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GENUINE OCCUPATIONAL REQUIREMENT AS JUSTIFICATION FOR SEX DISCRIMINATION IN EMPLOYMENT IN EU

Introduction

Undertaking measures for eliminating discrimination between women and men in the workplace is desirable in order to open up equality of opportunity in employment. Equality between men and women is now indisputably recognised as a basic principle of democracy and respect for human rights.

In European Union emphasis on equality between women and men has been made since the foundation of the European Economic Community in 1957 by including in Treaty of Rome Article 119 on principle of equal pay. Court of Justice of the European Union (hereafter the Court) has stated, for example in judgement of 15 June 1978, *Defrenne v. SABENA*, that the fundamental human rights are part of the general principles of Community law. In judgements like *Razzouk and Beydoun v. Commission* or *Süzen v. Zehnacker Gebäudereinigung Krankenhausservice* it has been set that the right to non-discrimination

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on grounds of sex is one of the fundamental human rights that the Court must ensure that is respected. Equal treatment between women and men is also a fundamental part of the general principles of European law. So the Court determined that equal treatment between women and men is a fundamental human right and a general principle of EU law. Equality between women and men is considered a fundamental principle by recent legislation.

It is clear that a general principle, in this situation the principle of non-discrimination on grounds of sex, could be a subject to some exceptions. Exceptions should be strictly prescribed by the law and should not compromise the principle. So, the exceptions to the principle of non-discrimination in employment it is found in the EU regulations.

The aim of this article is to present an overview of the EU provisions on a ground for justification of sex direct discrimination: genuine occupational requirement.

1. Sex discrimination in employment and grounds for justification

All sex discrimination legislation, either expressly or implicitly, distinguishes between two forms of sex discrimination: direct and indirect discrimination. The EU directives provide definitions for both forms of discrimination.

Direct discrimination is where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation. On the other hand, indirect discrimination is 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.

As we can notice the indirect discrimination definition include the possibility of justification, but the definition of direct discrimination does not include such provision.

Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) includes in the concept of discrimination on grounds of sex: harassment, sexual harassment, instruction to discriminate and any less favourable treatment of a woman related to pregnancy or maternity leave.

Harassment is defined as an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

Sexual harassment is 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.

Instruction to discriminate against persons on grounds of sex does not have a legal definition.

The Court of Justice has consistently recognized, as regards the principle of equal treatment, that legitimacy to protect a woman's biological condition during and after pregnancy. In addition, he consistently held that any unfavourable treatment of women regarding pregnancy or maternity constitutes direct discrimination based on sex.

It is accepted that it should be generally more difficult to justify direct discrimination because of its more insidious and corrosive nature, but in limited circumstances even direct discrimination should be capable of justification. (Bowers and Moran, 2002, p. 308)

Direct sex discrimination is unlawful unless it is covered by one of the express exceptions in the legislation. This means that all less favourable treatment on the ground of any categorical sex difference is prohibited unless the employer fails to justify its actions.

These exceptions are:

a. The genuine and determining occupational requirements

According to article 14(2) of Directive 2006/54 Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate.

b. positive action

Article 141(4) of Treaty of Lisbon stipulates that with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers. This provision it is reinforced by the article 3 of Directive 2006/54

that provides that Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life.

In conclusion an employer is able to discriminate on the grounds of sex is if there is a genuine occupational requirement or where the positive action is permitted.

2. Sex as genuine occupational requirement in EU legislation

The first provision on occupational requirements introduced in Community legislation was Article 2(2) of Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. According to this article the Directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor. This provision was amended by Directive 2002/73 and by Directive 2006/54. The present directive has no longer a general application, the genuine occupational requirement only applies to access to employment including the training leading to it.

Recital 19 of Directive 2006/54 states that ensuring equal access to employment and the vocational training leading thereto is fundamental to the application of the principle of equal treatment of men and women in matters of employment and occupation. Any exception to this principle should therefore be limited to those occupational activities which necessitate the employment of a person of a particular sex by reason of their nature or the context in which they are carried out, provided that the objective sought is legitimate and complies with the principle of proportionality.

As per article 14(2) of Directive 2006/54 Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate.

This defence allows employers to differentiate against individuals on the basis of a protected characteristic, where this characteristic is directly related to the suitability or competence to perform the duties required of a particular

post. (European Union Agency for Fundamental Rights, 2010, p.46)

It is considered that the exception for genuine occupational requirements now appears as a qualification to the basic principle of equal treatment, rather than as a freestanding exemption. (Pitt, 2009, p. 2)

Moreover, article 31(3) of Directive 2006/54 states that Member States shall assess the occupational activities referred to in Article 14(2), in order to decide, in the light of social developments, whether there is justification for maintaining the exclusions concerned. They shall notify the Commission of the results of this assessment periodically, but at least every 8 years.

