

## Definitions of Key Notions: Direct and Indirect Discrimination, Harassment

1. This paper deals with the key notions in the Directives 2000/78 and 2000/43. I will talk about the concept of direct discrimination under the Directives, the concept of indirect discrimination and the further concept of harassment. The aim of this talk is to give some guidelines and explanations of these concepts. In the course of talking about these matters I will touch on justifications and the specific justifications of Genuine Occupations Requirements, the GORs relating to religion and belief and the justification of age discrimination.

### Discrimination

2. In order to understand the concepts involved in the Directives, and therefore to be able to conduct effective litigation on the meaning of the Directives, it is necessary to consider the general principles of equality that the Directives are considering<sup>1</sup>. I take the view that there are at least two different concepts of equality at work within the definitions employed by the Directives. A concept of formal equality (which is embodied in the concept of direct discrimination) and a concept of substantive equality (which is partly embodied in indirect discrimination, but is more embodied in the concepts of reasonable accommodation, and positive discrimination).
3. The general principle of equality, in Community law<sup>2</sup>, requires that comparable situation is must not be treated differently in different situations must not be treated in the same way unless such treatment is objectively justified. So discrimination can arise through the application of different rules to comparable situations or the application of the same rule to different situations (Hill<sup>3</sup>).
4. Under Directive 2000/78 EC the concept of discrimination is defined in Article 2. However the preamble states that the principle of equal treatment between women and men is well-established and an important body of community law. As well as referring back to the earlier development of the concept of direct and indirect discrimination under the Directive 76/207 in this way the preamble notes that the right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, The United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants On Civil and Political Rights and on Economic Social and Cultural Rights And by the European Convention for the Protection of Human Rights and Fundamental Freedoms. Finally it recalls that Convention number 111 of the International Labour Organisation prohibits discrimination in the field of employment and occupation.

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<sup>1</sup> Mark Bell's presentation to the Trier seminar in October 2004 "*The Concept of Equality*" provides some useful insights in this respect. See also his publications "*The Right to Equality and Non-discrimination*" in *Economic and Social Rights under the EU Charter of Fundamental Rights -- a Legal Perspective* (Hart Publishing, 2003), and "*Equality and the European Union Constitution*" (2004) 33 *Industrial Law Journal* 242--260.

<sup>2</sup> Which corresponds to a formal equality concept

<sup>3</sup> *Hill v Revenue Commissioners & the Department of Finance* Case 243/95: As the Court held in Case C-279/93 *Finanzamt Köln-Altstadt v Schumacker* [1995] ECR I-225, paragraph 30, discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations.

5. The preamble also notes that its purpose is to prohibit any direct or indirect discrimination based on the various grounds of the Framework Directive throughout the Community. It therefore applies to nationals of third countries. However it does not cover differences of treatment based on nationality.
6. The purpose of the Directives is to put into effect in the Member States the principle of equal treatment (Article 1 2000/78).
7. The principle of equal treatment means that there should be no direct or indirect discrimination whatsoever on any of the framework grounds of (i) religion or belief  
(ii) disability  
(iii) age  
(iv) sexual orientation.

#### “Whatsoever”

8. The stringency of this requirement should not be underestimated. The obligation on the member states is that there should be no discrimination **whatsoever** on the framework grounds. In other words the judges cannot ignore minimal influence on treatment of framework grounds. The use of the term “whatsoever” indicates that there should be neither direct (overt or covert) discrimination and, significantly, that there should be no indirect discrimination (overt or covert) whether in treatment of persons or in the justification that is used in relation to indirect discrimination.

