Concentrate Questions and Answers EU Law: Law Q&A Revision and Study Guide (3rd edn)

Nigel Foster

p. 180

9. Sex Discrimination and Equality Law

Nigel Foster, LLM Degree Academic Director at Robert Kennedy College, Zurich, and Professor of EU Law Modules, South East European Law Schools' Network (SEELS); Visiting Professor at University of Saarland and The University College of Northern Borneo

https://doi.org/10.1093/he/9780198853190.003.0009

Published in print: 06 August 2020

Published online: September 2020

Abstract

The Concentrate Questions and Answers series offer the best preparation for tackling exam questions. Each book includes typical questions, bullet-pointed answer plans and suggested answers, author commentary, and illustrative diagrams and flowcharts. This chapter presents sample exam questions along with examiner's tips, answer plans, and suggested answers about EU law on sex discrimination and equality. The questions have been divided into a general question on the inclusion of sex discrimination provision in the first place; problem questions on aspects of equal pay and equal treatment; an essay question on a specific development in this area of law, which considers the overlapping area of pay and pensions and a problem on pregnancy-related matters; and an essay question on the expansion of areas protected by equality legislation.

Keywords: EU law, sex discrimination, equality, pay, pensions

Are You Ready?

In order to attempt questions in this chapter, you must have covered all of these topics in both your work over the year and in revision:

- The leading cases in this area which are also those on general principles of EU law; see e.g. the cases of ***Marshall (152/84)*** and ***von Colson (14/83)***, amongst others.
- The origin of only a very narrow Treaty provision in **Art 119 EEC (now Art 157 TFEU)** for sex discrimination law in the EU.

- The secondary legislation, which includes the consolidating **Directive (2006/54)** on gender discrimination replacing **Directives 75/117**, **76/207**, **86/378**, and **97/80** and which was introduced later to back up the limited treaty provision and the extensive case law now in this area of law. The leading case law includes the ***Defrenne litigation (80/70, 43/75, and 149/77)***, *the* ***Marshall*** *case* ***(152/84)***, *the* ***Jenkins v Kingsgate (96/80)*** *and* ***Bilka-Kaufhaus*** *cases* ***(170/84)***, ***Marschall (C-409/95)***, ***Barber (C-262/88)***, *and* ***P v S and Cornwall County Council (C-13/94)***.
- The fact that the Union has made further legislative moves into the area of social policy and equality rights on a broader front, hence more extensive further equal rights legislation has appeared under **Art 19 TFEU** and **Directives 2000/43, 2000/78 and 2004/113**.

Key Debates

Debate: the development of a general principle of equality in the EU legal order

The **2007 Lisbon Treaty** has reaffirmed the recognition of equality rights in the European Union by the inclusion of equality and non-discrimination provisions in the **Charter of Fundamental Rights** which is attached to the Treaties via a declaration with legally binding status, excepting the ↵ opt-outs for the Czech Republic, Poland, and the UK prior to Brexit. A new **Art 10** was introduced into the **TFEU** which provides that the Union in its policies shall aim to combat discrimination, including sex and sexual orientation. No specific substantive changes have been introduced though by the Treaty but the case law of the Court of Justice (CJEU) has substantially prepared the ground for the establishment of a general principle of equality or non-discrimination in the EU.

p. 181

Question 1

How can the appearance of gender equality rights in the EU Treaties be explained, when the Union seems to be a vehicle for economic integration rather than a champion for women's rights?

Caution!

- Although the consolidating **Directive (2006/54)** on gender discrimination replaced **Directives 75/117, 76/207, 86/378, and 97/80**, much of the existing case law was decided under the previous Directives, so you need to be aware of both old and new Directives, and Articles' numbers and how they equate.

Diagram Answer Plan

p. 182

Suggested Answer

Introduction[1]

[1] This is a general question aimed to address the reason for the inclusion of Articles concerned mainly with the prohibition of discrimination on the grounds of sex within the EU Treaties.

The area of sex discrimination law in EU law is a later developer than the other areas of law because of the original, less extensive provision for it in the Treaty, the delays by the Union and the Commission in introducing secondary legislation, and the delays by the Member States in implementing the principles of equal pay from **Art 119 EEC (now 157 TFEU)** and equal pay and equal treatment from the secondary legislation.[2] **Article 119 EEC** was the sole original Treaty provision for the EU concerned with sex discrimination.

[2] The first part requires you to consider the original aims of the Community (now Union).

Motives for the inclusion of equality rights[3]

[3] Then, the reason for the inclusion of social rights and, in particular, rights concerned with gender equality, which requires you to consider the development of the Community and Union and those rights.

Given that the EEC was, originally, of limited scope, it was clear that the main aim of the Community was the harmonisation of specific aspects of the Member States' economies and principally, the creation of the common or single market. Social policy was not regarded as greatly assisting this result. However, it is also suggested that the original reason for including **Art 119** in the **EEC Treaty (now Art 157 TFEU)** when drafted was not for reasons of social justice, but out of economic considerations.[4] The Article was allegedly included more for the French, whose legislation purported to provide for equality between male and female workers. It was feared that French industry would be at a disadvantage if equal pay were not a principle enforced in the other Member States. Thus, the aim was to ensure similar economic conditions applied in all the Member States. A consideration which supports this view is the fact that **Art 119 EEC** originally applied only to equal pay and not to all discrimination on the grounds of sex, although the CJEU has since then considerably expanded its scope. There has since been a considerable amount of secondary legislation and more general anti-discrimination Articles in the Treaties. The range is now much more extensive and includes **Arts 2 and 3 TEU**, **Art 8 TFEU**, **new Art 10 TFEU**, **Art 19 TFEU** (general power to prohibit discrimination across a range of issues), and **Art 153 TFEU** (equality of men and women in the work environment). Furthermore, the EU has enacted **Directives 2000/43 and 2000/78** dealing with other forms of discrimination. The objective to achieve an economic equality between Member States is acknowledged by the CJEU in the second ***Defrenne** case (43/75)*. The CJEU declared that **Art 119 EEC** also forms part of the social objectives of the Community (EU) and emphasised that the Community (EU) was not merely an economic union. The CJEU considered that it was at the same time intended, by common action, to ensure social progress and to seek the constant improvement of the living and working conditions of their peoples, ↵ as could be observed in the Preamble to the Treaty. It concluded that the double aim, which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the Community (EU). This has been followed up in the case of ***Deutsche Telekom v Vick (C-324 and 325/96)*** in which the CJEU pronounced that the social aims of **Art 119 EEC** prevail over the economic aims.

p. 183

[4] Address the provision of rights in the Treaty, the suggestion that the Union is essentially an economic Union, and the limited place that social concern had or has in its development.

