

Assuming the business was too small for the Dismissal Protection Act to apply, the question would be whether or not the termination was discriminatory. If it were, the termination could be declared invalid and void. The court would have assessed whether there was sufficient evidence to suggest that the termination breached the German Equal Treatment Act. Judging from the facts presented, this might have been the case. A German court would have found that in fact there are more single mothers than fathers taking care of their children. The inflexibility is therefore directly caused by gender. To distinguish between employees on the basis of the flexibility would therefore have been indirect discrimination on the grounds of gender. On this basis a termination might well have been declared invalid and void.

The Netherlands (Peter Vas Nunes): The Dutch Equality Commission has ruled repeatedly that dismissal on the grounds of inflexibility can constitute indirect sex discrimination, which is not always easily justifiable. In the case reported above, the court justified its decision to dismiss the plaintiff by stating, "that it would be more difficult for her to work odd hours in the weeks when she had to take care of her children". I am not certain that the employer would have won this case had it occurred in The Netherlands.

United Kingdom (Susie Jarrold): As in Denmark, employees in the UK have protection against indirect sex discrimination. This is by virtue of the Equality Act 2010, which implements the EC Equal Treatment Directive. Indirect sex discrimination arises where an apparently neutral provision, criterion or practice ("PCP") puts persons of one sex at a disadvantage, despite applying universally. So, in this case, a requirement for employees to be "flexible in their working hours" could indirectly discriminate against women who tend to have greater childcare commitments.

The only defence available to an employer where a PCP is discriminatory is to show that it can be justified as a proportionate means of achieving a legitimate aim. The UK Equality and Human Rights Commission's statutory code of practice, which employment tribunals must take into account where relevant, states that reasonable business needs and economic efficiency may be legitimate aims. The ECJ ruling in *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] IRLR 317 definitively sets out the approach to be taken in determining whether a PCP can be objectively justified. The PCP must correspond to a real need on the part of the employer, be appropriate with a view to achieving the objectives pursued and be necessary to that end.

In the case of "the inflexible mother", the Danish High Court ruled that employers are entitled to consider flexibility when deciding whose contract to terminate during a slump in work. The approach that would be adopted in the UK in respect of this case would be similar. The facts raise the issue of indirect sex discrimination, but the PCP could potentially be justified if it were found that the business needs relied on by the employer outweighed the discriminatory effect of the PCP on women generally and on the claimant in particular. However the tribunal or court would consider carefully whether there was a real need in that particular job to be flexible about hours and whether the same aim could be achieved with less discriminatory impact.

**Subject:** The Danish Act on Equal Treatment of Men and Women, which implements Directive 2006/54 EC of 5 July 2006.

**Parties:** The Danish Union HK acting for A – v – B, represented by C

**Court:** The Danish Eastern High Court (Østre Landsret)

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## "Greedy" plaintiffs and punitive damages

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### Introduction

The Treaty of Rome contained one provision, Article 119, that dealt with non-discrimination other than on the grounds of nationality. Its objective was not to promote human dignity but to combat unfair competition by Italian companies, which had a tendency to underpay their female workers even more grossly than did their competitors in Germany, France and the Benelux. Now, half a century later, EU law contains a whole raft of provisions aimed at promoting human dignity, amongst other things, through equal treatment in employment. Some of these provisions prescribe equal treatment in general terms (Article 2 TEU, Article 19 TFEU, Article 21 Charter of Fundamental Rights and – through Article 6(2) TEU – Article 14 ECHR and Protocol 12). Other provisions specifically prohibit discrimination<sup>2</sup> on the grounds of gender (Articles 8 and 157 TFEU and Recast Directive 2006/54), race (Directive 2000/43) and religion/belief/disability/age/sexual orientation (Directive 2000/78). The scope of the anti-discrimination rules is still expanding, both in terms of the different strands covered (e.g. agency work) and in terms of material scope (e.g. goods and services). What has caused this rapid evolution? Obviously, the principal driving factor is societal. However, credit must also be given to the Court of Justice of the European Communities/European Union (ECJ). It is fair to say that the EU legislator has to a large extent followed the ECJ rather than the other way round. Much of the EU's equal treatment law is essentially judge-made. Recent spectacular examples are *Mangold/Kücükdeveci* and *Test Achats*.

The anti-discrimination directives aim to effectively guard the core of the European principles, namely human dignity. As Mr Vladimir Spidla, a former EU Commissioner and former Prime Minister of the Czech Republic, said, "What distinguishes us from totalitarian countries is human dignity".<sup>3</sup> The anti-discrimination directives are not just ordinary EU-legislation. They are essential for protecting individuals' dignity against discrimination. Article 1 of the EU Charter of Fundamental Rights is clear: "human dignity is inviolable. It must be respected and protected". In brief, the effective implementation of anti-discrimination laws is of the utmost importance if the European Union wants to remain a beacon of freedom, instead of merely an island of prosperity.

If the EU's equal treatment rules are to have an impact on everyday life, they must be effectively enforceable. They must be capable of eliminating deeply ingrained attitudes, such as the idea that employers need to be protected against "greedy plaintiffs". In my own country, Germany, the case law indicates that such attitudes are still prevalent, and the anti-discrimination rules are still widely ignored. Fortunately, this reluctance is beginning to change, thanks to the ECJ's doctrine – now codified in Articles 18 and 25 of the Recast Directive, Article 15 of Directive 2000/43 and Article 17 of Directive 2000/78 – that compensation for victims of discrimination must be "effective, proportionate and dissuasive". This article attempts to examine that doctrine.

### **Punitive damages**

An employer that discriminates against an employee or a job applicant commits a breach of contract and/or a tort. In either case, the laws of the Member States, so I assume, obligate the employer to compensate the victim. Such compensation can consist of things other than financial compensation, for example, reinstatement or a public apology, but in most cases the victim is interested primarily in money. This article therefore focuses on financial compensation for the victim's loss.

