

THE CONCEPT OF EQUALITY IN EU LAW

The language of EU law

- Article 157 of the Treaty on the Functioning of the EU outlaws sex discrimination in pay (paras 1 and 2), seeks 'to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation' (para 3), and tries to ensure 'full equality in practice between men and women in working life' (para 4).
- The Consolidated Equal Treatment Directive (Directive 2006/54, OJ [2006] L204/23) states its purpose as 'to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation' (Article 1).
- The Race Directive (Directive 2000/43, OJ [2000] L180/22) and the Framework Directive (Directive 2000/78, OJ [2000] L303/16) lay down frameworks 'for combating discrimination.... with a view to putting into effect in the Member States the principle of equal treatment' (both in Article 1).

General issues

- Discrimination arises in different ways and is not limited to conscious or deliberate acts founded on prejudice. See eg. *The Stephen Lawrence Inquiry*, Cm 4262-I (HMSO, London, 1999).
- 'Formal' and 'substantive' equality. Diversity.
- 'Symmetrical' or 'one-sided' legal protection?

The two types of discrimination

(a) Direct

- The law's method of providing 'formal' equality.
- The ECJ's mistake in Case 43/75 *Defrenne v. Sabena* [1976] ECR 455. Direct discrimination can be – and often in practice is – disguised. Case 69/80 *Worringham v. Lloyds Bank Ltd* [1981] ECR 767.
- Intention or motive unnecessary. See eg. *R v. Commission for Racial Equality, Ex p. Westminster City Council* [1985] ICR 827.
- The EU statutory definitions all use the same formula. See eg. Article 2(1)(a) of the Consolidated Equal Treatment Directive: 'where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a

comparable situation'. Similarly, Race Directive Article 2(2)(a) and Framework Directive Article 2(2)(a).

- EU law seems to protect against 'discrimination by association', at least in the field of disability: Case C-303/06 *Coleman v. Attridge Law* [2008] ECR I-5603.

(b) Indirect

- The law's method of providing 'substantive' equality.
- Focuses on the circumstances experienced by groups of people.
- The statutory formulations are again similar. See eg. Article 2(1)(b) of the Consolidated Equal Treatment Directive: 'where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary'. Similarly, Race Directive Article 2(2)(b) and Framework Directive Article 2(2)(b) (but notice the additional defence of reasonable accommodation provided in the context of disability by Article 2(2)(b)(ii)).
- Notice that the concept embraces contingent harm.
- The main trap for claimants is making an effective comparison and proving adverse impact for a particular group. See eg. Case C-249/97 *Gruber v. Silhouette International Schmied GmbH* [1999] ECR I-5295.

Justification

- Important because it provides a defence to indirect discrimination.
- The pivotal case was Case 170/84 *Bilka-Kaufhaus GmbH v. WeberVon Hartz* [1986] ECR 1607. The ECJ's statements are now codified into the legislation.
- The danger of permitting economic justification: *Clay Cross v. Fletcher* [1979] ICR 1, *Bilka-Kaufhaus*.
- Logically, it ought to be impossible to justify direct discrimination.

Concluding remarks

- Law better at achieving 'formal' rather than 'substantive' equality.
- Does indirect discrimination really do the job?
- What other methods exist of seeking to achieve substantive equality? Positive action. Mainstreaming. Regulatory systems.

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