

EU anti discrimination law: Definition of key concepts

Academy of Law (ERA), Trier

7 November 2016

Claire Bruton BL

Historical background:

Following on the recognition of the direct effects of Article 119,¹ the European Commission responded with the implementation of the first piece of equality legislation at a European level, the Equal Pay Directive 1973.² This Directive put the right to equal pay for men and women on a legislative footing in European law and significantly clarified the scope of the protection by Article 119³ which had only recognised in the briefest terms possible the concept of equal pay for equal work. As a Treaty article, the direct effect of Article 119⁴ was of course limited to horizontal direct effects and could only therefore give rise to enforceable rights against the State or an emanation of the State. The Directive extended the principle of Article 119⁵ to equal pay for work of equal value to private sector employment and required any job classification system used for determining pay to be based on the same criteria for men and women and to be drawn up so as to exclude any discrimination on grounds of sex.

The following year saw the implementation of the Equal Treatment Directive⁶ which extended the principle of equal pay to equal working conditions including access to employment, training and promotion and conditions governing dismissal.

The insertion of Article 13 by the Treaty of Amsterdam of 1997⁷ had huge practical significance for equality law as it conferred secondary law making powers on Article 157 TFEU (formerly Article 119/141). Article 141(3) required the Council and the Parliament to:-

¹ Now Article 157 TFEU.

² Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

³ Now Article 157 TFEU.

⁴ Now Article 157 TFEU.

⁵ Now Article 157 TFEU.

⁶ Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

⁷ Now Article 19 TFEU.

“adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation including the principle of equal pay for equal work or work of equal value”.

Thus Article 13⁸ brought the principle of equality way beyond simply outlawing discrimination to imposing obligations on Member States to proactively ensure equality of opportunity thereby ensuring a far more progressive and effective equality law framework with the potential to really challenge discrimination within the European Union.

Further powers were conferred by Article 13(1) permitting the Council to *“take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”*, albeit confining those powers within the limits of the powers conferred upon the Community.⁹

The Charter of Fundamental Rights of the European Union has been a soft source of European law for some time. Even before its entry into force in the Lisbon Treaty, the Charter had been referred to by Advocate Generals and by the Court of Justice on a number of occasions.¹⁰ Upon the implementation of the Lisbon Treaty, Article 6(1) of the Treaty of the European Union provides that the Charter of Fundamental Rights of the European Union has *“the same legal value as the Treaties”*. Rather than existing as a substantive provision on fundamental rights, Article 6 has been recognised by the Court of Justice in *Association belge des Consommateurs Test-Achats*¹¹ as a link to rights that have long existed in the EU legal order as general principles and now also exist through the Charter¹². This was in spite of the Charter not being legally binding at the time. The Charter is also expressly referred to in the preamble to the Recast Equal Treatment Directive.¹³

⁸ Now Article 19 TFEU.

⁹ Now Article 19(1) TFEU.

¹⁰ For example *Commission of the European Communities v Kingdom of the Netherlands* (C-523/04), [2007] E.C.R. I-03267 (an action concerning the failure of a State to fulfil its obligations) and *R.J. Reynolds Tobacco Holdings, Inc v Commission of the European Communities* (C-131/03), [2006] E.C.R. I-07795 (an action for annulment).

¹¹ *Association belge des Consommateurs Test-Achats ASBL and others v Conseil des ministres*(C-236/09) [2011] 2 C.M.L.R. 994 ; at paragraph 16.

¹² C. Tobler ‘Casenote’ [2011] C.M.L.R. 2041 at p. 2050. See also P. Watson, ‘Equality, fundamental rights and the limits of the legislative discretion: comment on Test Achats’ [2011] *European Law Review* 896.

¹³ At paragraph 5 of the recital to Directive 2006/54/2006

Article 21 of the Charter of Fundamental Rights of the European Union: any discrimination on grounds of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, birth, disability, age or sexual orientation shall be prohibited.

