AUSTRIA

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1. National court system

Austrian law provides a specific right of access to the civil courts for the resolution of disputes in relation to discrimination cases. In cases of discrimination relating to employment the labour and social courts (*Arbeits- und*

Sozialgerichte) are competent, in other cases the ordinary civil courts. The general procedure in civil cases is prescribed in the Civil Procedure Code.

There is the system of the ordinary courts with the Supreme Court as last instance which are competent to decide the core of civil rights, predominantly disputes between individuals. The judicial implementation of anti-discrimination legislation is dealt with by the ordinary courts. In general the civil courts are responsible for adjudicating on claims for damages brought about by discriminatory acts. According to Article 90 of the Austrian Constitution, all court hearings are oral and public; exceptions are regulated by law.

In civil cases, the right of appeal is codified in the Civil Procedure Code, Articles 461ff. Depending on the value of the claim, civil proceedings could either start at the level of a District Court or before a Regional Court. Most matters regarding anti-discrimination have, however, thus far been brought before labour and social courts as they involved discrimination in employments. Whenever such courts decide at first instance, then one of the four regional Courts of Appeals sitting in panels of three judges would give the ruling on appeal. If the case gives rise to a question on an essential point of law, the appellate court can allow a final appeal to the Austrian Supreme Court. Different than in cases before ordinary civil courts, there is no value limit with labour and social cases in order to bring a case to the Supreme Court.

2. Restrictions regarding access to justice

Depending on the discriminatory act, the deadlines for bringing cases to court vary from 14 days to 6 months or in certain cases 3 years. The different deadlines might cause confusion for aggrieved persons. In a case concerning sexual harassment the Supreme Court ruled that the victim had to be granted more time to realise the effect the harassment had and that the time-limit did not necessarily started running with the perpetrator’s act.

In general, the complexity of the scattered legal framework and the complaints mechanisms has been criticised for posing undue difficulties to those who wish to access anti-discrimination procedures.

3. Length of judicial proceedings

Since judgments of lower courts are often not published it is relatively difficult to make a general statement on the issue of duration. In the following, 17 cases are analysed, most of which have reached the Supreme Court. However, also in these cases it is difficult to specify the exact duration of the cases since the filing dates of the actions are not provided in all judgments. In such cases, the dates of the alleged discriminatory acts are indicated. There is no data available regarding the time taken to execute the judgment.

- 9ObA12/03k: 4 years (opinion of the Federal Equal Treatment Commission, ETC, to first instance judgment: 2 years and 3 months, second instance: 8 months, Supreme Court: 1 year 1 month)
- 9ObA46/04m: 4 years and 3 months (rejection of application to first instance judgment: 2 years and 1 month, second instance: 7 months, Supreme Court: 5 months, back to first instance: 7 months, second instance: 7 months)
- 9ObA112/05v: 1 year and 9 months (criminal complaint of sexual harassment to first instance judgment: 11months, second instance: 6 months, Supreme Court: 4 months)
- 9ObA4/05: 1 year and 6 months (dismissal to first instance judgment: 3 months, second instance: 5 months, Supreme Court: 10 months)
- 10ObS34/06g: 11 years and 4 months (decision of the Social Security Administration to first instance judgment: 10 years 3 months, second instance: 9 months, Supreme Court: 4 months)
- 18Cga120/05t: 1 year (first instance judgment: 1 year)
- 9ObA44/06w: 1 year and 10 months (first instance judgment: 4 months, second instance judgment: 3 months, Supreme Court: 1 year and 3 months)
- 35R68/07w: 1 year and 9 months (first instance judgment: 1 year and 4 months, second instance: 5 months)
- 6Cga16/07t: 3 months (first instance judgment: 3 months)
- 26Cga13/07g-7: 8 months (first instance judgment: 8 months)
- 9ObA18/08z: 2 years and 6 months (dismissal to first instance judgment: 1 year and 5 months, second instance: 6 months, Supreme Court: 7 months)

