
Gender pay gap and job evaluation.

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Gender pay gap in Europe

- Gender annual gross remuneration gap ranging from 5,5 % in Italy to 26,9 % in Estonia for an average of 16,1%
 - Gender hourly base wage gap (based on occupied job) (without bonus, salary supplement...) : 16,3%
 - Men and women do not occupy the same jobs
 - Men and women do not have the same careers
 - There are biases in the parameters used to attribute value to jobs and employees
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- These measures reflect the overall occupational differences between men and women:
 - Diploma and type of work (horizontal)
 - Type of firms
 - Employment contract,
 - Impact of maternity and family
 - Working time
 - Stereotypes and traditions
 - Career and vertical positioning

Decompose the wage gap into two components :

1. Structural Gap explained by differences in average individual characteristics or employment (diploma, job, activity sector, kind of firms ...): 6% (6 of 16%).
2. Residual Gap "all things being equal " (the unexplained gap): 10 % .

Equal Pay between Men and Women

- Article 2 ILO Convention no 100 of 1951
- Article 157 TFEU (119 EEC Treaty (1957) – 141 EC)
- Directive 75/117 relating to Equal Pay
- Directive 2006/54 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)

Recital 8:

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.

Definition of direct discrimination:

Article 2 par 1.

where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;

Definition of indirect discrimination

Where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary

Article 4

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.

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.

ECJ 8 April 1976 Defrenne C-43/ 75

- The principle of equality of remuneration of article 119 can be invoked before national jurisdictions and must be applied to sanction discrimination related to national law but also to collective agreements
- Directive 75/117 provides precisions as to the material reach of article 119, but does not hinder the direct effect of article 119
- The national legislator does not have exclusive competence to implement equal pay

ECJ 17 October 1989, Danfoss C-109/88

- Collective agreement foresees that salary scales can be increased by the employer on the basis of :
 - flexibility,
 - professional training, and
 - seniority
- The average salary of men is 6,85 % higher
- No information on how these rules are implemented

Danfoss

- A remuneration system characterised by a lack of transparency resulting in average inferior remuneration of women is presumed to be discriminatory
- The lack of transparency precludes access to evidence
- The employer has the burden to prove that his practice is not discriminatory
- Must establish how the grounds were applied:
 - Objective
 - Non discriminatory
 - Proportionate

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□ Flexibility

- If corresponds to an evaluation of **quality** that is not favourable to women, it is abusive
- It corresponds to **adaptability** to schedules and work places ,
- the employer must further establish
- Its particular value to the specific work of the employee

Danfoss

- Professional Training
- It can carry a value if the employer establishes that a particular training has a particular value for the execution of the employee's functions.

ECJ, 27 October 1993, Enderby C-127/92

- Difference of remuneration between two job of comparable value related to salary levels and classifications in a public health collective agreement:
 - Speech Therapist (female)
 - Pharmacists (male)
- Apparent discrimination on the basis of statistics of the presence of male and female in each job category

Enderby – collective bargaining

- Employer must show that objective reasons justify the difference in remuneration
- The fact that they are the result of collective bargaining is not a justification since collective agreements must respect the principle of equal treatment
- The fact that each bargaining process did not take into account discriminatory considerations is not a justification either

Enderby – Tensions on the labour market

- The insufficient number of professionals explaining their high value on the market cannot be presumed
- The employer has the burden to justify the reality of the pressure of the labour market and the court must appreciate the proportionality of its impact in each situation

ECJ, 26 June 2001, Brunnhofer C-381/99

- Plaintiff complains that a male colleague hired 1 years after her at the same level benefits from a higher premium, negotiated at the time of his employment.
- She was dismissed after 4 years because of problems that had appeared before her male colleague was even hired
- The bank invokes the quality of plaintiff's work

Brunnhofer

- The Bank cannot invoke the quality of plaintiff's work or elements related to the performance of the employment contract to justify unequal pay fixed at the time of hire
- The fact of being hired at the same level of classification is insufficient to establish that both employees execute comparable work.
- Elements that are not taken into account by the collective agreement may be taken in consideration if they are objective, non discriminatory and proportionate

Brunnhofer §43

- Definitions of comparable situations:

Test: taking into account of a number of factors such as the nature of the work, the training requirements and the working conditions, whether those persons can be considered to be in a comparable situation

ECJ 1st July 1986 C-237/85

Gisela Rummler

- Classification system based on physical effort taking into account muscular fatigue and physical strain
- Factors establishing the value of work related to the average work performance of employees of one sex, outside any general context is a form of sex discrimination
- To evaluate work, a classification system must be constructed in such a way as to take into account factors that reflect qualities that are common to workers of both sexes at every level.

Lawrence, 17 September 2002 C-320/00

- On the basis of a study on the evaluation of employment, the House of Lords decided that Plaintiff's jobs were comparable to those of their male colleagues who were gardeners...
- The Municipal Council externalised these functions to three different companies who re-hired some of the women, employed others, and lowered their salaries.
- Plaintiffs initiated a recourse claiming equal pay with the male employees of the Council who's jobs had been held to be comparable.
- The principle of equal pay can apply to situations where there is a multiplicity of employers – see collective agreements- but they must be managed through a unique source in order to insure that a body is responsible for the inequality and could restore equal treatment. If not the situation is not comparable as provided by article 141.

Application

Examples

"Equal pay for work of comparable worth Definition"

Article L. 3221 - 4 French Labour Code

- Are deemed of equal value, works that require a comparable set of professional knowledge, skills resulting from experience, responsibilities and types of physical or nervous loads ". (1972)

Aims to overcome the problems of occupational segregation.

Individual situation

Ms B.

Cass. Soc.6 July 2010

HR Manager and chief of legal services

vs

Financial, Commercial and Information
system Directors

Ms B.

Equivalent value of typically female jobs
Beyond title and market:

Job content analysis

Ms B.

Beyond “market value” or “title”

Level in the hierarchy (all director level)
Classification
Responsibilities (part of direction committee)
Importance (combines a number of strategic functions)
Capacity
Educational level
Experience
Seniority Contribution to working unit, and
Stress

Collective agreements - French example

- Inter- professional collective agreement of 2004 provides for negotiation on gender pay gap.
- No methodology exists
- No legal training of experts and actors
- Isolation of experts
- Need to build common analysis

5 female and male jobs

- For example between :
 - Nursing and technical leader in a hospital,
 - Assistant and maintenance technician,
 - IT Engineer and Commercial representative

Male jobs :

- ❑ strong professional culture,
- ❑ precise job description,
- ❑ important technical aspects,
- ❑ clear organization role,
- ❑ predefined careers,
- ❑ technical legitimacy
- ❑ strongly supported by unions values ...

Female jobs :

- ❑ one title for various contents (ex: administrative assistant),
- ❑ unclear definition, imprecise job description,
- ❑ more personalized content,
- ❑ invisible and non-prescribed skills,
- ❑ assistant job (with the patient, vulnerable people, superiors, colleagues...)
- ❑ skills poorly recognized as non-technical ...

Gendered bias in job evaluation criteria.

Definition of Multi-tasking :

Capacity to work on a number of different jobs (male jobs)

VS

Diversity of roles and expectations for the same job (female jobs).

Value of relational skills as professional skill

To solve a human problem (crisis with a patient or a client) is not only a relational quality, but a technical skill.

Responsibilities :

Responsibilities with a value that should be compensated are not just financial or economic,

What is the value of responsibilities with people, confidentiality, communication...

Contribution of the activity to the working unit

The value attributed to working conditions:

They must take in consideration:

- the emotional burden,
- the human environment of work ...

and not only be attributed a value in the context of industrial work.