

Comparability of Men's and Women's Situations in the Workplace

In EU gender equality law, discrimination is defined as follows: direct discrimination occurs “where one person is treated less favourably on grounds of sex than another is, has been or would be treated **in a comparable situation**”¹. Discrimination, it is said, is a “relative” concept, in that it requires some kind of comparison in order to establish “less favourable” treatment. The call for “non-discrimination on grounds of sex” means that where individuals are in the same situation and the only thing that distinguishes them is their sex, the same treatment must be applied to them, for the reason that sex is a criterion that must not be used to make distinctions, a criterion which it is actually illegal to apply, at least in certain fields, and those include occupation and conditions of employment. The other side to the coin is that wherever an employer can show that the measure that was taken or the less favourable situation derives from an interplay of factors, reasons or criteria that are not linked to the worker's sex, but which make his or her situation different from that of comparable workers, this situation cannot be characterised as discriminatory. Comparing situations, when required, means identifying an individual of the other sex who is in a comparable situation. It is not always easy to identify this comparable individual or group with whom to perform the required comparison – far from it² – and this comparison is a complex operation, difficult to inscribe within a rigorous framework that might guarantee an outcome. This paper sets out to examine how courts approach the exercise of comparing the situation of men and women in employment and occupation under the law of the European Union. It will address the uncertainties that surround this comparison before considering in greater detail the problems of comparing the situation of men and women with regard to pay.

Before we begin, it should nevertheless be noted that the requirement to compare situations explicitly enshrined in the 2006 Directive is not absolute. The discrimination can also be tackled by ruling against any treatment that places the worker of a particular sex at a disadvantage, that is detrimental to that person (for example a disciplinary sanction, a dismissal, a refusal to hire) as a result of his or her sex. Direct discrimination may be established if it is observed that sex played a part in the decision. EU law does not entirely rule out this approach (cf. below on the question of less favourable treatment on grounds of pregnancy).

I- Exemptions from comparison

There are times when EU law does not require a comparison or allocates it a secondary function.

1) Less favourable treatment linked to pregnancy or maternity

According to the European Court of Justice, if the less favourable treatment inflicted on a woman is linked to pregnancy or maternity, this constitutes direct discrimination on grounds of sex (ECJ, 8 Nov. 1990, Dekker, C-177/88, refusal to appoint a pregnant woman: “only women can be refused

¹ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Article 2.

² On the problems that beset comparison, see in particular D Schiek, L Waddington, M Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Oxford, Hart Publishing, 2007, p. 205-237.

employment on grounds of pregnancy”). This solution, now incorporated into Directive 2006/54, has the advantage of relieving the victim of less favourable treatment of the particularly awkward task of identifying a man in a comparable situation to that of a pregnant woman.

However, the idea of comparing her with a sick man – for example, when the issue concerns time off work or leave associated with pregnancy or maternity – has not been discarded altogether. Although one might find the comparison inappropriate in so far as neither pregnancy nor maternity is an illness, this idea is based on the argument that these situations have identical effects at the workplace and can therefore be assimilated in the particular context of how work is organised. Hence, in the case of pregnancy-related illness, the law of the Union requires a comparison to be performed between the situation of the woman on leave and that of a sick man. A woman worker’s absence for this reason (outside maternity leave) can, therefore, be treated like that of a man who is off sick (cf. for example ECJ, 30 Apr. 1995, Thibault, 136/95 and, more recently, McKenna, 8 Sep. 2005, C-191/03, ECJ, 20 Sep. 2007, Kiiski, C-116/06³ and 26 Feb. 2008, Mayr, C-506/06⁴).

2) Harassment

Although harassment, in Union law, falls within the concept of discrimination, no comparison is required in order to prove it.

In the 2006 Directive, “harassment” is defined as “where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment”. And “sexual harassment” means “where any form of unwanted *verbal, non-verbal or physical* conduct of a *sexual nature* occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment situation”.

