

Equal pay for work of equal value

Professor Noreen Burrows
University of Glasgow

Equal pay in EU law - background

- Article 119 Treaty of Rome
- 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**.
- Pay – ordinary basic pay plus any consideration, in cash or in kind, which worker receives in respect of his employment.

Article 119 and ECJ

- Purpose – dual economic and social purpose Case 43/75 *Defrenne* (No 2)
- Direct effect as from 1962 for original Member States *Defrenne* (No 2)
- Broad interpretation of pay

Directive 75/117/EEC (repealed)

- The principle of equal paymeans, for the **same work** or for **work to which equal value is** attributed...elimination of all discrimination on grounds of sex
- ECJ -the Directive is principally designed to facilitate the practical application of the principle...and in no way alters the principle
Case 96/80 Jenkins
- Non-discrimination principle applies to job classification schemes

Treaty of Amsterdam

- Art 141 TEC
- 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.
- Same wide definition of pay
- Legal base for further legislation
- Positive measures permissible

Directive 97/80 Burden of Proof (repealed)

- Why needed?
- Particular problem with indirect discrimination Case 70/84 *Bilka*
- Definition of indirect discrimination codified
- ECJ approach – Case 109/88 *Danfoss*
- Reversal of the burden of proof

Current provisions

- Article 157 TFEU – effectively replicates Article 141EC
- Same principle – equal pay for equal work or work of equal value
- Same broad definition of pay
- Positive action measures permitted

Directive 2006/54 (recast)

- Matters of pay – repeals Directives 75/117 (equal pay) and 97/80 (burden of proof)
- Defines pay as in the Treaty
- Prohibits direct and indirect discrimination for **same work** or for **work to which equal value is attributed**
- Where job classification scheme used it must be drawn up based on the same criteria for men and women and avoid discrimination
- Reversal of burden of proof –as before

Recast cont

- Codifies case-law of the ECJ particularly prohibition of direct and indirect discrimination in occupational social security schemes covering sickness, invalidity, old age including early retirement, industrial accidents and occupational diseases, unemployment, other benefits e.g. survivors
- Why? All fall within broad definition of pay
- Provides examples – all based on ECJ case-law

Current provisions – Directive 92/89 Pregnant Workers Directive

- Health and safety issue – where pregnant worker has to be moved to different duties or granted leave – entitled to ‘**a payment** to, and/or entitlement to an **adequate allowance**’ in accordance with national legislation and practice
- 14 weeks paid maternity leave - a payment/adequate allowance at least equivalent to sick pay subject to possible eligibility criterion.

Current provisions - summary

- Article 157 TFEU
- Recast Directive
- Pregnant Workers Directive

Case law issues

- Definition of pay
- Definition of equal work or work of equal value
- Indirect discrimination – burden of proof and objective justification
- Interplay between equal pay and PWD

Definition of pay

- Extensive case-law
- Basic pay plus
- Overtime pay
- Pay supplements
- Occupational social security and pensions
- Payments in kind – travel facilities
- Etc etc.....

Equal work/work of equal value

- Equal work – identical work or to a great extent the same work with regard to the type of activity, work processes, the work environment and working materials
- Work of equal value – work which might appear to be different but work is of equal value if the same high demands are made on work criteria – such as knowledge and skills, effort and stress, responsibility, conditions in the working environment
- Question of fact for the national court

National court and equal work/equal value

- National provisions implementing Directives are applied
- ECJ guidance – national court to decide whether, in light of the circumstances such as, first, the fact that the work done by one of the groups of workers in question involves machinery and requires in particular muscular strength whereas that done by another group is manual work requiring in particular dexterity and, secondly, the fact that there are differences between the two groups with regard to paid breaks, freedom to organise one's work and work related inconveniences, the two types of work are of equal value or whether these circumstances may be considered to be objective factors unrelated to any non-discrimination based on sex...Case C-400/93 *Royal Copenhagen*

Same Work? Equal value?

