

## Damages in discrimination cases

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- 1 **Abstract** Discrimination is an attack on human dignity and highly inefficient as well.  
2 The European Union anti-discrimination directives demand “effective, proportionate  
3 and dissuasive” protection against discrimination. Above and beyond full compensa-  
4 tion for all losses, punitive damages are also necessary to ensure dissuasion. At the  
5 moment there is some reluctance to mete out punitive damages. For reasons unknown  
6 it seems perfectly normal for cartels to be ordered to pay hundreds of millions in  
7 punitive damages, or for tabloids to be ordered to pay huge sums of money to movie  
8 stars whose privacy was infringed, but for victims of discrimination in employment  
9 to be content with puny rather than punitive awards.
- 10 **Keywords** Anti-discrimination · Compensation · Punitive damages

<sup>1</sup> Gender: Recast Directive 2006/54, race/ethnic origin: Directive 2000/43, religion/belief/disability/age/sexual orientation Directive 2000/78.

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## 11 **1 Introduction**

12 The anti-discrimination directives<sup>1</sup> aim to effectively guard the core European prin-  
13 ciple: human dignity. As Vladimir Spidla, the former European Union Commissioner  
14 and former prime minister of the Czech Republic said: “What distinguishes us from  
15 totalitarian countries is human dignity”.<sup>2</sup>

16 The anti-discrimination directives are not just some directives like any other. They  
17 are essential for protecting an individual’s dignity against discrimination. Hence the  
18 effective implementation of anti-discrimination laws is of the utmost importance if the  
19 European Union wants to stay a beacon of freedom rather than merely be an island of  
20 prosperity.

21 If the European Union’s equal treatment rules are to have an impact on everyday  
22 life, they must be effectively enforceable. They must be capable of eliminating deeply  
23 ingrained attitudes, such as the idea that employers need to be protected against “greedy  
24 plaintiffs”. In my own country, Germany, the case-law indicates that such attitudes are  
25 still prevalent, and anti-discrimination rules are still widely ignored. Fortunately, this  
26 attitude of reluctance is beginning to change, thanks to the case-law of the European  
27 Court of Justice—now codified in Articles 18 and 25 of the Recast Directive, Article  
28 15 of Directive 2000/43 and Article 17 of Directive 2000/78—that compensation  
29 to victims of discrimination must be “effective, proportionate and dissuasive”. This  
30 article attempts to examine that doctrine.

## 31 **2 Punitive damages**

32 An employer who discriminates against an employee or a job applicant commits a  
33 breach of contract and/or a tort. In either case, the laws of the member states (one  
34 assumes) obligate the employer to compensate the victim. Such compensation can  
35 comprise elements other than financial compensation—for instance reinstatement or  
36 a public apology—but in most cases the victim is interested primarily in money. This  
37 article therefore focuses on financial compensation for the victim’s loss.

38 Discrimination can cause material loss, such as the loss of a (potential) job, under-  
39 payment and loss of earning capacity. It can also cause non-material loss, such as hurt  
40 feelings or depression. Both types of loss can be compensated for, to a certain extent  
41 at least, in the form of a monetary award. Such awards are common in all European  
42 Union jurisdictions. However, are they sufficient to deter employers from discriminat-  
43 ing or, as the case may be, from continuing a pattern of discrimination in the future?  
44 Will a multinational company really be motivated to change its policies because a  
45 judge in one member state orders it to pay a few thousand euros? My contention is  
46 that this is not the case and that the European Court of Justice acknowledges this  
47 by requiring member state courts, where necessary, to apply a penalty that has been  
48 common in the United States for decades, but which European legislators and courts  
49 seem to be reluctant to accept in employment disputes—namely, punitive damages.  
50 For some reason, we find it perfectly normal for cartels to be ordered to pay hundreds

<sup>2</sup> 3. German Antidiscrimination Congress, Bonn, 18.07.2008, <http://www.dgadr.org>.

51 of millions in punitive damages, or for tabloids to be ordered to pay huge sums of  
52 money to movie stars whose privacy was infringed, but for victims of discrimination  
53 in employment to be content with puny rather than punitive awards.

### 54 **3 Why are punitive damages necessary?**

55 The aim of the European Union directives is to guarantee a Europe free from discrim-  
56 ination. In the workplace this means that employees must be hired, paid and promoted  
57 based on facts alone, not on the basis of bias.

58 Contrary to widely held belief, the elimination of discrimination does not ham-  
59 per, but actually improves companies' efficiency, for a number of reasons. First, the  
60 absence of discrimination makes it easier to recruit the best employees and enhances  
61 the public image of a company. This can open new markets and help to win new clients.  
62 The following example makes the inefficiency of decisions based on discrimination  
63 evident. Let us suppose that an employer is looking for a mid-level manager. One  
64 hundred people send in applications. Using bias instead of facts, the employer rejects  
65 50 women, 10 migrants, 10 disabled people and 15 applicants aged over 50. This  
66 leaves no more than 15 applicants to choose from. It is not until the field has thus been  
67 narrowed down from 100 to 15 applicants that the employer in this example begins  
68 to apply facts to its decision-making. The chances are that it has already rejected the  
69 best applicant.