So there is no need to compare the victim’s situation with that of a person of the other sex. According to these definitions, it does not much matter whether the conduct relates to women or men. What does matter, however, is that the conduct relates to the person’s sex or is “of a sexual nature” and above all that it violates that person’s dignity. Unlike discrimination, human dignity is not relative: it requires no comparison.

The reference to dignity, as a substitute for a relative conception of discrimination that calls for comparison, is found in other contexts to which the non-discrimination rule applies. This solution is illustrated very well by the case-law on situations relating to sex change. Notably, in the P v. S ruling (ECJ, 30 Apr. 1996, C-13/94), the Court found that discrimination on the grounds of a gender reassignment is based, essentially if not exclusively, on the sex of the person concerned (in this instance, a man had been dismissed because he had undergone a sex change to become a woman). The reasoning is akin to the case-law on less favourable treatment for pregnant women. While the Court does not entirely reject comparison in this case (a comparison is made with the situation of a man who has not undergone the change), this does not reflect the initial thinking behind the prohibition of discrimination on grounds of sex, which requires a comparison between men and women (but here a woman would equally have been dismissed on the same grounds). However, this hardly matters, as the solution is inevitable in the name of dignity and freedom: discrimination on grounds of gender

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⁴ The dismissal of a female worker essentially because she is undergoing that important stage of in vitro fertilisation treatment constitutes direct discrimination on grounds of sex.

reassignment is considered intolerable because it violates the dignity and freedom of the person concerned, which the Court sees it as its mission to protect.

II- Difficulties associated with the requirement to compare situations

Comparison entails numerous difficulties, which makes the operation complex. In the law of the Union, the fact that the criteria to be applied to the comparison have not been clearly described constitutes the first source of uncertainty, added to which there is a tendency to shift away from a comparison of situations towards evidence of justifications for differences. Comparing situations involving men and women at the workplace also means that we have to identify a workplace collective within which to perform the comparison, and this needs to feature a certain internal mix, without which it is difficult to evaluate the treatment of workers of the other sex. These two requirements play their part in making comparison a sensitive issue.

1) The lack of comparative criteria

Where a comparison is called for, there is a risk that the “comparator” will be chosen arbitrarily, without any rational justification, which weakens the efficacy of the requirement not to discriminate or at least makes the result of applying the rule highly random.

A court looking to the law of the Union for assistance will not find any elements in the texts for assessing the comparability of situations. In choosing what makes situations like or unlike, it therefore enjoys broad leeway, and applying the non-discrimination rule is therefore exposed to an uncertain outcome.

In fields other than gender equality, Union law has attempted to come up with a definition, albeit fuzzy, of a comparable worker against whom less favourable treatment can be gauged. In the Framework Agreement on part-time work, for example, a comparable full-time worker is “a full-time worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work/occupation, due regard being given to other considerations which may include seniority and qualification/skills”. In the Framework Agreement on fixed-term contracts, the comparable permanent worker is “a worker with an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation, due regard being given to qualifications/skills”. If there is no comparable worker in the same establishment, both texts specify that “the comparison shall be made by reference to the applicable collective agreement, or where there is no applicable collective agreement, in accordance with national law, collective agreements or practice”.

Given the lack of guidance in the legal texts, we find some indication of the means for selecting an appropriate comparator in some of the case-law. For example, a judgment from the Court of First Instance (CFI, 1991, Tagaras v Court of Justice, T-18/89 and T-24/89⁵) suggests that there has been a breach of the principle of equal treatment “when two categories of person whose **factual and legal circumstances** disclose no **essential difference** are treated differently at the time of their recruitment”. This particular case concerned an official of the Court of Justice who claimed he had been subject to discriminatory treatment both in relation to his colleagues at the Court and in relation to officials of other institutions, in so far as neither the training nor the vocational experience of his colleagues could justify the more favourable treatment they received. The reference to “factual and legal circumstances” disclosing “no essential difference” is not, however, very helpful as a criterion: we still do not know what

⁵ This judgment refers to judgments by the Court of Justice on 11 July 1985, Appelbaum/Commission, 119/83 and 11 July 1985, Hattet et al/Commission, 66/83 to 68/83 and 136/83 to 140/83.

makes a difference “essential”. Some differences can be trivial in one context but fundamental in another.

