

# MULTIPLE DISCRIMINATION

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20 April 2015

## OVERVIEW

Introduction

1. Multiple discrimination and intersectionality: origin and developments

2. The legislation

Gaps in today's EU legislation and challenges

The Council of Europe

National legislation

3. The case-law

The European Court of Justice (ECJ)

The European Court of Human Rights (ECHR)

National case law

4. How can we tackle multiple discrimination today?



## MULTIPLE DISCRIMINATION AND INTERSECTIONALITY: ORIGIN AND DEVELOPMENTS

- Isabella Baumfree (pseudonym: Sojourner Truth): Icon of African-American women's rights advocacy and abolitionism. Speech, *Ain't I a Woman?*, Ohio Women's Rights Convention in Akron (Ohio) in 1851.
- Combahee River Collective, founded in Boston in 1974, regarded as a stronghold of black women's rights: *The Combahee River Collective Statement*, issued in 1977.
- Gloria C. Hull, Patricia Bell Scott and Barbara Smith's book (1981): "*All the Women Are White, All the Blacks Are Men, But Some of Us are Brave: Black Women's Studies*".
- Hooks, B., 1982: "*Ain't I a Woman. Black Women and Feminism*".

Black women experience oppression differently from both 'white middle-class women' and 'black men', because sex, race and class are inextricably bound together.



## MULTIPLE DISCRIMINATION AND INTERSECTIONALITY: ORIGIN AND DEVELOPMENTS

- Kimberlé Crenshaw (1989): **Intersectionality**

The location of women of color at the intersection of race and gender makes their experiences *structurally and qualitatively "different than that of white women"* but these experiences "*tend not to be represented within discourses of either feminism or anti-racism, discourses that are shaped to respond to one or the other, leaving women of color marginalized within both*"



## TRAFFIC INTERSECTION ANALOGY

- “Consider an analogy to traffic in an intersection, coming and going in all four directions. Discrimination, like traffic through an intersection, may flow in one direction and may flow in another. If an accident happens in an intersection, it can be caused by car travelling from any number of directions and, sometimes, from all of them. Similarly, if a Black woman is harmed because she is in the intersection, her injury could result from sex discrimination or race discrimination”
- (Crenshaw, K., 1989)



## The Legislation



## UNITED NATIONS

### **1995 Beijing:** Fourth World Conference on Women

*Beijing Declaration: to intensify efforts to ensure equal enjoyment of all human rights and fundamental freedoms for all women and girls who face multiple barriers to their empowerment and advancement because of such factors as their race, age, language, ethnicity, culture, religion or disability or because they are indigenous people.'* (United Nations 1995);

**2001, Durban:** World Conference on Racism, Racial Discrimination, Xenophobia and Related Intolerance (Falcón, S.M., 2012) preparatory meetings prior to the Conference spread debate on intersectionality and multiple discrimination (gender dimension of racism)

### **UN Convention on the Rights of Persons with Disabilities**

(entered into force in 2008)



## THE EUROPEAN UNION LEGISLATION

### o EU Secondary Law

**Council Directive 2000/43** implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

*Recital 14:* “In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, **especially since women are often the victims of multiple discrimination**”  
(Double Discrimination)



## THE EUROPEAN UNION LEGISLATION

**Council Directive 2000/78** of 27 November 2000 establishing a general framework for equal treatment in employment and occupation “**women are often the victims of multiple discrimination**”

*Recital 3:* In implementing the principle of equal treatment, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, **especially since women are often the victims of multiple discrimination.**

(Double discrimination)

[Art. 6 Justification of differences of treatment on grounds of age

(...) (2) Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, **provided this does not result in discrimination on the ground of sex]**



## THE EUROPEAN UNION LEGISLATION

Art. 17(2) of Directive 2000/43 and Art. 19(2) of Directive 2000/78:

(...) In accordance with the principle of gender mainstreaming, this report shall, *inter alia*, **provide an assessment of the impact of the measures taken on women and men**. In the light of the information received, this report shall include, if necessary, proposals to revise and update this Directive”.

