

tools chambers

Non-discrimination on the grounds of race, religion,
disability, age and sexual orientation

presented by

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Council Directives

- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin – the Race Discrimination Directive
- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation – the Equal Treatment Framework Directive

Directive on Race - why?

- Preamble (3) The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all forms of Racial Discrimination and the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories. (see also (4) of Preamble to Framework Directive)
- (9) Discrimination based on racial or ethnic origin may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and of social protection, the raising of the standard of living and quality of life, economic and social cohesion and solidarity. It may also undermine the objective of developing the European Union as an area of freedom, security and justice. (see (11) to Framework Directive)
- (12) To ensure the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin, specific action in the field of discrimination based on racial or ethnic origin should go beyond access to employed and self-employed activities and cover areas such as education, social protection including social security and healthcare, social advantages and access to and supply of goods and services (see (28)).

Directive on Race - purpose?

- Preamble - (13) To this end, any direct or indirect discrimination based on racial or ethnic origin prohibited.
- Applicable to nationals of third countries, but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and to occupation.
- (14) aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination

Directive on Race - how?

- Preamble (15) - appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for the national judicial or other competent bodies (incl statistical evidence).
- (19) Persons who have been subject to discrimination should have adequate means of legal protection.
- Associations or legal entities should also be empowered to engage in proceedings.
- (20) The effective implementation of the principle of equality requires adequate judicial protection against victimisation.
- (21) The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought.

Directive on Race - how?

- (22) No need to apply the rules on the burden of proof when it is for the court to investigate the facts of the case.
- (24) Protection against discrimination strengthened by the existence of a body with competence to analyse the problems involved, to study possible solutions and to provide concrete assistance for the victims.
- (25) Minimum requirements. (see also Article 6)
- (26) Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive.

Directive on Race - when justified?

- (18) In very limited circumstances - justified where
 - genuine and determining occupational requirement
 - objective is legitimate
 - requirement is proportionate.

- (17) Positive action – prohibition without prejudice to the maintenance or adoption of measures to prevent or compensate for disadvantages

- such measures may permit organisations of persons of a particular racial or ethnic origin where their main object is the promotion of the special needs of those persons.

- See also Articles 4 and 5

Directive on Race - purpose and definition

Article 1 – Purpose

- The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2 – definition

- 1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.

Directive on Race - key concepts

Article 2

For the purposes of paragraph 1:

(a) Direct discrimination

“one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin”

(b) indirect discrimination

“an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”

Directive on Race - key concepts

Article 2 - Harassment

3. Harassment

“unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.”

4. An instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination.

Article 9 -Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.

Directive on Race - scope

- Article 3 - Scope
- 1. Public and private sectors, including public bodies, in relation to:
- (a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- (c) employment and working conditions, including dismissals and pay;
- (d) membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations;
- (e) social protection, including social security and healthcare;
- (f) social advantages;
- (g) education;
- (h) access to and supply of goods and services which are available to the public, including housing.

Directive on Race - burden of proof

Article 8 - Burden of proof

- 1. ...facts from which it may be presumed that there has been direct or indirect discrimination, ...for the respondent to prove that there has been no breach of the principle of equal treatment.
- 2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

Key issues which arise

- What is covered in terms of “treatment” complained of?
- Who is the hypothetical or actual comparator? How do you define the comparator?
- Is intention or motive relevant?
- Absence of specific racial remarks?
- How has the complainant responded? What if the complainant has not raised any grievance until proceedings are brought?
- What about time limits and delay?

Remedies and enforcement

Article 7 – Remedies and enforcement

- 1. judicial and/or administrative procedures, including conciliation procedures, ...even after the relationship in which the discrimination is alleged to have occurred has ended.
- 2. associations, organisations or other legal entities, with a legitimate interest may engage in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.
- 3. Paragraphs 1 and 2 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment.

