

# DEFINITION OF KEY CONCEPTS

Nicola Braganza

Garden Court Chambers, London, UK

[Nicolab@gclaw.co.uk](mailto:Nicolab@gclaw.co.uk)

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## Outline

1. Some key points
2. Key concepts:
  - direct discrimination
  - indirect discrimination
  - harassment and sexual harassment
  - other forms of discrimination
  - positive action
3. What happens in practice ? Some pointers to have in mind.



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## Some key points

1. A universal human right, a fundamental principle of Community and International law – dignity, respect, equality.
2. And yet, it can be very (very) difficult to prove. It is rare to have direct evidence or access to the evidence.
3. Our laws must therefore be applied in a way so that they combat and safeguard against the hidden social evil of inequality and discrimination.
4. Discrimination and equality law provide different key concepts and tools to do this.



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## What is direct discrimination? A difference in *treatment*.

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

Art 2 (1) (a) Recast Directive



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## What are the components of direct discrimination?

- **First** - identify the treatment:
  - terms and conditions of work
  - eg allocation of shifts
  - access to benefits
  - inaction/ failure to act – eg no promotion, no pay rise, access to training, job offer
  - What is the adverse impact, the detriment, disadvantage?



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## When is treatment “less favourable”?

- **Second** – identify the comparator
- The exercise of comparison is central to discrimination = in direct discrimination - who is the comparator?
- The comparator is the person without the relevant protected characteristic – whose circumstances are not materially different
- Actual comparator, past comparator or hypothetical comparator



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## Comparator exceptions ...

- The exception - pregnancy - no comparator
- Webb C-32/93 – no comparison with pregnancy; Mrs W covered for pregnant employee. Discovered after started she might be pregnant, dismissed, employer argued man with future long term absence treated the same => CJEU direct discrimination
- Dekker C-177/88, Hertz C-179/88, Habermann C-421/92, Danosa C-232/09, Tele Danmark C-109/00, Melgar C-438/99
- Kreil C-285/98 - women in the armed forces, exclusion if specific nature of post
- Victim - Firma Feryn C-54/07 (race/ethnic origin), no individual complainant, public statement is enough



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## When is it “on grounds of ... “?

- **Third** – is there causation? A link? A connection between treatment and the protected characteristic?
- Is motive or intention necessary?
- What about perception?
- Protection by association? See Coleman C-303/06 - a mother discriminated against because of her disabled child



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## The exceptions in direct discrimination ...

- Genuine and determining occupational requirement
- “Any exception to this principle should therefore be limited to those **occupational activities** which necessitate the employment of a person of a particular sex by reason of **their nature or the context** in which they are carried out, provided that the **objective sought is legitimate** and complies with the **principle of proportionality.**” Recital (19)



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## What is indirect discrimination? A difference in *outcome*.

“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;**”

Art 2 (1) (b) Recast Directive



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## What are the components of indirect discrimination?

- **First** – identify the PCP, the apparently neutral provision, criterion or practice
  - The rule that applies to all at work.
  - The conditions that all have to meet.
  - What is the provision on its face neutral, fair and *'equally applied'* to all?
  - Seniority – if objectively necessary
  - Part-time pay
  - Physical requirements - height *Kalliri C-409/16*



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## What is the impact, the disadvantage?

- **Second** – what is the disadvantage? What is the effect of the PCP?
- What is the disadvantage it creates for persons of one gender compared with a person of another gender?
- So the difference is **not** in the treatment – treatment is the **same**
- The difference is in the **outcome or the effect or the impact** of the treatment on a group with a protected characteristic compared to a group without the protected characteristic.



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## Is it objectively justified?

- **Third** – is it objectively justified by a legitimate aim?
- Are the means of achieving that aim appropriate and necessary?
- Seniority - if objectively necessary
- Professional skills - training level



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## Is it objectively justified?

- *Bilka C-170/84* pension payments, justified if real need
- *Enderby C-127/92* speech therapists <-> clinical psychologists/ pharmacists, pay differences requiring justification
- “Accordingly, when a measure distinguishing between employees on the basis of their hours of work has in practice an adverse impact on substantially more members of one or other sex, that measure must be regarded as contrary to the objective pursued by Article 119 EEC, unless the employer shows that it is based on objectively justified factors unrelated to any discrimination on grounds of sex.”



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## What is harassment?

“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) Recast Directive



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## What are the components of harassment?

