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TRIER CONFERENCE

THE FIGHT AGAINST DISCRIMINATION: The Equal Treatment Directives of 2000

Definitions of key concepts: Direct and Indirect Discrimination, Harassment

Background

My assignment is to talk about the definitions of three key concepts in EC anti-discrimination law, namely direct and indirect discrimination and harassment. I will begin with direct and indirect discrimination because these are in practice much more important concepts than harassment. Their detailed definitions are, as we will see, set out in the Race Directive and the Framework Directive. However, before we analyse these provisions, I need to tell you a little about their background and development.

Although discrimination on the grounds of race, religion or belief, disability, age and sexual orientation only became the subject matter of EC legislation in 2000, there had been two bodies of EC anti-discrimination law in existence since the birth of the EC Treaty; these were the provisions prohibiting discrimination on the grounds of nationality and of sex. A large number of cases have been decided by the European Court of Justice (ECJ) about the meaning and ambit of these prohibitions on discrimination. These judicial decisions shed vital light on the underlying concepts of direct and indirect discrimination. Time precludes an extensive trawl through this case law, so suffice it to say that much of what was developed has found its way into the modern law contained in the Race and Framework Directives. Lessons were learned about the way in which discrimination occurs in practice and how it needs to be responded to, and these lessons are now applied in the modern law. The law on sex discrimination has also now been formally amended so that that legislation formally reflects the judicial developments it has undergone and so that it is expressed in identical language to the Race and Framework Directives.

There is therefore one consequence of this process which it is important to note; the Race and Framework Directives have of course only been in operation for a relatively short period of time so we only have as yet the beginning of a trickle of cases dealing with the interpretation of these instruments. There is, however, an extensive jurisprudence on nationality and, in particular, sex discrimination. This jurisprudence is therefore of the utmost significance to the application of the new Directives. It provides what we common lawyers would refer to as "precedents" for the interpretation and application of the new law. So, much of what we know about the meaning of the key concepts for the purposes of the new Directives will be drawn from sex and nationality discrimination law – at least until such time as there is a body of case law on the new legislation itself from the ECJ.

Direct discrimination

Let us begin with direct discrimination. This is really – in conceptual terms at least – much the simpler of the two manifestations of discrimination. It is what most people instinctively think of when they hear the word "discrimination". It occurs where, on one of the protected grounds, one person is treated less favourably than another. So, for example, it covers cases where somebody is not selected for employment because he or she is black, or where somebody is not promoted because of their disability or their sexual orientation. It is often described as protecting the principle of "formal equality", in other words, the principle that like cases should be treated alike. It is essentially an individualistic cause of action and it is a vital ingredient of all systems of anti-discrimination law.

Direct discrimination was not defined, or even referred to, in the earliest EC legislation on discrimination. It is, however, today defined in statutory language in both the Race and the Framework Directives. The crucial section in the Race Directive is Article 2. This provides, in paragraph 1, that the principle of equal treatment is to mean that there must be no direct or indirect discrimination based on racial or ethnic origin. It goes on to provide, in paragraph 2, that 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". Article 2 of the Framework Directive is cast in equivalent terms and says, in paragraph 2, that direct discrimination occurs "where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1". The grounds referred to in Article 1 are, of course, religion or belief, disability, age and sexual orientation.

There are two aspects of these definitions which require a little amplification. The first concerns the element of unfavourable treatment. The statutory definition is at pains to stress that unfavourable treatment can be demonstrated in several different ways. The most obvious is where the claimant can point to a comparator, placed in exactly the same situation as him or herself, but receiving more favourable treatment – so, for example, somebody doing exactly the same job as the claimant but being paid more for it. The second scenario contemplated by the statutory definition is where there is not currently a comparator to whom the claimant can point, but there has been in the past. This was recognised judicially in a sex discrimination case called *Macarthys Ltd v. Smith*; the comparator who had been paid more had left the job some months before the claimant was appointed, but the female claimant was nonetheless allowed to compare her rate of pay with that of her male predecessor. The third situation in which unfavourable treatment can be demonstrated is usually referred to as the case of the "hypothetical comparator". It means that a claimant can mount a claim even though there is no actual person in existence with whom a comparison can be made. It suffices to argue that, had the claimant been of a different race or religion, for example, they would have been appointed to the relevant job, or would have been rewarded better for undertaking it. This is a very important aspect of the legislation and puts a useful weapon in the armoury of