Therefore, whilst the initial concern may have been for economic reasons and originally the economic goals of the Community (EU) were undoubtedly paramount, present aims are arguably more genuinely concerned with social rights and rights of equality, as demonstrated by developments, including the Directives on equal treatment and the body of EU law now. This developing concern was prompted by a desire by the Member States in the European Summit meetings in 1972–73 to demonstrate that the EU was also concerned about social needs and equal rights and the view adopted by the original Member States was that it was necessary to get their act together before the new Member States joined in 1973.

The adoption of equality Directives[5]

[5] Then you should consider what the position is now, following the legislative, judicial, and policy developments in the area.

Consequently, the Commission was encouraged to produce a Social Action Programme, from which the following Directives arose: **Council Directive 75/117**, **the Equal Pay Directive 1975**; **Council Directive 76/207**, **the Equal Treatment Directive**; **and Directive 79/7, the Social Security Directive.** Much later came **Directive 86/378** on equal treatment in occupational pensions, **Directive 86/613** concerning equal treatment of the self-employed, and **Directive 92/85** on pregnancy and maternity rights. To these can now be added the **Parental Leave Directive (96/34)**, the **Burden of Proof in Sex Discrimination Cases Directive (97/80)**, and the **Part-time Workers Directive (97/81)**. More recently, **Directives 75/117**, **76/207**, **86/378**, and **97/80** have been repealed and recast in **Directive 2006/54** but without substantive amendment. The more recent secondary legislation includes **Directive 2004/113** on equality in the access to and the supply of goods and services, **Directive 2010/41** on equal treatment between self-employed men and women, and **Directive 2010/18** on parental leave.

Judicial developments[6]

[6] The eventual provision of rights is best discussed in the light of the CJEU case law.

However, EU law often seemed unsuitable for the provision of individual rights and was criticised because of its formality, limited accessibility, and distance from those who needed the effective application and enforcement of the provisions, i.e. women at work. The effect was, at first, that very little knowledge of EU equal rights law was disseminated beyond the small number of people in direct contact with these laws except where given substantial media publicity after the event, as in the leading cases such as the ***Marshall case (152/84)***, ↵ the ***Pickstone v Freemans*** *case* ***([1988] 3 CMLR 221)***, the ***Drake*** *case* ***(150/85)***, and the ***Webb v EMO*** *case* ***(C-32/93)***. EU law has, however, provided a considerable source of legislative impetus for women's rights in employment in the Member States.

p. 184

EU law provisions have been dependent largely on individual enforcement for their effectiveness where either governments have failed to take appropriate measures to implement them or enforce them if implemented, or the European Commission has not taken enforcement actions against the recalcitrant governments. It has largely been on the individual level only that these rights have been successfully established as positive rights for women. Notable successes include the ***Defrenne*** litigation ***(80/70, 43/75, and 149/77)*** involving a Belgian air stewardess whose action gave the Court of Justice the opportunity to interpret **Art 119 EEC** to include indirect and more subtle forms of discrimination. Another prime example of individual action required to force change is the ***Marshall*** case. These cases appear to have created more interest in the enforcement and the development of women's rights than the efforts of many national groups, although the backing of national agencies to promote equal rights has been fundamental in promoting women's rights, particularly in Belgium and the UK.

The liberal interpretation of the Court of Justice[7]

[7] Highlight that many of the judgments of the CJEU have been very generous in support of equality rights and give examples.

An important factor is that the EU legal provisions can be and have been subject to very liberal interpretations by the Court of Justice, far beyond a literal reading of the Articles; see e.g. the wide interpretation of **Art 157 TFEU (ex 119 EEC and 141 EC)**, including the concept of pay in the ***Garland*** *case* ***(12/81)***, and the concept of indirect discrimination in the ***Jenkins v Kingsgate*** ***(96/80)*** and ***Bilka-Kaufhaus*** *cases* ***(170/84)***. The Equal Treatment Directives have also been interpreted generously in cases such as ***Marschall (C-409/95)*** and ***Barber (C-262/88)***. The Court has even advanced the cause of equal rights through procedural means so that an effective remedy should be given by the Member States in cases where rights have been breached; see the ***von Colson*** *case* ***(14/83)*** and the ***Johnston v RUC*** *case* ***(222/84)***. In ***Richards (C-423/04)*** equal treatment rights were held to apply to secure equal right to pension access for a transgender woman. More recently the ***Mangold*** *case* ***(C-144/04)*** provides that non-discrimination as a general principle is one that can be enforced horizontally between individuals.

Although sex discrimination rights, of course, apply equally to men and women, they have been regarded as more beneficial, for the most part, for women, who have been generally more discriminated against. However, the body of case law involving claims by men is increasing. ↵

p. 185

Equality rights in the EU were considerably strengthened by changes introduced by the **Treaty of Amsterdam**.[8] The Treaty introduced in **Art 2 EC** 'equality between men and women' and added in **Art 3 EC**: 'In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women.' These are now to be found in **Arts 2 and 3 TEU** and **Art 8 TFEU**. Furthermore, a new power was introduced in **Art 13 EC (now 19 TFEU)** that the Council, acting unanimously, and in consultation with the EP, may take appropriate action to combat discrimination based on sex or sexual orientation, amongst others. **Directive 2000/78** provides a framework to prohibit direct or indirect discrimination generally in employment on the grounds of religion or belief, disability, age, or sexual orientation. The **EC Treaty** was amended by adding two sentences to **Art 141 EC (now 157 TFEU)** which located within a Treaty base the principles of equal pay for work of equal value and positive discrimination previously contained in Directives only, which meant that they could not previously have given rise to direct effects against other individuals (no horizontal direct effects of Directives—***Marshall***). The ***Mangold*** and ***Kükükdeveci*** judgments, noted here, may, though, have circumvented that limitation. The **Lisbon Treaty** has attached the **Charter of Fundamental Rights** to the Treaties which has further provided for equality rights. Furthermore, **Art 10 TFEU** provides that the Union in its policies shall aim to combat discriminations including sex and sexual orientation. A general summary article on gender equality law has been provided by Masselot.[9]

[8] Looking at positive discrimination rights or issues would be very helpful.

[9] Cited in the 'Taking Things Further' section at the end of the Chapter.

