

Leigh Day

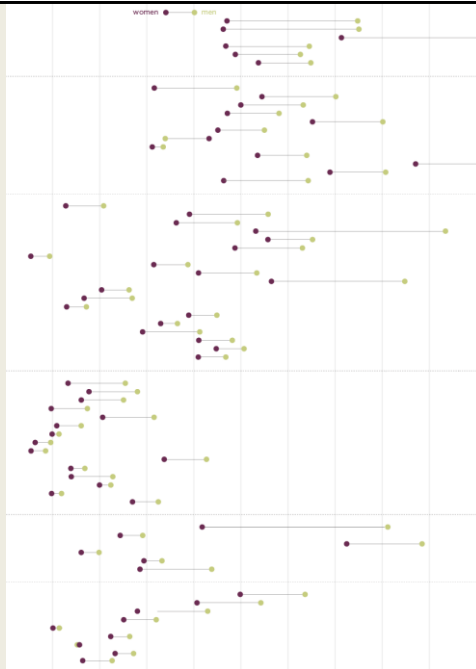
EU Gender Equality Law
Workshop II: case study on equal
pay

Michael Newman
Solicitor, England & Wales

WOMEN
Like men,
only cheaper.



Leigh Day



**Play a
data
game!
Spot the
jobs
where
women
are paid
more
than
men.**

Leigh Day

International legal framework

- Universal declaration of Human Rights 1948 Article 23
- ILO Convention on Equal Remuneration 1951 (C100)
- UN Convention on Economic Social and Cultural Rights 1966 Article 7
- UN Convention on the Elimination of all forms of Discrimination against Women (CEDAW) 1979 Article 11

Leigh Day

Causes of the gender pay gap

- Occupational segregation – historical/ stereotyping
- Undervaluing women's work
- Underrating the complexity of women's work
- Historical focus on male pay in collective bargaining
- Discrimination and lack of transparency in pay systems

Leigh Day

Causes of the gender pay gap

- Impact on women's pay of having children
 - Discrimination towards women returning from maternity leave
 - Part time work
 - Low quality work
 - Lower pay overall
 - Pension schemes and discrimination
 - Reality of flexible working systems

Leigh Day

EU Legal framework

- Equal pay as a core principle of the European Union
 - Article 119 Treaty of Rome 1957 (later Article 141)
 - Code of Practice on Implementation of Equal Pay (1996)
- Since 2009 incorporated into the Treaty on the Functioning of the European Union (TFEU), Article 157 – direct effect
- EU Charter of Fundamental Rights Article 23 requires that “Equality between women and men must be ensured in all areas including employment, work and pay”

Leigh Day

EU Legal framework

- Equal pay is a foundation of Community law

Advocate General Maduro (*Cadman v HSE* 2006 ECJ C-17/05)

Each member state shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied (art 157 TFEU)

Leigh Day

EU Legal framework

- Member state must take all appropriate measures to ensure fulfilment of the obligations arising out of the treaty (Art 4 TFEU)
- The right to equal pay is directly effective, enforceable against private individuals and states – *Defrenne v Sabena* 1976 ECJ 43/75

Leigh Day

EU Legal framework

- EU prevails over domestic law where the latter is less favourable – *Barber v Guardian Royal Exchange Assurance Group* 1990 ECJ
- EU law does not prevent a member state conferring greater rights to equal pay – such as rules on burden of proof being more favourable

Leigh Day

EU Legal framework

- Equal Pay is to be achieved immediately, not progressively.
- Defences are NOT a list of potential excuses for the gender pay gap

Leigh Day

Equal Pay Directive (75/117) Application of the principle of equal pay for men and women

- The principle means that for the same work or work to which equal value is attributed the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration
- In particular, where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and so drawn up so as to exclude and discrimination on grounds of sex. (Art 1; now in recast Directive)

Leigh Day

Ensuring effective application of the principle means...

- Providing means of legal redress
- Abolishing any pay discrimination arising from laws, regulations or administrative provisions
- Providing that terms contrary to the equal pay principle in collective agreements, wage scales, wage agreements or individual contracts, may be amended or nullified
- Protection from dismissal for enforcement of the right to equal pay

Leigh Day

Recast Equal Treatment Directive 2006/54

- Consolidates seven measures including
 - Equal pay directive
 - Equal treatment in employment Directives
 - Equal Treatment in occupational social security directives
 - Burden of proof directive
 - Incorporates the principles derived from CJEU case law
 - Encourages action to address gender pay gap

Leigh Day

What is Pay?

