

Recent CJEU case law on gender equality

Current Reflections on EU Gender Equality Law
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Overview

Access	1. Case C-409/16 <i>Kalliri</i> – height requirement
In Employment	2. Case C-531/15 <i>Otero Ramos</i> – breastfeeding 3. Case C-174/16 <i>H v Land Berlin</i> – parental leave
Termination, Unemployment, Pension	4. Case C-103/16 <i>Porrás Guisado</i> – pregnancy & redundancy 5. Case C-98/15, <i>Espadas Recio</i> – part-time work & unemployment 6. Case C-354/16, <i>Ute Kleinsteuber v Mars GmbH</i>

Case C-409/16 *Kalliri*

Indirect sex discrimination in access to employment (height req.)

Facts:

- ✓ Competition for enrolment in Greek police schools
- ✓ Competition notice requires: 'height of 1.70m, without shoes'
- ✓ Ms Kalliri not allowed to participate ('only 1.68m tall')
- ✓ Administrative Court of Appeal, Athens:
 - contrary to constitutional principle of equality of the sexes
- ✓ On appeal → Council of State → questions to CJEU



Source: Nottinghamshire Police

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Case C-409/16 *Kalliri*

National Law:

- ✓ Article 1(2)(a) of Law 2226/1994:
 - Men and women are admitted to Schools for Policemen
 - Conditions for preselection = for both sexes
- ✓ Art 2(1)(f) of Presidential Decree 4/1995 → civilian candidates for School of Policemen → height of at least 1.70m, without shoes

EU Law:

- ✓ Art 2(2) Dir 76/207 → prohibition of direct & indirect discrimination
- ✓ Art 3(1) Dir 76/207 → applies:
 - In private & public sector (public bodies)
 - To conditions for access to employment,...

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Case C-409/16 Kalliri

- Dispute concerns administrative acts adopted in 2007
 - ✓ Dir 2006/54 transposition period expired on 15 August 2008
 - ✓ Dir 76/207 applicable instead
- **Direct discrimination?** → ‘the law treats persons submitting applications to the competition for entry to the police school identically, whatever their sex’ → NO
- **Indirect discrimination?** → national measure, albeit formulated in neutral terms, works to the disadvantage of far more women than men? (C-100/95, *Kording*; C-7/12, *Riežniece*) (para 31)
 - ✓ Neutral rule: height requirement
 - ✓ Disadvantages far more women than men? → YES

‘much larger number of women than men are of a height of less than 1.70m’ (para 32)

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Case C-409/16 Kalliri

Indirect sex discrimination

Objectively justified?

- ✓ Legitimate aim:
 - Ensuring the operational capacity/proper functioning of police service
 - **Accepted** as per C-416/13, *Vital Pérez*; C-258/15, *Salaberria Sorondo*
- ✓ Appropriate & necessary? → NO

1. ‘Certain police functions, such as providing assistance to citizens or traffic control, do not clearly require the use of significant physical force’
2. Particular physical aptitude → not necessarily connected with being of a certain minimum height and that shorter persons naturally lack that aptitude
3. Until 2003 → minimum height was 1.65m for women, 1.70m for men
4. Preselection tests can be used to assess physical ability (instead of height)

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Case C-531/15 Otero Ramos

Breastfeeding protection in employment

Facts:

- ✓ Nurse employed in accident/emergency unit at public hospital
- ✓ Breastfed her child
- ✓ Warned employer that she was breastfeeding → **H&S risks**:
 - Complex shift rotation
 - Ionising radiation
 - Infections, stress
- 

 - Working hours adjustment
 - Preventative measures
- ✓ **BUT** reports: Hospital management + SS Institute → **risk free**
- ✓ **Request: rejected**
- ✓ Challenges decision → Social Court
 - ↳ Line manager report: physical/chemical
biological/psychosocial **risks**
- ✓ Dismissed → Appeal → Qts to CJEU



