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DISCRIMINATION DAMAGES – PROMOTING OR PREVENTING ACCESS TO JUSTICE?

It is appropriate in a Festschrift dedicated to Professor Ann Numhauser-Henning to address one of the topics she has focused much on in her research, combating unlawful discrimination; a battle firmly entrenched in both Swedish and EU law. Hand-in-hand with eradicating unlawful discrimination are issues of access to justice, the ability of individuals to seek and obtain effective remedies for unlawful discrimination through institutions of justice. The focus of this contribution is on three vital aspects necessary for disadvantaged communities to have access to justice. The first is effective, proportional and dissuasive remedies for discrimination claims.¹ Closely tied to this are aspects two and three, whether the Swedish justice system is financially accessible for discrimination plaintiffs and whether legal counsel is available to such plaintiffs. This contribution examines the institution of discrimination damages (*diskrimineringsersättning*) as newly created in the Swedish 2008 Discrimination Act, both as intended by the legislature to increase access to justice and as applied by the Labour Court (*Arbetsdomstolen*, 'AD'). The intention and application of the law will be assessed against an access to justice analysis focusing on the award of damages as well as trial costs and fees, and access to legal counsel for plaintiffs.

1 The legislative history of discrimination damages

In the first proposal submitted by the Discrimination Committee (*Diskrimineringskommittén*) investigating the Swedish discrimination legislation in 2006,² the Committee began by establishing the human rights bases

¹ For a general discussion of access to justice in this context, see M Mayo, G Koessl, M Scott, and I Slater, *Access to justice for disadvantaged communities* (Policy Press 2014).

² See the Legislative Committee Inquiry regarding the need for a new discrimination law, SOU 2006:22, *En sammanhållen diskrimineringslagstiftning*, part I (2006) at 211. For a summary of the Committee's work in English, see *id.* at 41–69, including a list of the legislation to be replaced by the proposed act.

for prohibitions against discrimination, citing most if not all international and European human rights instruments. The Committee concluded that discrimination constitutes a violation of fundamental human rights and that legislation and damages are two of several means of combating discrimination and thereby supporting these rights. Finding the regulatory situation in Sweden at best piecemeal legislation, the Committee proposed a single discrimination act to replace most of the existing discrimination legislation, with the exception of the legislation concerning part-time and fixed-term work, and the provisions protecting parents when taking parental leave. A right to damages was emphasized by the Committee, citing the EU law requirement that sanctions be effective, proportionate and dissuasive.

A right to damages for unlawful discrimination might be a self-evident general proposition with respect to violations of legislation, but in the Swedish context this has not necessarily always been the case and this for at least three reasons. Within tort law in general in Sweden, damages as set out by the 1972 Tort Act³ are either economic (*ekonomiskt*) or general (*ideellt* generally, with respect to labour and employment law, *allmänt*) damages. General damages⁴ are awarded for non-pecuniary harms, such as to privacy or loss of enjoyment of life. According to the Discrimination Committee above, the harm at issue with respect to general damages can, for example, be emotional suffering, being ill at ease or anything else that in the individual context can diminish quality of life. Thus, general damages are not to compensate for actual economic losses but to compensate for non-pecuniary harms and to help individuals get back on their feet after traumatic events. In the discrimination law context, general damages can be awarded in cases of unlawful discrimination (as discussed below). Economic damages, however, are only awarded by the Swedish courts in employment law cases where the plaintiff already is an employee of the discriminating employer. In other words, job applicants are not awarded economic damages in cases of unlawful discrimination. Equity is not an institution in Swedish law, so the courts have no equitable powers. Swedish courts consequently do not award equitable remedies in cases of unlawful discrimination (for example, ordering the hiring of a person who has suffered from unlawful discrimination in a hiring process). A decision made by an employer can be voided, but the employer ultimately

³ Skadeståndslag (SFS 1972:207). This is a framework act which entails two things: the act is purposefully not very detailed, leaving much to the courts to determine, and the law is used as a default law where other legislation is lacking in detail. As private law legislation, the parties are free to contract out of its application.

⁴ General damages can also be referred to as non-economic damages.

cannot be forced to take back a former employee, and can never be forced to hire an individual.

