

DEFINITION OF FUNDAMENTAL CONCEPTS

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Equal Treatment and Discrimination

Discrimination

- Discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations (Case C-157-02, Rieser 2004)
- Similarity between banning of discrimination and the principle of equal treatment
- For the Court of Justice, labels for a single general principle of Community law, which prohibits both treating similar situations differently and treating different situations in the same way unless there are objective reasons for such treatment (Case C-422/02, 2005, Europe Chemi-Con)

Discrimination

- A difference in treatment shall not be based on the fact that a person has a particular characteristic which is among the prohibited grounds for discrimination and, therefore, the sex of that person
- An unfavourable measure linked to a prohibited criterion
- Discrimination may be direct or indirect

Direct discrimination

- Definition Art. 2 Dir. 2006/54
“Direct discrimination: where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;”

Direct discrimination: comparison

- Comparison is essential in order to be sure that discrimination exists: it is necessary to check whether a person (or group) has received less favourable treatment than another because of their sex. Emphasis is placed on the comparability of the situation.

Direct discrimination: comparison

- The expressions “is, has been or would be” expand the possible field of comparison: the comparator may be current, past or hypothetical. It is not essential to compare a situation with that of a man employed in an identical job. The comparison can relate to a past situation (the current job with the job that was previously held by a man) or a hypothetical situation.

Direct discrimination: comparison

- An example of hypothetical comparison: CJEC, 30 April 1994, C-13/94: “Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.”

A hypothetical comparison

- CJEC, C-136/95, 1998, Thibault
- Failure to assess the performance of an employee on maternity leave

Direct discrimination: comparison

- Comparison may sometimes be unnecessary: unfavourable treatment of a pregnant woman
- CJEC Dekker (C-177/88, 8 Nov 1990)
- now Article 2.2.c): "Discrimination includes any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC."

Direct discrimination: exceptions

- Art. 14.2. "Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate."

Direct discrimination: exceptions

- A strict interpretation of the exceptions. They must be limited and proportionate. Example: CJEC, 11 January 2000, C-285/98, Kreil

Similar forms of discrimination

- Article 2.2. : The injunction to discriminate, harassment and sexual harassment
- Discrimination by association, CJEC, C-303/06, Coleman, 17 July 2008, (the person is discriminated against because of his/her child's disability)

CONCEPTS

Indirect discrimination

Origin

- Sotgiu Judgment, 12 Feb 1974, 152/73
- “The rules regarding equality of treatment forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.”

Indirect discrimination

- Definition Art. 2 Dir. 2006/54
“indirect discrimination: 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;”

The notion of indirect discrimination

- Discrimination will be indirect when it is based on criteria other than a person's sex, with those criteria appearing to be objective and acceptable, but which, in actual fact, lead to a differentiated treatment of one of the sexes.

Indirect discrimination

- Contrary to direct discrimination, indirect discrimination is not immediately obvious. It is based only indirectly on the prohibited criterion.
- Example: a measure that would affect part-time employees

The notion of indirect discrimination

- i) Indirect nature of the discrimination:
 - a) the existence of an officially neutral measure, namely a measure or practice not based, directly or obviously, on a prohibited discriminatory motive;
 - b) a disparate effect resulting from the measure in the sense of an expressly prohibited motive, in other words the measure only appears to be neutral, since in practice it leads to a disadvantage for a group that is protected by a particular non-discrimination provision;
- ii) Absence of objective justification:
 - a) taking as grounds a legitimate objective which is independent of the prohibited criterion, namely the measure must have a legitimate, non-discriminatory objective;
 - b) proportional nature of the measure in this context, namely:
 - aa) the measure is appropriate (suitable) in the context of the legitimate objective;
 - bb) the measure is necessary (required) in that context.

The notion of indirect discrimination: a measure that puts one sex at a particular disadvantage

- The prejudicial effect has to reach a certain level
- Indirect discrimination is established when a “considerably smaller percentage of female workers than male workers is capable of fulfilling the relevant requirement”.

The notion of indirect discrimination: a measure that places one sex at a particular disadvantage

- Indirect discrimination is also established in the scenario of a lesser but persistent and relatively constant disparity over a long period between men and women who satisfy the requirement in question (CJEC, 9 February 1999, C-167/97 Seymour Smith).

Justification for indirect discrimination

- In the case of action by employers, a measure must reflect a genuine need on the part of the undertaking and the difference in treatment must be based on factors unrelated to any discrimination
- An economic justification is possible: "The state of the employment market, which may lead an employer to increase the pay of a particular job in order to attract candidates, may constitute an objectively justified economic ground." (CJEC, 27 October 1993, C-127/92)

Justification for direct discrimination

- “Since, as a general rule, recourse to the criterion of length of service is appropriate to attain the legitimate objective of rewarding experience acquired which enables the worker to perform his duties better, the employer does not have to establish specifically that recourse to that criterion is appropriate to attain that objective as regards a particular job, unless the worker provides evidence capable of raising serious doubts in that regard;” (Cadman, 3 Oct 2006, C-17/05)

Justification for indirect discrimination

- In the case of the legislation of a Member State, the disputed rule must reflect a legitimate objective of the Member State’s social policy that is not linked to discrimination on the grounds of a person’s sex
- A simple assertion of a general nature is not enough to show that the objective of the measures in question is unrelated to any discrimination on the grounds of a person’s sex

Justification for indirect discrimination

- If considerations of a budgetary nature may be at the root of the social policy choices of a Member State and influence the nature or extent of the social protection measures that it wishes to adopt, they do not, however, constitute in themselves an objective pursued by that policy and, consequently, would not justify discrimination to the detriment of one of the sexes

Two recent examples

CJEU, 17 July 2014, C-173/13, Leone

CJEU, 28 Feb 2013, Case C-427/11, Kenny

The difference between direct and indirect discrimination

- Direct discrimination may include cases in which a provision based on an officially neutral criterion affects only one group.
- Example: the Hay case, CJEU, C-267/12, 12/12/2013
- On the other hand, indirect discrimination is relevant to cases in which an apparently neutral criterion leads to an effect that is less significant but that nevertheless reaches a certain level.
- An uncertainty: CJEC, 7 December 2000, C-79/99, Schnorbus

CONCEPTS

Harassment

Harassment

- (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." (Preamble Directive 2006/54)

Harassment

- Definition Art. 2 Dir. 2006/54
"harassment": 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

- Definition Art. 2 Dir. 2006/54
- “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;

Harassment and sexual harassment

- Both concepts concern violation of the dignity of a person and creation of an intimidating, hostile, degrading, humiliating or offensive environment. The main difference lies in the fact that, in the case of harassment linked to the sex of the person, he/she is mistreated because he/she is a man or a woman. Sexual harassment implies, rather, that a person is subject to unwanted sexual advances or that the aim of the conduct of the author of the harassment in question is, for example, to obtain sexual favours.