70 Secondly, there is evidence that companies that have eliminated discrimination have  
71 a significantly reduced employee turnover. On average a replacement employee in a  
72 non-executive position costs around 125 % of 1 year's wages.<sup>3</sup>

73 Thirdly, by ending discrimination, employers will improve the motivation of their  
74 employees. Employees who see that they will be paid and promoted according to their  
75 own achievements, will feel fairly treated and will work with more dedication. A study  
76 in Germany shows that sick days and motivation are closely related. Employees with  
77 higher motivation have on average four sick days less each year than their less highly  
78 motivated colleagues.<sup>4</sup> Poorly motivated employees will do just enough, whereas  
79 highly motivated ones will show all they can do.

80 Fourthly, the said European Union directives recognise harassment as a form of  
81 discrimination. In Germany there are 3.5 million victims of workplace harassment  
82 every year.<sup>5</sup> The cost of discrimination and bullying (often referred to in Germany  
83 and some other countries as "mobbing" or "straining"<sup>6</sup>) to employers in Germany is

<sup>3</sup> Benner, S. [1], p. 44; Arlinghaus, O./ Eickmeier, K. [2], p. 172.

<sup>4</sup> The Gallup Organization [3], p. 74.

<sup>5</sup> Ramacher, M. [4], p. 36.

<sup>6</sup> 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 6 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 6 months. Both phenomena have to occur in conjunction with the victim's workplace duties. See Ege, H. [5] p. 70: "straining" acknowledged in judgements of Italian Labour Courts: Bergamo, 21 April 2005, file number: 711/02 R.G.; Sondrio, 22 July 2006, file number: 264/2004 R.G.

84 estimated to total over € 100 billion per year.<sup>7</sup> This figure is exclusive of the cost  
85 of the associated social services (health insurance funds, pension institutions, social  
86 security services, etc).

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

#### 91 **4 Effective, proportionate and dissuasive**

92 Sanctions for discrimination must be *effective, proportionate and dissuasive*.<sup>8</sup>

##### 93 4.1 Judicial protection

94 To be effective, they have to give the victims of discrimination “real and effective  
95 judicial protection”.<sup>9</sup> That means the victim’s loss must be compensated for in full.  
96 This loss can consist of:

- 97 ● material damages *e.g.*,
- 98     – lost earnings;
- 99     – legal costs;
- 100     – loss of earning capacity;
- 101 ● immaterial damages.

102 Let me investigate each of these components.

##### 103 4.1.1 Lost salary

104 There is no cap for compensation for lost earnings in terms of the duration of the  
105 loss.<sup>10</sup> Allow me to illustrate this with the following hypothetical example. Tony is  
106 fired on reaching his 45th birthday because he is “too old”. He had wanted to retire  
107 at age 65. His annual salary was € 60,000. His maximum material loss, if we ignore  
108 lost pay raises and losses in retirement income, is 20 years x € 60K = € 1,200,000.  
109 If Tony finds another job, the money he earns there has to be taken into account. In  
110 theory, Tony could sue for € 60,000 each year (or for € 5,000 every month) for the  
111 next 20 years, minus his earnings elsewhere. This would lead to decades of lawsuits.  
112 Instead, the court can estimate the future loss and award a one-off payment. This is a  
113 more reasonable solution than spending decades on litigation. The problem with this  
114 approach, however, is that it involves making an estimate as to how long the victim’s

<sup>7</sup> € 148 billion: Ramacher, M. [4], p. 66; more than € 100 billion: Anselm, M. [6].

<sup>8</sup> Articles 18 and 25 of the Recast Directive 2006/54, Article 15 of Directive 2000/43, Article 17 of Directive 2000/78.

<sup>9</sup> ECJ Case 14/83 Von Colson [1984] ECR 1984 I-01891, at § 23, ECJ Case 177/88 Dekker [1990] ECR I-3941, ECJ Case C-271/91 Marshall II [1993], ECJ Case C-180/95 Draehmpaehl [1997] ECR I-02195.

<sup>10</sup> in Germany: Berlin Higher Labour Court, 26 November 2008, case 15 Sa 517/08.

115 employment would have lasted had the discrimination not occurred. A case—one out  
116 of many, but a rather insightful one—where a court was called on to make such an  
117 estimate is the English case of *Vento v. Chief Constable of West Yorkshire*.<sup>11</sup> In that  
118 case, which concerned a policewoman who lost her job at age thirty as a result of  
119 sexual harassment, the court calculated the income she probably lost as a result of the  
120 harassment at £165,829. It did so “on the basis that there was a 75 % chance of Ms  
121 Vento working in the police force for the rest of her career”.

122 In brief, what *Vento* tells us is, first, that although estimating the likely duration of  
123 lost earnings is a subjective matter—in essence, no more than educated guesswork—  
124 it is an exercise that needs to be undertaken. Secondly, making a serious estimate  
125 of probable lost earnings will in many cases, as in *Vento*, lead to a high level of  
126 compensation.

