

State of Play

EU anti-discrimination law

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ERA Trier 30 November 2009

State of Play on the Race and Employment Directives

(1) Progress on the Implementation of the Directives

(2) Implications of Recent Case law on the Directives

(3) Impact of the Lisbon Treaty

Implementation of the Race and Employment Directives

- Article 13 of the EC Treaty provided power to introduce anti-discrimination measures: 1 May 2009 (now Article 19 Lisbon Treaty)
- Race Directive 2000/43/EC and Employment Directive 2000/78/EC proposed by European Commission: November 1999
- Race Directive came into force 29 June 2000 and the Employment Directive came into force 27 November 2000

Implementation of the Race and Employment Directives

- **Race Directive** provides for protection from discrimination on grounds of racial and ethnic origin in fields of employment, occupational or vocational training, education, social protection (including social security and health care), social advantages, and access to goods and services (including housing)
- **Employment Directive** provides for protection from discrimination on grounds of religion or belief, sexual orientation, disability and age in employment, occupational or vocational training

Implementation of the Race and Employment Directives

- **Race Directive:** transposition into national law by 19 July 2003 (EU 15), 1 May 2004 (EU 10) and 1 January 2007 (Bulgaria and Romania)

- **Employment Directive:** transposition into national law by 2 December 2003 (EU 15), 1 May 2004 (EU 10) and 1 January 2007 (Bulgaria and Romania)

Implementation of the Race and Employment Directives

Transposition

- **Race Directive:** ECJ found a failure to transpose the Directive in relation to Finland (C-327/04), Luxembourg (C-320/04), Germany (C-329/04) and Austria (C-335/04) in 2005
- **Employment Directive:** European Commission initiated action against Finland, Luxembourg, Germany and Austria for failure to transpose the Directive and the ECJ found infringements in relation to Luxembourg (C-70/05) in October 2005 and Germany (C-43/05) in February 2006

Implementation of the Race and Employment Directives

Failure to fully Implement the Directives

- **Race Directive:** as at June 2007 the European Commission had sent to 14 Member States reasoned opinions that they have not implemented the Directive correctly
- **Employment Directive:** as at January 2008 the European Commission had sent to 11 Member States reasoned opinions that they have not implemented the Directive correctly

Implications of Recent Case Law

Race Directive

Feryn C-54/07 10 July 2008

Facts:

The Belgium National Equality Body brought proceedings against the company Feryn claiming that it operated a racially discriminatory recruitment policy.

The company specialised in the sale and installation of sliding doors and the director of Feryn made public statements that it would not employ immigrant fitters.

There was no evidence of an identifiable complainant.

Implications of Recent Case Law

Race Directive

Feryn C-54/07 10 July 2008

Issues before the ECJ:

(1) Direct race discrimination

Whether there needs to be an identifiable victim in order to establish direct race discrimination in recruitment policies?

- No, court looked at the intention of the Directive to “foster conditions for a socially inclusive labour market” (Recital 8)
- Would be difficult to achieve this objective if an identifiable victim required
- Nothing in Directive to prevent Member States giving National Equality Bodies (or others) power to bring discrimination proceedings

Implications of Recent Case Law

Race Directive

Feryn C-54/07 10 July 2008

Issues before the ECJ:

(2) Burden of proof

Whether public statements of a discriminatory recruitment policy are sufficient to establish a presumption of direct race discrimination?

Yes, the burden of proof will then shift to the employer to adduce evidence that the actual recruitment practice was not racially discriminatory

Implications of Recent Case Law

Race Directive

Feryn C-54/07 10 July 2008

Issues before the ECJ:

(3) Sanctions

Must sanctions for discrimination be effective, proportionate and dissuasive even where there is no identifiable victim?

Yes, and the following sanctions may be appropriate depending on national laws: publicity of the finding of discrimination; an injunction to prohibit further discriminatory conduct; a fine and damages to the body bringing the proceedings.

Implications of Recent Case Law

Employment Directive

Chacon Navas C-13/05 11 July 2006

Facts

Navas worked in catering company and was certified unable to work on grounds of sickness and did not work for 8 months.

She was then dismissed without reasons and brought a claim of unlawful disability discrimination.

The referring national court provided no information about the nature of Ms Navas's illness

Implications of Recent Case Law

Employment Directive

Chacon Navas C-13/05 11 July 2006

Meaning of disability

Does the prohibition of discrimination on grounds of disability include a worker who has been dismissed solely because she was sick?

The European Commission submitted that the question was inadmissible for lack of precision – no evidence of the nature and possible course of the sickness.

ECJ believed it had enough information and that the reference was admissible.

Implications of Recent Case Law

Employment Directive

Chacon Navas C-13/05 11 July 2006

Meaning of disability

Concept of disability must be given an “autonomous and uniform interpretation”

It refers to “*a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.*”

The limitation must be probable to “*last for a long time*”

Implications of Recent Case Law

Employment Directive

Chacon Navas C-13/05 11 July 2006

Meaning of disability

The terms disability and sickness are not the same.

As a result a person dismissed for reasons of sickness does not have protection on grounds of having a disability

Decision criticised for using a medical rather than a social model of the notion of disability

Implications of Recent Case Law

Employment Directive

Chacon Navas C-13/05 11 July 2006

Meaning of disability

Definition under Convention on Rights of Disabled Persons (Art 1):
“include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”

Model focuses on:

- the barriers created by attitudes, policies and the physical environment rather than the impairment;
- changes required to society rather than the person.

