

## **Eleventh Meeting of European Labour Court Judges**

**Florence, 24 October 2003**

### **European equality law in labour court proceedings**

#### **Questionnaire**

**General Reporter: Judge Paola Accardo,  
Corte d'Appello de Milano  
Sezione Lavoro (Appeal Court)  
Milan - Italia**

#### **FINLAND**

**National Reporter: Judge Jorma Saloheimo, Labour Court of Finland**

#### **Equal treatment**

How do labour courts apply the concepts of direct and indirect discrimination on the grounds of racial or ethnic origin, gender, religion or belief, disability, age and sexual orientation, with regard to employment and occupation?

In this respect there is established practice only in relation to gender discrimination, which is covered by a specific statute, the Act on Equality between Women and Men (1986). Both direct and indirect discrimination are prohibited under the Act (Sec. 7). The concepts are applied by and large in the same manner as the relevant EC sex discrimination directives are interpreted by the ECJ. In addition, adverse treatment on account of parenthood or the obligation to care and support one's family is defined as sex discrimination under Sec. 7 of the Act.

**As regards indirect discrimination, it is stated in the provision that any measure whereby women and men are *de facto* placed in clearly different positions in relation to each other shall be regarded as discriminatory. The definition seems to comprise also "individual indirect discrimination" as it does not require that the prohibited treatment affects a group in which a far higher proportion consists of women (or men). This was also the view of the Labour Court in its decisions 2002:7-10, concerning equality of pay.**

**The other grounds of discrimination are regulated in Sec. 2, Chapter 2 of the Employment Contracts Act (2001), which does not, however, contain specific regulation on direct and indirect discrimination. Also case law is scarce in this area. The implementation of the Framework Directive 2000/78 and the Race Directive 2000/43 is under way and will produce the necessary definitions and other domestic rules on, i.a., direct and indirect discrimination.**

## **Non-discrimination in recruitment procedures and employment**

2. Does national legislation foresee any prohibition or restriction regarding occupational requirements in job advertisements? If yes, please describe how case law deals with breaches of such provisions.

**The prohibition on discrimination on the grounds set out in the Sex Equality Act and the Employment Contracts Act shall, according to specific provisions of the two Acts, be observed already in the recruitment procedure. Occupational requirements may therefore not include discriminatory elements, unless warranted by justified reasons, e.g. if an ethnic restaurant seeks an employee of a certain racial origin. An advertisement may also be based on a plan of positive discrimination.**

## **Judicial enforcement, time limits and remedies**

3. Does your country provide special proceedings that enable the courts to deliver a quick (provisional?) remedy in cases of discrimination? If so, describe these proceedings and their effects.

There are no such special proceedings, applicable to discrimination cases, in place in Finland.

4. Does your national labour law foresee any time limits for the pursuit of related claims, and how are they applied? Have questions on time limits on equality law been raised in the case law of your country and how have they been dealt with?

**According to a total reform of the prescription of debts, which will be in force as from 1.1.2004, the general time limit for taking legal action is three years, and, in the case of damages, 10 years.**

**In the field of labour law, however, several special time limits are applied. Claims based on violations of duties laid down in the Employment Contracts Act, including the duty of non-discrimination, must be raised within the time of five years. If the employment relationship has come to an end, the time for taking legal action is two years from the end of the employment relationship.**

**The Sex Equality Act provides for a limit of one year concerning claims on pecuniary compensation for sex discrimination (Sec. 12).**

How is the burden of proof applied in your country in cases where the claimant cannot provide full evidence? Is the burden of proof shifted partially or fully to the employer if the claimant establishes facts that indicate discrimination (*prima facie case*, reversal, or other modification of the burden of proof)?

**In sex discrimination cases The Sex Equality Act provides that the claimant must establish that he or she has been treated differently than a comparator who usually, but not in all cases, has to be of the opposite sex. It is then for the employer to show that his action is based on objectively justifiable grounds not related to the claimant's sex.**

**As regards other types of discrimination (based on age etc.), the Employment Contracts Act is in legal writing interpreted basically in the same way. Explicit provisions to this effect are expected to be included in the General Equality Act, which will be issued in order to implement the Race and Framework Directives in a matter of a few months.**

**The burden of proof is not, however, reversed in criminal cases, which involve the application of the prohibitions of discrimination included in the Penal Code.**

Is European equality law *ex officio* applied in cases where no party makes reference to it?

**The national statutory law is in good conformity with European equality law, which means that it is usually not necessary in court rulings to refer to individual articles of equality directives. However, rulings of the ECJ provide useful guidance of interpretation and are therefore frequently referred to in domestic judgements. This is done *ex officio* where necessary.**

What compensation or redress can a plaintiff / claimant demand (reinstatement, injunction, penalty, damages, punitive damages, etc.)? Are there upper limits for compensation or redress? How have these aspects emerged in the case law of your country?

