

Equal pay for work of equal value

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Equal pay for work of equal value and gender equality law in general has provoked substantial litigation in the Court of Justice of the European Union. This is partly because equality bodies and trade unions in several of the Member States have pursued litigation strategies designed to challenge or clarify domestic provisions on gender equality. Repeat players such as the UK Equal Opportunities Commission saw EU law as a way to forward and champion the achievement of equal pay and supported individual test cases. The European Commission also had a heavy involvement in this litigation by intervening and forwarding arguments to clarify and occasionally push forward the development of the law. The Commission itself is very much a repeat player in equality litigation. The effect of this substantial case-law developed by the Court was to lead to further legislation in the form of directives, for example the burden of proof directive or the equal treatment amendment directive, culminating in the recast directive. These directives to a large extent codified the case-law of the Court, making the effects of Court judgments highly visible and encouraging further litigation and test cases.

In this presentation I will give an overview of the legislation and the case-law although given the sheer volume of the case-law in this area, the coverage will be rather broad.

Treaty provisions and legislation

Article 119 of the Treaty of Rome was included in the Treaty at the behest of the French government concerned that other Member States with less defined social welfare provisions would derive a comparative advantage within the customs union from their failure to respect social rights. The definition of equal pay was taken from an ILO Convention and reflects the more simple forms of pay structures then prevalent. Article 119 reads:

Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

For the purpose of this Article, '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.

Equal pay without discrimination based on sex means:

- (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
- (b) that pay for work at time rates shall be the same for the same job.

Article 119 was directed at the Member States. It contains a clear obligation on them to take appropriate measures at an early stage in the life of the EEC to ensure and then

maintain equal pay for equal work. As noted, some States had legislation in place prior to the creation of the EEC but in the early years of the EEC little attention appears to have been paid to Article 119 and there was no systematic attempt to ensure compliance with this obligation.

It was from 1970 onwards that Article 119 was brought to life. Cases brought on behalf of Gabrielle Defrenne allowed the Court to begin to examine the parameters of the Article in terms of definitions of pay but also to open up the possibility of a litigation strategy by declaring the direct effect of Article 119. In the *Defrenne* cases, the Court also broke the link between Article 119 and its purely economic role within the Treaty by stating that Article 119 ‘forms part of the social objectives of the Treaty’ and that ‘the principle of equal pay forms part of the foundations of the Community’.¹

The 1970’s also saw the first generation of directives in the field of gender equality. Directive 75/117 defines in more detail the principle of equal pay as provided for in Article 119. It stated that ‘the principle of equal pay for men and women outlined in Article 119 of the Treaty...means, for the same work or for 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’. By bringing in the concept of ‘work to which equal value is attributed’ it could be argued that there was a divergence between Article 119 and the Directive. The Court however resisted that interpretation. In *Jenkins*, for example, the Court stated that ‘the directive is principally designed to facilitate the practical application of the principle outlined in Article 119 of the Treaty and in no way alters the content of that principle’.²

There is however a distinction to be drawn between the concepts of equal pay for equal work and equal pay for work to which equal value is attributed. Equal work is identical work or to a great extent the same work with regard to the type of activity, work processes, the working environment and working materials. This is a relatively straightforward comparison between his work and hers. Equal value claims are more complex. Here work might appear to be different but it is of equal value if the same high demands are made on work criteria – such as knowledge or skills, effort and stress, responsibility or conditions in the working environment. Equal value claims require an evaluation of these factors using an objective evaluation system. Directive 75/117 did not specify how jobs were to be evaluated but it did specify that any job classification scheme ‘must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex’.

Directive 75/117 required Member States to introduce measures allowing for equal pay claims via a judicial process and they were required to abolish any discriminatory provisions in national laws. They were also to apply equal pay provisions to collective agreements, pay scales, wage agreements and individual contracts of employment and to ensure that individuals raising pay claims were not subject to victimisation.

Neither Article 119 nor Directive 75/117 made reference to concepts of direct and indirect discrimination. The Equal Treatment Directive (ETD) 76/207, adopted the

¹ Case 43/75 *Defrenne v Sabena* [1976] ECR 455.