- **unwanted** conduct
- **related to** the sex of a person
- the **purpose** or **effect** of **violating the dignity** of a person and
- creating an **intimidating, hostile, degrading, humiliating or offensive environment.**”

Art 2 (1) (c) Recast Directive



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## What is 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) Recast Directive



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## What are the components of sexual harassment?

- unwanted conduct
- **verbal, non-verbal or physical** conduct of a **sexual nature** occurs
- **purpose or effect** of violating the dignity of a person
- **in particular**, creating an intimidating, hostile, degrading, humiliating or offensive environment.”

Art 2 (1) (c) Recast Directive



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## Discrimination includes:

- harassment and sexual harassment, as well as any less favourable treatment **based on a person's rejection of or submission** to such conduct;
- instruction to discriminate against persons on grounds of sex
- any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC. (Directive on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.)

Art 2 (2) (b) Recast Directive



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## What is victimisation?

“Member States **shall introduce** into their national legal systems such measures as are necessary **to protect employees**, including those who are employees' representatives provided for by national laws and/or practices, **against dismissal or other adverse treatment** by the employer **as a reaction to a complaint** within the undertaking **or to any legal proceedings** aimed at enforcing compliance with the **principle of equal treatment.**”

Art 24 Recast Directive



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## Positive action

“Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.”

Art 23 EU Charter of Fundamental Rights



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## Why positive action?

“With a view **to ensuring full equality** in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.”

Article 157 (4) TFEU



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## How does positive action work?

“Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life.” Article 3

*Kalanke C-450/93* – Tie break clause, automatic preference – unjustifiable reverse discrimination

*Marshall C-409/95* – preferential treatment, unless the reasons specific to the male tilt the balance – held scheme compatible because of “saving clause” and consideration of individual circumstances



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## Some practical pointers - Start with the issues.

### What is the actual complaint?

1. Direct discrimination - What is the *treatment* complained of? What is the specific act or omission? For example – job offer denied, promotion overlooked, pay difference, access to training refused, overtime hours denied or too many imposed?
2. Indirect discrimination - What is the *outcome* complained of? What is the disadvantage the individual is subjected to because he/she/they cannot comply with the requirement, the Provision, Criterion, Practice (PCP) imposed on all? For example – set criteria for the job, requirement to work specific hours, duties that all staff have to carry out.



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## Some points to consider

1. Direct evidence/ circumstantial evidence?
2. Documentary evidence/ witness evidence - personnel files, company notes, statistics of disparate impact? Witnesses able to support the allegations directly?
3. And/or circumstantial evidence? Considering the documentary evidence in the round, does a pattern emerge? Can inferences be drawn?



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## Employee / employer - Inferences to be drawn?

1. Remarks generally?
2. Statistics generally?
3. Past complaints – how have these been dealt with?
4. Inconsistent/ contradictory behaviour (bad/ unfair employer or discriminatory employer?)
5. How did the employee/employer handle the matter internally? Was there a formal grievance? Any delay? Conduct of the investigation?
6. Explanation? Reasonableness of explanation?
7. Degree/ Seriousness of the treatment?
8. Disclosure? Request for information? How have these been responded to?
9. What are the employer's Equal Opportunities policies?
10. Contract of employment – any reference to ensuring equality in the workplace?
11. Induction/ training on Equal Opportunities? Is this updated/ repeated?



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## Good practice and prevention

- Are there systems in place to combat any discrimination?
- What is the evidence of any commitment to equality? What are the Equal Opportunities policies?
- Who is responsible for human resources? Any Equal Opportunities Officer?
- What is the training for staff? At all levels? Are there regular reviews?
- Statistics of workforce? Updated? Monitored? Analysed?
- How is this all documented? Evidenced?
- Personnel files? Properly maintained and reviewed?



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## Good practice and prevention continued ..

- Internal fair, independent and timely grievance procedures?
- Contracts of employment with provision as to combating discrimination? Do they show serious commitment?
- Is there compliance with statutory or best practice guidance issued by Equal Opportunity bodies?
- Are there clear paper trails of important policy decisions as well as individual ones?



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# Thank you.

020 7993 7600   info@gclaw.co.uk   @gardencourtlaw

<https://www.gardencourtchambers.co.uk/barristers/nicola-braganza/sao>

[nicolab@gclaw.co.uk](mailto:nicolab@gclaw.co.uk)



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