

Current issues in non-discrimination law in  
France and their possible impact in the EU

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## Overview

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## Introduction: The European initiative

The principles of equality and non-discrimination are firmly embedded in European law and the Treaties, and have given rise to a very solid body of European case law and domestic law in the Member States.

Equality has been established as a fundamental right of the EU by the CJEU: “equality of treatment of women and men is a fundamental right which forms part of the general principles of community law, the observance of which the court has a duty to ensure” (CJEC Defrenne III). Legitimacy strengthened by Art. 21 of the Charter of Fundamental Rights of the European Union, an integral part of the Treaty since Lisbon.

## Introduction: The European initiative

- The Amsterdam Treaty of 1997 (Art. 13, now Art. 19) further strengthens this body of law, extending the scope of non-discrimination law to other criteria and prohibiting discrimination based not just on sex, ethnic origins and race, but also on the grounds of religion, age, sexual orientation and disability.

## Introduction: The European initiative

- This same Article 13, now 19, of the Treaty invites “the Council, acting unanimously on a proposal from the Commission, and after consulting the European Parliament” to “take appropriate action to combat discrimination”.
- **The following main directives on discrimination in employment have been adopted:**
  - Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
  - Directive 2000/78/EC of 27 November 2000 establishing a framework for combating discrimination based on religion or belief, disability, age or sexual orientation
  - Recast Directive 2006/54/EC on discrimination on grounds of sex and equal treatment of men and women in matters of employment and occupation

## Introduction: The transposition of the directives and transnational perspective

- Today, the directives have been transposed in France in two stages, through the adoption of the laws of 2001 and 2008.
- But our focus today lies on domestic case law. It offers an interpretation of the law on non-discrimination which can lead, in a transnational perspective, to cross-fertilisation between readings of the law in different States

## Introduction: Current issues in the application of non-discrimination law in France

- With the proposed adoption of a law on **class actions** (J21 draft law), the application and interpretation of non-discrimination laws, particularly in employment, come to the fore, since such actions target **systemic discrimination**: “discrimination arising from a system, i.e. from an established order derived from apparently neutral practices, voluntary or otherwise, which lead to discrepancies in pay or career development between one category of persons and another.” (Pecaut-Rivolier report on class actions).
- In foreign law the concept of systemic discrimination is broader (Canada, United States).

## I - The various uses of the concept of direct discrimination

- A) Discrimination without comparison
- B) Direct discrimination in collective agreements

## I-A) Direct discrimination: discrimination without comparison

- While European law applies in its definition of direct discrimination:
- Where a person is treated less favourably than another is, has been or would be in a **comparable situation**
- In some disputes regarding direct discrimination against women linked to trade union activity, **the existence of discrimination does not necessarily require a comparison** with the situation of other employees.
  
- Cass. soc. 10 Nov. 2009, no. 07-42849; Cass. soc. 3 Nov. 2011, no. 10-20765; Cass. soc. 12 June 2013, no. 12-14153; Cass. soc. 29 June 2011, no. 10-14067

## I-A) Direct discrimination: discrimination without comparison

- **Cass. soc. 10 Nov. 2009, no. 07-42849:**
- Whereas in disallowing a female employee's request for payment of damages and interest for discrimination, the Appeal Court determined that the employee confined herself to stating that she had suffered a career slowdown that was discriminatory in nature without providing any evidence of comparison with other colleagues of identical status, that she had refused proposals for transfer, and that in their statements her superiors reported difficulties of concentration and organisation and of authoritarianism leading to conflicts with her subordinates;
- **Whereas, however, the existence of discrimination does not necessarily require a comparison with the situation of other employees;**
- Whereas in so determining, **without examining whether the employee's career slowdown and the difficulties she encountered after her participation in strike action gave any cause to assume the existence of direct or indirect discrimination**, the Appeal Court gave no legal basis for its decision;

## I-B) Direct discrimination in collective agreements

- European law recognises discriminatory collective agreements...

French judges investigate domestic law agreements granting compensation....

