

SUMMARY

## **ECJ 21 July 2011, case C-104/10 (Patrick Kelly - v - National University of Ireland), Gender discrimination**

***&lt;p&gt;Article 4(1) of Council Directive 97/80/EC [...] must be interpreted as meaning that it does not entitle an applicant for vocational training, who believes that his application was not accepted because of an infringement of the principle of equal treatment, to information held by the course provider on the qualifications of the other applicants for the course in question, in order that he may establish &quot;facts from which it may be presumed that there has been direct or indirect discrimination&quot; in accordance with that provision.&lt;/p&gt;***

***&lt;p&gt;Nevertheless, it cannot be ruled out that if the defendant refuses to disclose, in the context of establishing such facts, the objective pursued by the Directive could be compromised, depriving Article 4(1) thereof, in particular, of its effectiveness. It is for the national court to ascertain whether that is the case in the main proceedings.&lt;/p&gt;***

### **Facts**

Paul Kelly, a qualified teacher living in Dublin, applied for admission to a vocational training course (Master in Social Science) that was being offered by University College Dublin. His application was turned down. He made a complaint to the Equality Tribunal, submitting that he was better qualified than the least-qualified female candidate to be offered a place on the course. The Equality Tribunal rejected his complaint, concluding that Mr Kelly had failed to

establish a prima facie case of sex discrimination.

### **National proceedings**

Mr Kelly appealed to the Circuit Court. He also asked the Circuit Court to order the university to give him copies of (i) the other candidates' applications with appendices and (ii) the 'scoring sheets'. The Circuit Court refused to issue such an order, whereupon Mr Kelly appealed to the High Court, which referred five questions to the ECJ for a preliminary ruling.

### **ECJ's findings**

1. Question 1 was whether Article 4(1) of Directive 97/80 ('Member States shall take such measures as are necessary [...] to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish [...] facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment') entitles an applicant for vocational training who believes that his application was rejected for a sex-discriminatory reason, to information held by the course provider on the qualifications of the other applicants, in order that he may establish a prima facie case of discrimination (§ 26).
2. A person who considers himself to be discriminated against must initially establish presumptive discrimination. Only then must the defendant disprove the discrimination. It is for the national courts to assess the facts from which discrimination may be presumed (§ 29-32).
3. The Directive does not specifically entitle persons who feel discriminated against to information. However, there is a risk that refusal to disclose by the defendant could compromise the achievement of the Directive's objective and thus deprive it of its effectiveness. In that regard, Article 4(3) TEU requires Member States to refrain from any measure that could jeopardise the attainment of the Union's objectives (§ 33-36).

The order for reference mentions that the university did offer to provide Mr Kelly with part of the information requested. [Editor: the order for reference was not published on [www.curia.eu](http://www.curia.eu)]. 'Accordingly' [?editor] the answer to the first question is that Article 4(1) of Directive 97/80 must be interpreted as meaning that it does not entitle an applicant for vocational training, who believes that his application was not accepted because of an infringement of the principle of equal treatment, to information held by the course provider on the qualifications of the other applicants for the course in question, in order that he may establish 'facts from which it may be presumed that there has been direct or indirect

discrimination' in accordance with that provision. Nevertheless, it cannot be ruled out that a refusal of disclosure by the defendant, in the context of establishing such facts, could risk compromising the achievement of the objective pursued by that Directive and thus risk depriving, in particular, Article 4(1) thereof of its effectiveness. It is for the national court to ascertain whether that is the case (§ 37-39).

4. Questions 2 and 3 essentially ask the same as question 1, now based on Directives 76/207 and 2002/73 on sex discrimination and the ECJ's answer is basically similar (§ 40-48).

5. Question 5 asks whether any entitlement to information under Directives 76/207, 97/80 and 2002/73 is affected by rules of national or EU law relating to confidentiality. The ECJ answers that, when assessing whether a refusal of disclosure by the defendant in the context of establishing prima facie sex discrimination could risk depriving Article 4(1) of Directive 97/80 of its effect, national courts must take into account the EU rules in respect of data protection. The answer to the question, therefore, is affirmative (§ 49-56).

6. Question 4 asks whether the nature of the obligation contained in Article 267(3) TFEU (obligation of national court to refer questions to the ECJ) differs according to whether a Member State has an adversarial rather than an inquisitorial legal system. The ECJ answers in the negative.

### **Ruling (on Question 1)**

Article 4(1) of Council Directive 97/80/EC [...] must be interpreted as meaning that it does not entitle an applicant for vocational training, who believes that his application was not accepted because of an infringement of the principle of equal treatment, to information held by the course provider on the qualifications of the other applicants for the course in question, in order that he may establish "facts from which it may be presumed that there has been direct or indirect discrimination" in accordance with that provision.

Nevertheless, it cannot be ruled out that if the defendant refuses to disclose, in the context of establishing such facts, the objective pursued by the Directive could be compromised, depriving Article 4(1) thereof, in particular, of its effectiveness. It is for the national court to ascertain whether that is the case in the main proceedings.

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**Creator:** European Court of Justice (ECJ)

**Verdict at:** 2011-07-21

**Case number:** C-104/10