

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**

GERMANY

National Reporter: Judge Schliemann, Federal Labour Court of Germany

Equal treatment

- 1. 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?**

Neither EC-Directives 2000/78 nor EC-Directives 2000/78 have been implemented in German national law so far. For this reason labour tribunals most commonly base verdicts on § 611 a par. 1 Bürgerliches Gesetzbuch (Civil Code) which provides that nobody may be discriminated due to gender. This provision originated from EC equality law covers direct discrimination as well as indirect discrimination. The latter may be identified as unlawful discrimination in cases in which a rule of any kind attributes benefits or disadvantages to a specific group of employees given that the measure affects a proportionately greater number of male employees than of female employees. According to German Case law it is not the absolute number which renders a discrimination unlawful but the percentage of employees affected. Once an unequal treatment is established it depends on the employer's both suitable and necessary needs whether differentiating rules may be considered as being justified by law. At large courts tend to restrain from accepting any justifying needs. Discrimination on other grounds such as racial or ethnic origin, religion or belief, disability, age and sexual orientation are not covered by § 611 a Bürgerliches Gesetzbuch and are consequently dealt with under the general principles of law as set out in Article 3 par. 3 Grundgesetz (German Constitution) which prevents employees from being discriminated on the grounds of racial or ethnic origin, religion or belief and disability. Very few cases arose out of discrimination on the indicated grounds so far. In broad outline labour tribunals deal with discrimination in a strict manner by prohibiting any differentiation due to the stated grounds.

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.**

According to § 611 b Bürgerliches Gesetzbuch the employer is not to refer in job advertisements to the gender of the applicant. Although the law does not provide any sanctions for breaches of this requirement an applicant whose application is rejected on the grounds of gender is entitled to damages according to § 611 a Bürgerliches Gesetzbuch. In this case the lack of compliance with § 611 b Bürgerliches Gesetzbuch may give reason for a presumption of an unlawful treatment by the employer.

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.**

Although adjective law makes provisions for temporary injunction which enable the courts to deliver a judgement within a short period of time very few cases are stated in which employees being the victim of discrimination were seeking quick legal protection in front of the labour tribunals. Along general lines employees in discrimination cases are contented to take legal measures in compliance with the general proceedings.

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?**

§ 611 a par. 4 Bürgerliches Gesetzbuch requires an employee being discriminated by the employer on the ground of gender to notified his employer in written form within a period of two months (which may be longer in specific cases). If the employer refuses to pay damages the employee has to bring his claim into court within three months after the employer's notification, § 61 b par. 1 Arbeitsgerichtsgesetz (Provisions concerning the proceedings in front of labour tribunals). There are no claims having dealt with the time limits set out by § 61 b Arbeitsgerichtsgesetz so far. Nevertheless one might expect that the labour tribunals will apply the provided time limits strictly.

5. **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)?**

It is a general principle of law that it is up to the plaintiff to prove the facts which his claim is based on. Differing from this rule § 611 a par. 2 Bürgerliches Gesetzbuch provides that if there are facts which lead to the conclusion that the employee is subject to an unequal treatment the burdon of prove is placed on the employer that the measure is not infringing the rule of equality. In any case the plaintiff may invoke that the facts constitute a discrimination *prima facie*. Some courts are taking this argument even further by shifting the burden of proof completely; therefore it is the employer who has to prove that he has obeyed to the law of equal treatment.

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

Since and so far European equality law has been transferred into national legislation labour tribunals apply national law primarily. In this case European equality law may serve as an important means of interpretation in order to construe a national rule of law. In the absence

of national legislation European equality law - subject to its direct applicability - may function as a direct source of law. As a consequence tribunals are to deal with European law regardless to the fact that any party is referring to it.

7. **What compensation or redress can a plaintiff / claimant demand (reinstatement, injunction, penalty, damages, punitive damages, etc.)? Are there upper limits for**

8. compensation or redress? How have these aspects emerged in the case law of your country?

In cases in which the employer is falling short of the principle of equal treatment the affected employee is – apart from advancement - not entitled to claim reinstatement, § 611 par. 2 Bürgerliches Gesetzbuch. The only remedy provided by law is the right of the employee to claim damages. Following a judgement of the European Court of Justice in 1997 labour law is granting the right to claim damages which are appropriate to the employer's infringement. The amount will be determined by the court with regard to the way the employer has acted, the sustainability and the persistence of the discrimination and the employer's motifs. Apart from that the employer is facing neither penalties nor punitive damages. § 611 par. 3 Bürgerliches Gesetzbuch accords compensation even to discriminated applicants who would not have been contracted if the employer had obeyed to the Equality principle. These persons may be compensated by granting a payment which may amount up to a triple monthly income.

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

There are no obligatory mechanisms to deal with equality cases before an employee is entitled to take the matter to court. Nevertheless the employee may try to solve the problem by bringing up the subject to the Betriebsrat (the workers' committee) which is to monitor the policy of equal treatment throughout the enterprise, § 75 Betriebsverfassungsgesetz (Law concerning the relation between management and workers' committee). In addition to that some companies have installed equality representatives to deal with discrimination matters.

10. 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)?

Although there are no statistic data available it is to be presumed that the number of preliminary rulings which are brought to the European Court of Justice is tending to rise.

11. 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?

Since labour law does not provide special protection for persons seeking legal protection against discrimination the general rules apply. It is § 612 a Bürgerliches Gesetzbuch which plays an important role by preventing the employer from treating an employee unfavourably on the ground that the employee has brought a claim against him based on discrimination before.

References

Gender Equality Legislation

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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

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