This obligation to report has been interpreted as concerning both gender mainstreaming and issues of multiple discrimination (Schiek, D. 2012)



## THE EUROPEAN UNION LEGISLATION

**Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services**

**Directives 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)**

**NO reference to multiple discrimination, nor to mainstream other discrimination grounds in the reports assessing the implementation of these Directives.**



## SOFT LAW

- European Parliament resolution on the situation of women from minority groups in the European Union (2003/2109(INI)): Multiple discriminations concerning

1. *Disabled women*
2. *Migrant women*
3. *Roma women*

Green Paper "Equality and non-discrimination in an enlarged European Union"

European Parliament resolution on the situation of Roma women in the European Union (2005/2164(INI)),

Disability Action Plan and Gender Action Plan (Schiek, D. & Lawson, A., 2011)

Roadmap to equality between women and men 2006/2010 (Bello, B.G., *op.cit.*);

## GAPS IN THE LEGISLATION AND CHALLENGES

- o No definition of multiple discrimination
- o 'Only' multiple discrimination occurring to women are taken into account by the Directives 2000/43 and 2000/78
- o Hard law: Explicit mention of multiple discrimination appears just in the Recitals of the Directives 2000/43/EC and 2000/78
- o Different scopes of the anti-discrimination Directives and hierarchy of antidiscrimination protection
- o Numerus clausus of antidiscrimination grounds
- o Equality bodies just under Directives 2000/43/EC and 2006/54/EC. Many Member States adopted Equality bodies with single-ground agendas (see at: <http://www.equineteurope.org/>)
- o Two different EU Agencies (FRA and EIGE): Increasingly cooperating though; Different Legal Networks of Experts
- o No regulation is provided about: COMPARATOR; JUSTIFICATION; BURDEN OF PROOF; REMEDIES

## THE COUNCIL OF EUROPE

- Istanbul Convention
- Recommendation to member States on Measures to combat discrimination on the grounds of sexual orientation and gender identity (Recommendation CM/Rec(2010)5)
- Roma Youth Action Plan



### THE ISTANBUL CONVENTION ON PREVENTING AND COMBATING VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE

Its Explanatory report emphasizes that “migrant and refugee women may also be excluded from support services because of their residence status. It is important to point out that women tend to experience multiple forms of discrimination as may be the case of women with disabilities and/or women of ethnic minorities, Roma, or women with HIV/Aids, to name but a few. This is not different when they become victims of gender-based violence” (par. 53, p. 10).



### Recommendation to member States on Measures to combat discrimination on the grounds of sexual orientation and gender identity

It encourages the states “to take measures to ensure that legal provisions in national law prohibiting or preventing discrimination also protect against discrimination on multiple grounds, including on grounds of sexual orientation or gender identity; national human rights structures should have a broad mandate to enable them to tackle such issues” (Art.46).

### DEFINITION OF MULTIPLE DISCRIMINATION

**Multiple Discrimination = umbrella term for all** situations where discrimination occurs on more than one ground. It encompasses:

- 1) **Multiple Discrimination *tout court***: someone experiences discrimination on different grounds on separate occasions
- 2) **Compound Discrimination (also additive or cumulative)**: discrimination on more grounds which add to each other in the same occasion. The role of the different grounds can still be distinguished (see *Perera v Civil Service Commission* (no 2))
- 3) **Intersectional discrimination**: on more than one ground, where the influence of various grounds cannot be disentangled (PROBLEM!!!)

(Makkonen, T., 2002)

# FOCUS ON THE EU LEGISLATION



FOCUS ON THE EU LEGISLATION DIFFERENT SCOPES AND HIERARCHY OF ANTIDISCRIMINATION PROTECTION			
Directive 2000/43/EC	Directive 2000/78/EC	Directive 2004/113/EC	Directive 2006/54/EC
Racial and Ethnic Origin	Religion or Belief, Age, Disability, Sexual Orientation	Gender	
employment and occupation  supply of goods and services, including housing  education and social protection, including social security, healthcare and social advantages	employment and occupation	supply of goods and services, including housing, except education, media advertising	employment and occupation.

### PROPOSAL FOR A 'HORIZONTAL DIRECTIVE'

The Proposal was presented by the European Commission on 2 July 2008 for trying to eliminate the hierarchy of discriminatory grounds and to abolish the discrepancies between the objective scopes of the Directive 2000/78/EC and the Directive 2000/43/EC.