Source: Best for Babes

Case C-531/15 Otero Ramos

National Law:

- ✓ Art 26 Law 31/1995: **H&S risk assessment** – adverse effects: worker/foetus
 - Pregnancy & breastfeeding
 - Adjustments, OR different job, OR suspension
- ✓ Art 135a-b General Law on Social Security → entitled to **financial allowance** in case of **suspension during breastfeeding** (max: 9 months)
- ✓ Art 96(2) Ley 36/2011 → **burden of proof** in case of accident at work

EU Law:

- ✓ Art 4(1) Dir 92/85/EEC —**H&S risk assessment** for breastfeeding workers
- ✓ Art 2(2)(c) Dir 2006/54/EC – discrimination related to pregnancy/maternity
- ✓ Art 19(1) Dir 2006/54/EC —if claimant establishes facts from which discrimination may be presumed → **burden of proof shifts** to respondent

Case C-531/15 Otero Ramos

Qt 1: Should art 19(1) Dir 2006/54 apply when sex discrimination arises out of a breach of Dir 92/85? → CJEU:

- Rules on burden of proof (art 19(1)) apply to situations covered by Directive 92/85 that amount to sex discrimination (→ art 19(4)(a))
- **Does this situation amount to sex discrimination?**
 - ✓ Art 2(2)(c) Dir 2006/54 → less favourable treatment *related to* pregnancy/maternity = discrimination
 - ✓ Objt of EU rules → protecting women before/after birth
 - Vulnerability
 - Breastfeeding worker treated less favourably



direct sex discrimination

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Case C-531/15 Otero Ramos

Reasoning:

• Art 2(2) Dir 2006/54 'recognises the legitimacy, in terms of the principle of equal treatment of the sexes, first, of **protecting a woman's biological condition** during and after pregnancy and, second, of protecting the **special relationship between a woman and her child** over the period which follows childbirth' (**para 61**) (ref to Case C-104/09, *Roca Alvarez*)

• 'where the risks posed by the work of a breastfeeding worker have not been assessed in conformity with [art 4(1) Dir 92/85], **the worker concerned and her child are deprived of the protection** they should receive under that directive [...] In that regard, a breastfeeding worker **may not be treated in the same way as any other worker**, since her specific situation necessarily **requires special treatment** on the part of the employer.' (**para 62**)

• failure to assess the risk posed by the work of a breastfeeding worker in accordance with [Dir 92/85] amounts to **less favourable treatment of a woman related to pregnancy/maternity leave** (**para 63**)



Direct sex discrimination – art 2(2)(c) Dir 2006/54

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Case C-531/15 Otero Ramos

Qt 2: How should art 19(1) Dir 2006/54 be applied to such situations? (i.e breach of art 4(1) Dir 92/85 = sex discrimination)

→ CJEU, para 67:

- Burden of proof rules **don't apply** when worker **first requests an adjustment**
- They **apply**: when **risk assessment is challenged** by worker at court
 1. Worker → facts/evidence → presume direct/indirect discrimination
 2. Burden of proof shifts to defendant → prove: no breach

→ **Threshold to shift *onus probandi*?**

- ✓ Letter from line manager suggesting various risks + reasons } 1
 - ✓ Contradicts results of official risk assessment } 1
 - ✓ Official risk assessment → lack of explanations } 2
- **Potential breach of art 4(1) Dir 92/85 → national court**

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Case C-174/16 H v Land Berlin

Discrimination due to the exercise of parental leave rights

Facts:

- ✓ H had been a civil servant since 2002 (junior post)
 - ✓ Sept 2011: appointed to new post on probation (executive post)
 - ✓ Since Jul 2011: sick leave (due to pregnancy), maternity & parental leave
 - ✓ Jul 2012: new competition → executive post awarded to another person
 - ✓ Sept 2013: statutory 2 year probation ends → not successful
 - ✓ Reinstated to her former junior post
- H claims → **discrimination against a woman on parental leave**