#### On the grounds of

9. The result of the Directive being framed in terms of avoiding discrimination "on the ground of" one of the prohibited matters, is that discrimination by **association** will be prohibited. So, if I discriminate against you by dismissing you from a job because you would not comply with my order not to serve somebody because of their race, I discriminate against you on prohibited grounds. If it was not for race I would not have treated you on the way I did. Therefore the less favourable treatment is on the grounds of race.
10. Similarly **perceived** status gives rise to discrimination on the grounds of that status. Thus, if I discriminate against you because I think you are a Catholic, but in fact you are Protestant, I still discriminate against you on the ground of religion, although I have been mistaken about your religion. Take religion out of the situation and I would not have treated you in the way I did.

#### Direct Discrimination

11. Direct discrimination occurs when one person is treated less favourably than another is, has been or would be in a comparable situation on any of the Directive grounds.
12. As it appears in Article 2 of the Directive there appear to be the following elements: --
  - 1) less favourable treatment
  - 2) an actual or hypothetical comparator
  - 3) comparable circumstances between the claimant and the comparator.
13. Less favourable treatment may be past, present or hypothetical treatment – i.e. treatment that would be less favourable. Consideration of less favourable treatment requires a comparison to

be made between the situation of the complainant and that of any comparator by which the treatment given to the complainant is less favourable than that given to the comparator.

14. Words or acts of discouragement could amount to less favourable treatment<sup>4</sup> and all that is necessary is denial of an opportunity or choice to the Complainant even if there is no proof that what is lost was objectively better. All that is necessary is that the Complainant has been deprived of the choice or opportunity that was available to the comparator and is valued by them reasonably<sup>5</sup>.

### Comparators

15. The requirement that direct discrimination requires the identification of a comparator may result in situations where no meaningful comparator can be identified despite the evidence of clear disadvantage<sup>6</sup>. It may therefore act as a limitation on achieving formal equality.
16. The relevant circumstances must be the same or not materially different between the complainant and the persons with whom he or she is making comparisons.
17. In Abdoulaye<sup>7</sup>, an agreement for social benefits for Renault employees provided that "when taking maternity leave, a female employee shall be granted a sum of French francs 7,500. This was challenged as not being compatible with the prohibition of discrimination in pay in what was art 119 EC Treaty. However the Court of Justice held that granting this sum to women taking maternity leave was not a violation of the principle of equality between women and men because it was to compensate for the women's occupational disadvantages (absence of promotion, of claim for performance-related wage increment, etc.). The situation of women and men being different, the principle of equality was not violated.
18. In Lawrence<sup>8</sup> the Court of Justice remarked on the concept of equality:  
"As the Court held in Case 43/75 Defrenne II [1976] ECR 455, paragraph 12, that principle, which is a particular expression of the general principle of equality which prohibits comparable situations from being treated differently unless the difference is objectively justified, forms part of the foundations of the Community (see Case C-381/99 Brunnhofer [2001] ECR I-4961, paragraph 28)."

The Court dismissed the argument that there had been pay discrimination on the basis the women complaining had relied on male comparators working for different employers whose terms and conditions were not regulated by a unifying legal source or common terms<sup>9</sup>. Thus the circumstances were not comparable and the claim failed.

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<sup>4</sup> *Simon v Brimham Associates* [1987] ICR 596

<sup>5</sup> *R v Birmingham City Council, ex parte Equal Opportunities Commission* [1989] 1 All ER 769

<sup>6</sup> *Croft v Post Office* [2003] IRLR 592 illustrates the difficulties. A (preoperative) transsexual woman who was refused permission by the employer to use the women's toilets, despite presenting as a woman, would find it difficult to show a comparator.

<sup>7</sup> *Oumar Dabo Abdoulaye and Others v. Régie Nationale des Usines Renault SA* Case 218/98, 16 September 1999

<sup>8</sup> Case 320/02 *Lawrence & ors v Regent Office Care Ltd & Ors*.

<sup>9</sup> Similarly in *Allonby v Accrington and Rossendale College* [2004] 1 C.M.L.R. 35, the terms and conditions did not derive from a single source.