² Case 96/80 *Jenkins v Kinsgate* [1981] ECR 911.

following year, provided that ‘the principle of equal treatment shall mean that there will be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status’. However cases before the Court began to raise issues requiring the Court to examine these concepts in cases brought before it. The exclusion of part-time workers from occupational pension schemes raised in *Bilka* was the first equal pay case raising the issue of indirect discrimination and which led the Court to begin to refine both how indirect discrimination could be demonstrated using a statistical test of whether company policy adversely impacted on women rather than men and how such policies could be objectively justified if they met the proportionality test of genuine need on the part of the employer, appropriate means of achieving that goal and necessary for that purpose.³

The Court was then faced with questions of burden of proof where it could be shown statistically that workers of one sex were disadvantaged in terms of their pay in relation to workers of another. In *Enderby* the Court held that where significant statistics disclose an appreciable difference in pay then Article 119 required the employer to show that the difference in pay is based on objectively justified factors unrelated to any discrimination on grounds of sex.⁴

The case-law on the definition of indirect discrimination and burden of proof was codified in Directive 97/80 on the burden of proof in sex discrimination cases. Indirect discrimination was defined as existing ‘where an apparently neutral; provision, criterion or practice disadvantages a substantially higher proportion of members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex’. Member States were required to ensure that where persons who considered themselves wronged because the principle of equal treatment has not been applied to them could establish facts from which it might 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.

The Treaty of Amsterdam which came into force on 1st May 1999, brought new changes to the equal pay framework. Article 119 EEC was replaced by Article 141 TEC which reads:

1. 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.
2. For the purpose of this article, ‘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.

Equal pay without discrimination based on sex means:

- (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
- (b) that pay for work at time rates shall be the same for the same job.

³ Case 170/84 *Bilka* [1986] ECR 1607

⁴ Case C-127/92 *Enderby* [1993] ECR I-5535

3. The Council, acting in accordance with the procedure referred to in Article 251, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

Article 141 TEC provided a legal base for further legislation in the area of equal pay and also enabled Member States to maintain or adopt compensating measures for members of the underrepresented sex to pursue employment or to compensate for disadvantages in professional careers.

Five years after the Burden of Proof Directive, the Equal Treatment Amendment Directive (Directive 2002/73) introduced an alternative definition of indirect discrimination based on the definition of indirect discrimination in both the framework and the race directives. Indirect discrimination is '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'. Thus in equal pay cases the emphasis was on providing statistical data to show that a substantially higher proportion of members of one sex was disadvantaged by a particular provision or practice, whereas in equal treatment cases the emphasis was now on a more hypothetical 'would put' particular persons at a disadvantage. Equal pay provisions were therefore out of line with other equality directives.

The indirect discrimination provisions were harmonised in the Recast Directive 2006/54. Now indirect discrimination in matters of equal pay is the same as that provided for in matters of equal treatment. The Recast Directive is a very significant legislative instrument in matters of equal pay. It repeals Directive 75/117 EEC on equal pay and Directive 97/80 on the burden of proof. However it also codifies the case-law of the Court in matters relating to occupational social security schemes and their relation to pay. Title II, Chapter 2 is in effect a codification exercise of case law from the early *Defrenne* cases through to *Barber* and the post *Barber* cases. Article 9 provides examples of discrimination which are all taken from cases where the Court has found discrimination to have arisen.

The final amendment to the equal pay framework is found in the Lisbon Treaty although there are only marginal changes made. Article 157 TFEU reads:

Article 157 (ex Article 141 TEC)

1. 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.

2. For the purpose of this Article, '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.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job.

3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

In effect the Treaty of Lisbon makes reference to the ordinary legislative procedure which is in effect co-decision. There is therefore no substantive change made by Lisbon.

The case –law

As noted above, there is a considerable case-law on equal pay and time precludes a full analysis of the case-law. The Court of Justice gave an expansive interpretation of the concept of pay in a series of cases so as to include all elements of pay including, concessionary travel arrangements, sick pay, redundancy or severance pay, inconvenient hours supplements and, crucially aspects of occupational pensions. This case-law is largely codified in the Recast Directive and I do not intend to discuss it here.

Instead I will discuss three issues to demonstrate the application of the equal pay provisions. The first issue is the use of job classification or job evaluation systems and how these have been dealt with by the Court. The second is the approach the Court has taken to applying equal pay principles to complex pay structures which contain different elements of pay. The third is a discussion of some recent cases in relation to equal pay and the levels of pay paid to pregnant women or women on maternity leave.