Directives:

Treatment on grounds of race and ethnic origin were finally brought within the ambit of European equality law by the relatively speedy enactment of the Race Directive¹⁴ and in a manner that was broader than any of the equality directives to date or since then in that the Race Directive mandates member states to establish equality bodies to “promote” equal treatment but that is only in relation to race and ethnic origins. The Race Directive covers discrimination on narrow grounds race and ethnic origins but not colour or nationality but is wider than the Framework Directive as it pertains beyond employment and occupation into social protection, social security, healthcare, social advantages, education, access to and supply of goods and services which are available to the public, including housing. The Race Directive closely followed by the Framework Directive¹⁵ which covered discrimination on grounds of disability, age, religion and sexual orientation. Later in 2002 the Equal Treatment Directive was amended¹⁶ to strengthen the protection around pregnancy discrimination and equal pay between men and women.

The amended Equal Treatment Directive was ultimately consolidated with the other gender equality Directives into one single Directive in 2006, known as the Recast Directive¹⁷ which came into effect in August 2010. The title of the Recast Directive contains a subtle but significant change from the previous amended Equal Treatment Directive. Up to the Recast

¹⁴ Council Directive 2000/43/EC Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin Directive .

¹⁵ Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and education.

¹⁶ Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

¹⁷ Directive 2006/54/2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

Directive, the emphasis had been on equal treatment of men and women. The title of the Recast Directive stated to be “*on the implementation of the principle of equal opportunities and equal treatment of men and women...*” The second recital refers to equality between men and women as a fundamental principle of Community Law and/or Article 2 and Article 3(2) of the Treaty and the case law of the Court of Justice. Bringing the principle beyond equal treatment to that of equality and providing for an express reference to equal opportunities involves a wider approach and a clear move towards a more substantive concept of equality.

Overview:

The Directives adopt the classic, human rights model to combating discrimination individual and rights based.

Council Directive 2000/78/EC of November 2000 (the Framework Directive)

Article 2: Concept of discrimination

“For the purposes of this Directive, the principle of equal treatment shall mean there is no direct or indirect discrimination whatsoever on any of the grounds listed in Article 1”

Application of the same rules to different situations or the application of different rules to the same situation. Classic example is *Brown v Rentokil*¹⁸ where the CJEU held It is direct discrimination on grounds of sex to dismiss a pregnant woman because of absences resulting from pregnancy in accordance with a contractual term providing that an employer may dismiss workers of either sex after a stipulated number of weeks of continuous absence. Discrimination involves the application of different rules to comparable situations or the application of the same rule to different situations. The situation of a pregnant worker who is unfit for work as a result of disorders associated with her pregnancy cannot be considered to be the same as that of a male worker who is ill and absent through incapacity for work for the same length of time.

Direct discrimination :

¹⁸ C-394/96

Direct discrimination is the classic exponent of formal equality¹⁹ and is based on treating one person less favourably on the relevant ground than another person in a comparable situation, i.e. treating like with like. Similar definitions of direct discrimination apply in all of the Directives introduced since 2000 following on the introduction of Article 13 of the Treaty of Amsterdam.²⁰ Using the Recast Directive²¹ as the point of reference, direct discrimination is defined in Article 2(1)(a) as occurring:-

“where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation”.

All of the definitions in the equality directives now permit hypothetical comparisons. This had not been expressly provided for in the earlier directives which had caused some difficulties in considering, for example, the scope of protection for pregnant women for whom there was no male comparator. Given that most situations in which discrimination is alleged to arise occur because of different treatment rather than identical treatment, direct discrimination as a concept does have obvious limitations. Nevertheless the strength of direct discrimination within equality law is that it cannot be justified with the exception of age discrimination.²² This can be seen very starkly in the Court’s decision in *Dekker*²³ where less favourable treatment of a woman on grounds of her pregnancy was found, for the first time, to constitute direct discrimination and could not therefore be justified. This applied even where equal treatment between pregnant and non pregnant employees involved a financial penalty for the employer as national law required that both the pregnant claimant and her replacement during her maternity leave were both entitled to be paid by the employer. The

¹⁹ See generally at Chapter 1.

²⁰ Now Article 19 TFEU.

