



Testing for Discrimination:

Identifying and Prosecuting Human Rights Abuses

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Edited by Liam Mahony

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Disclaimer

The views expressed in this report do not necessarily reflect those of the New Tactics in Human Rights Project or its funders. The project does not advocate specific tactics or policies.

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Dear Friend,

Welcome to the New Tactics in Human Rights Tactical Notebook Series! In each notebook a human rights practitioner describes a tactical innovation that was successful in advancing human rights. The authors are part of the broad and diverse human rights movement, including educators, librarians, health care workers, law enforcement personnel, and women's rights advocates. They have developed tactics that not only have contributed to human rights in their home countries. In addition, they have utilized tactics that when adapted can be applied in other countries and other situations to address a variety of issues.

Each notebook contains detailed information on *how* the author and his or her organization achieved what they did. We want to inspire human rights practitioners to think *tactically* to reflect on the tactics they have chosen to implement their larger strategy and to broaden the realm of tactics considered to effectively advance human rights.

In this notebook, the author demonstrates that effective tactics can be transferred and adapted to other situations and other countries. The Legal Defense Bureau for National and Ethnic Minorities (NEKI) in Hungary learned about a testing tactic from a U.S. group that had successfully proved instances of housing discrimination by sending in "testers" of different races to apply for apartments. Similar discrimination was also occurring in Hungary against the Roma population – in housing, employment, access to public spaces and public services and other areas. NEKI adapted the tactic of testing to fit into its strategy of using lawsuits to challenge human rights violations. Not only did this tactic prove to be as applicable in Hungary as in the United States, it also proved effective in situations other than housing discrimination.

The entire Tactical Notebook Series will be available online at www.newtactics.org. Additional notebooks will continue to be added over time. On our web site you will also find other tools, including a searchable database of tactics, a discussion forum for human rights practitioners, and information about our workshops and symposium. To subscribe to the New Tactics e-newsletter, please send an e-mail to newtactics@cvt.org.

The New Tactics in Human Rights Project is an international initiative led by a diverse group of organizations and practitioners from around the world. The project is coordinated by the Center for Victims of Torture (CVT) and grew out of our experience as a creator of new tactics and a treatment center that also advocates for the protection of human rights from a unique position—one of healing and reclaiming civic leadership.

We hope that you will find these notebooks informational and thought provoking.

Sincerely,

A handwritten signature in cursive script that reads "Kate Kelsch".

Kate Kelsch
New Tactics Project Manager

Bea Bodrogi

Bea Bodrogi has been working as a lawyer dealing with human rights cases for six years. She received her LLM from the London School of Economics, where she focused on the international protection of human rights, legal regulation of discrimination and alternative dispute resolution. Bea is working as an advocate for the Legal Defence Bureau for National and Ethnic Minorities (NEKI), conducting cases on ethnic discrimination engaging in fact-finding missions and writing human rights reports (White Booklets 1996-2002). She has also worked on cases submitted to the European Court of Human Rights, and teaches and publishes widely on discrimination issues. Besides working for NEKI, Bea gives lectures on alternative dispute resolution to lawyers in the Faculty of Law in Debrecen. She is also involved in the work of the Helsinki Committee and the Hatter Support Society for Gays and Lesbians in Hungary.

Legal Defence Bureau for National and Ethnic Minorities (NEKI)

NEKI aims to protect national and ethnic minorities living in Hungary. The organization provides legal assistance in cases of discrimination based on the ethnic or national origin of the victim, or in cases of significance to the implementation of the rule of law. NEKI's annual report, called the "White Booklet," describes some of its most significant cases.

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Editor's Preface

This tactical notebook focuses on the successful transplanting to Hungary of "testing," a tactic developed in the anti-discrimination movement in the United States. In testing, an advocacy organization that has received a complaint of an incident of discrimination, immediately sends out "testers" to replicate the incident. If a person, for instance, is denied a job based on their identity, "testers" are sent out immediately to apply for the same job and document their treatment. This documentation will be legitimate evidence of the systematic nature of the discrimination.