claimants. This is because it is often not easy in practice to find an actual comparator; there may simply be no-one else in the organisation who is or has been similarly placed. This is particularly true in situations of segregated employment – where all the workers in a particular job are of a particular religion or from a particular ethnic group. Of course, it is still necessary to be able to prove to the satisfaction of the tribunal that a person of a different religion or from a different ethnic group would have been more favourably treated. But the absence of an actual comparator is not in itself a technical bar to the claim because a hypothetical comparator will suffice.

The other point to make about direct discrimination concerns grounds. The unfavourable treatment which the claimant alleges must be based, or grounded, upon one or other of the statutory heads. Put like this, this seems fairly obvious. However, what it really means is that it is not good enough simply to show that – say – a black and a white worker have been treated differently. The differential or unfavourable treatment of the one contrasted with the other must actually have its cause in race. Putting this another way, this opens up the possibility of the employer being able to defend the claim by showing that there was another reason for the differential treatment of the two workers – for example, that one was much more experienced than the other or that one worked much more efficiently than the other. Causation is thus a necessary ingredient of discrimination.

While we are on the subject of grounds, there is one other thing to which I should draw your attention. In general, EC anti-discrimination law is neutral or asymmetrical in its formulation. In other words, it applies simply to race – meaning people of all races; to religion – meaning all recognised religions; to all age groups and to any sexual orientation. However, there is one group to which symmetrical protection is offered and this is the disabled. The Framework Directive only prohibits discrimination against the disabled; it does not prohibit discrimination on the ground of disability. This means, clearly, that an able-bodied person cannot use the Directive to complain that a disabled person was treated more favourably than him or herself. This formulation I think reflects a different underlying philosophy for disability discrimination from the rest of the anti-discrimination legislation. The disability provisions are directed more to relieving the disadvantages suffered by the disabled section of the population than to protecting a fundamental human right shared by everybody. This distinction is an important one in practice and it does have other theoretical consequences for disability discrimination.

We have recently had a clear example of direct discrimination on the ground of age – although, as we shall see, there was a defence to it. This occurred in the most recent decision of the ECJ on the Framework Directive, the *Palacios* case, which was decided on 16th October. Mr Palacios (who was Spanish) complained that he had been forced to retire at the state pension age of 65. The Court held that this situation fell within the scope of the Framework Directive, notwithstanding that Recital 14 to the Preamble of the Directive states that the instrument is to be without prejudice to national provisions laying down retirement ages. The Court held that this means merely that the Directive does not affect the competence of the Member States to determine retirement age. The Spanish legislation permitting forced retirement at 65 affected the duration of the employment relationship and so fell within the scope of the Directive. Moreover, this was

direct age discrimination because the legislation resulted in less favourable treatment for workers aged 65 and over as compared with all other people in the labour force. The Court concluded: "Such legislation therefore establishes a difference in treatment directly based on age, as referred to in Article 2(1) and (2)(a) of Directive 2000/78".

Indirect discrimination

Turning now to indirect discrimination, this notion tries to address a subtler form which discrimination often takes in practice. But in saying this I do not mean to imply that it is conceptually entirely different from direct discrimination; on the contrary and as I shall try to explain, the two manifestations of discrimination are really the two faces of one single coin. Indirect discrimination occurs where the way in which things work turn out to be to the detriment of a particular section of society. It tries to achieve what is often referred to as "substantive equality" – meaning genuine equality in practical terms. It is essentially a group claim, rather than an individualistic one, because it refers to disadvantage experienced by a whole group of people, albeit that the claim itself is usually brought by an individual victim. The classic example of indirect discrimination – and this is the backdrop to almost all of the early cases of indirect discrimination – is the situation of part-time women workers. It has been traditional to treat part-time workers less favourably than full-timers, for example over their rates of pay or over their terms of access to company pension schemes. However, in almost all countries the vast proportion of part-time workers are female; they have to work part-time because they also have to find time for domestic and caring duties. So a rule which disfavours part-timers in reality actually disfavours women; it is a clandestine form of sex discrimination. The same sort of thing would occur where an employer demands particular hours of work which are impossible for the adherents of certain religions, or where particular language skills are demanded which members of certain ethnic groups cannot demonstrate. The concept of indirect discrimination steps in to halt this kind of disadvantage but it has to be defined with considerable care.

