



EU GENDER EQUALITY LAW DEFINITIONS OF KEY CONCEPTS

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SALLY ROBERTSON
CLOISTERS
sr@cloisters.com



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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



Direct - causation

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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