Discrimination can cause material loss, such as the loss of a (potential) job, underpayment and loss of earning capacity. It can also cause immaterial loss, such as hurt feelings or depression. Both types of loss can be compensated, to a certain extent at least, in the form of a monetary award. Such awards are common in all EU jurisdictions, as is evidenced by the cases reported in EELC. However, are they sufficient to deter employers from discrimination or, as the case may be, from continuing a pattern of discrimination in the future? Is a multinational company really motivated to change its policies because a judge in one Member State orders it to pay a few thousand euros? My contention is that it is not and that the ECJ acknowledges this by requiring the courts in the Member States, where necessary, to apply a penalty that has been common in the United States for decades, but which European legislators and courts have seemed reluctant to accept in employment disputes: namely punitive damages. For some reason, we find it perfectly normal for cartels to be ordered to pay hundreds of millions by way of punitive damages, or for tabloids to be ordered to pay huge sums of money to movie stars whose privacy was infringed, but for victims of discrimination in employment we expect employees to be content with puny rather than punitive awards.

### **Why are punitive awards necessary?**

The aim of the EU directives is to guarantee a Europe free from discrimination. In the workplace this means that employees must be hired, paid and promoted based only on facts, not on bias.

Contrary to widely held belief, the elimination of discrimination does not hamper, but actually improves companies' efficiency, for a number of reasons. First, the absence of discrimination makes it easier to recruit the best employees and it enhances the public image of a company. This can open new markets and help to win new clients. The following example makes the inefficiency of decisions based on discrimination evident. Let us suppose that an employer is looking for a mid-level manager. One hundred people send in applications. Using bias instead of facts, the employer rejects 50 women, 10 migrants, 10 disabled people and 15 applicants aged over 50. This leaves no more than 15 applicants to choose from. It is not until the field has thus been narrowed down from 100 to 15 applicants that the employer in this example begins to apply facts to its decision-making. The chances are that it has already rejected the best applicant.

Secondly, there is evidence that companies that have eliminated discrimination have a significantly reduced employee turnover. On average a replacement costs around 125% of one year's wages of an employee in a non-executive position.<sup>4</sup>

Thirdly, by ending discrimination, employers will improve the motivation of their employees. Employees who see that they will be paid and promoted according to their own achievements, will feel fairly treated and will work with more dedication. A study in Germany shows that sick days and motivation are closely related. Employees with higher motivation have on average four sick days less each year than their less highly motivated colleagues.<sup>5</sup> Poorly motivated employees will do just enough, whereas highly motivated ones will show all they can do.

Fourthly, the said EU directives recognise harassment as a form of discrimination. In Germany there are 3.5 million victims of workplace harassment every year.<sup>6</sup> The cost of discrimination and bullying (often referred to in Germany and some other countries as "mobbing" or "straining") to employers in Germany is estimated to total over € 100 billion per year.<sup>8</sup> This figure is exclusive of the cost of associated social services (e.g. health insurance funds, pension institutions and social security services).

In brief, discrimination is inefficient. However, even supposing discrimination were efficient, would we want to tolerate it? And if we want to accept discrimination for the sake of business figures, what will be next? Child labour? Discrimination is degrading. It is immoral and, what is more, it is against the law.

### **Effective, proportionate and dissuasive**

Sabine von Colson and Elisabeth Kamann applied for vacancies that had been advertised for positions in a men's prison. Their applications were rejected because the operator of the prison, the German province Nordrhein-Westfalen, wanted exclusively male employees. The court found that the province had violated the law implementing Directive 76/207 and that therefore Ms Von Colson and Ms Kamann were eligible to be compensated with "damages in respect of the loss incurred by the worker as a result of his reliance on the expectation that the establishment of the employment relationship would not be precluded by such a breach (of the principle of equal treatment)" in accordance with paragraph 611 A(2) of the German civil code. The damages amounted to 7.20 German marks, i.e. less than € 4, being each of Ms Von Colson's and Ms Kamann's travelling expenses from their home to the place where they were interviewed. However, the court was unsure whether German law was compliant with Directive 76/207. One of the questions it referred to the ECJ was "what sanction applies where there is an established case of discrimination in relation to access to employment?" The ECJ replied – in 1984 – that, "although [...] full implementation of the directive does not require any specific form of sanction for unlawful discrimination, it does entail that that sanction be such as to guarantee real and effective judicial protection. Moreover it must also have a real deterrent effect on the employer. It follows that where a member state chooses to penalise the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained".<sup>9</sup> I have underlined the words "moreover" and "also" because they seem to imply that there are two components to the sanction to be applied by the courts: "judicial protection", that is to say, compensation of the victim's loss and a deterrent, that is to say, a monetary award over and above the extent of the victim's loss.

The ECJ revisited its doctrine in 1990 in the *Dekker* case and in 1993

in the *Marshall* case.<sup>10</sup> *Marshall* concerned a sex-discriminatory dismissal. The ECJ reaffirmed that measures appropriate to restore equality in the event the principle of equal treatment is breached "must be such as to guarantee real and effective judicial protection and have a real deterrent effect on the employer".

In 1997, in its *Draehmpaehl* judgment<sup>11</sup>, the ECJ held that "if a Member State chooses to penalize breach of the prohibition of discrimination by the award of compensation, that compensation must be such as to guarantee real and effective judicial protection, have a real deterrent effect on the employer and must in any event be adequate in relation to the damage sustained". This passage seems to add a third requirement, in that compensation must not only (i) guarantee judicial protection and (ii) have a deterrent effect, but must also (iii) be adequate in relation to the damage sustained.

In brief, sanctions for discrimination must be *effective, proportionate and dissuasive*. What does this mean? How does the need for a deterrent effect relate to the adequacy requirement? How does "dissuasive" relate to "proportionate"? I will try to provide an answer, but first, let me analyse the "judicial protection" requirement.

#### Judicial protection

"Real and effective judicial protection" within the meaning of *Von Colson/Dekker/Marshall/Draehmpaehl*, as I see it, means that the victim's loss must be compensated in full. This loss can consist of: material damages e.g.:

- lost earnings;
- legal costs;
- loss of earning capacity;

immaterial damages.

