

# KEY CONCEPTS IN EU DISCRIMINATION LEGISLATION

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'Applying EU Anti discrimination law in practice'

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## INTRODUCTION

### Key concepts

- ▶ Direct discrimination
- ▶ Indirect discrimination
- ▶ Harassment
- ▶ Including reference to Directives and case law

## HISTORICAL BACKGROUND

Treaty of Rome: 1957: free movement of workers and equal pay for men and women

Equal Pay Directive 1975 (75/117): men and women

Equal Treatment Directive (76/207) working conditions, access to employment, training and promotion and dismissal

## HISTORICAL BACKGROUND

Treaty of Amsterdam: Art. 13: EU may take appropriate action to combat discrimination based on sex, racial or ethnic origins, religion or belief, disability, age or sexual orientation: now article 19 Treaty Functioning EU

Article 21 of the Charter of Fundamental Rights of the European Union: any discrimination on grounds of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, birth, disability, age or sexual orientation shall be prohibited.

## DIRECTIVES

- ▶ Directive 2000/43 June 2000 equal treatment between persons irrespective of racial or ethnic origins
- ▶ Directive 2000/78 November 2000 general framework for equal treatment in employment and occupation: religion or belief, disability, age, sexual orientation
- ▶ Recast Gender Directive equal treatment of men and women employment and occupation
- ▶ Directive 2010/41 July 2010: equal treatment men and women engaged in self-employed capacity

## Overview

- ▶ Council Directive 2000/78/EC of November 2000 (the Framework Directive)
- ▶ Article 2: Concept of discrimination
- ▶ “For the purposes of this Directive, the principle of equal treatment shall mean there is no direct or indirect discrimination whatsoever on any of the grounds listed in Article 1”

## Overview

Discrimination may consist of:

- ▶ The application of different rules to comparable situations
- ▶ the application of the same rule to different situations

*Brown v Rentokil C-394/96*

## DIRECT DISCRIMINATION

- ▶ Article 2(1)(a) Recast Directive:–
- ▶ *“where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation”.*

Less favourable treatment, comparable situation and on a protected grounds such as sex, race, disability, etc

## DIRECT DISCRIMINATION

- ▶ *Dekker* C-177/88: direct discrimination less favourable treatment of women on grounds of sex: pregnancy
- ▶ *Thibault* C-136/95
- ▶ *Firma Feryn* C-54/07: less favourable treatment statements which dissuade candidates of particular ethnic origin applying for position

## DIRECT DISCRIMINATION

- ▶ *Coleman* C-303/06: less favourable treatment by reason of association with another person who is covered by a Directive constitutes less favourable treatment and is direct discrimination

It can be seen that discrimination can arise with or without intent and by way of association

## DIRECT DISCRIMINATION

- ▶ Intention or another motive is irrelevant:  
*Fermyn*
- ▶ Need to be aware of unconscious bias or discrimination
- ▶ Unlike indirect discrimination, direct discrimination cannot be justified with exception of age discrimination, article 6(1):  
*Mangold*

## DIRECT DISCRIMINATION: PERMITTED DISCRIMINATION

- ▶ Genuine Occupational requirement: permitted discrimination, Article 4 Framework Directive, Article 14(2) Recast Directive and Article 4(5) Race Directive
- ▶ Will be strictly construed
- ▶ *Wolf* (C-229/08) age cap on recruitment, similarly *Petersen*

## INDIRECT DISCRIMINATION

Article 2(b) Recast Directive: neutral provision, particular disadvantage to those who are members of a group defined by particular characteristic such as gender and this cannot be objectively justified.

*Bilka Kaufhaus* C-170/84: less favourable treatment of part time workers: indirect discrimination on grounds of gender

## INDIRECT DISCRIMINATION

*Enderby* C-127/92: rate of pay lower for one group almost exclusively women and the other group are men: indirect discrimination

*Chez* C-83/14: indirect discrimination by reason of association established

C-157/15 *Achibata* and C-188/15 *Bougnaoui*

## INDIRECT DISCRIMINATION

- ▶ Objective justification
- ▶ Article 2 of Framework Directive permits a provision which is prima facie indirectly discrimination to be lawful and justified where it *“is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”*
- ▶ *Bilka Kaufhaus*
- ▶ *Rinner-Kuhn C-171/88*

## Harassment

Harassment and sexual harassment: Article 2(1)(c) and 2(1)(d) of Recast Directive

Unwanted conduct related to discriminatory ground with the purpose or effect of violating the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment

Sexual harassment any form of unwanted, physical, verbal, non-verbal or physical conduct of a sexual nature occurs

# Harassment

*Coleman C303/06*

Harassment covers a situation where an employee is the victim of unwanted conduct amounting to harassment which is related to the disability of her child