

Non-discrimination of part-time and fixed-term workers in recent EU case law: leave it, love it, change it

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the standard employment
relationship as
the norm



A solid red circle containing the text "work / family life" in white lowercase letters.

work / family life

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work processes

	Directive 97/81/EC	Directive 1999/70/EC
Aims (Clause 1)	<p>1 - remove discrimination and improve quality part-time work</p> <p>2- voluntary part-time work and flexible organisation of working time for employers and workers</p>	<p>1 - improve quality fixed-term work by applying principle of non-discrimination</p> <p>2- framework to prevent abuse of successive use of fixed-term contracts / relationships</p>
Personal scope (Clause 2)	part-time workers whose normal hours of work are less than the normal hours of work of a 'comparable full-time worker'	fixed-term workers whose employment contract / relationship differs from the contract / relationship of the 'comparable permanent worker';
Principle of non-discrimination (Clause 4)	<p>prohibited: in respect of 'employment conditions', 'less favourable treatment' than comparable full-time workers in same establishment only b/c they work part-time</p> <p>justification: objective grounds</p>	<p>prohibited: in respect of 'employment conditions', 'less favourable treatment' than comparable permanent workers in same establishment only b/c they work fixed-term</p> <p>justification: objective grounds</p>

3 questionable assumptions

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beneficial

3 questionable assumptions

beneficial

stepping stone

3 questionable assumptions

beneficial

stepping stone

unequal treatment

the principle of non-discrimination and its 'limited reach'

	Directive 97/81/EC	Directive 1999/70/EC
employment conditions	no social security if not employment condition, 'gender lens'	no social security
comparable worker	(actual) full-time worker in same establishment, engaged in same/similar work/occupation, same contract (Wippel)	(actual) permanent worker in same establishment, engaged in same/similar work/ occupation, (same contract?)
objective justification	if not treated less favourably 'solely' b/c part- time contract / relationship or pro data temporis	if not treated less favourably 'solely' b/c fixed-term contract / relationship or pro data temporis

approach: testing recent case law against the 'limited reach' (2013-2018)

Directive	number of cases	female	male	other	public employer	private employer
97/81/EC	6	5	-	1 (trade union)	3	3
1999/70/EC	9	8	1	-	8	1

EU case law on part-time work

- the interpretation of Clause 5(2) on opportunities for part-time work (Teresa Mascellani)
- the pro rata temporis principle and the calculation of:
 - * dependent child allowance (Österreichischer Gewerkschaftsbund)
 - * payment in lieu upon termination of the contract for paid annual leave not taken (Greenfield)
 - * amount of occupational pension accrued by part-time worker who left the undertaking before the occurrence of the pensionable event (Kleinsteuber)
- the relation w/ social security benefits and the 'gender lens'
 - * invalidity pension (Cachaldora Fernández)
 - * unemployment benefit 'vertical' part-time workers (Espadas Recio)

EU case law on fixed-term work

- 3-yearly length-of-service increments (Regojo Dans)
- special leave election to public office (Vega Gonzalez)
- notice period for terminating fixed-term employment contract (Nierodzik)
- compensation for terminating the fixed-term employment contract (Carratu, Perez Lopez, Diego Porras, Grupo Norte, Montero Mateos)
- right to reinstatement (Vernaza Ayovi, Opinion AG Kokott)

non-discrimination in recent EU case law: still limited?

employment conditions

Directive 97/81/EC

included:

- dependent child allowance = pay (157 TFEU) (Österreichischer Gewerkschaftsbund)
- (implicit - Dir 2003/88/EC) payment in lieu for paid annual leave not taken (Greenfield)
- (implicit) occupational pension pre-retirement age (Kleinsteuber)

excluded:

- risk worker of unilateral adjustment of working hours (Teresa Mascellani)
- invalidity pension - Dir 79/7/EEC (Cachaldora Fernandez) → statistical evidence problem
- unemployment benefit - Dir 79/7/EEC (Espadas Recio)

Directive 1999/70/EC

included:

- 3-yearly length-of-service increments (Regojo Dans)
- special leave election to public office (Vega Gonzalez)
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comparable worker

Directive 97/81/EC

n/a

Directive 1999/70/EC

unproblematic:

- From permanent to fixed-term work (Nierodzik)
- Replacing (absent) permanent worker (Diego Porras, Montero Mateos)
- Occupying same post (Grupo Norte)
- Fixed-term nurse public sector / permanent public servant nurse (Vernaza Ayovi)

for nat'l court:

- Non-permanent staff member / permanent career civil servant (Regojo Dans): entirely feasible to provide fixed-term workers such a right (CJEU)
- Non-established civil servants / permanent worker (Vega Gonzalez)

problematic:

- different aims of employment conditions (Carratú, Grupo Norte, Montero Mateos)
- different categories of fixed-term workers (Pérez López)

less favourable treatment

Directive 97/81/EC

Pro rata temporis principle = objective justification:

- Calculation dependent child allowance (Österreichischer Gewerkschaftsbund)
- Payment in lieu upon termination contract for paid annual leave not taken (Greenfield)
- Occupational pension pre-retirement (Kleinsteuber)

Directive 1999/70/EC

No justification:

- Permanent career civil servant (Regojo Dans)

to sum up

- employment conditions
 - * broadly interpreted, as long as...
 - * ... not social security → 'gender lens' and proving disparate impact
- comparable worker
 - * not necessarily problematic, b/...
 - * ... problematic where employment conditions have different aims
- 'less favourable treatment' - pro rata temporis principle - objective justification

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