The final text of the Proposal was adopted by the European Parliament on 2 April 2009

### DEFINITION OF MULTIPLE DISCRIMINATION IN THE PROPOSAL FOR A 'HORIZONTAL DIRECTIVE'

#### **2. Multiple discrimination occurs when discrimination is based:**

(a) on any combination of the grounds of religion or belief, disability, age, or sexual orientation, or

(b) on any one or more of the grounds set out in paragraph 1, and also on the ground of any one or more of:

(i) sex (in so far as the matter complained of is within the material scope of Directive 2004/113/EC as well as of this Directive),

(ii) racial or ethnic origin (in so far as the matter complained of is within the material scope of Directive 2000/43/EC as well as of this Directive), or

(iii) nationality (in so far as the matter complained of is within the scope of Article 12 of the EC Treaty).

**3. In this Directive, multiple discrimination and multiple grounds shall be construed accordingly".**

## OBLIGATION TO REPORT (PROPOSAL OF A 'HORIZONTAL DIRECTIVE')

Art. 16 (2)

The Commission's report shall (...) also contain information about multiple discrimination, covering **not only discrimination on grounds of religion or belief, sexual orientation, age and disability, but also discrimination on grounds of sex, race and ethnic origin**. In the light of the information received, this report shall include, if necessary, proposals to revise and update this Directive.



## MAIN CRITICISMS TO THE TEXT OF THE PROPOSAL

- 1) The specific combination between gender and racial/ethnic origin has not been addressed
- 2) The gaps of protection concerning gender discrimination (education, media, advertising) were not filled
- 3) Objective scope: definition of multiple discrimination provided by the Proposal: only outside employment?
- 4) Legal gaps (comparator, justification, remedies, etc.) remain unsolved



## NUMERUS CLAUSUS OF ANTIDISCRIMINATION GROUNDS

- In the light of *Chacón Navas*, should an «intersectional ground» (e.g. intersectional discrimination against a Roma woman) be considered as a «new ground”?

(*Chacón Navas* v Eurest Colectividades SA (2006) C-13/05)



NO REGULATION IS PROVIDED FOR:

1. **SUITABLE COMPARATOR**
2. **JUSTIFICATION**
3. **REMEDIES**



## COMPARATOR

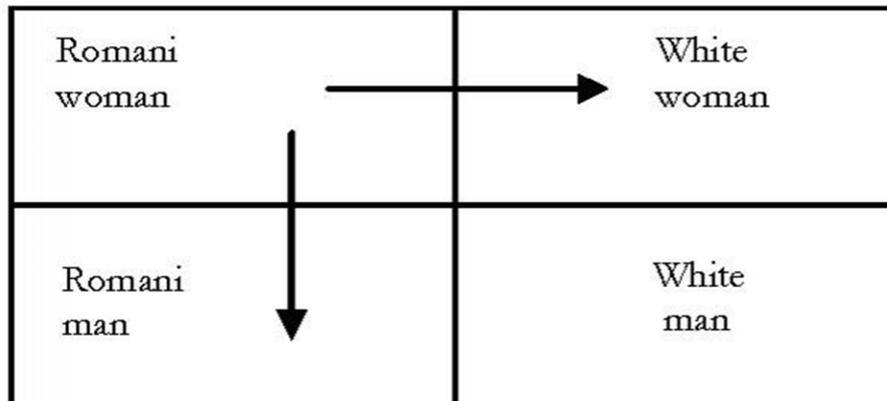
- Direct Discrimination: also hypothetical comparator
- Indirect Discrimination: comparator
- Harassment: no comparator

Intersectional Discrimination:

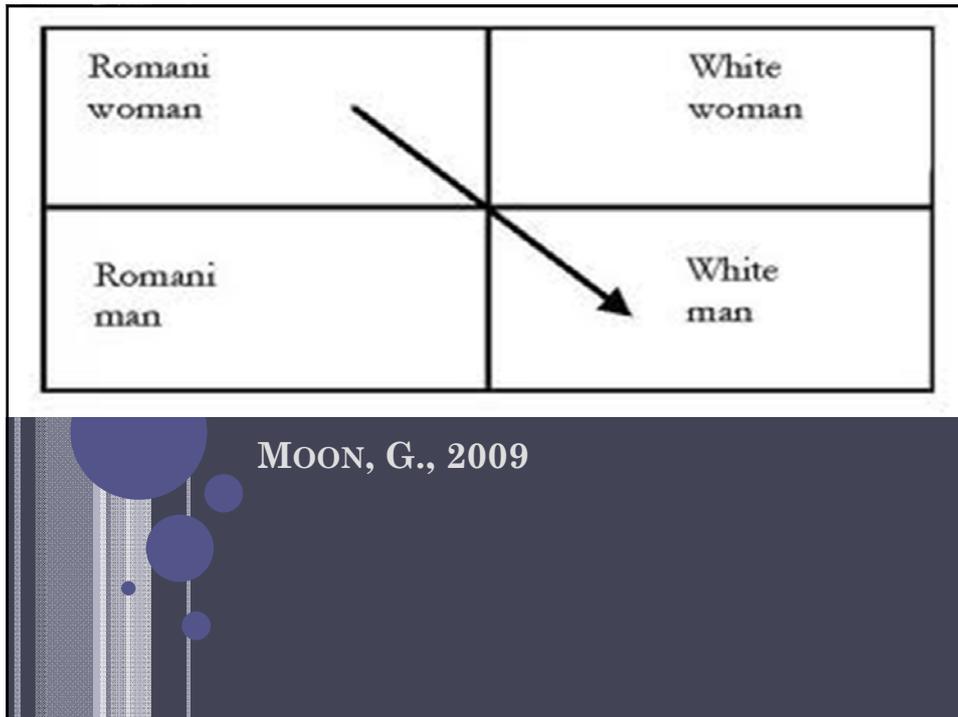
Single comparator vs. multiple comparator approach

Comparator - free approach? (like in the case of harassment)

Hypothetical comparator?



MOON, G., 2009



## JUSTIFICATION

**Direct discrimination:**  
Restrictive provision (numerus clausus): Only justifications provided by the antidiscrimination Directives are admitted.

**Indirect discrimination:** justifications which meet the general conditions described in the Directives are admitted

**Common Justifications**

- a) Genuine and determining occupational requirements
- b) Positive action

**Specific justifications (Directive 2000/78/EC)**

- a) Disability and age in the armed forces
- b) Religion and beliefs: specific, previously existing, genuine occupational requirements
- c) Age: legitimate objectives associated with employment and social security policies
- d) Religion: provisions specific to Northern Ireland (police officers and teachers)

## JUSTIFICATION

Intersectional discrimination: Should the case be rejected only on the basis of a justification applicable to all grounds referred in the claim (see below, *German Law*)? Or is sufficient to refer just to some of them?

In the amendments to the Proposal for a “horizontal” Directive, the opinion of the Committee for Women Rights seems in line with the first solution. However the final text adopted by the European Parliament did not include this remark.

## REMEDIES

How should the remedies be calculated in the cases of intersectional discrimination?

Different approaches:

On the one hand, the lack of higher remedies in the case of intersectional discrimination can discourage the claimants to ground the case on several categories or on the intersection of them. On the other hand, the higher remedies should not result in

‘adding’ different remedies or double counting. They should, though, mirror the major harm suffered by the victim of discrimination.

## NATIONAL LEGISLATION

## NATIONAL LEGISLATION

Austria, Bulgaria, Germany, Greece, Italy, Poland, Romania, Spain, United Kingdom

make a reference to multiple discrimination.

They mostly do not distinguish between multiple and intersectional discrimination

## AUSTRIA

Neither the Austrian Federal Equal Treatment Act nor the Equal Treatment Act (both 2004) provide specific rules on multiple discrimination.

2008 amendment of the two acts: multiple discrimination shall be taken into account when assessing the amount of damages.

Explanatory Memorandum: cases of multiple discrimination have to be assessed “from an overall perspective and the claims cannot be separated or cumulated by grounds”.

The Austrian Disability Equality Act provides that multiple Discrimination might be taken into account by authorities, when assessing the award of damages.

## BULGARIA

Protection against Discrimination Act (PADA):

Supplementary provisions to the PADA: multiple discrimination shall mean discrimination on the grounds of more than one of the characteristics under Article 4(1).