19. How is the judge to approach the question of how a person would treat another person? It may not be possible for the Complainant to point to a real person who is in materially the same circumstances as he or she is. The Directive permits a comparison to be made between the complainant's situation and the situation of a person whose circumstances are not identical. If there is evidence that shows that the person treating the Complainant less favourably would treat others in similar circumstances better, the Complainant can show direct discrimination.
20. There will be a judgement to be made about which circumstances are relevant. Which circumstances show how a person would treat another person in different circumstances? When making the comparison, one approach is to say that the circumstances of the hypothetical comparator and those of the complainant must be the same except for the prohibited ground of treatment. Thus the tribunal should consider whether the employer would have treated a person who had done exactly the same thing as the complainant, but did not share the same religion, in the same way. The real question will be whether the evidence of how other people were treated in dissimilar situations shed any light on how the person accused of discrimination would treat another person.
21. The question of comparison is central to the question of whether the circumstances of the treatment are like or unlike in each case.
22. Therefore the judge will have to look at whether the circumstances are the same or not materially different. This will involve looking at the comparators put forward by the Complainant as well as looking at situations which are close to the Complainant's, but in which there is a difference in respect of the protected ground. It is also relevant to look at the basis for the action taken by the person accused of discrimination.

### Causation

23. Use of the phrase "on the grounds of" in the Directive means that judges will have to look at the causative role that the protected ground played in the treatment of the complainant. It is important to note that what is required is that the protected ground causes the treat. The motive of the person who is accused discriminating may indicate that the protected ground caused the treatment. However it is not essential that there should be a discriminatory motive based on one of the protected grounds. This is because a person may discriminate against another unconsciously. Many discriminators will not admit even to themselves that the protected ground played a role in their decision-making. Quite often the decision will appear to have been based on an assumption such as that the complainant would not have fitted in to the workplace. That might be the conscious thinking of the person discriminating. However on closer inspection the reason why the less favourable treatment has been meted out is the prohibited ground which underlies the thought that the person would not have fitted in.
24. It will be necessary therefore for the judge considering whether discrimination has taken place to identify the role that the protected ground played. I would suggest that it does not have to be an overwhelming role. The Directive prohibits any discrimination whatsoever on the protected grounds. Therefore if the protected ground played more than a minor or trivial role in the treatment, if it can be said that it was causally operative, then the treatment will have been on the grounds of the protected ground.

25. These two aspects, that the protected ground must play more than a minor or trivial role in the causation of the treatment and that discrimination may occur unconsciously, are difficult initially for the judiciary to accept. Judicial decision-making has changed in the United Kingdom as these notions have gradually come to be accepted. Initially the courts and tribunals exhibited a high degree of disbelief and scepticism concerning the incidence of discrimination. Early cases exhibited confusion between the concept of fairness and equality and initially there was a very poor success rate. There is of course a danger that when this occurs those who are supposed to be protected by the antidiscrimination provisions will start to mistrust the rule of law.
26. Over the years however, partly as a result of the monitoring of outcomes for persons belonging to minority groups and partly as a result of new techniques attempted by advocates in the Court, because in tribunal is in the United Kingdom started to accept more that discrimination did occur.
27. Eventually new guidance was issued which recognised the problems of unconscious discrimination and the strategies that judges can adopt in order to detect such discrimination. Judges are encouraged to look at the surrounding evidence and to draw inferences from the surrounding evidence as to whether discrimination has occurred.
28. The new guidelines recognised that it is unusual to find direct evidence of racial discrimination and that a few employers would be prepared to admit such discrimination even to themselves. The discrimination may not be ill intention but based on assumptions.
29. So the outcome of the case will generally depend on the inferences it is proper to draw from the primary facts found by a tribunal. These inferences can include, in appropriate cases, any inference that it is just and equitable to draw from an evasive or equivocal reply to questions.
30. Where there is a finding of less favourable treatment and a finding of a difference between the complainant and the comparator in respect of a protected ground, the Directive will require a finding of discrimination to be made if any inference of discrimination can be made.