Let me investigate each of these components.

#### Lost salary

There is no cap on compensation for lost earnings in terms of the duration of the loss.<sup>12</sup> Allow me to illustrate this with the following hypothetical example. Tony is fired on reaching his 45th birthday because he is "too old". He had wanted to retire at age 65. His annual salary was € 60,000. His maximum material loss, if we ignore lost pay raises and losses in retirement income, is 20 years x € 60K = € 1,200,000. If Tony finds another job, the money he earns there has to be taken into account. In theory, Tony could sue for € 60,000 each year (or for € 5,000 every month) for the next 20 years, minus his earnings elsewhere. This would lead to decades of lawsuits. Instead, the court can estimate the future loss and award a one-off payment. This is a more reasonable solution than spending decades on litigation. The problem with this approach, however, is that it involves making an estimate as to how long the victim's employment would have lasted had the discrimination not occurred. A case – one out of many, but a rather insightful one – where a court was called on to make such an estimate is the English case of *Vento-v-Chief Constable of West Yorkshire*.<sup>13</sup> In that case, which concerns a policewoman who lost her job at age 30 as a result of sexual harassment, the court calculated the income she probably lost as a result of the harassment at £165,829. It did so "on the basis that there was a 75% chance of Ms Vento working in the police force for the rest of her career".

In brief, what *Vento* tells us is, first, that although estimating the likely duration of lost earnings is a subjective matter, in essence no more than educated guesswork, it is an exercise that needs to be undertaken.

Secondly, making a serious estimate of probable lost earnings will in many cases, as in *Vento*, lead to a high level of compensation.

In Germany the theory is similar. In the event a job and hence the income that goes with the job is lost, the lost income must be compensated on the basis of an estimate.<sup>14</sup> In making this estimate, one of the determining factors is how long employees such as the victim commonly tend to retain their job. This is as Parliament intended it to be when it debated the Anti-Discrimination Act on 29 June 2006.<sup>15</sup> In determining how long the victim would probably have retained his or her job, the courts have reduced the victim's burden of proof. In 1994 the *BAG* ruled that the relevant statutory provisions reduce the victim's burden of proof "not only in respect of the amount of damages but also in respect of the question of whether there are damages at all".<sup>16</sup> In 2000 the *BGH* held<sup>17</sup>: "when determining a victim's likely professional development in the absence of the event that caused the loss, Article 252 BGB requires the court to make an estimate based on the normal course of events, taking account of the specific circumstances of the case, in particular as they relate to the victim's education and professional experience. Although it is up to the victim to provide the court with as concrete facts and arguments as possible, this requirement must not be overstretched [...]. In the event no facts can be established that allow the court to determine with any measure of certainty whether the victim's career would in all likelihood have been successful or not, the court will need to proceed from the assumption that the victim's professional success would have been average [...] Article 287 (1) ZPO requires the court to determine whether a loss has occurred and how serious that loss is, taking account of all of the circumstances of the case and the court's own convictions. This provision of the law does not merely reduce the victim's burden of proof but also its duty to present all the facts supporting his claim. Even where relevant facts are lacking the court must make such an estimation, provided sufficient facts have been established to enable the court to do this [...]".

Normally we use a formula that is called the Kattenstein Formula as a means to estimate loss from discrimination. This formula is based on 14 million data sets. It takes into account, *inter alia*, the normal staff turn-over rate, deduction of accrued interest and lost promotion.<sup>18</sup> The following example illustrates how the Kattenstein Formula can be used to determine a claim:

Monthly wage (€):	5,000
Age:	45
Retirement age:	65
Interest rate p.a.:	2.50 %
Estimated salary index-linkage p.a.:	3.60 %
Lost pension accrual p.a.:	0.27 %
Salary increase due to promotion p.a.:	0.47 %
Probability of keeping the job p.a.:	86 %
Remaining duration of employment (months)	240
Volume of employment:	100 %
Reduction for unemployment pay I:	59.80 %
Reduction for unemployment pay II (€):	800
<b>Claim for damages:</b>	<b>€ 233,960.48</b>

#### Legal costs

Under German law there is no compensation for legal costs in the first instance in the Labour Courts.<sup>19</sup> Directive 2006/54 provides (and Directive 76/207 previously provided) that "Member States shall introduce into their national legal systems such measures as are

necessary to ensure real and effective compensation or reparation in accordance with the applicable national rules". In applying this Directive, the ECJ has stressed that the compensation awarded to victims of discrimination has "to be made good in full".<sup>20</sup> This includes full compensation for legal costs. Given this case law, the German provision excluding compensation for legal costs may not stand up if challenged in the ECJ.

#### Loss of earning capacity and career opportunities

Besides lost salary and legal expenses, a victim of discrimination may be confronted with loss in the form of reduced productivity and/or loss of abilities.

Damages for these factors can be expected in cases of intensive and degrading bullying.<sup>21</sup> They can be permanent or long-lasting. Hence the financial losses may be higher than the lost salary. The damage can be determined by an expert in a way similar to the way immaterial damages are determined in cases involving bullying.<sup>22</sup>

Let me give an example. Tony is 45 years of age and works as a mid-level manager (salary: € 60,000). He has been bullied by his superiors and colleagues for five years because of his religion. He is the only Roman Catholic in the company. Finally, he collapses and his doctor advises him to leave the company. He suffers from depression, he feels insecure and avoids meeting people. His achievement potential is down by 50 percent. His doctor expects these handicaps to be permanent. He loses the ability to work in an executive position, e.g. as the head of a department, and his achievement potential is permanently down to 50 percent. After four years he finds a new job, again at an annual salary of € 60,000. His estimated loss of earnings according to the Kattenstein Formula is € 233,960 (see table above). However, this sum equals only around four years' wages. The permanent loss of abilities is not taken into account. The employee "sells" his abilities and efficiency in his job. If these "goods" are damaged he loses economic value. This means: no salary or lower salary. This material loss has to be compensated in full. Here Tony loses any chance of promotion and bonuses.