Organizations struggling for fair housing in the United States developed this tactic to confront discriminatory home-selling, lending and renting practices. The Legal Defense Bureau for National and Ethnic Minorities in Budapest has adapted it to defend the rights of Roma people, who are systematically denied everything from jobs to access to restaurants, clubs or other public places.

Wherever there is discrimination against minorities whether in housing, employment or public access, advocates often face a difficult challenge proving it in court. A single event can be explained away as a "mistake," or "individual error," and is frequently justified by the creation of numerous other context-specific "reasons" for the action. Advocates confronting this often must prove not only that a discriminatory act occurred, but that the motive behind the action was discriminatory, and that the discrimination is of a systematic nature. Testing is a tactic that fulfills this need, facilitating litigation even in legal settings that do not encourage anti-discrimination cases.

This notebook not only shows the utility of this tactic, but also demonstrates by example how tactics can be adapted from very different circumstances and used effectively in the struggle for human rights elsewhere in the world.

– Liam Mahony, notebook series editor

Introduction

The Legal Defence Bureau for National and Ethnic Minorities (NEKI) was founded in 1994 in response to problems caused by longstanding prejudices against the Roma, the largest ethnic minority in Hungary. NEKI seeks to document the experience of discrimination and demonstrate the absence of legal protection for the Roma. The organization has been involved with cases including police brutality, skinhead attacks, and the denial of employment, housing and service in public accommodation. Since discrimination is often subtle, direct evidence is rare. Adapting a method used by U.S. organisations, NEKI uses testing to collect evidence with which to challenge discrimination in court. After an incident of discrimination is reported to NEKI by a Roma victim, testers – both Roma and non-Roma – are sent to repeat the experience in order to document whether the incident represents a case of systematic discrimination, and to collect evidence for a possible court case.

Testing is thus an evidence-gathering tactic that can fit directly into the legal strategy of an

organization like NEKI, one confronting the impunity and public apathy about the prevalent problem of racism and discrimination.

The process is quite straightforward: Once NEKI receives a complaint, testers are sent to the place of the alleged discrimination. If the allegation concerns employment, for instance, testing is done by sending out a Roma and a non-Roma person who have similar characteristics and qualifications but differ primarily in their ethnicity. They are sent out at closely spaced intervals on the same day to apply for a job. To make the comparison clear, each tester is asked to take actions comparable to those of his fellow testers. Immediately after completing the test they record their experiences on a questionnaire detailing all the questions asked at the interview, treatment of the applicant, and the description of the job, including salaries and benefits. The test coordinator can then evaluate from this data whether differential treatment has taken place and decide if legal action can be initiated on the grounds of discrimination.

Grafting the Tool From U.S. Anti-discrimination Experience

In 1997 a NEKI colleague spent a year in the United States studying and gathering practical experience in human rights. During this period he worked in Washington D.C. at the Fair Housing Council¹, which uses testing to collect evidence of housing discrimination. The council tests the practices of real estate agencies and landlords who refuse to rent flats or sell houses to African Americans and other minorities. Our colleague returned with a great deal of material describing this process. Our challenge was to adapt it to our situation.

We quickly realized that this was exactly what we were looking for and began constructing our own testing process adapted to the needs in Hungary. The situation of the Roma is very different from that of minorities in the United States. In Hungary, for instance, it would not be as useful to collect evidence of housing discrimination because Roma live under such poor conditions that they are seldom in a position to rent much less buy houses or flats. We could, however, apply testing in cases of discrimination in labor affairs and in public services. Since no law prohibits the use of testing, we could see no obstacles in trying to apply it.