Again, the relevant definitions are contained in Article 2 paragraph 2 of both the Race and the Framework Directives. The definitions are identical. So, for example, Article 2(2) of the Race Directive says: "indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons". This is the case "unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary".

There are several aspects of this statutory drafting to note. First of all, there are the words "apparently neutral provision, criterion or practice". Such a provision, criterion or practice must be imposed by the employer on the workforce. This wording is intentionally broad. I think this is to demonstrate that it does not matter precisely how the discriminatory state of affairs comes into existence. UK law in the past used to use the words "requirement or condition", meaning that the employer had positively to demand a particular quality from the workforce, but it became clear that this was too restrictive a formulation if all indirect discrimination was to be caught; this was because an employer might, for example, simply express a preference for a particular type of employee, or

might just operate a practice which excluded certain groups. A classic example of this kind of thing is word-of-mouth recruitment, which used to be quite prevalent in many sectors of industry; the employer would not advertise jobs but would seek new recruits simply from those known to the existing workforce. This of course has the practical consequence that the same type of people from the same groups in society continue to be employed in the job in question. This practice used to be particularly common in Northern Ireland and it had the practical consequence that certain employers hired only Protestant workers and others hired only Catholics. So the Directives now use the expression "provision, criterion or practice" to show that it does not matter how the exclusionary process operates; it can be by the deliberate specification of the employer or it can simply be a consequence of the way in which in practice the business operates.

In order to constitute indirect discrimination, the exclusionary provision, criterion or practice must be capable of putting persons (say) of a racial or ethnic origin at a particular disadvantage compared with other persons. Again, the wording chosen here is intentionally far-reaching. An earlier definition used in sex discrimination law used to refer to disadvantaging a "substantially higher proportion" of one group than of another. This led to all sorts of difficulties, in particular the selection of the appropriate group or "pool" for the purposes of comparison. Quite a lot of claims foundered on this basis. A good example is provided by the *Gruber* case. Ms Gruber gave up her job because she could not obtain child care. The relevant national legislation (Austrian) provided that, where employment had lasted for three years, the employee was entitled to a termination payment. However, this only applied to terminations instigated by the employee if the termination was for what the legislation referred to as "important reasons". The important reasons listed did not mention child care. However, another legislative provision entitled workers who had worked for at least five years to half the usual termination payment where they left their job on childbirth. Ms Gruber argued that this situation amounted to indirect discrimination on the ground of sex. She argued that the groups to be compared were workers who resigned from employment because of childbirth and those who resigned for "important reasons". When this comparison was made, it was obvious that women were disadvantaged because the first group received only half the termination payment received by the second group. However, the employer responded that the comparator groups should be workers resigning for childbirth and those resigning without "important reasons"; if this basis was used, women were not disadvantaged because they received at least half the termination payment, whereas the comparator group received nothing. The ECJ held that the issue was whether childbirth could be aligned with "important reasons" and it eventually came to the seemingly extraordinary conclusion that it could not! This was because all the "important reasons" listed in the legislation were related to working conditions in the business concerned or to the conduct of the employer. These situations, the Court held, were "in substance and origin" different from Ms Gruber's. However, Léger AG reached a different conclusion, saying that the comparator group should consist of those placed in circumstances such that it would not be "reasonable" to require them to continue in employment.

This unfortunate case demonstrates what potential pitfalls lie in the claimant's path where the anti-discrimination legislation refers to groups or proportions of people who are

disadvantaged by a particular practice. If you choose the wrong group for comparison, your claim will fail. In addition, special problems present themselves in race cases because in a number of countries it is illegal, or anyway regarded as improper, to collect statistics on racial or ethnic identity. Where this is the case, it is obviously very difficult to construct a case for saying that many more people of one race or ethnicity than of another are disadvantaged by a provision because you do not have the requisite evidential base.