Problems arising from job classification/evaluation schemes

As noted above, EU law does not require Member States to use any particular method to measure the value of one job as against another. However the Court has insisted that each Member State should have in place an authority with the jurisdiction to decide whether different types of work have the same value.⁵ Both Directive 75/117

⁵ Case 61/81 Commission v UK [1982] ECR 2601.

and now the Recast Directive merely state that where a job classification system is used, it must be based on the same criteria for both men and women and drawn up in such a way as to exclude any discrimination based on sex.

It is not within the jurisdiction of the ECJ to determine whether jobs are of equal value – that is a matter for the national authority and is a question of fact not a question of law. The role of the ECJ in relation to job evaluation has therefore been to provide some indication of the principles underpinning job classification systems which are required under EU law.

Ensuring that a job evaluation system is free of discrimination is notoriously difficult. In the early years of job evaluation systems it was apparent that grading of masculine characteristics such as strength, the demands of heavy weight lifting, working in a dirty environment were factors which scored heavily as against other characteristics which might be said to be more female type characteristics such as dexterity or multi-tasking. In Case 237/85 *Rummler*, the Court was asked whether a job classification system based on muscular effort was contrary to Directive 75/117.⁶ The Court did not rule out the use of characteristics such as muscle demand or muscular effort or heaviness of work which, it acknowledged, were more characteristic of men, provided that the scheme as a whole, if the nature of the work permitted, also took into consideration criteria in which women had a particular aptitude so that the system as a whole precludes discrimination based on sex. A system which relied on the average performance of one sex to determine the values in the system itself could not be justified.

Complex pay structures and the role of national courts

It is a relatively straightforward exercise to apply equal pay principles to piece rate work and hourly rates of pay. However in the modern world pay schemes are inordinately complex and the elements of a pay structure are routinely composed of additional items in the form, for example, of overtime pay, bonuses, performance pay, pension contributions and so on. In these circumstances the quest for equal pay is more difficult. Such complex pay structures reveal issues of lack of transparency making comparisons difficult.

The Court of Justice has examined complex pay structures in several cases. In *Danfoss* the Court examined a pay scheme by which employees were paid the same basic wage but pay supplements were paid to individuals on the basis of mobility, training and seniority.⁷ The trade union produced evidence to show that on a sample of 157 workers the average pay of the men was some 6.85% higher than that paid to women.

The Court responded to the question of complexity as a question of the burden of proof. The Court held that where a complex pay system such as one where individual pay supplements were awarded by the employer the resulting lack of transparency meant that female employees could only establish differences in average pay. In these circumstances, once a difference in average pay could be demonstrated the burden of

⁶ Case 237/85 *Rummler* [1986] ECR 2101

⁷ Case 109/88 *Danfoss* [1989] ECR 3199.

proof fell on the employer to justify the differential and to demonstrate that the pay system was not discriminatory. The Court also examined the criteria used to allocate pay supplements holding that such criteria might be objectively justified. A mobility allowance, for example, could be justified if it related to the performance of specific tasks. Similarly a supplement based on training could be justified if such training relates to the performance of specific tasks. Length of service, according to the Court, routinely went with experience and experience generally led to improved performance and therefore the Court held that an employer would not have to justify reliance on this criterion.

In *Enderby* a speech therapist complained that members of her profession who were predominantly women were paid considerably less than other professional groups in the NHS such as clinical psychologists or pharmacists who were predominantly men.⁸ The pay of each group was determined by different collective bargaining processes. The Court held that where significant statistics disclose an appreciable difference in pay between groups of workers and where the lower paid group is composed almost exclusively of women and the higher paid group predominantly by men Article 119 requires the employer to show that the difference is based on objectively justified factors unrelated to discrimination on grounds of sex. The Court rejected as objective justification the fact that the rates of pay were determined by different collective bargaining systems but conceded that market supplements might provide an objective justification for differences in pay. Throughout this case it is clear that the ECJ sets limits as to its own role and that of the national courts. It is first and foremost for the national court to examine the statistical significance of the facts placed before it and to ascertain whether jobs are of equal value. It is also for the national court to apply the principle of proportionality to any objective justification based on, in this case, information about the shortage of otherwise of particular groups of staff.

In *Royal Copenhagen* the Court was asked to decide whether there was a prima facie case of discrimination in the operation of a piece work pay scheme simply on the basis that the average pay of a group of predominantly female workers was appreciably lower than the average pay of a group of predominantly male workers, where both groups were engaged on work considered to be of equal value.⁹ In such a situation, and provided that the unit of measurement is the same for both groups of workers, the Court held that the simple fact of a difference in average pay does not give rise to a presumption of discrimination. Applying the notion of transparency used in *Danfoss*, however, it may be necessary for the burden of proof to be shifted to the employer to show that the system is not discriminatory. This might arise in a system where an element of remuneration is based on a fixed unit of pay and another element is variable depending on the individual output of the worker. In that situation, it is for the national court to determine whether the burden of proof should be transferred.