The first complication with respect to damage awards for unlawful discrimination surfaced already with the first legislation prohibiting discrimination as against women, the 1979 Equal Treatment between Men and Women Act.⁵ The 1979 Act was controversial, in that legislation prohibiting discrimination was not seen as desirable, and any statutory regulation of discrimination in the private sector had long been fought by both employer and employee organizations. They argued that discrimination did not and should not differ in any aspect from other employment issues regulated by the social partners and consequently the social partners should also regulate discrimination issues.⁶ To ameliorate the effects of the legislation, the focus of the 1979 Act (as well as the subsequent 1991 Act) was on positive measures, with the right to litigate and receive damages a secondary approach, perceived of more as a necessary evil and not as a step in eradicating societal discrimination. This can be clearly seen from the 'group rebate' found in the section 8 of the 1979 Act and later section 25 of the 1991 Act. In the event an employer discriminated against more than the one person on the basis of sex, the damages were to be assessed as to one person and then shared equally by the group. This group rebate was not removed from the legislation until the year 2000.⁷

The second complexity with respect to damages within the Swedish legal system is that there is no general right to damages for a legal violation. Instead, any sanctions (including damages) for a law violation are to be explicitly included in the statute in question. This problem has been raised most acutely in the contexts of the European Convention of Human Rights and the Swedish constitution. With respect to violations of either the ECHR or the constitution, the Swedish courts initially did not award damages as there is no such explicit legal provision in either the ECHR or in the Swedish constitution. This has recently been relaxed somewhat, but the issue of awarding damages for violations of the ECHR or the constitution is still unclear.⁸ Damages can be

⁵ Lag (SFS 1979:503) om jämställdhet mellan kvinnor och män i arbetslivet.

⁶ Legislative Bill 1978/79:175, med förslag till lag om jämställdhet mellan kvinnor och män i arbetslivet, m.m. (1978) at 25. All the social partners were negative to the proposed law with the exception of SACO/SR. *Id.* at 196.

⁷ Lag (SFS 2000:773) om ändring i jämställdhetslagen (1991:433).

⁸ See the Swedish Supreme Court judgments in NJA 2003 p. 414, NJA 2005 p. 462 and NJA 2014 p. 323. See also, I Cameron, Skadestånd och Europakonventionen för de mänskliga rättigheter, *SvJT* 2006, 553 and the Legislative Committee Inquiry, SOU 2010:87, Skadestånd och Europakonventionen (2010), and its English summary at 27–38.

awarded under the Tort Act, but only in cases of intentional harms or negligence. Strict liability damages can only be awarded where explicitly prescribed by statute.

The third complicating aspect is that there is a tendency in both the scholarship concerning damages and in the judgments of the courts to create a hierarchy of harm/damages based on criminal sanctions. Very often civil general damages are compared to criminal sanctions, with the argument being, for example, that general civil damages for discrimination cannot be awarded at levels higher than for example the damages received by a sexual assault victim. A high profile 2006 judgment in which the Swedish Supreme Court lowered the damages awarded for unlawful discrimination, NJA 2006 p. 170, concerned a lesbian who was discriminated in a restaurant. The plaintiff pleaded general damages of SEK 120,000 which was rejected by the trial court. The Court of Appeals found for the plaintiff and awarded SEK 50,000 in general damages. The Supreme Court lowered the damages to SEK 15,000 after comparing the Court of Appeal's award of SEK 50,000 with the average of general damages awarded in criminal cases for murder, SEK 100,000, and first degree sexual assault, SEK 75,000. The Supreme Court reasoned that:

The case of discrimination at issue here for judgment differs radically from many of the cases encompassed by the employment discrimination legislation. Discrimination in accordance to that legislation often has persistent or long-term effects. In the case at hand, the discriminatory actions S.G. has been exposed to have been that she was requested to stop kissing and hugging and eventually escorted out of the restaurant. These actions have not entailed any long-term practical effects. Despite the fact that the actions without doubt may be seen as serious, damages in the amount requested by the Ombudsman are long over the compensation levels for violations that are applied in accordance to general tort law.

