



Equal pay for work of equal value

EU legal framework and CJEU case law

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BOY OR GIRL, EQUAL OPPORTUNITIES?

These babies are born with equal opportunities, but the educational and career expectations for boys and girls are different. By the time they grow up, the boy will be earning on average around 16 % more than the girl.



The gender pay gap

“The gender pay gap is the difference in average gross hourly wage between men and women across the economy. The average gender pay gap in the EU is 16.3 %” Eurostat 2013

http://ec.europa.eu/justice/gender-equality/files/gender_pay_gap/gpg_eu_factsheet_2015_en.pdf

“The effective application of EU law on equal pay at national level currently remains one of the biggest challenges and is crucial for tackling the pay discrimination and gender pay gap effectively”

http://ec.europa.eu/justice/gender-equality/gender-pay-gap/eu-action/index_en.htm

European Commission

Statistics across the EU

From the new Eurostat estimates (based on the Structure of Earnings survey), it appears that there are considerable differences between the Member States in this regard, with the gender pay gap ranging from less than 10% in Slovenia, Malta, Poland, Italy, Luxembourg and Romania, to more than 20% in Hungary, Slovakia, the Czech Republic, Germany and Austria, and reaching 30% in Estonia.

The gender overall earnings gap is the difference between the average annual earnings between women and men. It takes into account three types of disadvantages women face: lower hourly earnings; working fewer hours in paid jobs; and lower employment rates (for example when interrupting a career to take care of children or relatives).

The average gender overall earnings gap in the EU is 41.1 %.

Eurostat 2010

Why such a gap?

- The pyramid structure – far fewer women in senior and leadership positions
 - Management and supervisory positions are overwhelmingly held by men.
 - Promotion and sector differences - within each sector men are more often promoted than women, and paid better as a consequence. This trend culminates at the very top, where amongst Chief Executive Officers (CEOs) less than 4 % are women.
- Unpaid work in society - women take charge of important unpaid tasks
 - household work, family responsibilities, caring for children or relatives on a far larger scale by women than men.
 - Care and household work - working men spend on average 9 hours per week on unpaid care and household activities, while working women spend 26 hours – that's almost 4 hours every day.
 - Career breaks from paid work - women tend to spend periods off the labour market more often than men. These career interruptions not only influence hourly pay, but also impact future earnings and pensions.

Some further reasons for the gap

- Part-time hours
 - in the labour market this is reflected by the fact that more than 1 in 3 women reduce their paid hours to part-time, while only 1 in 10 men do the same.
- Segregation in education and in the labour market
 - this means that in some sectors and occupations, women tend to be overrepresented, while in others men are overrepresented. In some countries, occupations predominantly carried out by women, such as teaching, sales, nursing and care professions, offer lower wages than occupations predominantly carried out by men, even when the same level of experience and education is needed.
- Pay discrimination in the workplace (direct and indirect)
- Workplace practices and pay systems (lack of transparency)
- Historical cultures and practices
- Undervaluing women's work and skills ("female skills")



Equality - a universal right

- Equality before the law and protection against discrimination is a universal right: Universal Declaration of Human Rights
- All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Article 1
- All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination. Article 7



Article 23

Universal Declaration of Human Rights

- (1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
- (2) Everyone, without any discrimination, has the right to equal pay for equal work.
 - (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
- (4) Everyone has the right to form and to join trade unions for the protection of his interests.

International framework

- Universal Declaration of Human Rights 1948
- International Labour Organisation (ILO) Convention on Equal Remuneration 1951 (C100)
- United Nations Convention on Economic, Social and Cultural Rights 1966 Article 7
- United Nations Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) 1979 Art.11

EU framework

- Equal pay = core principle Art 119 treaty of Rome (later Art 141)
- Treaty on the Functioning of the European Union “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
- EU Charter of Fundamental Rights “Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.” Art 23
- *Cadman v Health & Safety Executive* ECJ-C17/05

How is the principle of equality implemented and safeguarded?

- Member states 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 C43/75

The principle - Equal Pay directive 75/117/EEC

- Previously Council Directive 75/117/EEC of 10 February 1975 relating to the application of the principle of equal pay for men and women.
- Repealed by Council Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) – the Recast Directive 2006/54/EC.
- 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 - now Article 4 Recast Directive 2006/54/EC
- 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 Art 4 in Recast Directive)

Recast Equal Treatment Directive

What does it do?

