

DISCRIMINATION IN CONTRACT LAW – LEARNING FROM EU LAW?

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1. GENERAL PRINCIPLE OF EQUALITY?

ECJ case C-101/08 Audiolux:

“According to settled case-law, the general principle of equal treatment requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified (para 54).”

However, no application to company law (corporate governance with regard to minority shareholder relations)!

2. NON-DISCRIMINATION - NATIONALITY

Art. 12EC/18 TFEU as starting point

- Scope of application
- The concept of indirect discrimination
- Justifications of indirect discrimination
- Effect in private law relations?
- Third country nationals – Dir. 2003/109

3 (i). NON-DISCRIMINATION WITH REGARD TO GENDER

- Discrimination with regard to work payment: Art. 141 EC (now Art. 157 TFEU) – Barber 262/88
- Discrimination with regard to access, termination and modalities of employment: Dir. 76/207, now codified by Dir. 2006/54
- Direct discrimination
- Indirect discrimination – Jenkins sets the tone – 96/80
- Problems of part time work

3 (ii). NON-DISCRIMINATION WITH REGARD TO GENDER

- Justifications – affirmative action – the Kalanke controversy C-450/93
- Burden of proof (Dir. 97/80)
- Effective remedies and sanctions – cases Johnston 222/84; von Colson 14/83
- Compensation: no fault requirement, non-material damage included?
- Group actions, injunctions and complementary measures
- Equal treatment in the access to and supply of goods and services – Dir. 2004/113

4. NON-DISCRIMINATION - RACE & ETHNIC ORIGIN

- Art. 13 EC (Art. 19 TFEU) as basis for Community/Union action
- Conceptual and statutory development
- Dir. 2000/43
- The Feryn Case C-54/07
- Freedom of (hate?) speech under Art. 10 ECHR??

5: FRAMEWORK DIR 2000/78

Sexual orientation, disability, age, religion, belief ;

- Sexual orientation: from Grant C-249/96 to Maruko C-267/07
- Case Römer C-147/08 – (opinion of AG Jäskinen) – general principle of non-discr. on sexual orientation?
- Disability – permanent sickness? C-13/05 - Navas
- Discrimination by association? Coleman C-303/06
- Age – controversial case law to be discussed later
- NO CASES on religion/belief – “head scarf” of muslim women as problem, eg in employment relations?

6. IMPACT OF A GENERAL EU-PRINCIPLE OF NON-DISCR.?

ECJ cases Mangold + Küçükdeveci: age discrimination
Art. 21 Charter of Fundamental Rights:

- (1) Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
 - (2) Within the scope of application of the Treaty... and without prejudice to the special provisions ... any discrimination on grounds of nationality shall be prohibited.
- Only “vertical”, or also “horizontal” application?
 - See Art. 51 of the Charter: non-discrimination only within the scope of existing EU law

7. CRITIQUE OF NON-DISCRIMINATION IN PRIVATE LAW

The approach by Basedow: “*Unvollständiger Rechtsgrundsatz*”??

„The principles of equality or the prohibition of discrimination are not part of the fundamental principles of private law. He who concludes a contract does this in his own interest and not to make justice against others. She who has to choose a contract partner among several candidates has according to a German saying the ‘pain of choice’ (‘Qual der Wahl’) because there exist usually several selection criteria, the relative value of which can only be assessed on subjective preferences...“

- Critique of Basedow?: effective remedies

8. (i): NON DISCRIMINATION IN CONSUMER LAW

- Dir: 2004/113 forbids (direct and indirect) discriminations based on sex in the “supply of goods or services available to the public”
- This also includes *insurance services*
- Exception in Art. 5 (2): “Notwithstanding paragraph 1, Member States may decide before 21 December 2007 to permit proportionate differences in individuals’ premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data.”
- This exception was used by Germany (§ 20 (2) AGG)
- Women in Germany have to pay higher premiums for life and health insurance, men for car insurance because of statistical “evidence” concerning different risk profiles of women resp. men!
- Does this conform to Art. 3 (2) Grundgesetz? “Sachlicher Grund” may justify different insurance tariffs for men and women!

8. (ii): CONSTITUTIONAL LITIGATION BEFORE THE ECJ

- **Justification** of the exemption for insurance contracts?
- case C-236/09 Ass. Belge Tests Achats
- ECJ has decided on 1.3.2011
- Important, very carefully researched opinion of AG Kokott of 30.9.2010
- Not formally binding but persuasive authority
- Explains political, legal and actuarial background of the exemption

8. (iii): OPINION OF AG KOKOTT (1)

“(W)ith Directive 2004/113, particularly with Article 5, the Council made a conscious decision to adopt anti-discrimination legislation in the field of insurance. Such provisions must, without restriction, withstand examination against the yardstick of higher-ranking European Union law, in particular against the yardstick of the fundamental rights recognised by the Union. They must, to use the words of Article 13(1) EC (now Article 19(1) TFEU), be ‘appropriate’ for combating discrimination; they may not themselves lead to discrimination. The Council cannot evade that examination by simply arguing that it could also have taken no action”

8. (iv): OPINION OF AG KOKOTT (2)

„In view of social change and the accompanying loss of meaning of traditional role models, the effects of behavioural factors on a person's health and life expectancy can no longer clearly be linked with his sex. To refer once again to a few of the examples just mentioned: both women and men nowadays engage in demanding and sometimes extremely stressful professional activities, members of both sexes consume a not inconsiderable amount of stimulants and even the kind and extent of sporting activities practised by people cannot from the outset be linked to one or other of the sexes“.

8. (v): JUDGMENT OF THE ECJ of 1.3.2011

“Article 5(2) of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services is invalid with effect from 21 December 2012.”

- “Normative principle of equality”
- Dynamic concept of equality allows transition periods which must however be limited in time!

8. (vi): JUDGMENT OF THE ECJ (2)

Preliminary discussion of the judgment

- Very short legal reasoning
- Critique by the ECJ of missing temporal limitation of exemption (para 32)
- Political message of the ECJ: importance of fundamental rights also in private law (horizontal) relations – exemptions must be limited in time!
- ECJ does not pay account to the political compromise of Dir. 2004/113, unlike in case C-540/03 (Dir. 2003/86/EC on family reunion)
- Possibility of “verfassungskonforme Auslegung” like in case C-540/03?
- “Efficiency of sex-differentiation” as actuarial factor? “moral hazard” argument not applicable

8. (vii): CONSEQUENCES OF SUCCESSFUL LEGAL ACTION?

- Effects of an avoidance of Art. 5 (2) of Dir. 2004/113 on existing insurance contracts?
- AG Kokott pleads for a three year adjustment period to modify existing contracts and to recalculate premiums (para 81 of her opinion!)
- ECJ: effects only on contracts concluded after 21.12.2012?
- Consequence for insurance contract law: *unisex tariffs*
- *General increase in insurance premiums as price to pay against discrimination?*
- Tariffs/bonuses based on specific, gender neutral risk criteria are possible (smokers, hazardous activities regarding health insurance, driving record regarding car insurance);