This approach of comparing civil and criminal law awards of general damages has led to very conservative awards in discrimination cases in general. Consequently, the committee's proposal as to being able to receive damages against this background was not so self-evident.

Criticism was directed at the Discrimination Committee's Report for its failure to address the issue of effective damages more thoroughly.⁹ The cautious approach to damages by the Committee was replaced in the

⁹ See for example, SOU 2006:22 Part III at 32.

Legislative Bill by the mantra: 'It should cost to discriminate' (*det ska kosta att diskriminera*).¹⁰ The creation of a new sanction in the form of a new category of damages, discrimination damages (*diskrimineringsersättning*),¹¹ is to effect this cost. This is based on a similar theme recurrent in Union law as can be seen in the Gender Recast Directive,¹² 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men, stating in its Article 25 that the penalties for the infringement of the national measures taken in accordance to the directive are to be effective, proportionate and dissuasive, in the Race Directive 2000/43/EC in its Article 17, that sanctions are to be effective, proportionate and dissuasive, as well as in Article 17 of the framework directive 2000/78/EC prohibiting discrimination on the basis of religion or belief, disability, age or sexual orientation, requiring that sanctions be effective, proportionate and dissuasive. The Government Legislative Bill submitted in 2008 can be seen as a product of the point of time at which Union discrimination law requirements were being more clearly articulated in the legislation and case law, as well as in the wake of recent Swedish cases concerning for example the ECHR and the lesbian couple as mentioned above.¹³

According to the Legislative Bill, discrimination damages create a third category of damages distinct from general and economic damages in that an award of discrimination damages is to have two functions, not one: compensation and deterrence. A distinction is made here between criminal law, where deterrence is based not only on criminal damages but on the criminal sentence, for example imprisonment or fines. In the area of discrimination law, deterrence can only rely on the damages awarded and consequently, discrimination damages must be at higher levels. The Government states in the Legislative Bill that comparisons to criminal sanctions are not appropriate and should be avoided, as the functions of discrimination damages and criminal damages diverge.¹⁴ Discrimination damages are to constitute both compensation for the violation and deterrence from discriminating. The courts are also not to make direct comparisons

¹⁰ Legislative Bill 2007/08:95, Ett starkare skydd mot diskriminering (2007) at 390.

¹¹ This new sanction was based on a government proposal to address in part the problems posed by the ECHR and damages, and also to delineate more clearly the line between criminal and civil sanctions, see Ds 2007:10, Skadeståndsfrågor vid kränkning (2007) at 14.

¹² Replacing several directives, including the Equal Treatment directive, 2002/73/EC as cited by the Legislative Bill (2006).

¹³ See Legislative Bill 2007/08:95 at 392.

¹⁴ Id. at 391.

between discrimination damages and the award of general damages for violations of privacy or integrity under the Torts Act. Another distinction made by the Government is that discrimination damages in the majority of cases are to be assessed against employers, often legal persons having significant assets (and not against individuals as is the case in criminal law).¹⁵ As legal persons often have greater financial resources, the amount considered to be deterring will need to be higher. Nothing in the proposal suggests that all three types of damages, economic, general and discrimination damages, cannot be awarded in the same judgment depending upon the claims made by the plaintiff.

The Government goes on to give a proposal as to how the amount of discrimination damages is to be determined. The degree of severity of the discriminatory acts is to be assessed, based among other things, on:

- The nature and extent of the actions
- The interest of the plaintiff in the law being upheld
- The repercussions of the actions on the individual
- The intent of the party who has discriminated as an aggravating factor (for example, only allowing Swedes to apply)
- The consequences of the discrimination (lost job, refused housing, etc.).

The more egregious the discriminatory acts, the greater the amount of discrimination damages that should be awarded. The public's interest in preventing societal discrimination is also to be particularly taken into consideration. The damages are to be effective in deterring violations of the law. Other circumstances that can be taken into account include the turnover of a business that has been found to be unlawfully discriminating, and whether the business has previously been found to have unlawfully discriminated. The discrimination damages are to be assessed in each individual case so that the damages constitute a reasonable compensation to the individual discriminated against as well as act as a deterrence against future discrimination.¹⁶

The 2008 Discrimination Act came into effect 1 January 2009. The Act forbids unlawful discrimination on the basis of sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age. Transgender identity or expression as well as age are new protected grounds under the Act. The protection against unlawful discrimination is to encompass employment (both private and public), education, labour market policy, starting a business and professional recognition, membership in organizations such as labour unions, housing, the provision of goods and

¹⁵ Id. at 392. Legal persons cannot generally be held criminally liable under Swedish law.