**Here again, a distinction must be made between gender discrimination and discrimination on other grounds. According to the Sex Equality Act, the discriminated person may demand a pecuniary compensation of EUR 8 700 at most and EUR 2 600 at minimum. If warranted by the circumstances of the case, the maximum compensation may be EUR 17 400. The sanction is primarily an indemnification of the intangible damage caused by the discriminatory action. In addition to the pecuniary compensation, the actual damage of the victim (financial loss etc.) may be compensated by virtue of the general rules concerning such compensation. In practice the total compensation awarded in court proceedings hardly ever exceeds the limits provided for in the Sex Equality Act.**

**Under the Employment Contracts Act, discrimination on grounds of age, race, etc. will result in the employer's liability to compensate the actual damage suffered by the victim. Unfounded dismissal will, however, entitle the employee to a normalized indemnity, which may amount to 24 months' wages at most. Actual loss is only one of the factors used by courts in determining the amount of the indemnity.**

**All grounds for discrimination discussed here are covered by a criminal sanction set out in Sec. 3 Chapter 47 of the Penal Code. The sanction for discrimination in employment, imposed on the natural person responsible for the wrongful action, is a fine or imprisonment for not more than six months.**

**Reinstatement is not used as a form of legal protection in the Finnish labour law system. Only state and local government officials, whose employment relationships are governed by rules of public law, enjoy such protection. In these cases a job applicant or a dismissed employee may claim reinstatement if he or she has been denied employment for discriminatory reasons.**

Are there mechanisms (as a voluntary or mandatory step) in your country to solve disputes on equality out of court proceedings? If so, please describe them.

**In the field of Sex Equality, the Equality Ombudsman monitors how the legal rules are followed and also takes active measures to this effect. Employers and various authorities are**

**under a duty to provide the Ombudsman with the documents and information that is requested from them. In individual disputes, employers and employees may contact the Ombudsman for an opinion in the matter. A couple of hundred such opinions are issued yearly. If an amicable solution is not reached, it is customary that the opinion is delivered to a court to which the case is brought.**

**The office of the Ombudsman for Minorities was established in 2002 to promote good ethnic relations and to monitor and improve the status and rights of ethnic minorities. In addition, the Ombudsman for Minorities will, together with other officials, supervise that everyone is treated equally regardless of their ethnic background.**

**According to a draft Government Proposal, designed to implement the EC Race and Framework Directives, a new administrative body, the Discrimination Board will be established to handle cases concerning discriminatory treatment envisaged in the Directives. On the other hand, the competence of both the Ombudsman and the Board would be enshrined to cases not relating to employment. The observance of the prohibitions on discrimination in labour life would remain in the competence of the Labour Inspectorate and, as regards gender discrimination, the Equality Ombudsman.**

Is there a tendency among the lower courts to refer questions to the European Court of Justice as a preliminary ruling (Article 234 EC Treaty)?

**No. It is very uncommon for lower courts to make a request to the ECJ in general and in labour matters in particular. It has been reported that one such reference, concerning the interpretation of occupational health and safety rules, is under preparation at the moment.**

Does your country foresee special protection for persons who pursue an equality claim or for those who support such claimants (prohibition of victimization)? How does case law deal with these situations?

**According to the rules currently in force, victimisation as a reaction to an employee pursuing his or her rights under the Sex Equality Act is deemed to be a form of sex discrimination. In the context of other discrimination grounds, victimisation will have to be treated according to the general rules concerning e.g. unfair dismissal. Victimisation claims are considered case by case mostly on the basis of the evidence that is presented to support them.**

## References

### Gender Equality Legislation

[Http://europa.eu.int/comm/employment\\_social/equ\\_opp/rights\\_en.html](http://europa.eu.int/comm/employment_social/equ_opp/rights_en.html)

Lo Faro, Antonio, *Judicial Enforcement of EC Labour Law: time limits, burden of proof, ex officio application of EC Law*.

WP C.S.D.L.E. "Massimo D'Antona" N. 3 / 2002

[http://www.lex.unict.it/eurolabor/ricerca/wp/n3\\_lofaro.pdf](http://www.lex.unict.it/eurolabor/ricerca/wp/n3_lofaro.pdf)

McCrudden, Christopher, *The New Concept of Equality*,  
Academy of European Law, fight Against Discrimination:  
the Race and Framework Employment Directives  
Trier, 2-3 June 2003

[http://www.era.int/www/gen/f\\_14196\\_file\\_it.pdf](http://www.era.int/www/gen/f_14196_file_it.pdf)

\*

\* \*

Brief information on directives.

### **n.2000/78**

The Directive concerns the following areas:

conditions of access to employed or self-employed activities, including promotion;  
vocational training;

employment and working conditions (including pay and dismissals);

membership of and involvement in an organisation of employers or workers or any other  
organisation whose members carry on a particular profession

This applies as much to the public sector as to the private sector including public bodies as well as  
for paid and unpaid work.

