equality body and the victim regarding all aspects of the case and the strategy of dealing with media.

However, even in situations when all foregoing criteria are fulfilled, if the circumstances of the case are such that it is highly possible that the person concerned will be victimized for dealing with the media, the equality body should reconsider such an option. On the other hand, if the victim does not want to be involved in any kind of media work, regardless the circumstances of the case, it should be absolutely respected by the equality body.

## FOLLOW-UP WORK

The aim of strategic litigation is to have a wider impact on law and society beyond those involved in an individual case. In order to ensure that the impact is meaningful and effective, the equality body should follow up on the case. Depending on the subject matter of the case, and the extent to which it was successful, this could involve writing to the losing party to check whether they have taken action to remedy the discrimination at the heart of the case; following up with politicians to ensure that laws are changed or enforced; or monitoring complaints regarding the same issue to ensure that the problem the case sought to address does not persist when the case is no longer in the public eye. If the issue persists, the outcome of the strategic case can be used to show offenders that they can be brought before court and will lose if they do not cease to commit discriminatory acts.

Whatever the situation, it is important that the equality body can demonstrate that it did everything in its power to ensure that the strategic litigation had the desired effect.



# EQUINET MEMBER EQUALITY BODIES

## ALBANIA

Commissioner for the Protection from Discrimination  
[www.kmd.al](http://www.kmd.al)

## AUSTRIA

Austrian Disability Ombudsman  
[www.behindertenanwalt.gv.at](http://www.behindertenanwalt.gv.at)

## AUSTRIA

Ombud for Equal Treatment  
[www.gleichbehandlungsanwaltschaft.at](http://www.gleichbehandlungsanwaltschaft.at)

## BELGIUM

Institute for the Equality of Women and Men  
[www.igvm-iefh.belgium.be](http://www.igvm-iefh.belgium.be)

## BELGIUM

Unia (Interfederal Centre for Equal Opportunities)  
[www.unia.be](http://www.unia.be)

## BOSNIA AND HERZEGOVINA

Institution of Human Rights Ombudsman of Bosnia and Herzegovina  
[www.ombudsmen.gov.ba](http://www.ombudsmen.gov.ba)

## BULGARIA

Commission for Protection against Discrimination  
[www.kzd-nondiscrimination.com](http://www.kzd-nondiscrimination.com)

## CROATIA

Office of the Ombudsman  
[www.ombudsman.hr](http://www.ombudsman.hr)

## CROATIA

Ombudsperson for Gender Equality  
[www.prs.hr](http://www.prs.hr)

## CROATIA

Ombudswoman for Persons with Disabilities  
[www.posi.hr](http://www.posi.hr)

## CYPRUS

Commissioner for Administration and Human Rights (Ombudsman)  
[www.ombudsman.gov.cy](http://www.ombudsman.gov.cy)

## CZECH REPUBLIC

Public Defender of Rights  
[www.ochrance.cz](http://www.ochrance.cz)

## DENMARK

Board of Equal Treatment  
[www.ast.dk](http://www.ast.dk)

## DENMARK

Danish Institute for Human Rights  
[www.humanrights.dk](http://www.humanrights.dk)

## ESTONIA

Gender Equality and Equal Treatment Commissioner  
[www.volink.ee](http://www.volink.ee)

## FINLAND

Non-Discrimination Ombudsman  
[www.syrjinta.fi](http://www.syrjinta.fi)

## FINLAND

Ombudsman for Equality  
[www.tasa-arvo.fi](http://www.tasa-arvo.fi)

## FRANCE

Defender of Rights  
[www.defenseurdesdroits.fr](http://www.defenseurdesdroits.fr)

## GERMANY

Federal Anti-Discrimination Agency  
[www.antidiskriminierungsstelle.de](http://www.antidiskriminierungsstelle.de)

## GREECE

Greek Ombudsman  
[www.synigoros.gr](http://www.synigoros.gr)

## HUNGARY

Equal Treatment Authority  
[www.egyenlobanasmod.hu](http://www.egyenlobanasmod.hu)

## HUNGARY

Office of the Commissioner for Fundamental Rights  
[www.ajbh.hu](http://www.ajbh.hu)

## IRELAND

Irish Human Rights and Equality Commission  
[www.hrec.ie](http://www.hrec.ie)

## ITALY

National Equality Councilor  
[www.lavoro.gov.it/ConsiglieraNazionale](http://www.lavoro.gov.it/ConsiglieraNazionale)

## ITALY

National Office against Racial Discrimination - UNAR  
[www.unar.it](http://www.unar.it)

## LATVIA

Office of the Ombudsman  
[www.tiesibsargs.lv](http://www.tiesibsargs.lv)

## LITHUANIA

Office of the Equal Opportunities Ombudsperson  
[www.lygybe.lt](http://www.lygybe.lt)

## LUXEMBURG

Centre for Equal Treatment  
[www.cet.lu](http://www.cet.lu)

## (FYRO) MACEDONIA

Commission for the Protection against Discrimination  
[www.kzd.mk](http://www.kzd.mk)

## MALTA

Commission for the Rights of Persons with Disability  
[www.crpdp.org.mt](http://www.crpdp.org.mt)

## MALTA

National Commission for the Promotion of Equality  
[www.equality.gov.mt](http://www.equality.gov.mt)

## MONTENEGRO

Protector of Human Rights and Freedoms (Ombudsman)  
[www.ombudsman.co.me](http://www.ombudsman.co.me)

## NETHERLANDS

Netherlands Institute for Human Rights  
[www.mensenrechten.nl](http://www.mensenrechten.nl)

## NORWAY

Equality and Anti-Discrimination Ombud  
[www.ldo.no](http://www.ldo.no)

## POLAND

Commissioner for Human Rights  
[www.rpo.gov.pl](http://www.rpo.gov.pl)

## PORTUGAL

Commission for Citizenship and Gender Equality  
[www.cig.gov.pt](http://www.cig.gov.pt)

## PORTUGAL

Commission for Equality in Labour and Employment  
[www.cite.gov.pt](http://www.cite.gov.pt)

## PORTUGAL

High Commission for Migration  
[www.acm.gov.pt](http://www.acm.gov.pt)

## ROMANIA

National Council for Combating Discrimination  
[www.cncd.org.ro](http://www.cncd.org.ro)

## SERBIA

Commissioner for Protection of Equality  
[www.ravnopravnost.gov.rs](http://www.ravnopravnost.gov.rs)

## SLOVAKIA

National Centre for Human Rights  
[www.snsip.sk](http://www.snsip.sk)

## SLOVENIA

Advocate of the Principle of Equality  
[www.zagovornik.gov.si](http://www.zagovornik.gov.si)

## SPAIN

Council for the Elimination of Ethnic or Racial Discrimination  
[www.igualdadynodiscriminacion.msssi.es](http://www.igualdadynodiscriminacion.msssi.es)

## SWEDEN

Equality Ombudsman  
[www.do.se](http://www.do.se)

## UNITED KINGDOM - GREAT BRITAIN

Equality and Human Rights Commission  
[www.equalityhumanrights.com](http://www.equalityhumanrights.com)

## UNITED KINGDOM - NORTHERN IRELAND

Equality Commission for Northern Ireland  
[www.equalityni.org](http://www.equalityni.org)

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