### Indirect discrimination

31. The mere fact that an employer may apply the same (apparently neutral) rule to all staff, does not preclude inequalities remaining. The characteristics of the group to which the individual belongs may result in disadvantage, so that an apparently neutral practice, such as requiring all staff to wear a company hat, will disadvantage members of the group (e.g. Sikhs)<sup>10</sup>.
32. The dividing line between direct and indirect discrimination has never been entirely clear. However certain differences are clear:
  1. Indirect discrimination is often a more powerful tool to detect and remedy covert discrimination based on a prohibited ground.

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<sup>10</sup> The concept of substantive equality may be employed here, in that the concept of indirect discrimination looks beyond the apparent neutrality of the situation to consider the barriers that the criteria practice or policies applied in that situation present to members of the protected group. However the concept of substantive equality may also require equal results. In that context it underlies the concept of positive discrimination or positive action.

2. The indirect discrimination claim deals with apparently neutral provisions, criteria or practices;
  3. Indirect discrimination can be justified without derogation.
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33. The lack of clarity between direct and indirect discrimination can be illustrated by reference to the case of Schnorbus<sup>11</sup> where the Court of Justice found that
    - (i) although **only** men could perform military service, and therefore
    - (ii) only men could gain the benefit of a preferential route to a legal qualification (granted to those who had performed military service),
    - (iii) this was not direct discrimination but indirect discrimination.
  34. This is a rather extreme example of a technical analysis of indirect discrimination. I suggest that it was reached as a result of a failure to consider accurately the provision that was being challenged. The court was prepared to accept that those who had completed compulsory military service were disadvantaged because they had found it necessary to defer their practical legal training. It accepted that there were other reasons why people would defer that legal training, which also provided a basis under the relevant provision for preferential access. It concluded therefore that the provision (taken as a whole) could not be said directly to discriminate. However not all the provision's components were being challenged. What was being challenged was that there was one route to preferential access to practical legal training which was only open to men.
  35. The case can be reasoned more readily as a direct discrimination case. No women could perform military service. Therefore *a priori* 100% of those who could claim the benefit would be men. Therefore it is possible to reason thus: if you had performed military service you are a man; only those who had performed military service can claim the preferential route on this ground; therefore only men can claim the preferential route on this ground. Such an approach is analogous to the situation of women and pregnancy. It would not be indirect discrimination to say "I will only employ a person who does not get pregnant". Pregnancy is only available to women, and it has been recognised that such an approach would constitute direct discrimination.
  36. In order to try to understand the case as an indirect discrimination claim, it must be argued that the criteria for obtaining the preferential route on this ground is gender neutral on its face. To benefit from the preferential route on this ground you must have performed military service. Unless you know more about the situation, that appears to be a gender neutral criterion. Therefore, if discrimination is occurring, it is because the criterion places women at a disadvantage in comparison to men.
  37. The distinction between the two approaches however it may be vital. This is because it is possible to justify indirect discrimination<sup>12</sup>, whereas it is not possible to justify direct discrimination.
  38. The traditional analysis of direct and indirect discrimination arising from sex discrimination law can be found in Nikoloudi<sup>13</sup> most recently. A national measure involves indirect

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<sup>11</sup> C-79/99 *Schnorbus* [2000] ECR I-10997

<sup>12</sup> as happened in *Schnorbus*

discrimination where, although worded in neutral terms, it works to the disadvantage of a much higher percentage of women than men<sup>14</sup>.