Positive discrimination

Measures of positive discrimination have, however, been given a mixed reception by the CJEU and rules of positive discrimination which try to promote the appointment of women to achieve more substantive rather than just formal equality have been subject to exacting criteria to ensure that men are not then discriminated against. See the case of ***Marschall (C-409/95)***.

Summary[10]

[10] Your conclusion may range from considering that the Union and, in particular, the CJEU have contributed significantly in promoting and enforcing equal treatment rights for women, to the view that it has only done what was to be expected or not enough so far.

In summary, although **Art 119** provided the only specific mention of equal treatment in the original **EEC Treaty**, it formed the basis upon which the principle has been expanded into areas beyond equal pay, and has become a fundamental social principle of the Treaty (**now 157 TFEU**). Whilst the amount of legislation is limited, it has been subject to very liberal interpretations by the CJEU far beyond a literal reading of the Articles in cases more often brought by individuals rather than the Commission in **Art 258 TFEU** actions; see the ***Garland***, ***Defrenne***, and ***Marschall*** cases.

p. 186

Looking for Extra Marks?

■ Making reference to and discussing the potential of the EU Charter of Fundamental Rights for extending the general rights' provision in the EU would be a useful addition.

■ You might also mention though that attempts by the Commission to promote a general Directive on equality rights, including covering sexual orientation discrimination, has thus far not been approved by the Council where it required unanimous support under **Art 19 TFEU**.

Question 2

Meg and Nicola work part-time for the telephone call centre of the 'Chaste Direct Bank'. They discover that even though they were working what they considered to be antisocial hours (from 6.00 pm until 12.00 midnight), they were receiving less per hour than their full-time colleagues working during daylight hours. There are eighteen female and two male part-time evening workers. The daytime staff are evenly divided between male and female workers. Meg complains to her boss, Mr Branston, that this appears to be discrimination. He explains that it is far easier to get staff for evening work and, in particular, women find this a very suitable way of combining their commitment to a family and childcare sharing, and being able to earn money. He has very many applicants for the

part-time evening work but in contrast far fewer for the daytime work. Soon after, Meg is dismissed on the grounds of displaying a poor attitude. She has found it difficult to obtain alternative employment as Mr Branston has failed to respond to enquiries for a reference for Meg.

Nicola became pregnant but suffered ill health as a result of the pregnancy. She was forced to take time off during the early part of the pregnancy but after a successful birth she returned to work at the end of her fourteen weeks' maternity leave. Her rights to the Sports and Social Club were suspended during her maternity leave. However, since the birth of her baby, the health problems which had first manifested themselves during pregnancy flared up again and, combined with the depression from which Nicola also suffers, meant she has been absent for twenty-five days in twelve weeks. She was dismissed because she exceeded the number of days off which could be taken on the grounds of ill health.

The call centre has advertised for a new manager. The shortlist for applications consists of two equally qualified persons only. George is an internal candidate who already works for the company and Posy is an external applicant. 'Chaste Direct' stated its positive discrimination policy for filling job vacancies in the advertisement and as a result has appointed Posy as the new manager. George has protested that he has been discriminated against by the company and threatens to take the matter to court. In response the company issue him with a formal warning that he will be dismissed if he causes any more difficulty. Shortly afterwards another management position is advertised and George applies again but under the name Georgina. Appearing at the interview, George/Georgina states that he intends to undergo a sex-change operation. This time there was no equally or better qualified female applicant. George/Georgina, however, was dismissed.

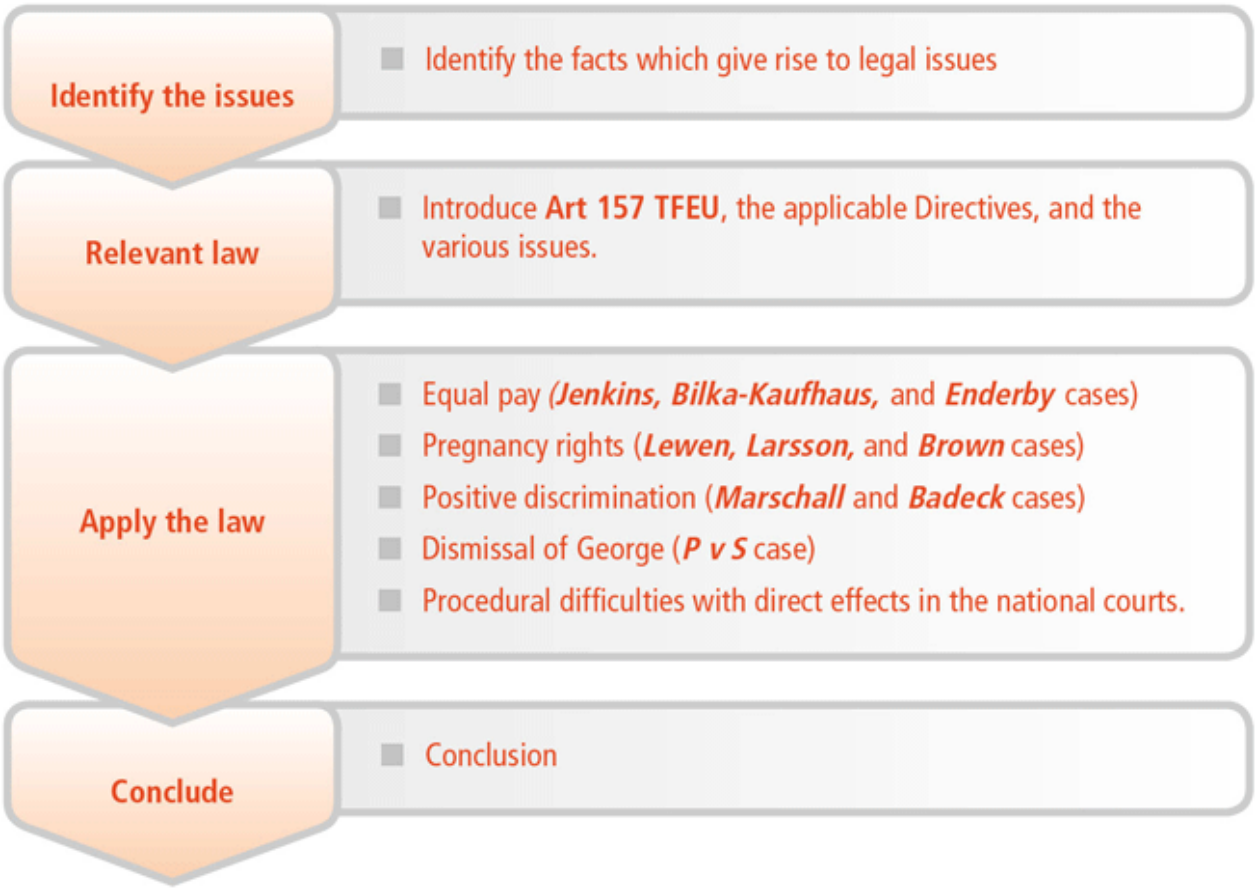
Meg, Nicola, and George seek your advice as to their rights, if any, under EU law.

p. 187

Caution!