- A clause in a collective agreement excluding employees dismissed due to incapacity following a non-industrial illness or accident from the compensation it establishes is void because of its discriminatory nature based on state of health without any objective and relevant justification.
- Cass. Soc. 08.10.2014, no. 13-11789
- See also Soc. 23 May 2012, no. 10-18.341

## II - The original application of indirect discrimination

- A) Systemic discrimination in social protection
- B) Indirect discrimination and access to the law
- C) Indirect discrimination in the management of absence

## A) Systemic discrimination in social protection

- **Where consideration of discrimination sheds light on the gendered segregation of occupations**
- Within the MSA agreement, the AGIRC allows executive membership at the same occupational level to certain positions predominantly occupied by men while refusing it to other mainly female positions. This disadvantages women in some jobs, and the organisation has not shown the necessary and appropriate nature of the exclusion from membership such as to refute the description of indirect discrimination, holding that the criterion of comparison with similar positions in sister agreements was the only one for achieving the objective of stability, consistency and sustainability of the scheme.
- Cass. soc., 6 June 2012, no. 10-21.489

## B) Indirect discrimination and access to the law

- **Indirect discrimination due to an apparently neutral law may result in the denial of access to justice:**
- The Supreme Court upheld the Appeal Court's decision to convict an employer of indirect discrimination because of ethnic origin:
- The Employment Division found that, "**whereas the existence of discrimination does not necessary require comparison with the position of other employees;** that, having determined that the exploitation by Mrs X and Mrs Y of the irregular status of Mrs Z on French soil, allowing her no scope for any complaint, resulted for this 'employee' in the **negation of her legal and conventional rights and put her at a total disadvantage compared with domestic staff benefiting from labour laws**, the court of appeal, deducing that Mrs Z had suffered indirect discrimination by reason of her origin, has legally justified its decision on these grounds..." (Soc. 3 Nov. 2011 cited above)

## C) Indirect discrimination in the management of absence

- French judges investigate employers' decisions which take the form of discriminatory collective practices.
- "But whereas having determined that the employer had introduced a measure for 'raising awareness of production disruption issues', conducting 'return from absence' interviews regardless of the length and reason for the absence, including cases of industrial illness or accident, which interviews discussed the disruption to the organisation of the firm caused by the absence and concluded with a document signed by the employee concerned, the Appeal Court, finding that employees absent for health reasons were suffering indirect discrimination because of their state of health despite the apparently neutral character of this measure, rightly ordered this practice to be stopped; that the plea missing in its first part was inadmissible in its remainder. **Cass. soc. 12 February 2013, no. 11-27689**

## III - The various uses of discriminatory criteria

- A) Discrimination on the grounds of age (exceptions not admitted)
- B) Discrimination on the grounds of sex (maternity)
- C) Discrimination on the grounds of religion or beliefs (customers)
- D) Discrimination on the grounds of sexual orientation (burden of proof)
- E) Discrimination on multiple grounds (physical appearance, sex, age, trade union membership)

### III A) Discrimination on the grounds of age (exceptions not admitted)

**Art. 6 of Directive 2000/78 concerns age:**

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.**

**CJEC Palacios, C-411/05; CJEU Fuchs, C-159/10**

**In domestic law, Art. 1133-2 of the Labour Code reflects this exception**

### III A) Discrimination on the grounds of age (exceptions not admitted)

The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law insofar as **it constitutes a specific application of the general principle of equal treatment.** (Case C-144/04 - Werner Mangold, points 74 - 76)

**“In those circumstances, it is for the national court, hearing a dispute involving the principle of non-discrimination on grounds of age as given expression in Directive 2000/78, to provide, within the limits of its jurisdiction, the legal protection which individuals derive from European Union law and to ensure the full effectiveness of that law, **disapplying if need be any provision of national legislation contrary to that principle.**”**

**•C-555/07 Küçükdeveci, points 50, 51**

### III A) Discrimination on the grounds of age (exceptions not admitted)

- **The Supreme Court has sometimes been more rigorous** than the European Court of Justice in examining the legitimate and proportionate nature of the justifications advanced for exceptions.
- Recently, in the case of ski instructors: Soc. **17 March 2015**, no. 13-27142
- For older employees refusing early retirement: **Soc. 9 July 2015**, no. 14-16009

### III A) Discrimination on the grounds of age (exceptions not admitted)

- Soc. 9 July 2015, no. 14-16009:
- “That having found that, firstly, **the employee had refused early retirement** and that the employment protection plan therefore provided her fewer benefits than other redundant employees who did not satisfy the conditions for early retirement, and secondly, that this difference in treatment could not be justified by the sole fact that employees aged at least 55 years were encouraged to accept early retirement, the Appeal Court rightly held that the employee suffered different treatment which was not justified by objective and relevant reasons.”