#### Immaterial damages

Compensation for immaterial damages is mainly for psychological suffering. The amount to be awarded depends on the severity of the discrimination and its psychological and medical impact.<sup>23</sup>

In Germany, when determining the extent of immaterial damages, the courts have for a long time taken into account the need for the damages to have a dissuasive effect. This approach is technically incorrect. A distinction needs to be made between immaterial damages, the purpose of which is to compensate primarily for the injustice done, focusing on the victim and his or her sufferings, and on the other hand, the preventive effect of an award for damages, where the focus is on the defendant and on potential future perpetrators of discrimination. It strikes me as erroneous to lump compensation for the victim and preventive effect together in one award for "immaterial damages". Both elements need to be separated.

It may be that the idea of punitive damages is alien to many in Germany, but this is precisely what the EU directives and the ECJ's case law require. German case law in respect of privacy protection (see below) is more in line with the EU's rules, even though it avoids qualifying the awards in question as being "punitive". Rather, the courts refer compensation for immaterial damage and awards aimed at prevention jointly as "compensation". This lack of precise terminology needs to be

redressed. Only when the different elements of an award are identified can the award be determined in accordance with the European rules.

Therefore, the suffering of the victim needs to be compensated and then a sum should be added which is enough to guarantee a deterrent effect. The required sum can be determined by an expert.<sup>24</sup>

#### Deterrent

One can distinguish between two types of deterrent:

- measures aimed at dissuading the perpetrator of the discrimination from continuing or repeating his behaviour (specific prevention) as the case may be;
- measures aimed at dissuading other employers from discriminating against their employees in a similar manner (general prevention).

#### Interpretation of "deterrent effect" and "dissuasive"

Neither the ECJ's judgments in *Von Colson*, *Marshall* and *Draehmpaehl* nor Directives 2000/43, 2000/78 and 2006/54 provide any hint as to what is meant by "deterrent effect" and "dissuasive". One way to determine what they mean is to look them up in a dictionary or thesaurus (synonyms of "deter" being warn, frighten or intimidate) or to investigate the contexts in which these expressions are used.

One field where the concept of deterrent effect is often applied is international politics. There, the concept has been defined as "the use of threats by one party to convince another party to refrain from initiating some course of action". Clearly, whatever the exact meaning of deterrent in a legal context, it is something serious – more than a slap on the wrist.

#### EU anti-trust law

An idea of the meaning of "deterrent effect" can, perhaps, be derived from the law and case law on Regulation 2003/1 and its predecessor Regulation 17. These regulations deal with violations of EU anti-trust law. Article 23(2) of Regulation 2003/1 allows the Commission to impose fines on companies for infringement of the competition rules, up to a certain maximum related to total turnover in the previous year. In fixing the amount of the fine, "regard shall be had both to the gravity and to the duration of the infringement". In its 1983 judgment in the *Pioneer case*, the ECJ held that "it was open to the commission to raise the level of fines so as to reinforce their deterrent effect".<sup>25</sup> In 2005 the ECJ held that the need to ensure the deterrent effect of the fines is one of the factors in assessing the gravity of the infringement.<sup>26</sup> In 2006 the Commission adopted "Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003". Its introduction states that "fines should have a sufficiently deterrent effect, not only to sanction the undertakings concerned (specific deterrent) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles 81 and 82 of the EC Treaty (general deterrent)." The guidelines relate the fine to each of the infringing parties' turnover. This allowed the Commission to impose, *inter alia*, the following fines:

2001: € 462 million against Hofmann-La Roche<sup>27</sup>

2004: € 497 million against Microsoft<sup>28</sup>

2006: € 280 million against Microsoft<sup>29</sup>

2008: € 899 million against Microsoft<sup>30</sup>

2009: € 1,060 million against Intel<sup>31</sup>

2011: € 320 million against Thyssen-Krupp<sup>32</sup>

Is it far-fetched to compare discrimination to competition transgressions? Clearly there are major differences. A company that infringes the anti-trust rules faces two separate sanctions: claims for compensation for lost profits lodged by the victims (judicial protection); and a fine imposed by the European Commission (and/or the domestic cartel authority) in the public interest (general and specific deterrents).

The victims of anti-trust behaviour cannot claim more than their actual, proven loss. Unlike their American counterparts they cannot claim treble damages. This is why the European Commission, as a sort of third party, imposes fines. This difference alone makes anti-trust law hard to compare with anti-discrimination law. In discrimination cases there is no third party similar to the European Commission that can impose a fine<sup>33</sup>, let alone any regulation or other EU or national legislation. Perhaps this difference is attributable to the fact that discrimination in employment as a rule involves no more than a few easily identifiable victims<sup>34</sup> whereas violation of the anti-trust rules usually affects the general public or an amorphous group of companies whose identity need not have been known in advance.

Be this as it may, the rationale behind the EC's power to impose fines on anti-trust malfeasance is the same as that behind the requirement that the Member States sanction discrimination by means of (effective, proportionate and) dissuasive measures. For this reason, the fines levied against cartels can serve as inspiration for plaintiffs in discrimination cases.

#### **Infringement of personal rights**

In Germany a number of higher courts have had to decide cases where personal rights were infringed.<sup>35</sup> The judgments in question did not award any compensation for loss. Rather, they stressed the importance of a deterrent in order to guarantee human dignity, given that without such deterrence, personal rights (which serve to protect human dignity) would wither away.

The courts stressed that the award had to have a preventive effect on the perpetrator. Moreover, the judgments stated that the courts must take into consideration the intensity of the infringement and the financial advantage gained by the perpetrators. The idea of prevention and deterrence was new at the time, but when the Bill of Parliament that in 2006 led to the new Anti-Discrimination Act was debated, its Explanatory Memorandum referred to two of these judgments.<sup>36</sup>

In other cases in which immaterial damages (physical or psychological pain) were awarded, the judgments did not provide a deterrent, but simply awarded compensation to the victim. The courts in those cases rejected the idea of deterrent compensation. Consequently, the amounts awarded were very limited.