127 In Germany, the theory is similar. In the event that a job (and hence the income  
128 that goes with the job) is lost, the lost income must be compensated for on the basis  
129 of an estimate.<sup>12</sup> In making this estimate, one of the determining factors is how long  
130 employees such as the victim commonly tend to retain their job. This is as the German  
131 parliament intended matters to be when it debated the Anti-Discrimination Act on 29  
132 June 2006.<sup>13</sup> In determining how long the victim would probably have retained his or  
133 her job, the courts have reduced the victim’s burden of proof. In 1994, the *BAG* ruled  
134 that the relevant statutory provisions reduce the victim’s burden of proof “not only in  
135 respect of the amount of damages but also in respect of the question whether there are  
136 damages at all”.<sup>14</sup> In 2000, the *BGH* held that<sup>15</sup> “when determining a victim’s likely  
137 professional development in the absence of the event that caused the loss, Article 252  
138 BGB requires the court to make an estimate based on the normal course of events,  
139 taking account of the specific circumstances of the case, in particular as they relate to  
140 the victim’s education and professional experience. Although it is up to the victim to  
141 provide the court with as concrete facts and arguments as possible, this requirement  
142 must not be overstretched [...]. In the event no facts can be established that allow the  
143 court to determine with any measure of certainty whether the victim’s career would  
144 in all likelihood have been successful or not, the court will need to proceed from  
145 the assumption that the victim’s professional success would have been average [...]”  
146 Article 287 (1) ZPO requires the court to determine whether a loss has occurred and  
147 how serious that loss is, taking account of all of the circumstances of the case and the  
148 court’s own convictions. This provision of the law does not merely reduce the victim’s  
149 burden of proof but also its duty to present all the facts supporting his claim. Even  
150 where relevant facts are lacking, the court must make such an estimation, provided  
151 sufficient facts have been established to enable the court to do this [...]”.

<sup>11</sup> Court of Appeal (Civil Division), 20 December 2002 re *Vento v Chief Constable of West Yorkshire Police* [2003] IRLR 102.

<sup>12</sup> 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.

<sup>13</sup> Plenarprotokoll 16/43 p. 4151, 4152 f.

<sup>14</sup> BAG 29 September 1994, case 8 AZR 570/93.

<sup>15</sup> BGH 6 June 2000, case VI ZR 172/99.

152 A good means to estimate losses caused by discrimination is the Kattenstein for-  
 153 mula. This formula is based on fourteen million data sets. It takes into account, *inter*  
 154 *alia*, the normal staff turn-over rate, deduction of accrued interest and missed promo-  
 155 tions.<sup>16</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 %       |
| Raise of salary 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          |
| Claim for damages                         | € 233,960.48 |

156

#### 157 4.1.2 Legal costs

158 Under German law there is no compensation for legal costs in the first instance in  
 159 Labour Courts.<sup>17</sup> European Union Directive 76/207 previously provided, and now  
 160 Directive 2006/54 provides, that “Member States shall introduce into their national  
 161 legal systems such measures as are necessary to ensure real and effective compensation  
 162 or reparation in accordance with the applicable national rules”. In applying this direc-  
 163 tive, the European Court of Justice has stressed that compensation awarded to victims  
 164 of discrimination has “to be made good in full”.<sup>18</sup> This includes full compensation for  
 165 legal costs. Given this (case) law, the German provision excluding compensation for  
 166 legal costs may not stand up if challenged in the European Court of Justice.

#### 167 4.1.3 Loss of earning capacity and career opportunities

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

170 These damages are to be expected in cases of intensive and degrading bullying.<sup>19</sup>  
 171 They can be permanent or long-lasting. Hence the financial losses may be higher than

<sup>16</sup> Alenfelder, K. M. [7], p. 5–8.

<sup>17</sup> See Article 12 a ArbGG.

<sup>18</sup> ECJ Case C-271/91 Marshall II [1993] ECR I-4367, § 26.

<sup>19</sup> Ege, H. [5], p. 70; acknowledged in judgements of Italian Labour Courts: Bergamo, 21 April 2005, case 711/02 R.G.; Sondrio, 22 July 2006, case 264/2004 R.G.

172 the lost salary. The damage can be determined by an expert in a way similar to the  
173 way in which non-material damages are determined in cases involving bullying.<sup>20</sup>

174 Let me give an example. Tony is 45 years of age and works as a mid-level manager  
175 (salary: € 60,000). He has been bullied by his superiors and colleagues for 5 years  
176 because of his religion. He is the only Roman Catholic in the company. Finally he  
177 collapses and his doctor advises him to leave the company. He suffers from depression,  
178 he feels insecure and avoids meeting people. His doctor expects these handicaps to  
179 be permanent. He loses the ability to work in an executive position (*e.g.*, as the head  
180 of a department) and his achievement potential is permanently down to fifty per cent.  
181 After 4 years he finds a new job, again at an annual salary of € 60,000. His estimated  
182 loss of earnings according to the Kattenstein Formula is € 233,960 (see table above).  
183 However, this sum equals only around 4 years' wages. The permanent loss of abilities  
184 is not taken into account. The employee "sells" his abilities and efficiency in his job. If  
185 these "goods" are damaged he loses economic value—he receives no salary or lower  
186 salary. This material loss has to be compensated for in full. Here Tony loses any chance  
187 of promotion and bonuses.