- 9ObA177/07f: 3 years and 7 months (rejection of application to first instance judgment: 2 years and 4 months, second instance: 5 months, Supreme Court: 10 months)
- 9ObA66/07g: 2 years and 11 months (end of employment to first instance judgment: 7 months, second instance: 9 months, Supreme Court: 1 year and 7 months)
- 8ObA59/08x: 3 years and 4 months (first instance: 1 year and 10 months, second instance: 1 year and 1 month, Supreme Court: 5 months)
- 9ObA122/07t: 2 years and 7 months (first instance: 4 months, second instance: 5 months, Supreme Court: 1 year and 10 months)
- 10ObS29/09a: 1 year and 11 months (decision of the Social Security Administration to first instance judgment: 10 months, second instance: 7 months, Supreme Court: 6 months)
- 8ObA11/09i: 3 years and 11 months (rejection of application and procedure before ETC to first instance judgment: 2 years and 5 months, second instance: 1 year, Supreme Court: 6 months)

4. Are procedures concluded within a reasonable time?

In general it can be observed that due to the novelty of the Federal Equal Treatment Act (ETA)[1] many basic questions had to be ruled upon by the Supreme Court, which led to court proceedings of considerable lengths. In the future, however, it can be expected that the proceedings will take shorter periods because the lower instances can now cite the Supreme Court's judgments as an authority. Another observation is that cases of discrimination on the ground of disability seem to take shorter because of the mandatory conciliation procedure preceding court cases.

Regarding non-judicial procedures before the Equal Treatment Commission (ETC), the Ombud for Equal Treatment (OET) and others have repeatedly criticised the length of the proceedings. Often, these long delays lead to difficulties because witnesses cannot remember circumstances that have been taken place more than one year ago. A reason for the long delays can be

[1] Austria/BGBl. 100/1993 (12.02.1993), last amended by Austria/BGBl. 97/2008 (01.09.2008).

detected in the fact that the ETC is set up by members who meet on a voluntary basis only every three to six weeks rather than being a full-time professional commission.

5. Does provision exist for speedy resolution of particular cases?

Articles 244ff of the Civil Procedure Code provide for an expedited procedure for civil suits regarding pecuniary claims not exceeding € 75.000,--. The court will order the respondent to pay within 14 days without conducting an oral hearing. The respondent can object to the order within one month. In case of objection, the court must call for a hearing.

There is no provision for an expedited procedure before the non-judicial body, the Equal Treatment Commission (ETC). The Disability Equality Act (DEA) foresees a maximum duration of three months for the mandatory conciliation procedure before the Federal Social Services.

6. Is it possible to waive the right of access to a judicial body?

In case a person concerned brings a case to the non-judicial procedure of the Equal Treatment Commission (ETC) he or she can later still decide to bring the same case to court. A possibility of reaching a settlement before the civil courts exists but is not obligatory. If the settlement cannot be reached, the case can still be litigated in front of the court. In case of discrimination on the ground of disability, a mandatory conciliation procedure before the Federal Social Services is foreseen. However, also in this case, if the conciliation fails, the case can be brought to court.

7. Access to non-judicial procedures

Victims of discrimination can access alternative, non-judicial, routes via the Equality Body system or mediation in order to obtain redress. The Equality Body system is composed of two bodies responsible for the promotion of equal

treatment. The Ombud for Equal Treatment (OET) and the Equal Treatment Commission (ETC).

The OET is a government agency. It is directly responsible to the Minister for Women and Public Administration and is situated in Vienna. It provides information, counselling and support – free of charge – for victims of discrimination, works council members, employers and representatives of other organisations. Often, the OET acts as a mediator between the concerned parties and brings about solutions such as obtaining an apology of person who set the discriminatory act. It provides individual support to victims of discrimination. It can negotiate with employers or other organisations on behalf of the victim provided that he or she agrees on such actions. If the OET concludes that discrimination has taken place, it can pass the case on to the ETC and legally represent the person concerned before this body. In addition, the OET has the possibility of requesting a declaratory judgment of a civil court, if it has referred a case to the ETC and the perpetrator does not comply with the ETC's recommendations or if the decision of the ETC is not in accordance with the OET's opinion.

