

KEY CONCEPTS OF EU EQUALITY LAW

Direct & indirect discrimination and
harassment



This training session has received funding from the European Commission



EU Anti-Discrimination Law | ERA Webinar for legal practitioners | 24 June 2021

Dr. Raphaële Xenidis, Marie Curie Fellow, iCourts

1

OUTLINE

- 1 DIRECT DISCRIMINATION**
 - Definition and legal sources
 - Case law
- 2 INDIRECT DISCRIMINATION**
 - Definition and legal sources
 - Case law
- 3 HARASSMENT**
 - Definition and legal sources
- 4 OTHER CONCEPTS**
 - Discrimination by association
 - Multiple and intersectional discrimination

2

1 Direct discrimination

- Art. 2(2)(a) Directive 2000/43 (race equality)
- Art. 2(2)(a) Directive 2000/78 (framework)

'direct discrimination shall be taken to occur where one person is *treated less favourably* than another is, has been or would be treated in a *comparable situation* on *grounds of*...racial or ethnic origin, age, disability, religion or belief, sexual orientation

→ 3 criteria



Photo by Oliver Cole on Unsplash



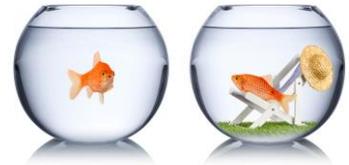
Direct discrimination is intentional discrimination?

a) Yes

b) No

5

i. Differential treatment



Example: direct discrimination on grounds of religion

C-193/17 *Cresco*, a paid public holiday on Good Friday is granted to employees who are members of certain churches but not others.

- Intent is not required

C-177/88 *Dekker*, para. 24: 'if [...] liability for infringement of the principle of equal treatment were made subject to proof of a fault [...], the practical effect of [the principle of equal treatment] would be weakened considerably'

- Public statements and discrimination as deterrence

C-507/18 *Associazione Avvocatura per i diritti LGBTI*, para. 42-23, furthering *Feryn* and *Accept*

6

2. On grounds of a protected category

▶ 'Because of' a protected ground: in C-414/16 *Egenberger*, the employer did not select the applicant because of her religion

▶ And 'inseparable' characteristics:

- C-267/06 *Maruko*, C-147/08 *Römer*, C-267/12 *Hay*: discrimination based on marital status as direct discrimination on grounds of sexual orientation
- C-499/08 *Ingeniørforeningen i Danmark*: a difference based on entitlement to old-age pension is direct age discrimination
- C-356/09 *Kleist*: a difference based on entitlement to old-age pension is direct sex discrimination where the pensionable age differs for men and women



Photo by David Herron on Unsplash

7

3. The comparison test

▶ C-147/08 *Römer*, para. 42: 'it is required *not that the situations be identical*, but only that they be comparable and, second, the assessment of that comparability must be carried out not in a global and abstract manner, but *in a specific and concrete manner*'

- ▶ AG Bobek's Opinion in C-193/17 *Cresco*:
- '**narrow**' comparator: employees for whom Good Friday is the most important religious celebration => no comparability
 - '**intermediate**' comparator: employees whose most important religious celebration does not coincide with a public holiday covered by the national legislation => unclear
 - '**broad**' comparator: employees who are being paid double on Good Friday => similar situation
- no exact science, prone to instrumentalisation!



8

Direct discrimination: a closed regime of justifications

- **Genuine and determining occupational requirements** (Art. 4 and 4(1) of Directive 2000/43 and 2000/78): 'where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out [...] provided that the objective is legitimate and the requirement is proportionate'

Example: C-258/15 *Salaberria Sorrondo*, C-188/15 *Boungaoui*

- **Derogations related to age** (Art. 6 Directive 2000/78)

Ex:ample: C-143/16, *Abercrombie & Fitch*

- **Occupational requirements related to organisations whose ethos is based on religion or belief** (Art. 4(2) Directive 2000/78)

Example: C-414/16 *Egenberger*, C-414/16 *IR v JQ*

- **Reasonable accommodation** (Art. 5 Directive 2000/78), **positive action** (Art. 5 Directive 2000/43 and Art. 7 Directive 2000/78), **armed forces** (Art. 3(4) Directive 2000/78), **public order, security, health and protection of rights and freedoms** (Art. 2(5) Directive 2000/78)

9

A critical appraisal of the direct discrimination doctrine

Same starting line...