JamO concerns a pay comparison between midwives and clinical technicians.¹⁰ It was agreed that these jobs were of equal value but the midwives were paid less. The pay of both groups of staff consists of basic pay plus anti-social hours supplements. Midwives must work shifts due to the nature of their work but this was not the case for the clinical technicians. The value of the anti-social hours supplements were therefore

⁸ Case C-127/92 *Enderby* [1993] ECR I-5535.

⁹ Case C-400/93 *Royal Copenhagen* [1995] ECR I-1275.

¹⁰ Case C-236/98 *JamO* [2001] ECR-I 2189.

greater for the technicians. The Finnish government argued that given these differences it was difficult to compare the equivalence of the work. The ECJ reiterated that it is for the national court to determine the equal value issues but if the national court was satisfied that the work of both groups was of equal value then the basis for comparison should exclude the anti-social hours supplement. In its judgement, the Court stressed the need for the national court to provide an effective review of pay structures and this can only be assured, according to the Court, where the principle of equal pay applies to each element of remuneration.

The use of the seniority criterion which appeared to have been endorsed by the Court in its ruling in *Danfoss* to justify differentials in pay was again raised in the case of *Cadman*.¹¹ The Court modified its ruling somewhat to hold that a seniority criterion was as a general rule appropriate to achieve the legitimate end of rewarding acquired experience which puts a worker in a better position to discharge their duties. The employer therefore did not have to justify such the use of such a criterion. However the Court went on to say that a worker might be able to challenge the use of the criterion in a given job if she can display features likely to cause serious doubts as to the automatic use of the seniority criterion.

Maternity and equal pay issues

Difficult pay issues have arisen in the interplay with the equal pay provisions of EU law and provisions relating to pregnant women and in particular in the interpretation of Article 11 of the Pregnant Workers Directive.

In *Gillespie* the Court held that maternity pay paid by an employer under legislation or collective agreements to a woman on maternity leave is based on the employment relationship and therefore constitutes pay within the meaning of Article 157 TFEU (then Article 119).¹² However the Court did not allow a woman taking maternity leave to compare herself with other workers to argue that she should receive full pay whilst on maternity leave. The Court held that women on maternity leave are in a special position which is not comparable to a man or woman actually at work. Therefore Article 157 TFEU does not require women to receive full pay although maternity pay should not be pitched so low as to undermine the purpose of maternity leave.

In *Boyle* the Court returned to the interplay between the equal pay provisions of European Union law and the Pregnant Workers Directive.¹³ The Court held that to require a woman to repay maternity pay which went beyond statutory requirements if she failed to return to work did not infringe Article 157 TFEU. This was despite the fact that women taking maternity leave were the only category of workers who had to repay benefits if they failed to return to work – other individuals taking sick leave who did not return to work, for example, were not under a similar requirement.

The Court ruled on the levels of pay required to be paid to pregnant women during periods of absence due to pregnancy related illness prior to maternity leave in *Høj*

¹¹ Case C-17/05 *Cadman* [2006] ECR I-9583.

¹² Case C-342/93 *Gillespie* [1996] ECR I-475.

¹³ Case C-411/96 *Boyle* [1998] ECR I-6401

Pederson.¹⁴ The Court held a woman cannot be deprived of her full pay when her incapacity for work is the result of a pathological condition connected with the pregnancy. This would be discrimination contrary to Article 157 TFEU and Directive 75/117. The Court reinforced this argument by comparing the situation of sick workers under the relevant national legislation and found that they would receive full pay.

