Recent anti-discrimination case-law of the CJEU

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Overview (1)

Sex equality cases to be discussed

- 3 cases on sex/gender equality:
  - Case C-335/15 *Ornano*: equal pay.
  - Case C-137/15 *Plaza Bravo*: statutory social security.
  - Case C-407/14 *Arjona Camacho*: unemployment benefit.

- To be discussed from different perspectives:
  - *Ornano*:
    Temporal and substantive aspects with respect to the relevant law; harmonisation vs. negative integration, Aristotelian equality.
  - *Plaza Bravo*: indirect discrimination in a situation where there is no legal definition of the concept.
  - *Arjona Camacho*: certain aspects of remedies and sanctions in the case of a finding of discrimination.
Overview (2)

Other cases to be discussed

• 2 AG opinions on the Islamic headscarf / discrimination on grounds of religion in employment (with a potential legal link to sex): Cases C-157/15 Achbita and C-188/15 Bougnaoui.

• [Not discussed:
  – Age discrimination in employment: Cases C-441/14 Rasmussen, C-122/15 C, C-159/15 Lesar and C-258/15 Salaberria Sorondo - limited relevance for sex/gender discrimination, as these cases mainly concern justification under Art. 6 of Directive 2000/78, for which there is no full equivalent in sex equality law.
  – Some cases that are pending at the time of writing, e.g. Case C-443/15 Parris, on sexual orientation and age.]
Gender equality (1)

Case C-335/15 Ornano

• Facts:
  – Ms Ornano is a magistrate in Italy (District Court of Cagliari).
  – In 2007, she makes a request for payment of, inter alia, the special judicial allowance for expenses that ordinary magistrates incur in the performance of their professional functions, in respect of two periods of compulsory maternity leave which she had taken during the years 1997/1998 and 2000/2001.
  – Her request is refused as such payment is not available for leave taken before 2005.

• Procedure: court proceedings in Italy which lead to a request for a preliminary ruling (Art. 267 TFEU).
Gender equality (2)

Case C-335/15 *Ornano*

- Question by the national court:
  What about Directive 92/85, Arts. 119 and 120 of the EC Treaty, Directive 2006/54 and Article 23 of the Charter of Fundamental Rights of the EU in such a situation?

- CJEU on the applicable law in terms of time:

- Case also touches on the difference between harmonisation and negative integration.
Gender equality (3)

Case C-335/15 Ornano

- CJEU on Directive 92/85 (harmonisation):
  - Reminders regarding pay/allowance during maternity leave:
    - Arts. 11(2)(b) and (3): the maintenance of a payment to, and/or entitlement to an adequate allowance for, workers must be ensured in order to guarantee income at least equivalent to that which the worker would receive in the event of a break in her activities on grounds connected with her state of health, subject to any ceiling laid down under national legislation.
    - Pay comes from the employer (anything given based on the employment relationship, as here), an allowance from elsewhere.
    - Directive contains minimum requirements and does not provide for an entitlement to full pay as if the worker were working.
    - If the Member State has not provided for the maintenance of all pay elements, it is not required under the Directive to pay the allowance in question.
Gender equality (4)

Case C-335/15 Ornano

- CJEU on Art. 119 of the EC Treaty and Directive 75/117 (negative integration):
  - Reminders:
    - Discrimination = the application of different rules to comparable situations or the application of the same rule to different situations (i.e. Aristotelian concept of equality/discrimination).
    - Women taking maternity leave provided for by national legislation are in a special position which requires them to be afforded special protection, but which is not comparable either to that of a man or to that of a woman actually at work.
    - Para. 40: “Therefore, the principle of equal pay […] neither requires that women should continue to receive full pay during their maternity leave nor lays down specific criteria for determining the amount of benefit payable to them during that period, provided that the amount is not set so low as to jeopardise the purpose of maternity leave.”
Gender equality (5)

Case C-335/15 *Ornano*

- **CJEU - outcome:**
  It follows that an ordinary magistrate was not entitled to the special judicial allowance during a period of compulsory maternity leave, unlike her male colleagues who were working, does not constitute discrimination on the grounds of sex within the meaning of Art. 119 of the EC Treaty (subsequently Art. 141 EC) and Art. 1 of Directive 75/117.