#### 188 4.1.4 Immaterial damages

189 Compensation for non-material damages is mainly for psychological suffering. The  
190 amount to be awarded depends on the severity of the discrimination and its psycho-  
191 logical and medical impact.<sup>21</sup>

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

201 It may be that the idea of punitive damages is alien to many in Germany, but this is  
202 precisely what the European Union directives and the case-law of the European Court  
203 of Justice require. The German case-law in respect of privacy protection (see below)  
204 is more in line with the European Union's rules, even though that German case-law  
205 avoids qualifying the awards in question as being "punitive". Rather, the courts refer  
206 collectively to compensation for non-material damage as well as awards aimed at  
207 prevention jointly as "compensation". This lack of precise terminology needs to be  
208 redressed. Only when the different elements of an award are identified can the award  
209 be determined in accordance with European Union rules.

<sup>20</sup> Ege, H. [8]; acknowledged in judgements 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.

<sup>21</sup> Ege, H. [8].

210 Thus the suffering of the victim has to be compensated for. Then a sum has to be  
 211 added, which is enough to guarantee deterrence. The required sum can be determined  
 212 by an expert.<sup>22</sup>

## 213 4.2 Deterrence

214 One can distinguish between two types of deterrence:

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

### 219 4.2.1 Interpretation of “deterrent effect” and “dissuasive”

220 Neither the judgments of the European Court of Justice in *Von Colson, Marshall* and  
 221 *Draehmpaehl* nor Directives 2000/43, 2000/78 or 2006/54 provide any clue as to what  
 222 is meant by, respectively, “deterrent effect” and “dissuasive”. One way to determine  
 223 the meaning of “deterrent effect” and “dissuasive” is to look them up in a dictionary  
 224 or thesaurus (synonyms of “deter” being warn, frighten, intimidate) or to investigate  
 225 in which contexts these expressions are used.

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

### 231 4.2.2 European Union anti-trust law

232 An idea of the meaning of “deterrent effect” can, perhaps, be derived from the law and  
 233 case-law on Regulation 2003/1 and its predecessor Regulation 17. These regulations  
 234 deal with violations of European Union anti-trust law. Article 23(2) of Regulation  
 235 2003/1 allows the Commission to impose fines on companies for infringement of  
 236 competition rules, up to a certain maximum related to total turnover in the previous  
 237 year. In fixing the amount of the fine, “regard shall be had both to the gravity and to the  
 238 duration of the infringement”. In its 1983 judgment in the *Pioneer case*, the European  
 239 Court of Justice held that “it was open to the Commission to raise the level of fines so  
 240 as to reinforce their deterrent effect”.<sup>23</sup> In 2005, the European Court of Justice held  
 241 that the need to ensure the deterrent effect of the fines is one of the factors in assessing

<sup>22</sup> Ege, H. [8]; acknowledged in judgements 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.

<sup>23</sup> ECJ joined Cases 100/80-103/80 *Musique Diffusion française and others-v-commission* [1983] ECR I-1825, at § 104.



242 the gravity of the infringement.<sup>24</sup> In 2006, the Commission adopted “Guidelines on  
 243 the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No  
 244 1/2003”. Its introduction states that “fines should have a sufficiently deterrent effect,  
 245 not only to sanction the undertakings concerned (specific deterrence) but also in order  
 246 to deter other undertakings from engaging in, or continuing, behaviour that is contrary  
 247 to Articles 81 and 82 of the EC Treaty (general deterrence).” The guidelines relate the  
 248 fine to the turnover of each of the infringing parties. This allowed the commission to  
 249 impose, *inter alia*, the following fines:

- 250 ● 2001: € 462 million against Hofmann-La Roche<sup>25</sup>
- 251 ● 2004: € 497 million against Microsoft<sup>26</sup>
- 252 ● 2006: € 280 million against Microsoft<sup>27</sup>
- 253 ● 2008: € 899 million against Microsoft<sup>28</sup>
- 254 ● 2009: € 1,060 million against Intel<sup>29</sup>
- 255 ● 2011: € 320 million against Thyssen-Krupp<sup>30</sup>

256 Is it far-fetched to compare discrimination to transgressions of competition law?  
 257 Clearly there are major differences. A company that infringes the anti-trust rules faces  
 258 two separate sanctions:

- 259 (i) claims for compensation for lost profits lodged by the victims (judicial protection);  
 260 and
- 261 (ii) a fine imposed by the European Commission (and/or the domestic cartel authority)  
 262 in the public interest (general and specific deterrence).

263 The victims of anti-trust behaviour cannot claim more than their actual, proven loss.  
 264 Unlike their American counterparts they cannot claim treble damages. This is why the  
 265 European Commission, as a sort of third party, imposes fines. This difference alone  
 266 makes anti-trust law hard to compare with anti-discrimination law. In discrimination  
 267 cases, there is no third party similar to the European Commission that can impose a  
 268 fine at all,<sup>31</sup> let alone on the basis of a regulation or some other European Union or  
 269 national law. Perhaps this difference is attributable to the fact that discrimination in  
 270 employment as a rule involves no more than one or a few easily identifiable victims<sup>32</sup>  
 271 whereas violation of anti-trust rules usually affects the general public or an amorphous  
 272 group of companies whose identity need not have been known in advance.

<sup>24</sup> ECJ joined Cases C-189/02, C-202-02, C-205/02 and C-208/02 Dansk Rotindustri [2005], at §260.

<sup>25</sup> European Commission 21 November 2001, OJ L 6 p. 1.

