

Discrimination in Individual-Related Employment – A View from Europe and Germany to Canada, analysing the Requirements and the Background of the European Anti-Discrimination Directives

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A. Introduction

In the legal systems of North America anti-discrimination law is a matter of course and very distinctive. A few years ago the anti-discrimination wave came to Europe. The European Community (EC) started with a bundled package of anti-discrimination directives. These directives serve as a skeleton law and, therefore, need to be implemented into the national law of member states. In the last months, the German legislator passed the Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz, AGG*)¹ to implement these EC directives. The AGG was enacted on 18 August 2006. In the last years the forthcoming implementation of these directives evoked much discussion in the judicial literature² and caused hot tempered controversy. This controversy is attributed to the failure of the first planned Anti-discrimination Act (*Antidiskriminierungsgesetz, ADG*).³ In the field of labour law the

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¹ Federal Law Gazette (*Bundesgesetzblatt*) I, 1987 (2006).

² See e.g. Rainer Nickel, *Widening the Scope: Anti-Discrimination Law, Social Equality, and the Right to Equal Treatment* in: ANNUAL OF GERMAN AND EUROPEAN LAW vol. 1, 353 (Russell Miller/Peer Zumbansen eds. 2003); Eduard Picker, *Anti-discrimination as a Program of Private law?*, 7 GERMAN LAW JOURNAL 771 (2003), available at: <http://www.germanlawjournal.com>; Gregor Thüsing, *Following the U.S. Example: European Employment Discrimination Law and the Impact of Council Directives 2000/43/EC and 2000/78/EC*, 19 THE INTERNATIONAL JOURNAL OF COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS 187 (2003); Jobst-Hubertus Bauer, *Europäische Antidiskriminierungsrichtlinien und ihr Einfluss auf das deutsche Arbeitsrecht*, NEUE JURISTISCHE WOCHENSCHRIFT 2672 (2001).

³ Draft bill of 16 December 2004, printed matter of the Federal Parliament (*Bundestag*), legislative period 15, no. 4538 (*Bundestagsdrucksache* 15/4538). On 17 June 2005 the *Bundestag* adopted the bill, but on 8 July

employers' associations fought against it because they feared a limitation on their freedom to contract and make decisions.⁴ A few changes were made in the new AGG, but all in all there seems to be no breakthrough to quiet the minds.⁵

This essay will show the development of the European regulations as a basis for German law in order to compare it with Canadian employment provisions. Canada is qualified for such an analysis because it has a viable anti-discrimination system with a long tradition. First, the law of the EC will be shown as the legal foundation for the AGG in order to understand the necessity for member states' national legislation to be uniform with it before presenting German employment provisions. As well, problems with the implementation of the directives will be mentioned. Thereafter, a review of Canadian law will be given. The presentation results from the perspective of individual-related law.

B. Legal Situation in the European Community

European law is somewhat complicated. The EC can be compared to a federal state, which has two levels of law, the European law and the law of member states. (To heighten the complexity, some member states are federal states as well, so one has to distinguish amongst at least three different kinds of lawmakers.) A first fundamental differentiation in this context is the distinction between the European Union and the EC. The European Union establishes a complex system of policies, including the complete system of the EC. Speaking metaphorical, the European Union makes up a "roof" over the several policies. The European anti-discrimination law is located in the context of the EC. A second fundamental line must be drawn be-

2005 the *Bundesrat* (Federal Council) objected and demanded that the committee for joint consideration of bills be convened (see Art. 77 para. 2 sent. 1 Basic Law). Because the *Bundestag* was elected early in autumn 2005 instead of 2006, the legislative procedure was finished without any result. This is the effect of the so-called *Diskontinuität* of the *Bundestag*.

⁴ See e.g. comments of the *Bundesvereinigung der Deutschen Arbeitgeberverbände*, available at <http://www.bda-online.de/www/bdaonline.nsf/id/B770DB33A0DE40FBC1256DE70069F41B> (visited on 28 August 2006); *Arbeitgeber fordern weitere Überarbeitung des geänderten Antidiskriminierungsgesetzes*, EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 293 (2005).

⁵ *Stellungnahme des Deutschen Anwaltsvereins e.V. durch die DAV-Ausschüsse Arbeitsrecht und Zivilrecht zu dem Regierungsentwurf eines Allgemeinen Gleichbehandlungsgesetzes*, NEUE ZEITSCHRIFT FÜR ARBEITSRECHT, Heft 12, VII (2006), Jobst-Hubertus Bauer, *Berliner Etikettenschwindel: der neue Gesetzentwurf zur Umsetzung der Europäischen Antidiskriminierungsrichtlinien*, DER BETRIEBS-BERATER 61, Heft 20, I (2006), Björn Gaul/Eva Naumann, *Entwurf des Allgemeinen Gleichbehandlungsgesetzes*, DER ARBEITSRECHTSBERATER 176 (2006), Jobst-Hubertus Bauer/Gregor Thüsing/Achim Schunder, *Das Allgemeine Gleichbehandlungsgesetz - Alter Wein in neuen Schläuchen?* in: NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 774 (2006).

tween European primary law and the secondary law. The primary law is essentially composed of the EU Treaty and the EC Treaty.⁶ The secondary law has its roots in the treaties. The European lawmaker can thereby act if and only if he is authorized by these two European treaties. For the EC, Art. 249 EC Treaty specifies the kinds of feasible acts (regulation, directive, decision, recommendation, and opinion). The European anti-discrimination (secondary) law is regulated by directives. These directives are binding as to the result to be achieved, but the member states are left with the choice of form and methods it takes. Thus, the directives have to be implemented into domestic law. The following paragraphs give an overview of the relevant European primary law rules and the European targets of the several directives regarding individual-related labour law.

I. Guidelines of the European Primary Law

As mentioned before, European anti-discrimination law is a matter of the EC law in particular. One has to distinguish between rules of the EC Treaty which give guidelines to the secondary law of the EC itself and rules of the EC Treaty which give guidelines directly to member states.

Certain articles of the EC Treaty imply the general principles of the EC and thereby give some *general guidelines* for the anti-discrimination matter. Art. 2 EC Treaty requires member states to promote the equality between men and women. Art. 3 para. 2 EC Treaty demands that the EC shall aim to eliminate inequalities, and promote equality, between men and women in all its activities. More specifically, Art. 13 EC Treaty authorizes the Community to take appropriate actions to combat discrimination based on sex, race or ethnic origin, religion or belief, disability, age, or sexual orientation.

Article 141 EC Treaty demands that each member state shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. However, art. 141 EC Treaty is important for the European secondary law, as well since para. 3 of this article enables the Council to adopt measures to ensure the application not only of the principle of equal pay, but also of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

⁶ Treaty on European Union, consolidated version, Official Journal of the European Communities 2002, C 325, 24/12/2004, p. 5; Treaty establishing the European Community, consolidated version Official Journal of the European Communities 2002, C 325, 24/12/2004, p. 33.