Following the said two judgments, starting in 1996, the German civil courts affirmed the need for dissuasive compensation in cases where personal rights were violated by the media. Well-known examples are where the courts awarded:

- € 1,200,000 for the publication of a photograph of Boris Becker without his consent.<sup>37</sup>
- € 400,000 for publication of fictitious articles and faked photos of Crown Princess Viktoria of Sweden.<sup>38</sup>
- € 256,000 for publishing nude pictures of a German singer after she had revoked her agreement.<sup>39</sup>

- approximately € 80,000 for imitating a German singer for a commercial.<sup>40</sup>
- approximately € 79,000 for the use of a picture of Boris Becker for an advertisement.<sup>41</sup>
- €76,000 for publishing a photograph of Princess Caroline's five-year old daughter.<sup>42</sup>
- approximately € 75,000 for publishing a nude picture of a German author.<sup>43</sup>
- € 70,000 for alluding to a 16 year old student's purported involvement in commercial pornography by a German TV host in his show.<sup>44</sup>
- € 70,000 for re-enacting a scene in a Marlene Dietrich film – The Blue Angel – for a commercial, this sum being awarded to Marlene's heirs.<sup>45</sup>

At present, the concept of actual dissuasive compensation is a new, if not alien, concept for most German Labour Courts.

In the cases referenced above the courts awarded the plaintiffs far higher sums than what is usually awarded for psychological pain under German law. Why? Because in these cases the perpetrators attacked the core of the German Constitution: human dignity (personal rights). This core has to be effectively guarded against any attack by whomever. Therefore the compensation has to act as a deterrent in order to prevent further attacks (general and specific prevention). Any discrimination is an attack on the victim's human dignity – just as any libellous media coverage is. Hence I feel that the German judgments referenced above are directly applicable in discrimination cases.

Since Article 1 of the EU Charter of Fundamental Rights uses the same words as Article 1 of the German Constitution, the German verdicts offer an indication of how "deterrent effect" in the anti-discrimination directives could and should be interpreted, particularly given that this interpretation is consistent with the EU interpretation of deterrence under anti-trust law.

#### **The victim's perspective**

Having reviewed legislation and case law, let me now turn to a practical issue, namely that, without high compensation, why should a victim care to make a claim? German victims of discrimination face many obstacles:

- the Anti-Discrimination Act is a relatively new law with unclear interpretations;
- victims are faced with years of legal battles (potentially three instances and five years of litigation);
- they have to prove things only they themselves have seen and heard;
- in many cases they will be denounced as liars, as being paranoid, as being greedy;
- some of my own clients have had to take tranquilizers before even being able to read letters from their former employers and their lawyers;
- they lose their jobs, for example because things often tend to get rather unpleasant in the work place;
- they have a hard time finding a new job because their references are damaged;
- if they win, they are awarded no more than token compensation, frequently something in the region of € 1,000 to € 2,000.

## Why make the effort?

### Honouring international obligations

Another aspect of this issue is the relevance of the international treaty obligations, e.g. CEDAW<sup>46</sup>, CRPD<sup>47</sup>, European Convention on Human Rights<sup>48</sup> and of course the Universal Declaration of Human Rights.<sup>49</sup> These treaties have been ratified by most member states of the EU. They are binding on these countries. Every judge has to respect them while interpreting national law.

Punitive damages on the perpetrators of discrimination may be deemed draconic or too harsh by some, but we have to consider the applicable UN treaties which are commitments to be honoured. These treaties state that every kind of discrimination must be eliminated and that discrimination is a direct attack on human dignity. The Universal Declaration of Human Rights states: "the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".<sup>50</sup> In Article 2 of the Declaration it says: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".<sup>51</sup> Article 8 even guarantees effective remedies: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".<sup>52</sup>

Consequently, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) emphasises: "that all Member States have pledged themselves to take joint and separate action, in co-operation with the Organisation, for the achievement of one of the purposes of the United Nations, which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion".<sup>53</sup>

Discrimination "is a violation of the inherent dignity and worth of the human person". as the UN Convention on the Rights of Persons with Disabilities states.<sup>54</sup> Thus, every state party must take all "appropriate measures to eliminate discrimination" in order to end any kind of discrimination.<sup>55</sup> And to this end the state party must "take measures to the maximum of its available resources".<sup>56</sup> The government must ensure "effective legal protection against discrimination" (emphasis by the author) and must "guarantee [...] equal and effective legal protection against discrimination".<sup>57</sup>

The UN stresses the importance of ending discrimination, which shows that the state parties must end discrimination by all legal means. But – as we can clearly see – the state parties have widely ignored this obligation. Just to give one example: female employees in Germany still have slim chances of being promoted and on top of that they receive around 23% less salary than their male colleagues.<sup>58</sup>

The most effective way is to ensure a real deterrent. Hence, punitive damages have to be awarded. The severity of this demand equals the harshness and impact of denying a human being his or her innate dignity.

### How to calculate punitive compensation

After these preliminary remarks we now have to determine the right amount. What kind of sum is necessary to guarantee a real deterrent? Let me give an example:

The perpetrator has a turnover of € 10 billion. The court awards compensation of € 10,000, which is 0.001% of the turnover. To grasp what this means for such a company we have to compare it with numbers that normal people such as judges and lawyers can understand. The easiest way is to relate this example to average income, which in Germany is around € 30,000 per year. This is the "business volume" of an average citizen and 0.0001% of this is 3 cents. How can such a sum be a deterrent? Nonetheless this seems to be precisely what some judges (without reasoning their decision) think.<sup>59</sup>

As noted before, sanctions for discrimination must not only be effective (judicial protection), they must also be proportionate and dissuasive. Surely this means that the deterrent part of an award needs to be tailored to the perpetrator's circumstances.