¹ The Fair Housing Council of Greater Washington: 1212 New York Avenue, N.W., Suite 500, Washington, D.C. 20005

The Situation of Roma Living in Hungary

NEKI receives more than 100 complaints a year, most of them concerning Roma people who face discrimination in all spheres of their everyday life. As the most vulnerable minority and social group of the country, Roma are overrepresented in all societal groups in need of protection: the poor, the long-term unemployed, the unskilled, the uneducated, members of large families. In most regions of the country, they still live on the outskirts of town, some in settlements segregated from the majority non-Roma population. With few exceptions, Roma people have suffered setbacks from the social and economic changes of the past ten years. During transitions, they are always the first to be fired, and due to their lack of education they seldom have access to new jobs. In the countryside the unemployment rate among Roma is almost 100 percent. Only in big cities can one find some employed Roma, and these are usually employed illegally.

Since the early 1990s, Roma communities have often been targets of hate crimes. Skinhead attacks against Roma were, at times, reported every week. The forms of prejudice against this minority group have, however, changed since this period. Instead of open attacks, hidden forms of discrimination are now widespread.

An employer would never say that he does not employ Roma; he would say instead that there are no more vacancies. A bartender would not admit that he is refusing to provide service on the ground of ethnic origin; he would argue instead that there is a full house.

Because of this subtlety, and due to the inadequate legal regulation of discrimination, lawyers litigating human rights cases face great difficulty gathering evidence and proving discrimination. In addition, Hungarian law concerning cases of discrimination is very weak. According to a recent European Union Directive concerning race discrimination, for example, if it may be presumed that there has been direct or indirect discrimination, the defendant must prove that there has been no breach of the principle of equal treatment. But Hungary does not comply with this requirement despite the criticisms of several human rights reports. Thus, when litigating discrimination cases, we must choose the classic method of putting forward evidence, i.e. an applicant must prove that they suffered discrimination. This is not always easy to prove, and each complainant's case will of course be stronger if the lawyer has a variety of types of evidence to demonstrate the discrimination. The use of testing provides us with one additional tactic to collect evidence for such cases, evidence that has been crucial to our success in winning discrimination cases.

The Testing Tactic

To implement the testing tactic a number of steps must be taken:

- Recruiting and selecting the testers
- Training the testers
- Carrying out the testing
- Evaluating the results of the testing to decide whether or not they show discrimination and whether the organization will take the case
- Using the evidence in court

Each of these steps will be described in greater detail.

Recruiting and Selecting Testers

Recruitment

When we decided to apply the method in Hungary, our first task was to gather potential testers. We needed a list of testers from whom the test coordinator could choose adequate pairs, namely a Roma and a non-Roma tester for each concrete case. Sometimes we use two pairs of testers to follow up on a single incident (see the Lajos Balogh example below). Each time we used testers, we needed to be able to choose comparable persons with similar

characteristics and qualifications. We needed a good pool from which to draw.

To find potential testers we relied primarily on our pre-existing network – students, personal contacts, journalists and researchers. Students proved to have flexible schedules and were generally open to new ideas. Some journalists, however, were “too excited” and eagerly wanted results that could be immediately reported in the newspapers. Although reporting results is an important part of the testing procedure, the right timing for such publicity has to be carefully chosen according to the needs of the case rather than journalistic criteria. In most human rights cases, we prefer to wait for the legal procedure to begin before launching any publicity because most evidence is gathered by this time and there is less risk of any false accusation.

Relying on our personal contacts has raised some problems. In a recent case, a friend of the NEKI test co-coordinator was the least reliable tester. The co-coordinator organized the testing of a bar in Budapest where Roma are not allowed to enter. A few minutes before the testing started the “friend” tester cancelled, saying that something came up and that he could not appear. The testing had to be cancelled and seven people had to be sent home. The test co-coordinator supposed that her friend thought that he could “allow” himself to cancel the testing at the last minute even for unacceptable reasons. In addition, “friend” testers give testimonies in court, defendants might argue that such testimony is biased and should not be taken into account. This problem has not yet come up in any court cases, but it is better not to provide any reason for objections.

We have not yet needed to develop any methodical recruitment procedures as we have informally been able to find enough testers when we needed them. Our recent public presentations about NEKI’s work and the testing tactic have become recruitment opportunities, with people approaching us and volunteering to help. We have decided not to recruit testers through job advertisements, as is done in the United States; the Roma issue is so heated in Hungary that there would be a high risk that provocateurs would apply.