Based on these legal provisions we can make some comments.

First thing we could notice from article 14(2) is that the genuine occupational requirement provision is not mandatory. The article gives the possibility to Member States to adopt such measures.

Secondly, genuine occupational requirement is a justification for direct discrimination on grounds of sex only as regards access to employment including the training leading to it.

Thirdly, the Directive does not say that sex must itself constitute the genuine occupational requirement. The genuine occupational requirement need only be a characteristic related to sex, which is a wider formulation. (Pitt, 2009, p. 3)

Fourthly, there are two alternative ways in which a characteristic constitutes a genuine and determining occupational requirement. First is the reason of the nature of the particular occupational activities concerned and the second is the context in which they are carried out.

Lastly, the objective of genuine occupational requirement measures must be legitimate and the requirement must be proportionate.

3. Examples of jobs in which sex is considered genuine occupational requirement in the Court of Justice of the European Union case-law

The legislation does not give a precise list of the circumstances in which sex can be a genuine occupational requirement. EU law provides a general rule that is applied to all the situation when the characteristic related to sex constitutes a genuine and determining occupational requirement. The judge must determine whether sex was a genuine and determining occupational requirement, having regard to the merits of the case. This approach is preferable in order to prevent that unforeseen circumstances are not included in legislation.

The Court indicates particular professions where the defence was likely to be applicable.

a. Policing activities

In judgment of 15 May 1986, *Johnston v. Chief Constable of the Royal Ulster Constabulary* the Court explores the application of genuine occupational requirement in policing activities.

In a situation characterized by serious internal disturbances the carrying of fire-arms by policewomen might create additional risks of their being assassinated and might therefore be contrary to the requirements of public safety.

The context of certain policing activities may be such that the sex of police officers constitutes a determining factor for carrying them out. If that is so, a member state may therefore restrict such tasks, and the training leading thereto, to men.

In deciding whether, by reason of the context in which the activities of a police officer are carried out, the sex of the officer constitutes a determining factor for that occupational activity, a member state may take into consideration requirements of public safety in order to restrict general policing duties, in an internal situation characterized by frequent assassinations, to men equipped with fire-arms.

The protection of women do not include risks and dangers, such as those to which any armed police officer is exposed when performing his duties in a given situation, that do not specifically affect women as such.

b. Assault units

The organisation of the Royal Marines differs fundamentally from that of other units in the British armed forces, of which they are the 'point of the arrow head'. They are a small force and are intended to be the first line of attack. It has been established that, within this corps, chefs are indeed also required to serve as front-line commandos, that all members of the corps are engaged and trained for that purpose, and that there are no exceptions to this rule at the time of recruitment. In such circumstances, the competent authorities were entitled, in the exercise of their discretion as to whether to maintain the exclusion in question in the light of social developments, and without abusing the principle of proportionality, to come to the view that the specific conditions for deployment of the assault units of which the Royal Marines are composed, and in particular the rule of interoperability to which they are subject, justified their composition remaining exclusively male. So exclusion of women from service in special combat units such as the Royal Marines may be justified. (C-273/97, para. 30-32)

c. Prisons warders

In the judgment of 30 June 1988, *Commission v. France* the Court found that the specific nature of the post of warder and the conditions under which warders carry out their activities justify reserving such posts primarily for men in male prisons and primarily for women in female prisons. To that extent, the different access to the custodial staff corps arising from a system of separate recruitment for men and women is in accordance with the exception from principle of treatment. This exception should be applied to functions which involve regular contact with the prisoners.

d. Armed forces

It is for the Member States, which have to adopt appropriate measures to ensure their internal and external security, to take decisions on the organisation of their armed forces. It does not follow, however, that such decisions must fall entirely outside the scope of Community law. (C-273/97, para. 15)

Having regard to the very nature of armed forces, the fact that persons serving in those forces may be called on to use arms cannot in itself justify the exclusion of women from access to military posts. (C-285/98, para. 28)

In *Johnston* case the Court found that the risks and dangers to which women are exposed when performing their duties in the police force in a situation such as exists in Northern Ireland are not different from those to which any man is also exposed when performing the same duties. A total exclusion of women from such an occupational activity which, owing to a general risk not specific to women, is imposed for reasons of public safety is not one of the differences in treatment that EU laws allows out of a concern to protect women.

The protection of women do not include risks and dangers, such as those to which any armed police officer is exposed when performing his duties in a given situation, that do not specifically affect women as such.

The armed forces are not excluded from the scope of application of Directive 76/207. Excluding women from almost all military posts was held to be disproportionate, even taking into account the margin for national discretion.

e. Respect for patient's sensitivities

Another reason that can be given to prefer a person of a certain sex is the protection of privacy. Either a male or female employee, as appropriate, may be employed where the employer wants to preserve reasonable standards of privacy. For example, is not considered discrimination

to employ women as shop assistants if the work involves taking body measurements.