<sup>26</sup> European Commission 24 May 2004, OJ L 32 p. 23.

<sup>27</sup> European Commission 12 July 2006, OJ C 138 p. 10.

<sup>28</sup> European Commission 27 February 2008, OJ C 166 p. 20.

<sup>29</sup> European Commission 13 May 2009, OJ C 227 p. 13.

<sup>30</sup> ECJ 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 [2011] OJ C 155, 7.7.2007.

<sup>31</sup> In most if not all European countries unlawful discrimination is subject to criminal prosecution. However, discrimination in employment is rarely prosecuted.

<sup>32</sup> 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”.

273 Be this as it may, the rationale behind the European Union's power to impose fines  
 274 on anti-trust malfeasants is the same as that behind the requirement that the member  
 275 states sanction discrimination by means of (effective, proportionate and) dissuasive  
 276 measures. For this reason, the fines levied against cartels can serve as an inspiration  
 277 for plaintiffs in discrimination cases.

#### 278 4.2.3 Infringement of personal rights

279 In Germany a number of higher courts have had to decide cases where personal rights  
 280 were infringed.<sup>33</sup> No award of any compensation for loss was made in the judgments  
 281 in question. Rather, the judgments stressed the importance of deterrence in order to  
 282 guarantee human dignity, given that without such deterrence, personal rights (which  
 283 serve to protect human dignity) would wither away.

284 The courts stressed that an award had to have a preventive effect on the perpetrator.  
 285 Moreover, the judgments stated that the courts must take into consideration the inten-  
 286 sity of the infringement and the financial advantage gained by the perpetrators. The  
 287 idea of prevention and deterrence was new at the time, but when the legislative Bill  
 288 (that in 2006 became the new Anti-Discrimination Act) was debated, its Explanatory  
 289 Memorandum referred to two of these judgments.<sup>34</sup>

290 In other cases in which non-material compensation (in respect of physical or psy-  
 291 chological pain) was awarded, the judgments did not provide for deterrence, simply  
 292 awarding compensation to the victim. The courts in those cases rejected the idea of  
 293 deterrent compensation. Consequently, the amounts awarded were very limited.

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

- 297 – €1,200,000 for the publication of a photograph of Boris Becker without his con-  
 298 sent;<sup>35</sup>
- 299 – € 400,000 for publication of fictitious articles and faked photos of Crown Princess  
 300 Viktoria of Sweden;<sup>36</sup>
- 301 – € 256,000 for publishing nude pictures of a German singer after she had revoked  
 302 her agreement;<sup>37</sup>
- 303 – approximately € 80,000 for imitating a German singer for a commercial;<sup>38</sup>

<sup>33</sup> 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.

<sup>34</sup> Both judgments in cases where Princess Caroline was the plaintiff: see *Bundesgesetzblatt* Drs. 16/1780 page 46.

<sup>35</sup> München 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 on the rights of the person by means of a normal and very small photograph), 29 October 2009, case I ZR 65/07.

<sup>36</sup> Hamburg Appellate Court, 30 July 2009, case 7 U 4/08.

<sup>37</sup> Hamburg County Court, case 324 O 280/01.

<sup>38</sup> Karlsruhe Appellate Court, 30 January 1998, case 14 U 210/95.

- 304 – approximately € 79,000 for the use of a picture of Boris Becker for an advertise-  
 305 ment;<sup>39</sup>  
 306 – € 76,000 for publishing a photograph of Princess Caroline’s five-year old daugh-  
 307 ter;<sup>40</sup>  
 308 – approximately € 75,000 for publishing a nude picture of a German author;<sup>41</sup>  
 309 – € 70,000 for alluding to a 16 year old student’s purported involvement in com-  
 310 mercial pornography by a German television host in his show;<sup>42</sup>  
 311 – € 70,000 for re-enacting a scene in a Marlene Dietrich film—The Blue Angel—for  
 312 a commercial, this sum being awarded to Marlene’s heirs).<sup>43</sup>

313 At the moment the concept of actual dissuasive compensation is a new, if not alien,  
 314 concept for most German labour courts.

315 In the cases referenced above the courts awarded the plaintiffs far higher sums  
 316 than are usually awarded for psychological pain under German law. Why? Because  
 317 in these cases the perpetrators attacked the core of the German Constitution: human  
 318 dignity (personal rights). This core has to be effectively guarded against any attack  
 319 from whoever this may come. Therefore compensation has to be deterrent in order  
 320 to prevent further attacks (general and specific prevention). Any discrimination is an  
 321 attack on the victim’s human dignity—just as any libellous media coverage is. Hence  
 322 this writer feels that the German judgments referenced above are directly applicable  
 323 in discrimination cases.

324 Since Article 1 of the European Union Charter of Fundamental Rights uses the same  
 325 words as Article 1 of the German Constitution, the German verdicts offer an idea on  
 326 how the concept of “deterrent effect” in the anti-discrimination directives could and  
 327 should be interpreted, particularly given that this interpretation is consistent with the  
 328 European Union interpretation of deterrence under anti-trust law.