Close reading of judgments from the Court of Justice reveals another guiding principle, which is to assess comparability **in the light of the measure’s objectives**, although the Court does not formally say so and does not adhere consistently to its reference to objectives. This method, which means comparing situations in terms of the factors which feature rationally in the decision or choice of measure, resembles the approach adopted in France by the Conseil d’Etat and the Conseil Constitutionnel⁶. The method was notably used by the Court of Justice in its Nikoloudi ruling (ECJ, 10 March 2005, C-196/02). In the case referred to the Court, only full-time workers could be established as staff members, and this excluded a category of persons consisting entirely of women (cleaners) who were employed on fixed-term, part-time contracts. The Court advised the national court that it must “reflect on the **aim pursued by the agreements at issue** inasmuch as it made the possibility of appointment as an established member of staff subject to the requirement of two years’ full-time work”, because it was for the national court to “determine whether, **in light of that aim**, this requirement should have been applied also to part-time workers, or whether the circumstances of the main proceedings justified the requirement being applied proportionally to working time”.

This approach is similarly at play, although less obvious, in the Mouflin ruling (ECJ, 13 Dec. 2001, C-206/00), which says that “**as for the entitlement to a retirement pension with immediate effect** (provided for by French law) **male and female civil servants are in comparable situations.**” After all, “there is nothing to distinguish the situation of a male civil servant whose wife suffers from a disability or incurable illness making it impossible for her to undertake any form of employment from that of a female civil servant whose husband suffers from such a disability or disease”. There are other examples of comparability being assessed, like this, in the light of the aim a measure pursues (cf. for example ECJ, 9 Dec. 2004, Hlozek, C-19/02).

However, comparisons are not always undertaken in the light of the aim of the measure. This is illustrated, for example, in a ruling about taking periods of military service into account when calculating severance pay (ECJ, 8 June 2004, Österreichischer Gewerkschaftsbund, C-220/02). In this case, the calculation of time spent in employment, as a factor in determining severance pay, does take into account periods of military service or their civilian equivalent, performed mostly by men, but not periods of parental leave, more frequently taken by women. The Court assesses the comparability of these situations **in the light of the reasons for suspending the contract of employment**, observing that in each case the suspension of the contract is based on particular reasons: the interests of the worker and family in the case of parental leave and the collective interests of the nation in the case of national service. In the Court’s opinion, as those reasons are of a different nature, the workers who benefit are not in comparable situations. Rather than the solution itself, it is the reasoning that is open to question: what should have been taken into account is not the reason for the suspension, but the reason for distinguishing between different periods of leave when calculating severance pay.

2) The shift from the comparison of situations towards justifications for discrimination

The complexity of comparison explains why a shift from comparison towards causality is sometimes at play in the case-law. Occasionally the sequence of argument is reversed, with the question of justification being examined before the question of comparison. Naturally, this affects the clarity and regularity of court procedure in the interests of simplified reasoning. This break in the order of questions to which the non-discrimination rule requires an answer is reflected, for example, in the method adopted

⁶ Cf. DC no. 87-232 of 7 Jan. 1988: the equality principle requires that any difference in treatment be “related to the aim of the law that institutes it”. This formula is echoed, for example, in CE, 15 May 2000, Barroux.

by the English court in the Enderby case. As the Court of Justice states in its ruling (ECJ, 27 Oct. 1993, C-127/92): “the Court of Appeal decided in accordance with the British legislation and with the agreement of the parties to examine the question of the objective justification of the difference in pay before that of the equivalence of the jobs in issue, which may require more complex investigation.” The aim, then, is to free oneself from the problem of comparison, in that the existence of an objective justification is sufficient in any case to make the distinction applied acceptable.