## B) Discrimination on the grounds of sex (maternity)

- **Judges are particularly vigilant regarding maternity protection at moments that increase the risk of discrimination:**
- “That in ruling thus, given that it had found that the employer, informed of the employee’s pregnancy, had, after abandoning the initial dismissal procedure, exempted the employee from work until her maternity leave, refused to continue to pay her salary during this leave in accordance with the company’s normal practice, and implemented the mobility clause at the end of her maternity leave, from which it could conclude upon the existence of discrimination due to the employee’s pregnancy, and that it was for the employer, given these facts, to show that its decision was justified by objective facts wholly unrelated to discrimination, the Appeal Court had breached the aforementioned texts” **Soc. 02/07/2014, no. 1312496**
- See also Soc. 15/09/2010, no. 08-43299, which is less ambitious than the CJEC 11/10/2007 Paquay case, C-460/06

## C) Discrimination on the grounds of religion or beliefs (customers)

- **Preliminary ruling on wearing the veil and customer wishes**, Cass. soc. 9 April 2015, no. 1319855
- “Should the provisions of Art. 4 §1 of Council Directive 78/2000/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation be interpreted to mean that the desire of the customer of an IT consultancy firm not to have this firm’s IT services delivered by a female employee, a design engineer, wearing an Islamic veil, can constitute a genuine and determining occupational requirement by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out?”
- **Lyons industrial tribunal (casting vote), 18 September 2014**: Article 1121-1 of the Labour Code controlling restrictions on freedom, rather than the prohibition of discrimination: **Carrefour may not invoke surveys hostile to wearing the veil to justify the dismissal of a veiled cashier.**

## D) Discrimination on the grounds of sexual orientation

- **Burden of proof, Cass. Soc. 6 November 2013, no. 12-22270:**
- Whereas in disallowing an employee's request for the revocation of his dismissal on the grounds of discrimination due to his sexual orientation, re-instatement, and the payment of gross salary from the date of dismissal to the effective date of re-instatement, the judgment found that Mr X reported no words, measures or decisions suggesting the existence of direct or indirect discrimination against him;  
**That in so determining, when the employee held that a month after learning of his sexual orientation his superior had withdrawn him from a case against the wishes of the customer concerned, and that barely two weeks after this withdrawal he was summoned to an interview prior to dismissal for serious misconduct, the Appeal Court, which, while finding that the dismissal was without real and serious cause, abstained from investigating whether these facts could suggest the existence of discrimination, deprived its decision of legal basis;**
- See also Soc. 24/04/2013, no. 11-15204; Soc. 9 July 2014, no. 10-18341

## III E) Discrimination on multiple grounds (physical appearance, sex, age)

- **Some disputes concern new forms of discrimination (gender) by aggregating criteria (physical appearance, sex)**
- "But whereas having recalled that under Art. 1132-1 of the Labour Code no employee may be dismissed on the grounds of sex or appearance, the Appeal Court noted that the dismissal occurred for the reason, set out in the dismissal letter, that "because of your position in customer service we are unable to tolerate the wearing of earrings by a man", **showing that the reason was the employee's physical appearance in conjunction with his sex**; that having found that the employer did not justify its decision to require him to remove the earrings by objective facts wholly unrelated to discrimination, it could conclude that the dismissal was founded on a discriminatory reason; that the appeal, ineffective insofar as it is based on Art. 1121-1 of the Labour Code which the Court has not applied, is unfounded;"
- Cass. soc. 11 Jan. 2012, no. 10-28213

### III E) Discrimination on multiple grounds (age and trade union membership)

- Age and trade union membership (discrimination on the grounds of trade union membership is not covered by the EU), Soc. 19 May no. 13-27763:
- **Fraudulent enforced retirement and deferred benefits under the employment protection plan:** “Where the employer waits until the end of an employee’s protection period in order to terminate, in the guise of enforced retirement not meeting the statutory conditions, an employment contract that is part of a mass redundancy project due to site closure which is already in effect at the termination date, the undertakings in the employment protection plan are deferred in the case of this employee.”

### III E) Discrimination on multiple grounds (Sex, physical appearance and age)

- Versailles Appeal Court, 7/05/2014, no. 13/03766:
- **Lingerie saleswomen aged 54**, accepted as discriminated against because of her age and appearance when requesting a transfer in a large Paris store. Young women were given preference.

## IV - The apprehension of harm

**The ability to distinguish different kinds of harm (harassment and discrimination):** Cass. Soc. 3 March 2015 no. 13-23521, RJS 5/15 no. 314:

In this particular case from the world of publishing, an editor suffered a significant reduction in her editing duties when returning after taking maternity leave on three occasions. Dismissed for physical incapacity, she claimed compensation before the lower court for psychological harassment and discrimination on the grounds of pregnancy.

The Supreme Court ruled that “the obligations under Articles L 1132-1 and L 1152-1 of the Labour Code, prohibiting discrimination and psychological harassment respectively, are distinct, insofar as the failure to respect each of them, where they cause different harm, give rise to specific compensation.”

## Conclusion

- Burden of proof is key and helpful role of the Defender of Rights
- Some criteria still difficult to apply in France (racial criterion)
- New criteria to bring into play (residence, discussions of loss of independence, social insecurity?)
- Challenges of class action