²¹ Directive 2006/54/2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

²² This is subject to very limited exceptions on the facts of particular cases such as occurred in *Birdseye Walls Limited v Roberts* (C-132/92) [1993] E.C.R. I-5579. Whilst both the European Commission and the Advocate General argued that exceptionally direct discrimination might be justified, the Court to some extent side stepped the issue by finding there was no discrimination at all on the facts where bridging pensions were provided to female ex-employees aged between 60 and 65 who had retired early. Article 6(1) of the Framework Directive (Directive 2000/78/EC) allows for direct discrimination on grounds of age where such treatment is objectively justified. Article 2(5) of this Directive contains a derogation for the prohibition on direct discrimination for reasons related to public safety.

²³ *Dekker v. Stichting Vormingscentrum voor Junge Volwassenen* (C-177/88), [1990] E.C.R. I-3941

basis for this decision was the fact that only women can be refused employment on grounds of pregnancy. The other noteworthy aspect of this decision was the rejection, in absolute terms, by the Court of the arguments advanced by the employer that it was justified in its non-employment of the claimant as it would suffer financial loss for the duration of her maternity leave.²⁴ Similarly in *Thibault v CNAVTS*,²⁵ the Court of Justice held that national rules which deprived a woman to a right to an assessment of her performance owing to her absence from work whilst on maternity leave constituted discrimination.

In July 2008, the ECJ handed down its first decision under the Race Directive.²⁶ In *Feryn* the ECJ had to consider whether a discriminatory recruitment policy publically acknowledged by an employer could amount to discrimination for the purposes of the Race Directive in the absence of any actual identifiable complainant. The employer in this case was a company specialising in the installation of garage doors. The Centre for Equal Opportunities commenced an action before the Belgian courts seeking a declaration that the employer had applied a discriminatory recruitment policy. To this end, it relied on statements made publicly by a director of the employer where he stated that although his company was recruiting installers, it would not take on employees of a particular ethnic origin ('immigrants') owing to a reluctance of its customers to give access to their homes during installation work. The ECJ expressed the view that as the objective of the Race Directive was to implement the principle of equal treatment between persons irrespective of racial or ethnic origin, this principle would be undermined if the Directive only applied to circumstances where an unsuccessful candidate for employment instituted proceedings against a discriminatory employer. It held that where employer states publicly that it will not recruit employees of a certain ethnic or racial origin constitutes direct discrimination in respect of recruitment within the meaning of Article 2(2)(a) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, such statements being likely strongly to dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market. The ECJ was also mindful of the dissuasive effect such discriminatory statements would have on potential

²⁴ *Dekker v. Stichting Vormingscentrum voor Junge Volwassenen* Case C-177/88, [1990] ECR I-3941 at paragraph 12.

²⁵ C-136/95

²⁶ Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*.

applicants. Therefore it held that the statements constituted direct discrimination in respect of recruitment within the Directive.²⁷

The ECJ then considered the relevant burdens of proof in such cases. It ruled that public statements whereby an employer acknowledges that its recruitment policy is not to recruit employees of a certain ethnic or racial origin are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory.²⁸

The Court of Justice in *Maruko v Versorgungsamt der Deutschen Bühnen*²⁹ held that the Framework Directive prohibited legislation which provided after the death of an employee's gay life partner, the surviving partner did not receive a survivor's benefit pursuant to their deceased partner's pension equivalent to that provided to a surviving spouse, even though as a matter national law life partnership places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor's benefit. The Court of Justice found the treatment of Mr Maruko would constitute discrimination on grounds of his sexual orientation contrary to the Directive if the position of surviving spouse and life partner was comparable. There was less favourable treatment of a long term homosexual couple who are in a comparable situation to long term heterosexual partners whose relationship is recognised by law constitutes direct discrimination where the less favourable treatment in question is inflicted upon a group of persons who by definition can only be homosexual.