A real deterrent for employers could be to award victims of discrimination compensation equaling 1 or 2% of their annual turnover. However, this could lead to extremely high and disproportionate sums. A suggestion to solve this problem could be to award a minimum of one year's salary or one year's average income (in Germany: approximately € 30,000) for each element of discrimination. This suggestion was supported in the German parliament (*Bundestag*) at the time the Bill that led to the Non-Discrimination Act was debated.<sup>60</sup> Given that there were no other suggestions during the parliamentary debates, it could be argued that it was the "will of the legislator" that German victims of discrimination should be awarded no less than one year's salary. Moreover, the ECJ decided in 1997 that three months' wages are insufficient as "deterrent compensation" in a situation where a job applicant is rejected on discriminatory grounds, unless the company provides evidence that the applicant would have been rejected anyway.<sup>61</sup>

If the (average) income is too low, sums greater than one year's wages are necessary. For example in some EU member states the average income is so low that it would not hurt a big international company. The question therefore remains whether one year's salary is really a deterrent, especially when applied to big enterprises.

### Examples from Germany

In the past, German judges awarded low sums (around 1.5 months' wages) for discrimination. This clearly is insufficient. Now the courts are slowly increasing the amounts. Several courts have awarded 6 to 12 months wages.<sup>62</sup>

Some of my own cases<sup>63</sup> (aggregate amounts):

- € 500,000: gender and age discrimination, employer's offer of a settlement, 2009, discrimination during employment
- € 250,000: gender discrimination, employer's offer of a settlement, 2011, discrimination during employment
- € 200,000: gender discrimination, settlement, 2011, discrimination during employment
- € 200,000: age discrimination, settlement, 2008, discrimination during employment
- € 135,000: age discrimination, settlement, 2010, discrimination during employment
- € 100,000: age discrimination, settlement, 2009, discrimination during employment
- € 100,000: age and gender discrimination, settlement, 2005, discrimination during employment
- € 80,000: age and gender discrimination, settlement, 2010, discrimination during employment

- € 75,000: ethnic discrimination, settlement, 2011, discrimination during employment
- € 75,000: age discrimination, employer's offer of a settlement, 2011, discrimination during employment
- € 70,000: gender discrimination, proposal of the court, 2011, discrimination during employment
- € 50,000: gender discrimination, settlement, 2009, discrimination during employment
- € 50,000: discrimination of disabled people, settlement, 2008, discrimination during employment
- € 34,000: workplace harassment, settlement, 2011, discrimination during employment
- € 33,000: discrimination on grounds of belief, settlement, 2008
- € 30,000: bullying, judgment, 2009, in addition to compensation for the loss of the job and outstanding salary, discrimination during employment
- € 25,000: age discrimination, settlement five years after the end of employment and in addition to compensation for the loss of the job, 2010, discrimination during employment
- € 23,000: gender discrimination (14.5 months' wages), settlement, 2009, discrimination against an applicant 11 months' wages as compensation and continuation of a fixed-term employment contract: gender discrimination during employment<sup>64</sup>

In most cases the settlements included a confidentiality clause. I am therefore restricted in what I can write. I can, however, give the following examples:

#### **Mrs L.**

Mrs L worked in a nursing home as a senior nurse. She was praised for her excellent work. Then a new manager took over. From the first day he started to bully her. He revoked most of her managerial authority, even though she had proved herself to be outstandingly efficient. He ignored her warnings regarding health risks to patients. He wrongly accused her of having removed documents and he offended her with misogynistic statements. Finally he terminated her contract. She required medical treatment for several years for, *inter alia*, clinical depression.

We filed the case in 2008, applying for compensation both from her employer and from the manager personally. In 2009 the judge awarded our client compensation of € 30,000, adding that additional compensation would be payable in the event any future harm should arise. Both the company and the manager were liable for all damages.

The judgment stressed the need for both general and specific prevention. The company was relatively small, employing around 40 people, and was situated in a less affluent region of Germany (the Eastern part). For that reason € 30,000 was seen as being sufficiently dissuasive. On appeal, a confidential settlement was reached.<sup>65</sup>

#### **Mrs M.**

Mrs M worked as a physiotherapist. She had a one-year fixed-term contract. At the end of the year she was pregnant. She told her boss about it and he told her that, because of the pregnancy, he would not offer her a permanent contract, adding, "surely you will understand that." Well, she did not understand that and asked my firm to sue her employer. The boss had been accommodating enough to give his reasons not only to my client (who, as the plaintiff, was not allowed to testify) but to her husband as well. The company hired another physiotherapist. This was a clear case of direct gender discrimination [maternity].

As per her request, the court awarded her a permanent contract, immaterial damages (of 11 months' wages) and her full salary for the period between dismissal and judgment.<sup>66</sup>

#### **Mr X.**

Mr X worked for 20 years for a German corporation. When he turned 60, he was asked to resign and enjoy life. He did his work as well as before, but the employer wanted to give the company a "younger face". The employer demoted him from middle management and a plush office to a cubicle near the entrance of the building and he was instructed to review unimportant data and to write superfluous reports. Finally, at 63, we filed an application to the court. One year later the employer paid him € 200,000. Our client had to promise eternal confidentiality.

#### **Blacklisting**

An effective way to combat discrimination in the workplace would be to blacklist discriminatory companies and to bar them from applying for public sector tenders and subsidies. This would force the companies to abstain from discrimination in order to avoid such severe consequences. In the United States such a blacklist already exists. It is managed by the Office of Federal Contract Compliance Programs (OFCCP).<sup>67</sup>

Even more effective would be to require a certificate attesting to non-discriminatory practice from any company that wishes to take part in a public sector tender or asks for subsidies. Why should tax payer's money be spent on discriminatory companies by awarding them public tenders and subsidies? The government, at least, should uphold the notion of a society free from discrimination. Surely doing business with perpetrators, and even awarding them subsidies, is hypocritical, as it involves passing legislation against discrimination whilst at the same time supporting discriminatory companies.