The OET of women and men was originally established in 1991. The amendment of the Equal Treatment Act (ETA) in 2004 resulted in two new ombudspersons covering the new grounds and areas, the Ombud for Equal Treatment Irrespective of Ethnic Belonging, Religion and Belief, Age and Sexual Orientation in Employment (OET II) and the Ombud for Equal Treatment Irrespective of Ethnic Belonging in Other Areas and for Equal Treatment of Men and Women in Goods and Services (OET III).[2] If a person is affected by both gender discrimination and discrimination on the ground of ethnic belonging or religion in the field of employment, his/her case falls within the competency of the Ombud for Equal Treatment between Men and Women in Occupation (OET I). OET I is also responsible for co-ordinating the work of the OET body as a whole. OET I already has regional offices in Linz, Graz, Innsbruck and Salzburg. However, regional offices of OET II and III are not planned to be established in the near future.

[2] The extension of the sphere of responsibility of OET III to Equal Treatment of Women and Men in Goods and Services was introduced by the amendments to Equal Treatment Legislation implemented in transferring the obligations imposed by Directive 2004/113/EC, which came into effect in August 2008.

The proceedings before the Equal Treatment Commission (ETC) represent yet another avenue of redress for victims of discrimination.[3] The ETC was originally established in 1979 for the field of equal treatment of men and women in the working world. The amendments of the ETA in 2004 resulted in dividing the Commission into three senates. Senate I since then is responsible for the equal treatment of women and men in employment, Senate II for the equal treatment irrespective of ethnic belonging, religion and belief, sexual orientation and age in employment and Senate III for the equal treatment irrespective of ethnic belonging in the other areas as well as of men and women in access to and supply with goods and services[4]. If a person is affected by discrimination on the grounds of gender and ethnic belonging (or any other of the protected grounds) in the field of employment, it falls within the competency of Senate I. Each senate is headed by a chairperson, who has to be a federal civil servant, the chairperson of Senate I is responsible for the coordination of the work of the ETC and is supported by a chief executive officer.

The proceedings before the ETC are informal and confidential. This means that the parties are heard separately and none of them has the right or possibility to directly question the other one. There is no possibility for the respondent to appeal against a finding by the CET that an act of discrimination has been taking place. Furthermore, witnesses are heard without the presence of either party. The proceedings before Senate I of the ETC take on average one year from the complaint to the actual dealing with the case; the results have to be issued within three months after the decision. Cases before Senate II take about one year, while cases before Senate III take on average one and a half years.

The ETC has power to adopt opinions (i.e. non-enforceable decisions) declaring whether the treatment in question was discriminatory or not. Thus, the ETC has no competence to issue sanctions or to set compensations but has to limit its findings in a specific case to issuing its opinion, whether discrimination has occurred or not. Under Article 13 ETC/OET-A, if the competent Senate can assume that in a specific case the Federal Equal Treatment (ETA) has been violated, it can request the perpetrator to submit a written report covering one or

[3] In case of discrimination on the ground of disability, the case has first to be brought before the Federal Social Services for conciliation.

[4] The responsibility of Senate III was extended to equal treatment of men and women in access to and supply with good and services by amendments to the ETA in 2008, BGBl. I Nr. 98/2008.

more years. The relevant legal provision, however, does not specify the nature of the report that can be requested. In practice, this provision has never been used so far, due to lack of resources, and it is not certain that ETC senate members have a clear idea of what the report should be about.