- **Reflect: do you agree with this outcome?**

- **Further note:**
  CJEU mentions neither Art. 120 of the EC Treaty (equivalence of paid holiday schemes) nor Art. 23 of the Charter of Fundamental Rights. Any idea why not?
Gender equality (6)

Case C-137/15 Plaza Bravo

• Facts:
  – Case concerns the calculation of unemployment benefits in Spain.
  – Ms Plaza Bravo works part-time (60%) in a hotel as a waitress. When dismissed, she applies for unemployment benefits.
  – Rather complicated calculation of the daily benefit:
    – First step – basic amount: average of the monthly remuneration over the last 180 days is divided by 30; 70% of this results in EUR 36.27.
    – Second step – limitation to a maximum as specified in the law: one element here is the application of a reduction coefficient of 60%, corresponding to the applicant’s part-time working hours. Results in EUR 21.74.

• Procedure: court proceedings in Spain which lead to a request for a preliminary ruling.
Gender equality (7)

Case C-137/15 Plaza Bravo

• Problem according to the national court:
  – This calculation results in the *unfavourable treatment of part-time workers* compared to full-time workers in that the provision establishes a maximum amount of unemployment benefit, calculated on the basis of the average number of hours worked during the last 180 working days.
  – The vast majority of part-time workers in Spain are women.

• Therefore question to the CJEU:
  Does such a calculation lead to discrimination under Directive 79/7 on statutory social security (note: the only surviving directive of the first generation of secondary sex equality law)?
Gender equality (8)

Case C-137/15 Plaza Bravo

• CJEU on procedure:
  – **Order** rather than a judgment.
  – Reason (para. 17): “Under Article 99 of the Rules of Procedure of the Court, where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.”
Gender equality (9)

Case C-137/15 Plaza Bravo

- CJEU on substance:
  - The issue of competence:
    - Mantra about the Member States’ competence with respect to the organisation of their social social security systems.
    - Therefore (para. 20): “EU law does not affect, in principle, the choice of the Spanish legislature to prescribe [...] the maximum and minimum amounts of unemployment benefit and to apply a reduction coefficient for part-time work to those amounts. However, it is necessary to establish whether, in the main proceedings, that choice complies with Directive 79/7 [...].”
  - Discrimination?
    - Not direct.
    - Indirect? [Note: Art. 4 of the Directive mentions indirect discrimination but does not define it.]
Gender equality (10)

Case C-137/15 Plaza Bravo

- CJEU on indirect discrimination (continued):
  - Reference to settled case law for the definition (para. 22): “indirect discrimination arises where a national measure, albeit formulated in neutral terms, works to the disadvantage of a far greater number of women than men”.
  - Here (para. 23 et seq.):
    - Not clear from the file that a national provision of the kind at issue results in a situation where a much higher number of women than men is negatively affected.
    - Rule does not apply to all part-time workers, and there is no statistical proof showing a disparate effect within the particular group of part-time workers falling under the rule. Full-time workers may also suffer.
    - Pro rata-calculation promotes equal treatment as they are intended to ensure the same maximum amount of benefits per hour worked.
Gender equality (11)

Case C-137/15 Plaza Bravo

• Finding: does not look like indirect sex discrimination under Directive 79/7.

• Do you agree with this outcome? Reflect:
  – Could it have to do with the fact that the definition under this old Directive focuses on the actual effect, which in principle at least, requires proof through statistics?
  – Compare e.g. Art. 2(1)(b) of Directive 2004/56: “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“.

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Gender equality (12)

Case C-407/14 Arjona Camacho

- **Facts:**
  - In 2014, Ms Arjona Camacho is dismissed from her employment as a security guard within a juvenile detention centre in Cordoba (Spain).
  - According to Ms Arjona Camacho, the dismissal was based on discrimination on grounds of sex.
  - National court agrees but is unsure with respect to the amount of damages.

- **Procedure:** following an unsuccessful conciliation procedure, court proceedings in Spain which eventually lead to a request for a preliminary ruling.
Gender equality (13)

Case C-407/14 Arjona Camacho

• Question of the national court:
  “May Article 18 of Directive 2006/54, which refers to the dissuasive (in addition to real, effective and proportionate) nature of the compensation to be awarded to a victim of discrimination on grounds of sex, be interpreted as meaning that it enables the national court to award the victim reasonable punitive damages that are truly additional, that is to say, an additional amount which, although going beyond the full reparation of the actual loss and damage suffered by the victim, serves as an example to others […], provided that the amount in question is not disproportionate, that also being the case even when the concept of punitive damages does not form part of the legal tradition of that national court?”