For these various reasons, the Race and Framework Directives have used different language and now simply require that persons like the claimant are "at a particular disadvantage compared with other persons". To what extent this will free up the new provisions from the problems faced by their predecessors it is difficult to predict. There clearly remains a need to demonstrate that the impugned practice has a negative impact for a particular group and it is hard to see how such a thing can be proved without some sort of statistical evidence. Hopefully, however, the new formulation has removed some of the technicality surrounding the old law so that tribunals will be able to rely more on their common sense in drawing conclusions. So, for example, if one was trying to establish that an hours of work requirement was indirectly discriminatory, it would only be necessary to adduce evidence that the religion in question forbade working on the Sabbath or that it required regular prayer breaks. It should not be necessary to produce statistical evidence about the actual number of people affected.

Nevertheless, it needs to be remembered that the Directives both refer to "a particular disadvantage" being experienced by the claimant group. What precisely is meant by a "particular" disadvantage is something which will have to be worked out in the case law. I assume that it means that the claimant group must experience a significant, not merely a trifling, disadvantage. However, this is not exactly what the instruments say. And it would clearly undermine the purpose of the legislation if tribunals were to insist on a very high level of disadvantage before an indirect discrimination claim could be sustained. In the analogous cases in the sex discrimination field the ECJ has not in practice required very precise proof of the degree of impact and it seems likely that it will continue to take this approach. Tribunals will probably be left quite a measure of discretion in this area.

The final thing to notice about the definition of indirect discrimination is its contingent nature. The Directives use the expression "would put" – the impugned practice "would put" persons from a particular group at a particular disadvantage. It is not, therefore, necessary to show that disadvantage has already been experienced. All that is necessary is to show potential disadvantage. There are two essential reasons for this legislative wording. The first is that it could sometimes prove practically very difficult indeed to produce statistical evidence to demonstrate that disadvantage has actually been experienced by a particular group; this is especially true in sensitive fields such as sexual orientation where obviously statistical evidence is likely to be non-existent. If the test is a contingent one, then all that has to be shown is that the impugned practice would operate to the disadvantage of a particular group, and this can largely be left to the good sense of the tribunal. So, for example, if the employer demanded that all his employees must be

married, a tribunal could conclude without much trouble that this would disadvantage gay people and it would not need statistical data to support this finding. The second reason for having a contingent test of harm for indirect discrimination is that, where the law provides that a particular thing is prohibited, it is not in principle usually necessary to wait for actual harm to happen. Most legal systems try to injunct such harm before it happens and this is what the new Directives allow too. So apprehended discrimination can be stopped in its tracks.

Defences

Once a *prima facie* case of either direct or indirect discrimination has been made out, the next question is obviously whether there are any defences to the claim. I have already made passing reference to this matter in the context of direct discrimination. We saw that, to constitute discrimination, the unfavourable treatment received by the claimant must be grounded in, or caused by, that person's membership of a protected class. If there is some other and acceptable reason for treating the claimant less favourably than others, then the unfavourable treatment is not caused by membership of the protected class and there has been no discrimination. This is in one sense a matter of defence, but I think that it is better explained in terms of the essential ingredients of a discrimination claim. As I understand it, there are really two elements of the statutory tort or civil wrong which we know as discrimination; they are: harm or adverse impact (in other words, unfavourable treatment) and causation (in other words, the unfavourable treatment is grounded on the claimant's membership of a protected group). If either of these elements is lacking, then there has been no unlawful discrimination. Where the cause of the unfavourable treatment is something other than membership of a protected group, then the element of causation is not satisfied. I'm going to return to this point a little later because it is also relevant in another context.

Of course, apart from cases where discrimination is not proved, there are some specific defences contained in the Directives themselves. There is, for example, a defence where belonging to a particular group is a genuine occupational requirement; this covers things like requiring a Jew for a job as a rabbi. However, these are matters of the substantive law, rather than of basic definition, so I am not going to discuss them further here.

