



KEY CONCEPTS IN EU DISCRIMINATION LEGISLATION

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INTRODUCTION

This paper deals with three key concepts in EU anti-discrimination law – direct and indirect discrimination, and harassment.

DIRECT DISCRIMINATION

The EU anti-discrimination directives are all essentially identical in how they define direct discrimination, which is often viewed as the 'core' case of discrimination as it involves less favourable treatment based directly on a protected ground (gender, race, disability etc.)

Article 2(2)(a) of Directive 2000/78 (Framework Directive) – 'direct discrimination shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation, on any of the (protected) grounds...' See also Article 2(2)(a) of Directive 2000/43 (Race Directive), and Article 2(1)(a), Directive 2006/54 on equal opportunities and equal treatment of men and women in employment and occupation (Recast Gender Equality Directive); and Article 2(a) of Directive 2004/113/EC (goods and services)

Key Elements

Three key elements – (i) 'less favourable treatment', (ii) 'comparable situation', (iii) on a protected ground – gender, race, disability etc.

* Case C-54/07 *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV* [2008] ECR I-5187 – 'less favourable treatment' extends to cover statements which dissuade candidates from particular ethnic minorities and thus hinder their access to the labour market.

* Case C-303/06 *Coleman v Attridge Law* [2008] ECR I-5603 – discrimination on the grounds of association with another person (in this case, a disabled child) constitutes less favourable treatment on a protected ground and is thus direct discrimination.

* Case C-267/06 *Maruko v Versorgungsanstalt der Deutschen Bühnen* [2008] 2 CMLR 32 – less favourable treatment of long-term homosexual couples who are in a comparable situation to long-term heterosexual partners whose relationship is recognised by law constitutes direct discrimination on grounds of sexual orientation, on the basis that the less favourable treatment in question is inflicted upon a group of persons who by definition can only be homosexual – a 'wholly filled category'.

[This is perhaps difficult to reconcile with * Case C-79/99 *Schnorbus v Land Hessen* [2000] ECR I-10997, where the ECJ concluded that less favourable treatment of persons who had not undergone national service (women) did not constitute direct discrimination. But it is consistent with the ECJ's famous judgment in Case C-177/88, *Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, [1990] ECR I-03941, where pregnancy discrimination is classified as a form of direct sex discrimination as only women can be subject to this form of less favourable treatment. Here the ECJ stated that '...whether a refusal of employment [...] may be regarded as direct discrimination on grounds of sex [...]...[t]he answer depends on whether the fundamental reason for the refusal of employment is one which applies without distinction to workers of either sex or, conversely, whether it applies exclusively to one sex.'

*C-83/14, *CHEZ v Nikolova*, Judgment of 16 July 2015 – an important recent case: less favourable treatment allegedly motivated by prejudicial views of Roma which has a negative impact on a non-Roma individual can still qualify as direct discrimination.

* See also the 'headscarf' cases of C-157/15 *Achbita* and C-188/15 *Bouagnaoui*, Judgments of 14 March 2017, for what does not constitute direct discrimination in the context of religion/belief – as discussed further below.

The Irrelevancy of Intention

Intention, or another 'bad motive', is generally viewed as not necessary to establish direct discrimination: see *Firma Feryn* above, as well as the *Birmingham* case and the recent (controversial) UK case of *R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS* [2009] UKSC 15.

No Justification

Direct discrimination under EU law cannot be justified – this is a key point. See e.g. *Firma Feryn*, above – discrimination motivated by concern about the response of customers is still unlawful. See also the interesting example of the UK case of *R v Birmingham CC ex parte EOC* [1989] IRLR 173; [1989] AC 1155; 2 WLR 520; 1 All ER 769, HL.

An exception exists for age – Article 6(1) of Directive 2000/78, and see Case C-45/09 *Rosenblatt* [2010] ECR I-9391.

Genuine Occupational Requirement

However, employers can differentiate between individuals when required to give effect to a 'genuine occupational requirement' (GOR). See Article 4, Race Directive (2000/43); Article 4, Framework Directive (2000/78); Article 14(2), Recast Directive (2006/54); Art. 4(5) Directive 2004/113/EC (goods and services) – and see C-229/08, *Wolf v Stadt Frankfurt am Main*, ECJ, Grand Chamber, Judgment of 12th January 2010 (physical fitness required to be a fireman) for an example of a 'GOR'. But note also Case C-341/09 *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] ECR I-47, where the CJEU emphasised that any such requirement had be shown to be demonstrated to be genuinely viewed as being essential to discharge the duties associated with the post in question.

Note also Article 2(5) of Directive 2000/54 and 2000/78 – an exception for public safety/security.

