Discrimination on grounds of gender

Directive 2006/54/EC on the principle of equal opportunities and equal treatment of men and women in matters of employment & occupation

- The recast 1976 EqT Directive covers:
- Access to employment, promotion, vocational training
- Working conditions, including pay
Scope of the Directive

‘Discrimination’ includes:

• Discrimination arising from gender reassignment – preamble (3)
• Harassment & sexual harassment; less favourable treatment based on rejection or submission to such conduct – Art 2(1)(c), (d), (1)
• Less favourable treatment of a woman related to pregnancy or maternity leave – Art 2(2)
• Instruction to discriminate on grounds of sex – Art 2(2)

Direct discrimination

• Directive 2006/54/EC Equal Treatment
• Art 2(1)

‘where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation’
Direct discrimination - elements

• Less favourable treatment
• On grounds of sex – whose?
• Comparator
• Causation
• No justification possible (unless genuine occupational requirement; or age)
• Is a victim necessary?

Is it direct?

Schnorbus Case C-79/99
... where the difference in treatment is based on a criterion which is either explicitly that of sex or necessarily linked to a characteristic indissociable from sex

Bressol Case C-73/08
... when the category of those receiving a certain advantage and the category of those suffering a correlative disadvantage coincide exactly with the respective categories of persons distinguished only by applying a prohibited classification
On grounds of sex

• The reason why
• Based on an inherently discriminatory / indissociable criterion
• Conscious or unconscious
• The mental processes of the alleged discriminator – different from ‘motive’
• Burden of proof – Art 19

Examples
Dekker C-177/88 – pregnancy
Thibault C-136/95 – effect of maternity leave
Tele Danmark C-109/00 – dismissal because of pregnancy or because she had not disclosed her pregnancy when recruited?
Firma Feryn C-54/07 – statement of intent to discriminate
**Borderline between direct & indirect**

*Discrimination is*

The application of different rules to comparable situations, &

The application of the same rule to different situations

*(Brown v Rentokil C-394/96)*

- direct: aims to achieve formal equality, a level playing field
- Indirect: looks at an equality of results; outcomes with a disproportionate impact

**Indirect discrimination**

2006/54/EC Article 2(1)(b)

*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 PCP is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary*
Indirect discrimination – elements

- Provision, criterion or practice (PCP)
- Apparently neutral
- Selection of pool to test the PCP
- Particular disadvantage
- Legitimate aim – (cost / cost plus)
- Are the means appropriate & necessary – Bilka-Kaufhaus
- *Enderby* indirect discrimination (equal pay)

Examples

**O’Flynn v Adjudication Officer** C-237/94
- PCP: Legal conditions for funeral payment
- Indirectly discriminatory if ‘intrinsically liable to affect migrant workers more than national workers & if there is a consequent risk that it will place the former at a particular disadvantage’
- The risk of doing so is sufficient

**Seymour Smith C-167/97**
- PCP: 2 year qualification period
- Statistical significance: lesser but consistent & relatively constant disparity over a long period
Justification

- Must establish the ‘legitimate aim’
- Must be true on the facts – does the expressed aim reflect the full scope of the aim pursued?
- Relied on at the time
- Purpose must be relevant to the business & not discriminatory
- The PCP must be rationally connected to that aim
- Be proportionate: no more than is necessary to achieve that aim / the least discriminatory method
- Evidence – not generalisations *Nimz C-184/89*

more on the borderline

*Chez C-83/14 –*

- *meters put too high to read; predominately Roma area*
- PCP puts x group at a particular disadvantage
- That disadvantage is shared
- = shifts the burden of proof
- DD - if meters high because it’s a majority Roma area
- ID – if high because of incidence of meter tampering

Consider: effect of indissociability of the reason & gender
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 – Art 2(1)(c)

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 – Art 2(1)(d)
Harassment

- Unwanted conduct
- Related to sex / gender reassignment
- Violates dignity
- Creates the prohibited environment
- Purpose? Effect?
- No comparator
- No justification
- Perception of complainant: recipient / observer

Victimisation

Article 24

- Must be measures to protect employees & their representatives
- Against dismissal or other adverse treatment by their employer
- As a reaction to a complaint or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment
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