DEFINITION OF KEY CONCEPTS

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TOPICS

1. What function of definitions?
2. Direct discrimination
3. Indirect discrimination
4. Harassment
Conclusions

1. WHAT FUNCTION OF DEFINITIONS?
AIM

• Same language: objective, uniform standards
• Effective enforcement of EU anti-discrimination law
• For all grounds (?)
DEFINITION – What it means

• Not any difference is discriminatory (injustice)
• What is lawful/unlawful
• Definitions + exemptions
• Source: Directives + ECJ

KEY CONCEPTS

• Direct discrimination
• Instruction to discriminate
• Victimization
• Indirect discrimination
• Harassment, sexual harassment
EU DIRECTIVES

• Recast Directive 2006/54
• Race Directive 2000/43/EC
• Framework Directive 2000/78/EC
• +Treaty 10, 157

2. DIRECT DISCRIMINATION
DISCRIMINATION CONCEPT

Discrimination involves
- **different** rules to **comparable** situations or
- **same** rule to **different** situations

*Brown v Rentokil C-394/96*

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DIRECT DISCRIMINATION

one person is treated **less favourably**
on a **discrimination ground**
than another **is, has been or would be** treated in a comparable situation
Compared to a comparable person | Less favourable treatment | Based on a discrimination ground

**DISCRIMINATION GROUNDS**

- **Closed EU list**: sex, race, religion or belief, disability, age, sexual orientation
- **Multiple grounds** strengthen the claim (Galina Meister C-415/10)
- **Meaning of disability** (Coleman, C-303/06)
UNFAVOURABLE TREATMENT –
Material scope

E.g. Employment
• Access, termination
• Promotion, training
• Pay etc.

LESS FAVOURABLE
TREATMENT

• Act or inact
• Individual or collective
• Treatment, not intention
• Victim identified?
• Statement?
CAUSALITY - COMPARATOR

„than another is, has been or would be treated in a comparable situation”

• Actual comparison
  – present,
  – subsequent

• Hypothetical

COMPARABLE SITUATION?
WENDY SMITH C-129/79
A person is treated less favourably, than another has been treated
Ms Smith had a claim because she could compare her pay with a former colleague

THIBAULT C-136/95
A person is treated less favourably than another would be treated:
• Equal pay is not confined to situations in which men and women are contemporaneously doing equal work for the same employer
DEKKER C-177/88

Sometimes no comparator is required:
– Refusal to hire the applicant ultimately due to her pregnancy.
– Direct discrimination since only women can get pregnant

EXEMPTION – GOR

• by the nature of activities or its context,
• Sex, age etc. is a genuine and determining occupational requirement,
• if its objective is legitimate and the requirement is proportionate
Kreil C-285/98

No German women in military posts involving the use of arms. Exclusion could be justified by the specific nature of the post or the particular context in which the activities were carried out.
EXEMPTION

• If implemented!
• Minimum requirement
• No other exemption
• Narrowly interpreted

VICTIMIZATION

• dismissal or other adverse treatment by the employer
• reaction to a complaint or any legal proceedings
• in a discrimination case
LEGAL STRUCTURE

Special **direct discrimination**
Protected characteristic is unique:
• **Complaint, legal proceeding**
• **Lost** complaint?

INSTRUCTION

Instructed to discriminate
**Request** by client, employer
**Discrimination**, both involved
Not used as **justification**
3. INDIRECT DISCRIMINATION
INDIRECT DISCRIMINATION

an apparently neutral provision would put persons with a discrimination ground at a particular disadvantage compared with other persons.

LEGAL STRUCTURE

• Apparently neutral provision
• Different impact (stats)
• Compared with others – causality
+ Justification
Apparantly neutral treatment

- Seniority (years worked)
- Physical conditions (height)
- Part-time (pay)
- Inactivity (child care)
JUSTIFICATION

measure is **objectively justified** by a **legitimate aim**, and proportionate: the **means** of achieving that aim are **appropriate and necessary**

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**Bilka C-170/84**

- Pension payments only full time 15 years
- Higher administrative costs for pensions to part-time worker
- Justification (ECJ): if disparate treatment was based on a "real need" of the business
Jenkins C-96/80

**difference in pay** between full-time and part-time workers is not discrimination
unless it is an indirect way of **reducing pay** of part-time workers because they are **women**

ENDERBY C-127/92

- speech therapists paid less than clinical psychologists, pharmacists
- statistics may presume indirect sex discrimination
- the employer must justify the pay arrangements - non-sex based reason?
4. HARASSMENT

unwanted conduct related to a discrimination ground with the purpose or effect of violating dignity: creating an intimidating, hostile, degrading, humiliating, offensive environment
Unwanted conduct

Because of a discrimination ground

Violates human dignity

LEGAL STRUCTURE

Special **direct discrimination**

Unwanted conduct – Regular?

**Disadvantage** is special:

- **Purpose or effect** on **dignity**
- Capacity only, no intention
SEXUAL HARASSMENT
Recast Directive

any **unwanted** verbal, non-verbal, physical conduct
of a **sexual nature**
with the **purpose or effect** of
violating dignity
6. CONCLUSIONS

- Detailed EU guide
- Room for interpretation
- Direct discrimination – key
- Exemptions
- Constantly developing
Thanks for your attention 😊

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