Lecture outline: General Principle of Non-Discrimination
Chapter 14 Subject Guide;
Chapter 16 Horspool and Humphreys

- The general principle of non-discrimination
- Articles 18, 19 and 157 TFEU (ex Articles 12, 13 and 141 EC)
- The meaning of ‘pay’
- Temporal effect of Article 157 TFEU
- Pensions
- Justification for direct and indirect discrimination
- Secondary legislation on equal pay and equal treatment

THE GENERAL PRINCIPLE OF NON-DISCRIMINATION

Horspool and Humphreys, Chapter 6: ‘General principles of law’, 6.30-6.36; Chapter 16: section 16.5-16.73: Equal treatment and sex discrimination; Discrimination as a general principle: sections 16.74-16.80

The principle of non-discrimination is the foundation of European Union law. The basis of the general principle is the principle that there should be no discrimination on the grounds of nationality ‘within the scope of this Treaty’, that is between Member States, which is enshrined in Article 18 TFEU and manifested in the Articles underpinning the four freedoms. It is followed by Article 19 TFEU, an ‘enabling’ article dealing with other forms of discrimination. It is also apparent in Article 157 TFEU.

It is considered that the case law of the Court of Justice has elevated the principle of non-discrimination or equality (they are considered to be the same principle) to one of the general principles of Union law.

Elimination of sex discrimination as a fundamental human right

A high point in this case law was when the Court explicitly recognised that the elimination of sex discrimination was a fundamental human right upheld by Community law. See:

This case concerned gender reassignment. The ECJ stated that equal treatment of men and women in employment was ‘simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law’.
See also Case C-122/99 D v Council [2001] ECR 1-4319. The Court stated it could not disregard the views prevailing within the Community as a whole, where same sex partnerships were not considered equivalent to marriage.
Article 19 TFEU (ex Article 13 EC)

Anti-discrimination Directives

Directive 2000/78 prohibits discrimination on the grounds of race or ethnic origin, religion or belief, disability, age or sexual orientation. It does not cover sex discrimination, which has been addressed by Directive 76/207.

Directive 2000/43

Directive 2000/43 implements the principle of equal treatment on the grounds of racial and ethnic origin. The Directive prohibits both direct and indirect discrimination (Article 2). Its scope is laid down in Article 3; Article 5 permits positive discrimination and Articles 9 and 15 set out that Member States must ensure proper procedures and sanctions where there are breaches. It should be noted that Directive 2000/78 is limited to economic actors, whereas Directive 2000/43 has no such limitation.

Case C-144/04 Werner Mangold v Rüdiger Helm, elevating the principle of equality to a general principle

Case C–555/07 Kücükdeveci (2010).

Sex Discrimination

Equal treatment of men and women

Article 157 TFEU (ex Art 141 EC)

Directive 2006/54 on the implementation of the principle of equal treatment of men and women in matters of employment and occupation (recast)

• Equal Treatment Directive 76/207 (replaced by Directive 2006/54)
• Equal Pay Directive 75/117 (replaced by Directive 2006/54)
• Social Security Directive 79/7
• Parental Leave Directive 96/34
• Occupational Social Security Directive 86/378
• Pregnancy Directive 92/85
• Burden of Proof Directive 97/80 (replaced by Directive 2006/54)
• Part-time Workers’ Directive 97/81

Case 43/75 Defrenne v Sabena (No. 2) [1976] ECR 455.

EQUAL TREATMENT
The meaning of ‘pay’

In Case 80/70 Defrenne v Belgium [1971] ECR 445 the ECJ gave the definition of ‘pay’ for the purposes of Art 141 (now 157 TFEU):

‘any… consideration, whether in cash or kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer’.

The Court then, in a series of cases, broadened the meaning of ‘pay’ under the Article.

An award of compensation for breach of the right not to be unfairly dismissed; Case C-167/97 Seymour-Smith and Perez [1999] ECR 1-623.

Are pensions included in ‘pay’?

State benefits are excluded from ‘pay’
Whether the pension is ‘pay’ or a state benefit is very important because social security benefits are governed by Directive 79/7.
Included: supplementary occupational pensions

Included: contracted-out occupational pensions

The ECJ has, controversially, included contracted-out occupational pensions within the meaning of pay, Case C-262/88 Barber v GRE [1990] ECR I-1889.

The Barber Protocol

‘benefits under occupational schemes shall not be considered as remuneration if and so far as they are attributable to periods of employment prior to May 17th 1990’ (the date of the judgment). See Also Case C-109/91 Ten Oever [1993] ECR 1-4879 which also held that an employee’s pension, paid after his death to his widow, is ‘pay’.
**Indirect discrimination**

*Equal Opportunities Commission v Secretary of State for Employment* [1994] 1 All ER 910.
Case C-167/97 *Seymour-Smith and Perez* [1999] ECR 1-623

Direct discrimination under Article 157 TFEU can never be justified, but indirect discrimination can be justified where there are objective reasons for the discrepancy as the ECJ held in Bilka-Kaufhaus:

‘If…the [discriminatory] measures…

1. correspond to a real need on the part of the undertaking,
2. are appropriate with a view to achieving the objectives pursued,
3. [are] necessary to that end

the fact that the measures affect a greater number of women than men is not sufficient to show that they constitute an infringement of Article 119’. (now Art 157 TFEU)

Where the indirect discrimination is in a social security scheme (although the benefit was actually paid by the employer ‘by virtue of the contract of employment’ and therefore was held to fall within Art 141 EC), see Case 171/88 *Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co KG* [1989] ECR 2743.

**The burden of proof**

Where there is evidence of indirect discrimination, it is for the employer to show that it is for reasons unrelated to sex discrimination. See now Directive 2006/54, replacing Directive 97/80 (the Burden of Proof Directive).