¹⁶ Id. at 399.

services both as provider and as customer, social benefits, social insurance and military service. The 2008 Discrimination Act prohibits unlawful discrimination, defined as direct and indirect discrimination, harassment, sexual harassment and instructions to discriminate. The Discrimination Act explicitly states that the law is mandatory, and that any agreements in contravention of the rights or obligations afforded under the act are void. Discrimination damages are part of the 2008 Act, found in its Chapter 5. Compensation and invalidity – Compensation, Section 1:

A natural or legal person who violates the prohibitions of discrimination or reprisals or who fails to fulfil their obligations to investigate and take measures against harassment or sexual harassment under this Act shall pay compensation for discrimination for the offence resulting from the infringement. When compensation is decided, particular attention shall be given to the purpose of discouraging such infringements of the Act. The compensation shall be paid to the person who has been offended by the infringement.¹⁷

This section ends by explicitly stating that if such is deemed fair, the amount of damages awarded can be reduced to zero. As there is no detailed statutory guidance with respect to the actual determination of damages, according to Swedish canons of statutory interpretation the court is to turn to the legislative preparatory works, with the legislative bill one of the weightier sources.

2 The judgments of the Labour Court awarding discrimination damages

The 2008 Discrimination Act became effective law the 1st of January, 2009. Given this limited timeframe, 2009–2016, the number of cases in which the Labour Court¹⁸ has addressed the issue of discrimination damages is relatively

¹⁷ English translation available at the website of the Discrimination Ombudsman ('DO') at do.se.

¹⁸ The judgments of the Labour Court are the focus here as the Labour Court in the Swedish judicial system is the ultimate court with respect to employment issues. The Labour Court has jurisdiction in labor-related disputes, defined fairly broadly as any dispute affecting the relationship between the employee and the social partners where a collective agreement exists. Certain cases are brought directly to the Labour Court as it has exclusive jurisdiction, such as when a labor union or DO prosecutes a discrimination claim on behalf of the plaintiff. If a private person prosecutes a claim of discrimination, it is first brought to the general trial courts. Any appeal of the trial court judgment is then made to the Labour Court as the final instance, in other words, a judgment of the Labour Court cannot be appealed to a Swedish Supreme Court. The Labour Court has discretion in granting a leave of appeal, in other words, there is no automatic right of appeal from the trial court to the Labour Court. The judgments of the Labour Court are published in Swedish on its website, arbetsdomstolen.se.

low. To date the Court has awarded discrimination damages in thirteen cases.¹⁹ The cases are discussed below in accordance to the discrimination grounds pled, which protected grounds under the 2008 Act are sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation and age. There are two further categories of protected grounds under two other acts, part-time or fixed-term employment,²⁰ and the taking of parental leave during employment.²¹ Of the thirteen cases in which discrimination damages have been awarded, women were the parties claiming unlawful discrimination in eleven, and in the twelfth the male plaintiff prevailed with a claim that a sex equality measure was unlawful. Only one of the cases was completely disconnected from the gender of the employees, three male employees pleading age discrimination.

2.1 Discrimination damages awarded for unlawful sex or gender discrimination

Within the category of sex or gender discrimination are included pregnancy, sex and sexual harassment. Of the thirteen cases in which discrimination damages have been awarded, almost one-half were based on pregnancy, six of the thirteen. The cases concerned the following situations: transfer of an undertaking during which the pregnant employee was not hired by the new employer (AD 2015 no. 72), pregnant employee terminated because of pregnancy (AD 2015 no. 12), pregnant job applicant not hired because of pregnancy (AD 2014 no. 19 and AD 2011 no. 23), pregnant employee refused agreed wage increase (AD 2013 no. 18) and where an intern's miscarriage led the employer to fear a future pregnancy and thus refused to employ the individual (AD 2011 no. 02).