- Formal equality: the Aristotelian formula according to which 'likes should be treated alike' is 'tautological' and 'circular' in the absence of an external normative point of reference (Westen 1982)
- Sameness/difference logic controls 'access to equality claims' (MacKinnon 1990)
- Symmetry: assimilationist version of equality (Fredman 2016)

...but different vehicles

- Power of norm definition?
- Accommodation of differences?
- Eliminating disadvantage?



10



Rationale for the doctrine of indirect discrimination

- Harm resulting from 'the application of the same rule to different situations' or the 'equal treatment of different situations' (Tobler 2005)
- Aim: to dismantle structural discrimination, that is certain organisation patterns in society and given choices that reproduce and amplify existing inequality
- Substantive equality: completing the equal treatment principle
- From a perpetrator-centred focus to a focus on the discriminatory effect of a measure or practice
- Beyond the individual paradigm: group justice and collective harm
- Asymmetry: treating different groups differently



11



12

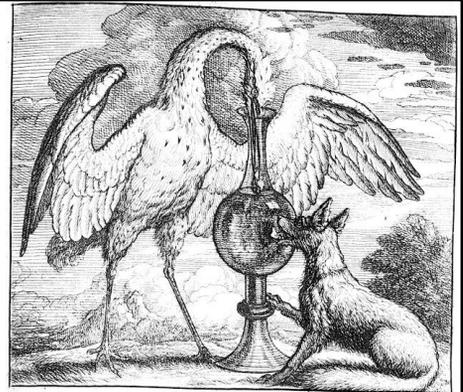
What is a major difference between direct and indirect discrimination?

- a) Indirect discrimination does not require a comparison
- b) Indirect discrimination does not involve a defendant's fault
- c) Indirect discrimination can be justified on a wider basis

13

2 Indirect discrimination

- Art. 2(2)(b) Directive 2000/43 (race equality)
- Art. 2(2)(b) Directive 2000/78 (framework)



*'indirect discrimination shall be taken to occur where an **apparently neutral** provision, criterion or practice would put persons of a [protected group] at a **particular disadvantage compared with** other persons, unless that provision, criterion or practice is **objectively justified** by a **legitimate aim** and the means of achieving that aim are **appropriate and necessary**'*

14

1. An apparently neutral provision, measure or practice

= formulated by reference to other criteria not related to a protected characteristic



- Manifestly neutral as opposed to *prima facie* neutral?
= neutral 'ostensibly' or 'at first glance', C-83/14, *Chez*, [93] & Opinion of AG Kokott, [92]
- Reference to religion vs targeting of a particular religious group? C- 157/15 *Achbita* and discussion Kokott-Sharpston in *Achbita/Bouagnaoui* opinions

15

2. A particular disadvantage

- 'Particular' = disproportionate
- But no prescribed quantification or threshold
- Contextual assessment of impact on protected group
- Open-ended criterion
- Can be established by any means, including statistics



- C- 157/15 *Achbita*: A rule prohibiting any head gear at work could impose a particular disadvantage on employees whose religion mandates head-covering religious apparel
- C-312/17 *Bedi*: termination of assistance based on earliest retirement age disadvantages workers with disability

16

3. The comparison test

C-223/19 *YS v NK*, Opinion of AG Kokott, [64]: absolute comparisons between the groups affected by the measure would yield 'a distorted picture' and 'only illustrate the social conditions of the time'

- context: unbalance 'at most linked to an already existing state of inequality'
- careful use of statistical evidence: use of ratios between individuals disadvantaged and not disadvantaged by the reforms within each affected group

Joined cases C-804/18 and C-341/19 *WABE* and C-157/15 *Achbita*: disagreement between AG Sharpston and Kokott/Rantos shows lack of consensus on how to delineate the right comparator group

- AG Sharpston: employees whose religion 'mandates' the wearing of religious apparel
- AG Kokott and Rantos: all religious employees

17

Recent discussions: personal scope, comparators and direct/indirect discrimination