It is all the more understandable that the justification of differences should be reviewed at an earlier stage if we consider that the comparison is performed in the light of those very reasons that motivated the decision, in other words, its justification. Besides, the justification may also appear to test the comparison, in so far as it consists in putting forward a reason which lends authority to a distinction. For example, granting a bonus to a male worker doing the same job because of his particular availability might be allowed in the framework of this “objective justification”, but one might equally say that this male worker is not “comparable” because of that very availability (ECJ, 17 Oct. 1989, Danfoss, C-109/88). The question for the comparison becomes a question about the legitimacy of the reason given, in the light of the objective of gender equality at the workplace.

There are no simpler answers, in the case-law from the Court of Justice, to the question about the legitimacy of reasons given to justify differences than there are to the question about methods of comparison. To come back to our example of availability, the question might be asked in the following terms: does the legitimate interest of the person deciding the merit of this criterion justify the difference in treatment between a man who is flexible and available (because his family responsibilities are minor) and a woman who furthermore has to put up with restrictions on her hours because of her role as carer? One might conclude that the more favourable treatment is not legitimate because it reflects a certain organisational culture, a certain lop-sided behaviour model forged by ideas inherited from the past/from a tradition in which the distribution of tasks/activities/responsibilities between men and women was not egalitarian. But that was not the Court’s conclusion in the (above-mentioned) Danfoss case when, on the contrary, it allowed that the company’s interest justified the advantage granted to men on account of their availability. This reference to the interest of the employer, which may require distinctions to be made between male and female workers, plays an important part in case-law from the Court, although it does not mean that merely invoking the employer is enough to prevent the Court from ruling against the observed difference. On the contrary, the Court reviews whether the difference is proportional to the objective it is designed to meet (cf. for example the Enderby ruling above, where a pay differential between workers whose tasks are considered to be of equal value is justified by the “state of the employment market, which may lead an employer to increase the pay of a particular job in order to attract candidates”, on condition, however, that the higher pay is strictly necessary to fulfil the function ascribed to it).

In formal terms, the distinction between tests of comparison and tests of justification is also important when it comes to direct discrimination, for which no justifications are, in principle, possible – apart from those for which the directives provide. The only way to justify a difference in treatment, then, is to show that situations are not comparable. For example, in a judgment concerning a lump sum paid to women who took maternity leave, the Court ruled that the advantage granted to women was acceptable where male and female workers were in different situations, as the payment was designed to offset the occupational disadvantages which arise, for women, as a result of their being away from work (ECJ, 16 Sep. 1999, Abdoulaye, C-218/98).

Along the same lines we might quote a more recent judgment relating to the provisions of a redundancy plan entailing a difference in treatment between workers on direct grounds of sex, because the age of entitlement to a bridging allowance was 55 for men and 50 for women (ECJ, Hložek, cited above). The

plan at issue was designed to alleviate the social effects of dismissal for a large number of workers during a merger with another company, and to this end it provided for a bridging allowance to be granted exclusively to workers who were relatively old at the point when they lost their jobs, thereby taking account of the higher risk of long-term unemployment generally incurred by workers approaching the statutory age of retirement. The difference in treatment between men and women derived from the fact that the two sexes could not claim their statutory pensions at the same age (55 for women, 60 for men). It was based on the gap in the retirement age, which was different for men and women: consequently men and women were not in the same situation with regard to the degree of the unemployment risk to which they were exposed.