#### **Conclusion**

Discrimination is immoral. It is a direct attack on human dignity and it is inefficient as well. Low awards are useless and encourage discrimination. At the same time such awards discourage victims. Only full compensation for all material and immaterial damages as well as punitive damages will end discrimination. A meaningful deterrent must be "painful" and only high sums will guarantee an end to discrimination. The European directives and the ECJ's rulings clearly show the way forward. With these, effective protection against discrimination is possible, but now the courts need to fulfil these obligations. Protection against discrimination is therefore in the hands of judges. Will they deter the perpetrators or the victims? Low levels of compensation will result in a high level of discrimination. It is therefore up to each and every court to decide for itself whether to be an accessory to the perpetrator or protector of the victim.

#### **[Footnotes]**

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- 2 Where this article does not indicate otherwise, I use the expression "discrimination" to mean unjustified, illegal discrimination.
- 3 3rd German Anti-discrimination Congress, Bonn, 18 July 2008: see [www.dgadr.org](http://www.dgadr.org).

- 4 Sabrina Benner, *Risiken der Diskriminierung*, 2008, p. 44; Olaf Arlinghaus/Kerstin Eickmeier, *Praxishandbuch Turnaround Management: Liquidität sichern, Kosten senken*, 2007, p. 172.
- 5 The Gallup Organization, *Engagement Index 2004*, p. 74.
- 6 Markus Ramacher, *Das Allgemeine Gleichbehandlungsgesetz unter Berücksichtigung der Kosten von Diskriminierung und Mobbing in der Bundesrepublik Deutschland*, 2011, p. 36.
- 7 In Germany, Italy and perhaps other countries as well, "mobbing" is used as a synonym for workplace harassment. Normally this is defined as degrading behaviour lasting at least six months and occurring several times each week. "Straining" is a similar term which describes comparable behaviour of at least a single occurrence which puts a particular onus on the victim for at least six months. Both phenomena have to occur in conjunction with the victim's workplace duties. See Prof. Dr. H. Ege: *Oltre il Mobbing. Straining, Stalking e altre forme-di conflittualità sul posto di lavoro*, Franco Angeli, Milano, 2005, p. 70; "straining" acknowledged in judgments of Italian Labour Courts: Bergamo, 21 April 2005, file number: 711/02 R.G.; Sondrio, 22 July 2006, file number: 264/2004 R.G.
- 8 € 148 billion: Markus Ramacher, *Das Allgemeine Gleichbehandlungsgesetz unter Berücksichtigung der Kosten von Diskriminierung und Mobbing in der Bundesrepublik Deutschland*, 2011, p. 66; more than € 100 billion: Marina Anselm, 17.08.2006, *Die Welt*, [www.welt.de/print-welt/article146192/Die\\_hohen\\_Kosten\\_der\\_Angst.html](http://www.welt.de/print-welt/article146192/Die_hohen_Kosten_der_Angst.html).
- 9 ECJ 10 April 1984, case 14/83 (Von Colson), at § 23.
- 10 ECJ 8 November 1990, case 177/88 (Dekker), ECJ 2 August 1993, case C-271/91 (Marshall)
- 11 ECJ 22 April 1997, case C-180/95 (Draehmpaehl)
- 12 In Germany: Berlin Higher Labour Court, 26 November 2008, case 15 Sa 517/08.
- 13 Court of Appeal (Civil Division), 20 December 2002 re *Vento v Chief Constable of West Yorkshire Police* [2003] IRLR 102.
- 14 See Article 252 BGB and Article 270 ZPO. Case law: BAG 12 November 1985, case 3 AZR 576/83; BGH 6 June 2000, case VI ZR 172/99; BAG 29 September 1994, case 8 AZR 570/93.
- 15 Plenarprotokoll 16/43 S. 4151, 4152 f.
- 16 BAG 29 September 1994, case 8 AZR 570/93.
- 17 BGH 6 June 2000, case VI ZR 172/99
- 18 Klaus Michael Alenfelder, *Materieller Schaden wegen Diskriminierung*, *Zeitschrift für Antidiskriminierungsrecht ZfAD*, 2/2007, p. 5 – 8, <http://www.dgadr.org>.
- 19 See Article 12 a ArbGG.
- 20 ECJ 2 August 1993, case C-271/91 (*Marshall II*, § 26).
- 21 Prof. Dr. H. Ege: *Oltre il Mobbing. Straining, Stalking e altre forme di conflittualità sul posto di lavoro*, Verlag Franco Angeli, Mailand, 2005, p. 70; acknowledged in certain judgments of Italian Labour Courts: Bergamo, 21 April 2005, case 711/02 R.G.; Sondrio, 22 July 2006, case 264/2004 R.G.
- 22 Harald Ege "La valutazione peritale del danno da Mobbing", 2002; acknowledged in judgments of Italian Labour Courts: Agrigento, 1 February 2005, case 2700/2003 R.G.C.; La Spezia, 4 July 2005, case 503/2004; Sondrio, 9 March 2006, case 194/2004 R.G.; Sondrio, 22 July 2006, case 264/2004 R.G.; Bergamo, 8 August 2006, case 1785/2001 P. G.; Bergamo, 14 June 2007, case 882/03 R.G.
- 23 Harald Ege, "La valutazione peritale del danno da Mobbing", 2002.
- 24 Harald Ege "La valutazione peritale del danno da Mobbing", 2002; acknowledged in judgments of Italian Labour Courts: Agrigento, 1 February 2005, case 2700/2003 R.G.C.; La Spezia, 4 July 2005, case 503/2004; Sondrio, 9 March 2006, case 194/2004 R.G.; Sondrio, 22 July 2006, case 264/2004 R.G.; Bergamo, 8 August 2006, case 1785/2001 P. G.; Bergamo, 14 June 2007, case 882/03 R.G.
- 25 ECJ 7 June 1983, joined cases 100/80-103/80 (*Musique Diffusion française and others – v – Commission*), at § 104.
- 26 ECJ 28 June 2005, joined cases C-189/02, C-202-02, C-205/02 and C-208/02 (*Dansk Rotindustri*) at §260.
- 27 European Commission 21 November 2001, OJ L 6 p.1
- 28 European Commission 24 May 2004, OJ L 32 p. 23
- 29 European Commission 12 July 2006, OJ C 138 p. 10
- 30 European Commission 27 February 2008, OJ C 166 p. 20
- 31 European Commission 13 May 2009, OJ C 227 p. 13
- 32 ECJ 13 July 2011, joined cases T-138/07, T-141/07, T-142/07, T-145/07, T-146/07, T-144/07, T-47/07, T-148/07, T-149/07, T-150/07, T-154/07, T-151/07
- 33 In most, if not all, European countries unlawful discrimination is subject to criminal prosecution. However, discrimination in employment is rarely prosecuted.
- 34 The recent Supreme Court decision in the WalMart class action (Supreme Court of the United States, 20 June 2011, no. 10-277 re *Wal-Mart Stores Inc. – v – Dukes Ltd*) demonstrates that the victims of discrimination in employment, even if the discrimination is structural, do not constitute a sufficiently homogenous group to qualify as a "class".
- 35 Federal Constitutional Court (*Bundesverfassungsgericht*) 8 March 2000, case 1 BvR 1127/96; Federal Civil Court (*Bundesgerichtshof*) 5 December 1995, case VI ZR 332/94, misleading press article about breast cancer of Caroline of Monaco; 12 December 1995, case VI ZR 223/94, photos of a child of Caroline of Monaco were taken and published without her consent.
- 36 Both judgments were in cases where Princess Caroline was the plaintiff: see *Bundesgesetzblatt* Drs. 16/1780 page 46.
- 37 Munich County Court, 22 February 2006, case 21 O 17367/03; revised by the Federal Civil Court for other reasons (freedom of the press was deemed more important than the infringement of the rights of the person by means of a normal and very small photograph), 29 October 2009, case I ZR 65/07.
- 38 Hamburg Appellate Court, 30 July 2009, case 7 U 4/08.
- 39 Hamburg County Court, case 324 O 280/01.
- 40 Karlsruhe Appellate Court, 30 January 1998, case 14 U 210/95.
- 41 München County Court I, case 21 O 12437/99.
- 42 Federal Civil Court, 06 October 2004, case VI ZR 255/03.
- 43 Hamburg County Court, case 324 O 68/01.
- 44 Hamm Appellate Court, case 3 U 168/03.
- 45 München Appellate Court, 17 January 2003, case 21 U 2664/01.
- 46 UN Convention on the elimination of all forms of discrimination against women, 18 December 1979.
- 47 Convention on the Rights of Persons with Disabilities, adopted on 13 December 2006, which entered into force on 3 May 2008.
- 48 European Convention on Human Rights,
- 49 The Universal Declaration of Human Rights – UN, 10.12.1948.
- 50 The Universal Declaration of Human Rights, Preamble.
- 51 The Universal Declaration of Human Rights, Article 2 (1).
- 52 The Universal Declaration of Human Rights, Article 8.
- 53 International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 21 December 1965, which entered into force on 4 January 1969.
- 54 Convention on the Rights of Persons with Disabilities, Preamble (h); Convention on the elimination of all forms of discrimination against women, Preamble.
- 55 Convention on the Rights of Persons with Disabilities, Article 4(1)(e); Convention on the elimination of all forms of discrimination against women, Article 11(1).