The Court was asked in *McKenna* to rule on the applicable rules in the case of a woman who was on sick leave for almost the entire duration of her pregnancy with a pathological condition connected to her pregnancy.¹⁵ Under the relevant Irish scheme workers who were absent due to illness did not automatically receive full pay. The Court stated that it had not yet been asked to rule specifically ‘whether a female worker is entitled, in any event, to continue to receive full pay in the event of a pregnancy-related illness arising prior to her maternity leave, even if the contested national rule provides for the application of a reduction in the same measure to the remuneration paid to a worker in the event of an illness unrelated to a condition of pregnancy. In setting the question this way, the Court distinguished the facts of *McKenna* from those in *Høj Pederson*. The Court restated the fact that that European Union law does not require full pay during maternity leave and quoted *Gillespie*. Arguing by analogy the Court went on to hold that ‘if a rule providing, within certain limits, for a reduction in pay to a female worker during her maternity leave does not constitute discrimination based on sex, a rule providing, within the same limits, for a reduction in pay to that female worker who is absent during her pregnancy by reason of an illness related to that pregnancy also cannot be regarded as discrimination of that kind’. Therefore European Union law does not require full pay for a woman absent because of a pregnancy related illness. The Court then went on to introduce the sick man as a comparator and held that provided that the pregnant woman is treated in the same way as the sick man and that the level of pay is not so low as to undermine the objective of protecting pregnant workers such a scheme would not violate European Union law.

Two recent cases further illustrate the interplay between the equal pay provisions and the Pregnant Workers Directive. In *Parviainen* the Court was asked to interpret the relevant provisions of Directive 92/85.¹⁶ The Directive requires an employer, following an adverse risk assessment, to adjust the working conditions and/or hours of the worker to avoid the risks identified. Where this is not possible, the employer must move the worker to another job and, if all else fails; the worker shall be granted leave. In these cases, Article 11 states that ‘the employment rights relating to the employment contract, including the maintenance of a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2, must be ensured in accordance with national legislation and/or national practice.

Mrs Parviainen, a senior member of cabin crew, was transferred to ground duties at the end of April and she remained in that position until 15 September when she commenced maternity leave. The dispute centres therefore on the level of pay she received during the months of May through to mid-September. Prior to this transfer, Mrs Parviainen’s actual pay was based on a basic rate of pay plus a range of

¹⁴ Case C-66/96 *Høj Pederson* [1989] ECR I-7327

¹⁵ Case C-191/03 *McKenna* [2005] ECR I-7631

¹⁶ Case C-471/08 *Parviainen* decision of the Court of I July 2010 nyr in ECR

supplementary allowances. These allowances differed between staff in promoted posts, as she was, or other staff in non-promoted posts and on the number of hours actually worked. As the Court notes, these allowances made up approximately 40% of Mrs Parvianen's take home pay. Moving to ground duties therefore meant that she was some 834 Euros a month worse off. She argued that she should be paid the same pay as when she worked as a purser whereas Finnair argued that she was actually being paid more than colleagues doing similar ground duties plus the fact that none of her supplementary payments were guaranteed – they depended on the hours she actually worked and her shift patterns.

The Court distinguished its case-law relating to pay when a women took maternity leave (*Boyle and Gillespie*) from the situation where she continues in work arguing that to transpose that case-law would be unfair and would also undermine the 'legal provisions of the European Union on equal treatment for male and female workers, contrary to Recital 9' The 9th recital of the Pregnant Workers Directive requires that the protections provided for 'should not treat women on the labour market unfavourably nor work to the detriment of directives concerning equal treatment of men and women'. However the Court did not go as far as the Commission which had argued that a woman transferred temporarily must *a priori* continue to receive the full amount of her salary. Again the Court examined the interplay between Article 157 TFEU (then Article 141 EC) and Article 11 of the Pregnant Workers Directive. Admitting that the money received by Mrs Parviainen from Finnair was pay within the meaning of Article 157 TFEU the Court turned to Article 11 which requires the maintenance of 'a payment' and not 'the payment' to the worker concerned

If 'the' payment was not required, the Court then had to turn to what level of payment a worker who had been transferred to other activities should be entitled to under European Union law. The Court established certain criteria to define the level of pay: the level of pay cannot be lower than the pay accorded to workers occupying the job to which the pregnant worker is temporarily assigned; during the temporary transfer the pregnant worker is entitled to the pay components and supplementary allowances relating to that job provided she fulfils the eligibility requirements for them. Member States and, where relevant, management and labour must also honour those pay components and supplementary allowances 'which relate to her professional status such as, in particular, her seniority, her length of service and her professional qualifications'. However they are not bound to honour pay components or supplementary allowances which are dependent on performance of specific functions which are designed to compensate for disadvantages related to that performance. In the case of a purser these would include over-time allowances and allowances for long-haul flights. Thus the Court held that the Pregnant Workers Directive does not require that a woman be paid the equivalent of her average pay before transfer to other duties. The Court also reminded Member States and management and labour that the relevant Community provisions did not prevent the Member States from laying down more stringent protective provisions which means that they would be free to provide that a woman transferred to alternative duties could be paid the average of her take-home pay without infringing European Union law.