Finally, art. 12 EC Treaty is important when examining the issue of anti-discrimination in the employment context. This article directly prohibits any discrimination on the grounds of nationality. It concerns the equal treatment of all citizens of member states of the EC in any member state. However, art. 12 EC Treaty addresses the member states only, but not private persons.

II. The Anti-Discrimination Directives

The following paragraphs deal with the European secondary legislation referring to the matter of anti-discrimination. Authorized by art. 13 and art. 141 para. 3 EC Treaty, the EC took action by passing several directives. Basically, one can identify the following two stages of European anti-discrimination legislation.

1. The Beginning of European Anti-Discrimination Legislation in Labour Law

In the 1970s, the EC took its first big steps at formulating anti-discrimination laws. In 1975, a directive concerning the principle of equal pay for men and women was adopted.⁷ This directive transferred the special targets of the EC Treaty referring to the principle of equal pay into European secondary law. In 1976 a directive on the implementation of the principle of equal treatment for men and women followed. This directive concerned access to employment, working conditions, vocational training and promotion.⁸ As an “intermediate step” the directive of 1992, concerning measures to encourage improvements in the safety and health of pregnant workers at work,⁹ which – as the name suggests – primarily served to regulate safety and health in the workplace. The directive demands that member states shall take the necessary measures to prohibit the dismissal of workers during the period from the beginning of their pregnancy to the end of their maternity.¹⁰

2. The Height of European Anti-Discrimination Legislation in Labour Law

During the second and more important stage of the last few years the EC passed four anti-discrimination directives which directly concern labour law.¹¹ Directive

⁷ Council Directive 75/117/EEC of 10 February 1975, Official Journal L 045, 19/02/1975, p. 19.

⁸ Council Directive 76/207/EEC of 9 February 1976, Official Journal L 039, 14/02/1976, p. 40.

⁹ Council Directive 92/85/EEC of 19 October 1992, Official Journal L 348, 28/11/1992, p. 1.

¹⁰ Art. 10 Directive 92/85/EEC.

¹¹ A fifth anti-discrimination directive was passed in 2004, see Council Directive 2004/113/EC of 13 December 2004, Official Journal of the European Union L 373, 21/12/2004, p. 37. This directive is, how-

2000/43/EC¹² aims to prohibit any discrimination because of race or ethnic origin by an employer. Directive 2000/78/EC¹³ establishes a general framework for equal treatment in employment and occupation, and thereby aims to prohibit any discrimination on the grounds of religion or belief, disability, age, or sexual orientation.¹⁴ Both directives work in a similar way. The equal treatment of men and women is now regulated by Directive 2002/73/EC.¹⁵ Directive 97/80/EC¹⁶ governs the burden of proof required for discrimination claims on the ground of sex. In 2004, the European Commission put forth a proposal for a new directive which simplifies and centralizes the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation into one directive. Directive 2006/54/EC was completed on 5 July 2006.¹⁷ This directive now includes the former Directives 75/117/EC, 76/207/EC as amended by Directive 2002/73/EC and Directive 97/80 EC.

III. Guidelines of the Directives and the German Implementation in individual-related Labour Law

As a starting point for comparison with Canadian law some of the European and German provisions will be presented. To some extent these topics are problematic regarding their application to German law therefore it would be interesting to examine other legal systems to look for solutions.

ever, without influence on the field of labour law. It concerns the principle of equal treatment between men and women in the access to and supply of goods and services.

¹² Council Directive 2000/43/EC of 29 June 2000, Official Journal L 180, 19/07/2000, p. 26.

¹³ Council Directive 2000/78/EC of 27 November 2000, Official Journal L 303, 02/12/2000, p. 16.

¹⁴ Art. 1 Directive 2000/78/EC.

¹⁵ Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002, Official Journal of the European Communities L 269, 05/10/2002, p. 15 amends the Directive 76/207/EEC mentioned before.

¹⁶ Council Directive 97/80/EC of 15 December 1997, Official Journal L 14, 20/01/1998, p. 6. The Directive 98/52/EC (Council Directive 98/52/EC of 13 July 1998, Official Journal L 205, 22/07/1998, p. 66) only extends the Directive 97/80/EC to the United Kingdom of Great Britain and Northern Ireland.

¹⁷ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, publication in Official Journal pending, the legislation procedure is available at: http://europa.eu.int/prelex/detail_dossier_real.cfm?CL=en&DosId=190518 (visited on 28 August 2006).

1. *Grounds of Discrimination and Discriminatory Behaviour*

Protected by the EC directives are the grounds of sex, race or ethnic origin, religion or belief, disability, age and sexual orientation.¹⁸ The AGG strictly reflects the grounds which are given by the directives.¹⁹ The term discrimination is defined extensively in the directives. It includes both direct and indirect discrimination, harassment, and the ban on instruction to discriminate.²⁰ Remarkably, the European lawmakers formulated the scope of the directives in the following wording: "Within the limits of the powers conferred upon the Community, this Directive[s] shall apply to all persons, as regards both the public and the private sector, including public bodies" ²¹ However, contrary to this wording the directives have basically no direct effect,²² but rather need to be implemented into the domestic law of each member state. Everything of importance to employers and employees is included in the directives, *e.g.* conditions of hiring, advancement and working conditions.²³ The scope regarding discriminatory behaviour of the AGG is not different from the directives. For the most part one can find exactly the same wording²⁴ which illustrates the difficulty of formulating provisions not too far and not too tight. The scope of these provisions will be formed by practical use. At present jurists in Germany are still looking for "cooking recipes" to interpret the extent of the AGG and its grounds.²⁵

2. *Exceptions*

The right of the employer to make decisions which are essential for the viability of the company must be protected. Therefore, one can find a regulation in the direc-

¹⁸ Directive 2000/43/EC (race/ethnic origin); Directive 2000/78/EC (religion or belief/ disability/ age/ sexual orientation); Directive 2002/73/EC (sex).

¹⁹ § 1 AGG.

²⁰ Art. 2 Directives 2000/43/EC, 2000/78/EC and 2002/73/EC.

²¹ Art. 3 Directives 2000/43/EC and 2000/78/EC.

²² This must not be mixed with the question if the directives could have a direct effect after the time lapse for the implementation under special circumstances.

²³ Art. 3 Directives 2000/43/EC, 2000/78/EC and 2002/73/EC.

²⁴ See *e.g.* § 2 AGG.