- 56 Convention on the Rights of Persons with Disabilities, Article 4(2); similar: Convention on the elimination of all forms of discrimination against women (CEDAW), Article 2(b).
- 57 Convention on the Rights of Persons with Disabilities, Article 5(2); similar: Convention on the elimination of all forms of discrimination against women (CEDAW), Article 2(c).
- 58 <http://www.dw-world.de/dw/article/0,,6482088,00.html>.
- 59 See, e.g., Wiesbaden Labour Court, 18 December 2008, case 5 Ca 46/08.
- 60 During the final debate on the Bill on 29 June 2006 the MP Sylvia Schmidt (SPD) said that in such cases dissuasively high awards for immaterial damages, by which she meant punitive damages, should be "no less than the equivalent of an annual salary and in no event less than € 30,000"; Christine Lambrecht, Legal Expert to the SPD group of the German Parliament, session 29 June 2006, plenary minutes 16/43 p. 4036, 4037; Silvia Schmidt, Member of Parliament, 29 June 2006, plenary minutes 16/43 p. 4151, 4152 f.
- 61 *Draempaehl – v – Urania Immobilienservice OHG* 22 April 1997, case C-180/95, at § 26. Only in cases of discrimination of against applicants who would have been rejected anyway because of poor qualifications would three months' wages be deemed sufficient.
- 62 E.g. Hamm Higher Labour Court, 26 February 2009, case 17 Sa 923/08; Neumünster Labour Court 09 December 2009, case 3 Ca 1055 b /2009; bullying: 12 months wages: Cottbus Labour Court 08 July 2009, case 7 Ca 1960/08.
- 63 Most cases in co-operation with my colleague Frank Jansen, Bad Hersfeld, [www.goeb-jansen.de](http://www.goeb-jansen.de).
- 64 Neumünster Labour Court, case 3 Ca 1055 b/09, 2009.
- 65 Cottbus Labour Court, file number: 7 Ca 1960/08, 8 July 2009. For a news article about the case in German see: [www.lr-online.de/regionen/forst/Forsterin-durchleidet-Mobbing-Martyrium-in-DRK-flegeheim](http://www.lr-online.de/regionen/forst/Forsterin-durchleidet-Mobbing-Martyrium-in-DRK-flegeheim); Article 1052,2601305,0.
- 66 Labour Court Neumünster, case 3 Ca 1055 b/09, 2009.
- 67 [www.epls.gov](http://www.epls.gov).