Selection Criteria

The role of the tester is crucial, and the following requirements must be met by participating individuals.

- **No criminal record:** First and foremost, the testers’ backgrounds must be clean. Testers might be asked to appear before the court as witnesses, and a criminal record can reduce their credibility.
- **Objectivity:** The tester cannot have any vested interest in the results of the testing, nor any relationship with either the complainant or defendant.
- **Reliability:** Since litigation may last several years, they must be willing to stay in contact with the testing program for an extended period of time. We are able to get a subjective sense of people’s reliability during their full-day training. We also make sure to tell them up front that if we go forward with the case we will be depending on their availability to testify, even if the case takes years to get to court.
- **Preciseness:** They must be good observers, capable of noticing any relevant aspects of their treatment during the testing experience and later recalling and clearly documenting the details of the experience. This is not an easy skill to measure in advance, but after one experience of testing the coordinator can judge it.

In addition to the technical criteria, testers also need to consider whether they are emotionally prepared for this task, which may be unpleasant or even frightening. (see below: Testers’ Concerns and Experiences).

Training of the Testers

NEKI provides two stages of training for the testers. After recruiting potential testers we do a full-day training as a group. Then, when a testing situation arises in response to a complaint, we conduct a preparation session for the particular case including only those testers who will be participating.

Full-Day Orientation Training

The first training is a one-day orientation to introduce potential testers to the method. This is not only important preparation, but gives the testers a chance to decide if this is a task they feel capable of performing and allows our testing coordinator to judge if the candidates meet our selection criteria. Our first training involved 15 to 20 people and yielded our initial pool of testers. After a second training we had a pool of 30. From this pool we have maintained a solid core of six to ten testers, sufficient for our testing needs.

During this training session testers are introduced to NEKI, to our work, and to the kind of cases in which testing can be used. We present a translated version of a videotape that describes the testing method used by the Fair Housing Council in Washington.

Testers then learn the entire testing procedure on a step-by-step basis, including a careful examination of the questionnaire they will be asked to complete after each test (see Appendix 1, Sample Questionnaire). Testers also have a chance to learn about the legal procedure that can be initiated on the grounds of the testing results, and how testing can be used to enforce civil rights. We have found that the most useful part of the training has been the detailed question-and-answer session.

Testers need to clearly understand their role in both the testing and the subsequent legal procedures. If NEKI initiates legal procedures on the grounds of testing results, testers will be expected to give testimony in court. While we cannot work with testers on their testimony, we make certain that they are informed about every detail of the court procedure, including the length of the procedure and the questions they might be expected to face. In a recent case a tester announced that he did not want to go to the court more than once because he did not have time, and he did not want to meet with the defendant at the trial. It was clear that we had not provided him with enough information about the legal procedure. We persuaded him to attend the trial, but the situation was risky. We now pay more attention to preparing potential testers.

Case-specific Training for Testers

When NEKI receives a specific complaint, a second training is held for testers who will be sent to the place of alleged discrimination. This preparation is crucial as testers need to understand the specifics of the particular situation. They benefit as well from a reminder of the basic principles presented at the initial training session.

The test coordinator meets with the pairs of testers (Roma and non-Roma), introduces them to the allegation NEKI is investigating and provides them with information they need to know in advance (address of the site, telephone number, names). With the help of the coordinator, the testers read through the questionnaire and prepare for the specific task. Depending on the complaint, there are specific kinds of information we want testers to obtain. For instance, in cases when Roma are not let into a bar or restaurant, testers must find out the reason for the refusal. In several cases, the security guard openly told both the complainant and then the testers that the establishment does not allow Roma because they cause problems. Testing provides more witnesses to discrimination such as this, making it easier to demonstrate in court that discrimination took place.