²⁵ See *e.g.* Gerlind Wisskirchen, *Der Umgang mit dem Allgemeinen Gleichbehandlungsgesetz – Ein „Kochrezept“ für Arbeitgeber*, DER BETRIEB 1491 (2006), Georg Annuß, *Das Allgemeine Gleichbehandlungsgesetz im Arbeitsrecht*, DER BETRIEBS-BERATER 1629 (2006).

tives²⁶ which leaves the employer some leeway with regard to policies aimed at the nature of particular occupational activities. The actions of the employer must be genuine and determining, proportionate and with a legitimate objective.²⁷ This regulation is adopted without providing details in the AGG.²⁸ The directives also clarify that the principles they embody shall not prevent any member state from maintaining or adopting specific measures to prevent or compensate for disadvantages (“positive action”).²⁹ This principle can also be found in the AGG.³⁰ The German implementation of this principle without defining any requirements is problematic because the provisions in the directives direct member states themselves to take action.³¹ Finally, there are exceptions for religious organizations which are allowed to give preferential treatment in offers of employment to individuals belonging to their religion³² and regarding discrimination based on age³³ in European and also German law. Discrimination based on age is allowed when it is genuine, determining and proportionate with a legitimate objective. There are several examples given, *e.g.* in case of a termination of the employer-employee relationship because of retirement.³⁴

3. Defence of the rights

Of particular importance are the regulations in the EC directives about the defence of rights which state that member states shall ensure that judicial and/or administrative procedures for the enforcement of obligations under these directives are available to all concerned persons. This can include – as far as the member states deem it appropriate, conciliation procedures. This legal protection shall be ensured even after the relationship upon which the discrimination is alleged to have oc-

²⁶ Art. 4 Directive 2000/43/EC; art. 4 para. 1 Directive 2000/73/EC; art. 2 para. 6 Directive 2002/73/EC.

²⁷ Art. 4 Directive 2000/43/EC; art. 4 para. 1 Directive 2000/73/EC; art. 2 para. 6 Directive 2002/73/EC.

²⁸ § 8 para. 1 AGG.

²⁹ Art. 5 Directive 2000/43/EC and art. 7 Directive 2000/78/EC, but not in Directive 2002/73/EC. Now Art. 3 Directive 2006/54/EC rules positive action. For further information see: Daniela Caruso, Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives, 44 HARVARD INTERNATIONAL LAW JOURNAL 331 (2003).

³⁰ § 5 AGG.

³¹ Art. 5 Directive 2000/43/EC and art. 7 Directive 2000/78/EC, Georg Annuß, *Das Allgemeine Gleichbehandlungsgesetz im Arbeitsrecht*, DER BETRIEBS-BERATER 1629 (2006).

³² Art. 4 para. 2 Directive 2000/78/EC, § 9 AGG.

³³ Art. 6 Directive 2000/78/EC, § 10 AGG.

³⁴ § 10 sentence 3 no. 5 AGG.

curred has ended.³⁵ Employees are to be protected against adverse treatment by an employer who is reacting to a complaint or to proceedings aimed at enforcing their rights.³⁶ The AGG does not include detailed provisions about conciliation; it only rules that the federal government agency against discrimination (*Antidiskriminierungsstelle des Bundes*) can proceed with conciliation without further information.³⁷ Therefore, labour courts will finally be responsible for matters of discrimination in employment. Under German law the claim has to be filed within two months after the incident.³⁸ The directives allow a deadline to assert the rights,³⁹ but time will tell if the German deadline, criticized as too long,⁴⁰ will comply with European legislation.

The EC directives can have the effect of conflicting with domestic law. An employee who has been dismissed in Germany is well protected by the Dismissal Protection Act (*Kündigungsschutzgesetz*). The question raised is how this law would work together with discrimination legislation? The AGG does not answer this question clearly. Only the exclusive application of special law for dismissals is governed by the AGG.⁴¹ Does it mean that the AGG is not applicable in the case of discriminatory dismissals? This certainly would not be in line with the directives.⁴² Or does it mean all grounds of discrimination within the meaning of the AGG have to be considered by the Dismissal Protection Act?⁴³ This may comply with the directives

³⁵ Art. 9 Directive 2000/78/EC; art. 7 Directive 2000/43/EC; art. 6 Directive 2002/73/EC.

³⁶ Art. 9 and art. 11 Directive 2000/78/EC; art. 7 and 9 Directive 2000/43/EC; art. 6 and 7 Directive 2002/73/EC.

³⁷ § 27 para. 1 no. 3 AGG, *see also* the competence ruled in § 28 para. 1 AGG for this facultative task.

³⁸ § 21 para. 5 AGG. Take note, in consideration of the wording this only aims for compensation based upon § 15 paras. 1, 2 AGG.

³⁹ Art. 9 para. 3 Directive 2000/78/EC; art. 7 para. 3 Directive 2000/43/EC; art. 6 para. 4 Directive 2002/73/EC.

⁴⁰ *See e.g. Stellungnahme des Deutschen Anwaltvereins e.V. durch die DAV-Ausschüsse Arbeitsrecht und Zivilrecht zu dem Regierungsentwurf eines Allgemeinen Gleichbehandlungsgesetzes*, NEUE ZEITSCHRIFT FÜR ARBEITSRECHT, Heft 12, VII (2006).

⁴¹ § 2 para. 4 AGG.

⁴² In this way Gerlind Wisskirchen, *Der Umgang mit dem Allgemeinen Gleichbehandlungsgesetz – Ein „Kochrezept“ für Arbeitgeber*, DER BETRIEB 1491 (2006), Georg Annuß, *Das Allgemeine Gleichbehandlungsgesetz im Arbeitsrecht*, DER BETRIEBS-BERATER 1629 (2006).

⁴³ *See* Jobst-Hubertus Bauer in: Jobst-Hubertus Bauer/Gregor Thüsing/Achim Schunder, *Das Allgemeine Gleichbehandlungsgesetz – Alter Wein in neuen Schläuchen?* in: NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 774 (2006) who thinks a discriminatory dismissal is covered by the established dismissal protection law. On the other side is the opinion of Gregor Thüsing who speaks about a failure of this provision in the same essay.

but not with German law since the AGG provides a more extensive scope of protection than the dismissal protection law. So there are more questions than answers and it will be a task of the courts to find a balance.

Another basis for collision between the AGG and domestic law is the burden of proof. The directives state that the member states shall ensure that the person considered to be discriminated against shall present "...facts from which it may be presumed that there has been [...] discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment."⁴⁴ The AGG provides for a shifting of the burden of proof in the case that the employee can prove signs of discrimination.⁴⁵ But what does this mean? German law is familiar with proof of facts and satisfactory proof (*Glaubhaftmachung*). The latter is ruled by § 294 German Code of Civil Procedure (*Zivilprozessordnung*) whereupon a statutory declaration (*eidesstattliche Versicherung*) answers a purpose. Taking the wording of the German provision the discriminated person has to prove the signs, not the facts. It appears that the AGG has a higher burden of proof because it would demand more from the employee than the EC directives call for.⁴⁶ On the other side the employers would be penalized strongly if only satisfactory proof in the form of a statutory declaration would suffice. When a provision similar to § 611 a para. 1 sentence 3 German Civil Code was intended⁴⁷ the question could be raised as to why the provision was not formulated the same way.⁴⁸

4. Sanctions

The directives demand rules on sanctions which are to be imposed for an infringement of the national provisions adopted pursuant to these directives. The sanctions

⁴⁴ Art. 8 para. 1 Directive 2000/43/EC; art. 10 para. 1 Directive 2000/78/EC. Directive 2002/73/EC does not rule the burden of proof because in the case of discrimination based on sex Art. 4 Directive 97/80/EC was applicable.

