

# Discrimination and Diversity: Obligations, Buzzwords or Opportunities?

HEC: Human Resources Management & Sustainable Development  
2<sup>nd</sup> November 2010

Nicolas C. Sauvage

ReedSmith

---

The business of relationships.



- **“Female soldier wins discrimination claim against army”**
- **“Goldman Sachs hit by lurid allegations of sex discrimination”**
- **“Must one be beautiful to find a job?”**
- **“Baby-toting Italian MEP causes stir”**
- **“Drinks Company Executive Says she was Sacked for Being Pregnant”**

## International News Headlines, 2010

- **“Female soldier wins discrimination claim against army”** *“(victim) told the army “unsuitable for a single mother who couldn't sort out her childcare arrangements” (13/04/2010 The Guardian)*
- **“Goldman Sachs hit by lurid allegations of sex discrimination”** *“women working full-time in the financial sector earn 55% less, on average, than men.” (The Guardian, 15/09/2009)*
- **“Must one be beautiful to find a job?”** *« Discrimination on physical appearance remains one of the most frequent forms, and yet one of the most difficult to discern. » (from French, L'Express 25/10/2010)*
- **“Drinks Company Executive Says she was Sacked for Being Pregnant”** *(The Times 18/10/2010)*
- **“Baby-toting Italian MEP causes stir”** *“It was not a political gesture. It was first of all a maternal gesture” (The Guardian, Brussels 26/09/2009)*



## In the beginning...

### ➤ Early References

- Universal Declaration of Human Rights, 1948

*Article 7: “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”*

- European Convention on Human Rights, 1950

*Article 14: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.*

## From tiny acorns...

### ➤ **Discrimination and the EU: From Modest beginnings...**

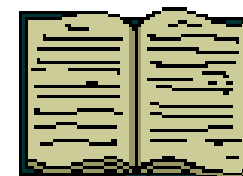
- **Treaty of Rome 1957**

- prohibition of discrimination based on nationality of workers of member states
- **Article 119: basic principle of equal pay for equal work between male and female workers**

- limited scope, linked to competition law – to become a cornerstone of European social policy

- even in these early stages, the link between economic development through improvement of living and working conditions and discrimination was already established

## ...do mighty oak trees grow



### ➤ ...to a Plethora of texts

- Initial principles extended and developed through:
  - decisions and interpretations of the EUCJ and the ECHR
  - transpositions and enactments in Member States
- Recent texts and projects:
  - Setting new standards
  - Reducing inconsistencies across the EU

## Some recent European texts

- “Racial Equality Directive” *2000/43*
- “Employment Equality Directive” *2000/78*
- (Directive) implementing the principle of equal treatment between men and women in the access to and supply of goods and services *2004/113*
- “Sex equality” on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation *2006/54*

## Milestones & Ideas

- from 2000/43 & 2000/78
- Direct Discrimination, Indirect Discrimination
- Discriminatory Harassment
- Bodies for the Promotion of Equal Treatment
- Social Dialogue
- Burden of Proof





## Milestones & Ideas (ii)

- from 2000/43 & 2000/78
- Exceptions / Limitations:
  - Affirmative Action
  - Genuine and determining occupational requirements
  - Justification: legitimate aim and appropriate and necessary means of achieving that aim

## In Practice

### ➤ Examples from the EUCJ (ECJ)

- Age Discrimination: German law which restricted applications to join the fire service to those under the age of 30 could be defended as a genuine occupational requirement (*Wolf v Stadt Frankfurt am Main* 12/01/2010)
- Disability/Discrimination by association: Less favourable treatment of an employee due to her situation as the primary carer of a disabled child, held to be contrary to the prohibition of direct discrimination (*Coleman v Attridge Law* 17/07/2008)

## In Practice... (ii)

### ➤ Examples from the EUCJ (ECJ)

- Sexual orientation: a denial of survivor pension rights on the death of a same-sex life partner on the grounds that such rights were limited to married persons constitutes an unjustifiable direct discrimination (*Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* 01/04/2008)



## Recent EU projects

- **PROGRESS** (employment and social solidarity programme)
  - Focus: Employment, Social inclusion and protection, working conditions, non-discrimination, gender equality
  - Umbrella Networks: AGA, European Disability Forum, European Network Against racism etc
  - Training
  - Work with NGOs

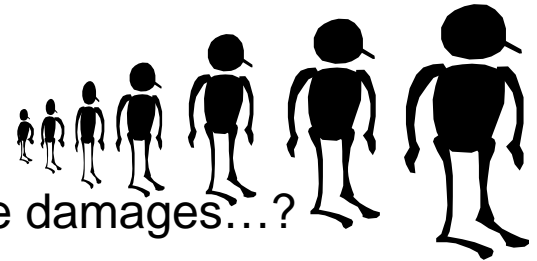
## International Reports

- ILO: Equality at Work: Tackling the Challenges 2007
  - Draws attention to new and emerging forms of discrimination e.g. based on genetic disposition, HIV/AIDS, lifestyle choices (obesity).
  - Notes difficulties in looking past short term costs of eradicating discrimination, especially in times of economic recession.
- United Nations: Commission for Social Development (*48<sup>th</sup> session, February 2010*)
  - "...racism, sexism and other forms of discrimination... hamper effective market functioning on a macro level"
  - "Barriers to equal opportunities are often embedded in social, legal and political institutions, requiring structural change, outside intervention or affirmative action."