- This is quite a complex and involved question with a number of points to be addressed.
- Given that this is such a long question, any general treatment must be brief to give you time to deal with the many substantive issues arising.

Diagram Answer Plan



Suggested Answer

Introduction[1]

[1] As a general introduction to this problem on discrimination you could state the narrow Treaty base for EU law, but that a number of Directives have been issued.

The area of law applicable to the factual situation in this problem stems originally from a very narrow legislative base in the **EEC Treaty**. This is **Art 119 (now 157 TFEU)** which was the sole primary legislative provision for the EU to concern itself with sex discrimination. It is concerned predominantly with equal pay but also, following the **Treaty of Amsterdam**, with positive

discrimination. There also exists a growing body of EU law on the subject following the enactment of a number of Directives, on matters of equality between men and women. Case law on these, as with the original Treaty provision, has extended the scope of protection further.[2]

[2] Point out that the Court interprets these rights liberally, to give the maximum protection to the rights provided.

p. 188

The facts

The factual circumstances in this question give rise to a number of issues to be resolved. They are:

(a) part-time pay[3]

(b) the possible objective justification[4]

(c) the dismissal of Meg

(d) the failure to give a reference[5]

(e) Nicola's treatment during pregnancy and dismissal afterwards[6]

(f) the failure to appoint George and his dismissal.[7]

[3] You must identify the issues, which start with part-time pay, an old favourite but nevertheless still frequently appearing in exam questions. This may be an equal pay claim or possibly equal pay for work of equal value.

[4] There is a possible objective justification which needs to be discussed.

[5] Then include the dismissal of Meg and the failure to give a reference.

[6] Nicola's treatment during pregnancy and dismissal afterwards.

[7] Finally the issues affecting George. These are the failure to be appointed, which includes an aspect of positive discrimination, and the dismissal.

The part-time staff, who are predominantly women, receive less pay per hour than the full-timers. Meg is claiming that she has been indirectly discriminated against compared to full-time workers and despite the fact they are paid the same as male part-time workers, of which there are only two out of twenty.

The law applicable[8]

[8] With reference to the appropriate statutory provisions first, and case law where relevant, you should suggest the outcome of these issues.

The principal enactments we are concerned with are Art 157 TFEU and the consolidating **Directive 2006/54**. It is well-established law that the prohibition of discrimination in pay under **Art 157 TFEU** applies not only to direct but also to indirect discrimination. The cases of ***Jenkins v Kingsgate (96/80)*** and ***Bilka-Kaufhaus v Weber (170/84)*** confirm that this situation will be regarded as indirect discrimination, when a disadvantage falls on a category which is predominantly female, unless it can be justified objectively. Indirect discrimination in this area is covered in the consolidating **Directive 2006/54** which takes its definition from the earlier general discrimination Directives as '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'. The ***Bilka-Kaufhaus*** case provides three guidelines to determine whether a difference in pay is objectively justified. The measure employed must:

- correspond to a real need on the part of the undertaking
- be appropriate to achieve the objective
- be necessary for that objective.

It is, though, in the end, a question of fact to be decided by the national court but the CJEU has further held in the case of ***Dansk v Danfoss (109/88)*** that the burden is to be placed on the employer to prove that the difference is justified and that this should be transparent. The reasons put forward in the present case appear to be an objective justification because there is no shortage of applicants for part-time positions compared with full-time daytime positions. However, it is combined with references to marital and family status, which was expressly covered in **Art 2** of the **Equal Treatment Directive (76/207)**, ↵ namely that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to family or marital status, although that particular reference has been omitted from the consolidating **Directive 2006/54**. This would appear to be unlawful indirect discrimination but if there is a doubt, given the applicants for the positions, a reference under **Art 267 TFEU** to the CJEU may be necessary to decide the point.

p. 189

An equal value claim?

There may also be an argument here that Meg has a claim for equal pay for work of equal value. **Article 157 TFEU** now includes the words 'equal pay for work of equal value', previously restricted to **Directive 75/117**. In the present case, Meg is comparing her wages with a male worker whose work is arguably of equal or lesser value because it is daytime work and she is working antisocial hours but receives lower wages. She could ask for a job evaluation scheme and should the company refuse to carry out a job evaluation scheme to test this, it can be imposed on them through court proceedings (***Commission v UK (61/81)***). Following ***Murphy v Irish Telecom (157/86)*** and ***Enderby v Frenchay (C-127/92)***, in which the CJEU held that **Art 119 EEC (now 157 TFEU)** could be used to make a comparison of work of equal value, this claim has a good chance of success. **Article 19 of Directive 2006/54** now removes the need to produce statistical evidence to support a claim of indirect discrimination in pay and that the burden of proof was on the employer to rebut this.

Meg's dismissal

Meg was then dismissed, which appears to be a reaction to her making a complaint, and this is specifically covered now in **Directive 2006/54, Art 24** which serves to protect complainants from unfair dismissal on the grounds that they have complained. The procedural difficulty that this is a private employer will be considered at the end of this answer.

Meg's reference refusal

Finally concerning Meg is the refusal to give a reference. This point is covered by the case of ***Coote v Granada (C-185/97)*** which held that a refusal to provide a reference would undermine **Art 6 of Directive 76/207** but which is contained now in **Directive 2006/54, Art 17**, under which Member States should take measures to achieve the aims of the Directive and must ensure the rights can be enforced by an individual before the national courts. The CJEU held that **Art 6 of Directive 76/207** also covers measures an employer might take as a reaction against legal proceedings of a former employee outside of dismissal.