⁴⁵ § 22 AGG rules verbatim: „Wenn im Streitfall die eine Partei Indizien beweist, die eine Benachteiligung wegen eines in § 1 genannten Grundes vermuten lassen, trägt die andere Partei die Beweislast dafür, dass kein Verstoß gegen die Bestimmungen zum Schutz vor Benachteiligung vorgelegen hat.“

⁴⁶ See Gregor Thüsing in: Jobst-Hubertus Bauer/Gregor Thüsing/Achim Schunder, *Das Allgemeine Gleichbehandlungsgesetz – Alter Wein in neuen Schläuchen?* in: NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 774 (2006).

⁴⁷ Information of the Federal Ministry of Justice, NEUE ZEITSCHRIFT FÜR ARBEITSRECHT, Heft 10, IX (2006), see also Federal Labour Court, Decision of 5 February 2004 in : NEUE JURISTISCHE WOCHENSCHRIFT 2112 (2004) for an interpretation of § 611 a para. 1 sentence 3 German Civil Code.

⁴⁸ See Katharina Vera Boesche, *Beweislast im Regierungsentwurf eines Antidiskriminierungsgesetzes*, Europäische ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT, 264, 265 (2005) with her proposal for a formulation.

must be effective, proportionate, and dissuasive.⁴⁹ Directive 2002/73/EC demands the member states shall introduce such measures as are necessary to ensure real and effective *compensation or reparation* for the loss and damage sustained by a person injured as a result of discrimination.⁵⁰ This is different from the Directives 2000/43/EC and 2000/78/EC. A sanction in this sense can be compensation to the victim, but it does not have to be. In this field the directives seem to leave the member states freedom to create regulations the way they want to. Only for discrimination based on the grounds of sex is compensation demanded. Therefore, in other fields would every sanction be possible when it is effective, proportionate, and dissuasive? So one can say the member states are free to determine the sanction they want to have. But maybe this is a false conclusion because not every sanction fulfils the requirements of being effective, proportionate, and dissuasive. The AGG rules compensation for financial loss emerged from the discrimination and in an adequate dimension non-financial loss.⁵¹ It is stated explicitly that the employer does not have to pay compensation following from § 15 para. 1 AGG when he is not responsible for the breach of duty.⁵² Justifiably so, the question was raised how this provision will survive in view of European jurisdiction.⁵³ In addition, the employee can complain about an incident inside of the enterprise.⁵⁴ In the case of harassment the employee also has the right to refuse his work legally.⁵⁵

5. Government Agency

Directive 2000/43/EC and directive 2002/73/EC demand the member states designate a body for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. This body shall provide independent assistance to victims of discrimination in pursuing their complaints about discrimination, conduct independent surveys concerning discrimination and publish inde-

⁴⁹ Art. 15 Directive 2000/43/EC, Art. 17 Directive 2000/78/EC.

⁵⁰ Art. 6 para. 2 Directive 2002/73/EC.

⁵¹ § 15 paras. 1, 2 AGG.

⁵² § 15 para. 1 sentence 2. Take note, such a statement is missing in § 15 para. 2 AGG (non financial loss).

⁵³ Gregor Thüsing in: Jobst-Hubertus Bauer/Gregor Thüsing/Achim Schunder, *Das Allgemeine Gleichbehandlungsgesetz – Alter Wein in neuen Schläuchen?* in: NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 774 (2006) with clue to the decision of the European Court of Justice of 22 April 1997, C-180/95 in: NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 645 (1997).

⁵⁴ § 13 AGG.

⁵⁵ § 14 AGG.

pendent reports.⁵⁶ Remarkably, there is no equivalent in Directive 2000/78/EC. In Germany a federal government agency against discrimination (*Antidiskriminierungsstelle des Bundes*) for all grounds of discrimination shall be created.⁵⁷

C. Legal situation in Canada

The Canadian Bill of Rights⁵⁸ was passed by federal legislation in 1960, and the province of Ontario already has its own anti-discrimination law since 1944.⁵⁹ According to this, it will be interesting to see how the Canadian system of equality rights is structured. Which rights are protected? Concerning the requirements of the EC directives, is there something one can learn from Canadian anti-discrimination law? This part aims to give some answers to these questions in the field of individual-related employment law by showing a system of human rights that is 60 years old and the attempt to embrace a new human rights system.

An overview of the Canadian anti-discrimination law has to take two characteristics of the Canadian legal system into account. First, Canada naturally stands in the tradition of common law. Secondly, Canada is not a unitary, but a federal state. The legislative authority is divided between federal and provincial government.⁶⁰ Thus, anti-discrimination law can be found in both federal and provincial jurisdictions. The article deals with both, the federal and the provincial anti-discrimination law, considering as an example the province of Ontario.

Anti-discrimination law with regard to individual-related employment law consists of two parts: human rights legislation and equity legislation. The first part deals with the prevention of discrimination by an employer. This means that the employer is obliged to avoid an employment decision based on prohibited grounds of discrimination. The second part guarantees the equal treatment regarding equal pay or employment equity. Both issues overlap and belong to the field of discrimination, which the Supreme Court of Canada described as a "... distinction which, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, has an effect which imposes disadvantages not imposed

⁵⁶ Art. 13 Directive 2000/43/EC, art. 8a Directive 2002/73/EC.

⁵⁷ Art. 25 AGG.

⁵⁸ S.C. 1960, c.44.

⁵⁹ Act to prevent the Publication of Discriminatory Matter Referring to Race or Creed, S.O. 1944, c. 51.

⁶⁰ For a first overview of the Canadian federal system see Peter W. Hogg, *Constitutional Law of Canada* 103 (2002 student ed.).

upon others or which withholds or limits access to advantages available to other members of society... ."⁶¹

I. Human Rights

The basic principles of human rights legislation in Canada are grounded in the Canadian Charter of Rights and Freedoms (Charter)⁶² which is the "supreme law" with a list of fundamental freedoms and basic democratic and legal rights. All other pieces of legislation must be in accord with the Charter. One can compare this with the principles of the German basic law which have direct and indirect influence in every part of German legislation. The pertinent pieces of legislation in the intersection of equality and employment laws are, on the federal level the Canadian Human Rights Act,⁶³ and on the provincial level, in the case of Ontario, the Human Rights Code.⁶⁴ Whether the federal or provincial law is applied, depends on the nature of the business of the employer. Persons employed by the federal government or federal organizations are covered by the Canadian Human Rights Act. The scope of federal work goes from railways to radio and television broadcasting.⁶⁵ In most cases the business does not fall under the federal sector.

II. Equality legislation

As mentioned before, equality legislation is divided into equal pay and employment equity. In the field of federal legislation the Canadian Human Rights Act⁶⁶ is the decisive law regarding equal pay. All provinces also have equal pay legislation. In Ontario it is the Employment Standards Act.⁶⁷ Equal pay means the abolition of different wages for male and female employees employed in the same establishment and performing work of equal value. The valuation factors of the value of work can be *e.g.* skill, effort, responsibility, and the conditions under which the

⁶¹ *Law Society British Columbia v. Andrews* (1989) 1 S.C.R. 143, 144.

