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# Equality and human rights: nothing but trouble?



**Liber amicorum Titia Loenen**

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Edited by  
Marjolein van den Brink  
Susanne Burri  
Jenny Goldschmidt

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Marjolein van den Brink, Susanne Burri & Jenny Goldschmidt (eds.)

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# Comparators in multiple discrimination cases: a real problem or just a theory?

Merel Jonker

## 1. Introduction

Suppose a black man of Ghanaian descent applies for a job at a Dutch home-care organization and, to his disappointment, is refused the position. After inquiring, he learns that the main reason for this lies in the fact that he is male since, in the experience of the organization, clients regularly refuse to be helped by male nurses. Furthermore, his being black would supposedly increase the possibility that he would not be accepted by clients.<sup>1</sup> This may be considered a typical example of multiple discrimination; the man in question is discriminated against on both accounts.

Legal scholars dealing with such cases distinguish two forms of multiple discrimination. In case of additive discrimination, discrimination grounds ‘add to each other’ and may therefore be distinguished from one another.<sup>2</sup> In contrast, intersectional discrimination, a concept introduced by the legal scholar Kimberly Crenshaw in 1989, refers to the situation in which the discrimination grounds ‘intersect with each other’ and therefore cannot be disentangled, resulting in a specific form of discrimination.<sup>3</sup> Crenshaw emphasised the problematic consequences of the dominant single-ground approach in American anti-discrimination law, denying protection against work-life discrimination for black women, who were being discriminated against not as women, not as blacks, but as black women. Cases of additive discrimination may be dealt with on just one of the grounds. However, for the people involved, who are convinced that they were discriminated on

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1 This case came before the Netherlands Institute for Human Rights (*College voor de Rechten van de Mens*) in 2012 (*Oordeelnummer* 2012-122, 17 July 2012).

2 MAKKONEN 2002; BURRI and SCHIEK 2009, at p. 3.

3 CRENSHAW 1989.

more than a single ground, it will be unsatisfactory if the other grounds remain undiscussed and invisible. In cases of intersecting discrimination the problem may be more complicated since the discrimination may remain invisible when looked at through the lens of a single discrimination ground. An interesting question is how victims of multiple discrimination may establish their discrimination claim and, subsequently, how discrimination based on more than one ground may be responded to by the courts and equality bodies, notably the Court of Justice of the European Union (CJEU). According to the EU anti-discrimination directives,<sup>4</sup> a complainant first has to establish a *prima facie* case of discrimination. These directives state that a complainant of direct discrimination has to present facts from which it may be presumed that he or she is, has been or would be treated unfavourably in comparison with someone else in a comparable situation on the specific discrimination ground. Consequently, a comparator, either real or hypothetical, has to be identified (exceptions to these requirements have been made with regard to pregnancy cases).<sup>5</sup> Indirect discrimination, on the other hand, which occurs when an apparently neutral provision, criterion or practice puts a particular group of persons at a particular disadvantage compared with other persons, has to be established by statistical evidence. In general, in CJEU cases where only one discrimination ground is at issue, identifying an appropriate comparator does not appear problematic. Moreover, the comparator is not always discussed explicitly.<sup>6</sup> However, as has been recognized in the literature,<sup>7</sup> a comparator may not be so easily identifiable in multiple discrimination cases. For instance, who could be the

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4 Council Directive (EC) 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180 p. 22), Council Directive (EC) 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303 p. 16), Council Directive (EC) 2004/113 of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ L 373 p. 37) and Council Directive (EC) 2006/54 implementing the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ L 204 p. 23).

5 Case C-177/88, *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen*, [1990] ECR I-3941.

6 EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS AND COUNCIL OF EUROPE 2011, at p. 23.

7 See EUROPEAN COMMISSION 2007; GERARDS 2007, at pp. 172-173; BURRI and SCHIEK 2009, at pp. 18-19.

comparator of the Ghanaian man in the example presented above? Would this be a black woman, a white man, both a black woman and a black man, or a white woman, or no comparator at all? It has been suggested, therefore, that a strict interpretation of the comparator requirement in the anti-discrimination directives poses a problem for the courts and equality bodies dealing with such situations.<sup>8</sup> As an alternative, some have proposed a contextual approach as a more suitable method.<sup>9</sup> A contextual approach does not require the appointment of a comparator, but instead takes into account all circumstances of the case at hand. The occurrence of discrimination may thus be found by looking, for example, at interactions that have taken place.<sup>10</sup> Although multiple discrimination receives increasing attention, also within the EU context,<sup>11</sup> the subject has not yet been explicitly addressed in CJEU case law.<sup>12</sup> However, a recent ruling by the Court in the *Galina Meister* case<sup>13</sup> seems to imply that the Court will not necessarily choose to adopt a strict interpretation. Although the preliminary questions do not address the multiple discrimination aspect of the case, they do address comparable problems with regard to the burden of proof in discrimination cases (more specifically, in recruitment cases).