When addressing the issue of discrimination damages in these six cases, the Labour Court in one of the cases, AD 2011 no. 2, appears to explicitly examine the factors set out in the legislative preparatory works when determining the amount of discrimination damage. The Court however concludes the analysis by collapsing together the general damages pled under the Parental Act and the

¹⁹ AD 2016 no. 38, AD 2015 no. 72, AD 2015 no. 51, AD 2015 no. 44, AD 2015 no. 12, AD 2014 no. 19, AD 2013 no. 71, AD 2013 no. 29, AD 2013 no. 18, AD 2011 no. 37, AD 2011 no. 23, AD 2011 no. 02 and AD 2010 no. 91.

²⁰ Lag (2002:293) om förbud mot diskriminering av deltidssamarbetande arbetstagare och arbetstagare med tidsbegränsad anställning and the 2002 Prohibition of Discrimination of Employees Working Part Time and Employees with Fixed-term Employment Act, an unofficial English translation available at the website of the Government Offices of Sweden at government.se.

²¹ Föräldraledighetslag (1995:584), The 1995 Parental Leave Act. An unofficial English translation is available at the website of the International Labour Organization, ilo.org.

discrimination damages pled under the Discrimination Act to arrive at a combined amount of SEK 30,000. Such a hybrid award was also assessed in three other of the cases. No analysis is given as to the determination of discrimination damages in either AD 2011 no. 23 or AD 2013 no. 18, with the Court combining the amounts of general damages under the Parental Act and discrimination damages under the Discrimination Act to a total of SEK 50,000 in each case. In AD 2015 no. 12, the Labour Court again simply combines the pleaded amounts, SEK 120,000 for discrimination damages under the Discrimination Act, and SEK 120,000 for general damages under the Parental Leave Act, halving them to arrive at a total amount of SEK 120,000, which combined amount was stipulated to by the employer as fair.

The judgment in AD 2014 no. 19 includes fairly extensive citations from the above-discussed Swedish legislative preparatory works as well as from EU and Swedish case law. However, no determination of the individual factors is recited in the judgment, simply a summary of the state of the law. In AD 2015 no. 72, the Labour Court simply restates that the Court is to make an overall assessment, followed by the summary conclusion that the plaintiff lost her job and that the discrimination damages should be assessed at SEK 75,000. Consequently, of the six judgments here awarding discrimination damages, two are pure awards of discrimination damages, SEK 75,000 (AD 2015 no. 72) and SEK 50,000 (AD 2014 no. 19) while four are hybrid awards, combining general damages under the Parental Act and discrimination damages under the Discrimination Act, SEK 120,000 (AD 2015 no. 12), SEK 50,000 (AD 2013 no. 18), SEK 50,000 (AD 2011 no. 23) and SEK 30,000 (AD 2011 no. 02). In only one of the cases can the Court's assessment as to the factors in the legislative preparatory works be seen.

Claims of sex/gender discrimination were made successfully in two cases, with the awards of discrimination damages in the amounts of SEK 25,000 (AD 2015 no. 44) and SEK 50,000 (AD 2013 no. 29). Plaintiff in AD 2015 no. 44 argued that a university policy supporting women becoming merited through research funding was reverse discrimination, pleading discrimination damages originally in the amount of SEK 100,000 and later SEK 50,000. The university agreed that the amount of SEK 25,000 would be fair if the Court found discrimination, which amount was awarded by the Labour Court. The Court included an explicit assessment as to damages in the judgment, finding that the discrimination at hand was of a less serious nature and that the university no longer offered such research funding. In AD 2013 no. 29, the Labour Court found that the employer requiring employees to have name tags

stating their bra size was unlawful discrimination but included no explicit assessment as to the discrimination damages.

Two cases have been successful on claims of sexual harassment, with the awards of discrimination damages in the amounts of SEK 50,000 (AD 2016 no. 38) and SEK 75,000 (AD 2013 no. 71). In AD 2016 no. 38, the Labour Court found that the employer requesting the employee to sit on his knee and then fondling her was unlawful sexual harassment. The Court included an explicit assessment as to the determination of discrimination damages. In AD 2013 no. 71, the Court simply states that discrimination damages are to be assessed for violations of the act, and that in the present case a reasonable amount is SEK 50,000, comparing AD 2011 no. 23 and 2013 no. 18.