- To assess if workers perform the same work, all factors must be taken into account – such as the nature of the work, the training and working conditions Case C-309/97 *Wiener* (note in this case the ECJ decided itself that psychologists and doctors employed as psychotherapists did not perform like work)

Job classification

- Classification of employees in the same job category under a collective agreement not in itself sufficient to conclude they perform the same work or work of equal value...number of factors to be taken into account, such as the nature of the activities actually entrusted to employees. training requirements...working conditions. It is for the **national court** to determine whether the plaintiff and comparator perform comparable work Case C-381/99 *Brunnhofer*

Indirect discrimination

- Art 2 recast – 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
- Relevance to pay claims? Pay schemes which introduce criteria for differential pay for a variety of factors – cumulative effect might indicate discrimination between men and women (comparator pool)
- Her pay against his – explanation of differences may lie in pay system and is in fact neutral - she is more productive, he has taken on responsibility etc

Burden of proof – role of ECJ

- Case 109/88 *Danfoss* – individual pay supplements lacking in transparency- *prima facie* case based on average pay rates – burden of proof falls on the employer to show wage practices are not discriminatory
- Now recast – reversal of burden of proof
- But Case C-381/99 *Brunhoffer* – claim of inequality in a precise component of overall remuneration – plaintiff to prove that her pay is less and that she does same work or work of equal value – employer not bound to show that the work they perform is different.

Burden of proof – national court

- Where complainant brings evidence to court that men and women doing same work or equal value and one group receives lower pay – national court must ask certain questions:
- Do statistics demonstrate a significant difference in pay between men and women giving rise to a presumption of discrimination?
Case C- 127/92 Enderby
- Take into consideration the sample size – for the purposes of comparison...the national court must satisfy itself that the two groups encompass all the workers who, taking into account a set of factors such as the nature of the work, the training requirements and the working conditions, can be considered in a comparable situation and that they cover a relatively large number of workers ensuring that the differences are not due to purely fortuitous or short-term factors or to differences in individual output...*Case C-4000/93 Royal Copenhagen*

Objective justification

- Assuming statistics based on adequate sample size demonstrates significant pay gap the national court must investigate the employer's defence. Are the differences in pay based on objectively justified factors and unrelated to any discrimination based on sex.
- If objectively justified – no claim
- If no objective justification – claim succeeds

Objective factors to be considered by the national court?

- Difference in pay arrived at as a result of collective bargaining with different groups of staff – no objective justification Case C-127/92 *Enderby*
- Training – increased pay to better trained workers – no need for justification Case 109/88 *Danfoss*
- Seniority – ECJ assumes that more experienced staff perform roles better – so seniority does not require justification – *Danfoss* **BUT** Case C 17/05 *Cadman* “unless the worker displays features likely to cause serious doubts in this respect”.

Grey areas/Suspect categories

- Market forces – *Enderby* – national court to determine whether and to what extent the shortage of candidates for a job and the need to attract them by higher pay constitutes an objectively justified economic ground for the difference in pay between the jobs in question.
- Mobility – *Danfoss*
- Quality of performance/work capacity/effectiveness
Brunhoffer
- Organisation of work – *Royal Copenhagen*
- Role of national court to make assessment of facts to discover if, in light of all these facts, objective justification is made

Maternity pay

- Maternity pay provided by employer is pay within the meaning of Article 157 TFEU
- Equal pay does not mean full pay
- PWD – health and safety ‘a payment’
- Maternity leave a payment/allowance at least equivalent to sick pay

ECJ and maternity leave

- EU law does not require full pay during maternity leave – nor does it lay down the amount – provided amount is not set so low as to jeopardise the purpose of maternity leave Case C-342/93 *Gillespie*
- Where national law provides that employees receive full pay during sick leave then contrary to EU law not to provide women on maternity leave with full pay Case C-66/96 *Pederson*

Maternity and health and safety

- Woman granted temporary leave for health and safety reasons during pregnancy – entitled to pay equivalent to her average earnings before leave but not on-call duty allowances Case C-194/08 *Gassmayr*
- Pregnant worker, temporarily transferred on account of pregnancy to a different post – not entitled to average pay prior to transfer – is entitled to basic salary plus pay components or allowances related to her professional status e.g seniority, length of service and professional qualifications Case C-471/08 *Parviainen*