Case C-174/16 H v Land Berlin

National Law:

- ✓ Para 97(1) LBG (Land Civil Service Law) → probation 2 years (no extension)
- ✓ Para 97(4) LBG → if unsuccessful probation, no reappointment (1 year)

EU Law:

- ✓ Art 14(1)(a) Dir 2006/54 → no (direct/indirect) **sex discrimination**
 - Includes public sector/public bodies
 - Promotion
- ✓ Art 15 Dir 2006/54 → right to return to same/equivalent post after **maternity leave**
- ✓ Clauses 5(1)-(2) Framework Agreement on **parental leave** (Dir 2010/18):
 1. Right to return to the same/equivalent/similar job
 2. Rights acquired/being acquired at the start of parental leave → maintained until the end + at the end: should apply

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Case C-174/16 H v Land Berlin

CJEU:

- ✓ Reference to arts 23 & 33(2) EU Charter & art 151 TFEU
- ✓ Rights acquired/being acquired at start of Parental Leave (PL) should be **guaranteed even if PL taken exceeds 4 months** (min. required by Clause 2)
- ✓ As a ftal right (Charter), Clauses 5(1)-(2) **cannot be interpreted restrictively**
- ✓ Although she was on **sick leave** when assigned to new post...
'from that moment, [it] bec[a]me hers, so that it must be held that **when, subsequently, she took her parental leave, she already occupied that post and enjoyed any rights acquired or in the process of being acquired** relating to it'
- ✓ Probationary period could not be extended
 - Not given the chance to demonstrate her suitability & being definitively promoted
 - Likely to dissuade exercise of PL/undermine effectiveness
 - **Contrary to Clause 5(2), even if provided by national law**
- ✓ **Cannot be justified** → Dir 2010/18 doesn't contain derogations

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Case C-174/16 H v Land Berlin

→ Potential breach of **Dir 2006/54** not considered by CJEU

- BUT see AG Mengozzi's Opinion (paras 31-36) → **indirect sex discrimination**

→ **Consequences of breach of Clause 5(1)-(2)?**

- ✓ **Clauses 5(1)-5(2) Dir 2010/18** have **direct effect** (precise, unconditional)
 - National courts should disapply, if necessary, contrary domestic law
- ✓ Employer bears burden to provide objective reasons for impossibility to return to equivalent/similar post
- ✓ Equiv/similar = similar degree of status and remuneration
- ✓ Continuation of probation for the same total duration
- ✓ New selection procedure cannot be required for assignment to equiv/similar post → 'would render right nugatory' (para 79)

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Case C-103/16 Porras Guisado

Pregnant worker made redundant

Facts:

- ✓ Consultation with the workers' representatives with a view to effecting a Collective Redundancy (CR)
- ✓ Priority status: couples, disabled employees (+33%)
- ✓ Ms Porras was made redundant
- ✓ She was pregnant, but had not informed the employer yet



Source: <http://www.dohaveacase.co.uk>

Case C-103/16, *Porras Guisado*

National Law:

- ✓ Law 39/1999 of 5 November 1999 reconciling family life and working life of workers
- ✓ Arts 53(4)(1)-55(5) Workers' Statute
- ✓ Art 8 Law 3/2007 ('Gender Equality Law')
- ✓ Art 51(1) Workers' Statute → CR: priority status to some workers

EU Law:

- ✓ **Art 2(a) Dir 89/391/EEC**: 'pregnant worker who informs her employer of her condition', in accordance with national law
- ✓ **Art 10(1) Dir 92/85/EEC** – prohibition of dismissal for pregnant workers, save exceptional circumstances
- ✓ **Art 1(1)(a) Dir 98/59/EC** – defines 'collective redundancies'

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Case C-103/16 *Porras Guisado*

AG Sharpston:

