

An overview of the EU legislation on equality, some key concepts, and the direction of the CJEU's recent case law

Evelyn Ellis

University of Birmingham

University of Western Australia

Introduction – sources of EU sex discrimination law

- Article 157 of the TFEU:
- (i) Equal pay for men and women for equal work or work of equal value;
- (ii) Definition of “pay” and “equal pay”;
- (iii) Enabling provision for further legislation on equal opportunities and equal treatment in the workplace;
- (iv) Member States may maintain/adopt measures providing for specific advantages to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

Introduction (cont.)

- The Directives:
- Directive 2006/54, the Recast Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation; also Directive 79/9, mandating sex equality in most social security schemes
- Directive 2000/43, the Race Directive, and Directive 2000/78, the Framework Directive; relevant because they contain identical concepts to sex discrimination law.
- Directive 2004/113, the Goods and Services Directive. See eg. C-236/09 *Test-Achats*.

Introduction (cont.)

- The general principle of equality.
- Article 23 of the Charter of Fundamental Rights: "Equality between women and men 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".

Introduction (cont.)

- Where to turn in a sex discrimination claim?
- General principle of equality if impugning a measure of EU law, or implementing measure of a Member State.
- Directives cannot, of themselves, take horizontal direct effect.
- Doctrine of “indirect effect” may help – ie. reading parallel provision of national law in accordance with directive wherever possible.

Introduction (cont.)

- Importance of underlying Article 157.
- CJEU has traditionally taken sex equality very seriously.

EU Concept of Non-Discrimination

(a) Direct Discrimination

- Recast Directive, Article 2(1)(a): direct discrimination shall be taken to occur “where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation”.
- Formal equality.
- Two elements: adverse treatment and causation.

EU Direct Discrimination (cont.)

- No requirement of intention or motive.
- Situations of victim and comparator must be “comparable”. See C-356/09 *Kleist*.
- Hypothetical comparison permitted.
- Discrimination by association, and probably also on the basis of perception, covered. See C-303/06 *Coleman v. Attridge*.
- No identifiable victim needed. See C-54/07 *Feryn* and C-81/12 *Accept*.

EU Concept of Indirect Discrimination

(b) Indirect Discrimination

- Recast Directive, Article 2(1)(b): indirect discrimination shall be taken to occur “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”.
- Substantive equality.
- No requirement of intention or motive.

EU Indirect Discrimination (cont.)

- Contingent definition.
- Choice of comparator. Very important: see C-249/97 *Gruber*.
- Proving adverse impact. See C-167/97 *Seymour-Smith*.

EU Concept of Non-Discrimination: Justification

- Indirect discrimination may be justified by a legitimate aim, provided that the means of achieving that aim are appropriate and necessary.
- Discrimination only occurs where a protected classification is at the root of the adverse treatment. See Case 129/79 *Macarthys v. Smith*.
- When indirect discrimination is justified, it is shown that discrimination is not at the root of the treatment alleged. See Case 170/84 *Bilka-Kaufhaus*.
- Direct discrimination cannot usually be justified. See C-356/09 *Kleist*, C-614/11 *Kuso* and C-127/92 *Enderby*.
- Exceptionally – eg. Art.6(1) Framework Directive – direct discrimination is justifiable.

Recent direction of the CJEU's case law

- Many cases on discrimination against fixed-term and part-time workers. Is this the new frontier?
- On the meaning of “pay”, see C-124/11 *Dittrich*

Recent direction of the CJEU's case law (cont.)

- Straightforward decisions on indirect discrimination:
 - C-385/11 *Moreno*
 - C-427/11 *Kenny*
 - C-173/13 *Leone*
- Several cases on pregnancy, maternity and parental leave:
 - C-167/12 *CD*
 - C-363/12 *Z*