#### 329 4.2.4 *The victim’s perspective*

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

- 333 – the Anti-Discrimination Act is a relatively new law and some of its provisions are  
 334 unclear;  
 335 – victims are faced with years of legal battles (potentially three instances and 5 years  
 336 of litigation);  
 337 – they will have to prove things which only they themselves will have seen and  
 338 heard;  
 339 – in many cases they will be denounced as liars, as being paranoid, or as being  
 340 greedy;

<sup>39</sup> München County Court I, case 21 O 12437/99.

<sup>40</sup> Federal Civil Court, 06 October 2004, case VI ZR 255/03.

<sup>41</sup> Hamburg County Court, case 324 O 68/01.

<sup>42</sup> Hamm Appellate Court, case 3 U 168/03.

<sup>43</sup> München Appellate Court, 17 January 2003, case 21 U 2664/01.

- 341 – some of my own clients have had to take tranquilisers before even being able to  
 342 read letters from their former employers and their lawyers;  
 343 – they will lose their jobs, for example because things often tend to get rather unpleas-  
 344 ant in the work place;  
 345 – they will have a hard time finding new jobs because their references are lacking;  
 346 – if they win, they are awarded no more than token compensation—frequently some-  
 347 thing in the region of € 1,000 to € 2,000.

348 Why make the effort?

#### 349 4.2.5 Honouring international obligations

350 Another aspect of this problems consists of international treaty obligations, *e.g.*, the  
 351 United Nations Convention on the elimination of all forms of discrimination against  
 352 women,<sup>44</sup> the Convention on the Rights of Persons with Disabilities,<sup>45</sup> the European  
 353 Convention on Human Rights<sup>46</sup> and of course the Universal Declaration of Human  
 354 Rights.<sup>47</sup> These treaties have been ratified by most member states of the European  
 355 Union. They are binding for these countries. Every judge has to respect them while  
 356 interpreting national law.

357 Punitive damages on the perpetrators of discrimination may be deemed draconic  
 358 or too harsh by some. But we have to consider the applicable United Nations treaties  
 359 which are commitments which must be honoured.

360 These treaties state that every kind of discrimination has to be eliminated. Further-  
 361 more, discrimination is a direct attack on human dignity. The Universal Declaration of  
 362 Human Rights states that “the recognition of the inherent dignity and of the equal and  
 363 inalienable rights of all members of the human family is the foundation of freedom,  
 364 justice and peace in the world”.<sup>48</sup> In Article 2 the Declaration adds that “everyone is  
 365 entitled to all the rights and freedoms set forth in this Declaration, without distinction  
 366 of any kind, such as race, colour, sex, language, religion, political or other opinion,  
 367 national or social origin, property, birth or other status”.<sup>49</sup> Article 8 even guarantees  
 368 effective remedies, stating that “everyone has the right to an effective remedy by the  
 369 competent national tribunals for acts violating the fundamental rights granted him by  
 370 the constitution or by law”.<sup>50</sup>

371 Consequently the International Convention on the Elimination of All Forms of  
 372 Racial Discrimination emphasises: “that all Member States have pledged themselves  
 373 to take joint and separate action, in co-operation with the Organization, for the achieve-  
 374 ment of one of the purposes of the United Nations which is to promote and encourage

<sup>44</sup> Adopted 18 December 1979.

<sup>45</sup> Adopted on 13 December 2006, entry into force 3 May 2008.

<sup>46</sup> European Convention on Human Rights.

<sup>47</sup> The Universal Declaration of Human Rights—UN, 10.12.1948.

<sup>48</sup> The Universal Declaration of Human Rights, Preamble.

<sup>49</sup> The Universal Declaration of Human Rights, art. 2 (1).

<sup>50</sup> The Universal Declaration of Human Rights, art. 8.

375 universal respect for and observance of human rights and fundamental freedoms for  
376 all, without distinction as to race, sex, language or religion”.<sup>51</sup>

377 Discrimination “is a violation of the inherent dignity and worth of the human  
378 person” as the United Nations Convention on the Rights of Persons with Disabilities  
379 states.<sup>52</sup> Thus every state party has to take all “appropriate measures to eliminate  
380 discrimination” in order to end any kind of discrimination,<sup>53</sup> and to this end the  
381 state party has “to take measures to the maximum of its available resources”<sup>54</sup> The  
382 government has to ensure “effective legal protection against discrimination” and to  
383 “guarantee [...] equal and effective legal protection against discrimination”.<sup>55</sup>

384 The United Nations stresses the importance of ending discrimination—which shows  
385 that party states have to end discrimination by all legal means. But—as we can clearly  
386 see—party states have widely ignored this obligation. To give just one example, female  
387 employees in Germany still have only slim chances of winning promotion, and on top  
388 of that receive wages around 23 % lower than those of male colleagues.<sup>56</sup>

389 The most effective way is to ensure real deterrence. Punitive damages have to be  
390 awarded. The strictness of this requirement is the counterpart of the harshness and  
391 impact of denying a human being its innate dignity.