When one moves onto indirect discrimination the matter of so-called "defences" becomes a little more complicated. We have seen that, according to the definition in Article 2(2) of the Directives, *prima facie* indirect discrimination can be "justified". In the statutory language, an apparently discriminatory provision, criterion or practice may be "objectively justified by a legitimate aim" provided that "the means of achieving that aim are appropriate and necessary". It is very important to understand the role played by justification in this scheme. We need to go back to our two essential ingredients of a discrimination claim: harm and causation. In the case of direct discrimination, both have to be demonstrated by the claimant. However, when it comes to indirect discrimination, it is not so easy for a claimant to establish causation. All that the claimant can do in the indirect sort of case is show that there is an adverse impact on a particular group which results from the defendant's practices. The law understands this difficulty and so it gives the claimant the benefit of the doubt in indirect discrimination claims. If the claimant can

demonstrate adverse impact on a protected group, then the law assumes that that adverse impact is caused by discrimination unless the defendant disproves this. The defendant can do so by demonstrating that the impugned practice was used for some entirely unconnected and innocent reason. So, for example, an hours of work requirement was imposed because the factory had to operate continuously, or a language requirement was imposed because the employee had to communicate effectively with customers. In such a situation, the *prima facie* indirect discrimination is said to be "justified"; in other words, it is explained away on innocent, legal grounds. The functional role played by justification is therefore to disprove causation in indirect discrimination claims.

There is, as you might expect, a good deal of case law on the requirements of justification. The first case in which the ECJ discussed the matter in detail was *Bilka-Kaufhaus* in 1986. This was another sex discrimination claim and the Court made a famous statement of principle. This was that apparent indirect discrimination could be justified by the defendant if it could be established that the defendant had acted in response to a real need on his part, that he had acted in a way which was appropriate to achieving his objectives, and that the measures taken were necessary to achieve these objectives; in other words, there must be no alternative, non-discriminatory way of achieving the objectives. Provided that these criteria were satisfied, the ECJ held that an economic objective can be sufficient to constitute justification for pay discrimination. These requirements have effectively now been written into the new Directives and we can, I think, legitimately assume that the ECJ's case law will continue to provide reliable guidance as to the meaning of justification.

There is not time at the moment to examine in detail all the practical applications to which the notion of justification has been put. For employers it is of course a very useful way of getting themselves off the hook, so it is very frequently pleaded. There are, however, three significant points about it which I should like to make briefly. The first is that, to constitute justification, the employer's reasoning must be entirely free of discrimination; if a practice has its roots in prior discrimination, then it will not satisfy this condition. What is required is "objective" justification, not merely "justification". Secondly, the Court has found it very difficult to articulate clear policy in this area. In particular, it has never properly explored the relationship between a person's right to be free of discrimination and an employer's right to make a profit. The balance between human rights and economic needs has not been fleshed out fully and there will undoubtedly be more cases which raise this issue. To what extent can it really be permissible for an employer to excuse discrimination by saying that he needed his enterprise to be commercially successful?

The third point about justification is that the ECJ has not been consistent in its articulation of the content of justification in different contexts. This statement requires a bit of unpacking! We have seen that discrimination is forbidden by the Race and Framework Directives in the context of employment; an employer is prohibited from discriminating against his or her employees in the circumstances contemplated by the Directives. However, the obligation not to discriminate is a wider one too. The Member States are also required to abide by EC law; they must implement the Directives in their

own systems and they must refrain for enacting or maintaining in force any legislation which runs counter to the Directives. This has the necessary corollary that national legislation must be judged against the standards set by the Directives. Just like the actions of an individual employer, the Member State's laws may be *prima facie* indirectly discriminatory and, if they are, then they can only be saved by being objectively justified. The problem which has been encountered in this context is that the ECJ has tended to be more generous to the Member States than to individual employers; it has permitted the States a much wider measure of discretion in justifying what would otherwise be indirect discrimination than it has for employers. This is probably in deference to the political sensibilities of the Member States, but it produces a somewhat incoherent set of standards.