In *Commission v. United Kingdom* the Court noted that in a sphere in which respect for the patient's sensitivities is of particular importance, it considers that limitation is in conformity with EU directives.

f. Mining

The mining sector is examined in judgment of 1 February 2005, *Commission v. Austria*. Women should not be excluded from a certain type of employment solely because they are on average smaller and less strong than average men, while men with similar physical features are accepted for that employment.

The general prohibition of the employment of women in the underground mining industry does not constitute a difference in treatment permissible in connection with pregnancy and maternity.

The general prohibition of the employment of women in the underground mining industry involves excluding women even from work that is not physically strenuous and that does not, therefore, present any specific risk to the preservation of a woman's biological capacity to become pregnant and to give birth, or to the safety or health of the pregnant worker or for one who is breast-feeding or who has recently given birth, or to the foetus.

g. Pregnancy and maternity

The provisions relating to pregnancy and maternity protection are applicable to all jobs. So, provision regarding pregnancy and maternity protection does not allow women to be excluded from a certain type of employment on the ground that public opinion demands that women be given greater protection than men against risks which affect men and women in the same way and which are distinct from women's specific needs of protection. (C-222/84, para. 44)

h. Other occupations

The exceptions in connection with discrimination on the grounds of sex are often related to occupations traditionally dominated by men such as police work, as well as work in certain penal institutions and in certain parts of the army. However, such exceptions are also related to artistic activities, religious functions, the occupation of models, etc. (Burri, 2006)

The laws and practices of the various Member State are similar with regard to certain clearly-defined occupations (such as singing, acting, dancing and artistic or fashion modelling). The Member States maintain a

wide variety of other exceptions based on social, moral or, in certain cases, religious considerations, that a substantial number of those exceptions are based on considerations relating to the physical and moral protection of women and, finally, that certain important exemptions are bound up with the question of military service and the organization of the police and similar bodies. (C-248/83, para. 34)

Employment of a person of a certain sex shall not be considered discrimination if we are talking about dramatic performances or other entertainment, for reasons of authenticity. So, a producer could not take into consideration a woman if the role is written for a male. But, even if the role is written for a male, a producer could prefer a woman to give an artistic effect, for example.

4. Some conclusions drawn from the jurisprudence of the Court of Justice of the European Union on genuine occupational requirement

In order to provide an overview of the notion of genuine occupational requirement it is necessary to examine the interpretation given by the Court of Justice of European Union case-law to the relevant EU provisions.

There have been a number of cases before the Court of Justice of European Union which raise questions on the interpretation of the article 2(2) of Directive 76/207. Although this legal provision is not in force, the case-law interpreting article 2(2) of Directive 76/207 continues to be applicable in interpreting the legal provisions of Directive 2006/54.

According to the jurisprudence of the Court of Justice of European Union on genuine occupational requirement should be submitted several aspects.

1. Genuine occupational requirement provision is derogation from the principle of non-discrimination on grounds of sex so it should be interpreted strictly. (C-222/84, para.36) So each situation has to be examined on its own merits because a general exception to the principle of equal treatment is not admissible.

2. In the application of any derogation from an individual right such as the equal treatment of men and women the principle of proportionality must be observed. (C-222/84, para.38) The European test of proportionality involves an investigation as to whether there is a causal link between the aim of the employer and the means chosen to achieve that aim and whether there is any other non-discriminatory means of achieving the same aim. (Moran, 2000, pp. 73-74) The principle of proportionality requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim. (C-222/84, para.38)

3. The derogation only applies to specific jobs and not to entire occupation or professions.

In judgment of 8 November 1983, *Commission v. United Kingdom* the Court states that an exclusion of all kinds of employment in private households or in small undertakings with more than five employees was not justified by reason of the generality of the exclusion.

Furthermore, the Court of Justice underlined that, in the judgment of 30 June 1988 *Commission v France*, the derogation could relate only to specific activities. In *Johnston* judgement the Court does not accept a general reservation covering all measures taken by a Member State for reasons of the protection of public safety.

In *Kreil* judgment the Court state that an exclusion, which applies to almost all military posts cannot be regarded as a derogating measure justified by the specific nature of the posts in question or by the particular context in which the activities in question are carried out. The derogations regarding genuine occupational requirement can apply only to specific activities.