See in addition the 'religious ethos' exception set out in Article 4(2) of Directive 2000/78/EC, as interpreted by the CJEU in the cases of C-414/16, *Egenberger*, and C-68/17, *IR v JQ*. In *Egenberger*, the CJEU ruled as follows [59], [68]-[69]:

Article 4(2) of Directive 2000/78, read in conjunction with Articles 9 and 10 of the directive and Article 47 of the Charter, must be interpreted as meaning that, where a church or other organisation whose ethos is based on religion or belief asserts, in support of an act or decision such as the rejection of an application for employment with it, that by reason of the nature of the activities concerned or the context in which the activities are to be carried out, religion constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church or organisation, it must be possible for such an assertion to be the subject, if need be, of effective judicial review by which it can be ensured that the criteria set out in Article 4(2) of that directive are satisfied in the particular case.

The requirement in Article 4(2) of Directive 2000/78 must comply with the principle of proportionality. While that provision, unlike Article 4(1) of the directive, does not expressly provide that the requirement must be 'proportionate', it nonetheless provides that any difference of treatment must take account of the 'general principles of Community law'. As the principle of proportionality is one of the general principles of EU law (see, to that effect, judgments of 6 March 2014, *Siragusa*, C-206/13, EU:C:2014:126, paragraph 34 and the case-law cited, and of 9 July 2015, *K and A*, C-153/14, EU:C:2015:453, paragraph 51), the national courts must ascertain whether the requirement in question is appropriate and does not go beyond what is necessary for attaining the objective pursued.

In the light of those considerations, the answer to Question 3 is that Article 4(2) of Directive 2000/78 must be interpreted as meaning that the genuine, legitimate and justified occupational requirement it refers to is a requirement that is necessary and objectively dictated, having regard to the ethos of the church or organisation concerned, by the nature of the occupational activity concerned or the circumstances in which it is carried out, and cannot cover considerations which have no connection with that ethos or with the right of autonomy of the church or organisation. That requirement must comply with the principle of proportionality.

See also the 'headscarf' cases of C-157/15 *Achbita* and C-188/15 *Bouagnaoui*, Judgments of 14 March 2017, for what does not constitute a GOR – as discussed further below

Pregnancy/Age

Pregnancy discrimination is a special form of direct discrimination – see Article 28(1), Recast Directive and Case C-177/88 *Dekker* [1990] ECR I-3941, discussed above.

Direct age discrimination can be objectively justified, as noted above.

INDIRECT DISCRIMINATION

The legal prohibition on 'indirect discrimination' (or 'disparate impact', in US legal terminology) is designed to reduce institutional or structural barriers to the achievement of equality.

Article 2(b) Directive 2006/54 (Recast Directive) defines indirect discrimination as 'an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary'. See also Article 2(2)(b) Directive 2000/78 (Framework Directive); Article 2(2)(b) Directive 2000/43 (Race Directive); and Art. 2(b) of Directive 2004/113/EC (goods and services).

Key Elements

Three key elements – (i) a 'neutral provision, criterion or practice', which (ii) subjects a particular group of persons defined by their possession of a protected characteristic (age, gender etc.) to a 'particular disadvantage' when compared to another such group; and that (iii) cannot be 'objectively justified' by reference to a proportionality analysis.

* Case 170/84 *Bilka Kaufhaus* [1986] ECR 1607 – less favourable treatment of part-time workers can constitute indirect sex discrimination.

*Case 171/88 *Rinner Kuhn* [1989] ECR 2743 – 'broad generalisations' will not be sufficient to establish objective justification, although state legislation may benefit from a certain leeway as long as it meets a 'necessary aim of social policy' and is 'suitable and requisite for attaining that aim'.

*Case C-167/97, *R v SoS for Employment ex p Seymour Smith* [1999] ECR I-623 – 'if a considerably smaller percentage of women than men is capable of fulfilling the requirement of two years' employment imposed by the disputed rule, it is for the Member State, as the author of the allegedly discriminatory rule, to show that the said rule reflects a legitimate aim of its social policy, that that aim is unrelated to any discrimination based on sex, and that it could reasonably consider that the means chosen were suitable for attaining that aim' [77]: again, 'mere generalisations' will not suffice in this regard.

* Case C-127/92 *Enderby v Fenchay Health Authority* [1993] ECR I-5535 – [17] '...if the pay of speech therapists is significantly lower than that of pharmacists and if the former are almost exclusively women while the latter are predominantly men, there is a prima facie case of sex discrimination, at least where the two jobs in question are of equal value and the statistics describing that situation are valid...'; [22] '[t]he fact that the rates of pay at issue are decided by collective bargaining processes conducted separately for each of the two professional groups concerned, without any discriminatory effect within each group, does not preclude a finding of prima facie discrimination...[27] if...the national court has been able to determine precisely what proportion of the increase in pay is attributable to market forces, it must necessarily accept that the pay differential is objectively justified to the extent of that proportion. When national authorities have to apply Community law, they must apply the principle of proportionality'.