In *Coleman v Attridge Law*³⁰ the plaintiff claimed that she had been treated less favourably than other employees because she was the primary carer of a disabled child. She claimed that she had been discriminated against and harassed. In relation to the harassment claim, she alleged abusive and insulting comments were made both about her and her child whereas no such comments were made when other employees asked for time off or a degree of flexibility

²⁷ Council Directive 2000/43/EC, Art 2(2)(a) ([2000] OJ L180/22) on race discrimination provides for the concept of direct discrimination which is the same as that in all of the Equal Treatment Directives: less favourable treatment than another person is, has, would be treated in a comparable situation on any of the respective grounds.

²⁸ Council Directive 2000/43/EC, Art 8 ([2000] OJ L180/22) on race discrimination provides for the burden of proof.

²⁹ (C-267/06) [2008] E.C.R.I. I-1757

³⁰ Case C-303/06 *Coleman v Attridge Law* [2008] ICR 1128 and see also Pilgerstorfer, 'Transferred Discrimination in European Law' [2008] *ILJ* 384.

in order to look after non-disabled children. The ECJ found that the Framework Directive³¹ outlawed not only direct discrimination of people who are themselves disabled but also less favourable treatment of a person where that treatment is based on the disability of their child. The Court held that the Framework Directive³², including article 2 must be interpreted as meaning that the prohibition of direct discrimination in these provisions is not limited to people who are themselves disabled. Where an employer treats an employee who is not disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is based on the disability of his child whose care is provided primarily by that employee, such treatment is contrary to the prohibition on direct discrimination laid down by Art 2(2)(a).

The case involved the allegation by Ms Coleman that she had been treated less favourably than other employees because she was the primary carer of a disabled child. She claimed that that treatment had caused her to stop working for her former employer. of disadvantageous treatment of her due to her taking time off because of her disabled child, such that she felt she had to leave her employment. This was essentially a constructive dismissal case under UK law. The evidence that Ms Coleman gave was that she had been treated consistently worse than other employees who had taken similar amounts of time off and in refusing to allow her the same flexibility as regards her working hours and working conditions as those of her colleagues who were parents of non-disabled children. She claimed that abusive and insulting comments had been made about both her and her and her child.

There is no need for any intention as an element of discrimination as intention or another motive is irrelevant: *Fermyn*. Decision makers need to be aware of unconscious bias or discrimination.

Age discrimination and objective justification

It is worth nothing that direct discrimination cannot be justified with the exception of age. This is particularly evident from the decision in *Fermyn* where the company argued its approach was due to the reaction of customers to employees of a particular ethnic origin.

³¹ Council Directive 2000/78/EC [2000] L303/16 establishing a general framework for equal treatment in employment and occupation.

³² Council Directive 2000/78/EC ([2000] L303/16) establishing a general framework for equal treatment in employment and occupation.

Article 6(1) of the Framework Directive permits discrimination on grounds of age. Article 6(1) is as follows:

‘1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are 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.

The ECJ decision in *Mangold*³³ concerned the legality of a provision of domestic German law which authorised the entering into fixed-term contracts of employment once the worker had reached the age of 52. Thus it was not specifically a retirement case but rather concerned the forced change in the status of the worker once they had reached the age of 52.

Mr Mangold challenged the lawfulness of the fixed-term nature of his contract. The German Labour Court made a reference to the ECJ. The main issue before the ECJ was whether Art 6(1) of Directive 2000/78, the directive establishing a general framework for equal treatment in employment and occupation, precluded a provision of domestic law which authorised, without restriction, the conclusion of fixed-term contracts of employment once the worker had reached the age of 52.

The ECJ held that Community law, and ‘more particularly’ Art 6(1) of Directive 2000/78, precluded a provision of domestic law that authorised the conclusion of fixed-term contracts of employment once the worker has reached the age of 52.

In its reasoning, the ECJ first addressed the question whether allowing fixed term contracts without justification in respect of all workers over the age of 52 constituted age discrimination. It noted that under Art 6(1) of the Directive, differences in treatment on grounds of age would not amount to discrimination if they were objectively and reasonably justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary. The ECJ was satisfied that the German legislation had a legitimate purpose, which was to promote the vocational integration of unemployed workers above a certain age.