39. Article 2 of the Directive provides a new definition of indirect discrimination.
40. Indirect discrimination occurs where an apparently neutral provision criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons.
41. However indirect discrimination does not occur where the provision criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Indirect discrimination also does not arise as regards persons with a particular disability if the employer or any person or organisation to whom the Directive applies, is obliged under national law to take appropriate measures in line with the principles relating to reasonable accommodation<sup>15</sup> in order to eliminate disadvantages entailed by such a provision criterion or practice. In other words, if there is a duty to make a reasonable adjustment to remove the disadvantages caused by the provision criterion or practice, the judge does not need to look at whether the provision criterion or practice discriminates indirectly.
42. One of the debates that will have to take place is the extent to which there is a difference between the definition of indirect discrimination that has been used in the context of sex equality law and that which is to be employed in the new Directives.
44. The novel features of the concept of indirect discrimination in the Framework and Race Directives are the following:
  1. Counterfactual application (the provision can be impugned in the absence of evidence that it actually has put any person at a disadvantage. It is enough if it would have that effect on prohibited grounds if it were applied).
  2. No need for statistical comparison between the protected group and the relevant remainder population.
  3. Scope of application - criteria, provisions or practices.
  4. There must be a particular disadvantage compared to others.
  5. Justification by reference to a legitimate aim, with appropriate and necessary means used to pursue it.

#### “would”

45. This means that it is possible to challenge a practice, criteria, or provision before it has been applied. The implication of this is that it should be possible to nullify provisions etc which clearly have a discriminatory effect without waiting for their application in a particular case.

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<sup>13</sup> Case C 196/02 *Nikoloudi v Organismos Tilepikinonion Ellados AE*, (judgement 10 March 2005)

<sup>14</sup> see Case C-1/95 *Gerster* [1997] ECR I-5253, paragraph 30, Case C-100/95 *Kording* [1997] ECR I-5289, paragraph 16, and Case C-313/02 *Wippel* [2004] ECR I-0000, paragraph 43

<sup>15</sup> Contained in Art 5

### “particular disadvantage”

46. This means that it is not necessary to employ statistical evidence to show that the protected group is affected disproportionately to the other groups to whom the provision is applied. What is necessary is to show that there is a disadvantage to the individuals.

### Scope of Application

47. The provisions will cover all working arrangements, whether they be practices in the workplace, the criteria used to promote or appoint people or to give access to benefits, or the provisions of the contract (or other policies). Thus an ordinary working practice, such as when information about benefits which are granted on a first come first served basis is published, may be challenged as indirectly discriminatory. If the workplace custom was to publish overtime opportunities for the week at a time of day when those with caring responsibilities would be unlikely to access them, this would place women at a particular disadvantage and could be challenged.

### Justification

48. The test for justification is similar to that employed in relation to sex discrimination. Age discrimination (direct or indirect) can be justified by reference to different criteria, but in relation to the other prohibited forms of discrimination justification requires the Defendant to identify a legitimate aim and to show that the means used to achieve that aim are appropriate and necessary.

49. In *Bilka-Kaufhaus GmbH v Weber von Hartz*<sup>16</sup> the Court formulated the test which can be universalised as follows:

- (i) Is the criteria, provision or practice, imposed other than in order to discriminate on ‘protected grounds’?
- (ii) Do the means selected to achieve the chosen aim correspond to a real need?
- (iii) Are they appropriate to achieve that aim?
- (iv) Are they necessary in order to achieve that end?

50. Justification by an individual Defendant will require evidence rather than mere assertion. In *Nimz*<sup>17</sup> there were part time workers, predominantly women, who were required to have more years of service than full time workers before they could be promoted to a higher grade. The employer had to show that there was a relationship between the nature of the duties performed and the experience afforded by the performance of those duties after a certain number of hours had been worked. The argument that full-time workers acquire necessary skills more quickly and have greater experience, in so far as they were generalisations, could not amount to objective criteria capable of justifying an otherwise discriminatory practice.

51. There must be proportionality between the aim and the means used to achieve it. This will require the judge to balance between the discriminatory impact of a provision and the aim being pursued.