This paper examines whether the concern, as has been expressed in the literature, that identifying an appropriate comparator is one of the major challenges of equality bodies in tackling multiple discrimination is justified. Research has shown that the national equality bodies of the Netherlands, Denmark, Norway and Sweden apply different approaches in this matter.<sup>14</sup> As the EU anti-discrimination directives are applicable to all three countries,<sup>15</sup>

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8 HANNET 2003.

9 GOLDBERG 2011; TIMMER 2011.

10 GOLDBERG 2011, at p. 280.

11 MONAGHAN 2011.

12 Notwithstanding the fact that in a number of cases, multiple discrimination could have been recognized. See for an overview BURRI and SCHIEK 2009, at pp. 7-8.

13 Case C-415/10, *Galina Meister v Speech Design Carrier Systems GmbH*, [2012].

14 JONKER and HALRYNJO 2014.

15 Based on the EEA Agreement, Norway has implemented Council Directive 2006/54/EC. Although Council Directive 2000/78/EC and Council Directive 2000/43/EC do not form part of the EEA Agreement, Norway has implemented these directives in its anti-discrimination legislation (NOU 2009:14, 4.6.1).

their national practices may provide valuable lessons as to how the CJEU may deal with the comparator problem in multiple discrimination cases. In the next section, I first discuss the Galina Meister case, where the final ruling suggests that the CJEU may have left the door open for a contextual approach. I then consider the national practices of the Netherlands and the Scandinavian countries,<sup>16</sup> after which I provide suggestions regarding the future assessment of cases by the CJEU.

## 2. Galina Meister

In 2012 the CJEU gave a preliminary ruling in the Galina Meister case.<sup>17</sup> This ruling may provide some salient points for the treatment of other (including multiple) discrimination cases. Most importantly, the Court rendered a decision on evidence requirements when establishing a discrimination case, more specifically on the consequences of not being able to identify a comparator.

Galina Meister had Russian nationality and held a Russian degree in systems engineering, which was recognized in Germany. At the age of 46, she twice applied for a job as an ‘experienced software developer’ with a company called Speech Design in Germany, but was rejected on both occasions without having been invited for a job interview and without any explanation as to the reasons for her rejection. Meister claimed to have been discriminated against on the grounds of sex, age and ethnic origin and brought a case against the employer before the *Arbeitsgericht* (Labour Court), which was subsequently appealed before the *Landesarbeitsgericht* (Higher Labour Court) and, finally, the *Bundesarbeitsgericht* (Federal Labour Court). The latter referred two questions to the CJEU for a preliminary ruling, the first of which was whether the European anti-discrimination directives<sup>18</sup> were to be interpreted as meaning that a job applicant, who is refused the job despite meeting the requirements for the post as advertised by the employer, has a right to know whether the employer engaged another applicant at the

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16 Due to the limited amount of cases in Denmark, the Danish cases are not considered this article.

17 See also FARKAS 2012.

18 Article 19(1) of Directive 2006/54, Article 8(1) of Directive 2000/43 and Article 10(1) of Directive 2000/78.

end of the recruitment process and, if so, on the basis of which criteria the appointment was made.

Secondly, the referring court wanted to know whether, if the answer to the first question was affirmative, the non-disclosure of the requested information by the employer gives rise to a presumption that the alleged discrimination did occur.

With regard to the first question, the Court stated that a job applicant who ‘claims plausibly that he meets the requirements listed in the job advertisement and whose application was rejected is not entitled to information indicating whether the employer engaged another applicant at the end of the recruitment process’. However, it simultaneously mentioned that ‘the refusal to grant any access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination’. In view of this answer there was no further need for the Court to reply to the second question.

One of the main issues in this case concerned the burden of proof. Due to the fact that employers are not obliged to provide information about the other applicants – since privacy rights play an important role here – it may be very difficult for claimants to prove discrimination in cases such as this.<sup>19</sup> Information on the identity and qualifications of the other applicants would be pivotally to identify an appropriate comparator. This implies that even in discrimination cases on a single ground, an appropriate comparator may not be readily available. It is true that in this case, as an alternative, a hypothetical comparator may be construed from evidence about how other persons have been treated in comparable situations, for example on the basis of the employer’s previous recruitment practices. However, in cases of multiple discrimination, it remains unclear who this hypothetical comparator should be, with options ranging from younger workers, male workers, workers of German descent, to, perhaps, a young man of German origin.

The *Galina Meister* case has been heavily debated.<sup>20</sup> While academics welcome the final ruling, they argue that the CJEU ‘missed an opportunity to provide

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19 BURRI 2012, at p. 360.