- Directive **2006/54/EC** of 5 July 2006 the “**Recast Directive**” consolidates 7 measures including
 - Equal pay directive
 - Equal treatment in employment directives
 - Equal Treatment in occupational social security directives
 - Burden of proof directive
- Also, incorporates the principles derived from CJEU case law and
- Encourages action to address gender pay gap

The Recast Directive

- “The principle of equal pay for equal work or work of equal value as laid down by Article 141 of the Treaty and consistently upheld in the case-law of the Court of Justice constitutes an important aspect of the principle of equal treatment between men and women and an essential and indispensable part of the *acquis communautaire*, including the case-law of the Court concerning sex discrimination. It is therefore appropriate to make further provision for its implementation. Recital (8)
- 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. (9)
- The Court of Justice has established that, in certain circumstances, the principle of equal pay is not limited to situations in which men and women work for the same employer. (10)
- The Member States, in collaboration with the social partners, should continue to address the problem of the continuing gender-based wage differentials and marked gender segregation on the labour market by means such as flexible working time arrangements which enable both men and women to combine family and work commitments more successfully. This could also include appropriate parental leave arrangements which could be taken up by either parent as well as the provision of accessible and affordable child-care facilities and care for dependent persons. (11)

Article 1 of the Recast Directive

Purpose

The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

To that end, it contains provisions to implement the principle of equal treatment in relation to:

- (a) access to employment, including promotion, and to vocational training;
- (b) working conditions, including pay;
- (c) occupational social security schemes.

It also contains provisions to ensure that such implementation is made more effective by the establishment of appropriate procedures.

See Article 2 for the definitions of direct and indirect discrimination

Article 4 of the Recast Directive

Equal pay

Prohibition of discrimination

For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated.

In particular, where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.

How is it effected?

- EU prevails over domestic law where the latter is less favourable *Barber v Guardian Royal Exchange Assurance Group* 1990 ECJ C-262/88
- EU law does not prevent a member state conferring greater rights to equal pay – rules on burden of proof more favourable to employees
- Equal pay a right to be achieved with immediacy not progressively. The employer has defences - not excuses.

Equal pay

“The principle that men and women should receive equal pay, which is laid down by Article 119, is one of the foundations of the Community. It may be relied on before the national courts. These courts have the duty to ensure the protection of the rights which that provision vests in individuals. [...]” [Defrenne II C-43/75]

“The economic aim pursued by Article 119 of the Treaty (157 TFEU), namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right”
[Schröder C-50/96]

Effective application

- Providing means of legal redress -*Preston v Wolverhampton Healthcare NHS Trust C-78/96*
- 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

What is pay?

A broad concept

“pay’ means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer”

TFEU 157(2) and Recast Directive Article 2(1)

CJEU case law

- *Rinner-Kühn* - C-171/88, *Pederson* C-66/96 - sick pay
- *Barber* C-262/88 - company pensions
- *Lewen v Denda* -C-33/97 – Christmas bonus, contractual and non-contractual pay
- *Griesmar* C-366/99 - civil servant pensions
- *Kowalska* C-33/89 - severance grant paid upon termination of contract

CJEU case law on pay

- *Royal Copenhagen C-400/93*- piecework
- *Kreuger C281/97* - bonus
- *Nimz C184-89* -pay Increases
- *Gillespie C342-93 Alabaster C-147/02 Abdoulaye C-218/98* - sick pay, maternity pay
- *Botel C-360/90* - travel allowances

A broad interpretation

- Unfair dismissal compensation *Seymour-Smith* C-167/97
- Occupational pensions, equal treatment in occupational social security schemes see Recast ETD Directive 2006/54/EC Art 5-13 - *Barber* C-262/88 & *Bilka-Kaufhaus* C-170/84
- Pay is different to other working conditions - *Lommers* C-476/99 subsidised nursery facilities = working condition
- Comparison of pay must be term by term - *Jamstalldhetsombudsmannen* C-236-98

Who is covered?

- “Worker” not to be interpreted restrictively *Allonby C-256/01*
- Exclusion of part time workers from benefits can contravene -*Nikoloudi v Organismos Tilepikinonion Ellados AE C-196/02*
- Provisions of Recast Directive 2006/54 – services for and under the direction of another for remuneration - employment; self employment and occupation
- Trainees and apprentices

Who is the comparator?