It does not cover discrimination based on sex because this principle has already been addressed in  
Community legislation (notably in Directive 76/207/EEC on equal treatment for men and women as  
regards access to employment, vocational training and promotion and working conditions and  
Directive 86/613/EEC on equal treatment between men and women engaged in an activity,  
including agriculture in a self-employed capacity ).

The proposal for a directive aims to combat both direct discrimination (differential treatment based  
on a specific characteristic) and indirect discrimination (any provision, criterion or practice which is  
neutral on its face but is liable to adversely affect one or more specific individuals or incite  
discrimination). Harassment, which creates a hostile environment, is deemed to be discrimination.  
Reasonable arrangements must be made to guarantee the principle of equal treatment for disabled  
persons, limiting it to cases which do not involve unjustified difficulties.

Cases in which differences in treatment are authorised

- In certain cases differences in treatment may be justified by the nature of the post or the conditions in which the job is performed.
  - Differences in treatment on grounds of age
- Differences in treatment on grounds of age are permissible when they are objectively and reasonably justified by a legitimate labour market aim and are appropriate and necessary to the achievement of that aim (protection of young people and older workers, requirements as to the extent of job experience, etc.).

### Positive action

Member States have the right to maintain and adopt measures intended to prevent or compensate for existing inequalities (measures to promote the integration of young people, the transition from work to retirement, etc.).

### Minimum requirements

The proposal contains a "non-regression" clause which concerns Member States whose legislation provides for a higher level of protection than that afforded by the Directive.

### Remedies and application of the law

Despite affirmation of the principle of equal treatment between men and women by Community law, enforcement of this principle has proved extremely difficult in practice. For this reason the proposal includes a series of mechanisms to ensure effective remedies in the event of discrimination.

These mechanisms rely on:

improvement of legal protection by reinforcing access to justice or to conciliation procedures (both in the form of individual access and by empowering organisations to exercise this right on behalf of a victim;

shifting the burden of proof: once facts have been established from which it may be presumed that there has been discrimination, the burden of proof lies with the defendant, in compliance with Directive 97/80 and the case law of the Court of Justice in the case of sex discrimination;

protection of victims of discrimination against reprisals, and notably dismissal;

dissemination of adequate information on the Directive's provisions (once adopted) to vocational training and educational bodies and within the workplace.

The social partners have a crucial role to play in combating discrimination. Hence Member States must take adequate measures to promote the social dialogue between the two sides of industry with a view to fostering the principle of equal treatment, through the monitoring of workplace practices, codes of conduct, exchange of experiences and good practices, etc.

Discriminatory national provisions must be abolished or declared null and void. Sanctions will be imposed by Member States in the event of infringement of the principle of equal treatment.

The Member States must communicate to the Commission, within two years of the entry into force of the Directive and then every five years, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on its application.

### **Deadline for implementation of the legislation in the member States**

02.12.2003

Directive 2000/43

This Directive aims to fight discrimination on grounds of race or ethnic origin by reinforcing existing national provisions in this area, notably by means of a common definition of unlawful discrimination. From the point of view of enlargement, the Directive will help to ensure that human rights are observed. Moreover, by discouraging discrimination, it should allow increased participation in economic and social life and a reduction in social exclusion.

All forms of discrimination on grounds of race or ethnic origin are prohibited. This discrimination may be in the form of less favourable treatment of the person concerned or a provision, criterion or practice which appears to be neutral but is likely to have an unfavourable outcome for a person or a specific group of persons. Harassment creates a hostile environment and is to be deemed to constitute discrimination.

Equal treatment must be guaranteed in terms of access to employment or self-employment, training, education, working conditions, involvement in a professional organisation, social protection and social security, social advantages, and access to and the supply of goods and services. The only possible exception is where race or ethnic origin constitutes a fundamental professional requirement (artistic performances, social services for people from a specific ethnic group, etc.).

The Directive does not prevent Member States from taking positive measures in relation to a specific group. Similarly, Member States may apply provisions which are more favourable than those defined in the Directive.

Legal and/or administrative procedures to enforce the ban on discrimination are available to everyone. A procedure of this kind may be instituted on behalf of an individual by an association, organisation or other legal person. In general, where it may be presumed from the facts that discrimination has taken place, the burden of proof falls to the defendant, who must prove that the principle of equal treatment has not been infringed. Each Member State adopts measures to protect the complainant against retaliation.

The social dialogue between the two sides of industry has made it possible to organise the monitoring of workplace practices. It is also possible to draw up different texts (codes of conduct) and agreements (collective agreements) to promote equal treatment. Exchange of best practice is also encouraged.

The Member States are responsible for disseminating information on equal treatment and giving one or more independent bodies the task of promoting this principle. These bodies can receive complaints from victims of discrimination, start investigations or studies and issue recommendations concerning the type of discrimination defined by the Directive.

Discriminatory national provisions must be abolished or declared null and void. Member States shall provide for sanctions in the event of the principle of equal treatment being infringed.

**Deadline for implementation of the legislation in the member States: 09.07.2003**