So, in cases of direct discrimination, everything hinges on an assessment of whether situations are comparable, with all the uncertainties arising from that in the Court's approach, apart from the fact that an advantage granted to women may be allowed because certain types of positive action are tolerated. This is illustrated very well by the famous Griesmar judgment on a challenge to the service credit granted exclusively to female employees who had raised children when calculating civil service pensions (ECJ, 29 Nov. 2001, C-366/99). The Court observes that the situations of male and female civil servants may be comparable in terms of bringing up children. In particular, the fact that female civil servants are more affected by the occupational disadvantages entailed in bringing up children, because this is a task generally carried out by women, does not prevent their situation from being comparable to that of a male civil servant who has assumed the task of bringing up his children and has thereby been exposed to the same career-related disadvantages. As for the possibility of justifying the solution in the light of positive action, the parameters for putting forward this argument are, as always, extremely limited. The Court recognises that the Treaty allows Member States to maintain or adopt measures providing for specific advantages in order to make it easier for women to pursue a vocational activity or to prevent or compensate for disadvantages in their professional careers, but it finds that the credit in question does not qualify as a measure contemplated in this provision, as such measures must be "intended to eliminate or reduce actual instances of inequality which result from the reality of social life and affect women in their professional life". It follows that national measures covered by that provision must "contribute to helping women conduct their professional life on an equal footing with men", whereas the credit in the main proceedings merely grants women an advantage at the date of their retirement, without providing a remedy for the problems which they may encounter in the course of their professional career⁷. The French government nevertheless argued that granting the credit exclusively to female civil servants who had brought up children was intended to acknowledge a social reality: the particular disadvantage suffered by women in the course of their professional careers given the dominant role assigned to them in raising children, even if they did not stop working in order to look after them, which explained why women received lower pensions than men – something the credit sought to offset.

3) Determining the category of workers within which to perform the comparison

When determining the category of workers within which a comparison of situations has to be performed, one of the first requirements is to identify the employer. The Court of Justice requires the worker to be employed by the same company as the comparator (ECJ, 13 Jan. 2004, Allonby, C-256/01, about a lecturer dismissed and then re-employed through an agency). This solution is founded on the idea that whoever originated the inequality should be in a position to remedy it. The drawback to this is that it authorises the employer to restructure forms of employment in order to escape the demands of non-discrimination.

⁷ In the Court's view, it is significant in this context that, although the measure dates back to 1924, it has, to this day, still not been possible to resolve, by means of that provision, the problems which such a female civil servant may encounter in her career.

Like it or not, this effect of company restructuring limits the reach of the gender equality principle. When, for example, schools outsource cleaning and catering, tasks carried out by women, the female workers retained by the sub-contractor are quite likely to be paid less than they were by their previous employer (ECJ, 17 Sep. 2002, Lawrence, C-320/00). Although, according to the Court, the applicability of the equal pay rule provision in the Treaty is not confined to situations where men and women are doing the same work for the same employer, if differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment. The work and pay of those workers cannot, therefore, be compared with a view to verifying compliance with the equal pay requirement (ECJ, Lawrence, cited above).

These examples demonstrate the limits of the non-discrimination rule once it can be bypassed by organising employment in a manner that enables the employer's responsibilities to be compartmentalised. This does not only apply when direct employment is substituted by other arrangements involving a third-party as the employer, who then takes responsibility for paying wages and for the terms of employment. An employer may also attempt to escape the obligation not to discriminate by creating legally distinct companies or establishments which can, in particular, negotiate wages separately with trade unions.

However, when asked to accept a difference in employment conditions, the Court of Justice will not be satisfied by the argument that negotiations were conducted separately. In the Enderby case cited above, the employer had raised this argument in an effort to justify paying speech therapists, for the most part women, less than pharmacists and psychologists employed in the same establishment. According to the Court: "the fact that the respective rates of pay of two jobs of equal value, one carried out almost exclusively by women and the other predominantly by men, were arrived at by collective bargaining processes which, although carried out by the same parties, are distinct, and, taken separately, have in themselves no discriminatory effect, is not sufficient objective justification for the difference in pay between those two jobs".

