Definition of Key Concepts of Discrimination

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Discrimination on Grounds of Gender

Directive 76/207/EEC
 Implemented in 1976 the Equal Treatment Directive on the implementation of the principle of Equal treatment for men and women as regards employment


• access to employment, including promotion, and vocational training
• Working conditions, including pay

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Definitions from the directive - Direct Discrimination

where one person is treated less favourably on grounds of sex than another is, has been or would have been treated in a comparable situation (Art 2(1) a Recast Directive)

The scope of the Directive

Specifically includes
• Discrimination arising from the gender reassignment of a person;
• Harassment and sexual harassment as well as any less favourable treatment based on a persons rejection of or submission to such conduct;
• Instruction to discriminate against persons on grounds of sex(Article 2(2)b
• Any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC (Article 2 2c)
Direct Discrimination

Direct Discrimination can arise where members of one sex are treated more favourably than those of the other sex. Direct Discrimination occurs where the treatment is based on a criterion which is either explicitly that of sex or necessarily linked to a characteristic indissociable from sex. See Schnorbus v Land Hessen [2000] case C-79/99

Examples of an explicit link to sex
- Different retirement ages for men and for women
- Different charges to a swimming pool for men and woman of different ages
- Earlier finish time for shift work for women than for men
- Failing to promote or employ a woman because of gender
Direct Discrimination

Examples of factors necessarily linked to a characteristic indissociable from sex

- Dismissal of pregnant women
- Less favourable treatment of pregnant women
- Exclusion of woman who is breast feeding
Distinction between direct and indirect discrimination

The basic difference between direct and indirect discrimination is plain........ The rule against direct discrimination aims to achieve formal equality of treatment: there must be no less favourable treatment between otherwise similarly situated people on grounds of [sex]. Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular [sex]


On Grounds of gender

• The legal test concerns causation and not motivation - it does not matter what the intention of the discriminator was, only what the cause of the treatment was; It is an objective test

• No fault need be proved against the employer for example (See Dekker)

• The question is what is the treatment grounded upon, or caused by?
The comparator - actual or hypothetical

- A comparison may be made with an actual identified other person who is employed at the same time as the claimant, or after or even before the claimant.
- A comparator may also be hypothetical, i.e. how would the employer have treated a man in the same circumstances?

Direct Discrimination - comparators

- In either case the comparator must be in the same material circumstances as the person alleging discrimination.
- Where the cause of the treatment is pregnancy (subject to the protected period), there is no need to make a comparison, and the way that a sick man would have been treated is of no relevance.
Direct Discrimination by reason of Association

The framework directive forbids discrimination against a woman who, though not herself disabled, was subject to detrimental treatment by her employer because she had to care for her son who was disabled.

See Coleman v Attridge law case C-303/06 [2008]

Query - does this cover less favourable treatment of a person because of their association with someone of the opposite gender?

See the opinion of AG Madero in C.

Direct Discrimination by statement of intent?

Yes say the CJEU.

See Centrum v Firma Feryn NV [2008] case C-54/07

In which CJEU considered the statement by a company director that he would not employ immigrants to work in his business, was direct discrimination.
Can Direct Discrimination on grounds of sex be justified?

- Dekker v Stichting Vormingscentrum Voor Jonge Volwassen Plus case C-177/88
  The concept of justification has no place in the law relating to direct discrimination
- Pensionsversicherungsanstalt v Kliestrecent Case C-356/09
  confirms the position in Dekker that no justification of Direct discrimination under EU law

Definitions from the Directive - indirect discrimination

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
Indirect discrimination - What is a Policy, Criteria or practice

- Pension scheme terms conferring rights on part time workers only after a period of full time work with the company
  - Bilka Kaufhaus GhmbH v Weber Von Hartz case 170/84
- State terms excluding women who work part time from receipt of benefits
  - Rinner - Kuhn v FWW Spezial gebaudereinigung GhmbH case 171/88
  - Any rule defining a requirement to work full time hours

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Indirect discrimination - making the comparison

- Indirect discrimination is about a particular impact on one group compared to another. The Definition requires a comparison of the impact on different groups. In the case of gender the comparison is between how the PCP affects women, and how it affects women.
- Does the PCP have a significant adverse impact on women compared to men?
Indirect discrimination - making the comparison

• Does a 7 day rotating shift system impact more on women than men?
• If so, does it matter why?
• Does a requirement to work full time impact more on women than men?
• Is the difference in impact statistically significant enough?
• See R v Secretary of state ex parte Seymour Smith and Perez Case C-167/97

Indirect discrimination - making the comparison

• See Nolte v Landesversicherungsanstalt Hannover Case C -317/93
  • Leger AG observations
Indirect discrimination - examples

• Different entitlement to overtime pay for part time and full time workers
  • Elsner-lakeberg v Land Nordrhein- Westfalen case C-285/02
• Differential treatment of a part time work force in other ways
  • Kachelmann v Bankhaus Hermann Lampe KG Case C- 322/98
  • Concerns selecting employees for redundancy

Justification on Indirect Discrimination

The test requires the establishment of a legitimate aim
• True on the facts
• Relied on at the time
• Aimed at achieving a purpose which is not discriminatory and relevant to the business
Justification on Indirect Discrimination

• It must be a proportionate means of achieving the aim
• The method or policy or practice must be
• The least discriminatory method

See Bilka Kaufhaus GhmbH v Weber von Hartz Case 170/84

Definitions - Harassment

Where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile degrading humiliating or offensive environment
Definitions - Sexual Harassment

Where any form of unwanted verbal, non verbal or physical conduct of a sexual nature occurs with the purpose or effect of violating the dignity of a person in particular when creating an intimidating hostile degrading humiliating or offensive environment

Harassment

• Note two different types of harassment
  • one is based on gender - i.e. a woman is harassed where a man would not be
  • second type is sexual - that is the comments or treatment or behaviour is of a sexual nature
Harassment

Commission recommendation 92/131/EEC on the protection of the dignity of women and men at work

- Noted that sexual harassment is unacceptable and may be contrary to the principle of Equal treatment
- Emphasis on the conduct being
  - Unwanted,
  - Unreasonable and
  - offensive
  - To the recipient

Annex to the recommendation is the
- European Commission Code of Practice on Sexual harassment

The conduct must be unwanted
- This is dependant upon the view of the complainant and not of the perpetrator
- The behaviour need not be intended to have the effect of undermining dignity or creating a hostile environment, it is sufficient that it does in fact have the effect
- Again, the depends on the view of the complainant
Harassment - Some examples

Coleman v Attridge Law and Steve law c-303.06

• Discrimination by Association
• Harassment by the making of inappropriate and insulting comments about her and her disabled son
• Court was asked if an employer harasses a person where it is proven that the reason for the treatment is that person has disabled son, is this a breach of the equal treatment directive?
• CJEU answer yes, in context of disability
• Query - how far does this apply to gender harassment or sexual harassment?

Other forms of Discrimination

• Instructions to discriminate
• Discrimination on grounds of gender reassignment
• Pregnancy
  • Because a woman is pregnant
  • Because a woman is taking maternity leave
• In receipt of IVF
• Surrogacy?