

# 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 (injustice) discriminatory
- What is lawful/unlawful
- Definitions + exemptions
- Sources: Directives + ECJ

## **KEY CONCEPTS**

- **Direct** discrimination
  - **Instruction** to discriminate
  - **Victimization**
- **Indirect** discrimination
- **Harassment**
  - **Sexual** harassment

## 2. DIRECT DISCRIMINATION

### 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

<b>Less favourable treatment</b>	<b>Based on a discrimination ground</b>	<b>Compared to a comparable person</b>
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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 not identified? Class action
- Statement?

## CAUSALITY - COMPARATOR

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

- **Actual** comparison
  - present,
  - subsequent
- **Hypothetical** comparison

## COMPARABLE SITUATION?





## 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

## 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

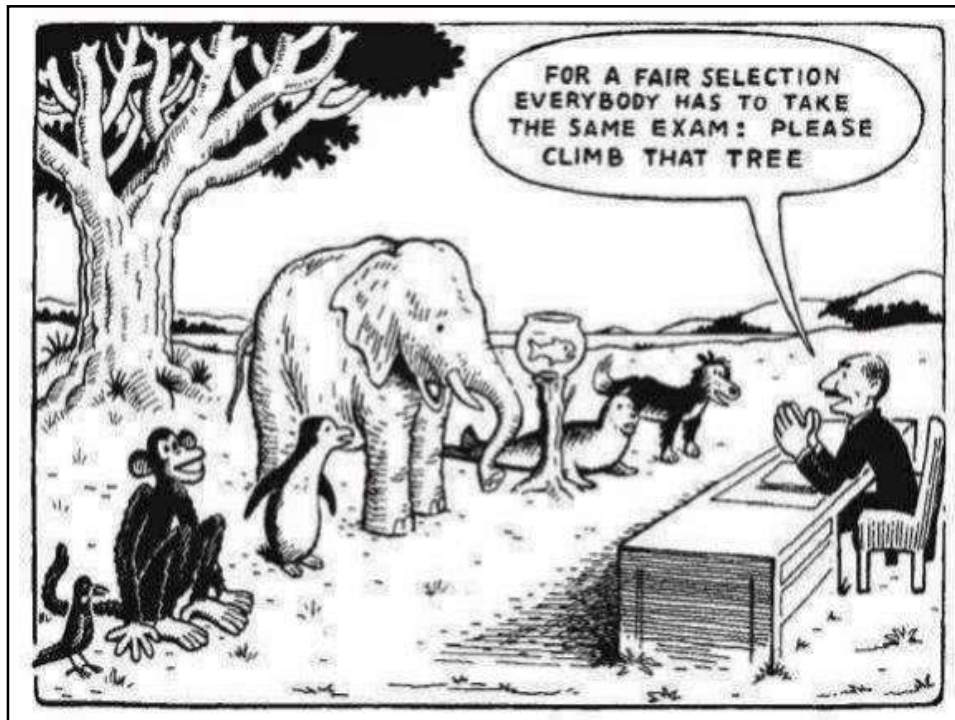
Not used as **justification**

## POSITIVE ACTION

- Measures in favour of female workers
- Preferential treatment, quotas
- TFEU, Recast Directive: full equality in practice
- Case law: Kalanke, Marschall, Badeck, Abrahamsson



### 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

- Physical conditions (height)
- Part-time (pay)
- Seniority (years worked)

## 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

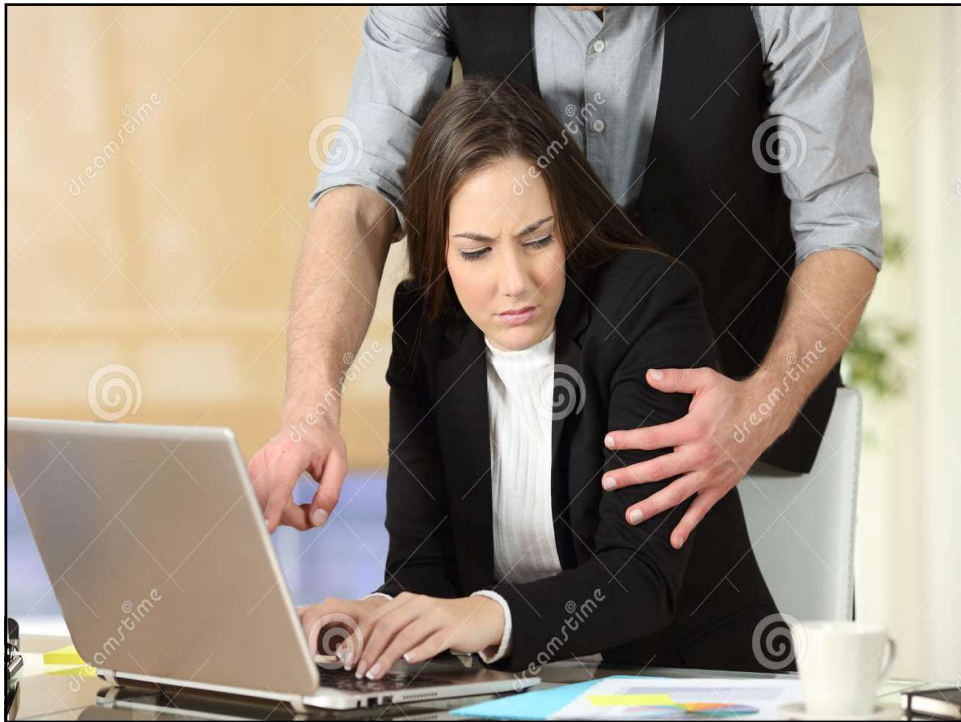
## ENDERBY C-127/92



- 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**

## **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 ECJ interpretation
- Direct discrimination – key
- Exemptions
- Constantly developing

**Thanks for your  
attention**



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