Nicola's issues

Turning to Nicola, the suspension of rights during fourteen weeks would appear to be a straightforward breach of **Art 11 of Directive 92/85** which serves to protect employment rights during pregnancy and maternity (see ***Susanne Lewen v Lothar Denda (C-333/97)***). If there was any doubt about this, a reference to the CJEU would be necessary. However, the dismissal for absence outside of the fourteen-week protected period due to ill health arising from pregnancy would appear to be lawful according to the case law of the CJEU and not protected by either **Directive 76/207 or 92/85** and with no change under **Directive 2006/54**. See ***Larsson v Dansk Handel and Service (C-400/95)***, in which the CJEU confirmed that **Directive 76/207** does not prevent dismissals for absences due to illness attributable to pregnancy even where the illness arose during pregnancy and continued during and after maternity. **Directive 92/85** does not help as this also only protects against

p. 190

dismissal for the beginning of pregnancy to the end of maternity leave, as confirmed in ***Brown v Rentokil (C-394/96)***. Absences due to illnesses thereafter are treated in the same way as any other illness and may constitute grounds for dismissal according to provisions of national law. The case of ***NW Health Board v McKenna (C-191/03)*** confirms that this basis of comparison is acceptable. Hence, the dismissal appears to be lawful.

George and gender discrimination[9]

[9] For the purposes of answering the question, at least, you will have to assume that the stated intention of George is genuine.

George was not appointed and suspects the positive discrimination policy has actually discriminated against him. Positive discrimination is now located in **Art 157(4) TFEU** although the first cases arose under **Directive 76/207, Art 2(4)**, now recast in **Art 3 of Directive 2006/54**. In the case of ***Hellmut Marschall v Land Nordrhein-Westfalen (C-409/95)***, the CJEU held that clauses favouring women applicants would only be acceptable if they contained a 'saving clause' which provides that if a particular male candidate has grounds which tilt the balance in his favour, women are not to be given priority. Further, such clauses are acceptable provided the candidates are objectively assessed to determine whether there are any factors tilting the balance in favour of a male candidate but that such criteria employed do not themselves discriminate against women. This position is now supported by the ***Badeck case (C-158/97)*** which is based on **Art 141(4) EC (now 157 TFEU)**. The facts reveal no such clause in the present case, and unless there is such a clause or careful assessment by the bank, it is unlikely that the positive discrimination policy of the bank conforms with EU law.

George's dismissal

George was dismissed after stating that he was to undergo a sex-change operation. These facts fit within the case of ***P v S and Cornwall County Council (C-13/94)*** which involved a male-to-female transsexual who was dismissed from employment in an educational establishment after informing the employers he was going to undergo gender reassignment. The CJEU held that this was unlawful

p. 191 ↵ discrimination on the grounds of sex because it was 'based, essentially if not exclusively on the sex of the person concerned'. The dismissal would be contrary to **Art 24 of Directive 2006/54** which provides that Member States must introduce into their own legal systems such measures as are necessary to enable all persons who consider themselves wronged to pursue their claims by judicial process.

Claims in the national tribunals[10]

[10] Consider the right to pursue these claims before the national tribunals, because they are employed by a private employer, which may affect their rights to remedy in the national courts.

The final aspect concerns the difficulties which might arise in respect of pursuit of the claims in the national tribunals. Any claims made under **Art 157 TFEU** will be safe in all circumstances because this was held to be directly effective in ***Defrenne (No 2) (43/75)***, both vertically against the state and horizontally against other individuals. If the Member State has accurately implemented the Directives, then applicants can invoke national law before the national court. However, if they have not been implemented or correctly implemented, the claimants will be unable to rely directly on the Directives because a private employer is involved and there are no horizontal direct effects of Directives; see the ***Marshall*** case ***(152/84)***. The result in such a circumstance would depend on whether the national court could interpret any national law in compliance with EU law, thus following the ***von Colson (14/83)*** and ***Marleasing*** *cases* ***(C-106/89)***. If this is not the case, a further possibility exists in that a claim may be made against the state, in accordance with the ***Francovich*** case ***(C-6/90)***, for a failure to implement the Directive with the result that the claimant has suffered damage.

Looking for Extra Marks?

■ The final part of the answer above may be regarded as coming within this feature, unless you are advised on a particular course that a full discussion of the procedural aspects of the case must be given.

■ A brief statement of the problems and possible solutions will complete an answer in a question which essentially concerns sex discrimination.

Question 3

'Strange Fruit', a wholesale fruit merchant, advertise for a full-time permanent secretary and also for a temporary sales post for four months to provide cover for a member of staff on secondment to another workplace. All the existing secretarial positions in the company are part-time appointments.

The two main contenders for the permanent position are Tony and Astrid. Their qualifications are broadly equivalent but Astrid has slightly more experience, but not so much as to make her a clear favourite. In line with their policy of positive discrimination to appoint staff of the minority sex to
p. 192 ↵ posts predominantly staffed by the other sex, they decide to appoint Tony. As a part of that policy they have increased Tony's salary by 10 per cent pro rata over and above that paid to the existing part-time secretaries and provided him with a 20 per cent pension enhancement. The appointment is challenged by Astrid and the increased pay and pension payments have been questioned by Karen, an existing secretary. SF argue that their policy conforms with EU law and argue that the pension enhancement is linked to the state pension age and the fact that men generally work to an older age but die younger, so their policy helps to ensure that male employees get to enjoy the fruits of their labour in the shorter period of retirement likely to be available to them. The increased pay is to attract full-time workers, which, it is argued, is more cost-efficient for the employer.