4) A lack of workers of the other sex

If no worker of the other sex belongs to the group within which the comparison is to be performed, Union law provides that the comparison may be drawn with a past situation (a previously employed worker) or a hypothetical one. Article 2 of Directive 2006/54 defines direct discrimination as occurring where one person is treated less favourably on grounds of sex than another **is, has been or would be** treated in a comparable situation. It follows that we can approach the comparability of situations diachronically; the exercise can be performed using elements from successive situations.

The phrase "has been" refers to past situations, such as successive incumbents in the job. To echo the terms used by the Court of Justice of the European Communities in a judgment that dates back quite some time (ECJ, 27 May 1980, Macarthys Ltd v Wendy Smith, C-129/79), "the principle of equal pay for equal work is not confined to situations in which men and women are contemporaneously doing equal work for their employer but, on the contrary, that principle also applies where a worker can show that she receives less pay in respect of her employment than she would have received if she were a man doing equal work for the employer or than had been received by a male worker who had been employed prior to her period of employment and who had been doing equal work for her employer".

In the case of a hypothetical comparator, the problem resides in the task of combining all the elements needed to be able to show that someone would have been better treated. That means taking into account contextual factors (for example, a sexist question or comment during the job interview or

statistics demonstrating a gender imbalance) and making reference to the situation of persons of the other sex in circumstances which (if not identical or similar) betray some affinity, or else referring to normal or customary practices/measures by comparison with what actually occurred. When performing hypothetical comparisons, it may be useful to draw on what are known as discrimination testing procedures, especially when domestic law admits these as evidence⁸.

III- The specifics of comparing pay situations

In Union law, the prohibition of gender discrimination is primarily envisaged by the Treaty with regard to pay: the oldest requirement enshrined in primary law relates to equal pay for men and women. However, wide pay gaps persist, and this issue of the gender pay differential remains one of the key concerns of European social policy. This is partly to do with the specific problems which arise when implementing the equal pay principle. Apart from some fairly narrow aspects, such as pay scheme transparency, which should be mentioned before proceeding further, the biggest difficulty relates to comparing the value of work performed by men and women when the two sexes are not doing identical jobs.

1) Pay structure transparency

The lack of transparency around pay schemes can pose an insurmountable hurdle to equal pay. To tackle this, the Court of Justice considers that a gender pay differential resulting from a non-transparent pay scheme can be seen as an “unfavourable effect”, which allows a presumption of indirect discrimination (cf. notably ECJ, *Danfoss*, cited above). The Court says that if a pay scheme completely lacks transparency, it is up to the employer to prove that his wage policy is not discriminatory if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men.

For example, if two groups are performing work considered to be of equal value, but individual pay varies depending on each worker’s output, it might be concluded that there should be a presumption of discrimination if there is no transparency, that is, if it is not possible to identify the factors which determined the rates or units of measurement used to calculate the variable element in the pay (ECJ, *Royal Copenhagen*, 31 May 1995, C-400/93).

The concern for transparency is also reflected in the choice of an analytical method for comparing advantages, rather than a global approach: “As regards the method to be used for comparing the pay of the workers concerned in order to determine whether the principle of equal pay is being complied with, genuine transparency permitting an effective review is assured only if that principle applies to each aspect of remuneration granted to men and women, excluding any general overall assessment of all the consideration paid to workers” (cf. notably ECJ, 27 May 2004, *Elsner-Lakeberg*, C-285/02). It is also necessary, for example, to carry out separate comparisons “in respect of the pay for regular hours and the pay for additional hours”.

2) Determining the value of work

In occupations where there is a predominance of one or the other sex, or when most jobs are held by members of one or the other sex, there is a risk that comparing the situation of men with that of women doing “the same work” will be impossible. The phenomenon of gender segregation encourages the pay gap, making it impossible to compare a worker with someone of the other sex doing the same job. This

⁸ In France, the Cour de cassation recognised the evidential value of discrimination testing in a ruling of 11 June 2000, and its validity in criminal law was subsequently endorsed by the Equal Opportunities Act (Law no. 2006-396) of 31 March 2006.

calls for the far more complicated comparison of jobs of “equal value”. As the Court pointed out in the Enderby case above, which presented a fine example of occupational segregation, this comparison of “jobs of equal value” has to be undertaken if jobs are not the same.