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<sup>16</sup> Case 170/84 [1986] ECR 1607

<sup>17</sup> *Nimz v Freie und Hansestadt Hamburg*, Case 184/89 [1991] ECR I-297

52. In *R v Secretary of State for Employment ex parte Seymour-Smith*<sup>18</sup> the Court of Justice held that in order to show that a measure is justified by objective factors unrelated to any discrimination (there based on sex), it was not enough for a Member State to show that it was reasonably entitled to consider that the measure would advance a social policy aim.
53. Although in choosing the measures capable of achieving the aims of their social and employment policy, the Member States have a broad margin of discretion, that cannot have the effect of frustrating the implementation of a fundamental principle of Community law (such as that of equal pay for men and women).
54. Therefore mere generalisations concerning the capacity of a specific measure to encourage recruitment were not enough to show that the aim of the disputed measure was unrelated to any discrimination based on sex nor to provide evidence on the basis of which it could reasonably be considered that the means chosen were suitable for achieving that aim.
55. Similarly the case law of the Community suggests that where an individual employer puts forward justification it will be scrutinized very carefully and much more carefully than if the justification was being made by the government on a measure of law. Thus in *Stapleton v The Revenue Commissioners and Department of Finance*<sup>19</sup> the Irish Revenue asserted that there was a particular practice relating to the crediting of actual service. The ECJ stated that this was no more than a general assertion unsupported by objective criteria.
56. In *Jørgensen v Foreningen af Speciallaeger*<sup>20</sup> the Court of Justice held that budgetary considerations could in themselves justify discrimination on grounds of sex. Although budgetary considerations might underlie a Member State's choice of social policy and influence the nature or scope of the social protection measures which it wishes to adopt, they will not in themselves constitute an aim pursued by that policy and cannot therefore justify discrimination (against one of the sexes in that case).
57. In *Schnorbus* the measures were justifiable as they were designed to take account of the delay to male applicants' education caused by national service and the delay was not disproportionate as it did not exceed 12 months. The Directive did not therefore preclude the disputed provisions as they were objectively justifiable and used to address the delay suffered by male applicants due to their national service obligations.
58. There must be an objective basis for the justification. There must be, in other words, objective reasons unrelated to any discrimination on the prohibited grounds.
59. The tools, which practitioners will need to become familiar with, include:
1. How to use statistics. Recital 15 of the FD points out that the appreciation of the facts from which it can be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice.

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<sup>18</sup> [1999] 2 C.M.L.R. 273

<sup>19</sup> [1998] E.C.R. 1-3739 (C-243/95)

<sup>20</sup> [2002] 1 C.M.L.R. 40

However “such rules may provide, in particular, for indirect discrimination to be established by any means including on the basis of statistical evidence”.

2. How to employ monitoring techniques. Employers and Public Authorities will be able to preempt legal actions by acting on the messages that regular monitoring gives to them concerning the disposition of the people to whom the Directives apply. Article 13 in particular provides that member states shall take adequate measures to promote dialogue between the social partners with a view to fostering equal treatment. These measures include the monitoring of workplace practices, collective agreements, codes of conduct and also include research or exchange of experiences and good practice.

#### Justification of direct discrimination: Age discrimination

60. One exception to the principle that direct discrimination cannot be justified relates to Article 6 of the Framework Directive. This provides that

‘Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.’

61. The FD goes on to give an indication of the differences in treatment that may be justified. These include special conditions for young people, older workers and persons with caring responsibilities in order to promote vocational integration or ensure their protection; fixing minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment; fixing a maximum age for recruitment based on training requirements of post, or the need for a reasonable period of employment before retirement.
62. The meaning of this Article will have to be the subject of an early preliminary ruling by the Court of Justice.

#### Justification: Genuine Occupational Requirements

63. The Preamble to the FD states that in very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission<sup>21</sup>.
64. This introduces the concept of Genuine Occupational Requirements, under Article 4. The preamble speaks of these as a justification of discrimination. Article 4 of the Directive provides that member states may provide that a difference of treatment which is based on a characteristic related to any of the Article 1 grounds shall not constitute discrimination where by reason of the nature of the particular occupational activities concerned or of the context in which they are

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<sup>21</sup> Para 23 Preamble

carried out, such a characteristic constitutes a genuine and determining occupational requirement.