⁶² Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

⁶³ Canadian Human Rights Act (Act) R.S.C. 1985, c. H-6.

⁶⁴ Human Rights Code Ontario (Ontario Code) R.S.O. 1990, c. H.19.

⁶⁵ The scope of industries within federal jurisdiction is defined by the Canada Labour Code R.S.C. 1985, c. L-2, s. 2.

⁶⁶ Act, s. 11.

⁶⁷ Employment Standards Act S.O. 2000, c. 41, s. 42.

work is performed.⁶⁸ Only a few provinces have special legislation to address pay equity, among them the Pay Equity Act⁶⁹ in Ontario. It has the purpose of creating rules for female job classes by the proportional value of the work or proper methods of finding comparators. It concerns the public sector and the private sector when an employer has ten or more employees.⁷⁰

Employment equity is only governed by the federal Employment Equity Act.⁷¹ Employment equity goes further than human rights legislation. While human rights legislation wants to prohibit discrimination, employment equity requires the employer to take positive and proactive measures,⁷² e.g. consult with employee representatives to provide their views concerning the implementation of employment equity in its workplace⁷³ or identify and eliminate workplace barriers against persons in designated groups.⁷⁴

III. Several provisions of Canadian individual-related labour law

Now the same topics presented in European and German law will be examined in the Canadian law context as a basis for comparison.

1. Grounds of Discrimination and Discriminatory Behaviour

We find a richness of grounds in Canadian legislation because the Canadian Human Rights Act prohibits discrimination on the grounds of race, national or ethnic origin, colour, religion, age, sex (including pregnancy and child-birth), sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.⁷⁵ The Human Rights Code of Ontario provides protection against

⁶⁸ Act, s. 11 paras. 1 - 3.

⁶⁹ Pay Equity Act R.S.O. 1990, c. P.7.

⁷⁰ Pay Equity Act, s. 3 para.1.

⁷¹ Employment Equity Act S.C. 1995, c. 44.

⁷² Randall Scott Echlin/Christine M. Thomlinson, *For Better or For Worse – a Practical Guide to Canadian Employment Law* 141 (2nd ed. 2004); Carol Agocs, *Canada's employment equity legislation and policy, 1987-2000 – The gap between policy and practice*, 23 *INTERNATIONAL JOURNAL OF MANPOWER* 256 (2002).

⁷³ Employment Equity Act, s. 15.

⁷⁴ Employment Equity Act, s. 5 para. a.

⁷⁵ Act, s. 3 para. 1.

discrimination in employment on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex (including pregnancy), sexual orientation, age, record of offences, marital status, family status and disability.⁷⁶ The grounds are different in federal and provincial law and even amongst provincial laws, but there is a common essential protection. Other provinces prohibit discrimination on grounds such as social conditions and language,⁷⁷ source of income,⁷⁸ or political beliefs.⁷⁹

Also, in Canada direct and indirect discrimination by an employer is prohibited.⁸⁰ It is illegal to refuse or to continue to employ someone or to differentiate adversely on a prohibited ground.⁸¹ The hiring process has some perils for the employer because he has to consider these principles when he publishes an advertisement, uses application forms or makes an oral or written inquiry for reasons of employment.⁸² All company policies need to comply with anti-discrimination legislation.⁸³ In the case of harassment there are special regulations.⁸⁴ Sexual harassment is also addressed in provisions in both the Human Rights Code and the Canadian Human Rights Act,⁸⁵ as well as some provisions in the Canada Labour Code (which even includes a definition).⁸⁶

⁷⁶ Ontario Code, s. 5 para. 1, s. 10 para. 2.

⁷⁷ Charter of Human Rights and Freedoms Quebec R.S.Q., c. C-12, s. 10.

⁷⁸ See e.g. Human Rights Code Manitoba C.C.S.M., c. H175, s. 9 para. 2j, Human Rights Act Nova Scotia R.S.N.S. 1989, c. 214, s. 5 para. 1t, Human Rights Act Prince Edward Island R.S.P.E.I. 1988, c.H-12, s. 2 para. 1d.

⁷⁹ See e.g. Human Rights Code British Columbia RSBC 1996, c. 210, s. 11, Human Rights Code Newfoundland and Labrador RSNL 1990, c. H-14, s. 9 para. 1a, Human Rights Act Yukon R.S.Y. 2002, c. 116, s. 7 para. j.

⁸⁰ Act, s. 7, Ontario Code, s. 9, 23 para. 1.

⁸¹ Act, s. 7.

⁸² Act, s. 8, Ontario Code, s. 23 paras. 2, 3.

⁸³ Act, s. 10.

⁸⁴ Act, s. 14.1, Ontario Code, s. 8.

⁸⁵ Act, s. 14 para. 2, Ontario Code, s. 7 para. 2, Ontario Human Rights Commission, publications: Policy on Sexual Harassment & Inappropriate Gender Related Comments & Conduct, available at <http://www.ohrc.on.ca/english/publications/sexual-harassment-policy.shtml> (visited on 28 August 2006).

⁸⁶ Canada Labour Code R.S.C. 1985, c. L-2, s. 247.1 until s. 247.4.

The following Canadian examples show the effect of the prohibited grounds in employment: In *McAvinn v. Strait Crossing Bridge Ltd.* the employer denied the complainant employment in his company because of her sex. McAvinn applied for a job as a bridge patroller and was the only female candidate. Nine positions were offered. She passed the first hurdles and had two interviews, but all positions were given to men. Among them were a few who had less qualification and experience than her. She also had completed a Law and Security course contrary to a few men who were given the job. The decision of the employer not to give her the job was found to be discriminatory.⁸⁷ In *Haig v. Canada* an employee was discriminated against based on sexual orientation. After telling his employer that he was gay, the complainant was denied further career training. Even though, at the time of this claim, the Canadian Human Rights Act did not list the ground of sexual orientation as a prohibited ground, the court read it in and found that the actions of the employer constituted a discriminatory practice.⁸⁸ Later, this decision was reversed by the Ontario Court of Appeal,⁸⁹ but since 1997 sexual orientation is officially listed in the Canadian Human Rights Act.

2. Exceptions

The duty to accommodate to the point of undue hardship is determined as on a case-by-case basis. Canadian employers are allowed to make decisions which at first glance appear to be discriminatory, when it is based upon a *bona fide* occupational requirement. This practice is only possible when the employer tries to accommodate to the point of undue hardship. When this point is not achieved, he acts illegally.⁹⁰ Undue hardship is determined by factors, like cost of the accommodation, examined in the context of the size and financial state of the employer, safety risks, and employee morale,⁹¹ which are examined on a case-by-case basis. In 1999, the Supreme Court of Canada found the following principles directed at *bona fide* occupational requirements. Accordingly, it must be ensured

⁸⁷ *McAvinn v. Strait Crossing Bridge Ltd.* (2002) 41 C.H.R.R. D/388.

⁸⁸ *Haig v. Canada* (1991) 16 C.H.R.R. D/224.

⁸⁹ *Haig v. Canada* (1992) 16 C.H.R.R. D/226.

