

GENDER EQUALITY & EMPLOYMENT

GENDER EQUALITY ISSUES FEATURE AS ONE OF THE MAIN TOOLS TO ACHIEVE HIGH EMPLOYMENT LEVELS IN THE EU, AS ADOPTED IN THE EUROPEAN EMPLOYMENT STRATEGY, THE “**LISBON STRATEGY**”.

(march 2000)

In contrast to specific discriminatory acts such as termination, «[p]ay disparities often occur in small increments» and «cause to suspect that discrimination is at work develops only over time. Moreover, comparative pay information is often hidden from the employee's view» .

(Ruth Bader Ginsburg).



EQUALITY AND NON-DISCRIMINATION

➤ EQUALITY AND NON-DISCRIMINATION

- «Having thus clarified the scope of this plea, the Court confirms, secondly, that the principle of equal treatment for men and women in matters of employment and, at the same time, the principle of the prohibition of any direct or indirect discrimination on grounds of sex form part of the fundamental rights the observance of which the Court of Justice and the Court of First Instance must ensure pursuant to Article 164 of the EEC Treaty» (Case T-45/00, §47).

➤ GENDER EQUALITY

- Sex / Gender

EQUALITY AND NON-DISCRIMINATION

- GROUNDS ON WHICH THE DIRECTIVES CONTAIN AN OUTRIGHT PROHIBITION ON DISCRIMINATION
 - A. NATIONALITY;
 - B. SEX
 - C. PART-TIME AND TEMPORARY EMPLOYMENT,
 - D. RACIAL OR ETHNIC ORIGIN
 - E. RELIGION OR BELIEF
 - F. DISABILITY
 - G. AGE AND SEXUAL ORIENTATION

EMPLOYMENT

- GROUNDS ON WHICH THE EU LAW ACTUALLY CONTAINS AN OUTRIGHT PROHIBITION ON DISCRIMINATION (EMPLOYMENT)
 - a. RACIAL EQUALITY DIRECTIVE (2000/43/EC), ART. 3 (1)
 - b. EMPLOYMENT EQUALITY DIRECTIVE (2000/78/EC), ART. 3 (1)
(FRAMEWORK DIRECTIVE)
 - c. GENDER EQUALITY DIRECTIVE (RECAST) (2006/54/EC), ART. 1, ART. 14 (1) (A)
 - d. COUNCIL DIRECTIVE (2003/109/EC), ART. 11, (1) (A)

EMPLOYMENT

Gender Equality Directive (recast) - 2006/54/EC

- GENDER (RECAST) DIRECTIVE - 2006/54/EC (employment, occupation)
- REPEALED
 - Directive 75/117/EEC on equal pay;
 - Directive 86/378/EEC, as amended by Directive 96/97/EC, on equal treatment in occupational social security schemes;
 - Directive 76/207/EEC, as amended by Directive 2002/73/EC, on equal treatment of men and women;
 - Directive 97/80/EC, as amended by Directive 98/52/EC, on the burden of proof in cases of discrimination based on sex.
 - References shall be construed as being made to this directive - Article 34.

EMPLOYMENT

Gender Equality Directive (recast) - 2006/54/EC

- PAY
 - Art. 5

- ACCESS TO EMPLOYMENT, VOCATIONAL TRAINING AND PROMOTION AND WORKING CONDITIONS
 - Art. 14

- OCCUPATIONAL SOCIAL SECURITY SCHEMES
 - Art. 5

EMPLOYMENT

Gender Equality Directive (recast) - 2006/54/EC

- ARTICLE 4 (PROHIBITION OF DISCRIMINATION)
 - For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated.
 - In particular, where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.

EMPLOYMENT

Gender Equality Directive (recast) - 2006/54/EC

- IMPLEMENTATION OF CONCEPTS: **PAY**
 - Salary; additional benefits such as bonuses, overtime compensation, travel facilities, compensation for attending training, payments in case of dismissal, statutory sick pay, statutory required compensation and occupational pensions ;
 - all forms of occupational pensions (recital 13);
 - benefits from pension schemes for public servants

EMPLOYMENT

Gender Equality Directive (recast) - 2006/54/EC

- IMPLEMENTATION OF CONCEPTS: **DIRECT DISCRIMINATION**
 - Art. 2 (1), a): where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;
 - Treatment
 - Less favourable
 - On ground of sex
 - Comparator & comparable situation