20 FARKAS 2012; BURRI 2012, at p. 360; VELDMAN 2012.

vital guidance on basic procedural issues'.<sup>21</sup> Although the identification of an appropriate comparator was not at issue, the Court, in my view, has left room for the application of a contextual approach instead of a comparator approach by stating that a refusal to provide such information could be one of the factors to be considered in discrimination cases. This appears to be in line with national judicial practices. Research by Jonker and Halrynjo shows that the national equality bodies of the Netherlands, Norway and Sweden do not identify a comparator in every multiple discrimination case.<sup>22</sup> Moreover, in almost half of the 50 cases examined, a so-called 'non-comparator' approach was applied. The following section highlights the findings with respect to recruitment cases.

### 3. National practice

In our research, we compared and analysed the case law of the Dutch, Norwegian, Swedish and Danish equality bodies concerning gender-plus discrimination in the labour market. The study focused on the characteristics of multiple discrimination cases, on whether comparators were used and whether the structure of the equality body as well as the legislative structure affected the way in which these cases were dealt with. Although our study did not consider which factors were decisive when the equality bodies did not appoint a comparator, the data do provide some indications.

Focusing on the cases that are comparable with the *Galina Meister* case – recruitment cases –, the Norwegian and Swedish equality bodies seemed more familiar with identifying an 'integrated comparator' than the Dutch equality body.<sup>23</sup> In these two countries, employers are obliged, at the request of an applicant, to provide information concerning the education, working

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21 FARKAS 2012.

22 JONKER and HALRYNJO 2014. Some 50 complainant cases concerning gender-plus discrimination were compared (including two Danish cases). The cases came before the equality bodies between 2006 and 2010.

23 In all three Swedish recruitment cases an integrated comparator approach was applied and this was done in 4 out of 7 Norwegian recruitment cases.



experience and other demonstrable qualifications of the other applicants.<sup>24</sup> It appears that, depending on who these other applicants were, one of two approaches is followed. Firstly, the equality body may appoint two comparators (or comparator groups), with each comparator being considered for a particular discrimination ground while keeping the other ground(s) 'invariable'; we have dubbed this the invariable approach. In the example of the Ghanaian man, the man would be compared with a black woman (with ethnicity skin colour as the invariable ground in the comparison) as well as with a white man (with gender being the invariable ground). Conversely, the Ghanaian man may be compared with his 'opposite', which could be a white woman, and this is therefore denoted as the opposite approach.

In the Netherlands, on the other hand, discrimination grounds appeared to be more commonly dealt with separately (in the separate approach), either with or without a comparator.<sup>25</sup> The question arises, then, which elements are decisive to prove discrimination if no comparator is appointed. The recruitment cases in which the Dutch (and in one case the Norwegian) equality body applied a non-comparator approach contain examples of the contextual factors that may substantiate a presumption of discrimination. Substantiation may be done by referring to the correspondence between the claimant and the defendant, by examining the selection criteria and by considering the overall profile of employees working for the particular employer.

Firstly, the least problematic cases are those in which the justification for the rejection proves to be decisive. In some cases, employers explicitly refer to the discrimination grounds concerned in their replies to the questions of rejected applicants. In answering why they were rejected, employers have asserted that they 'were looking for someone who fits [in their team] in terms of gender and age' (CGB 3 June 2008, oordeel 2008-59), or that they were 'looking for a woman, aged between thirty and forty' (CGB 5 November

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24 Art. 4 Norwegian Equality Act; Art. 13-7 Norwegian Working Environment Act; Art. 14 Norwegian Anti-Discrimination and Accessibility Act; Art. 11 Norwegian Anti-Discrimination Act; Chapter 2, Art 4 Swedish Discrimination Act (2008:567).

25 In all of the Dutch cases (9) a separate approach was applied (2 with a comparator and 7 without a comparator).

2010, oordeel 2010-161). In these kinds of cases, it is clear that identifying a comparator is not necessary.

Secondly, the criteria for the selection of job applicants may play different roles in establishing a presumption of discrimination. In a Dutch case (CGB 15 May 2007, oordeel 2007-81), for example, the employer refused to mention the selection criteria when requested to do so by the equality body and this was sufficient to shift the burden of proof to the defendant. In a Norwegian case (LDO 3 July 2007, LDO-07/111), discrimination was not proven when the employer did mention objective selection criteria (not related to the claimed discrimination grounds) and the applicant was shown to fail on these requirements.

Lastly, general information on the employees working for the defendant may be provided and policies investigated. A man, 54 years of age, applied for an administrative job with an insurance company (CGB 9 December 2008, oordeel 2008-149). He claimed to have been discriminated against because of his age and gender, since mainly younger women were working for the company. The claim was overruled; general figures concerning the company showed that the age of the employees ranged from 21 to 58 years, which, according to the CGB, suggested that a younger age was not held to be a selection criterion. Furthermore, the company had an active 'diversity policy', stimulating their employees' personal development while taking into account their age, gender, ethnicity and so on. Moreover, although the vast majority of the employees were female, discrimination could not be presumed in this case since women are generally overrepresented in administrative jobs.