See also Case 108/88 *Danfoss* [1989] ECR 3199.
This decision has also been codified in the Directive. Directive 2006/54 enshrines the definition of ‘indirect discrimination’ in Article 2(1) (b).

**The meaning of equal work**

Case 129/79 *McCarthys Ltd v Wendy Smith* [1980] ECR 1275
Case C-127/92 Enderby v Frenchay Health Authority [1993] ECR 15535. (speech therapists)

**Application of national time limits to claims under Art 157 TFEU**

Case C–188/95 Fantask A/S v Industrieministeriet Erhvervsmristeriet) [1997] ECR I-6783
Case C-78/98 Preston v Wolverhampton Healthcare NHS Trust and Others and Fletcher v Midland Bank plc [1999] ECR I-3201

**Secondary Legislation**

Several Directives provide for equal treatment of men and women:

. Directive 79/7 (social security)
. Directive 86/614 (self-employment)
. Directive 92/85 (pregnant women and working mothers). Prohibits dismissal of women from the beginning of their pregnancy to the end of maternity leave
. Directive 96/34 (parental leave)
. Directive 96/97 (equal treatment occupational social security schemes)(replaced by Directive 2006/54)

Recall that the case that establishes that there is no horizontal direct effect of an unimplemented Directive concerned the direct effect of the ETD: Case 152/84 Marshall v Southampton & Southwest Hampshire Area Health Authority [1986] ECR 723.

**The Equal Treatment Directive: Directive 76/207**

Amendment of the ETD by Directive 2006/54 (itself replacing Directive 2002/73 has included the following definitions in Art 2 of the Directive.
**Direct discrimination**
‘where one person is treated less favourably on grounds of sex than another is, has been or would be in a comparable situation’

**Indirect discrimination**
‘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.’

**Sexual harassment**
‘where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment’.

**Derogations**
Directive 76/207 provides for a number of derogations:

Article 2(2): ‘activities for which the sex of the worker constitutes a determining factor’
Article 14(2) Directive 2006/54
. Case C-345/89 The Republic (France) v Stoeckel [1991] ECR 4047
. Case 165/82 Commission v United Kingdom (male midwives) [1983] ECR 3431
Case C-285/98 Kreil v Germany [2000] ECR I-1-69

Article 2(3): ‘provisions concerning the protection of women, particularly as regards pregnancy and maternity’ (Article 2(2c) Directive 2006/54).

Note that dismissal for pregnancy is direct discrimination as is the refusal to employ a woman because she is pregnant: Case C-177/88 Dekker [1990] ECR I-3841.

However, in Case 179/88 Hertz [1990] ECR I-3979 it was held that it was lawful to dismiss a woman for illness following pregnancy. See also Case C-400/95 Larsson [1997] ECR I-2757

Note that Directive 92/85 (pregnant women and working mothers) prohibits dismissal of women from the beginning of their pregnancy
to the end of maternity leave but does not cover the situation in Dekker where a woman is not appointed because she is pregnant. So Dekker and Art2(3) of the ETD are still relevant here. See: Case C-207/98 Mahlburg v Land Mecklenburg-Vorpommern [2000] ECR 1-549.

In the following cases, the dismissal was found to be unlawful under Article 2(3) of the Equal Treatment Directive. See: Case C-32/93 Webb v EMO Air Cargo [1994] ECR I-3567. A woman who was employed on an indefinite contract to cover the absence from work of another woman on maternity leave, was dismissed when she herself became pregnant. This was held to be unlawful under the Equal Treatment Directive.

Originally it appeared that a woman who had been employed on a short-term contract, would not be protected if dismissed for pregnancy. However, it has now been confirmed that a woman employed on a short term contract is also protected from dismissal because she is pregnant: Case C-109/00 Tele Danmark v HK [2001] ECR I-6993.

Article 2(4): permits measures which ‘promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities’

This is another exception to the principle of equal treatment allowing positive action. This was restrictively interpreted in Case C-450/93 Kalanke [1995] ECR I-3051 which caused a great deal of criticism.

A wider approach was adopted, however, after the addition of paragraph 4 to Article 141 EC (now Article 157 TFEU) by the Amsterdam Treaty. In Case C-409/95 Marschall v Land Nordrhein Westfalen, [1997] ECR I-6363 [1997] All ER (EC) 865, decided after this amendment to the Treaty article, female candidates for promotion who were equally qualified to their male colleagues were to be given preferential treatment in sectors where women were underrepresented. The Court distinguished the procedure under review in this case from that at issue in Kalanke because it contained a ‘saving clause’ which permitted the appointment of a man on the basis of his particular, individual characteristics. In Kalanke, in the absence of such a clause, the appointment of a woman was automatic.


Other provisions of Directive 76/207
For Directive 76/207, Article 6 (effective judicial protection; Article 17 Directive 2006/54), see
Refusal to give a reference after settled claim.

Remedies: On national limits to compensation and interest, see: Case C-271/91 Marshall v Southampton and South West Area Health Authority (Marshall No.2) [1992] ECR I-4367

Directive 2006/54 now replaces most equal treatment directives and guarantees equality of treatment for men and women ‘as regards access to employment, including promotion, and to vocational training (and promotion added by Directive 2006/54) and as regards working conditions’. (Article 1 of the Directive)

Unlike the equal pay requirement of Art 141 to which there are no exceptions (although indirect discrimination under this Article may be objectively justified), there are exceptions to the principle of equal treatment which have been interpreted by the Court of Justice. The Court has held that dismissal on the grounds of pregnancy is direct discrimination under the Directive.