### **(Positive measures)**

Article 11(2) of Pada: “State authorities, public bodies and local governments shall undertake priority measures due to the provisions of Article 7(1), subparagraphs 12 and 13 (currently pp. 13 and 14), to provide equal opportunities for individuals who are victims of multiple discrimination”, i.e.:

- educational and training measures ensuring balanced inclusion of women and men
- specific measures for the benefit of disadvantaged individuals or groups of people

*(Tisheva, G. 2009. Bulgaria. In Burri, S. et al., 2009)*

## GERMANY

The German Equal Treatment Act (AGG 14.08.2006).  
Section 4 of this Act provides:

“Discrimination is based on several of the grounds...[it] is only capable of being justified...if the justification applies to all the grounds liable for the difference of treatment.”

This clause means that, with any combined grounds, justification needs to be established at the highest standard (Moon, G., 2009. *Op. Cit.*)

No further explicit provisions



## GREECE

The Greek anti-discrimination legislation (Laws 3304/2005 and 3896/2010) does not refer to multiple discrimination

Law 3996/2011 on the reform of the Labor Inspection Body:

Article 2 par. 1 (h) : [The Labour Inspectorate Body] supervises the implementation of the principle of equal treatment irrespective of racial or ethnic origin, religion or other beliefs, disability, age or sexual orientation, taking into consideration instances of multiple discrimination in accordance with article 19 of Law 3304/2005



## ITALY

Italian law explicitly provides rules on multiple discrimination only in the simplified form of double discrimination (gender and any of the other grounds of discrimination of Legislative Decree 215/2003, implementing Directive 2000/43/EC, and Legislative Decree 216/2003, implementing Directive 2000/78/EC).

Legislative Decree 150/2011 harmonized the rules of procedure applicable for discrimination claims, apart those concerning gender discriminations. Consequently, it is possible to bring a case of discrimination on grounds of e.g. religion and ethnic origin with a single procedure, BUT if gender is involved, two separate proceedings will have to be pursued.



## POLAND

Article 18(4) of the Labour code defines 'indirect discrimination' as follows: 'Indirect discrimination occurs whenever an apparently neutral provision, criterion or practice results in differences in terms of employment to the detriment of all or a substantial number of employees belonging to a group differentiated with regard to one or more reasons mentioned in § 1, and if they cannot be objectively justified by other reasons



## ROMANIA

In Romania, the law on Equality between Men and Women (Act 340/2006, Article 4h) explicitly defines multiple discrimination as an act of discrimination based on two or more grounds of discrimination.

The Romanian Equal Treatment Act (2006), which covers the grounds of age, disability, race and ethnic origin, religion and belief, and sexual orientation, provides that discrimination on two or more grounds shall be treated as an “**aggravating circumstance**”.



## SPAIN

May 2011: New equality bill has been debated and approved (Proyecto de Ley Integral para la Igualdad de Trato y No Discriminación)

- 1) definition and regulation of multiple
- 2) discrimination and positive actions for this specific type of discrimination

### *Article 7. Multiple Discrimination*

Multiple discrimination occurs when more grounds of discrimination covered by the antidiscrimination law combine and interact (Tr: concurren o interactúan), generating a specific form of discrimination.

- Justification shall refer to each ground of discrimination
- Positive action



## UNITED KINGDOM

### Equality Act 2010

Chapter 1: Eight discrimination grounds (age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex, sexual orientation)

Chapter 2: Combined discrimination: dual characteristics;

Section 14: A person (A) discriminates against another (B) if, because of a combination of two relevant protected characteristics, A treats B less favorably than A treats or would treat a person who does not share either of those characteristics

Limits: Only direct discrimination and only on two grounds (double discrimination)



## The Case Law



## THE ECJ

### **Judgment in case C-415/10 - Galina Meister v Speech Design Carrier Systems GmbH**

Neither the national court nor the ECJ have any problem considering discrimination on grounds of age, gender and ethnicity next to each other

(Farkas, L., 2012)

### **Case C-227/04 P. Marie-Luise Lindorfer. v. Council of the European Union**

Age and sex discrimination in defining pension rights

(Schiek, D., 2012. Op. Cit.)



## THE ECHR

### **Judgement B.S. v Spain**

The ECHR recognizes the particular vulnerability of the applicant due to her race, gender, and employment status



## NATIONAL CASE LAW IN EUROPE

### AUSTRIA

#### **Supreme Court in 2010 (8 Ob A63/09m)**

Gender and ethnic origin

No decision should be made here “whether compensation for multiple discrimination had to be assessed by a general view or by cumulating amounts for each discriminatory act” (Schindlauer, D., 2012)

#### **Equal Treatment Commission, GBK II/79/09.**

Sexual harassment combined with ethnic harassment: grounds were addressed separately, since they are covered by separate legal provision.