The Contract

The job of the testers is laid down in a contract signed by both the tester and NEKI. In this contract, the tester agrees to the following:

- The tester will carry out the testing in the given place.
- Within 20 minutes of the testing the tester will complete the questionnaire.
- During the testing the tester will behave in a normal manner and should not express his/her opinion. When filling in the questionnaire the tester will describe the situation in detail.
- In the event that before, during or after the testing something unexpected happens, the tester will immediately contact the test coordinator.
- In case of a legal procedure, the tester will appear before the authorities and testify about his/her experiences.

- The tester will not reveal the result of the testing to third parties. Before and after the testing the tester will not give information about the testing to third parties without permission of NEKI.
- The tester must follow the instruction of the test coordinator.
- In the same contract, NEKI agrees to the following:
- NEKI will provide legal help to the tester if it is needed in relation to the testing.
- NEKI will not reveal any information to third parties about the testers without his/her permission.
- Testing fee: After the testing NEKI will pay 5,000 HUF to the tester. In case of a court procedure, NEKI will pay 5,000 HUF per day to compensate the tester for lost work time.

Testers' Concerns and Experiences

Being a tester is not easy, nor is it always gratifying. For instance, B. Berkes, one of our testers, spoke about her experience testing at a popular pub in Budapest in August 2002:

"Even if I was prepared for the rejection, the feeling I had at the entrance was more humiliating than I expected. All the time I was thinking of the situation being here with my both Roma and non-Roma friends. I do not know how I would have behaved in the 'real' situation."

It is not uncommon for testers to have very mixed feelings about the experience – especially the Roma testers. In a sense, participating in testing is choosing deliberately to walk into a situation where people will humiliate you. Roma people, and members of any minority facing discrimination, repeatedly face this humiliation and don't need more of it. Every instance of humiliation is personally damaging, even if it is entered into for a good reason. But while testers may not "like" to do it, they do report a sense of gratification when the testing is successful – when they feel NEKI has obtained the evidence it needs to advocate for the complainant.

Similar concerns arise in the testers' preparation sessions: "What if I get insulted,

harassed, assaulted? What if I hear racist comments?" NEKI staff members always emphasize that the test is not as important as the individual, and encourage testers to care for their own safety and emotional health. Testers are urged to respond passively to harassment, and to leave as soon as they feel vulnerable. They are cautioned not to get involved in a quarrel or heated discussions that might lead to violence. They are advised to use their judgment to determine the best solution in a given situation.

Another common concern arises from the eventual need for testers to testify in court. Because most people have no experience with the court, many feel intimidated by the court system, especially if they are a member of a minority that also faces unequal treatment from the legal system.

Despite these concerns, people continue to participate in the testing. They feel positive about contributing to the advocacy process, and report encouraging courtroom experiences. One tester – a law student in the final year of law school – chose to come and work with NEKI as an intern.

Carrying Out Testing

Once NEKI receives a complaint, we decide whether to initiate testing. The majority of complaints are not judged to be incidents of discrimination. For those cases that do represent valid discrimination complaints, (about 30 per year), we first collect all possible data on the situation. This fact-finding itself can sometimes have a positive impact. We may write a letter to local authorities or to the owners of an offending company, and they may be willing to make changes without further legal steps.

When we believe testing will help gather evidence for a potential litigation, the decision to test must usually be made very quickly. In a case, for instance, when someone has been denied a job, testing will only work if we can send in potential applicants while that job is still available, since it is essential that they apply for the same job under the same circumstances in order for their experience to be considered legally relevant to the experience of the original complainant. So,

once we decide to implement a test, we quickly choose testers, train them and plan the test.

Testers are then sent to the place of the alleged discrimination. They record their experiences on a questionnaire immediately after completing the test, reporting all details of their treatment. The test coordinator can then evaluate from this data whether discriminatory treatment has taken place, and decide if legal action can be initiated.

The Procedure Involved in Carrying Out Testing:

- Collect data, and decide on the utility of using testing on the specific case

- Choose the pair of testers (Roma and non-Roma)
- Conduct the case-specific training with these testers
- Sign the contract with the testers
- Send out the testers
- Have the testers return to the office and fill in the questionnaires
- Evaluate the data resulting from the tests

Example: The Lajos Balogh Case

Perhaps the best way to understand the use of testing is to walk through a specific example of its use.