Case C-132/11, *Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH v Betriebsrat Bord der Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH*, Judgment of the Court 7 June 2012 – here, an Austrian court asked the CJEU whether this collective agreement indirectly discriminated against older workers by only taking account of the skills and experience they had acquired while working with

one airline and not the other, even though the knowledge acquired was ‘substantively identical’ in both cases. However, the CJEU ruled that the difference in treatment at issue was not ‘directly or indirectly based on age or an event linked to age’. As a result, no issue of indirect discrimination arose - a difference of treatment must affect a particular group defined by their age or some other protected characteristic, or otherwise clearly differentiate between different categories of person on the basis of a non-discrimination ground, before a claim for indirect discrimination could arise.

Recent Cases

C-83/14, *CHEZ v Nikolova*, Judgment of 16 July 2015 – sufficient if individual(s) affected are negatively affected by a ‘tainted’ form of classification.

See also Case C-157/15, *Achbita* and C-188/15, *Bougnououi* Judgments of 14 March 2017 - private employer restrictions on staff wearing headscarves held to constitute potential indirect discrimination, needs to be objectively justified. See for further analysis - <https://eutopialaw.com/2017/03/18/achbita-and-bougnououi-raising-more-questions-than-answers/>

Case C-409/16, *Esoterikon*, 18 October 2017, [44], relating to police height requirements challenged on the basis they indirectly discriminate on grounds of sex:

‘The provisions of Directive 76/207 must be interpreted as precluding a law of a Member State, such as that at issue in the main proceedings, which makes candidates’ admission to the competition for entry to the police school of that Member State subject, whatever their sex, to a requirement that they are of a physical height of at least 1.70m, since that law works to the disadvantage of a far greater number of women compared with men and that law does not appear to be either appropriate or necessary to achieve the legitimate objective that it pursues, which it is for the national court to determine.’

HARASSMENT

Again, a similar definition of *harassment* can be found across the different EU non-discrimination directives – except that *sexual harassment* is also prohibited as a distinct and separate form of discrimination.

Thus, Articles 2(1) and 2(3) of Directives 2000/54 and 2000/78 prohibit ‘unwanted conduct’ related to a non-discrimination ground 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’. But Article 2(c) and 2(d) of Directive 2004/113/EC (goods and services) prohibit both ‘harassment’ as defined in the 2000 Directives *but also* ‘sexual harassment’, defined as ‘any form of unwanted physical, 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 Case C-303/06, *Coleman v Attridge Law* [2008] ECR I-5603, the ECJ was asked whether the prohibition of harassment covers a situation where an employee is the victim of unwanted conduct amounting to harassment which is related to the disability of her child for whom she is the primary care provider. In line with its findings in respect of direct discrimination on the basis of association (discussed above), the Court concluded that the prohibition of harassment should cover this type of

situation. What was particularly significant about the Court's reasoning was the manner in which it emphasised that harassment has to be treated as a form of discrimination in line with the provisions of Article 2(1) of the Directive. In other words, the harassment provisions of the 2000 Directives must be interpreted and applied in line with the general interpretative approach applied to their other provisions. However, what remains unclear from the brief discussion in *Coleman* is how the specific elements of the definition of harassment set out in Article 2(3) of both Directives should be interpreted. Uncertainty also remains to the meaning of the provision in Article 2(3) that 'the concept of harassment may be defined in accordance with the national laws and practice of the Member States'.

National law however provides some interesting case-studies: see e.g. from the UK, *Reed & Bull v Stedman* [1991] – view of the harassee is key, employer subject to a proactive duty to prevent harassment (a mixed objective-subjective test); *Richmond Pharma v Dhaliwal* [2009] – two types of case – 'purpose' and 'effect' – mixed objective-subjective test applied: tribunals have to take on board the claimant's feelings (the subjective element), but overall they have to decide whether it was reasonable for the claimant to have experienced those feelings or perceptions (an objective standard) and also consider why the perpetrator acted as they did.

SUPPLEMENTAL COMMENTS

Note the following two points in passing:

Comparators

Case C-253/09 *Commission v Hungary*, para. 50: "[...] it is settled case-law that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations [...]." The issue of who qualifies as a 'comparator' can be a difficult issue to resolve, for direct discrimination as well as for other forms of discrimination – see e.g. the (indirect discrimination) case of C-256/01, *Allonby v Accrington & Rossendale College* [2004] ECR I-00873, employees not able to compare their conditions to others also employed by a common 'single source' employer.

Burden of Proof

The burden of proof in certain circumstances must be shifted in a discrimination claim.

See e.g. Art. 8 of Directive 2000/43/EC: – "[...] when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, ..." – "... it shall be for the respondent to prove that there has been no breach of the principle of equal treatment."

No Abuse of Rights

Case C-423/15, *Kratzer*:

[T]he answer to the questions referred is that Article 3(1)(a) of Directive 2000/78 and Article 14(1)(a) of Directive 2006/54 must be interpreted as meaning that a situation in which a person who in making an application for a post does not seek to obtain that post but seeks

only the formal status of applicant with the sole purpose of seeking compensation does not fall within the definition of 'access to employment, to self-employment or to occupation', within the meaning of those provisions, and may, if the requisite conditions under EU law are met, be considered to be an abuse of rights [44].'

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11/10/2018