4. Exceptions must be transparent so that it is possible to identify exactly which jobs are being limited to one sex.

If the measures adopted by the Member States are not transparent the Commission will not be able to exercise effective supervision and it will be more difficult for any persons wronged by discriminatory measures to defend their rights. (C-248/83, para. 39) The exceptions may relate only to specific activities, that they must be sufficiently transparent so as to permit effective supervision by the Commission and that in principle they must be capable of being adapted to social developments. (C-318/86, para. 25)

This lack of transparency in a recruitment system makes it impossible to exercise any form of supervision, not only by the Commission and the courts but also by persons adversely affected by discriminatory measures. (C-318/86, para. 27)

5. National authorities have a certain degree of discretion when adopting genuine occupational requirement measures.

Depending on the circumstances, national authorities have a certain degree of discretion when adopting measures which they consider to be necessary in order to guarantee public security in a Member State. But, in the exercise of the discretion, the measures taken by the national authorities should have a legitimate aim and the measures taken are appropriate and necessary to achieve that aim. (C-273/97, para. 27 -28)

6. There is no need for Member States to use this facility at all.

The purpose of article 2(2) is not to oblige but to permit the member states to exclude certain occupational activities from the field of application

of the directive. This provision does not have the object or effect to require the member states to exercise the power of derogation in a particular manner. (C-248/83, para. 36)

7. The difference between nature and context is illustrated in judgment of 15 May 1986, *Johnston v. Chief Constable of the Royal Ulster Constabulary* C-222/84.

The Court held that the nature of the occupational activity in the police force is not a relevant ground of justification for the discrimination in question. So the Court examined if the specific context in which the activity of members of an armed police is carried out, the sex of the person carrying out that activity constitutes a determining factor.

The Court recognized that the context in which the occupational activity of members of an armed police force are carried out is determined by the environment in which that activity is carried out. In this regard, the possibility cannot be excluded that in a situation characterized by serious internal disturbances the carrying of fire-arms by policewomen might create additional risks of their being assassinated and might therefore be contrary to the requirements of public safety. In such circumstances, the context of certain policing activities may be such that the sex of police officers constitutes a determining factor for carrying them out. If that is so, a member state may therefore restrict such tasks, and the training leading thereto, to men.

8. A system of separate recruitment fixing the percentages of posts to be allotted to men and women should be governed by any objective criterion defined in a legislative provision. (C-318/86, para. 26)

9. The national court should say whether the reasons of the employer decision are in fact well founded and justify the specific measure taken in case. It is also for the national court to ensure that the principle of proportionality is observed. (C-222/84, para. 39)

10. The circumstances in which a genuine occupational requirement can be claimed have been treated by the Court as exhaustive: that is to say, there are no circumstances in which Member States can argue for other special occupational exemptions. (Pitt, 2009, p.6)

Conclusions

The EU legislation prohibits discrimination on grounds of sex, but also the possibility to Member States to adopt measures where genuine occupational requirement is a justification for direct discrimination on grounds of sex. The possibility is only permitted in conjunction with access to employment including the training leading to it.

The case-law of the Court of Justice of European Union has shown that the provisions regarding genuine occupational requirement must be very strictly interpreted, that it must be related to specific occupational activities, and that it requires an examination of each specific case. National authorities have a certain degree of discretion when adopting genuine occupational requirement measures and in the application of this derogation the principle of proportionality must be observed.

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Abstract

Elimination of discrimination between women and men in the workplace is a desirable measure in order to open up equality of opportunity in employment. Equality between men and women is now indisputably recognised as a basic principle of democracy and respect for human rights.

The law and the Court of Justice of European Union permit the justification of direct and indirect discrimination. EU law allows an employer to treat applicants differently if sex is on genuine occupational requirement.

The aim of this article is to present an overview of the EU provisions on a ground for justification of sex direct discrimination: genuine occupational requirement.

In order to provide an overview of the notion of genuine occupational requirement it is also necessary to examine the interpretation given by the Court of Justice of European Union case-law to the relevant EU provisions.

Резиме

Отстранувањето на дискриминацијата меѓу мажите и жените на работното место е препорачлива мерка со цел унапредување на правото на еднакви можности при вработувањето и во работните односи. Денес, еднаквоста меѓу мажите и жените несомнено претставува основно начело на демократијата и потврда за почитувањето на човековите права.

Правото и Судот на правдата на Европската унија дозволуваат оправдување на директната и индиректната дискриминација. Европската унија му дозволува на работодавецот да ги третира кандидатите различно доколку полот претставува суштинско и определувачко професионално барање.

Целта на овој труд е да понуди краток преглед на одредбите на Европската унија во врска со суштинските и определувачки професионални барања кои служат како основа за оправдување на директната дискриминација на основ на пол.

Со цел да се даде краток преглед на концептот на суштинските и определувачки професионални барања, потребно е да се разгледа толкувањето содржано во одлуките на Судот на правдата на Европската унија во однос на релевантните одредби на Унијата.

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