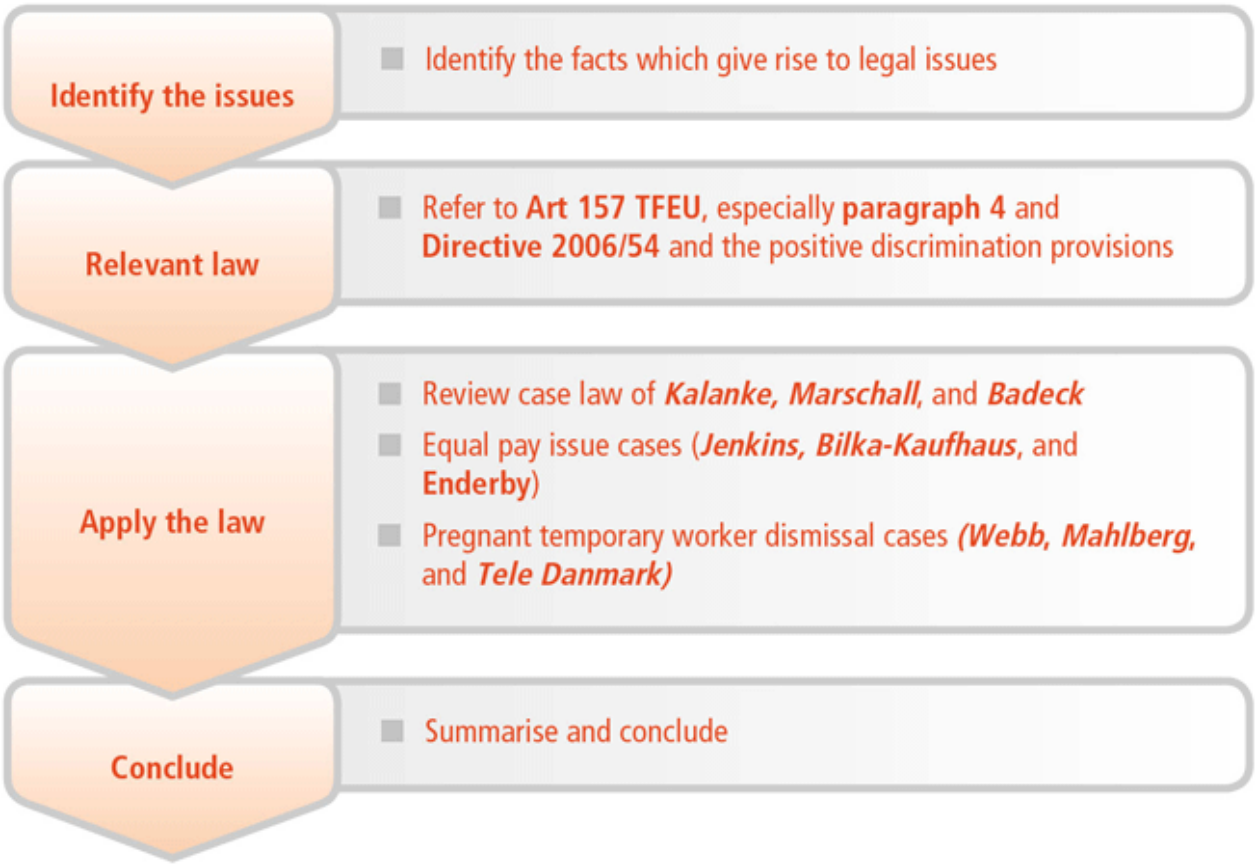
In the interview for the temporary post, the applicant Clare was asked if there were any grounds which would prevent her from fulfilling all the duties of the contract during the busiest fruit sales period of spring and summer. She replied that there were no obstacles and was subsequently appointed, starting work on 1 May. Clare knew she was pregnant at the time of the interview and after just three weeks in work announced that she was due to give birth at the end of June and was taking maternity leave as from 1 June. When she left work one week later, she was dismissed and paid only for the time actually worked.

Advise the various parties of their rights under EU law.

Caution!

- Note that it is intended by the question that you take account of case developments.
- Hence, you should concentrate on these developments.

Diagram Answer Plan



p. 193

Suggested Answer

Introduction and issues arising[1]

[1] This question revisits positive discrimination and the dismissal of Clare who applied and was appointed to a temporary position when pregnant but was subsequently dismissed when the pregnancy was revealed.

This question is concerned with some of the more recent developments of equality law, which has become one of the fundamental policies of EU substantive law.[2] The issues which arise are the appointment of a worker on the basis of the application of a policy of positive discrimination, which

then gives rise to Astrid's claim to equal access to employment under **Directive 2006/54**. It is also concerned with indirect discrimination between full-time and part-time workers and finally the dismissal of a pregnant woman from a temporary contract.

[2] Provide a general introduction to the area of law and the problem before moving on to consider the factual issues arising.

Positive discrimination[3]

[3] In particular, positive discrimination is a feature of this problem.

A limited form of positive discrimination is provided in **Art 3 of Directive 2006/54** and **paragraph (4) of Art 157 TFEU**. **Article 3** of the Directive provides that the Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities. It would seem therefore to concern women only but not exclusively, as seen in case law. Hence, despite the actual words contained within the Directive, it was not limited to women. **Article 157(4) TFEU** provides:

> 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.

The Treaty Article is thus aimed at covering both men and women but is specifically addressed to the Member States. It would nevertheless have direct effects. The facts of the present case involve a private employer; therefore the Treaty Article would need to be applied if there were any doubts about the Directive. **Article 3 of Directive 2006/54** provides that Member States may maintain or adopt measures within the meaning of **Art 141(4) EC (now 157 TFEU)** with a view to ensuring full equality in practice between men and women, thus backing up the amended Article in the Treaty.

It has already been observed in the cases of ***Kalanke (C-450/93)***, ***Marschall (C-409/95)***, and ***Badeck (C-158/97)*** that where a policy of positive discrimination is employed it should not automatically favour one sex and that procedures must be included within any such policy to ensure that an objective assessment of the individual candidates is undertaken. This position was made even clearer in the case ↵ of ***Abrahamsson (C-407/98)*** whereby a female was appointed to a university chair in preference to a male applicant on the basis of a positive discrimination regulation and despite a clear

p. 194

vote in favour of a male applicant (5:3), his qualifications, and the overall higher ranking of the male. The university contended that the difference was not so great as to breach the objectivity requirement. However, the CJEU held that EC (EU) law, primary or secondary, does not support appointments based on automatic preference for the underrepresented sex irrespective of whether the qualifications are better or worse and where no objective assessment of each candidate has taken place. Whether that would be enough in Astrid's case to support her claim for unlawful discrimination in access to employment contrary to **Arts 1 and 4 of Directive 2006/54** is difficult to say with certainty in the absence of more detailed facts. A reference to the CJEU may be needed.

The pay difference[4]

[4] The other issues must, of course, still be addressed, starting with the pay difference.

What is clear from numerous cases and pronouncements of the CJEU is that the additional salary for Tony as a full-timer in comparison with the female part-timers could only be accepted as lawful if objectively justified (see the cases of ***Jenkins (96/80)***, ***Bilka-Kaufhaus (170/84)***, and ***Enderby (C-127/92)***). Here, there does not appear to be an overwhelming objective reason to support this. The increase in pension is also to be regarded as pay following the ***Barber*** case ***(C-262/88)*** and must therefore also be at the same rate unless similarly objectively justified. It may also be argued that it is up to the pension fund actuaries to determine the pension payments and the amount needed to be paid into the pension fund and not for the employers themselves. Indeed, this will have already been taken into account in calculating payments, thus removing the need for the employer to do so, in which case it appears more like an unlawful discriminatory measure. Again, in the event of uncertainty here, a reference to the CJEU should be made.

The dismissal of a pregnant worker[5]

[5] Dismissal during or as a result of pregnancy is an issue which has received close attention from the CJEU.