Implications of Recent Case Law

Employment Directive

Chacon Navas C-13/05 11 July 2006

Meaning of disability

Need for ECJ to develop a more progressive position on the meaning of disability consistent with the CRPD and signing of CRPD by the EU

Possible Adoption of CRPD definition in Proposed GFS Directive

Implications of Recent Case Law

Employment Directive

Coleman v Attridge Law C-303/06

Discrimination by Association

Ms Coleman was a legal secretary in a law firm from 2001. In 2002 she gave birth to her son who is disabled. Ms Coleman is his primary carer.

She accepted voluntary redundancy in 2005 and brought a claim of disability discrimination and harassment on grounds of disability.

This alleged discriminatory acts by her former employers by reason of her association with her disabled son.

Implications of Recent Case Law

Employment Directive

Coleman v Attridge Law C-303/06

Discrimination by Association

Does the protection from direct discrimination and harassment under the Employment Directive extend to situations where the person claiming discrimination is not themselves disabled, but is associated with a disabled person?

Implications of Recent Case Law

Employment Directive

Coleman v Attridge Law C-303/06

Discrimination by Association

Opinion of the Advocate General

Aim of Article 13 and the Directive is to protect the “*dignity and autonomy of the persons belonging to those suspect classifications*”

Human dignity and autonomy of a disabled person can be affected where those associated with them (such as family and friends) are discriminated against

Implications of Recent Case Law

Employment Directive

Coleman v Attridge Law C-303/06 17 July 2008

Discrimination by Association

Grand Chamber

Distinguished between direct discrimination and harassment provisions which use term “on grounds of” disability and indirect discrimination provision which refers to provisions that would put “persons with a particular disability” at a disadvantage.

No inconsistency between direct discrimination and harassment provisions and those aimed specifically at disabled persons (eg reasonable adjustments and positive action)

Implications of Recent Case Law

Employment Directive

Coleman v Attridge Law C-303/06

Discrimination by Association

Grand Chamber

Implications for all other grounds under the Employment and Race Directive

Implications for discrimination by perception or assumption and even where person known not to have the characteristic

English v Sanderson Blinds [2008] EWCA Civ 1421

Implications of Recent Case Law

Employment Directive

Maruko C-267/06 1 April 2008

Discrimination on grounds of sexual orientation

In 2001 Mr Maruko entered into a life partnership with his partner, comparable to a marriage. In 2005 Maruko's partner died.

Maruko applied for a widower's pension but his application was rejected on grounds that the regulations did not provide for such an entitlement for surviving life partners.

Was this direct or indirect discrimination on grounds of sexual orientation?

Implications of Recent Case Law

Employment Directive

Maruko C-267/06 1 April 2008

Discrimination on grounds of sexual orientation

Opinion of Advocate General

Found indirect discrimination:

- Pension scheme applied neutral requirement (being married)
- Placed same sex couples at a particular disadvantage
- No justification provided for the difference in treatment

Implications of Recent Case Law

Maruko C-267/06 1 April 2008

Discrimination on grounds of sexual orientation

Grand Chamber

A survivor's benefit under an occupational pension scheme is "pay" within the meaning of article 141 and article 3(1)(a) of Directive

Recital 22 (Directive without prejudice to national laws on marital status and the dependent benefits) does not mean survivor's benefits outside scope of Directive

If the national court finds that surviving spouses and surviving life partners are "*in a comparable situation so far as concerns that survivor's benefit*" legislation that does not provide the same benefit is **direct** discrimination on grounds of sexual orientation.

It is for the national court to determine whether surviving partners and spouses are in comparable situations.

Implications of Recent Case Law

Employment Directive

Maruko C-267/06 1 April 2008

Discrimination on grounds of sexual orientation

Problems with decision:

No requirement to ensure that same sex couples have similar or same recognition in national laws to married couples (see recital 22 Directive)

Leaves it to national courts to determine whether situations between married and same sex couples are “comparable”. If not, no requirement of non-discrimination

Implications of Recent Case Law

Employment Directive

Maruko C-267/06 1 April 2008

Discrimination on grounds of sexual orientation

Would have been better to find indirect discrimination? Avoid focus on comparable situations and rather whether there was justification for the difference in treatment.

New case

Romer v City of Hamburg (C-147/08) 5 May 2008

Relates to denial of occupational pension payments to survivor in same sex couple

Whether that amounts to direct or indirect sexual orientation discrimination

Impact of the Lisbon Treaty

Comes into force 1 December 2009

Amends Treaty on European Union (TEU) and the Treaty establishing the European Community (TEC). The TEC will become the Treaty on the functioning of the European Union (TFEU)

Charter of Fundamental Rights

Is a Human Rights Charter that will have significant impact for those working in the field of EU discrimination and human rights.

The Charter of Fundamental Rights will have binding force (Article 6(1) of the TEU)

Impact of the Lisbon Treaty

Charter will apply to all EU institutions, legislation, policies and to Member States in implementing EU legislation.

The Charter will be directly enforceable by the ECJ and national courts will need to apply the Charter to cases involving the application of any EU law (including the Equality Directives).

Number of provisions relating to equality have human rights elements:

- the right to non-discrimination (additional grounds such as genetic features, language, political or other opinion, property): Article 22)
- The rights of the child to have views taken into account and best interests principle: (Article 24)
- Rights of the elderly and disabled to dignity and participation: Articles 25 and 26)

Impact of the Lisbon Treaty

Treaty on the Functioning of the Union (formerly TEC)

Gender mainstreaming provision retained: article 8 TFEU, formerly article 3(2)

New mainstreaming provision on other grounds

“In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”

Article 10 TFEU

Creates a positive obligation to eliminate discrimination and to mainstream equality considerations in all EU policies and activities

Impact of the Lisbon Treaty

Treaty on the Functioning of the Union (formerly TEC)

Equivalent Mainstreaming provision for GFS Draft Directive and Race and Employment Directive?

“Member States shall actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in this Directive.”

Article 29 Recast Gender Directive 2006/54/EC