- Could she benefit from protection under art 10(1) Dir 92/85 **even if pregnancy had not been disclosed?**
 - ✓ Pregnant women → vulnerable group, require special protection
 - ✓ Give priority to art 10(1) (v art 2 Dir 89/391) → 'during the period **from the beginning of their pregnancy** to the end of the maternity leave'
 - ✓ Otherwise, protection would vary depending on whether protection disclosed/not
 - ✓ When should pregnancy be disclosed?
 - Duty not to delay notification unreasonably
 - Latest: date when maternity leave would have ended

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Case C-103/16 *Porras Guisado*

- **Are the following expressions equivalent?**

- ✓ Art 10(1) Dir 92/85 → exception permitting dismissal of pregnant workers (in 'exceptional cases not connected with their condition')
- ✓ Art 1(1)(a) Dir 98/59 → defining 'collective redundancies' as 'dismissals effected by an employer for 'one or more reasons not related to the individual workers concerned' ...

→ **NO**

✓ Art 1(1)(a) → doesn't refer to 'exceptional' cases

✓ CR are not 'exceptional' - occur regularly → impact on Common Market

'within the context of [Dir 92/85] there are situations that are, indeed, deemed to be exceptional. That does not mean, in my view, that every collective redundancy is an 'exceptional case' for the purposes of the derogation from the prohibition of dismissal in Article 10(1) of the Maternity Directive.' (para 69)

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Case C-103/16 *Porras Guisado*

- **Other conclusions of AG Sharpston on art 10 Dir 92(85):**

- ✓ If, in CR, pregnant worker can be reassigned to another suitable post → derogation will not apply
- ✓ Pregnant workers' protection should include both:
 - a. Protection against dismissal itself to comply with art 10(1)
 - b. Protection against the consequences of a dismissal prohibited by Article 10(1) that has nevertheless taken place
- ✓ MS not required to have specific provision giving priority for retention to pregnant workers in CR
- ✓ For a notice of dismissal to fulfil art 10(2) reqs, it must be both:
 - a. In writing and
 - b. State duly substantiated grounds regarding the exceptional cases not connected with the pregnancy that permit the dismissal

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Case C-98/15, *Espadas Recio*

(Vertical) part-time work – Indirect sex discrimination in calculation unemployment benefit

Facts:

- ✓ Spanish cleaner – worked **Part-Time (PT)**
- ✓ **Vertical** PT: Mon, Wed, Thu (2.5h/day) + 1 Fri/month (4h/day)
- ✓ Claimed unemployment benefit:
 - ✓ Requested: 2160 contributed days → 720 days benefit
 - ✓ Granted benefit for: 1260-1439 contributed days → 420 days benefit
- ✓ **Full-Time (FT)** and **Horizontal** PT workers would have been granted the requested days



Source: Parttime Cleaner Sp

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Case C-98/15, *Espadas Recio*

National Law:

- ✓ **Art 210(1) LGSS** → duration of unemployment based on period contributed (in days) in the 6 preceding years
- ✓ **Art 3(4) RD 625/1985** → for part-time workers:
 - Every day worked = 1 day
 - Whatever the length of the working day

EU Law:

- ✓ **Dir 79/7** on equal treatment for men/women in social security matters
 - Applies to involuntary unemployment (art 2) & statutory unemployment schemes (art 3)
 - Art 4(1) → prohibition of direct/indirect sex discrimination regarding calculation of contributions/benefits
- ✓ **Clause 4 Dir 97/81** - Framework Agreement on part-time work
Non-discrimination of part-time workers (v full-time workers)

Case C-98/15, *Espadas Recio*

CJEU:

- **Clause 4 Dir 97/81** → not applicable
 - ✓ Concerns 'employment conditions' → employment relationship
 - ✓ Here: contributions paid pursuant national legislation
 - ✓ Not governed by employment contract → ≈ state SS scheme
 - ✓ ≈ C-527/13, *Cachaldora Fernández*
- **Art 4(1) Dir 79/7** → applicable
 - ✓ For MS to organise conditions for granting SS benefits
 - ✓ **BUT** conditions cannot be (indirectly) discriminatory

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Case C-98/15, *Espadas Recio*

Cachaldora Fernández

- No irrefutable statistical evidence...
- ...that most PT workers = women
- Some PT workers **benefited**
- Random effects** of provision

Plaza Bravo (AG)

- Not all part-time workers affected
- Unclear if mostly affected women**
- Negative effects** on FT workers?