If the ETC concludes that in a specific case the ETA has been violated, it has to impart to the perpetrator a request in written form to end discrimination and a suggestion of realising the principle of equal treatment.[5] The measures taken by the Senates are not coercive; no sanctions can be issued if alleged perpetrators do not follow the instructions of submitting a written report. Neither are the opinions and recommendations rendered by the Senates legally binding. However, if in a subsequent court proceeding the judge does not agree with the senate's decision, the court has to substantiate its judgement

Due to the nature of the proceedings and competences of the Austrian Equality Bodies legal consequences in discrimination cases are quite poor. The outcomes of discrimination cases in terms of sanctions, compensations, mediation and other legal consequences furthermore is hard to monitor as the availability of data in fact is restricted to the ETC cases made public on its website. Furthermore, the sanctions and compensations laid down in the ETA are comparably low and even these limits are usually not exhausted by courts and administrative bodies.

There are no specific provisions regarding the role of mediation in discrimination cases . Mediation in civil law procedures has been introduced as an alternative way to conflict resolution by the Federal Act on Mediation in Civil Law Procurements (BGBl. I Nr. 29/2003). It defines the requirements for mediation procedures to be relevant for civil law court cases in terms of suspension of the period of limitation.[6]

As mentioned above, the Ombud for Equal Treatment is using methods of alternative conflict resolution and mediation as a tool in cases, where the plaintiffs do not want to proceed with their case before the ETC or courts.

Due to a lack of cases as well as of information it is not possible to assess if the interests of the victims, especially regarding compensation, are sufficiently

[5] Article 12 ETC/OETA.
[6] Art 22 Federal Act on Mediation in Civil Law Procurements (Bundesgesetz über Mediation in Zivilrechtssachen (Zivilrechts-Mediations-Gesetz – ZivMediatG), BGBl. I Nr. 29/2003)

protected in mediation procedures. The outcomes are not made public and informal information provided by NGOs does not show any tendencies that would provide for usual outcomes that could be reported. Victims of discrimination are informed about their possibilities by the OET as well as by NGOs and they are provided with recommendations on what way to chose. The decision, however, is left to the clients.

8. Legal aid

According to Article 63 (1) of the Civil Procedure Code, legal aid is provided to a party if a (natural) person is otherwise not able to conduct the proceedings without endangering his or her basic subsistence. Furthermore, the aspired legal proceedings must not be obviously arbitrary or futile. If the person concerned within three years acquires sufficient financial means, he or she has to pay back the legal aid granted (Article 71 Civil Procedure Code).

An element of legal aid is the assignment of a lawyer, if legal representation is necessary (above a certain value of a claim) or if the specifics of the case make legal representation necessary. (Article 64 (3) Civil Procedure Code). It should be stressed in the context of access to justice that filing an application for legal aid during a period of appeal will stay the period and thus prevents that the time in which the appeal must be submitted expires before the assigned legal representative takes up the function. The party then has the full period of appeal running again either from the date when the lawyer is appointed or when the application is finally rejected.

Article 62 ETA explicitly mentions the Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern zur Durchsetzung der Rechte von Diskriminierungsopfern (KlaV) [Litigation Association for the Defence of the Rights of Victims of Discrimination (LitA)], an NGO who can act as intervener (Nebenintervenient) in civil court cases; i.e. the LitA can join legal proceedings in its own interest or as supporter of the complainant. It can, however, not represent a plaintiff itself, but has to appoint a lawyer as its representative.

The procedure before the Equal Treatment Commission (ETC) is without costs. Free support for complainants can be provided by the OET, representatives of NGOs, the LitA, trade unions or other interest groups. A victim of

discrimination has in fact the right to determine a “person of trust”, which can be an NGO representative, to represent him/her in the non-judicial proceedings before the Equal Treatment Commission (ETC).[7] The person needs not be a lawyer, but can be anyone, whom the victim trusts. The ETC is obliged to notify the victim about this right.

9. Forms of satisfaction available to a vindicated party

Compensation claims before civil courts can include compensation for pecuniary damages as well as compensation for immaterial damages. Furthermore, the plaintiff can claim that the court rules a dismissal on discriminatory grounds null and void or that he or she is included in professional training measures.