⁹⁰ Act, s. 15 paras. 1, 2, Ontario Code, s. 24 paras. 1, 2.

⁹¹ Act, s. 15 paras. 2, 3, Ontario Code, s. 11 paras. 2, 3, see *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* (1990) 12 C.H.R.R. D/417, Canadian Human Rights Commission, publication: Duty to Accommodate Fact Sheet, available at http://www.chrc-ccdp.ca/preventing_discrimination/duty_obligation-en.asp (visited 28 August 2006).

1. that the employer adopted the standard for a purpose rationally connected to the performance of the job;
2. that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
3. that the standard is reasonably necessary for the accomplishment of that legitimate work-related purpose. In order to fulfil this last criterion, it must be demonstrated that is impossible to accommodate the individual employees sharing the characteristics of claimant without imposing undue hardship upon the employer.⁹²

It is sometimes difficult to decide the achievement of the point of undue hardship. This issue is well illustrated for the ground of disability by *Black v. Gaines Pet Foods* where the court found that there was enough room for accommodation. The appellant Black had an unusually high rate of absenteeism due to cancer. Back at work, the employer demanded she maintain a normal level of attendance, but she failed and was dismissed. Only a part of her absenteeism was attributable to her cancer, the other part was caused by other circumstances. Despite this fact the court decided that she was dismissed because her absenteeism related to cancer as a disability and the employer had not accommodated her to the point of undue hardship.⁹³

Other examples for a *bona fide* occupational requirement are illustrated through cases dealing with discrimination based on religion. In *Bhinder v. Canadian National Railway* the appellant was a Sikh employee who wore a turban. He worked as maintenance electrician in the Toronto Coach Yard where he was required to wear a hard hat while working. He refused to comply with this requirement. The court found that the hard hat rule was a *bona fide* requirement and not a discriminatory practice. Here, there was no room for accommodation.⁹⁴ In contrast, the court found that denying an employee a paid-day off to observe a religious holy day to be a discriminatory practice. In *Chambly (Commission scolaire regionale) v. Bergevin*⁹⁵ three Jewish teachers employed by a Catholic school board wanted a paid-day off to

⁹² *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.* (1999), 176 D.L.R. (4th) 1, see also *British Columbia (Superintendent of Motor Vehicles) v. British Columbia* (2000), 181 D.L.R. (4th) 385.

⁹³ *Black v. Gaines Pet Foods* (1993), 28 C.H.R.R. D/256; see also the decision of the Ontario Board of Inquiry ([1992] 17 C.H.R.R. D/150) which was reversed by the Ontario Court of Justice.

⁹⁴ *Bhinder v. Canadian National Railway* (1985) 7 C.H.R.R. D/3093. The first decision of the tribunal ([1981] 2 C.H.R.R. D/546) was reversed by the decision of the Federal Court of Canada ([1983] 4 C.H.R.R. D/1404), which was affirmed by the Supreme Court of Canada.

⁹⁵ *Chambly (Commission scolaire regionale) v. Bergevin* (1994) 22 C.H.R.R. D/1 (S.C.C.), see also *Toronto District School Board v. Canadian Union of Public Employees* (2003) L.V.I. 3371-1.

celebrate *Yom Kippur*. The employer refused their request but rather suggested that they take an unpaid day off. The court decided that the effect of the calendar which recognizes Christian holidays discriminates against the teachers because of their religious beliefs. The court found that there was a duty to accommodate religious observance and therefore religious leave should have been available.

Two Canadian cases dealing with the ground of age relating to the same job also address the issue of the employer's duty to accommodate to the point of undue hardship. In *Canada (Human Rights Commission) v. Greyhound Lines of Canada Ltd.* a policy of hiring only bus drivers who were under the age of 36 was found to be discriminatory. This policy was based on the fact that new bus drivers did not have a regular route and worked for uncertain hours for the first few years. The employer argued that the ability to deal with the stress declines with age. But age is not necessarily an indication of one's ability to cope with stress. The actions of the employer in this case were found to be discriminatory against the 37-year-old man.⁹⁶ On the other hand, in *Jardine v. Ottawa-Carleton Regional Transit Commission* a 60-year-old-complaint was also refused the job as a bus driver, even though he had years of experience. The employer did not hire people over 60 years of age for this job. Here, it was decided that the company's policy of not hiring bus drivers over age 60 was a *bona fide* occupational requirement. The stressful conditions for new drivers legitimated this policy of the employer.⁹⁷

There are other exceptions, apart from *bona fide* requirements, similar to the European and German provisions, *e.g.* for religious institutions and organizations⁹⁸ or regarding "positive action" called "affirmative action" with the same meaning. The aim of such exceptions is to give individuals the opportunity to achieve equal treatment.⁹⁹ The Human Rights Code of Ontario sets out more exceptions in the field of medical/personal needs of an individual person¹⁰⁰ than found in the directives and German law.

⁹⁶ *Canada (Human Rights Commission) v. Greyhound Lines of Canada Ltd.* (1987) 8 C.H.R.R. D/4184.

⁹⁷ *Jardine v. Ottawa-Carleton Regional Transit Commission* (1995) C.R.H.D. No. 6.

⁹⁸ Ontario Code, s. 24 para 1a.

⁹⁹ Act, s. 16 para. 1, Ontario Code, s. 14 para. 1.

¹⁰⁰ Ontario Code s. 24 para. 1.

3. Defence of the rights

In Canada an employee can file a complaint if he has been discriminated on a prohibited ground.¹⁰¹ The government agency responsible for such a complaint is the Human Rights Commission. Under the Ontario Human Rights Code the deadline to make a complaint is six months,¹⁰² and under the Canadian Human Rights Act one year.¹⁰³ The Commission sends the complaint to persons named in the complaint and requests a response within a certain time frame. After receiving the response, the mediation proceedings directed by the Commission will be initiated. If mediation does not result in an agreement, an officer of the Commission will investigate the complaint including interviewing witnesses and gathering documentary evidence.¹⁰⁴ After finishing the investigation there is a new attempt to find a settlement between the parties called conciliation. If conciliation is also unsuccessful the Commission can decide to bring the complaint to the Human Rights Tribunal.¹⁰⁵

The employee is also free to claim his rights in other ways. For example, in the case of a wrongful dismissal claim the employee can file a claim under Ontario's Employment Standards Act¹⁰⁶ or the Canada Labour Code.¹⁰⁷ Therefore, the employee has the choice to file a claim to the responsible court, or file a complaint to the Human Rights Commission. Either way is possible because discriminatory behaviour and wrongful termination are seen as different matters of fact. But when these different matters of fact are based upon the same incident, the employee cannot raise a claim under both the Employment Standards Act for wrongful termination and a discrimination claim under the Human Rights Act or Code.

¹⁰¹ Act, s. 40, Ontario Code s. 32.

¹⁰² Ontario Code, s. 34 para. 1d.

¹⁰³ Act, s. 41 para. 1e.