In the Nikoloudi case (above), national law was itself the reason why an occupational category had been confined to women: in a Greek public company, only women can be hired as part-time cleaners. As a consequence, obviously, there is no man within the company doing the same work as the woman claiming discrimination. That is no obstacle to applying the principle of equal pay, as “the work which may serve as a comparison need not be the same as that carried out by the person who invokes that principle of equality in his favour”. It is for the national court to determine whether, **in the light of facts relating to the nature of the work done and the conditions in which it is carried out, work of equal value to that performed by the female worker exists in the company.**

Determining as much calls for studies designed to evaluate the respective tasks of men and women. For example, in the Lawrence case (ECJ, 17 Sep. 2002, C-320/00), women workers drew on a national study of occupational tasks to show that their work (cleaning and catering in schools) was of equal value to that of men performing tasks such as gardening, picking up litter and cleaning drains.

In the case-law of the Court, the concepts “same work”, “same job” and “work of equal value” are purely qualitative, in that they are applied exclusively to the **nature of the tasks** actually carried out by those concerned (cf. for example ECJ, Macarthys, above, and 1 July 1986, Rummler, 237/85). This consideration of the nature of the tasks carried out has now been complemented by taking into account other aspects of the worker’s situation. To assess whether workers are performing the same work or work to which equal value can be attributed, it is necessary to examine whether these workers, taking into account a **range of factors such as the nature of the work, the training requirements and the working conditions**, can be considered to be in a comparable situation (cf. notably ECJ, 31 May 1995, Royal Copenhagen, C-400/93).

This jurisprudence has now been reflected in the preamble to Directive 2006/54 (recital 9): “In accordance with settled case-law of the Court of Justice, in order to assess whether workers are performing the same work or work of equal value, it should be determined whether, having regard to a range of factors including the nature of the work and training and working conditions, those workers may be considered to be in a comparable situation.”

This general formulation has been fine-tuned on a number of occasions with regard to the criteria for evaluating jobs.

The application of the criterion of physical strength, for example, has been contested (ECJ, 1 July 1986, Rummler, C-237/85). There, the Court of Justice did not rule out the use of such a criterion, which it found “objective”, and it ruled that a system is not necessarily discriminatory simply because one of its criteria makes reference to attributes more characteristic of men. But it added that, in order not to be discriminatory, a classification must be established in such a manner that it includes, if the nature of the tasks in question so permits, jobs to which equal value is attributed and for which regard is had to other criteria in relation to which women workers may have a particular aptitude. This ruling was based on the idea that the pay scheme as a whole must offer men and women the same wage opportunities. This solution does, however, seem to have been undermined by later judgments. In the Danfoss judgment (above), for example, the Court of Justice does not insist that pay policy be structured in such a way as to ensure the same outcomes for men and women. On the contrary, it requires that the criteria applied by the employer be examined one by one to verify whether they objectively justify a pay differential.

The Danfoss judgment is particularly interesting in that it scrutinises a number of criteria for assessing the value of work. It says, in particular, that a wage practice that specifically rewards adaptability to variable hours and varying places of work can be justified if the employer shows that such adaptability is of importance for the performance of the specific tasks which are entrusted to the employee, even if “the employee’s adaptability to variable hours and varying places of work, the criterion of mobility, may also work to the disadvantage of female employees, who, because of household and family duties for which they are frequently responsible, are not as able as men to organise their working time flexibly”.

The Court likewise recognises that the training criterion may work to the disadvantage of women workers “in so far as they have had less opportunity than men for training or have taken less advantage of such opportunity”, but the employer may nevertheless justify remuneration of special training “by showing that it is of importance for the performance of specific tasks entrusted to the employee”.