- Opposite sex
- Comparable situation – *Cadman*
- Same establishment or service – *Defrenne II C-43/75* at 22
- Different employer but single source for determination of *pay* - *Lawrence v Regent Office Care Ltd C-320/00*
- Employment at the same time or at a different time
McCarthy v Smith C-129/79
- Multiple comparators possible - *Enderby C-127/92*
- No need for comparator when discrimination derives from national law - *Allonby C-256/01*

Equal work or work of equal value

- “48. It is necessary to ascertain 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 in the case, 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.
- 49. It is for the national court, which alone has jurisdiction to find and assess the facts, to determine whether, in the light of the actual nature of the activities carried out by those concerned, equal value can be attributed to them” Brunnhoffer C-381/99
- Cadman C-17/05 – seniority
- Danfoss C-109/88 - degrees and training, working flexibility
- Rummler C-237/85 – physical effort

How to compare?

- 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 – *Rummler*)
 - Mental ability:
 - Management factors
 - Intellectual ability

Work evaluation?

- Classification in the same job category will not be enough – must be the same criteria
- It is for the national courts to decide whether on the facts the jobs are of equal value
- An equal pay claim cannot be dependant upon the existence of a job evaluation scheme *EC v UK C-320/00*

Burden of proof

Who proves what?

“Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, 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.” Art 19 Recast Directive

Why so essential?

“[13] It should next be pointed out that in a situation where a system of individual pay supplements which is **completely lacking in transparency** is at issue, female employees can establish differences **only so far** as average pay is concerned. They **would be deprived of any effective means** of enforcing the principle of equal pay before the national courts if the effect of adducing such evidence was not to impose upon the employer the burden of proving that his practice in the matter of wages is not in fact discriminatory.

[14] Finally, it should be noted that under Article 6 of the Equal Pay Directive member-States must, in accordance with their national circumstances and legal systems, take the measures necessary to ensure that the principle of equal pay is applied and that effective means are available to ensure that it is observed. **The concern for effectiveness which thus underlies the directive** means that it **must be interpreted as implying adjustments** to national rules on the burden of proof in special cases where such adjustments are necessary for the effective implementation of the principle of equality.” *Danfoss C-109/88*

An essential tool....

Enderby v Frenchay Health Authority C-127/92

“[13] It is normally for the person alleging facts in support of a claim to adduce proof of such facts. Thus, in principle, the burden of proving the existence of sex discrimination as to pay lies with the worker who, believing himself to be the victim of such discrimination, brings legal proceedings against his employer with a view to removing the discrimination.

[14] However, it is clear from the case law of the Court that the onus may shift when that is necessary to avoid depriving workers who appear to be the victims of discrimination of any effective means of enforcing the principle of equal pay. Accordingly, when a measure distinguishing between employees on the basis of their hours of work has in practice an adverse impact on substantially more members of one or other sex, that measure must be regarded as contrary to the objective pursued by **Article 119** EEC, unless the employer shows that it is based on objectively justified factors unrelated to any discrimination on grounds of sex. Similarly, where an undertaking applies a system of pay which is wholly lacking in transparency, it is for the employer to prove that his practice in the matter of wages 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.”

How to prove?

- Has the woman been paid less than her male comparator because she is a woman?
- Is there an apparently gender neutral criterion or practice which adversely impacts on women?
- Is there cogent, relevant and sufficiently compelling statistical evidence to demonstrate that women suffer disparate impact compared to men?
- Where valid statistics disclose an appreciable difference in pay between jobs of equal value, where one job is done predominantly by women and one by men, there is a prima facie case of discrimination - *Enderby*

When will a pay gap be justified?

- A pay system which discriminates against women will be unlawful, unless it is justified by the employer on objective economic grounds *Rinner-Kuhn C-171-88*
- Provision, criteria or practice is objectively justified by a **legitimate aim**, and the means of achieving that aim are **appropriate** and **necessary** Art 2 (1) b of the Recast Directive

What are the remedies available to the victim?

- Immediate instatement of the pay difference – an employer cannot delay for reasons of cost
- Equalisation of pay - levelling up
- Awarding of arrears – *Levez C-326/96*
- Access to pension schemes can be backdated *Defrenne v Sabena No 2*

So how do we change the statistics? How do we eliminate the pay gap?

- European Commission - Strategic Engagement for Gender Equality 2016-2019
- Awareness and commitment by all, across the labour market and society, to equality of pay
- Strategies in the workplace to address pay inequality
- Securing increased transparency in pay
- Requiring equal pay audits and reviews
- Revaluing “women’s work”
- Positive action to reduce occupational segregation
- Improved support for equal sharing of care between women and men
- Reduced wage inequality overall
- Actions by equality bodies



Thank you for listening!

