DEFINITION OF KEY CONCEPTS

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TOPICS

1. What function of definitions?
2. Direct discrimination
3. Indirect discrimination
4. Harassment
Conclusions

1. WHAT FUNCTION OF DEFINITIONS?
AIM

- Same language: objective, uniform standards
- Effective enforcement of EU anti-discrimination law
- For all grounds (?)
DEFINITION –
What it means

• Not any difference (injustice) discriminatory
• What is lawful/unlawful
• Definitions + exemptions
• Sources: Directives + ECJ

KEY CONCEPTS

• Direct discrimination
  – Instruction to discriminate
  – Victimization
• Indirect discrimination
• Harassment
  – Sexual harassment
EU DIRECTIVES

• **Recast** Directive 2006/54
• **Race** Directive 2000/43/EC
• **Framework** Directive 2000/78/EC
+Treaty S. 10, S. 157

2. DIRECT DISCRIMINATION
DISCRIMINATION CONCEPT

Discrimination involves
- **different** rules to **comparable** situations or
- **same** rule to **different** situations

*Brown v Rentokil C-394/96*

DIRECT DISCRIMINATION

- one person is treated **less favourably**
- on a **discrimination ground**
- than another **is, has been or would be** treated in a comparable situation
<table>
<thead>
<tr>
<th>Less favourable treatment</th>
<th>Based on a discrimination ground</th>
<th>Compared to a comparable person</th>
</tr>
</thead>
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**DISCRIMINATION GROUNDS**

- **Closed EU list**: sex, race, religion or belief, disability, age, sexual orientation
- **Multiple grounds** strengthen the claim (Galina Meister C-415/10)
- Meaning of **disability** (Coleman, C-303/06)
UNFAVOURABLE TREATMENT – Material scope

E.g. Employment
• Access, termination
• Promotion, training
• Pay etc.

LESS FAVOURABLE TREATMENT

• Act or inact
• Individual or collective
• Treatment, not intention
• Victim not identified? Class action
• Statement?
CAUSALITY - COMPARATOR

„than another is, has been or would be treated in a comparable situation”

• **Actual** comparison
  – present,
  – subsequent

• **Hypothetical** comparison

COMPARABLE SITUATION?
WENDY SMITH C-129/79

A person is treated less favourably than another has been treated

Ms Smith had a claim because she could compare her pay with a former colleague

DEKKER C-177/88

Sometimes no comparator is required:
– Refusal to hire the applicant ultimately due to her pregnancy
– Direct discrimination since only women can get pregnant
EXEMPTION – GOR

• by the **nature** of activities or its **context**

• Sex, age etc. is a **genuine and determining** occupational requirement,

• if its **objective** is legitimate and the requirement is proportionate
Kreil C-285/98

No German women in military posts involving the use of arms exclusion could be justified by the specific nature of the post or the particular context in which the activities were carried out

EXEMPTION

• If implemented!
• Minimum requirements
• No other exemptions
• Narrowly interpreted
VICTIMIZATION

• dismissal or other adverse treatment by the employer
• reaction to a complaint or any legal proceedings
• in a discrimination case

LEGAL STRUCTURE

Special direct discrimination
Protected characteristic is unique:
• Complaint, legal proceeding
• Lost complaint?
INSTRUCTION

Instructed to discriminate

Request by client, employer

Discrimination, both involved

Not used as justification

3.

INDIRECT DISCRIMINATION
INDIRECT DISCRIMINATION

- an **apparently neutral** provision
- would put persons with a **discrimination ground**
- at a **particular disadvantage**
- **compared** with other persons
LEGAL STRUCTURE

• Apparently **neutral** provision
• **Different impact** (stats)
• Compared with others – **causality**
+ **Justification**

Apparantly neutral treatment

• Physical conditions (height)
• Part-time (pay)
• Seniority (years worked)
• Inactivity (child care)
JUSTIFICATION

measure is objectively justified by a legitimate aim, and proportionate: the means of achieving that aim are appropriate and necessary
Bilka C-170/84

- Pension payments only full time 15 years
- Higher administrative costs for pensions to part-time worker
- Justification (ECJ): if disparate treatment was based on a "real need" of the business

Jenkins C-96/80

difference in pay between full-time and part-time workers is not discrimination unless it is an indirect way of reducing pay of part-time workers because they are women
**ENDERBY C-127/92**

- speech therapists paid less than clinical psychologists, pharmacists
- statistics may presume indirect sex discrimination
- the employer must justify the pay arrangements - non-sex based reason?

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4. **HARASSMENT**
HARASSMENT

unwanted conduct
related to a discrimination ground
with the purpose or effect of violating dignity: creating an intimidating, hostile, degrading, humiliating, offensive environment

<table>
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<tr>
<th>Unwanted conduct</th>
<th>Because of a discrimination ground</th>
<th>Violates human dignity</th>
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LEGAL STRUCTURE

Special direct discrimination
Unwanted conduct – Regular?
Disadvantage is special:
- Purpose or effect on dignity
- Capacity, not intention
SEXUAL HARASSMENT
Recast Directive

any unwanted verbal, non-verbal, physical conduct
of a sexual nature
with the purpose or effect of violating dignity

6. CONCLUSIONS
• Detailed EU guide
• Room for ECJ interpretation
• Direct discrimination – key
• Exemptions
• Constantly developing

Thanks for your attention😊

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