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Definition of key concepts

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Context

- Defining conduct contrary to the principle of equality
- Equality vs equity - either treating persons differently/treating people the same may constitute discrimination

Challenges in codification of protection

- Language
- Variation of legal systems
- Relativism and different models of equality
- Exemptions/defences threatening integrity of the equality principle



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Context

- Giving concepts mobility and agency
- Requirement to frame legislation to giving effect to the fundamental right to equality and, by corollary, non-discrimination.
- Defining conduct which impedes and offends equality
- **Key concepts;**
- Direct Discrimination, Indirect Discrimination, Harassment



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Coleman Case C-303/06 **Opinion of AG Maduro - 31 January 2008**



“Treating someone less well on the basis of reasons such as religious belief, age, disability and sexual orientation undermines this special and unique value that people have by virtue of being human. Recognising the equal worth of every human being means that we should be blind to considerations of this type when we impose a burden on someone or deprive someone of a benefit. Put differently, these are characteristics which should not play any role in any assessment as to whether it is right or not to treat someone less favourably”.

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Context

- **Legislative protection of equality**
- Framework Directive - Directive 2000/78/EC of 27 November 2000 - framework for equal treatment in employment and occupation
- Race Equality Directive: Directive 2000/43/EC of 29 June 2000: equal treatment between persons irrespective of racial or ethnic origin;
- Goods and Services Directive: Directive 2004/113/EC : equal treatment between men and women in the access to and supply of goods and services;



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Context

- **Legislative protection of equality (cont)**
- Gender Recast Directive, Directive 2006/54/EC of 5 July 2006: equal treatment of men and women in matters of employment and occupation (recast);
- Directive 2010/41/EU 7 July 2010 - equal treatment between men and women engaged in an activity in a self-employed capacity;
- Directive 79/7/EEC of 19 December 1978 - equal treatment for men and women in matters of social security



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Context

Scope

- free-standing prohibition on discrimination but limited to specific areas
- Article 20 of the EU Charter - equality before the law
- Article 21 prohibition of discrimination on an open list of grounds

Limits

Defences - justification (indirect discrimination) - genuine occupational requirement, religion and age

Core concepts

1. Direct Discrimination
2. Indirect Discrimination
3. Harassment



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1. Direct Discrimination



‘where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin’.

Art 2(2)(a), Directive 2000/43

See also Directive 2000/78, Art 2(2)(a); Directive 2006/54, Art 2(1)(a); Directive 2004/113, Art 2(a); Directive 2010/41, Art 3(a); Directive 2023/970, Art 3(1)(i).

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1. Direct Discrimination

Second Ingredient - metric against which less favourable treatment can be measured

Comparator

Person in a similar position to the complainant but without the protected characteristic. May be:

- Actual - past or present
- Hypothetical

- Need not be identical (C-147/08 *Römer*)



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1. Direct Discrimination

Third Ingredient - protected characteristic

Protected ground/characteristic

- Exhaustive list

- Race and ethnic origin
- Gender
- Religion or belief, disability, age, sexual orientation



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1. Direct Discrimination

Protected ground/characteristic

- Domestic law may include additional grounds - e.g. Ireland: Race, Gender, Disability, Age, Sexual Orientation, Marital Status, Family Status, Religion, Membership of the Traveller Community and Housing Assistance Ground*

*Goods and services only

- Review of equality legislation - discussion of inclusion of "socio-economic status"



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1. Direct Discrimination

- **Nexus** between the treatment and the protected characteristic is required - extends to association with protected characteristic (C-38/24 *Bervidi*)
- No requirement to prove intent (C-77/88 *Dekker*)

Glasgow City Council v Zafar [1998] ICR 120;

".....those who discriminate on the grounds of race or gender do not in general advertise their prejudices: indeed they may not even be aware of them."



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2. Indirect Discrimination

Whereas direct discrimination is conduct centred, indirect discrimination is effects based

Art. 2(2)(b) Directive 2000/43:

“indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”

See also Art 2(2)(b) Directive 2000/78



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2. Indirect Discrimination

- ‘*less favourable treatment*’ is interpreted as substantially the same as ‘*particular disadvantage*’ (C-83/14, *CHEZ*)
- Again, intention or motive not required to be proven, arguably of less relevance where the measure is *prima facie* neutral (although may be covert effort to discriminate behind an apparently neutral measure)



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2. Indirect Discrimination

Ingredients

(1) An apparently neutral measure that would put persons of a protected group at a particular disadvantage (2) compared with other persons and (3) the measure does not fulfil a legitimate aim or cannot be justified as appropriate and necessary to attain the legitimate aim



2. Indirect Discrimination

- Direct and indirect discrimination may co-exist on the same facts
- Comparator group required (to demonstrate neutral nature of measure and detrimental effect)
- Application of the policy to persons with protected characteristic (not every member of that group but proof of detrimental effect by reference to the protected characteristic is required)

C-123/10 *Brachner* - percentage/degree of impact

C-83/14 *CHEZ* - indirect discrimination by association

Irish law

Stokes v Christian Brothers High School Clonmel [2015] 2 IR 509; *ADJ-00038010 A Complainant v A Hotel*

2. Indirect Discrimination

Case 170/84 *Bilka* - indirectly discriminatory measures could be justified only if they “correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objective in question and are necessary to that end”

Inoue v NBK Designs Ltd EED0212, Labour Court, Ireland in interpreting domestic law held: “The wording of Section 22(1) must be interpreted as contemplating the three-tiered test for objective justification set out by the ECJ in *Bilka – Kaufhaus*. This test requires that the Court be satisfied that the impugned measures,

- a) correspond to a real need on the part of the undertaking,
- b) are appropriate with a view to achieving the objective pursued and
- c) are necessary to that end.”



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2. Indirect Discrimination

Proportionality of the measure

Case C-127/92 *Enderby*

“...if...the national court has been able to determine precisely what proportion of the increase in pay is attributable to market forces, it must necessarily accept that the pay differential is objectively justified to the extent of that proportion. When national authorities have to apply Community law, they must apply the principle of proportionality.”

See also Case 109/88 *Danfoss*



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3. Harassment



- No comparator required
- Subjective experience
- Connection to protected ground



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3. Harassment

Directive 2000/43, Art 2(3).

‘where unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment’

See also: Directive 2000/78, Art 2(3); Directive 2006/54, Art 2(c); Directive 2004/113, Art 2(c); Directive 2010/41, Art 3(c); Directive 2023/970, Art 3(1)(j)

Note intention or effect



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3. Harassment



- Sexual harassment where unwanted conduct is of a sexual nature
- Includes harassment by association (Case C-303/06 *Coleman*)

Challenges and developments

- Breadth of defences - e.g. Joined Cases C-804/18 and C-341/19, *WABE eV* and *MH Müller Handels GmbH*
- No regard to interplay of protected characteristics - Intersectional discrimination is not prohibited - C-443/15 *Parris*
- Consider layered approach to allow for enrichment of jurisprudence eg - “discrimination” cases resolved by reliance on Directives outside of the equality framework - e.g. Case C-311/13 *Tümer*; Case C-394/23 *Mousse*; C-43/24 *Shipova*

Direct Discrimination

Go raibh maith agaibh

Thank you

Comments and questions welcome to sdl@lawlibrary.ie