On the same day as the Court gave its decision in *Parviainen*, it handed down its judgement in *Gassmayr*.¹⁷ Dr Gassmayr was a junior hospital doctor who had been working in the anaesthesia department since 1995. In addition to her pay, she received an allowance for on-call services performed. This allowance was individually assessed on the basis of the on-call duties she was required to perform. The relevant Austrian law provided that a pregnant woman could not continue working if a doctor certified that doing so could endanger the life or health of the woman or her child and that pregnant workers could not work in the 8 weeks prior to the birth and 8 weeks after. Other rules applied where there was no danger to the pregnant women or her child. The periods of extended leave were to provide for additional protection. Dr Gassmayr stopped working on 4 December 2002 as she was pregnant. It was medically certified that she could not continue working as there was a danger to her health or that of her child. After the birth of her child she resumed on-call services in October 2003.

Dr Gassmayr requested that her employer pay her, in addition to her basic salary, the average of her on-call allowances for the period in which she was unable to perform on-call duties. Relevant Austrian law at the time provided that pregnant employees in her situation should receive their usual remuneration but her employer took the view that this provision did not include on-call duty allowances as these were additional allowances for duties actually performed. Dr Gassmayr challenged that decision.

In giving its judgement, the Court distinguished two periods of time; the first was the period when Dr Gassmayr was unable to work prior to her maternity leave and the second was the extended period of her maternity leave. Dr Gassmayr did not continue working during the first period – unlike Mrs Parviainen who continued working but in alternative employment. The Court held that Dr Gassmayr was not entitled to receive the on-call duty allowance for that period. Whilst holding that these allowances were indeed pay within the meaning of Article 157 TFEU (then Article 141 EC), the Court pointed to Article 11 (1) of the Pregnant Workers Directive which provides that a woman in this situation is entitled to ‘a’ payment and not ‘the’ pay which she had hitherto received. The Court pointed to Article 11(4) which entitles Member States ‘to make entitlement to pay or the allowance referred to in Article 11(1) conditional upon the worker fulfilling the eligibility criteria for such benefits laid down under national legislation’. It again referred to its case-law in *JämO*, as it had done in *Parviainen*, to the effect that the nature of the work done and the conditions in which it is carried out may under certain circumstances provide objective facts unrelated to sex discrimination which may justify differences in pay between different groups of workers. Then, applying its logic in *Parviainen* to the effect that employers are not required to maintain pay supplements which depend on the performance of certain duties by employees which are intended to compensate for disadvantages relating to that performance during a temporary transfer, the Court held that this was also the case where a woman was granted leave under Article 5(3). As in *Parviainen* the Court referred to the degree of latitude open to Member States and to management and labour where relevant in defining the conditions for the exercise and implementation of the entitlement to an income of pregnant workers who are required to take leave from their employment on health and safety grounds. That discretion cannot undermine the objective of protecting women in these circumstances and

¹⁷ Case C-194/08 *Gassmayr* decision of the Court of 1 July 2010 nyr in ECR

therefore the allowance or payment must be sufficient to guarantee the effectiveness of the protection and cannot be used as a mere cost saving exercise for employers. As in *Parvianenen* the Court laid down the minimum criteria for the level of payment; it must include the worker's basic monthly salary; the pay and components or supplements relating to her occupational status, including seniority, length of service and professional qualifications payments. In the case of Dr Gassmayr, her pay was calculated taking her average salary in the 13 weeks prior to her leave into account and excluding the on-call supplements. The Court held that this was not contrary to Article 11 (1) of the Pregnant Workers Directive.

In respect of pay received during the extended maternity leave which was required under Austrian law, the Court relied on its earlier case law to the effect that despite the fact that maternity payments were pay for the purposes of Article 157 TFEU, women on maternity leave could not rely on that Article nor on the Pregnant Workers Directive to claim that they should receive any particular level of pay whilst on maternity leave. All that European Union requires in terms of the level of pay is that it must be at least equivalent to the sickness allowance provided by national social security legislation, irrespective of how this is paid. This minimum protection does not require the person concerned to receive full pay or the payment of on call duty allowances. At the same time the Court repeated that European Union law does not prevent the Member States from adopting more stringent protective measures including that the level of maternity pay be above the minimum required by the Pregnant Workers Directive.