#### 392 4.2.6 How to calculate deterrent compensation

393 After these preliminary remarks a calculation remains to be made. Which sum is  
394 necessary to guarantee real deterrence? Let me give an example:

395 The perpetrator has a business volume of € 10 billion. The court awards compen-  
396 sation of € 10,000. This is 0.001 % of turnover. To grasp what this means for such a  
397 company we have to compare it with numbers that normal people such as judges and  
398 lawyers can understand. The easiest way is to relate this example to average income,  
399 which in Germany is around € 30,000 per year. This is the “business volume” of an  
400 average citizen. 0.0001 per cent of this is 3 cents. How can such a sum be a deterrent?  
401 Nonetheless this seems to be precisely what some judges (without reasoning their  
402 decision) think.<sup>57</sup>

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

<sup>51</sup> International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 21 December 1965, which entered into force on 4 January 1969.

<sup>52</sup> Convention on the Rights of Persons with Disabilities, Preamble (h); Convention on the elimination of all forms of discrimination against women, Preamble.

<sup>53</sup> Convention on the Rights of Persons with Disabilities, art. 4 (1) (e); Convention on the elimination of all forms of discrimination against women, art 11 (1).

<sup>54</sup> Convention on the Rights of Persons with Disabilities, art. 4 (2); similar: Convention on the elimination of all forms of discrimination against women (CEDAW), art 2 (b).

<sup>55</sup> Convention on the Rights of Persons with Disabilities, art. 5 (2); similar: Convention on the elimination of all forms of discrimination against women (CEDAW), art 2 (c).

<sup>56</sup> Corbett, D. [9].

<sup>57</sup> See, for example, Wiesbaden Labour Court, 18 December 2008, case 5 Ca 46/08.

406 A real deterrent for employers could be to award victims of discrimination com-  
 407 pensation equalling 1 or 2% of their annual turnover. However, this could lead to  
 408 extremely high and disproportionate sums. A suggestion for solving this problem  
 409 would be to award a minimum of 1 year's wages or 1 year's average income (in  
 410 Germany: approximately € 30,000) for each incident of discrimination. This sugges-  
 411 tion was supported in the German parliament (*Bundestag*) at the time the Bill that led to  
 412 the Non-Discrimination Act was debated.<sup>58</sup> Given that there were no other suggestions  
 413 during the parliamentary debates, it can be argued that it is the "will of the legislator"  
 414 that German victims of discrimination should be awarded no less than 1 year of salary.  
 415 Moreover, the European Court of Justice decided in 1997 that 3 months' wages are  
 416 insufficient as "deterrent compensation" in a situation where a job applicant is rejected  
 417 on discriminatory grounds, unless the company provides evidence that the applicant  
 418 would have been rejected anyway.<sup>59</sup>

419 If the (average) income is too low, higher sums than 1 year's wages are necessary.  
 420 For example, in some European Union member states the average income is so low that  
 421 it will not hurt a big international company. The question therefore remains whether  
 422 1 year's salary is really a deterrent, especially when applied to big enterprises.

#### 423 4.3 Examples from Germany

424 In the past, German judges awarded low sums (around 1.5 months wages) for discrim-  
 425 ination. This clearly is insufficient. Now the courts are slowly increasing the amounts.  
 426 Several courts have awarded 6–12 months wages.<sup>60</sup>

427 Some of my own cases (aggregate amounts):

- 428 – € 500,000: gender and age discrimination, employer's offer for a settlement made  
 429 in 2009, discrimination having occurred during employment
- 430 – € 250,000: gender discrimination, employer's offer for a settlement made in 2011,  
 431 discrimination having occurred during employment
- 432 – € 200,000: gender discrimination, settlement made in 2011, discrimination having  
 433 occurred during employment
- 434 – € 200,000: age discrimination, settlement made in 2008, discrimination having  
 435 occurred during employment
- 436 – € 135,000: age discrimination, settlement made in 2010, discrimination having  
 437 occurred during employment

<sup>58</sup> 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 SPD group 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.

<sup>59</sup> ECJ Case C-180/95 *Draehmpaehl* [1997] ECR I-02195, at § 26. Only in cases of discrimination of applicants who would have been rejected anyway because of their poor qualifications 3 months wages was deemed sufficient.

<sup>60</sup> 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.

- 438 – € 100,000: age discrimination, settlement made in 2009, discrimination having  
439 occurred during employment
- 440 – € 100,000: age and gender discrimination, settlement made in 2005, discrimination  
441 having occurred during employment
- 442 – € 80,000: age and gender discrimination, settlement made in 2010, discrimination  
443 having occurred during employment
- 444 – € 75,000: gender discrimination, settlement made in 2012, discrimination having  
445 occurred during employment
- 446 – € 75,000: ethnic discrimination, settlement made in 2011, discrimination having  
447 occurred during employment
- 448 – € 75,000: age discrimination, employer's offer for a settlement made in 2011,  
449 discrimination having occurred during employment
- 450 – € 70,000: gender discrimination, proposal of the court made in 2011, discrimina-  
451 tion having occurred during employment
- 452 – € 50,000: gender discrimination, settlement made in 2009, discrimination having  
453 occurred during employment
- 454 – € 50,000: discrimination of disabled people, settlement made in 2008, discrimi-  
455 nation having occurred during employment
- 456 – € 38,000: racial discrimination, settlement made in 2012, discrimination having  
457 occurred during employment
- 458 – € 34,000: workplace harassment, settlement made in 2011, discrimination having  
459 occurred during employment
- 460 – € 33,000: discrimination on grounds of belief, settlement made in 2008
- 461 – € 30,000: bullying, judgment made in 2009, in addition to compensation for the  
462 loss of the job and outstanding salaries, discrimination having occurred during  
463 employment
- 464 – € 25,000: age discrimination, settlement made 5 years after end of the employment  
465 and in addition to compensation for the loss of the job, 2010, discrimination having  
466 occurred during employment
- 467 – € 23,000: gender discrimination (14.5 month's wages), settlement made in 2009,  
468 discrimination against a job applicant
- 469 – 11 month's wages awarded in 2009 as compensation and continuation of the fixed-  
470 term employment contract: gender discrimination having occurred during employ-  
471 ment<sup>61</sup>

