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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

Directive 2006/54/EC -on the principle of Equal opportunities and Equal treatment of men and women in matters of employment and occupation(The recast Directive)

- 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)

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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 (2)c

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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

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Direct Discrimination



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

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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*

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Direct Discrimination



Direct Discrimination has three key elements

- Different treatment
- on grounds of gender
- Than an actual or hypothetical other person in comparable circumstances

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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]

See **R (on the application of E) (respondent) v. GOVERNING BODY OF JFS AND THE ADMISSIONS APPEAL PANEL OF JFS and others (appellants)** [2009] UKSC 15 [2010] IRLR 136 Baroness Hale

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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?

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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?

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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.

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Direct Discrimination by reason of Association



The frame work 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

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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

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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

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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

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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 men.
- Does the PCP have a significant adverse impact on women compared to men?

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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

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Indirect discrimination - making the comparison



- See Nolte v Landesversicherungsanstalt Hannover Case C -317/93
 - Leger AG observations

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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

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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

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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 GmbH v Weber von Hartz**
Case 170/84

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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

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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

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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

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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

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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

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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?

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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?

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