• So far, this issue had not been raised explicitly under present EU law.
Gender equality (14)

Case C-407/14 Arjona Camacho

- Applicable law – Art. 18 of Directive 2006/54, on compensation and reparation:

  “Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered. Such compensation or reparation may not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive is the refusal to take his/her job application into consideration.”
Gender equality (15)

Case C-407/14 Arjona Camacho

- CJEU on sanctions:
  - Reminder: Art. 18 of Directive 2006/54 is largely a codification of CJEU case-law under the previous provision of Art. 6 of Directive 76/207.
  - Previously, the genuine deterrent effect sought by Art. 6 did not involve awarding, to the person injured as a result of discrimination on grounds of sex, punitive damages which go beyond full compensation for the loss and damage actually sustained and which constitute a punitive measure.
  - That is no different under Art. 18 of Directive 2006/54. Rather, it is Art. 25 of that Directive which allows (not obliges) Member States to penalise discrimination through compensation to be paid to the victim.
Gender equality (16)

Case C-407/14 Arjona Camacho

- CJEU on sanctions (continued):
  - The directive sets up a level of minimum protection; Member States can go further.
  - However, Spain has not done so with respect to punitive damages. In those circumstances, Art. 25 does not provide that a national court can on its own require the person responsible for the discrimination to pay such damages.

- Reflect: do you agree with this outcome?
Gender equality (17)

Case C-407/14 Arjona Camacho

- Reminder by the CJEU on a more general level:
  “Should a Member State decide to adopt measures allowing the award of punitive damages, it is for the national legal system of each Member State to set the criteria for determining the extent of the penalty, provided that the principles of equivalence and effectiveness are respected.”

- Background:
  The principle of national procedural autonomy, which, in the absence of specific EU law, is nevertheless limited by the principles of equivalence and effectiveness.
Boing beyond sex / gender

Why a broader approach?

• Sex/gender equality law:
  – The oldest sub-field of anti-discrimination law in the social field.
  – Strong influence on other sub-fields, notably when the Directives 2000/43 (race and ethnic origin) and 2000/78 (religion and belief, disability, age and sexual orientation) were adopted.
  – Conversely, influence of these new directives and their interpretation by the Court of Justice of the European Union (CJEU) on EU sex/gender equality law.

• Thus: the various sub-fields influence each other. A complete picture emerges only by taking into account all case-law.
Religion (and gender) (1)

Headscarf cases

- Two cases with a factual link with sex / gender: Cases C-157/15 Achbita and C-188/15 Bougnaoui.
- So far we have the Opinions of the two Advocates General Kokott and Sharpston.

- The Opinions concern notably:
  - The relationship between the ECHR and EU law (there is previous ECHR case-law on religious apparel, but not EU case-law);
  - The delimitation between direct and indirect discrimination;
  - Justification for different treatment on grounds of religion.
Religion (and gender) (2)

Case C-157/15 Achbita

• Facts:
  – Ms Achbita works as a receptionist for a Belgian company.
  – Company (G4S) policy:
    – Initially, there was an unwritten company rule according to which G4S employees were not permitted to wear any religious, political or philosophical symbols at work.
    – In 2006, a written rule was adopted with the approval of the works council: “employees are prohibited, in the workplace, from wearing any visible signs of their political, philosophical or religious beliefs and/or from giving expression to any ritual arising from them.”
    – Ms Achbita for some time wore her headscarf only outside work. In 2006, she announced that she would now also wear it at work. She was dismissed because of that.
Religion (and gender) (3)

Case C-157/15 Achbita

- Procedure: preliminary ruling.
- Question by the national court:
  “Should Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 [establishing a general framework for equal treatment in employment and occupation] be interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer’s rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace?”

- Note: limitation to direct discrimination only.
- AG Kokott takes the question as referring also to the delimitation from indirect discrimination and to the issue of justification.
Religion (and gender) (4)

Case C-188/15 Bougnaoui

- Facts:
  - Ms Bougnaoui works for the French company Micropole SA as a design engineer. She wears a veil every day at work.
  - In 2009: interview preliminary to possible dismissal, then dismissal. Reason: after having worked for a client, that client told the employer that the wearing of a veil had embarrassed a number of its employees. There should be “no veil next time”.
  - When taken on, Ms Bougnaoui had been told that since she would be in contact with the company’s clients, she would not be able to wear the veil in all circumstances.
  - The insistence to wear the veil “makes it impossible for you to carry out your functions on behalf of the company”. The company regrets this, “as your professional competence and your potential had led us to hope for a long-term collaboration.”
Religion (and gender) (5)

Case C-188/15 Bougnaoui

• Facts (continued):
  – Note – the reach of the prohibition is disputed:
    – According to Ms Bougnaoui, the prohibition related to the wearing the Islamic headscarf when in contact with customers of the employer’s business.
    – According to the employer, there was a general ban on the wearing of religious signs when attending the premises of those customers. That ban applied to all religions and beliefs.