The final issue here concerns the dismissal of the pregnant worker from a temporary post. However unjust it might be felt in certain quarters that the employer is suffering unduly in such a circumstance, a line of cases from the CJEU show clearly that the CJEU upholds fully the rights provided now by **Directive 2006/54, Art 15** and **Directive 92/85, Art 10** in protecting women workers from dismissal whilst pregnant, including those on temporary contracts (see the cases of ***Webb (C-32/93)***, ***Mahlberg (C-207/98)***, and ***Tele Danmark (C-109/00)***). In the last case, the pregnant worker had also not informed the employer of her pregnancy; however, ↵ the CJEU held quite clearly that 'Had the Community legislature wished to exclude fixed-term contracts, which represent a

p. 195

substantial proportion of the employment relationships, from the scope of those directives, it would have done so expressly.' The only distinguishing factor would be that in the present case, the employers specifically asked whether there would be any grounds on which the applicant could not fulfil the entire contract. Once again, only a reference to the CJEU on this point would determine whether it would make any difference to alter the previous view of the court. I would suggest it would not, particularly in the light of ***Busch (C-320/01)*** in which the pregnancy of a worker returning to duty was not revealed to the employer, although there is clearly scope for argument.

Summary

Overall then, the employer appears to be in breach of EU law provisions for the actions it has undertaken.

Looking for Extra Marks?

■ Some discussion on positive discrimination would be interesting, if there is time. After an initial flurry of cases, you might suggest that this seems to have stalled, with no new cases recently.

■ If there is time, you might also mention the improvement in remedies and damages available for those suffering discrimination has helped in realising the overall aims of equality.

Question 4

To what extent has the EU moved from prohibiting discrimination on the grounds of sex to the provision of much more far-reaching equality protection? What is the evidence of the elevated status of a general principle of equality?

Caution!

■ As with similar very open questions in this book, be careful that you do not write a long rambling answer on anything and everything without focusing on any topic in particular and without, in the end, answering the question.

p. 196

Diagram Answer Plan

Suggested Answer

Introduction[1]

[1] This question seeks your knowledge of equality, which the EU has now incorporated, and how equality is developing into a general principle and being supported by the Court of Justice.

The EU originally provided a Treaty base that only prohibited discrimination in relation to the pay of men and women[2] (**Art 119 EEC**). This was, however, expanded over the years by both increased Treaty provision and directives to outlaw discrimination between men and women and then into other areas of discrimination protection.

[2] You need to commence with an outline of the limited original provision for prohibiting discrimination (then just equal pay).

Expanded the Treaty provision[3]

[3] Then, but only briefly, outline its extension over time to considerable provision for gender equality to the now much more extensive scope of equality protection.

Article 157 TFEU (ex 119 EEC and 141 EC) on equal pay for equal work originally provided the only specific mention of equal treatment of the sexes in the **EC Treaty**, but, following amendments to the Treaties, equality provisions are more extensive. In addition to the main Treaty Article, **Art 157 TFEU**, the **Treaty of Amsterdam** introduced as one of the goals now outlined in **Art 2 TEU**, 'equality between men and women', and **Art 3 TEU** states the aim 'to promote ... equality, between men and women'.

Equality between men and women in the working environment was also included in the **1989 Community Social Charter**, which was ↵ brought into **Art 136 EC (now 151 TFEU)**. The amended **Art 137 EC (now 153 TFEU)** provides that the Union shall complement and support the activities of the Member States in the field of equality between men and women with regard to labour market opportunities and treatment at work.

p. 197

Article 157 TFEU was amended and added to by the **Treaty of Amsterdam**, which added two sentences to locate within a Treaty base the principles of equal pay for work of equal value and action to promote equality, but which falls short of out-and-out positive discrimination.

There are now a number of examples of express prohibitions of discrimination within the Treaty, but there is not, as such, an express general principle of non-discrimination or equality. The specific prohibitions do, however, support the emergence of a general principle in the EU legal order that is additionally supported by the judgments of the CJEU and academic commentary. In addition to the ones noted elsewhere, the Treaty Articles that seek either to prohibit discrimination or promote equality are:

- **Article 8 TFEU**, general statement on equality between men and women
- new **Article 10 TFEU**, general statement on equality
- **Article 18 TFEU**, on nationality
- **Article 40(2) TFEU**, concerned with equality between producers and between consumers in the **Common Agricultural Policy (CAP)**
- **Articles 45, 49, and 56 TFEU**, providing for equal treatment of workers and the self-employed

- **Article 106 TFEU**, on public undertakings
- **Article 110 TFEU**, on taxation.

All of these Articles support the development of a general principle of equality by the establishment of a legal culture that does not tolerate the different treatment of like, or the same treatment of unequals across a range of subject matters.

Finally, as far as the Treaties are concerned, a new enabling power has been provided in **Art 19 TFEU (ex 13 EC)**, which provides:[4]

[4] Highlight the importance of **Art 19 TFEU**.

> the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Secondary legislation[5]

[5] Outline the expansion of rights protection by secondary EU legislation.

p. 198 The first secondary legislative interventions in this area were enacted following the publication of a social action programme in 1974 by the ↵ Commission. Three Directives concerned with equality between men and women were adopted:

- the **Equal Pay Directive 75/117**
- the **Equal Treatment Directive 76/207**
- the **Social Security Directive 79/7**.

A second social action programme in 1982 led to the enactment of **Directive 86/378** on equal treatment in occupational pensions and **Directive 86/613** on equal treatment of the self-employed and protection of self-employed women during pregnancy and motherhood (now replaced by **Directive 2010/41**).

The amendment of the **EC Treaty** by the SEA in 1986 resulted in the enactment of the **Pregnancy and Maternity Directive 92/85**. The **Maastricht Treaty** led to the **Parental Leave Directive 96/34**, repealed and replaced now by **Directive 2010/18**, the **Burden of Proof in Sex Discrimination Cases Directive**

97/80, and the **Part-time Workers Directive 97/81**. The more recent secondary legislation includes **Directive 2004/113** on equality in the access to and the supply of goods and services, and **Directive 2010/41** providing for equal treatment of the self-employed.

EU Charter of Fundamental Rights[6]

[6] The **EU Charter of Fundamental Rights**, which further supports a general principle, must also be included in your answer.

The **EU Charter of Fundamental Rights** further provides **Arts 20–23**, which prohibit discrimination on any grounds in **Art 21**, i.e. 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, and sexual orientation. The CJEU is now making reference to it and it will no doubt feature much more in case law in the future.

