

Equal pay for work of equal value: EU legal framework and ECJ case- law

Seminar on EU Law on equality between women and
men in practice

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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

Equal pay in the EU

- Council of Europe Commissioner for Human Rights on 8 March 2011:

“Every day women in Europe experience one of the most deep-rooted injustices - being paid less than a man for work of equal value.”

Women in Europe currently earn on average 17.5% less than men

Causes of gender pay gap

- Undervaluing of women's work
- Occupational segregation
- Gendered impact of having children
 - Women's propensity to work part-time
 - Poor quality of part-time work
 - Reality of flexible working
- Discrimination in pay systems
- Lack of transparency in pay systems

EU Legal Framework

- Equal pay was adopted as a core principle of the European Union - Article 119 Treaty of Rome 1957 (later Article 141)
- Since 2009 incorporated into the Treaty on the Functioning of the European Union, Article 157
- 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.*”
- Advocate General in *Cadman v Health & Safety Executive* 2006 ECJ C - 17/05

EU legal framework (cont...)

- 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)
- Member states must take all appropriate measures to ensure fulfillment 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

EU legal framework cont...

- EU law 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 from conferring greater rights to equal pay - eg having rules on the burden of proof that are more favourable to employees
- Equal pay is not a right to be achieved progressively, it has immediacy. The employer has defences but not excuses.

Equal pay directive (No 75/117) - on the application of the principle of equal pay for men and women

- The principle of equal pay 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.
- 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 as to exclude any discrimination on grounds of sex. (Art 1; now in Art 4 recast Directive)

Ensuring effective application of the principle means...

- Providing a 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

Recast Equal Treatment Directive 2006/54

Consolidates 7 measures including

- Equal pay directive
- Equal treatment in employment directives
- Equal treatment in occupational social security directive
- Burden of proof directive

Incorporates principles derived from CJEU case law

Encourages action to address gender pay gap
eg flexible work; parental leave

What is pay?

For the purposes of Article 157 “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/her employment
- from his/her employer

Includes contractual and non-contractual terms,
Lewen v Denda 2000

Broad interpretation by CJEU

- Piecework - *Royal Copenhagen 1996*
- Bonuses - contractual and non-contractual, immediate or future - *Lewen v Denda ; Krueger*
- Pay increases - *Nimz 1991*
- Sick pay - *Rinner-Kuhn 1989; Pederson 1999*
- Maternity pay - *Gillespie 1996, Alabaster 2005, Abdoulaye 1999*
- Travel and fringe benefits - *Garland 1982*
- Training allowance - *Botel 1992*
- Redundancy payments - *Barber 1990*

Broad interpretation of pay (cont...)

- Unfair dismissal compensation - *Seymour-Smith 1999*
- Occupational Pensions - *Barber 1990; Bilka-Kaufhaus 1986*
 - Equal treatment in occupational social security schemes is covered in Chapter 2 Recast ETD 2006/54/EC Arts 5-13 which codifies CJEU cases

Distinguish 'pay' from other working conditions

- Subsidised nursery facilities deemed to be a working condition under ETD in *Lommers 2002*

Comparison of pay must be term by term -
Jamstalldhetssombudsmannen 2000

Who is covered?

- The term worker has a Community law meaning and cannot be interpreted restrictively: *Allonby 2004*
- A person who performs services for and under the direction of another person in return for which s/he receives remuneration
- May include those deemed self-employed under national law
- Trainees and apprentices

Comparators

- Opposite sex
- Comparable situation - *Cadman v Health and Safety Executive Case C-17/05 2006*
- In the same establishment or service whether public or private - *Defrenne II at 22*
- Can be a different employer but single source for determination of pay - *Lawrence v Regent Office Care Ltd 2003 Case C-320/00*
- No need for contemporaneous employment - *McCarthy's Ltd v Smith 1980*
- Multiple comparators are possible - *Enderby 1994*
- No need for comparator where discrimination derives from national law - *Allonby*

What is work of equal value?

- Assessment of the value of different jobs must consider factors such as nature of the work actually performed, the training requirements, and the working conditions
- Being classified in the same job category under a collective agreement is not in itself sufficient
- It is for the national court to determine whether on the facts the jobs are of equal value : *Brunnhofer 2001*
- Can mean greater value: *Murphy 1988*

Job evaluation or classification

- Where a job classification system is used to determine pay it must be based on the same criteria for women and men and exclude discrimination on grounds of sex
- This does not preclude the use in job evaluation schemes of factors such as physical effort which favour one sex providing it is not discriminatory overall: *Rummler 1987*
- A claim for equal pay cannot be dependent on existence of a job evaluation scheme: *EC v UK 1982*

Burden of Proof

- It is for the complainant to establish facts from which it may be presumed that there has been direct or indirect discrimination
- It is for the respondent to prove that there has been no breach of the principle of equal treatment: Art 19 Recast ETD
- Where a pay system is wholly lacking in transparency and there is evidence that women are on average paid less in the organisation, it is for the employer to prove that pay is not discriminatory - *Danfoss 1989*

Evidence of discrimination

- A woman is paid less just 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

Showing discrimination

- There is a prima facie case of sex discrimination where valid statistics disclose an appreciable difference in pay between jobs of equal value, one of which is predominantly done by women and the other predominantly by men: *Enderby 1993*
- A pay practice that discriminates against women is unlawful unless it is justified by the employer on objective economic grounds relating to management of the undertaking: *Rinner-Kuhn 1989*

Criteria that disadvantage women

- Part-time work - *Bilka-Kaufhaus 1987*; for overtime issue see *Stadt Lengerish 1995*
- Job-sharing - *Hill 1998*
- Length of service/ seniority - if employee can raise serious doubts about link between experience and length of service employer must justify - *Cadman*
- Mobility - *Danfoss*
- Market forces - *Enderby*
- Performance-related pay

Pregnancy and maternity

- EU law does not require full pay during maternity leave - *Gillespie*
- However women should receive the benefit of any pay-rise awarded before or during their maternity leave
- Member states are not obliged to ensure workers receive full pay during maternity leave - but Pregnant Workers Directive under review

Remedies

- Equalisation of pay - levelling up
- Awarding arrears of pay - principle of equivalence applies: *Levez 1999*
- Access to pension schemes can be backdated to *Defrenne v Sabena No 2*

Measures to reduce the gender pay gap

- Increased pay transparency
- Equal pay audits or reviews
- Revaluing of “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!