Despite the fact that there has been no final judgement yet in any employment discrimination cases in Hungary, the case of Lajos Balogh is worth examining in detail. The results of the testing were unambiguous, and the case illuminates every step of the testing procedure. The case was also important because the Labour Code is the only law in Hungary with adequate anti-discrimination provisions. Since these provisions had never been invoked before this case, we found it important to play a role in interpreting and applying them.

The Complaint

Lajos Balogh interrupted his college education because of financial hardships and searched for employment. In February 1999, after reading a job advertisement in a newspaper, he applied for a job via telephone. The T. Company was looking for people to disseminate leaflets. The operator told the applicant that there were vacancies and invited him in for a personal interview. Once in the office, he was asked to

fill out a form detailing his personal information. In response to their query, he said he had performed similar work before. He was asked no further questions and told to call back two days later. Mr. Balogh went to the office in person, and alleges that he saw his application form with the word "gypsy" written across it in block letters. He was told nothing concrete, but simply instructed to call back again in another two days. He was repeatedly asked to call back, but in the end was told there were no more vacancies.

Mr. Balogh approached NEKI immediately, alleging that he had not been hired for the job because of his Roma origin and that his allegation was supported by the writing on the form. The form was not returned to him, but was thrown away in his presence. To prove this typical case of discrimination we decided to test the process of recruitment.

The Testing Steps

Preparing the testers

The test coordinator chose two pairs of testers with characteristics similar to those of the original Roma complainant. All were students and in need of income. Before sending them out, the coordinator invited them to the office and provided them with the information needed to carry out the testing. The testers were told the original complainant's story, and

given precise instructions with the help of the questionnaire, which they would complete after the testing. They were also informed about the possibility of a court hearing, and told that they might be invited to give testimonies concerning their experiences.

We have a general questionnaire applicable to a variety of cases, and amend it for each specific case. It is important for testers to know in advance what details they need to pay attention to, what kind of questions might come up at the interview and especially the questions we are particularly interested in obtaining answers to.

The testers' experience

The first two testers applied for the job on April 29, 1999, closely repeating the behavior of the initial complainant. The Roma tester called in to the firm followed by the non-Roma tester half an hour later. Then they went to inquire in person. Both filled in the application form and were told to call back later. The other pair of testers applied several days later. All four applicants called the company and discovered that the two non-Roma testers had been recruited whereas the two Roma testers had not.

The recruited testers signed the contract and were given leaflets to distribute. To further ascertain the discrimination, we asked the testers not to carry out the job but to return the leaflets saying that the work was too troublesome. That day we sent in another Roma tester, knowing that there was certainly work to be done. He also filled in the form and he too was later turned down by the company by telephone. The firm had by this point

refused to hire four Roma for a job that required neither professional skills nor a high level of education.

Evaluating the questionnaires and follow-up

The testers returned after each test and filled out the questionnaire, detailing their experiences. In every case, NEKI must analyze this information and decide whether it offers clear evidence of discrimination. If we cannot find enough evidence we must inform the complainant that we cannot proceed with a case. But if the results of the testing do demonstrate discrimination, we can initiate legal action.

In the *Lalos Balogh* case, testing results were quite consistent and provided useful evidence. On behalf of the original complainant, NEKI filed a lawsuit against the company, invoking Section 5 of the Labour Code. The plaintiff is the original complainant whose basic human rights have been violated, and the five testers can testify about the discriminatory practices of the company's recruitment process. On the surface, the case does not seem very complicated. There is strong evidence that could prove discrimination, testers are ready to give objective testimonies concerning their experiences, and a well-known human rights lawyer represents the plaintiff whereas the company is without legal representation. Nevertheless, it took three years for the court simply to determine whether the case falls under its jurisdiction. The trial on the merits of the case has not even begun. The final judgement is thus still very far away, so we cannot predict either the outcome of the procedure or the reaction of the judge to the results of the testing.

