

DEFINITION OF KEY CONCEPTS

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This training session is funded under the 'Rights, Equality and Citizenship Programme 2014-2020' of the European Commission.



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

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
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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

THIBAUT 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

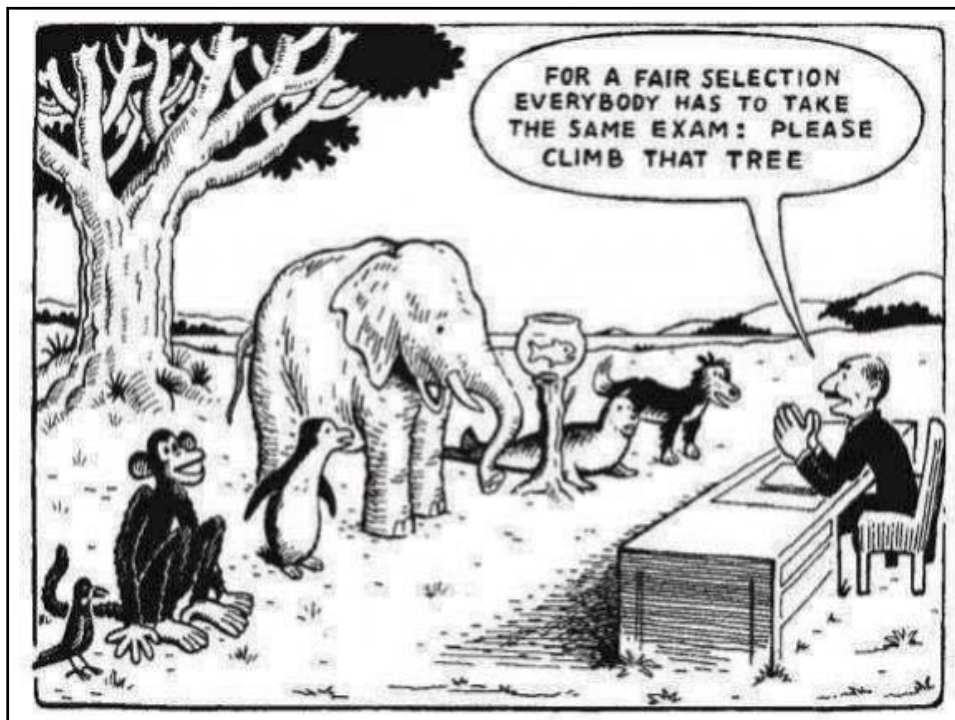
Instructed to discriminate

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**

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

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
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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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