#### **4. Conclusion**

In the literature, identifying an appropriate comparator is mentioned as one of the major challenges for equality bodies in tackling multiple discrimination. Is this concern justified, or does it merely concern a 'theoretical' problem? The practices of the Dutch, Norwegian and Swedish equality bodies show that equality bodies sometimes apply a contextual approach in multiple discrimination cases, which provides a feasible alternative to the comparator approach whereby they compared the complainant with the other applicants. In the case of the Ghanaian man presented in the Introduction,

the identification of his comparator did not appear to be necessary for the Dutch equality body since the statements of the employer were considered sufficient evidence for his discrimination claim. However, it remains unclear whether these practices are in line with EU legislation, since the EU anti-discrimination directives postulate that either a (hypothetical) comparator or statistical evidence is required to prove a discrimination case. With the ruling in the *Galina Meister* case, the CJEU has arguably opened up the possibility of a contextual approach in discrimination cases, at least in recruitment cases. Unfortunately, the Court did not provide any further guidance as to how to prove a discrimination case if an appropriate comparator cannot be identified. Examples may be obtained from the Dutch equality body, which has so far referred to three different contextual factors that could be used in recruitment cases: the selection criteria of the employer, a general evaluation of all employees working for the employer, and the reasons for the rejection provided by the employer.

In conclusion, multiple discrimination cases do not appear to pose insurmountable problems for national judicial practices. In line with these practices, the CJEU may be advised to investigate the feasibility of contextual approaches in future (multiple) discrimination cases whenever a comparator is difficult to identify. If so, additional guidance would be needed regarding the factors to be considered when applying such an approach. This would allow for a more straightforward as well as transparent judicial process, and thus for more legal certainty.

## BIBLIOGRAPHY

- BURRI, S. and SCHIEK, D., *Multiple Discrimination in EU Law: Opportunities for Legal Responses to Intersectional Gender Discrimination*, European Commission, 2009.
- BURRI, S., 'Bewijsperikelen bij vermeende discriminatie' ('Evidentiary perils in cases of alleged discrimination'), *Tijdschrift voor de Arbeidsrechtpraktijk*, No. 8, 2012, pp. 360-365.
- CRENSHAW, K., 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics', *The University of Chicago Legal Forum*, 1989, pp. 139-168.
- EUROPEAN COMMISSION, *Tackling Multiple Discrimination, Practices, Policies and Laws*, Office for Official Publications of the European Communities, Luxembourg, 2007.
- EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS AND COUNCIL OF EUROPE, *Handbook on European non-discrimination law*, Publications Office of the European Union, Luxembourg, 2011.
- FARKAS, L., 'Getting it right the wrong way? The consequences of a summary judgment: the *Meister* case', *European Anti-Discrimination Law Review*, No. 15, 2012, pp. 23-33.
- GERARDS, J., 'Discrimination Grounds', in: Bell, M., Waddington, L. and Schiek, D. (eds.), *Ius Commune Case Books for Common Law of Europe: Non-Discrimination*, Hart Publishing, Oxford, 2007, pp. 33-184.
- GOLDBERG, B., 'Discrimination by Comparison', *The Yale Law Journal*, Vol. 120, No. 4, 2011, pp 728-812.
- HANNET, S., 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination', *Oxford Journal of Legal Studies*, Vol. 23, No. 1, 2003, pp. 65-86.
- JONKER, M. and HALRYNJO, S., 'Multidimensional discrimination in judicial practice: a legal comparison between Denmark, Norway, Sweden and the Netherlands', *Netherlands Quarterly of Human Rights*, Vol. 32, No. 4, 2014, pp. 408-433.
- MAKKONEN, T., *Multiple, compound and intersectional discrimination: Bringing the experiences of the most marginalized to the fore*, Research Report Institute for Human Rights, Åbo Akademi University, No.11, 2002.
- MONAGHAN, K.Q.C., 'Multiple and intersectional discrimination in EU law', *European Anti-Discrimination Law Review*, No. 13, 2011, pp. 20-32.
- TIMMER, A., 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights', *Human Rights Law Review*, Vol. 11, No. 4, 2011, pp. 707-738.

VELDMAN, A.G., 'Het kip-ei-probleem van het leveren van een prima facie bewijs van discriminatie bij sollicitatie' ('The chicken and egg problem in adducing prima facie evidence of discrimination in job applications'), *Nederlands tijdschrift voor Europees recht*, No. 10, 2012, pp. 350-354.