Article 19 TFEU Directives[7]

[7] Consider whether there is a general principle of equality within the EU legal order and if there is evidence of this. The scope of the Directives issued under **Art 19 TFEU** are crucial in this expansion of equality rights.

Article 13 EC (now 19 TFEU) provided the Treaty with a new legal base for the enactment of legislation to tackle discrimination across a range of issues. The Article does not actually prohibit anything in its own right, but empowers the Council to take action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation. Two Directives were enacted in 2000 that, between them and the 2006 recast Equal Treatment Directive, encompass many of the matters identified in **Art 19 TFEU** where action was deemed necessary to combat discrimination.

The Racial Equality Directive (Directive 2000/43)

The first Directive adopted under **Art 13 EC (now 19 TFEU)** seeks to apply the principle of equal treatment to persons regardless of racial or ethnic origin in matters of employment, social protection,

p. 199 ↵ education, and access to public goods and services, including housing (**Art 3(1)**). An exception is provided whereby differential treatment can be justified where a certain characteristic is a genuine and determining occupational requirement (**Art 4(1)**).

The Framework Employment Directive (Directive 2000/78)

This Directive deals with all of the other forms of discrimination identified by **Art 19 TFEU (ex 13 EC)**, with the exception of the matters covered by the Racial Equality Directive and Directives on equality between men and women. It provides that there should be no discrimination, direct or indirect, on the grounds of religion or belief, disability, age, or sexual orientation. As with forms of indirect discrimination under previous Directives, indirect discrimination can be objectively justified provided that it is proportionate (**Art 4**). An exception exists whereby different treatment can be justified by a certain characteristic that is a genuine and determining occupational requirement (**Art 4(1)**). There is also a special exemption for access to employment in religious organisations (**Art 4(2)**), and there are further exceptions in respect of disability (**Art 5**) where measures to accommodate disabled persons would cause employers a disproportionate burden, along with numerous exceptions in respect of age (**Art 6**).

In 2004, **Directive 2004/113** was enacted to implement the principle of equality between men and women in the access to and supply of goods and services. It applies to the provision of all public and private sector supply of goods and service outside the sphere of private and family life transactions.

Case law from the Article 19 TFEU Directives[8]

[8] Turn to the CJEU and its case law to support your view. The cases of ***Mangold*** and ***Kükükdeveci*** are most instructive here as to the development and value of a general principle.

Of the many cases now arising, the only examples provided here are those which clearly support the development of a general principle of equality and not those merely considering particular provisions of the Directives. ***Mangold v Helm (C-144/04)*** concerns age discrimination that resulted from a scheme to ease the employment of older workers. It was held that a change of German law to assist older workers in finding work went beyond the objectively justified exceptions permitted in **Art 6(1) of Directive 2000/78**, even though its implementation period had not expired. Mangold became subject to the change, which allowed workers over the age of 52, previously 58, to be employed on fixed-term contracts without accruing compensation rights on termination, as opposed to permanent contracts, which would allow such rights. The justification for the ruling was that non-discrimination on the grounds of age was part of the general principle of non-discrimination in EU law and thus applicable in its own right, but with reference to the norms contained in the Directive for assistance.

p. 200 ↵ The decision in the ***Mangold*** case was subsequently affirmed by the CJEU in ***Kükükdeveci (C-555/07)***, which involved a dispute about a notice period between an employee and a private employer because a German law precluded periods of employment completed before the employee reached the age of 25 from counting towards the notice period. **Directive 2000/78** should have been

implemented in Germany at the material time, but it had not. The preliminary ruling question was essentially: on what provision of law could Kükükdeveci rely? The CJEU held that the general principle of EU law prohibiting discrimination on the grounds of law, as expressed in **Directive 2000/78**, applies to preclude national law from discriminating.

Hence the existence and value of a general principle of equal treatment has been acknowledged and confirmed by the CJEU in a number of cases: recently, e.g. in ***Chatzi (C-149/10)***, in which the Court held that the principle of equal treatment is one of the general principles of EU law and is now affirmed by **Art 20 of the EU Charter of Fundamental Rights** (in that case, to support the right to parental leave on an equal basis). A good overview of developments in equality law has been provided by Prechel.[9]

[9] Cited in the 'Taking Things Further' section at the end of the chapter.

Summary

Equality law provision in the EU has developed, from limited beginnings, a number of genuine and comprehensive legal instruments for the combating of discrimination in a range of areas. Furthermore, a general principle of equality is emerging more and more visibly through provision of a number of equality rights in the Treaties, secondary legislation, and the judgments of the CJEU. The CJEU will no doubt have opportunities to expand on the general principle endorsed.

Looking for Extra Marks?

■ It may be too soon for you to state definitively that there is now a general principle of equality, but there is nothing wrong in you stating that in your answer; but try to weigh up the evidence thus far and perhaps then state that the development appears to be pointing in that direction.

■ You may be of the view that there is now a general principle, in which case say so and say why you are convinced.

Taking Things Further

■ Burrows, N and Robinson, M, 'An Assessment of the Recast Equality Laws' (2007) 13 EL Rev 186.

Focuses on the consolidating equality Directive which incorporated much of the prior Directives and case law.

p. 201 ↵ ■ Costello, C and Davies, G, 'The Case Law of the Court of Justice in the Field of Sex Equality Since 2000' (2006) 43 CML Rev 1567.

A general overview of case law developments in this area.

■ Dewhurst, E, 'Intergenerational Balance, Mandatory Retirement and Age Discrimination in Europe: How Can the ECJ Better Support National Courts in Finding a Balance between the Generations?' (2013) 50 CML Rev 1333.

A focused look at the age discrimination rules.

■ Masselot, A, 'The State of Gender Equality Law in the European Union' (2007) 13 ELJ 152.

An overview of gender equality developments.

■ Möschel, M, 'Race Discrimination and Access to the European Court of Justice: Belov' (2013) 50 CML Rev 1433.

■ Prechal, S. 'Equality of Treatment, Non-discrimination and Social Policy: Achievements in Three Themes' (2004) 41 CML Rev 533.

A focused look at the race equality developments.

Online Resources

www.oup.com/uk/qanda/ *<http://www.oup.com/uk/qanda/>*

For extra essay and problem questions *<https://iws.oupsupport.com/ebook/access/content/eu-qanda3e-resources/eu-qanda3e-chapter-9-extra-questions?options=name>* on this topic and guidance on how to approach them, please visit the online resources.