65. On the face of it Article 4 is a general provision in which the onus lies on the Defendant to justify why an exception from the normal provisions relating to discrimination is appropriate in the particular circumstances. It permits the judge to determine each case on individual merit. However the circumstances in which the justification is to be used are to be notified by the Member States to the Commission. Thus there will necessarily be a limited set of circumstances in which the justification can apply in any particular Member State.
66. What must the Defendant prove? I think that something along the lines of a Canadian bona fide occupational requirement is needed<sup>22</sup>.
- a. The treatment must be based on an Article 1 related characteristic.
  - b. Such treatment will not be discrimination if either by reason of the particular occupational activities concerned or of the context in which they are carried out, the following conditions are fulfilled
    - (a) The Defendant has an honest and good faith belief that the GOR is necessary for the fulfilment of the legitimate aim of the employer (The characteristic must be a genuine occupational requirement);
    - (b) The characteristic is a determining occupational requirement. Possession of the characteristic or failure to possess it cannot be accommodated in another way, so that the person cannot engage in the occupation without (or with) that characteristic.
    - (c) The insistence of the Defendant that the characteristic is a requirement of engaging in the occupation must be in pursuit of a legitimate aim, and
    - (d) Requiring the characteristic for engaging in the occupation is proportionate to the aim pursued.
67. Thus if there is another way in which the aim of preserving a particular occupational context can be achieved without giving differentiating in the treatment of the Complainant (so as to give rise to possible discrimination), the difference in treatment will not be justified by the alleged GOR.

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<sup>22</sup> *Terry Grismer v The British Columbia Council of Human Rights & The British Columbia Superintendent of Motor Vehicles and the Attorney General of British Columbia* [1999] 3 S.C.R. 868 and see *British Columbia (Public Service Employee Relations Commission) v BCGSEU* (the Meiorin case) [1999] 3 SCR 3, where Supreme Court of Canada adopted the following approach:

“<sup>54</sup> Having considered the various alternatives, I propose the following three step test for determining whether a prima facie discriminatory standard is a BFOR. An employer may justify the impugned standard by establishing on a balance of probabilities:

- (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
- (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
- (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer”

68. There are specific GORs relating to religion and belief. Article 4.2 provides that a state may maintain national legislation pursuant to which a difference of treatment based on a person's religion or belief shall not constitute discrimination
- (e) if it relates to occupational activities within
    - i. churches or
    - ii. other public organisations or private organisations (if the ethos of these organisations is based on religion or belief) and
  - (f) by reason of the nature of those occupational activities (or the context in which they are carried out) a person's religion or belief constitutes an occupational requirement which is
    - i. genuine
    - ii. legitimate and
    - iii. justifiedhaving regard to the organisation's ethos.
  - (g) The difference of treatment must be implemented taking into account the Member States' constitutional provisions and principles as well as the principles of Community law;
  - (h) The difference of treatment should not justify discrimination on another ground.
69. Churches and other public or private organisations (the ethos of which is based on religion or belief) may continue to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

#### Harassment

70. A new concept of discrimination is introduced in the Directives. Under Article 2.3 harassment is deemed to be a form of discrimination. It consists of
- (a) unwanted conduct
  - (b) related to any of the article 1 grounds
  - (c) which takes place with the
    - a. purpose of violating the dignity of a person or
    - b. effect of violating the dignity of a personand with
    - c. the purpose of creating an intimidating, hostile or degrading humiliating or offensive environment or
    - d. the effect of creating an intimidating, hostile or degrading humiliating or offensive environment.
71. The FD goes on to provide that the concept of harassment may be defined in accordance with the national laws and practice of the member states.
72. The implementation of this provision cannot dilute the requirements of the Article. This raises the issue of non-regression, which is emphasised in the preamble and in the text of the FD. There can be no regression from pre-existing rights.

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