As for the criterion of length of service, there is a prejudice in its favour: the Court acknowledges that “it is also not to be excluded, as with training, that it may involve less advantageous treatment of women than of men in so far as women have entered the labour market more recently than men or more frequently suffer an interruption of their career”. However, it associates length of service with experience, and “since experience generally enables the employee to perform his duties better, the employer is free to reward it **without having to establish the importance it has in the performance of specific tasks entrusted to the employee**”.

So, as we see, there is some variation in requirements when it comes to applying evaluation criteria which have the effect of placing women at a disadvantage. Length of service is cited in the Danfoss judgment as being beyond dispute: as the Court says, “the employer does not have to provide special justification for recourse to the criterion of length of service”. Length of service is of a nature that justifies a difference in pay, whatever the nature of the tasks performed. However, although it was not overturned, this questionable solution has been subject to greater nuance in more recent case-law. In the Cadman ruling (3 Oct. 2006, C-17/05), the Court allows that it is not excluded that, in certain situations, the employer will need to justify recourse to the length-of-service criterion, depending on the circumstances. That is so, in particular, where the worker provides evidence capable of giving rise to serious doubts as to whether recourse to the criterion of length of service is, in the circumstances, appropriate to attain the objective concerned. It is in such circumstances for the employer to prove that that which is true as a general rule, namely that length of service goes hand in hand with experience and that experience enables the worker to perform his duties better, is also true as regards the job in question.

In the Brunnhofer judgment (ECJ, 26 June 2001, C-381/99), a question was raised about whether being classified in the same job category under a collective agreement but not doing the same job (the male worker was responsible for important customers and was authorised to enter into binding commitments on behalf of the employer, whereas the female worker supervised loans, had less contact with clients and could not enter into commitments directly binding her employer) constituted evidence that they were performing the same work or work to which equal value is attributed. For the Court, belonging to the same job category was not sufficient. As a matter of evidence, the general indications provided in the collective agreement must in any event be corroborated by precise and concrete factors based on the activities actually performed by the employees concerned. It must be ascertained whether, **when a number of factors are taken into account, such as the nature of the activities actually entrusted to each of the employees in question, the training requirements for carrying them out and the working conditions in which the activities are actually carried out**, those persons are in fact performing the same work or comparable work.

In the same spirit, the Court of Justice was consulted about the respective value of the work done by psychotherapists with a doctorate in psychology and doctors employed as psychotherapists (ECJ, Angestelltenbetriebsrat der Wiener Gebietskrankenkasse, 11 May 1999, C-309/97). The psychotherapists, a category of practitioners with a majority of women, had been granted a lower salary. An application to classify them in the same job category as the doctors was based on the training and duties of psychologists engaged in psychotherapy, who also work in the therapy sector (performing the same psychotherapeutical work). The Court argued that, although the psychologists and doctors working as psychotherapists performed seemingly identical activities, in treating their patients **they drew upon knowledge and skills acquired in very different disciplines**, the expertise of psychologists being grounded in the study of psychology, that of doctors in the study of medicine. Moreover, the doctors were qualified to perform other tasks in a field not open to the psychologists, who were only permitted to perform psychotherapy. In those circumstances, the Court ruled that two groups of persons who have received different professional training and who, because of the different scope of the qualifications resulting from that training, on the basis of which they were recruited, are called on to perform different tasks or duties, cannot be regarded as being in a comparable situation.

As this case-law shows, establishing the equal value of work poses a formidable obstacle in the path of equal pay for men and women. It will not be overcome simply within a framework of judicial technique and litigation. It cannot be left to the courts to assess the value of work: this task has to be performed upstream, in a process which brings together the various stakeholders at the level concerned⁹.

⁹ For more on this, see S. Lemièrre et R. Silvera, Comparer les emplois entre les femmes et les hommes, De nouvelles pistes vers l'égalité salariale, La documentation française, Paris, 2010.