¹⁰⁴ Act, ss. 43-46, Ontario Code, ss. 33-34, see also: Canadian Human Rights Commission, publications: The Complaint Process, available at http://www.chrc-ccdp.ca/publications/the_complaint-en.asp; Ontario Human Rights Commission, publications: If you Have a Human Rights Complaint: A Complainant's Guide, available at <http://www.ohrc.on.ca/english/publications/complainants-guide.shtml>; If you Receive a Human Rights Complaint: A Respondent's Guide, available at <http://www.ohrc.on.ca/english/publications/respondents-guide.shtml> (visited on 28 August 2006).

¹⁰⁵ Act, ss. 47-48, Ontario Code, s. 36-37, see also publications at *supra* note 96. Take note that there are discussions about strengthening this system at the moment because the complaint process takes a long time and costs much money.

¹⁰⁶ S.O. 2000, c. 41.

¹⁰⁷ R.S.C. 1985, c. L-2.

Concerning the burden of proof the complainant must present adequate evidence, but the threshold for substantiating an allegation of discriminatory behaviour is that it is "more likely than not." At a hearing the complainant shall present his evidence and the respondent is entitled to ask questions. Thereafter, the complainant and the Commission are allowed to re-examine their witnesses and the tribunal can ask questions before the complainant presents his evidence. Finally, the respondent can re-examine his witnesses. With these facts the tribunal decides how much weight to give the evidence in determining whether discriminatory behaviour took place.¹⁰⁸

4. *Sanctions*

Sanctions for the infringement of discrimination law include, requirements that the employer implement policies to bring itself into compliance with the legislation; to reinstate the employee; to compensate him for any pain or suffering, for any expenses or additional costs, or for any or all wages the employee was deprived. In addition, special compensation is available for a wilful or reckless discriminatory practice.¹⁰⁹ Furthermore, the employer is guilty of an offence and has to pay a fine.¹¹⁰

5. *Government Agency*

The body responsible for all grounds of discrimination is the Human Rights Commission. There is a federal Commission and a commission for each province. The Canadian Human Rights Commission is responsible for enforcing the federal Canadian Human Rights Code,¹¹¹ while the Ontario Human Rights Commission is responsible for enforcing the Ontario Human Rights Code.¹¹² For all matters dealing with Ontario's Pay Equity Act the responsible government agency is the Pay Equity Commission.¹¹³

¹⁰⁸ See Canadian Human Rights Tribunal, *Tribunal Rules and Procedures: What Happens Next? A Guide to the Tribunal Process*, available at http://www.chrt-tcdp.gc.ca/about/download/lay_guide-e.htm (visited on 28 August 2006).

¹⁰⁹ Act, s. 53, Ontario Code, s. 41.

¹¹⁰ Act, s. 60, Ontario Code, s. 44.

¹¹¹ Act, ss. 27 para. 1, 40 para. 1.

¹¹² Ontario Code, s. 32 para. 1.

¹¹³ Pay Equity Act, ss. 22-26.

D. Conclusion

The EC directives are a framework while the Canadian anti-discrimination system contains actual legislation with a direct effect. For this reason, a comparison does not work the same way as comparing two different types of legislation. Nevertheless, one can find more similarities than differences.

I. Grounds of Discrimination and Discriminatory Behaviour

Compared with the Canadian grounds for discrimination, the EC directives as well as German law appear to be more moderate. However, this does not necessarily mean that all the Canadian grounds are not protected in either the EC directives or German law. Discrimination on the ground of colour also includes discrimination on the grounds of race, because colour is a feature of a "race."¹¹⁴ A discriminatory behaviour in employment on record of offences or conviction for which a pardon has been granted can also be prohibited by the member states, such as Germany. Here a question about this topic is forbidden in a job interview, when it is not related to the performance of the job. But the consequences are different: the employee can refuse this question or, more practically, is allowed to lie. Moreover, for the employer itself, there are no consequences for asking this question.¹¹⁵ The ground of marital status is also not mentioned in German law.¹¹⁶ This ground could have an immense impact on an employer's decision to terminate. Termination for operational reasons (*betriebsbedingte Kündigung*) has to be determined by social criteria for redundancy (*Sozialauswahl*). If the employee is not married and has no children, it is easier for a German employer to dismiss him. So the protection of this ground would mean that in this regard the use of determined social criteria for redundancy is more problematic. However, in the case of age, which is also gaged by social criteria, the German legislator has examined the issue and found an exception.¹¹⁷ Whether this is a solution as measured by the requirements of the European

¹¹⁴ Georg Annuß, *Das Allgemeine Gleichbehandlungsgesetz im Arbeitsrecht*, DER BETRIEBS-BERATER 1629 (2006).

¹¹⁵ Ulrich Preis in: *Erfurter Kommentar zum Arbeitsrecht*, § 611 Civil Code (*Bürgerliches Gesetzbuch*) annotation 334, 341, 342 (Dieterich et al. eds. 2006); Federal Labour Court, Decision of 20 May 1999, NEUE JURISTISCHE WOCHENSCHRIFT 3653 (1999).

¹¹⁶ But it is stated explicitly in art. 2 para. 1 Directive 76/207/EEC and so in art. 1 para. 1 Directive 2002/73/EC.

¹¹⁷ § 10 sentence 3 no. 6 AGG. See also Björn Gaul/Eva Naumann, *Entwurf des Allgemeinen Gleichbehandlungsgesetzes*, DER ARBEITSRECHTSBERATER 176 (2006), Jobst-Hubertus Bauer/Gregor Thüsing/ Achim Schunder, *Das Allgemeine Gleichbehandlungsgesetz – Alter Wein in neuen Schläuchen?* in: NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 774 (2006), Georg Annuß, *Das Allgemeine Gleichbehandlungsgesetz im*

Court of Justice is another question. Similar problems with the implementation of the directives appear in the field of dismissal due to a disease, which is possible under German law.¹¹⁸ The whole dismissal system would be in danger were a dismissal because of illness to be seen as a discriminatory behaviour because the illness can be considered a disability. In this case the European Court of Justice decided that a dismissal due to a disease is not protected by the directives.¹¹⁹ A uniform protection of these rights in each member state would most likely infringe upon domestic legal systems. Therefore, one actually can say the Canadian anti-discrimination legislation includes higher protection than those found in the EC directives. But such a consideration would not take into consideration the national peculiarities of EC member states.

Equality legislation as a part of Canadian anti-discrimination law, includes the protection of equal pay for work of equal value regardless of gender. This is not an explicit part of the EC directives, but the principle of equal pay for men and women is well established in European legislation¹²⁰ as well as in the legislation of individual member states.¹²¹ European legislation, however, does not require a sophisticated system as that found in Canada. Nevertheless, this statement protects to a certain extent, but cannot match with the Canadian pay equity system which is an advancement of this principle. Canadian employment equity provisions can be described as placing an obligation on an employer with a large number of employees. Some EC member states have similar structures, among them Germany with its Works Constitution Act (*Betriebsverfassungsgesetz*). While the focus of the Canadian Employment Equity Act is on designated groups, the German Works Constitution Act ensures more generally that all workers participate equally in the workforce.