Results

To date, NEKI has sent testers out 15 times. In three cases it was not possible to complete the test, for a variety of reasons. Of the 12 completed tests, five did not produce evidence of systematic discrimination. The remaining seven tests were convincing demonstrations of discrimination sufficient to justify litigation. Of these seven, NEKI has initiated six anti-

discrimination suits. Three of these suits are still pending.

Of the three completed cases using testing, we won two and lost one. Testers appeared in court each time, and their evidence was accepted by the judge without dispute or questioning. In the two successful litigations, the judge accepted the testing data as proof of discrimination. NEKI believes that the data was a crucial element in these victories. In the third

case, the judge concluded that the testing evidence, though not invalid, did not sufficiently prove that the complainant had experienced discrimination.

NEKI is the only law firm in Hungary using this tactic. Other human rights lawyers have, however, referred cases to NEKI when they felt that testing would be essential in the gathering of evidence.

Using Testing for Out-of-Court Negotiation

In one case where testing demonstrated discrimination, NEKI did not initiate legal proceedings. Instead, we approached the defendant about negotiating a much quicker out-of-court settlement. We described both the complainant's case and the testing data to the defendant, whose lawyer recognized the strength of our case. NEKI had already won court cases using testing evidence. The defendant wanted to avoid the court, and NEKI and the complainant were interested in a

speedier solution. The parties were able to negotiate an agreement in less than three months. In the final settlement the defendant publicly apologized, fired the abusive employees and paid compensation to the victims – a compensation five times higher than any won in similar cases in court.

In a more recent case, complainants alleged discrimination in access to a very well-known club in Budapest. Because the incident involved a number of witnesses, testing was not necessary. NEKI approached the owner to propose a negotiation. Although the owner expressed some openness to this, he wanted to debate the merits of the case. NEKI, however, will not negotiate on the facts of the case – on whether discrimination took place – but only on the settlement. So in this case, negotiation was ended and the case will be taken to court.

NEKI expects that testing may prove more and more useful in cases that will be possible to negotiate without litigation.

Applying the Tactic for Legal Cases: Important Issues to Consider

According to our experiences, without the help of an organization with time, resources and legal skills it would be impossible to litigate discrimination cases in Hungary. This is a clear sign that Hungarian discrimination law is not effective and does not serve the interest of the victims of human rights violations. If you face a similar situation in your country, where discrimination is prevalent and victims and their lawyers have a difficult time proving it in court, you might consider augmenting your efforts with the testing tactic described here. We hope that the description of our efforts will give you some clear ideas of steps to take and pitfalls to miss, especially in terms of the selection, training and use of testers. We also suggest that you consider some additional questions and lessons that we have derived from our experience.

Discrimination laws: The use of testing for legal purposes will of course have to conform to the specifics of national laws on discrimination. To the extent that a state also recognizes the jurisdiction of international law, this can also be a basis for legal action on discrimination. Whatever the legal framework, a case attempting to prove discrimination usually needs evidence showing that an incident was not a single episode, but rather an example of systematic discriminatory behavior. The testing method can be a powerful method of generating such evidence.

Resources: The testing method NEKI has developed to provide evidence of discrimination is costly in both time and money. It demands an organizational setting with a well-equipped office, a well-trained testing coordinator and trained testers. In order to use the results of testing in litigation, these investments must be further backed up by professional lawyers who are willing to take discrimination cases through the court system.

Who is to be the plaintiff?: In a case where testing reveals discrimination, both the original complainant and the testers will have suffered a violation. Although testers might also go through humiliating treatment during testing, their intention is different from that of the initial applicant. In employment discrimination cases, testers are not in need of the job, and they are employed by NEKI only to test the practice of the recruitment. Consequently, there is no legal ground to involve them in the procedure as plaintiffs. NEKI thus initiates legal procedures only on behalf of the original complainant, and uses the testimonies of the testers when putting forward evidence.