- Article 157 means
 - The ordinary basic minimum wage or salary and
 - any other consideration
 - whether in cash or in kind
 - which the worker receives directly or indirectly in respect of that employment
 - from the employer
 - This includes contractual and non contractual terms

Leigh Day

CJEU interpretation of pay

- Piecework – *Royal Copenhagen* 1996
- Bonuses – contractual and non-contractual, immediate or future – *Lewen v Denda C-333/97*; *Kreuger*
- Pay Increases – *Nimz* 1991
- Sick pay – *Rinner-Kuhn* 1989; *Pederson* 1999
- Maternity pay – *Gillespie* 1996; *Alabaster* 2005; *Abdoulaye C-218/98*
- Travel Allowances – *Botel* 1992
- Redundancy payments – *Barber* 1990

Leigh Day

CJEU interpretation of pay

- Unfair dismissal compensation – *Seymour-Smith* 1999
- Occupational Pensions – *Barber* 1990; *Bilka- Kaufhaus* C-170/84
(with an exception for additional voluntary contributions – *Coloroll* C-2000/91)
- Bridging allowance – *Hlozek* C-19/02
- Equal treatment in occupational social security schemes see recast ETD directive 2006/54/EC art 5-13

Leigh Day

CJEU interpretation of pay

- Pay is different to other working conditions – *Lommers* 2002 regarding subsidised nursery facilities
- Comparison of pay must be term by term – *Jämställdhetsombudsmannen* C-236/98

Leigh Day

Who is covered?

- “a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration”
CJEU 66/85 *Lawrie-Blum*
- The term worker should not be interpreted restrictively – *Allonby* C-256/01
- Provisions of Dir 2006/54 – employment; self employment and occupation - applicable to all groups?
- Trainees and apprentices

Leigh Day

Comparators

- Opposite sex
- Must be in a comparable situation – *Cadman v Health and Safety executive* C-17/05
- In the same establishment or service – *Defrenne II* at 22
- Different employer but single source of determination of pay - *Lawrence v Regent Office Care Ltd* C-320/00; *Voss* C-300/06
- Employment at the same time or at a different time – *McCarthy v Smith* 1980

Leigh Day

What is work of Equal Value?

- Work where the component parts of different jobs can be compared by scoring factors which are gender-neutral such as
 - Skill and expertise and training required
 - The working conditions
 - Physical ability and effort (as long as not discriminatory, muscular effort to be balanced against manual dexterity – *Rummler C-237/85*)

Leigh Day

What is work of Equal Value?

- Mental ability
- Management factors (including stress)
- Professional training
- Intellectual ability
- Handling money
- Dealing with the public

Leigh Day

CJEU approach

- Classification in the same job category will not be enough
- It is for national courts to determine whether on the facts jobs are of equal value:
Brunnhofer C-381/99
- Can mean the job is of greater value: *Murphy 1988*
- BUT and equal pay claim cannot be dependant upon the existence of a job evaluation scheme: *EC v UK 1982*

Leigh Day

Proving gender pay discrimination

- Burden of proof Directive applies
- Where a pay system lacks transparency and evidence that women are paid less on average than within an organisation, employer must show that not discriminatory – *Danfoss C-109/88*

Leigh Day

Proving gender pay discrimination

- Woman is paid less than comparable man because she is a woman
- An apparently gender neutral criterion or practice adversely impacts on women;
- Where cogent, relevant and sufficiently compelling statistics demonstrate that women suffer disparate impact compared to men

Leigh Day

Proving gender pay discrimination

- Where valid statistics disclose an appreciable difference in pay between jobs of equal value, where one done predominantly by women and one by men, there is a prima facie case of discrimination; *Enderby C-127/92*

Leigh Day

Proving gender pay discrimination

- A pay system which discriminates against women will be unlawful, unless it is justified by the employer on objective economic grounds – *Rinner-Kuhn* 1989.
- Good industrial relations is a possible justification, subject to the overall principle of non-discrimination *Kenny* C-427/11

Leigh Day

Justification of discriminatory pay measures

- Article 2(1)b of Recast Directive
- Provision, criteria or practice is objectively justified by a **legitimate aim**, and the means of achieving that aim are **appropriate** and **necessary**
- **Enderby**: only the part of the difference in pay that is attributable to the need to attract suitable candidates is objectively justified

Leigh Day

Remedies for Pay Inequality

- Immediate – cannot delay for reasons of cost (although transitional arrangements are possible if objectively justified *Smith C-28/93*)
- Levelling up of pay *C-231/06 Jonkman*
- Awarding of arrears – *Levez 1999*
- Access to pension schemes can be backdated *Defrenne II C-43/75*

Leigh Day

Leigh Day

EU Gender Equality Law
Workshop II: case study on equal
pay

Michael Newman
Solicitor, England & Wales