## Pushing the Boundaries (too far?)

### ➤ USA

- So *sue me!* overly litigious? Excessive punitive damages...?
- « guerre des sexes », « political correctness gone mad »?



### ➤ Closer to home

- UK: claimant successfully argued that he was unfairly dismissed because of his beliefs about climate change, and that such philosophical beliefs should be recognised under religious discrimination legislation. (*Grainger plc v Nicholson* 03/11/2009)
  - **Spain:** Breastfeeding leave for Men... (30/09/2010) the EUCJ ruled that employed fathers are entitled to 'breastfeeding' leave irrespective of the professional status of their child's mother. Spanish legislation, according to which an employed father may only take the leave in place of the mother if she is an employee, amounts to discrimination.



## Pushing the Boundaries (too far?) (ii)

### ➤ Positive Discrimination / Affirmative action

- JFK executive order 1961: required federal contractors to *"take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."*
- Necessar(il)y Controversial
  - "communitarisation" of society
  - favouring certain communities because they are in fact treated unequally
  - preferential treatment to certain minorities to meet artificial quotas

## Pushing the Boundaries (too far?) (iii) Affirmative Action in Europe

- France:
  - **Disabled workers:** Quotas 4%, obligatory negotiation – sanctioned by fines
  - **Male/Female Equality:** a necessary element of annual collective bargaining on salaries, deadline 01/01/12, shall be punishable by fines
  - **Company boards** – following **Norway's** example
- Norway:
  - 40% of either sex on the boards of public limited companies (otherwise the company could be dissolved).





## Pushing the Boundaries (too far?) (iii) Affirmative Action in Europe

- UK:
  - Before largely prohibited (exceptions e.g. Police Service of Northern Ireland, sex discrimination Election candidates)
  - **Equality Act 2010** (important new legislation) to extend positive action so that employers may consider in recruitment or promotion the under-representation of disadvantaged groups

# Discrimination: Risks and Consequences

- Litigation : Criminal, Civil, Financial sanctions for the Company and/or its Directors
  - France:
    - L'Oréal & Adecco: racial discrimination, 2009 (€60k damages)
    - BNP Paribas : Sex discrimination / Maternity, 2010 (350 000 € damages)
  
- Image:
  - La Halde testing March 2008 “naming and shaming”



# Discrimination: Risks and Consequences



## ➤ “Windfall Effect” / Bandwagon Jumping

- trend emerging in employment litigation to “throw in” a discrimination claim “for good measure”.

## ➤ Links with other Hot HR Topics

- Social Media / New Technologies – Use in recruitment and the blurring of private life /professional boundaries which can quickly lead to discrimination
- Harassment and Stress

## How to...?

- From non-discrimination to positive diversity policies
  - Get involved in outreach and Community projects
  - Follow national legislation and international guidelines
  - Adapt Training and Communication (at all levels)
  - Focus on social dialogue and labour relations
  - Consider: team building, work/life balance, work from home, concierge services
  - Review recruitment and Promotion policies (“cv anonyme”, recruitment without a cv)
  - Look into Diversity charters
  - Accessibility of Workplace for disabled workers

## Opportunities

- Besides avoiding discrimination related fines and litigation...

- Labels

Before, good for communication - Now, essential

- calls for tender, especially for public contracts

- criteria of clients

- Talent: Candidates becoming more demanding, changing criteria



INVESTOR IN PEOPLE

GREAT  
PLACE  
TO  
WORK®



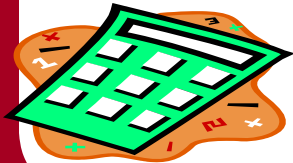
ReedSmith

The business of relationships.

# Opportunities (ii)

## Benefits of a Diverse Workforce

- Reflects diverse society - customers, partners
- Responsible Consumerism – effect of recession
- Cannot afford to limit the talent pool – not when faced with difficult economic times, globalisation, competition
- Positive diversity policies help to Hire and Retain Talent
- Show good faith, where litigation arises
- Economic Advantages – Triple bottom Line “People, Planet, Profit”





## Information

[www.ilo.org](http://www.ilo.org)

[www.europa.eu](http://www.europa.eu)

[www.un.org/esa/socdev/](http://www.un.org/esa/socdev/)

[www.eeoc.gov](http://www.eeoc.gov)

[www.equalityhumanrights.com/](http://www.equalityhumanrights.com/)

[www.halde.fr](http://www.halde.fr)

[www.reedsmith.com/publications](http://www.reedsmith.com/publications)

ReedSmith

The business of relationships.



## Reed Smith Paris

42 avenue Raymond Poincaré

75782 Paris Cedex

01 76 70 40 00

**ReedSmith**

The business of relationships.