³³ Case C-144/04 *Mangold v Helm* [2005] ECR 19981

However, the Court was not satisfied that setting the age at 52 was the appropriate and necessary means of achieving that legitimate purpose.

Although the ECJ recognised that Member States enjoyed a broad discretion in the field of social and employment policy, it considered that by this measure the German legislature had exceeded that discretion. By setting the age at 52, there was a significant body of workers (determined solely on the basis of age) who were in danger, during a substantial part of their working life, of being excluded from the benefit of stable employment. It had not been shown that fixing the age threshold was objectively necessary to the attainment of the objective of vocational integration of unemployed older workers. Since the measure did not respect the principle of proportionality in this way, it could not be justified under Art 6(1) of the Directive.

Permitted discrimination

The equality Directives outlaw both direct and indirect discrimination but also provide for exceptions or derogations where unequal treatment on the prohibited ground may be lawful. The most prevalent exceptions are where the relevant characteristic constitutes an occupational requirement, positive discrimination, discrimination on grounds of age and the more favourable treatment necessary to protect women, particularly in relation to pregnancy and maternity.

It is clear from earlier case law of the Court of Justice addressing the scope of what was Article 2(2) of the Equal Treatment Directive, that any derogation from the principle of equal treatment will be strictly construed. This is well illustrated by the Court's decision in *Johnston v Chief Constable of RUC*³⁴ where the Court held that a derogation from an individual right laid down in the directive must be interpreted strictly and that the principle of proportionality requires that a lawful exclusion should go no further than is required to achieve that objective.

In recent years, the issue of genuine occupational requirement has come to the fore again, this time in the context of age discrimination. In *Wolf*,³⁵ Mr. Wolf applied for a post as a

³⁴ (C-222/84) [1986] E.C.R. 1651.

³⁵ *Wolf v Stadt Frankfurt am Main* (C-229/08), [2010] ECR I-00001, [2010] I.R.L.R. 244.

professional fire fighter with duties involving fighting fires, rescuing people environmental protection tasks, helping animals and dealing with dangerous animals, as well as maintaining and controlling protective equipment and vehicles. However, as Mr Wolf was aged over 30 (being aged 31), this application was rejected. The Court of Justice held that an age bar not allowing recruits to the fire service over the age of 30 can be justified as a genuine occupational requirement in certain circumstances. The Court of Justice accepted as legitimate, the need to establish a balanced age range within the workforce so as to maintain an operational service, in circumstances where very few employees over the age of 50 remain in front line fire fighting and rescue duties. The issue of age as a genuine occupational requirement was further considered by the Court of Justice *Prigge v Deutsche Lufthansa AG*³⁶ which was concerned the legality of a collective agreement which provided for the employment of airline pilots to terminate automatically when they reached the age of 60. One of the arguments considered by the court was whether the requirement to be under the age of 60 amounted to a “genuine and determining occupational requirement” within Article 4(1) of the Framework Directive. The CJEU accepted that “it is essential that airline pilots possess particular physical capabilities”, and they also apparently baldly accepted that “those capabilities decline with age”. It further accepted that there was a legitimate aim (of ensuring air traffic safety). However, it went on to hold that in circumstances where national and international legislation permit pilots over the age of 60 to fly, the measure was disproportionate.

Indirect discrimination:

Indirect discrimination is far more sophisticated than direct discrimination can ever be as it is sensitive to differences that apply in practice between different categories of people. The significant limitation of indirect discrimination is that it can be justified subject to certain criteria. It is designed as a means of combating and eradicating (in so far as is possible) systematic and endemic discrimination.

³⁶(C-447/09) [2011] I.R.L.R. 1052

Again using the Recast Directive as a point of reference, indirect discrimination is defined at Article A 2(1)(b):-

“where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage, and the means of achieving that aim are appropriate and necessary.”