• AG Sharpston, para. 84:
  “Whatever the true position, it appears, nonetheless, plain that Ms Bougnaoui’s dismissal was linked to a provision in her employer’s dress code that imposed a prohibition based on the wearing of religious apparel.”
**Religion (and gender) (6)**

**Case C-188/15 Bougnaoui**

- Procedure: preliminary ruling.
- Question by the national court:
  
  “Must Article 4(1) of [Directive 2000/78] be interpreted as meaning that the wish of a customer of an information technology consulting company no longer to have the information technology services of that company provided by an employee, a design engineer, wearing an Islamic headscarf, is a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out?”

- In other words, question only about justification.
- However, among other issues, the AG also addresses the distinction between direct and indirect discrimination.
Religion (and gender) (7)

A preliminary question: must we use the law?

• Danger of a very formalistic approach (e.g. Achbita).
• AG Sharpston’s final observation, para. 133:
  “It seems to me that in the vast majority of cases it will be possible, on the basis of a sensible discussion between the employer and the employee, to reach an accommodation that reconciles adequately the competing rights of the employee to manifest his or her religion and the employer to conduct his business. Occasionally, however, that may not be possible. In the last resort, the business interest in generating maximum profit should then in my view give way to the right of the individual employee to manifest his religious convictions.”
Religion (and gender) (8)

Which law? ECHR – EU law

• AG Sharpston in Bougnaoui:
  – Different approach under the ECHR (restriction of a right, unless linked to Art. 14) and EU law (prohibition of discrimination).
  – Similar for indirect discrimination, since as the derogations permitted under EU legislation require there to be a legitimate aim and a measure that is proportionate (mirroring the ECHR).
  – Fundamental difference for direct discrimination:
    – Interference with a right granted under the ECHR may be justified on the ground that it pursues a legitimate aim and is proportionate.
    – Under the EU legislation, however, derogations are permitted only in so far as the measure in question specifically provides for them (stronger protection).
    – Wholly legitimate, see Art. 52(3) of the Charter.

• [Note: not to be confused with EU internal market law!]
Religion (and gender) (9)

Different treatment on grounds of religion?

• Clear for Bougnaoui in so far as the individual treatment is concerned.

• Disputed in the case of Achbita:
  – G4S: no different treatment/discrimination on grounds of religion.
  – Similarly AG Kokott:
    – There is no evidence either of discrimination against the members of one religious community as compared with the followers of other religions (discrimination between religions, on grounds of a particular religion), or of discrimination against religious individuals as compared with non-religious individuals or atheists (discrimination on grounds of religion).
    – The rule is an expression of a general policy which applies without distinction and is neutral from the point of view of religion and ideology.
Religion (and gender) (10)

If different treatment: directly or indirectly on grounds of sex?

• Different views of different parties/stake holders in the cases at hand.

• To use the example of Achbita:
  – France, UK: indirect discrimination.
  – Belgium, NGO bringing the case together with Ms Achbita: direct discrimination.
  – European Commission: indirect discrimination in this case (but direct discrimination in Bougnaoui).

• Inconsistent practice of national courts in comparable cases.
Religion (and gender) (15)

Different treatment directly on grounds of religion?

• Art. 2(2)(a) of Directive 2000/78.
• Achbita, AG Kokott:
  – In so far as the internal company rule expressly prohibits G4S employees from wearing visible signs of their religious beliefs in the workplace, the wording of that company rule is directly linked to religion.
  – Previous CJEU case-law:
    – Direct discrimination, where a measure was inseparably linked to the relevant reason for the difference of treatment.
    – But: this concerned individuals’ immutable physical features or personal characteristics rather than modes of conduct based on a subjective decision or conviction, such as the wearing or not of a head covering at issue here.
  – According to AG Kokott, this approach is not suitable here.
**Religion (and gender) (16)**

**Different treatment directly on grounds of religion?**

- *Achbita* according to AG Kokott (continued):
  - This leaves only a difference of treatment between employees who wish to give active expression to a particular belief — religious, political or philosophical — and their colleagues who do not feel the same compulsion. This does not constitute “less favourable treatment” directly and specifically linked to religion.
  - The position would be different if the ban proved to be based on stereotypes or prejudice in relation to one or more specific religions — or even simply in relation to religious beliefs generally. In that event, it would without any doubt be appropriate to assume the presence of direct discrimination based on religion (*Nikolova*). According to the information available, however, there is nothing to indicate that that is the case here.
Religion (and gender) (17)

Different treatment directly on grounds of religion?