The Equal Treatment Commission (ETC) does not have the power to rule on compensation for victims. It can only issue recommendations to the respondent, such as an intensive study of equal treatment legislation, reorganisation of future recruitment procedures etc. These recommendations are not enforceable. Often the procedure before the ETC is preceded by an mediation between the parties initiated by the Ombud for Equal Treatment (OET); in many cases, this mediation ends with an apology of the respondent.

10. Adequacy of compensation

Articles 12, 26 and 35 of the Federal Equal Treatment Act (ETA) and Article 9 of the Disability Equality Act (DEA).[8] DEA regulate compensation in cases of discrimination. Besides the material pecuniary damage, entitlements to immaterial damage range in certain cases from a minimum of € 400 (gender related harassment, harassment based on ethnic belonging, religion or belief, age or sexual orientation, discrimination on the grounds of ethnic belonging outside employment) to a minimum of € 720 (sexual harassment, harassment related to disabilities). In certain cases, a maximum claim of € 500 for

[7] Equal Treatment Act
[8] Austria/ BGBl. I 82/2005 (10.08.2005), last amended by Austria/ BGBl. I 67/2008 (07.05.2008).

immaterial damages is foreseen (discrimination in application procedures or in professional advancement).

In the 17 court cases examined material and immaterial compensation ranged from € 300,00 to € 4.131,48. The Commissioner for Human Rights of the Council of Europe and others have expressed their doubts whether the sums awarded have a truly dissuasive effect. Moreover, there is no legal tradition in Austria to award compensation to victims in civil cases that at the same time have a punitive effect on the respondent. It must be said that the level of compensation in civil proceedings is grounded on the principle of *restitutio in integrum*, meaning that a victim shall be put in the same position as he or she would be without the damage or incriminated act, but will not receive more than that. Punishment is left to criminal law. Hence, the level of compensation would in general appear to be adequate in civil proceedings.

11. Rules relating to the payment of legal costs

The financial risk of legal procedures is carried by the litigants. Articles 40ff of the Civil Procedure Code regulate the costs of civil procedure cases. Initially, all parties have to bear their own costs, e.g. for legal representation or expert opinions. If a party loses a case completely, he or she has to refund the necessary legal costs of the winning party and pay the court fees. In case the parties partly win and partly lose the case, the costs have to be borne proportionally.

The procedure before the Equal Treatment Commission (ETC) and the Federal Social Service are free of costs and there is no obligation to take over the costs of the other party's legal representative. Free support for complainants can be provided by the for Equal Treatment, representatives of NGOs, the Litigation Association for the Defence of the Rights of Victims of Discrimination (LitA), trade unions or other interest groups.

12. Rules on burden of proof

The Equal Treatment Act lowers the burden of proof for the plaintiff but in a way that is different from the way stated in Directive 2000/43/EC. The burden of proof does not completely switch over to the respondent, when the plaintiff established facts from which it may be presumed that there has been direct or indirect discrimination. The law states that the respondent has to prove that it is more likely that a different motive – documented by facts established by the respondent - was the crucial factor in the case or that there has been a legal ground of justification.[9] So the respondent is obliged to prove the likelihood of established facts. This does not constitute a clear shift of the burden of proof the way the Directive demands it, even though the level of the burden of proof is lowered.

There are no legal provisions that might indicate that testing and statistical data would not be a legitimate mean of proof in anti-discrimination cases in the non-judicial proceedings before the Equal Treatment Commission (ETC). However, these means are not used until now. The use of statistical data by the ETC until now is limited to analysing data on recruitment, salary regulations, career advancement, etc. of individual companies in individual cases and using this information within their procedures of taking evidence. No general statistical data has been used in anti-discrimination cases until now. This inter alia is also due to the lack of resources within the Ombud for Equal Treatment (OET), who would principally be ready to use statistical data.

[9] Article 26 para 12 ETA