Similar definitions are provided for in the Race Directive and the Framework Directive on the relevant grounds. The definitions provided for in the post 2000 Directives are helpful, given the absence of any clear definition of indirect discrimination in the earlier Directives. The focus of indirect discrimination is clearly on the effect of the rule or practice on the protected group and does not allow leeway by reference to the intention of the discriminator, not matter how innocent or laudable their intentions may be. This represents a greater move towards substantive equality than could ever be accommodated by the formalistic concept of direct discrimination.

The key elements are neutral provision, criterion or practice which subjects a particular group of persons defined by their possession of a protected characteristic, such as age or gender, to a particular disadvantage when compared to another group and this cannot be objectively justified.

The classic analysis of indirect discrimination and the circumstances in which it can be justified was provided by the Court of Justice in its seminal analysis of justification of indirect discrimination in *Bilka Kaufhaus*³⁷:

“Article 119 of the EEC Treaty is infringed by a department store company which excludes part-time employees from its occupational pension scheme, where that exclusion affects a far greater number of women than men, unless the undertaking

³⁷ *Bilka - Kaufhaus GmbH v Karin Weber von Hartz* (C-170/84), [1986] E.C.R. 01607,

shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex...

It is for the national court, which has sole jurisdiction to make findings of fact, to determine whether and to what extent the grounds put forward by an employer to explain the adoption of a pay practice which applies independently of a worker's sex but in fact affects more women than men may be regarded as objectively justified economic grounds. If the national court finds that the measures chosen by Bilka correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued and are necessary to that end, the fact that the measures affect a far greater number of women than men is not sufficient to show that they constitute an infringement of Article 119.”³⁸

Prior to the decision of the European Court of Justice in *Enderby v Frenchay Health Authority*³⁹, the Advocate General said:

“In cases in which it is established that a group of women is being disadvantaged in comparison with a group of male workers (doing work which is the same or of equal value in the same plant or undertaking) no additional factor, whereby unequal treatment is applied, need to be required”.

The Court of Justice agreed with the Advocate General’s Opinion and found that there will be situations where prime facie of indirect discrimination will be found even without identifying a provision, criteria or practice which is having a disparate impact on women. The Court made the following analysis of what can also establish indirect discrimination and in doing so, vastly expanded the scope of indirect discrimination in European equality law:

³⁸ At para. 33,

³⁹ Case C-127/92 [1994] I.C.R. 112

“[W]here significant statistics disclose an appreciable difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men, article 119 of the Treaty requires the employer to show that that difference is based on objectively justified factors unrelated to any discrimination on grounds of sex”⁴⁰.

Although the facts in CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia⁴¹ were not within the realm of employment, it is important as it considered indirect discrimination for the purposes of the Race Directive and also whether discrimination by association with a person of another race is prohibited by that Directive. The facts were that the relevant electricity supplier had installed meters much higher from the ground in the claimant's area than in other areas, meaning that she could not read her meter. The reason for the difference was that this was a predominantly Roma area and the height was to make the meters less easy to tamper with. However, as the claimant herself was not Roma, her claim thus depended on whether the Race Directive covered discrimination because of someone else's race. Unsurprisingly in light of the earlier case of Coleman v Attridge Law,⁴² the Court of Justice found that such discrimination is prohibited by the Race Directive. Therefore the case appears to extend indirect discrimination to the principle of associative discrimination. It covers cases of collateral damage as the claimant in the case would not have been given the less accessible electricity meter if she lived in a different area.

With regard to indirect discrimination, the court stressed the wording of the directive which refers to 'particular disadvantage' and held that this is to be applied as it stands and not in a restrictive manner; thus, Bulgarian law which restricted indirect discrimination to cases where the 'rights or legitimate interests' of the claimant had been interfered with was inconsistent with the directive (there being no further test of the 'seriousness' of the indirect effect). This finding that the particular advantage component of the test in indirect discrimination is to be applied in a non restrictive manner appears to be consistent with the

⁴⁰ At para 19.