The situation in public accommodation cases is different. In a few instances NEKI has litigated cases on behalf of both the original complainant and the testers. The intention of the testers here does not differ greatly from that of the original complainant, and testers are telling the truth about simply wanting to enter a public place. In a recent case, the Roma testers asked NEKI to “use” them as plaintiffs because they felt humiliated when they wanted to enter the place and were openly

refused because of their Roma origin. This civil suit is under preparation and the reaction of the court to the legal position of the testers cannot yet be judged.

Types of cases: We have had positive experiences using the tool to confront discrimination in employment, housing and public accommodation. The court’s acceptance of testimonies from testers can be interpreted to mean that testing itself is now considered a legally acceptable method of demonstrating discrimination.

Classes of victims: NEKI deals with race discrimination cases that primarily concern Roma people living in Hungary. There is also much discrimination on other grounds, such as sex, age, race, language, religion and political opinion. Legal protection is needed in all such cases. If the testing method works in cases of race discrimination, it should also work in these other types of cases. Within Hungary, as testing results and the subsequent court procedures are reported in the media, it is likely that other human rights organizations will try out the method in their own cases.

Using the Testing Tactic in Other Ways

Testing may also be a useful tactic for gathering evidence for lobbying or public education. Hungary, for instance, is considering new anti-discrimination legislation, and allows NGOs to officially comment as part of this process. NEKI’s comments included the argument that the necessity of testing is itself a demonstration of the weakness of current anti-discrimination laws. NEKI produces an annual public report outlining its work, cases and the results of its testing experiences. For some cases, usually in the later stages of litigation, NEKI also reports testing evidence to the media. This publicity contributes to public education about the need to eliminate discrimination.

We have learned a great deal through our experiences with testing. We are certain that there are many more places in Hungary where discriminatory practices are taking place. And yet, compared to the extent of the real problem, only a few people seek help from NEKI. While NEKI uses testing when it receives a complaint alleging discrimination, it is surely a tactic that could also be used for other purposes:

- Testing could be used proactively to demonstrate and publicize discriminatory practices in an industry or company. A broader application of the tactic, for instance, might involve carrying out testing without an original complaint in order to identify whether an industry systematically discriminates against people on the basis of nationality, race, gender, or disability (such as HIV/AIDS). The result of these

tests might then be used to lobby for changes in practices either through subsequent litigation or public education.

- Testing could also be used to expose racist attitudes in particular branches of government. A Russian colleague, for example, suggested that in his hometown they might have people from the Caucasus apply to the police academy to test hiring practices.
- Testing could also be carried out in a larger form to validate the existence of

discrimination in an area and pressure organizations not to use such practices. A series of tests might be run to see if people of different races are treated differently in situations where harassment or discrimination occur frequently, such as walking or driving in certain places. The tactic would have to be adapted to the situation, with testing perhaps extended over several weeks.

Conclusion

The situation in Hungary is not unique. Discrimination takes many forms, and is prevalent in most societies in the world. It is such a widespread problem, in fact, that many countries – perhaps most – have some legal framework for confronting this abuse of rights, which is not tolerated under international human rights law. The testing method takes advantage of such legal frameworks, but also recognizes that national anti-discrimination laws are nearly always insufficiently designed to protect the victim (in fact sometimes law implicitly protects the perpetrators of abuse by making litigation difficult). Where laws exist

they frequently are not enforced, and often the burden of proof is a nearly impossible challenge to meet.

We believe that the testing tool can bring us one small but important step closer to meeting that challenge. With expanded use, it will promote and encourage more litigation against discrimination. This litigation, and the public educational value of the testing results in and of themselves, will contribute to raising public consciousness against discrimination – eventually bringing us closer to a culture of respect for human rights. The testing tool has helped us in Hungary. We hope you will find it useful in your own work.

Notes

Notes

**For a full list of publications available in the Tactical Notebook Series,
go to www.newtactics.org.**

Online you will also find a searchable database of tactics and forums for discussion with other human rights practitioners.



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