2.2 Discrimination damages awarded for unlawful age discrimination

Plaintiffs in three of the thirteen cases successfully pled unlawful age discrimination and were awarded discrimination damages per plaintiff in the amounts of SEK 40,000 (AD 2015 no. 51), SEK 125,000 (AD 2011 no. 37) and SEK 75,000 (AD 2010 no. 91). In AD 2015 no. 51, the employment of three drivers was terminated when they reached the age of 70. The Labour Court provides an assessment of the factors taken into the calculation of discrimination damages. A hybrid award is granted in AD 2011 no. 37, where the Court found that the termination of 25 flight personnel was both unlawful age discrimination under the Discrimination Act and unlawful employment termination in violation of the Employment Protection Act, setting the damages for both at a combined amount of SEK 125,000 per plaintiff.

AD 2010 no. 91 was the first judgment by the Labour Court awarding discrimination damages. The Labour Court found that the plaintiff had been unlawfully discriminated against on the grounds of both age and sex, as she was much more experienced than the candidates called to interviews. As a case of first impression, the Court recites the new law as to discrimination damages and includes an assessment as to the amount awarded.

2.3 Other protected grounds

As clearly seen from the above-listing of those cases in which discrimination damages have been awarded, the protected grounds of transgender identity or expression, ethnicity, religion or other belief, disability or sexual orientation are absent, due either to the fact that such claims have not been brought to the Labour Court during this period, or if brought, have not been successful. Given space constraints, it can be briefly mentioned that no cases arguing

discrimination on the basis of transgender or sexual orientation or transgender have ever been litigated before the Labour Court even under the former statute. Few cases have been brought raising claims of religious discrimination. Over thirty cases have been litigated before the Labour Court raising claims of ethnic discrimination under the new and former legislation. Of these, only two have been successful and both were decided before discrimination damages could be awarded.²²

2.4 Discrimination damage award amounts in a historical context

The category of discrimination damages as created by the Swedish legislature was to insure that it would cost to discriminate. Given the hybrid discrimination damages in the judgments of the Labour Court, it is difficult to arrive at an exact average with respect to discrimination damages. If the hybrid awards are deemed to be 100% discrimination damages, the average award per plaintiff/case is SEK 62,700, and if deemed to be 50% discrimination damages, the average award per plaintiff/case is SEK 48,300.

This "enhanced" level of damages can be contrasted with the general damages awarded in the discrimination cases since the first 1979 Act. The average of general damages awarded for discrimination (only on the basis of sex as that was the only protected ground during that decade) in the 1980's was SEK 19,000, the 1990's SEK 37,000, the 2000's SEK 51,600 and during the 2010's, SEK 61,923 (including both general and discrimination damages).²³ Adjusting for inflation, the average of SEK 19,000 in 1980 is today worth SEK 59,983.²⁴ Taking the maximum average of discrimination damages at SEK 62,700, this entails that the amount of damages since the 1979 Act has materially increased by 4.5%. If we take the 50% level, which most likely was the Labour Court's intention, the amount of damages has decreased 19.5% since the 1980's.

To this can be added that the Labour Court in very few of the thirteen cases awarding discrimination damages has given any explicit assessment as to how the amount of discrimination damages was determined, and paid even less

²² The two cases successfully raising claims of ethnic discrimination are AD 2002 no. 128 and AD 2011 no. 13. As to claims of ethnic discrimination before the Swedish Labour Court, see L Carlson, 'Critical Race Legal Theory in a Swedish Context' (2010-11) 4 *Juridisk Tidskrift* 21-49.

²³ For a listing of the cases upon which these statistics are based, see L Carlson, 'Addressing Unlawful Discrimination: The Swedish Journey' in L Carlson, Ö Edström and B Nyström (eds.), *Globalization, Fragmentation, Labour and Employment Law: A Swedish Perspective* (Iustus 2016) 156-8.