Remedies and sanction

Article 15 - Sanctions

- Sanctions - incl payment of compensation to the victim, must be
 - effective, proportionate and dissuasive
 - (eg declarations, compensation, recommendations)
 - Financial loss
 - Non pecuniary loss – injury to feelings
 - Aggravated damages

Practical guidance and evidence

- Acting on behalf of the employer
- Acting on behalf of the employee
- As the Tribunal

Examples

- - questionnaires
- - statistics of workforce
- - past complaints
- - Equal Opportunity policies
- - monitoring/ adherence/ review of EO policies
- - statutory or recommended best practice/ guidance issued by EO bodies
- - extent of absence of any explanation for conduct complained of?
- - degree of treatment complained of?

Directive 2000/78

- Preamble

- (11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.
- (12) To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community. This prohibition of discrimination should also apply to nationals of third countries but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and occupation.

Exclusions and adjustments

(14) This Directive shall be without prejudice to national provisions laying down retirement ages.

(16) The provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability.

(17) This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.

Exclusions

- (18) the armed forces and the police, prison or emergency services to recruit or maintain those without capacity ...with regard to the legitimate objective of preserving the operational capacity of those services.
- (19)to safeguard the combat effectiveness of their armed forces, they may choose not to apply the provisions of this Directive concerning disability and age to all or part of their armed forces....
- (22) ...without prejudice to national laws on marital status and the benefits dependent thereon.
- (23) In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational
- when the objective is legitimate and
 - the requirement is proportionate.

Exclusions, Justification and Positive action

(24) churches and non-confessional organisations, religious associations or communities and status of philosophical and non-confessional organisations.

(25) ... differences in treatment in connection with age may be justified under certain circumstances.. by legitimate employment policy, labour market and vocational training objectives

(26) ...without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular religion or belief, disability, age or sexual orientation, and such measures may permit organisations of persons of a particular religion or belief, disability, age or sexual orientation where their main object is the promotion of the special needs of those persons.

And see (27) and Article 7

Burden of proof

- (31) The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought.
- However, it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation.
- Article 10 - Burden of proof - “facts from which it may be presumed that there has been direct or indirect discrimination, ... for the respondent to prove that there has been no breach of the principle of equal treatment.”

Key concepts

Article 1 – a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation

Article 2 - Concept of discrimination

Direct

Indirect discrimination unless

(i) justified

(ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

Article 3 - Harassment

Article 11 - Victimisation

Reasonable accommodation and adjustment

Article 5

Reasonable accommodation for disabled persons

- In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

See Preamble (20) Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.

(21) To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.

Justification in age

Article 6

Justification of differences of treatment on grounds of age

- 1. if objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

- Such differences of treatment may include, among others:
- (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
- (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
- (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

Definitions

- So when will a person qualify as “disabled”?
- When will the duty to make reasonable adjustments be triggered?
- What is the definition of religion or belief?
- How is sexual orientation defined?
- When will a person be discriminated on grounds of age?

Key issues

- How to define the comparator?
- Hypothetical or actual?
- What about perceived discrimination?
- And discrimination by association? See *Coleman v Attridge* (C-303-06)

Guidance and evidence

- - grievance/ complaint/ internal process
- - Human resources? Manager/ Head of Department
- - questionnaires
- - statistics of workforce
- - past complaints
- - Equal Opportunity policies
- - contract of employment
- - monitoring/ adherence/ review of EO policies
- - statutory or recommended best practice/ guidance issued by EO bodies
- - absence of any explanation for conduct complained of?
- - Personnel files
- - witnesses?

Remedies

- Declaration
- Compensation – financial loss, injury to feelings, aggravated damages? how to assess
- Recommendations – eg future adjustments

- Mediation?
- Conciliation?

- Return to work?
- Training for employers?
- Monitoring and review of policies and structures in place.

Last word

- Remember:
- - Treatment can be unfair/ unreasonable/ harsh- not discriminatory if can't show a difference
- - Discrimination may arise without explicit references - need to analyse and see what inferences to draw
- - Intention – motive may feature but is not a requirement and may be “best intentions” or not conscious
- - A woman can discriminate against a woman – perpetrator can have same protected characteristic
- - Time limits can be used both ways – undermining genuine concern about treatment or in the nature of discrimination unlikely to be raised until/unless all other explanations ruled out

And finally

Remember :

We are all different – which should be celebrated - but before the law there must be equality of treatment.

THANK YOU FOR LISTENING