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

#### 474 4.3.1 Mrs L.

475 Mrs L worked in a nursing home as a senior nurse. She was praised for her excellent  
476 work. Then a new manager took over. From the first day he started to bully her.  
477 He revoked most of her managerial authority, even though she had proven herself  
478 outstandingly efficient. He ignored her warnings regarding health risks for patients.

<sup>61</sup> Neumünster Labour Court, case 3 Ca 1055 b/09, 2009.

479 He wrongly accused her of having removed documents and he offended her with  
 480 anti-female statements. Finally he terminated her contract. She underwent medical  
 481 treatment for, *inter alia*, clinical depression, for several years.

482 We filed the case in 2008, applying for compensation both from her employer and  
 483 from the manager personally. In 2009 the judge awarded our client compensation of  
 484 € 30,000, adding that additional compensation would have to be paid in the event any  
 485 future damages would arise. Both the company and the manager were held liable for  
 486 all these damages.

487 The judgment stressed the need for general and specific prevention. The company  
 488 was relatively small, employing around forty people, and the company was situated in  
 489 a less affluent region of Germany (the Eastern part). For this reason, € 30,000 was seen  
 490 as being sufficiently deterring. On appeal, a confidential settlement was reached.<sup>62</sup>

#### 491 4.3.2 Mrs M.

492 Mrs M. worked as a physical therapist. She had a 1 year fixed-term contract. At the end  
 493 of the year she was pregnant. She told her boss about it and he told her that, because of  
 494 the pregnancy, he would not offer her a permanent contract, adding, “surely you will  
 495 understand that.” She did not—and asked my firm to sue her employer. Her boss had  
 496 been sufficiently accommodating enough to tell his reasons not only to my client (who,  
 497 as the plaintiff, was not allowed to testify) but to her husband as well. The company  
 498 hired another physical therapist. This was a clear case of direct gender discrimination  
 499 (maternity).

500 In accordance with her request, the court awarded her a permanent contract, non-  
 501 material damages (11 months’ wages) and her full salary for the intervening period  
 502 between dismissal and judgment.<sup>63</sup>

#### 503 4.3.3 Mr X.

504 Mr X worked for 20 years for a German corporation. When he turned 60, he was  
 505 asked to resign and enjoy life. He did his work as well as before, but the employer  
 506 wanted to give the company a “younger face”. The employer demoted him from middle  
 507 management and a plush office to a cubicle near the entrance of the building and he  
 508 was instructed to review unimportant data and to write superfluous reports. Finally,  
 509 at 63, we filed an application to the court. One year later the employer paid him  
 510 € 200,000.

## 511 5 Blacklisting

512 An effective way to combat discrimination in the workplace would be to blacklist  
 513 discriminating companies and to bar them from applying for public sector tenders and  
 514 subsidies. This would force the companies to abstain from any discrimination in order

<sup>62</sup> Cottbus Labour Court, file number: 7 Ca 1960/08, 08.07.2009; news article about the case in German: Preikschat [10].

<sup>63</sup> Labour Court Neumünster, case 3 Ca 1055 b/09, 2009.



515 to avoid such severe consequences. In the United States such a blacklist already exists.  
516 It is managed by the Office of Federal Contract Compliance Programs.<sup>64</sup>

517 Even more effective would be demanding a certificate of non-discriminating prac-  
518 tice from any company which wants to partake in a public sector tender or asks for  
519 subsidies. Why should we spend tax money on companies which engage in discrimi-  
520 nation by awarding them public tenders or subsidies? At least the government should  
521 keep up the idea of a society free from discrimination. Surely doing business with the  
522 perpetrators, and even awarding them subsidies, is hypocritical, as it involves passing  
523 legislation against discrimination whilst at the same time supporting discriminating  
524 companies.

## 525 6 Conclusion

526 Discrimination is immoral. It is a direct attack on human dignity and is inefficient as  
527 well. Low awards are useless and encourage discrimination. At the same time such  
528 awards discourage victims. Only full compensation for all material and non-material  
529 damages as well as punitive damages will end discrimination. REAL deterrence needs  
530 to be “painful”. Only high awards guarantee an end to discrimination. The European  
531 Union directives and the rulings of the European Court of Justice clearly show the way  
532 forward. With these, effective protection against discrimination is possible. For now,  
533 however, the courts have to fulfil these obligations. Protection against discrimination  
534 is in the hands of judges. Will they deter the perpetrators or the victims? Low levels  
535 of compensation will result in a high level of discrimination. It is therefore up to each  
536 and every court to decide for itself whether to be the accessory of the perpetrator or  
537 the protector of the victim.

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<sup>64</sup> <https://www.epls.gov>.