Espadas Recio

- Clear statistics
- All** vertical PT workers negatively affected
- Clear: mostly women (70-80%)
- Lack of negative effect** on FT worker
[Horizontal PT workers not affected not an issue]

→ Contrary to art 4(1) Dir 79/7

→ **Indirect sex discrimination**

→ **Unless justified:**

- **Aim:** Contribution to SS system; %
- **Appropriate & necessary?**

NOT appropriate to ensure correlation:
Contribution ↔ Benefit

FT worker ↔ Vertical PT worker:

- ✓ Same contributions
- ✓ Vertical PT worker: shorter benefit

Case C-354/16, *Ute Kleinsteuber v Mars GmbH*

Retirement age – Occupational pension scheme – Sex and age discrimination – Full-time & part-time work

Facts:

- ✓ Claimant employed by Mars between 1990-2014
- ✓ Worked full-time and part-time (50%-75%)
- ✓ Early retirement → claimed right to company's occupational pension
- ✓ Rules for calculating pension included:
 - 'Split pension' → diff between incomes below/above ceiling
 - Uniform rate of activity for reckonable years of service
 - Maximum years of service: 35
- ✓ Claimant argued that she was entitled to a larger pension



Source: Seekingalpha.com

Case C-354/16, *Ute Kleinsteuber v Mars GmbH*

National Law:

- ✓ Para 2(1) Betriebsrentengesetz (Law on Pensions)
- ✓ Para 4(1) Gesetz über Teilzeitarbeit und befristete Arbeitsverträge (Law on part-time and fixed-term contracts)

EU Law:

- ✓ Clauses 4.1-4.2 Framework Agreement on PT work (Dir 97/81/EC) → **equal treatment between PT & FT workers**
- ✓ Art 4 Dir 2006/54 → prohibition of (direct/indirect) **sex discrimination**
- ✓ Art 2 Dir 2000/78/EC → prohibition of age discrimination
- ✓ Art 6(1) Dir 2000/78/EC → justifications for **age** discrimination

Case C-354/16, Ute Kleinsteuber v Mars GmbH

CJEU:

- Is the **'split formula'** contrary to [art 4 Dir 2006/54 / Clause 4 Dir 97/81](#)?
 - ✓ Formula applies both to FT & PT workers
 - ✓ Formula is in line with the *pro rata temporis* principle
 - ✓ Based on objective criteria & reasons
 - ✓ Alternative formula suggested → overestimation of activity
- **Not discriminatory**
- Not contrary to art 4 Dir 2006/54 / Clause 4 Dir 97/81

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Case C-354/16, Ute Kleinsteuber v Mars GmbH

- Is the **'uniform rate of activity'** contrary to [art 4 Dir 2006/54 / Clause 4 Dir 97/81](#)?
 - ✓ Method for assessing time worked by PT workers
 - ✓ Nothing suggested that alternative method would allow more appropriate/fair calculation in line with *pro rata temporis* principle
- Is the way in which **length of service** is considered & **max limit of reckonable years** contrary to [Dir 2000/78](#)?
 - ✓ Legislation not **directly** based on age
 - ✓ **Indirectly**, may put at disadvantage employees who started working before the age of 30:
 - ↳ Max retirement age: 65 years
 - ↳ Max length of service: 35 years
 - ✓ For national court to determine BUT could be justified (social policy)

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