EMPLOYMENT

Gender Equality Directive (recast) - 2006/54/EC

- IMPLEMENTATION OF CONCEPTS: **DIRECT DISCRIMINATION**
 - Special Case, article 2(2) – Pregnancy;
 - Woman (person)
 - Any less favorable treatment
 - Related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC
 - (~~on grounds of sex~~)
 - (~~Comparator & comparable situation~~)
 - The Directive clearly acknowledges (recitals 23-25), in line with CJEU case-law, that any unfavorable treatment of women related to **pregnancy** or maternity constitutes a direct ground for discrimination on the basis of sex

EMPLOYMENT

Gender Equality Directive (recast) - 2006/54/EC

- IMPLEMENTATION OF CONCEPTS: **DIRECT DISCRIMINATION**
 - Special Case – Pregnancy
 - Inability to have a child
 - Does not constitute a ‘disability’ within the meaning of the Employment Equality Directive.
 - Surrogacy agreement:
 - Not prevent her from having access to, participating in, or advancing in employment
 - A commissioning father is not entitled to maternity leave either
 - Cases: C.D. (C- 167/12) and Z.(C-363/12) ,

EMPLOYMENT

Gender Equality Directive (recast) - 2006/54/EC

- IMPLEMENTATION OF CONCEPTS: **INDIRECT DISCRIMINATION**
 - Art. 2 (1), b):
 - 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;

EMPLOYMENT

Gender Equality Directive (recast) - 2006/54/EC

- IMPLEMENTATION OF CONCEPTS: **SAME WORK** or **for WORK TO WHICH EQUAL VALUE**
 - Taking into account the overall nature of the work, the responsibility involved, the training requirements and the working conditions;
 - Comparator
 - Not necessarily limited to situations in which man/woman work for the same employer
 - The comparator does not need to be employed at the same time as the complainant

EMPLOYMENT

Gender Equality Directive (recast) - 2006/54/EC

➤ ACCESS TO JUSTICE

- Reversal of the burden of proof - Firma Feryn, C- 54/07
 - Under the Directive, Member States must ensure that, when
 - When a claimant establishes 'facts from which it may be presumed that there has been direct or indirect discrimination',
 - It is for the employer to prove that there has been no breach of the principle of equal pay (Article 19): Firma Feryn, C- 54/07 (§ 33)
- Protection from victimization - Habelbracht and others, C-404/18
 - Employees covered by that article, other than the person who has been discriminated against (...)
 - Must be protected to the extent that such employees are likely to be disadvantaged by their employer because of the support they have provided, formally or informally, to the person who has been discriminated against (§ 35).

For days, tens of thousands of Poles have marched in the streets to protest their nationalist government's purge of the Supreme Court, an action that has been condemned by the European Union as a threat to the rule of law in a country.

(NY Times, July 5, 2018)



COHERENCE

(Recast) Directive; TFEU; TUE; Charter of Fundamental Rights

- C-192/18 JUDGEMENT OF THE COURT, 5 NOV 2019
 - Lowering of the retirement age of judges of the ordinary Polish courts; Possibility of continuing to carry out the duties of judge beyond the newly set age, by authorisation of the Minister for Justice
 - Fixing different retirement ages on the basis of sex = directly discriminatory
 - fail to comply both Article 157 TFEU and Article 5(1) of Directive 2006/54, in particular Article 5(1)(a), read in conjunction with Article 9(1)(f) of the Directive
 - No positive action (article 3 of the Directive)
 - The principle of irremovability
 - Exceptions (legitimate objective; proportionate; not raising reasonable doubt in the minds of individuals as to the impartiality of the courts concerned to external factors and their neutrality with respect to the interests before them)
 - Infringement of Article 19(1) TEU, read in the light of Article 47 of the Charter

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 - Lowering of the retirement age of judges of the ordinary Polish courts; Possibility of continuing to carry out the duties of judge beyond the newly set age, by authorisation of the Minister for Justice
 - No positive action
 - Article 3 and recital 22 of the Directive 2006/54 refer solely those in Article 157(4) TFEU;
 - The setting, for retirement, of an age condition that differs according to sex does not offset the disadvantages to which the careers of female public servants are exposed by helping those women in their professional life and by providing a remedy for the problems which they may encounter in the course of their professional career (§81).