The main scope of protection between the EC directives and Canadian legislation seems to be quite similar because various direct and indirect grounds of discrimination are included.

Arbeitsrecht, DER BETRIEBS-BERATER 1629 (2006) who criticise this provision with regard to the exclusion of the AGG from dismissals.

¹¹⁸ Reiner Ascheid in: *Erfurter Kommentar zum Arbeitsrecht*, § 1 KSchG (*Kündigungsschutzgesetz*) annotation 188 (Dieterich et al. eds. 2006).

¹¹⁹ European Court of Justice, Decision of 11 July 2006, C-13/05 in: DER BETRIEB 1617 (2006). Doubtfully if this clarifies the problem completely: Gregor Thüsing in: Jobst-Hubertus Bauer/Gregor Thüsing/Achim Schunder, *Das Allgemeine Gleichbehandlungsgesetz – Alter Wein in neuen Schläuchen?* in: NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 774 (2006).

¹²⁰ See *supra* B.

¹²¹ See, e.g. Germany § 612 para. 3 Civil Code (*Bürgerliches Gesetzbuch*).

II. Exceptions

A decision of a Canadian employer based upon a *bona fide* occupational requirement is allowed when he is unable to accommodate. Only directive 2000/78/EC explicitly states a duty to accommodate persons with disabilities.¹²² The EC directives do not make such a statement regarding other grounds of discrimination, also the AGG remains silent on the issue. This does not mean that the duty of accommodation does not exist. The condition of proportionality has to be interpreted. One point of this interpretation could be the duty of accommodation because it would be disproportionate to make a decision with discriminatory effects without thinking about accommodation.¹²³

III. Defence of the rights

In Canada the first avenue for an employee who is pursuing a claim of discrimination is the Human Rights Commission, not a court. Seeing the directives, such procedure would be possible in Europe, too.¹²⁴ Also the AGG provides for such a procedure, however no guidance is provided with regard to its application.¹²⁵ When an employee alleges to be the victim of discrimination, he could not take legal proceedings without the scrutiny of an independent government agency. This means, that without the acceptance of such an authority the claim would not be matter of a judicial scrutiny. The courts would only handle reasonable incidents. This seems to be a good way to confine a surge of claims and to give employees the opportunity to have the matter examined by a third party.

When looking at the protection of the employer in other areas, in particular dismissal protection law, one can see discriminatory behaviour and wrongful dismissals as different issues. But the fact that a wrongful dismissal can be a discriminatory dismissal must be taken into account. In Canada the employee can choose under which law he wants to claim his rights. Such course of action would be in accor-

¹²² Art. 5 Directive 2000/78/EC.

¹²³ Lisa Waddington/Aart Gendriks, *The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination To Reasonable Accommodation*, 18/3 THE INTERNATIONAL JOURNAL OF COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS, 403 (2003) who even see reasonable accommodation as form of discrimination *sui generis*.

¹²⁴ See Art. 7 para. 1 Directive 2000/43/EC, art. 9 para 1 Directive 2000/73/EC, art. 6 para.1 Directive 2002/73/EC.

¹²⁵ See § 27 para. 1 no. 3 AGG.

dance with the EC directives and could be a starting point to solve the problem of conflict between the EC directives and domestic law in Germany.

The provisions of the burden of proof are similar in Canadian law and the EC directives. But this does not help to reconcile the EC directives with German law with its formal law of evidence in civil legal proceedings. But it must be mentioned that the directives allow for the easing of restrictions in cases in which it is for the court or competent body to investigate the facts.¹²⁶ This could be in almost the same manner as in Canadian law where the responsible body to ensure the defence of the rights has to examine the matter of facts itself. This kind of examination is not totally strange in German civil law because the duty to officially investigate (*Amtsermittlungspflicht*) already exists in civil law cases where the *Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit*¹²⁷ is applicable. Maybe this could act as a basis for creating a balanced provision, considering the interests of employer and employee both?

IV. Sanctions

The Canadian law provide for financial and non-financial consequences of discrimination based on an enumerated ground. The EC directives 2000/43/EC and 2000/78/EC give the possibility to order both financial and non-financial compensation. Only in cases of discrimination because of sex¹²⁸ is compensation or reparation demanded. So the German legislator could have been free in cases of discrimination on other grounds to create non-financial sanctions in a similar way. Regretfully, financial consequences is what usually follows from infringement of the provisions. Perhaps an official apology from the employer connected with a fine for committing a regulatory offence¹²⁹ would be a more effective means of preventing discrimination in some cases. Otherwise the danger exists that employers would risk financial penalties rather than reform their practices and procedures with regard to discrimination in their workplace.

¹²⁶ Art. 8 para. 5 Directive 2000/43/EC, Art. 10 para. 5 Directive 2000/78/EC.

¹²⁷ § 12 *Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit* (FGG).

¹²⁸ Art. 6 para. 2 Directive 2002/73/EC.

¹²⁹ Jost-Hubertus Bauer in: Jobst-Hubertus Bauer/Gregor Thüsing/Achim Schunder, *Das Allgemeine Gleichbehandlungsgesetz – Alter Wein in neuen Schläuchen?* in: NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 774 (2006).

V. Government Agency

In Canada there is a plurality of agencies. In Europe, this is not necessary to protect anti-discrimination rights because a single body can handle this task well, since the separation between human rights and equity rights does not exist. And indeed the directives do not require extending the responsibility of this agency on all grounds. On the ground of sex such an agency is not demanded by the EC directives. But there is no common-sense reason to factor out this ground from the responsibility of this agency. It would be curious if who somebody felt discriminated against based on the ground of sex was not able to get help from this authority and somebody who felt discriminated against based on another ground would receive help from this authority.

VI. Summary

Sometimes it seems that the EC directives could be a framework for the Canadian anti-discrimination system, too. They open ways to create procedures which are working for a long time in Canada. This does not mean this can be adopted in EC member states because there are too many peculiarities amongst domestic legislation. The problem seems to combine the directives, formed by influence from the North American legislation,¹³⁰ with the European understanding of law. Especially in Germany, where employees are well protected by the law, the well-balanced system of rights is in danger. This danger does not seem to be banished by the new AGG which adopted many regulations of the directives without giving answers to questions of its implementation. But seeing the practice in other countries could bring thought-provoking impulses for the embodiment and the use of anti-discrimination law.

¹³⁰ See Gregor Thüsing, *Following the U.S. Example: European Employment Discrimination Law and the Impact of Council Directives 2000/43/EC and 2000/78/EC*, 19 THE INTERNATIONAL JOURNAL OF COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS 187 (2003); Jobst-Hubertus Bauer, *Berliner Etikettenschwindel: der neue Gesetzentwurf zur Umsetzung der Europäischen Antidiskriminierungsrichtlinien*, DER BETRIEBS-BERATER 61, Heft 20, I (2006), Jobst-Hubertus Bauer/Gregor Thüsing/Achim Schunder, *Das Allgemeine Gleichbehandlungsgesetz – Alter Wein in neuen Schläuchen?* in: NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 774 (2006).