

THE FIGHT AGAINST DISCRIMINATION IN THE EUROPEAN UNION

TRIER

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THE CASE OF RELIGIOUS DISCRIMINATION

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THE AIM OF THIS PRESENTATION

- **To illustrate some of the problems of EU non-discrimination law with the example of religious discrimination**
- **To discuss the case of Ms Sad Atmar Ghan**

Direct and indirect discrimination

- **We will concentrate on the definitions of direct and indirect discrimination, on**
- **the possible justifications for direct and indirect discrimination, and on**
- **the burden of proof in case of justifying indirect discrimination**

RELIGIOUS DISCRIMINATION (1)

The case of Ms Ulla Senton (born catholic) who has converted to the Sikh religion and now calls herself Ms Sad Admar Gahn

- She is a qualified counsellor.
- She applies for 4 different jobs. (*)
- Is this direct / indirect discrimination?
- Is positive action to get her a job allowed?

RELIGIOUS DISCRIMINATION (2)

- Job 1: psychologist / counsellor in the local health care centre annex hospital
- Job 2: counsellor in a Catholic grammar school
- Job 3: social worker / counsellor in a women's shelter
- Job 4: psychotherapist / counsellor in a psychiatric hospital

DIRECT DISCRIMINATION

**Definition: Article 2, par. 2 (a) of Directive 2000/43/EC
and
2000/78/EC**

Important elements:

- **A less favourable treatment**
- **A comparable situation**
- **A relationship with one of the non-discrimination grounds of the Directives**

INDIRECT DISCRIMINATION

Definition: Article 2, par 2 (b) of Directive 2000/43/EC and 2000/78/EC

This involves a two-fold test:

- **Is there a (a) *particular disadvantage* as a result of of (b) certain *provisions, criterion or practices*? (Claimant)**
- **Is there an objective justification for this situation? (Defendant)**

JUSTIFICATION FOR DIRECT DISCRIMINATION (1)

- **Closed system of justification (except with age discrimination)**
- **Narrow interpretation of the justifications by the ECJ**

JUSTIFICATIONS FOR DIRECT DISCRIMINATION (2)

Directive 2000/78/EC:

- Measures necessary for public security et cetera (Article 2 par. 5)
- Occupational requirements (Article 4, par. 1)
- Occupational activities within churches et cetera (Article 4, par. 2)
- Positive action programmes (Article 7, par. 1) Social measures for disabled persons (Article 7, par. 2)
- Specific positive action programs in Northern Ireland (Article 15)
- In case of age discrimination: See Article 6

G.O.R. and Positive Action

Especially difficult are the justifications of

- ◆ Genuine Occupational Requirements
- ◆ Positive action measures

INDIRECT DISCRIMINATION

**Definition: See Article 2, par 2 (b) of Directive
2000/43/EC
and 2000/78/EC**

This involves a two-fold test:

- **Is there a (a) *particular disadvantage* as a result of
of (b) certain *provisions, criterion or practices*?**
(Claimant)
- **Is there an objective justification for this
situation? (Defendant)**

JUSTIFICATION FOR INDIRECT DISCRIMINATION

- **Open system of justifications**
- **Criteria for objective justification in Article 2, b (i)
+ case law ECJ (less narrow)**

Objective justification test - part 1

The defendant should bring forward the *aim* of the provision, criterion or practice, and has to prove:

- a. that this aim corresponds to a real need of the undertaking or meets a necessary aim of the social policy of a Member State (See e.g. *Bilka*, C.-170/84 and *Nimz*, C.-184/89)
- b. that this aim in itself has nothing to do with discrimination on one of the forbidden grounds

Objective justification test - part 2

The defendant should prove that the *means* (i.e. the contested provision, criterion or practice) of achieving this aim are *appropriate and necessary*.

This means:

- a. that the aim could not be reached with other (less damaging) means (necessary)
- b. that the means are proportional to this aim and are effective to reach this aim (appropriate)