⁴¹ C-83/14 [2015] IRLR 746

⁴² C-303/06 [2008] IRLR 722

rationale for the use of this phrase in the Race Directive: to obviate the need for onerous statistical proof to demonstrate particular disadvantage.⁴³

This case is a momentous judgment for discrimination law. It has established the principle that indirect discrimination applies to persons who suffer or share the disadvantage but also to others who do not share the characteristic of that group if they are equally disadvantaged. Therefore if a particular neutral practice causes a particular disadvantage to members of an ethnic group, any person who is similarly disadvantaged is entitled to challenge this on the basis of indirect discrimination.

The issue of the manifestation of religion, in particular the wearing of religious symbols in the workplace has come to the fore in recent years. This reflects the reality that the issue of assimilation, in times of unprecedented times of immigration, is a question of how much difference and diversity in an open and pluralist European society should member states respect. Judgment from the Court of Justice is awaited on the issue of whether a prohibition on wearing of a headscarf in the workplace constitutes direct discrimination on grounds of religious belief within the Framework Directive. Two divergent Advocate General Opinions have issued in recent months and are worthy of consideration.

The cases of Achbita⁴⁴ and Bougnaoui⁴⁵ concerned Muslim applicants working for private companies. They used to wear the hijab and, in both cases, their employer considered that this was in conflict with the company neutrality policy. Following refusal to remove the hijab, the applicants were dismissed. There are some differences in the cases: Ms Achbita decided to wear the headscarf during working hours after she had been employed for a period of three years. By contrast, Ms Bougnaoui wore her headscarf from the outset of employment and was not permitted to wear the headscarf when in contact with clients. Ms Achbita was not permitted to wear the headscarf at any time. In the case of Ms Bougnaoui, there was an express complaint of a client who was “inconvenienced” by the hijab and requested that she did not wear it the next time she attended the premises. In the case of Ms Achbita, no explicit client complaint had been received.

⁴³ See Case C-237/94 *O'Flynn v Adjudication Officer* [1996] 3 CMLR. 103 where particular disadvantage was first developed in indirect discrimination.

⁴⁴ Case C-157/15.

⁴⁵ Case C-188/15.

In Achbita, the Belgian referring court asked whether the employer's neutrality rule amounted to direct discrimination. In Bougnaoui, the French court asked whether the neutrality requirement could amount to an occupational requirement (article 4(1) if it is a client's demand. In that case, there had been a complaint from a client of the company who was "inconvenienced" by the *hijab*.

AG Kokott in Achbita and Sharpston in Bougnaoui respectively concluded that where a ban on religious symbols at work is found to be indirectly discriminatory, a balancing exercise must be carried out. The Advocates General disagreed on whether such a ban could constitute direct discrimination.

AG Kokott opined that direct discrimination had not taken place. She distinguished religion and belief from other protected characteristics such as gender or race. This case was about "*modes of conduct based on a subjective decision or conviction, such as the wearing or not of a head covering*".⁴⁶ She commented that the ban could constitute indirect discrimination but it could be justified on a legitimate policy of religious and ideological neutrality being pursued by an employer, insofar as this was necessary and proportionate. Issues such as the size of the religious symbol, the nature of the employer's activity, the context in which the activity had to be performed and the national identity of the member state concerned. It appears AG Kokott was influenced by the fact that Ms Achibata was a receptionist and was exposed to the public on a regular basis in undertaking her duties of employment.

AG Sharpston on the other hand would not distinguish between religion and other protected grounds and stated:

to someone who is an observant member of a faith, religious identity is an integral part of that person's very being. The requirements of one's faith – its discipline and the rules that it lays down for conducting one's life – are not elements that are to be applied when outside work (say, in the evenings and during weekends for those who are in an office job) but that can politely be discarded during working hours. Of course, depending on the particular rules of the religion in question and the particular individual's level of observance, this or that element may be non-compulsory for that individual and therefore negotiable. But it would be entirely

⁴⁶ Ibid, at para 45.

