

Definition of key concepts

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This training session is commissioned under the Rights, Equality and Citizenship Programme 2014-2020 of the European Commission

Overview

- I. Direct discrimination
- II. Indirect discrimination
- III. Harassment

I. Direct discrimination, for example in Directive 2000/78/EC Article 2(2)(a)

"...direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;..."

Grounds referred to in Article 1:
Religion/ideology, disability, age, sexual orientation

Note: The question of direct or indirect discrimination is not an academic one

The difference lies in justification:

Article 2(2)(b) where **indirect** discrimination is **objectively justified**

Article 4 justification through occupational activity in cases of **direct** discrimination

More stringent requirements

I. Elements of a direct discrimination offence

1. Direct connection to the aforementioned properties

a) **Simple example**, characteristic is mentioned directly in Regulation, e.g.

-Age limit - contract termination due to "reaching the age of 65"

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b) Characteristic is not mentioned directly, but is dependent on the criteria mentioned in the Regulation

CJEU 22/6/2011 C-399/09 Landtova: "Accordingly, conditions imposed by national law must be regarded as **indirectly discriminatory** where, although applicable **irrespective** of (discriminatory characteristic), they affect essentially or the great majority ..."

Conversely direct discrimination = dependent on characteristic and criteria

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b) Characteristic is not mentioned directly, but is dependent on the criteria mentioned in the Regulation

- Employment contract not completed because of pregnancy (CJEU "Dekker" C-177/88)
- Surviving dependant's pension only for spouse = Excluding registered life partner (CJEU "Maruko" C-267/06)

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Direct or indirect discrimination?

An employer imposes a general rule that employees must dress with religious neutrality (CJEU 14/3/2017 C-157/15 Achbita)

An employer agrees to a customer's request that employees do not wear a headscarf when in contact with customers of the company (CJEU 14/3/2017 C-188/15 Bougnaoui)

I. Elements of a direct discrimination offence

2. Comparability of the situation

Basis of equal treatment: Two different persons shall be treated the same

-Therefore, it is not necessary to know their identity

-Comparability overview of the circumstances e.g. comparable circumstances of professional relationships, tracing back to a regulation, assignment to particular employee groups (e.g. clerk)

-Comparability can result from the purpose of the action, e.g. survivors pension

CJEU 10.5.2011 C-147/08 Römer

Recital 42: ,... it should be pointed out that ... the assessment of that comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner in the light of the benefit concerned.

Recital 43: ‘Thus, the comparison of the situations must be based on an analysis focusing on the rights and obligations of the spouses and registered life partners as they result from the applicable domestic provisions, which are relevant taking account of the purpose and the conditions for granting the benefit at issue in the main proceedings, and must not consist in examining whether national law generally and comprehensively treats registered life partnership as legally equivalent to marriage.’

3. Comparator

"...treated less favourably than another person is, has been or would be treated."

- Is treated (current situation)
- Has been treated (in the past, e.g. a woman receives a lower basic wage than her predecessor)
- Would be treated (no comparable employee in the company)

4. Actual existence of the characteristic

Simple prejudice (Federal Labour Court case BAG 6 AZR 190/12; asymptomatic HIV infection)

- Associated discrimination (CJEU *Coleman*, C-303/06; caring for a disabled child)**
- Lack of a tangible disadvantaged person (CJEU *Feryn*, C-54/07)**

5. Causality

Discrimination "because of"

-Intention not required (CJEU *Draempaehl*, C-180/95)

-Joint causality in the motives is sufficient (BAG 8 AZR 112/03)

II. Indirect discrimination

Directive 2000/78/EC Article 2(2)(b):

"indirect discrimination shall be taken to occur where an **apparently neutral provision**, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation **at a particular disadvantage compared with other persons...**"

Example: Placing part-time employees (all women) at a disadvantage

II. Indirect discrimination

Differences from direct discrimination

-Justification belongs to the elements of the offence

-By means of apparently neutral regulations, criteria and practices, persons are placed at a disadvantage compared to other persons

Problem

"Apparently neutral" mandatory comparison of data necessary?

II. Indirect discrimination

No, not mandatory, examples below:

-Involving military service only to be carried out by men as a requirement for a benefit (CJEU *Schnorbus*, C-409/95)

-Reducing severance payment with earlier payment of retirement pension if severely disabled persons have the possibility of being paid earlier (CJEU *Odar*, C-152/11)

II. Indirect discrimination

Statistics - practice of apparently neutral policies significantly affects women more than men

-Significantly more (only 2/3 of case law is certain, but it is also present in development trends)

-Subjective goal does not matter

II. Indirect discrimination

Statistics can lead to the reversal of the burden of proof if a connection to the employer exists

-90% of men achieve higher remuneration levels, while only 40% of women do

-Only men employed

-No connection to general statistics (higher unemployment rate amongst those over 50 years old)

II. Indirect discrimination

Unlike direct discrimination, the justification is a constituent element

Objective reason justified (proven by discriminating), if it is

-justified through an objectively not discriminatory goal

- suitable for goal attainment
- and reasonable and necessary.

Example

Only full-time employees receive a cafeteria allowance; part-time employees (working until 12pm) do not.

Examining both cases

- Different treatment of comparable full-time and part-time employees
- Part-time employees are all women
- Objective reason (= not intrinsically because the position is part-time) for unequal treatment, instead working over lunch-time
- Objective reason must be a differentiating factor between groups

III. Harassment

Article 2(3) of Directive 2000/78/EC

"Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of the affected person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the individual regulations and practice of the Member States."

III. Harassment

- Individual behaviour is sufficient ("harassment")
- No intention is required
- Objectified victim perspectives
- Undesirability of the behaviour (rejection not apparent to the perpetrator)
- Dignity violated (equivalent to aforementioned grounds laid out in Article 1)
- Negative environment (arguably having a lasting effect if multiple dignity violations are required (so BAG 8 AZR 705/08))