I mentioned earlier that disability is treated differently by the legislation from the other prohibited types of discrimination. It is only discrimination against disabled persons which is prohibited, not discrimination on the general ground of disability. This is in deference to the fact that disability discrimination is analytically rather different from the other kinds of discrimination. Discrimination on most of the grounds dealt with by law is usually prohibited because it is almost always irrelevant to a person's capacity to do a particular job. However, it is not so simple with disability; of course many disabilities are entirely irrelevant to the doing of a job but this is not invariably the case. Some disabilities have a genuine and significant bearing on a person's ability to carry out particular tasks. The legislation therefore has to try to engineer a balance between protected disabled people from being discriminated against and permitting employers to carry on their businesses effectively and safely. The mechanism for achieving this balance is contained in Articles 2(2)(b)(ii) and 5 of the Framework Directive. It is the principle known as "reasonable accommodation". When an employer is faced with an allegation of unlawful discrimination against a disabled person, it is a defence to prove that reasonable accommodation has been provided for persons with the disability in question. Article 5 states that this means that employers must take appropriate measures, where needed in a particular case to enable a person with a disability to be employed; measures cease to be "appropriate" where they imposes a "disproportionate burden" on the employer. This is another balancing act which has to be performed by the tribunal. In practice, this area of the law gives rise to huge amounts of litigation in national courts; so far, the ECJ has only dealt with it very briefly in the context of the *Chacón Navas* case. It said there that dismissal on the ground of disability is prohibited by the Framework Directive where, in the light of the obligation to provide reasonable accommodation, the dismissal is not justified by the fact that the job-holder is no longer competent, capable and available. This does not really tell us a great deal that we did not already know – but more litigation on this issue before the ECJ can certainly be foreseen.

Before leaving the subject of defences, there is one further point I need to make. It is sometimes suggested that direct discrimination, like its cousin indirect discrimination, should generally be justifiable. This is a dangerous idea and I think that it involves a serious misunderstanding of the concepts underlying the tort of discrimination. We have already seen that there are two essential elements of a successful discrimination claim: harm and causation. If there is no causation, there is no unlawful discrimination. We have

also seen that objective justification reflects the element of causation where the discrimination is indirect: if the adverse consequences to one group can be shown to be attributable to an acceptable and discrimination-neutral factor, then there can be no discrimination. The cause of the adverse impact is something other than discrimination. When one is dealing with direct discrimination, however, once adverse treatment and causation have been proved, that is the end of the matter. There can logically be no room for further arguments about the roots or causes of the adverse treatment. Justification is, therefore, simply irrelevant in the context of direct discrimination. It would also be a very dangerous thing to import generally into the law because it would introduce a raft of undefined excuses for discrimination which are not articulated in the Directives. This would obviously have the potential to undermine very seriously the effectiveness of the legislation. So the concept of justification is very important as regards indirect discrimination; but it should in principle have no relevance or application to direct discrimination.

Sadly, however, life is not always simple! And some important inroads have been made into the theoretical position that direct discrimination cannot be justified. The most significant of these inroads for present purposes is Article 6 of the Framework Directive because this permits the justification of age discrimination. Article 6(1) says that the 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. This provision was in issue in the first case to reach the ECJ on the Framework Directive, *Mangold v. Helm*. The Court took a robust view there of the defence of justification in this context. It was confronted with a German law which on its face discriminated against workers over 52 by permitting unrestricted fixed-term employment contracts to be made with them. German law (in deference to the Directive on Fixed-Term Contracts) normally sets restrictions on the circumstances in which fixed-term employment contracts can be made, because temporary employment obviously does not provide stability for employees. The Member State attempted to justify this exception to the normal rule, saying that it was necessary to integrate older workers into the labour market because older workers find it much more difficult than younger ones to obtain jobs. The Court was not persuaded by this argument and held that the legislation was a disproportionate way of achieving a legitimate objective.

