

EU Gender Equality Law

Definition of Key Concepts

Her Honour Judge Jennifer Eady QC
Senior Circuit Judge
Employment Appeal Tribunal



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Equal Treatment Directive 2006/54/EC

Preambles:

(2) Equality between men and women is a fundamental principle of Community law ... Treaty provisions proclaim equality between men and women as a 'task' and an 'aim' of the Community and impose a positive obligation to promote it in all its activities.

...

(6) Harassment and sexual harassment are contrary to the principle of equal treatment between men and women and constitute discrimination on grounds of sex for the purposes of this Directive. These forms of discrimination occur not only in the workplace, but also in the context of access to employment, vocational training and promotion. They should therefore be prohibited and should be subject to effective, proportionate and dissuasive penalties.

Equal Treatment Directive 2006/54/EC

Article 1: Purpose

The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

To that end, it contains provisions to implement the principle of equal treatment in relation to:

- (a) access to employment, including promotion, and to vocational training;*
- (b) Working conditions, including pay;*

...

Direct Discrimination

2006/54/EC Article 2

“where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation”

On grounds of sex – 1st category



- Discriminatory on its face - the ground, or the reason, for the treatment complained of is inherent in the act itself.
- Or it is discrimination on the grounds of a characteristic very closely related to sex (e.g. pregnancy/maternity) – its necessarily gender based.
- *But for ...* (reason/motive/purpose/intention is irrelevant)

On grounds of sex – 2nd category



- The treatment is not objectively discriminatory – you need to know something about the employer's reasons (whether conscious or subconscious) for the action in question: is the treatment because of the protected characteristic?
- NB do not confuse reason with intent.
- NB the protected characteristic need not be the sole or even the intended reason but it is a substantial/material reason.

Less favourable treatment –
requires a comparison (actual/hypothetical)
in which the circumstances are the
same/not materially different



Discrimination by association

- “On the grounds of” usually covers the protected characteristic (sex) of the complainant.
- It is wide enough, however, to cover the protected characteristic of someone who is not the complainant, so where the less favourable treatment on grounds of sex is not the complainant’s sex.
- See (by analogy) **Coleman v Attridge Law** C-303/06

Direct discrimination vs Indirect discrimination

“The basic difference ... 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]”

R (on the application of E) v Governing Body of JFS and ors [2009]

UKSC 15

Indirect Discrimination

2006/54/EC Article 2

“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: the essential elements

- An apparently neutral provision, criterion or practice (“PCP”)
- Which puts persons of one sex at a particular disadvantage
- Is there a legitimate aim for the PCP?
- If so, are the means adopted for achieving that aim appropriate and necessary?

Indirect discrimination: PCP

Typical PCPs in gender discrimination cases have included the following:

- A requirement to work full-time; anti-social hours; flexibly; long hours; uncertain hours.
- Making benefits or rights etc conditional on long-service; a particular length of service; having a permanent contract etc
- Age, height, physical strength etc requirements

These can be described as “context” factors: it is the context factor that causes the discriminatory impact. In order for the impact of the PCP to be apparent one needs context – the fact of the disadvantage.

Indirect discrimination - disadvantage

“In order to succeed in an indirect discrimination claim, it is not necessary to establish the reason for the particular disadvantage to which the group is put. The essential element is a causal connection between the PCP and the disadvantage suffered ... This may be easier to prove if the reason for the group disadvantage is known but that is a matter of fact, not law.”

Essop v Home Office and Naeem v Secretary of State for Justice [2017]
UKSC 27

Indirect discrimination - disadvantage

NB disadvantage does not need to be something in the control of the employer (although, it may be): it is not, for example, an employer’s “fault” that there is a social expectation that women will be principal carers for children and as a result be less able to work full-time/experience career disruption etc, just as it is not an employer’s “fault” that less women may be able to meet a particular height or strength requirement.

Indirect discrimination - disadvantage



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But, when an employer's PCP combines with the context factor – the disadvantage – the result is an unequal playing field and the employer must then justify the use of the criteria.

Indirect discrimination: Justification

Bilka-Kaufhaus v Weber Von Hartz C-170/84

To justify an aim which has a discriminatory effect, an employer must show that the means chosen for achieving that aim:

- Correspond to a real need on the part of the employer
- Are appropriate with a view to achieving that aim
- Are necessary to that end

Is there no less discriminatory way of achieving the aim?

Harassment

2006/54/EC Article 2

“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”

Sexual harassment

2006/54/EC Article 2

“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/Sexual Harassment

- Harassment related to sex – e.g. a woman is harassed where a man would not be
- Sexual harassment – the comments, treatment or behaviour are of a sexual nature



Harassment – essential elements

- The conduct must be unwanted – this is dependent upon the perspective of the complainant, not the perpetrator
- The behaviour need not be intended to have the effect (although that would be sufficient if it established “purpose”) – it would be enough that it does in fact have the effect of undermining dignity or creating a hostile etc environment
- For unlawful harassment to be established it is only necessary that it *relates to sex* (it does not have to be “on grounds of”)