

DEFINITION OF KEY CONCEPTS

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TOPICS

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

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1. WHAT FUNCTION OF DEFINITIONS?

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AIM

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

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DEFINITION – What it means

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

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KEY CONCEPTS

- **Direct** discrimination
 - **Instruction** to discriminate
 - **Victimization**
- **Indirect** discrimination
- **Harassment**
 - **Sexual** harassment

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EU DIRECTIVES

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

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2. DIRECT DISCRIMINATION

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DISCRIMINATION CONCEPT

Discrimination involves

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

Brown v Rentokil C-394/96

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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

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| | | |
|----------------------------------|---|--|
| | | |
| Less favourable treatment | Based on a discrimination ground | Compared to a comparable person |
| | | |

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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)

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UNFAVOURABLE TREATMENT – Material scope

E.g. Employment

- Access, termination
 - Promotion, training
 - Pay
- etc.

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LESS FAVOURABLE TREATMENT

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

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CAUSALITY - COMPARATOR

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

- **Actual** comparison
 - present,
 - subsequent
- **Hypothetical** comparison

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COMPARABLE SITUATION?



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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**

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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**

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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**

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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

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EXEMPTION

- **If** implemented!
- **Minimum** requirements
- **No other** exemptions
- **Narrowly** interpreted

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VICTIMIZATION

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

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LEGAL STRUCTURE

Special **direct discrimination**

Protected characteristic is
unique:

- **Complaint, legal proceeding**
- **Lost complaint?**

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INSTRUCTION

Instructed to discriminate

Request by client, employer

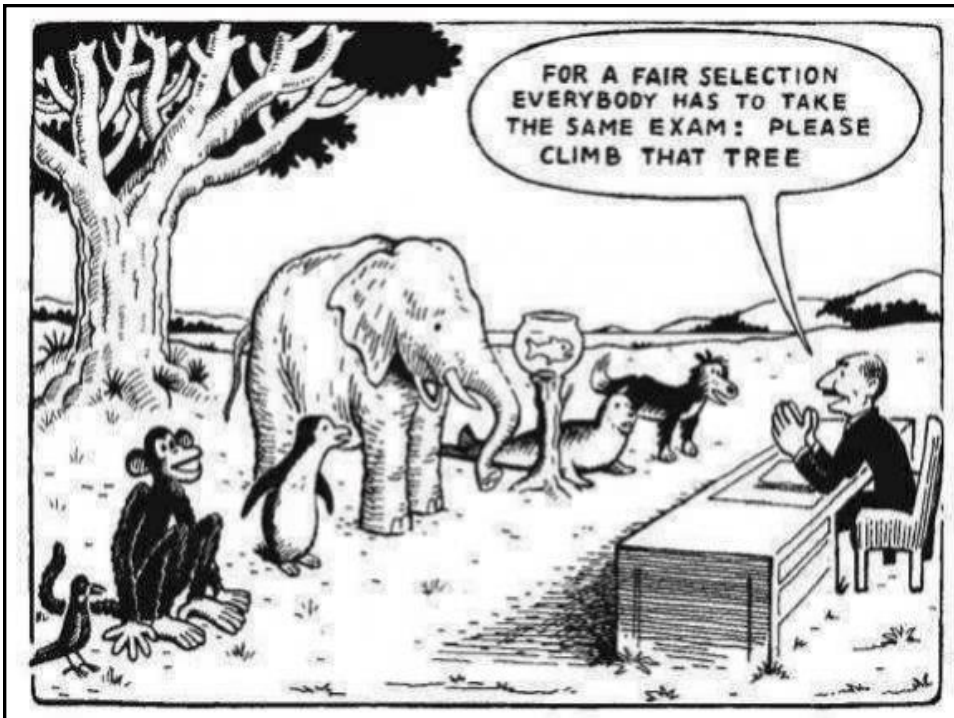
Discrimination, both
involved

Not used as **justification**

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3. INDIRECT DISCRIMINATION

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INDIRECT DISCRIMINATION

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

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LEGAL STRUCTURE

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

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Apparantly neutral treatment

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

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JUSTIFICATION

measure is **objectively justified**

by a **legitimate aim**, and **proportionate**: the means of achieving that aim are **appropriate and necessary**

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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

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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**

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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

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HARASSMENT

unwanted conduct

related to a **discrimination ground**

with the **purpose or effect** of violating dignity: creating an intimidating, hostile, degrading, humiliating, offensive environment

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**Unwanted
conduct**

**Because of a
discrimination
ground**

**Violates
human
dignity**

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LEGAL STRUCTURE

Special **direct discrimination**

Unwanted conduct – Regular?

Disadvantage is special:

- **Purpose or effect** on dignity
- **Capacity**, not intention

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SEXUAL HARASSMENT

Recast Directive

any **unwanted** verbal, non-verbal, physical conduct

of a **sexual nature**

with the **purpose or effect** of violating dignity

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6. CONCLUSIONS

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- Detailed EU guide
- Room for ECJ interpretation
- Direct discrimination – key
- Exemptions
- Constantly developing

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**Thanks for your
attention**



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