However, in the more recent *Palacios* case, the ECJ was undoubtedly more deferential to the Member States and it was persuaded on this occasion that the age discrimination was justified; as we have seen, this discrimination resulted from the dismissal of those who had reached retirement age. Spain argued that such dismissals were necessary to promote its national policy for achieving a better distribution of employment between the generations. The Court reiterated that the Member States enjoy a "broad discretion" in their choice of social measures. It concluded that the Spanish legislation was objectively and reasonably justified and that the measures taken were appropriate and necessary; it is worth noting that this was despite the fact that Spain's alleged policy was not articulated expressly in its legislation. However, the Court did take into account that the workers

concerned were not unduly prejudiced because, before they could be dismissed, it had to be shown that they were eligible to receive their old-age pensions. So it might not have found the legislation justified if the workers concerned had simply been sacked without any financial provision being made for them.

Intention or motivation

I want to move on now to the place of motivation or intention in discrimination law. There is, at first blush, a natural feeling that direct discrimination must require some sort of intention; the employer must mean in some sense to disadvantage the employee. On the other hand, indirect discrimination seems to arise more spontaneously and so perhaps it does not require intention.

In fact, this analysis misunderstands the basic rules and concepts contained in anti-discrimination law. The law exists in order to compensate victims for a civil wrong which has been committed against them. It is not a matter of punishing someone for a criminal offence. Intention is therefore quite unnecessary, as the ECJ has made clear on a number of occasions in relation to sex discrimination. It is enough simply that the victim's adverse treatment was on the ground of their membership of the relevant group. In other words, all that has to be established is that "but-for" their race, religion or the like, they would have received more favourable treatment. The classic example of this principle at work is an English case, *James v. Eastleigh Borough Council*. A married couple, both aged 62, went to a local authority swimming pool. The local authority operated a well-intentioned policy of admitting old-age pensioners into its pool free. However, unfortunately English law had different pension ages for men and women, with the result that Mrs James had a free swim but Mr James had to pay about one Euro to go swimming! The House of Lords held that this amounted to unlawful sex discrimination in the provision of a service. "But-for" his sex, Mr James would have got in free. His adverse treatment was therefore caused by his sex and the benign motive of the local authority was completely irrelevant. It is clear from a number of cases that the ECJ also endorses this principle. So motive or intention are not necessary ingredients of discrimination, whatever form that discrimination takes. Of course, it needs to be added that there may be a malign motive for either direct or indirect discrimination; and where this can be proved it clearly strengthens the claimant's case.

Harassment

The final topic which I have been asked to discuss is harassment. This concept has only appeared in statutory form in EC law in very recent years, although it has been perceived to exist in practice for very much longer. Harassment is expressly defined by Articles 2(3) of both the Race Directive and the Framework Directive. These Articles say that harassment is to be "deemed" to be discrimination for the purposes of the Directives. And "harassment" occurs where "unwanted conduct" related to racial or ethnic origin (or the other grounds) takes place "with the purpose of effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment".

There is no case law yet from the ECJ about the meaning of harassment, but there are some oddities about the wording of the statutory definition which may well give rise to future litigation. Harassment is, as we have seen, "deemed" to be unlawful discrimination. However, the definition contained in Articles 2(3) does not really correspond to the accepted concept of discrimination; this is because, unlike other types

of discrimination, there is no element of actual or hypothetical comparison. Discrimination normally involves the allegation that someone has been treated less favourably than a comparator but this is not the case for harassment. Perhaps the answer is that, where someone is harassed on the ground of – say – their race, it is quite obvious from the circumstances that a person of a different race would have been treated more favourably.

More problematically, it is arguable that (presumably contrary to what was intended) it could actually be more difficult to prove harassment than simple discrimination. We know that the usual types of discrimination require proof of harm and causation. However, in order to satisfy the Directives' definition of harassment, it is necessary to prove additional elements as well – namely, that the conduct complained of is "unwanted", that it must have the purpose or effect of violating the claimant's dignity (which will certainly have to be elucidated by the ECJ), and that it must have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment. In fact, that third and last element would seem to be much harder to prove than mere harm or adverse impact. So it will be interesting to see what the ECJ makes of the harassment provision and whether it actually adds anything constructive in the long-run to the claimant's weaponry.

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