*wrong to suppose that, whereas one's sex and skin colour accompany one everywhere, somehow one's religion does not.*⁴⁷

She found that direct discrimination had taken place, as an employee “*who had not chosen to manifest his or her religious belief by wearing particular apparel would not have been dismissed. Ms Bougnaoui's dismissal therefore amounted to direct discrimination.*”

The forthcoming rulings of the Court are awaited with interest. Clearly, there is a conflict which awaits resolution. The Grand Chamber of the Court of Justice will now have to resolve the different views of the Advocate Generals.

Objective justification

Each of the definitions of indirect discrimination in the equality Directives expressly allow its objective justification. Article 2 of Framework Directive permits a provision which is prima facie indirectly discrimination to be lawful and justified where it “*is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary*”

*Bilka Kaufhaus*⁴⁸:

“Article 119 of the EEC Treaty is infringed by a department store company which excludes part-time employees from its occupational pension scheme, where that exclusion affects a far greater number of women than men, unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex...

It is for the national court, which has sole jurisdiction to make findings of fact, to determine whether and to what extent the grounds put forward by an employer to explain the adoption of a pay practice which applies independently of a worker's sex

⁴⁷ Ibid, at para 118.

⁴⁸ *Bilka - Kaufhaus GmbH v Karin Weber von Hartz* (C-170/84), [1986] E.C.R. 01607,

but in fact affects more women than men may be regarded as objectively justified economic grounds . If the national court finds that the measures chosen by Bilka correspond to a real need on the part of the undertaking , are appropriate with a view to achieving the objectives pursued and are necessary to that end , the fact that the measures affect a far greater number of women than men is not sufficient to show that they constitute an infringement of Article 119. ”⁴⁹

Given that the Court expressly referred to a “*real need*” on the part of the undertaking, it would appear that a subjective view by an employer of its needs will not be sufficient. The employer will have to show a genuine need for the discriminatory treatment. This creates a formidable hurdle for any employer seeking to justify indirectly discriminatory conduct.⁵⁰

Mere generalisations will not satisfy the test of justification. This can be seen in the Court’s decision in *Rinner-Kuhn*⁵¹ where it rejected the “*mere generalisations*” put up by German government in its unsuccessful attempts to defend and justify its sick pay legislation which was not granted to part-time workers.⁵²

Harassment

The Recast Equal Treatment Directive⁵³ defines harassment in relation to gender in Art 2(1)(c):

‘where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.’

Article 2 (1)(d) defines sexual harassment as occurring:

⁴⁹ At para. 33,

⁵⁰ . Ellis *EU Antidiscrimination Law* (Oxford: Oxford University Press, 2005) at p. 109

⁵¹ (C-171/88) [1989] E.C.R. 2743

⁵² See also *Nimz v Freie und Hansestadt Hamburg* (C-184/89), [1994] E.C.R. I-297.

⁵³ Council Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

‘where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.’

In *Coleman v Attridge Law*⁵⁴ the plaintiff claimed that she had been treated less favourably than other employees because she was the primary carer of a disabled child. She claimed that she had been discriminated against and harassed. In relation to the harassment claim, she alleged abusive and insulting comments were made both about her and her child whereas no such comments were made when other employees asked for time off or a degree of flexibility in order to look after non-disabled children. The ECJ found that the Framework Directive⁵⁵ outlawed not only direct discrimination of people who are themselves disabled but also less favourable treatment of a person where that treatment is based on the disability of their child. The Court held:

*Where it is established that the unwanted conduct amounting to harassment which is suffered by an employee who is not himself disabled is related to the disability of his child, whose care is provided primarily by that employee, such conduct is contrary to the principle of equal treatment enshrined in Directive 2000/78 and, in particular to the prohibition of harassment laid down by Article 2(3) thereof.*⁵⁶

⁵⁴ Case C-303/06 *Coleman v Attridge Law* [2008] ICR 1128 and see also Pilgerstorfer, ‘Transferred Discrimination in European Law’ [2008] *ILJ* 384.

⁵⁵ Council Directive 2000/78/EC [2000] L303/16 establishing a general framework for equal treatment in employment and occupation.

⁵⁶ In his opinion, the Advocate General considered the rationale for providing such protection from discrimination in more detail than the ECJ. See his Opinion of 31 January 2008.