²⁴ According to Statistics Sweden, SEK 1,000 in 1980 is worth SEK 3,157 in 2016 compensating for inflation, see scb.se.

attention to the assessment from a deterrence perspective. In not one case has the Court looked at the turnover of the employer (or at least not explicitly included it in the analysis given) when assessing the deterring effect of the damage award as proposed in the Legislative Bill.

3 Litigating discrimination claims – affordable?

Financially affordable redress and legal aid are vital components of access to justice. With respect to trial costs and fees, in Sweden they generally are awarded according to the English rule, which means that the non-prevailing party pays the trial costs and fees for both parties. Even if a party prevails on the merits, such as in AD 2015 no. 44, above, the Labour Court can reallocate the costs and fees, finding in the case that as plaintiff initially pled damages in the amount of SEK 100,000 and was only awarded SEK 25,000, plaintiff actually did not prevail and was to pay defendant's litigation costs of SEK 42,300, resulting in a pyrrhic victory.²⁵ According to § 5(2) of the 1974 Labour Disputes (Judicial Procedure) Act, the Labour Court may also order that each party bear its own costs if the losing party had reasonable cause to have the dispute tried, but this is seldom invoked by the Court and even more rarely in cases the employee has lost.²⁶

The amount of trial costs and fees as awarded by the Labour Court in discrimination cases demonstrates a trend that deviates radically from the relatively modest increases in the amount of damages given in the cases as seen above. During the 1980's, the average award for trial costs and fees was SEK 22,534, the 1990's SEK 94,056, the 2000's SEK 145,628, and during the 2010's SEK 192,122. Making the same adjustment for inflation, the average in the 1980's valued today is SEK 71,139, leading to a material increase in the awards of trial costs and fees of 170%. These sums in reality need to be multiplied by two – the unsuccessful party will be paying twice the amount of fees, as she must pay for both the prevailing party and herself.

Consequently, during this 45-year time span in which discrimination law has been in place, the amount of general and discrimination damages per plaintiff has increased by roughly 4.5% even after the implementation of discrimination damages, while the trial costs and fees have risen 170%. This disparity renders the option of litigation even more expensive to already

²⁵ It can be noted that plaintiff in AD 2013 no. 29 originally pled SEK 200,000 and was awarded discrimination damages of SEK 50,000, the same 25% ratio as in AD 2015 no. 44, but there was not ordered by the Court to pay the trial costs and fees of the losing party.

²⁶ See for example, AD 1999 no. 51, AD 1996 no. 79 and AD 1991 no. 65.

disadvantaged plaintiffs. The financial risks a plaintiff assumes if unsuccessful have successively increased due to the increase in costs and fees and the parallel relative stagnation of damage awards. During the 1980's, damages and fees were comparable, SEK 59,983 and SEK 71,139 in today's value. During the 2010's, this disparity is significantly greater, SEK 62,700 as against SEK 192,122. To this can be added the success rates of the different claims, with the lowest success rate for claims of ethnic discrimination; only two of over thirty such cases have been brought successfully by plaintiffs, a less than 7% chance of prevailing. The trends with respect to damages and attorneys' costs and fees, combined with the low success rates, create a significant deterrent for plaintiffs bringing discrimination claims. Litigation is arguably not an affordable option for most discrimination plaintiffs. This is particularly true in light of the fact that it is often cases of discrimination with respect to hirings or firings, consequently individuals who are unemployed.

4 Legal counsel

The Discrimination Ombudsmen as well as labour unions can bring discrimination cases on behalf of plaintiffs, and have greater resources than individuals so that the financial risks associated with litigating discrimination claims are not as decisive. However, there are limits even to these resources and there is no requirement that either the DO or the unions pursue such claims. DO's policy when assessing whether to pursue complaints of discrimination is whether the actions concern a prioritized area, an untried legal question, a significant societal problem or a serious event, whether litigating the case can be seen as creating precedent, making it difficult for individuals with claims that have already been found favorable to employees to litigate with DO's support.²⁷ As to the labor unions, there is no duty of representation under Swedish labor law, so unions are basically free to decline to represent in a discrimination claim, with the union member/employee having only the redress of leaving the union.