C-16/19 *VL v Szpital Kliniczny* (2021): a difference in treatment within a protected group based on submission date of disability certificate

- '[t]he Court [wa]s thus called upon to decide whether the scope of Directive 2000/78, which has traditionally been confined to the prohibition of discrimination between individuals who have a certain protected characteristic and those who do not, may be extended, by means of interpretation, so as to cover situations where persons who have the same protected characteristic (in this instance disability) are treated differently' [28]
- EU anti-discrimination law cannot mean that 'the prohibition of discrimination laid down by that directive is limited only to differences in treatment between persons who have disabilities and persons who do not have disabilities' [29]

→ Direct or indirect discrimination

18



Recent discussions: personal scope, comparators and direct/indirect discrimination

Joined cases C-804/18 and C-341/19 *WABE*: rules banning the wearing of headgear in the workplace (pending)

- AG Rantos compares religious and non-religious employees = no direct discrimination
- Former AG Sharpston (shadow opinion) compares employees wearing 'mandated religious apparel' and others = 'enlarged definition of direct discrimination' where 'an employer imposes a criterion that he either knows or ought reasonably to have known will inevitably place a member of a particular group in a less favourable position on the basis of any of the grounds' protected under the Directive [263], see also C-83/14 *Chez*

19

Indirect discrimination: an open-ended justification regime

A three-pronged proportionality test:

(1) **Legitimate aim**

E.g. C-270/16 *Ruiz Conejero*, [44]: combating absenteeism at work

(2) **An objective measure that is appropriate**

E.g. C-270/16 *Ruiz Conejero*, [48]: does the measure 'encourag[e] recruitment and maintenance in employment'?

(3) **The necessity requirement**

E.g. C-312/17 *Bedi*, [66]: 'in order to examine whether such a provision goes beyond what is necessary to achieve the aims pursued, that provision must be placed in its context and the adverse effects it is liable to cause for the persons concerned must be considered'

= reasonableness and minimisation of harm

→ **Contextual variation of the test**: C-223/19 *YS v NK*, Opinion of AG Kokott, [76]: the existing economic inequality between the sexes is not exacerbated further' so 'the requirements regarding the justification of any indirect discrimination are correspondingly lower'



20



21

Harassment can be, for example

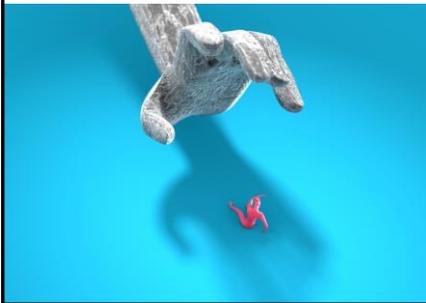
- a) when an employer calls an employee 'young and incompetent' once during an argument
- b) when a manager repeatedly bullies an older colleague, routinely sabotages his work and makes fun of his age in front of others
- c) when an employer prohibits an employee from wearing a religious sign at work

22

3 Harassment

→ Art. 2(3) Directives 2000/43 and 2000/78

'Harassment shall be deemed to be discrimination [...], when an *unwanted conduct related to* [racial or ethnic origin, religion or belief, disability, age or sexual orientation] 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*. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.'



- link to protected ground: larger scope
- shift of the burden of proof when *prima facie* case
- intention not necessarily required
- cumulative conditions:
 - dignity-based harm: subordination (role of power)
 - 'environment': likely not to capture single occurrence
- E.g. C-303/06 *Coleman*: insults, threats of dismissal...

23

4 Other concepts



Photo by Bekir Dönmez on Unsplash

Discrimination by association:

- C-303/06 *Coleman*, [66]: 'the prohibition of harassment laid down by those provisions is not limited only to people who are themselves disabled. 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 prohibition of harassment'

Multiple and intersectional discrimination:

- C-443/15 *Parris*, Opinion of AG Kokott, [153]: 'The combination of two or more different grounds for a difference of treatment is a feature which lends a new dimension to a case such as this and must be taken duly into account in its assessment under EU law.'

24



Thank you!
Ďakujem!

✉ raphaele.xenidis@jur.ku.dk
🐦 @raphaelexenidis