- *Bougnaoui* according to AG Sharpston, para. 88:

  “[…] it seems impossible to conclude otherwise than that Ms Bougnaoui was treated less favourably on the ground of her religion than another would have been treated in a comparable situation. A design engineer working with Micropole who had not chosen to manifest his or her religious belief by wearing particular apparel would not have been dismissed. Ms Bougnaoui’s dismissal therefore amounted to direct discrimination against her on the basis of her religion or belief for the purposes of Article 2(2)(a) of Directive 2000/78.”
Religion (and gender) (18)

Different treatment indirectly on grounds of religion?

• Art. 2(2)(b) of Directive 2000/78.
• Achbita according to AG Kokott:
  Since such a rule is in practice capable of putting individuals of certain religions or beliefs — in this case, female employees of Muslim faith — at a particular disadvantage by comparison with other employees, it may, if it is not justified in some way, constitute indirect religious discrimination.
Religion (and gender) (19)

Different treatment indirectly on grounds of religion?

- *Bougnaoui* according to AG Sharpston:
  - Conceivable if the company rule imposes an entirely neutral dress code on all employees. Any item of apparel that reflects the wearer’s individuality in any way is prohibited.
  - In such a case, all religious symbols and apparel are banned – but so too is the wearing of a FC Barcelona supporter’s shirt or a tie denoting that one attended a particular Cambridge or Oxford college.
  - Disparate effect:
    The rule is apparently neutral. It does not ostensibly discriminate against those whose religious convictions require them to wear particular apparel. It nevertheless indirectly discriminates against them. If they are to remain true to their religious convictions, they have no option but to infringe the rule.
Religion (and gender) (20)

Justification?

- Both AGs put the emphasis on Art. 4(1) of Directive 2000/78, concerning genuine and determining occupational requirements.
- *Achita* according to AG Kokott:
  - Indirect discrimination may be justified in order to enforce a policy of religious and ideological neutrality pursued by the employer in the company concerned, in so far as the principle of proportionality is observed in that regard.
  - Here: Art. 4(1) can be used.
  - The measure taken is in principle proportionate.
Religion (and gender) (21)

Finding of AG Kokott in Achbita

• Para. 141:

“Such discrimination may be justified in order to enforce a policy of religious and ideological neutrality pursued by the employer in the company concerned, in so far as the principle of proportionality is observed in that regard.
In that connection, the following factors in particular must be taken into account:
– the size and conspicuousness of the religious symbol,
– the nature of the employee’s activity,
– the context in which she has to perform that activity, and
– the national identity of the Member State concerned.”

• Reflect: do you agree with this approach/outcome?
Religion (and gender) (22)

Justification?

• *Bougnouei* according to AG Sharpston:
  – Art. 4(1) of Directive 2000/78:
    Micropole relies on the commercial interest of its business in its relations with its customers – that cannot constitute a genuine and determining occupational requirement.
  – Whilst the freedom to conduct a business is one of the general principles of EU law and is now enshrined in Art. 16 of the Charter, the Court has held that that freedom is not an absolute principle but must be viewed in relation to its function in society.
  – Accordingly, limitations may be imposed on the exercise of that freedom provided in accordance with Art. 52(1) of the Charter.
Religion (and gender) (23)

Finding of AG Sharpston in *Bougnaoui*

- **Para. 135:**
  
  “Where there is indirect discrimination on grounds of religion or belief, Article 2(2)(b)(i) of Directive 2000/78 should be construed so as to recognise that the interests of the employer’s business will constitute a legitimate aim for the purposes of that provision. Such discrimination is nevertheless justified only if it is proportionate to that aim.”

- **Reflect:**
  - Do you agree with this approach/outcome?
  - In your opinion, would it have made a difference if the two cases had concerned a niqab, chador or burka rather than a hijab (headscarf)?
Religion (and gender) (24)

For both cases: is there a (legal) link to sex?

- No according to AG Kokott: para. 49:
  “After all, a company rule such as that operated by G4S could just as easily affect a male employee of Jewish faith who comes to work wearing a kippah, or a Sikh who wishes to perform his duties in a Dastar (turban), or male or female employees of a Christian faith who wish to wear a clearly visible crucifix or a T-shirt bearing the slogan ‘Jesus is great’ to work.”

- No according to AG Sharpston:
The issues that arise in this Opinion do not relate to the Islamic faith or to members of the female sex alone.

- Reflect: do you agree? What about some kind of “doubly indirect discrimination” on grounds of sex?
Thank you for your attention!

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