There is a limited right to receive legal aid (for example an individual cannot have assets and yearly income of more than SEK 260,000), with a limit of one-

²⁷ See the editorial, E Schömer, L Svenaeus and L Viklund, 'DO sviker diskriminerade', Svenska Dagbladet, 15 April 2014. Svenaeus was the Equality Discrimination Ombudsman from 1994 to 2000. According to the statistics given in the editorial, DO received almost 2000 complaints, 379 were dismissed without any investigation, 21 were filed with the court and 27 which were settled. After a missive from the Government about this poor performance, DO during 2013 received 1827 complaints and 887 were dismissed without any investigation.

hundred hours of legal advice. If the individual is a member of a labor union, the labor union is to be first contacted. If an individual has legal assistance coverage in their home insurance, the insurance coverage is to be used instead. With respect to home insurance covering legal assistance, the range of coverage varies per policy and can be from SEK 75,000 to SEK 200,000, often with a deductible of 20%. Some policies also cover liability for the other party's fees for up to 80%. A caveat here though is that most if not all insurance policies exempt employee employment disputes, relying as legal aid on the labor unions to pursue such claims. A divergent development can be seen in the insurance offered employers. Municipalities can now purchase discrimination insurance. Such can have a deductible of SEK 35,000 and coverage up to SEK 500,000, with limits of SEK 200,000 for legal counsel and SEK 100,000 for employee claims.²⁸ The insurance solution for employers (potential wrongdoers having significantly greater financial resources) is considerably better than the insurance solutions offered employees, those who were harmed and having considerably fewer resources.

Given the financial risks for plaintiffs, many claimants have opted to take discrimination claims to small claims court, which has a ceiling of approximately SEK 22,000 in damages (with a filing fee of SEK 900) but with a limited risk for being found liable to pay the other party's trial costs and fees. Given this limit in damages, it is questionable whether this can be seen as a suitable alternative from an access to justice perspective.

5 Discrimination damages – enhanced or reduced access to justice?

Article 47 of The Charter of Fundamental Rights of the European Union mandates that:

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

²⁸ See P Jodenius, 'Tingsryd försäkrar sig mot diskrimineringslagen', *Smålands Posten*, 9 January 2015. See Söderberg & Partners, 'Försäkringsinformation – Tierps kommun for the period from 2015–2017', available at the website of Tierp's municipality, tierp.se.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Eight years have passed since the enactment of the 2008 Swedish Discrimination Act, and little progress can be detected with respect to issues of access to justice, particularly effective and dissuasive remedies. The intent of the Swedish legislature, that it should cost to discriminate, cannot in any way be perceived as fulfilled. In a best case scenario, the amount of damages for unlawful discrimination as adjudged by the Labour Court has increased by 4.5% since the 1980's. In a worst (and most likely) case scenario, the amount of damages has decreased by 19.5%. Trial costs and fees have increased by more than a healthy amount, 170%, with legal aid provided to relatively few. Insurance covers employers considerably better than employees in employment discrimination claims. The facade of having done something new is in place, however as the judgments demonstrate, nothing has actually changed, and that which is done can be seen as degrading.

One way forward is to focus on access to justice issues for different groups. Of the thirteen discrimination damages awards adjudged by the Labour Court, the vast majority were connected to the grounds of sex and gender, technically only one of the seven protected grounds in the Discrimination Act. Claims of ethnic discrimination have not been successful, either before or under the Act, and it is time to seriously assess the barriers existing preventing such claims from being successfully made. In 2013 DO received 294 complaints of ethnic discrimination and not one was deemed worth pursuing, DO stating that the employers had 'provided objective explanations for their actions and that it was difficult to determine whether any discrimination had occurred.'²⁹ And this is the statement by the agency charged with representing individuals who have been discriminated. Certain grounds, such as transgender, have yet to even be claimed, let alone successfully. Access to justice is access to citizenship and access to democracy. Unless all individuals have the right to claim their rights, they are not equal citizens. History has proven this simple thesis time and time again. The research that Ann and the Norma Elder Law Research Environment have conducted with respect to elder law and age discrimination, a newly recognized ground in the 2008 Act, must be seen as ground-breaking and will hopefully act as both pioneer and inspiration for others in discrimination research as well as in practice.

²⁹ Schömer *supra*.