Acknowledgement of the combined effect of multiple discrimination



### DENMARK

#### **“Føtex” (U 2005, 1265H)**

A woman was dismissed from her job at a department store because she started wearing a hijab.

The claim was lodged exclusively on the basis of religious discrimination, but the Supreme Court considered ethnic and gender discrimination as well.

However, discrimination was justified (dress code) in this case.



## FRANCE

Paris Court of Appeal (2001/32582)

Black woman: A black woman employed by the Parisian public transport authority (RATP) claims discrimination based on gender and race (Fr: à raison de son sexe et de sa race) in the work place (advancement and training).

Comparator: a group including men and a woman.

The employer does not manage to justify objectively the unequal treatment



## GERMANY

Constitutional Court's Judgement of 27 January 2015  
on ban of teacher's headscarves in public schools  
ban of teacher's headscarves in public schools

Religion or belief and gender



## GERMANY

### **Labour Court Wiesbaden, judgment 5 Ca 46/08 of 18 December 2008**

German woman of Turkish origin: grounds of gender and ethnic origin.

She was moved to a less attractive job after maternity leave: her successor in the old job is a 'German male' (comparator)

Only discrimination based on gender has been acknowledged by the Court

### **Germany - BAG, 22.01.2009 (8 AZR 906/07)**

Remedy should be proportionate (no double counting)



## NORWAY

### **Oslo Equality Tribunal B vs. Thon Hotel Opera (1/2008)**

Two girls with Asian background were refused a room in a hotel in Oslo city center (suspect they were prostitutes and drug addicts, since one of them had a home address in the city and had no luggage)

Acknowledgment of multiple discrimination (gender and origin)

The policy of the hotel was judged discriminatory



## SWEDEN

- *Alleged multiple discrimination (age and gender) in relation to hiring* ( Labour Court Case 2010 No. 91 (judgment 2010-12-15))

If the same discriminatory act concerns more grounds, it is still regarded as a **single discrimination** case. The number of grounds does not affect the amount of damages



## UNITED KINGDOM

*Bahl v. the Law Society* (*Bahl v Law Society* [2003] I.R.L.R. 640 and [2004] I.R.L.R. 799)

- **Employment Tribunal** recognized that the claimant (Bahl), an Asian woman, had been discriminated as a Black woman.

- **Employment Appeal Tribunal:** tribunal failed to distinguish 'between the elements of alleged race and sex discrimination'. It overturns the decision of the **Employment Tribunal**

- Evidence in relation to each ground is needed.

**Court of Appeal rejected Bahl's appeal.**

(McColgan, A., 2010; Solanke, I., 2010)

**Ali v (1) North East Centre for Diversity & Racial Equality  
(2) Jamiel Bux**

The applicant claims that had been discriminated both on race and gender.



## UNITED KINGDOM

**United Kingdom, Employment Tribunal, Case Nr. 2200423/2010 (ET), *Miriam O'Reilly v. British Broadcasting Corporation*, judgment 11 January 2011.**

A presenter at the British Broadcasting Corporation (BBC) was replaced with a younger female presenter, while an older male presenter was retained.

Two discrimination grounds (gender and age) were considered separately and not in combination. Age discrimination only was found by the Tribunal, but not sex discrimination.



## UNITED KINGDOM

**United Kingdom, Employment Appeal Tribunal, *Ministry of Defence v. DeBique* [2010] IRLR 471 (EAT), 12 October 2009.**

More than one discrimination ground was taken into account.

**Complain of indirect gender discrimination indirect race discrimination**

Employment Appeal Tribunal:

«the nature of discrimination is such that it cannot always be sensibly compartmentalized into discrete categories. Whilst some complainants will raise issues relating to only one or other of the prohibited grounds, attempts to view others as raising only one form of discrimination for consideration will result in an inadequate understanding and assessment of the complainant's true disadvantage.»



## SUGGESTIONS TO PROMOTE THE DEFENCE ON INTERSECTIONAL DISCRIMINATION

- 1) Harassment (no comparator)
- 2) Strategic litigation
- 3) Mediation

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